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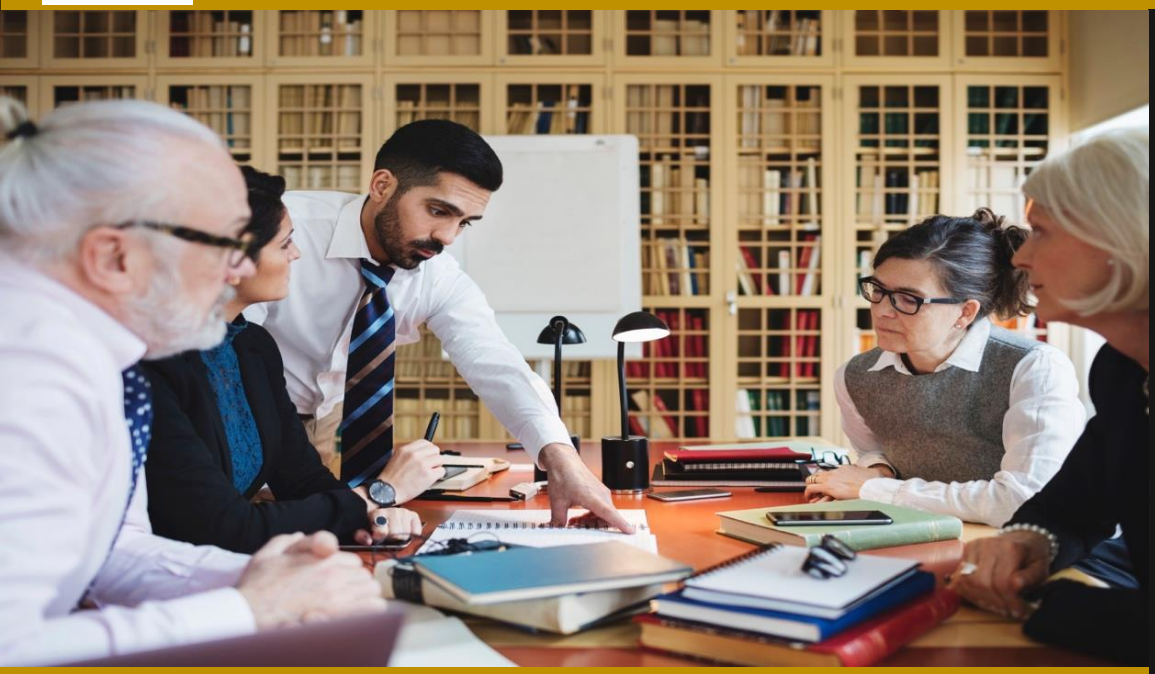

Ways to Impress for Mediation Success

Best Practices for all types of Civil disputes

What are some of the effective habits that mediators wish all attorneys would implement? What areas need improvement? What are the tools that skilled mediators use to bring out the best in the participants? Here is a chance to learn from experienced practitioners who are both attorneys and mediators to enhance your own ADR experience.

Moderated by Lori Dobrin, Attorney and Mediator for ARC

Wednesday, Nov. 1, 2023

12:00 PM - 1:00 PM

Hon. Anthony Khoury

Former Commissioner for Kern County Superior Court, he presided over a wide range of civil and criminal cases. During his time on the bench, he created both a civil mediation program and a voluntary settlement program for family law cases. Prior to taking the bench, Comm. Khoury ran a successful litigation practice specializing in civil, business and employment law. Comm. Khoury's experiences on and off the bench have positioned him to serve as a mediator on several prestigious program panels.

Michael Strauss, Esq.

Mr. Strauss has an impressive history of representing individuals and companies throughout California and nationwide in employment law disputes. Although he regularly litigated the gamut of employment issues, his specialty is in wage and hour class actions. Known for his innovative thinking as a litigator, Mr. Strauss brings this same creativity to his mediation practice to come up with novel solutions for resolution.

