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MEDIATION ADVOCACY

How to Get the Most Out of Your Next Mediation



Webinar
July 19, 2016

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Note: Slides and handout materials developed by Rebecca Callahan, Callahan Dispute Resolution, Newport Beach, California.



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Audience Polling Question



How many attending:

- A. Are full-time neutrals
- B. Are full-time advocates
- C. Split their time



Program Agenda

- Mediator selection
- Advocacy in the context of mediating the litigated dispute
- Substantive preparation
- Advocacy techniques that work to advance the mediation process and/or promote settlement
- Advocacy techniques that don't work to advance the mediation process or promote settlement
- Why does any of this matter?
- Q&A



Program Handouts

- Callahan Article on Mediation Advocacy
- Callahan Article on Reservation Points
- Callahan “Plan for Success” – Preparation Checklist
- Navigant Article on Riskin’s Grid
http://www.navigant.com/-/media/WWW/Site/Page/Insights/IFH/2013/WhatYourMediatorThinking_TL_0613.pdf
- Kiser Study Article
http://www.adrmediate.com/docs/Susan_Hammer_OSB%20Bulletin_Feb-Mar09.pdf
- *Playboy v. Sheppard Mullin* Article
<https://www.cacd.uscourts.gov/sites/default/files/documents/Leave%20the%20Odds%20for%20Vegas%20July%2010%202015.pdf>



Selecting the Mediator



“If the only tool you have is a hammer, you tend to see every problem as a nail.”
- Abraham Maslow

We often hammer away at the same old problems in the same old way because we know of no other way. That is frequently the case with mediator selection. One side simply defaults to the other – we’ll use whoever you want – instead of making a deliberate assessment about what mediator styles or approaches might meet the needs of the case at hand.



Selecting the Mediator

Problem Definition

Narrow _____ Broad

Legal Issues

Interests & Needs

bargaining in the shadow of the law

bargaining based on what the parties want or need to have addressed or accommodated today in order to say “yes”

backwards looking

forward looking



Selecting the Mediator

Mediator Role as Facilitator

Evaluative

- order
- recommend
- educate about what others have done
- ask permission
- wait to be asked
- never provide substantive input

Facilitative



Selecting the Mediator

Evaluative

- order
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Narrow

Legal Issues - bargaining in the shadow of the law

Broad

Interests & Needs - what the parties want or need to have addressed or accommodated today in order to say "yes"

Facilitative



Advocacy in the Context of Mediating the Litigated Dispute



If you want peace, prepare for war.

- Latin expression attributed to Publius Flavius Vegetius Renatus

Indeed, the definition of "advocacy" is pleading, advancing, championing or supporting a cause or proposal.



Advocacy in the Context of Mediating the Litigated Dispute



But how do you champion a cause and, at the same time, explore in earnest compromises and concessions of that cause?

What does it mean to advocate zealously in a mediation context where the purpose of the exercise is settlement?



Advocacy in the Context of Mediating the Litigated Dispute

For mediation to succeed in achieving a negotiated resolution of the dispute, there needs to be a *persuasive* and *constructive* dialogue about:

1. "the problem"
2. possible solutions
3. the litigation alternative & how it compares to the possible solutions
4. the uncontrollables & uncertainties of the litigation alternative
5. other risks that are attendant to the no-resolution alternative
6. lost opportunity costs



Advocacy in the Context of Mediating the Litigated Dispute

To win 100 battle victories is not the acme of skill. To subdue the enemy without fighting is the acme of skill.

