

7 Ways to Settle Your Case by Co-Negotiating With Your Mediator

By Jay Young, Esq.

Mediation is said to be assisted negotiation, with a mediator acting as your co-negotiator. If that is true, are you taking full advantage of the ways a mediator can assist you to control the process of the mediation? Ineffective mediation advocates rarely think to do so, clumsily attempt to manipulate the mediator into doing their bidding, or only see the mediator as someone delivering numbers to the other side. A more effective approach is to openly discuss the ways you would like the mediator to assist you “in the other room” or even in your own room. Here are some possibilities you may consider:

1. Prepare your client.

No, I mean really prepare. I am amazed when parties have spent years and untold amounts of money preparing a case for trial (that likely will not happen except in a tiny percentage of cases), but do not take the time to orient their client to the mediation process. “A client who understands the mediation process, has received guidelines for conduct during mediation, and has faced the realities of the dispute can contribute significantly to achieving resolution.” John Paul Jones, *Mediation Advocacy: Fundamental Principals and Guides*, 1999 MEDIATION & ARB. SEMINAR L-1, L-7. Many times, a client’s mental fatigue—from making too many decisions within a short amount of time without being prepared for it—



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will impede settlement at mediation. Preparation can help settle your case.

2. Call the mediator privately prior to the mediation.

Many mediators call counsel separately for an ex-parte *pre-mediation* caucus. If your mediator doesn’t do that, consider calling the mediator yourself. Have a discussion about the case and its unique needs. Give your opening statement. Educate the mediator about your client, the relationship with the opposing party or counsel, and how the mediator can help your client through the process. I often learn more from these conversations than I do from briefs.

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3. Ask your mediator to float an idea as his or her idea to the other side.

If your client might look “soft” or “weak” making a suggestion, ask the mediator to pitch it as his or her idea.

4. Ask the mediator to have a frank, evaluative conversation with an unrealistic client.

If your client has an unrealistic view of the case and will not listen to you, alerting the mediator to this reality will help the mediator deliver the right message to assist your client throughout the mediation.

5. Ask the mediator to allow your client to tell his or her story.

Many times clients are dissatisfied with litigation/mediation because they never get to tell their story in a way that isn't restrained by the style of questioning at a deposition or the limited nature of written testimony. Clients who are allowed to tell their story to an empathetic mediator in a way that is unfiltered are more satisfied with the process. It will also allow someone (if only the mediator) to express empathy for their situation, apologize that the client had to endure a hardship, and express the hope of resolving the matter through settlement.

6. Brainstorm creative ways to save an important business relationship.

A party may desire an on-going relationship with the party in the other room. That fact will alter the way that the party and the mediator should approach problem solving at mediation. Brainstorm ideas on what you want the future business relationship to look like and then solve the problem that brought the parties together for the mediation.

7. Honestly discuss the weaknesses in your case.

All cases have strengths and weaknesses. Unprepared and weak advocates who insist their case has no weakness are at odds with the truth when a mediator asks how their client plans to overcome the case's shortcomings. They likely oversold the case to the client and may be too embarrassed to admit a weakness and therefore must appear strong by arguing the point. A wiser approach is to intelligently accept that someone “may consider that as a weakness, and we accept that as a possibility. If it is a reality, we may have some trouble. However, we think that we can overcome that perception in the following way . . .”

Good luck on your next co-negotiation . . . I mean mediation. ☪

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Clark County Bar Luncheon

When: Thursday, June 20, 2019 • 12:00-1:30 p.m.

Speaker: State Bar of Nevada Counsel Dan Hooge

Deadline to RSVP: June 14, 2019 to CCBA office

Event info and registration form: See page 14