Please return with check to VCBA, 4475 Market Street, Suite B, Ventura, CA 93003. All reservations are considered "firm" on 10/30/23. **Ways to register: (805) 650-7599, vcba@vcba.org or Scan QR Code for VCBA Calendar**

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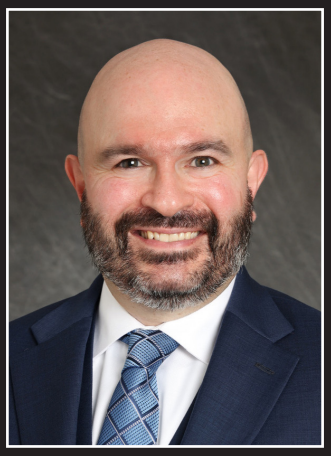

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Anthony S. Khoury, Esq.

Former Kern County Superior Court Commissioner

Anthony has more than 20 years in the legal industry, culminating most recently, with a position as a Court Commissioner in Kern County where he presided over very diverse calendars, including, preliminary hearings in criminal felony matters, family law, domestic violence restraining orders, civil harassment restraining orders, small claims, limited civil, unlawful detainer, traffic and juvenile traffic, child support/AB1058, and misdemeanor jury trials. During his time on the bench in Kern County, Anthony also created a civil mediation program for limited civil, small claims, unlawful detainer, and civil harassment matters, and he created a voluntary settlement program for family law matters, as well as served as a mandatory settlement conference judge for unlimited civil matters.

Prior to taking the bench, Anthony ran a successful law practice for over a decade, specializing in civil, business, and employment law litigation. During that time, he represented both plaintiffs and defendants, and participated in dozens of mediations. Despite his extensive experience as a trial attorney, Anthony's reputation was that of a staunch, but pragmatic, advocate--often receiving praise from colleagues, opposing attorneys, and judicial officers alike, for his exemplary ethical conduct, courteous and affable demeanor, and his ability to get cases settled.

Practice Areas

- Mr. Khoury's practice areas include: employment, business/contractual, family law/divorce mediation, personal injury, bad faith/insurance coverage, class actions, and construction defect.

Conflict Resolution

- During Mr. Khoury's time on the bench in Kern County, he created a civil mediation program for limited civil, small claims, unlawful detainer, and civil harassment matters. He also created a voluntary settlement program for family law matters, as well as served as a mandatory settlement conference judge for unlimited civil matters.
- Pepperdine University, Caruso School of Law, Straus Institute LL.M. Candidate in Dispute Resolution

Education & Training

- Washington University in St. Louis, School of Law: J.D. (May 2004); Honors and Activities: Scholar-in-Law Award, NAPIL Pro Bono and Public Service Award, and Criminal Law Society Founder and President
- University of California, Los Angeles: B.A. with College Honors (June 2001) in the Individual Field of Concentration of Social Deviance and Criminal Justice, with Minors in Afro-American Studies and Political Science

Organizations & Achievements

- Arbitrator, American Arbitration Association (AAA) Panel of Employment Arbitrators
- Member, Southern California Mediation Association (SCMA) and Co-Leader of SCMA PDG for Employment, and for Ventura and Santa Barbara Counties
- Member, International Academy of Mediators (IAM) Mentorship Program
- Member (Alternate), Committee on Professional Responsibility and Conduct (COPRAC), State Bar of California
- Board Member, California Court Commissioners Association (CCCA)
- Member, California Judges Association (CJA)
- Member, State Bar of California (admitted June 1, 2005)
- Temporary Judge, Los Angeles Superior Court (since July 2015)
- Attorney Coach, Santa Susana HS Mock Trial Team (2019-20)
- Attorney Coach, UCLA Mock Trial Program (2015-16)
- Attorney Coach, Thousand Oaks HS Mock Trial Team (2012-2015)
- Fluent in spoken and written French; excellent conversational and written ability in Spanish; and significant conversational ability in Arabic.

Mr. Khoury is available throughout California.

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Michael A. Strauss, Esq.