- Sun Tzu
The Art of War



Party / Counsel Preparation Checklist

1. Who should attend for your side?

- ✓ To tell the story & respond what the other side may say factually
- ✓ To explain the theory of the case & respond to what the other side may say about the law or legal merits
- ✓ To talk numbers
- ✓ To make “in game” adjustments as new information may be learned at the mediation or something unexpected is put on the table for consideration
- ✓ To make the ultimate decision to say “no” – which means putting the litigation alternative back on track and committing time, money and resources towards that effort.
- ✓ Are advisors or consultants needed to help with technical issues – e.g., CPA, tax attorney, other experts



Party / Counsel Preparation Checklist

2. Who is going to attend for the other side?

- ✓ What do you know about them in terms of power, resources, bargaining style?
- ✓ What was the nature / level of their involvement in the underlying transactions and events?
- ✓ Do they have ultimate decision making power? If not, do they have access to that person?
- ✓ What's their reputation?
- ✓ Have you had prior dealings with the person? If so, “good” or “bad”?

Note: In a perfect world, counsel would discuss and agree on “who should attend” in advance of the mediation to make sure that everyone was there who might be needed to discuss and consummate a settlement.



Party / Counsel Preparation Checklist

3. What's your message?

- ✓ What are the “key” facts or information you want to put on the table?
- ✓ What information do you need from the other side? Does the other side need information from you? Does the exchange of information need to be negotiated? Do you need the mediator's help?
- ✓ How are you going to package and talk about litigation risks – your upside is their down side and visa versa?
- ✓ What else is there to talk about in terms of other risks – reality factors, relationships, incentivizers for settlement? Do the parties have any of these things in common?
- ✓ Who should communicate “the message” – attorney – client – both?



Party / Counsel Preparation Checklist

4. What's your bargaining plan?

- ✓ What do you want & is there anything in what you want that you think the other side may be willing to give or concede to you? *If not, what's your plan on how to move them?*
- ✓ What does the other side want & is there anything that you may be willing to give or concede to them?
- ✓ What risks can you avoid through a negotiated resolution & what's that worth?
- ✓ Are there things you can achieve / risks you can avoid that have value & are not available as "relief" in the courts?
- ✓ Prioritize what you want to achieve & what you are willing to give up
- ✓ Leave yourself some room when setting reservation points with the client *and* specify clear qualifiers so you leave the door open with the client for making "in-game" adjustments at the mediation



Party / Counsel Preparation Checklist

5. What does the litigation alternative cost & is it worth the investment?

- ✓ What does it look like to "win" at litigation?
- ✓ What does it look like to "lose" at litigation?
- ✓ Are there other possibilities – e.g., both win a little and lose a little - & what does *that* look like?

6. Plan for success at mediation.

- ✓ How should the mediation start – joint, separate, staggered sessions?
- ✓ Where should the discussions start?
- ✓ What can the mediator do to get "headliner" issues on the table?
- ✓ What can the mediator do to facilitate discussions & negotiations?



Party / Counsel Preparation Checklist

7. Substantive preparation – review handout pp. 3-4

- ✓ Discuss and agree upon roles at mediation – who is going to say and do what?
- ✓ Create a visual aid – chronology, organization chart, spreadsheet analysis with different scenarios
- ✓ Read the other side's brief & prepare a reasoned response aimed at getting discussions going, not "winning" the argument. *Rethink not sharing your brief!*
- ✓ Prepare to be patient – with the process and with the other side
 - seismic shifts take time
 - people process information and decision make at different rates of speed – you can only work as fast as the slowest person at the table



Mediation Advocacy Techniques That Work



What are some things that attorney advocates can do in advance of the mediation to help their clients take full advantage of any settlement opportunities that may be presented at mediation?



Mediation Advocacy Techniques That Work

Advance thought is given and discussion is had about:

- who needs to be at the mediation:
 - ✓ to tell the story
 - ✓ to explain the theory of the case
 - ✓ to talk numbers
 - ✓ to make in-game adjustments to the pre-mediation case evaluation and definition of settlement objectives
 - ✓ to make the ultimate decision re deal or no deal
- when is the right time to sit down and talk:
 - ✓ Before or after the filing of the lawsuit
 - ✓ before the case is “at issue”
 - ✓ before discovery is taken / completed
 - ✓ before or after the hearing on a dispositive motion



Mediation Advocacy Techniques That Work

Viable settlement numbers and negotiation strategies are developed after consideration of a number of factors, including:

