

GET THE MOST OUT OF YOUR MEDIATIONS: TIPS FOR BETTER ADVOCACY IN MEDIATION

By Steve Altman*

Whether the court has ordered you to mediation, or counsel have agreed that it would be helpful, attorneys are finding themselves working with mediators more and more, and they need to make sure they are getting the most benefit from the process. Being a successful advocate in mediation includes additional techniques and strategies than requires a distinct preparation process, opening statements that engage both the mediator and the other side, and methods to both coach the mediator and be coached by the mediator. Having mediated hundreds of cases and taught hundreds of lawyers and law students how to improve their mediation advocacy, I have found that the following suggestions can improve results:

Hire the right mediator Mediators have different styles, skills and expertise. Make sure the mediator you hire fits the situation. I once allowed opposing counsel to select

Unfortunately, the reluctance of his clients to settle was not based on the merits of the dispute. It arose from their financial situation and their emotional reaction to being accused of fraud. The judge was not prepared to address these impediments to settlement.

When hiring a mediator, ask yourself, and sometimes opposing counsel, whether you need someone with subject matter expertise as well as mediation expertise; someone who will assist you as an evaluator or as a deal maker; someone who will focus on persuasion or on facilitation. that allows him to resolve emotional conflicts?

If the mediation is court ordered you may not have a choice. In those cases it is important to speak to the mediator beforehand to get a sense of who you are dealing with.

Prepare yourself and your client for a mediation not simply a negotiation. - A quick preparation checklist should include:

1. Is it the right time for mediation? Can you resolve the dispute before spending a lot on discovery or is there some education that needs to be done before resolution can be accomplished? Can the mediator assist in narrowing discovery as part of the mediation process?
2. Make sure the right people show up. Should the spouse attend? Should an insurance adjuster with real authority? Should the company exec? Should an expert witness?
3. Explain to your client the role of the mediator and your role as counselor as well as advocate. Explain the process, including opening statements, and the role of private caucuses as good opportunities to have candid discussions of the dispute

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- and to brainstorm possible solutions. Explain that the process requires patience and persistence.
4. Talk to your client about a range of options and numbers. This helps avoid a fixation on unrealistic numbers and prepares the client to be flexible.
 5. Decide how to educate the mediator and the other side. If the suit has not gone through discovery, the mediator may want to use all or part of the joint session to bring the parties to a level of knowledge that will allow them to make informed decisions. In those cases, a more detailed presentation may be in order.

Make an opening statement that engages the other side in a dialogue. Recent studies in neuroscience have confirmed my own experience regarding the role of opening statements. One study found that face to face communication is an effective way to convey sincerity. Another addressed the fact that opening statements often raise emotional responses in the other side. They found that such emotional responses to opening statements make it difficult for a party to make rational decisions without a

You can demonstrate confidence in your case and a willingness to settle without angering mediation discussions with the mediator should provide guidance on this topic. Keep in mind that what you say may not be what they hear. People often hear what they expect and the opposing party often expects to hear you misshape the truth. At least convey that

Finally, the opening need not contain every argument you have. When openings have too much information, good positions lose impact to weaker positions (information easily obtained is devalued). Nothing is saved to justify positions taken later in the day and the opposition feels compelled to argue every point. Another approach that can help effective openings while deflecting emotion is using your client or an expert witness to deliver part of the message.

Remember the dispute may not only be about money. Not only are there often hidden opportunities to create value, but even sophisticated counsel and business people bring an emotional content to disputes. Make sure you understand your client's needs. For example, employment cases often focus on a monetary amount that is a substitute for the anger, embarrassment and current employment obstacles that are an individual's concerns. Each of these can be addressed by solutions in addition to money. Discussing non-monetary terms with your client helps to shift the focus to other issues, including the value of getting the dispute behind them. Of course, many disputes are over money. But focusing only on the numbers increases the sense of winning and losing and inhibits rational assessment, compromise, and ultimately a real satisfaction from the process.

The mediator is your collaborator, not your advocate nor your adversary. The mediator is not right and they are wrong. Nor is it to negotiate against you on behalf of the opposition. The mediator has a unique

role: to lead the parties to a settlement that they feel was the product of a fair and neutral process. Your job is to assist the mediator in doing this. To do so you need to seek and ; to arm her with the best arguments; and to strategize with her to develop the best negotiation plan. You have hired someone who should be an excellent negotiator, should have the expertise or experience to help you evaluate your case, and should have the mediation skills to help both parties feel that the process provides them with control over their destiny and is e advantage of these skills.

As an example, you can benefit from the when you listen to negotiation suggestions such as adjusting your offer to manage expectations, using concepts such as scarcity or loss aversion to frame offers, or consider saving a creative offer until the problem it is intended to solve becomes an issue.

Examples of assisting the mediator could include asking her to focus on particular issues, or suggesting that the mediator say an offer is coming from her rather than from you in order to avoid what mediators call reactive devaluation, the automatic rejection of any offer that comes from the other side. You could also suggest a nontraditional format such as having the parties meet without their counsel, or you could suggest returning to joint caucuses when you feel the need to express yourself or just eyeball the other side.

Be patient. It was 3:00 pm. Just as I thought we were about to make progress, counsel and her client vigorously complained about the repetitive discussions and refusal of the together to sum up where we were and threw in an idea for sharing some possible profit that both sides had been claiming. The idea, rejected quickly in the morning session, was lain, but respect the process and trust the mediator.

These issues are highlighted to help you recognize that mediation advocacy requires a focus on areas that may be new to our negotiation repertoire. Thinking about these aspects before and during a mediation can increase the benefits and results of the process.