1. Quantifying a value and applying a discount for risks avoided through settlement, such as:
 - ✓ avoiding a loss on a possible summary judgment or nonsuit motion
 - ✓ avoiding a loss on a “conflict in the evidence” battle
 - ✓ avoiding a loss on a “witness credibility” battle
 - ✓ avoiding a loss in a “battle of the experts”
 - ✓ avoiding an appeal and possible loss on appeal because the judge makes a mistake
 - ✓ avoiding the possible negative impact of a third-party witness not appearing or a key piece of evidence not being allowed in



Mediation Advocacy Techniques That Work

2. Doing a candid assessment of what it will cost to take the matter through trial – in terms of time, money and other resources - *and* giving consideration to the other ways in which the client might “spend” those things
3. Doing a candid assessment in terms of what is known today about what it means to win – For example, is the judgment collectible? For another example, even if the client is awarded 100% of its attorney’s fees and costs, there is no ROI, so what is the true value of that recovery if collected in Year 3, 4 or 5 after the initial “investment”?
4. Doing an assessment of what it means to lose – For example, what types of costs might be assessed? For another example, might the client be exposed to attorney’s fees? punitive damages? If so, in what amount?



Mediation Advocacy Techniques That Work

5. Are there tax consequences of a judgment that can be avoided, minimized, structured, delayed by a settlement?
6. What does the client really need *today*?
7. What does the client really *want* and is that “relief” available in the courts.
8. Are there benefits to closure *and* shutting down the litigation? E.g., elderly or ill party not spending precious time in litigation? avoiding the aftermath to business and/or reputation associated with negative publicity?



Mediation Advocacy Techniques That Work

Plan for success – operate from the assumption that a settlement *will* be achieved at the mediation.



Bring a draft agreement with you in hard copy and electronic format that has your / your client’s settlement boilerplate.

Consider exchanging your form of a draft settlement agreement – with blanks re the terms – with the other side in advance of the mediation.

Note: This type of pre-mediation preparation signals the other side that you are serious about 1. trying to achieve a negotiated resolution, and 2. leaving the mediation with a deal signed up.



Mediation Advocacy Techniques That Work

Think and talk about body language as part of your / your client's preparation.

80% of our messages are communicated nonverbally. What are you trying / intending to communicate to the mediator? to the other side? Practice. Prepare the client with regard to these subtleties – just as you would prepare for trial.

- Body posture
- Gestures
- Eye contact / eye movement
- Facial expressions
- Tone of voice
- Diction / points of emphasis



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Mediation Advocacy Techniques That Work

Negotiation is a dance ... but it's not a two-step!

Prepare yourself and your client to make more than one move – go more than one or two rounds of offers and counter-offers. You may think you know where the negotiation will or should end – and you may be right - but remember the words of Randy Lowry: *The right answer at the wrong time is the wrong answer!*

- ✓ Changing beats
- ✓ Changing tempos
- ✓ Changing directions
- ✓ Changing moves
- ✓ Some dances last longer than others



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Mediation Advocacy Techniques That Work

While information is king ... true genius is the capacity to evaluate and make decisions in the face of uncertain, conflicting and missing information.



Negotiating a settlement is very much like playing bridge. In bridge, the players see only one-quarter of the cards, and some of the information that might be gathered is false due to an uneven split of the cards. In negotiations, the parties see only their information and that which the other party shares – which is less than all that is available, but still enough to make a *calculated* decision.



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What are deficient or ineffective advocacy techniques in the context of mediating the litigated dispute?

Not surprisingly, these "techniques" are frequently what cause or contribute to impasse at mediation.



Mediation Advocacy Techniques That Don't Work

1. Vilifying and/or insulting the other party or counsel
 - ✓ not a message that will be carried
 - ✓ not a message that invites negotiation
 - ✓ "fightin' words" ... not what mediation is about
2. Setting an artificial time limit on how much time will be committed to the mediation (e.g., 3 hour mediation session to settle a dispute that has been in the courts for 2 years)
3. Sending "appearance counsel" or an associate who is not responsible for advice-giving to the client or for taking the matter to trial
4. Planned or scripted "venting"
5. Coming prepared / willing to discuss only the virtues of the client's case and none of the negatives, risks, reality factors, etc.



Mediation Advocacy Techniques That Don't Work

6. Holding cards too close to the vest – not sharing information necessary or material to persuading the other side to move off of its position
7. Playing games aimed at fooling the mediator and using him or her as an instrument of deception or misinformation
8. Not giving thought or consideration to the things that do work to advance the mediation process and promote settlement dialogue
9. Not taking time to prepare / winging it
10. Limiting / pegging the client's settlement number to the predicted judgment value of the case.



Re Point No. 10:

- There is empirical evidence through the Kiser Study that attorneys are not good at predicting trial outcomes. [Handout](#).



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- Studies show that clients tend to anchor on the highest number of any settlement range developed with their attorney *and* due to the "halo effect," clients tend to place great trust in the accuracy / validity of "the number" discussed in advance of the mediation.



Why does any of this matter?



Because there is a disturbing trend of clients suing their lawyers for “settlement malpractice,” which means that we need to take seriously the settlement opportunity presented when both/all parties agree to mediation. We need to plan and prepare accordingly.

Cases Where Clients Settled with Their Adversary and Then Sued Their Lawyer

- Cassel v. Superior Court*, 51 Cal. 4th 113, 124 (2011)
- Filbin v. Fitzgerald*, 211 Cal. App. 4th 154 (2012)
- Roldan v. Callahan & Blaine*, 219 Cal. App. 4th 87 (2013)
- Syers Properties III, Inc. v. Rankin*, 2014 1761923 (1st Dist., May 5, 2014)
- Amis v. Greenberg Taurig LLP*, 2015 WL 1245902 (2d Dist., Mar. 18, 2015)

Cases Where Clients Did Not Settle / Did Not Like the Result at Trial and Then Sued Their Lawyer

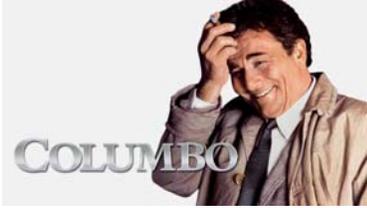
- Moua v. Pittullo Howington Barker Abernathy LLP*, 228 Cal. App. 4th 107 (2014)
- Playboy, Inc. v. Sheppard Mullin*, LASC Case No. BC579105 (filed May 2015)



Conclusion (in the *business dispute* context):

- Attorney advocates need to be careful about how much emphasis is placed on the perceived merits and value of the litigated claim under discussion *at the mediation*.
- The “advance preparation” topics help to do that *and* help to shift responsibility to the disputant client to make the decision and to do so on an “informed” / “business” basis.
- Deal v. No Deal is a *business decision*. Business decisions typically take a whole host of things into consideration: e.g., risk/reward, cost/benefit, lost opportunity costs, market factors, community reputation, etc. Decisions about settlement should too ... and should thus make sure business people are at the table on mediation day to make the all important decision whether to stay at the table and negotiate or return to the litigation alternative.





Just one more
thing ...



Pre-Mediation Settlement Offers:

- ✓ If you anticipate that you will be at mediation at some point in the case, where does a pre-mediation settlement offer or demand fit in to your *overall* settlement strategy / plan? How does it potentially help you? Might it potentially hurt you? Think more broadly and strategically about settlement from the outset *and* your negotiation moves privately or at the “first” mediation effort.
- ✓ Is this a case where it is appropriate to make a statutory offer as part of your pre-mediation settlement plan to put cost-shifting exposure on the table - especially in cases involving experts or technical issues that may need tech support to present to a jury?

Note: If you do engage in a pre-mediation settlement effort and fail, you might want to tell the mediator – in a private / mediator’s eyes only memo – why you think you got stuck or never got started.



Questions





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