Employment Mediator

Before becoming a mediator in 2022, Michael (Mike) Strauss had a long and impressive history representing persons and companies throughout California and the rest of the country in employment law disputes. Although Mike regularly litigated individual actions involving FEHA claims, such as harassment, discrimination, retaliation, and wrongful termination, Mike's primary practice area was wage-and-hour class actions. He prevailed on many motions for class certification, negotiated dozens of class settlements ranging from six to eight figures, and set important precedent in state and federal appellate courts. An employer himself (he owned and managed his own law firm for over twelve years), Mike also counseled employers on their employment policies and practices.

Mike has always been known for his creative thinking. He represented parties in cases of first impression, arguing legal positions no one had thought to assert before, which in 2019 took him to the pinnacle of American jurisprudence, the United States Supreme Court. He brings this same creativity to his mediation practice, where the path to settlement may require thinking outside the box to come up with a solution that works for everyone.

Practice Areas

Mike mediates the full gamut of employment law disputes: class and individual wage-and-hour/PAGA cases, FEHA claims (including all forms of discrimination, harassment, wrongful termination, equal pay, and leave violations), executive compensation and indemnification, employment contracts, 1102.5 whistleblower retaliation, and independent contractor misclassification.

Organizations and Achievements

- Ventura County Bar Association
- Consumer Attorneys Association of Los Angeles
- California Employment Lawyers Association
- Southern California Mediation Association
- Commendation, Mayor of Lancaster, California, for achievement in wage-and-hour class action, 2012

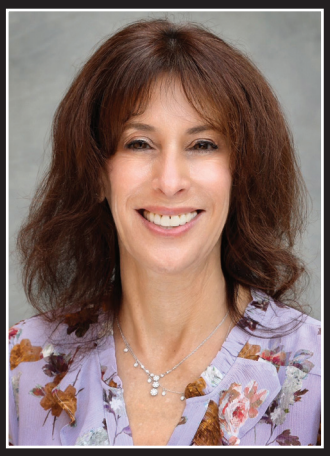
Education and Training

- J.D., Wake Forest University School of Law, 2006
- B.A., University of California, Berkeley, 2001
- Certificate in Dispute Resolution, Straus Institute for Dispute Resolution, Pepperdine University School of Law, in progress
- Mediator, Conflict Resolution Institute, 2022-present
- Mediator, Los Angeles County Superior Court Resolve Law Mediation Program, 2022-present

Volunteerism

- Socal Youth Cycling League, Head Coach, Ojai Composite Mountain Bike Race Team
- AYSO, Coach, Youth Soccer Teams
- Independent Elementary School, Board of Directors

Mr. Strauss is available throughout California.



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Lori M. Dobrin, Esq.

Mediator

Lori Dobrin is a 30-plus year litigator who is recognized for her preparation, empathetic demeanor and knack for building rapport and trustworthiness. She brings this mindset to her mediation practice where she balances patience with perseverance in discovering the underlying interests to forge a resolution. Firm on the substance on the dispute, yet tactful towards the participants, she employs active listening, and asking the right questions to hone into the root issues that move the parties to agreement. In her roles as mediator and settlement officer for various Courts, including the US District Court, and the Superior Courts of Los Angeles, Santa Barbara and Ventura, she is gratified when her encouragement and tenacity results in litigants taking control over the outcomes of their dispute and reaching resolution, sparing them from the inherent uncertainty of protracted litigation and trial.

Practice Areas

Civil disputes including Personal Injury, Products and Premises Liability, Real Estate, Landlord/ Tenant Disputes, Unlawful Detainer, Business, Insurance Subrogation, Medical Malpractice

Conflict Resolution Experience

- Panel Mediator US District Court Central District
- Settlement Officer - ResolveLA - Los Angeles Superior Court
- Settlement Master and CADRE Panelist - Santa Barbara Superior Court
- Judge Pro Tem - Ventura Superior Court
- Judge Pro Tem Los Angeles Superior Court (Santa Monica)
- Mandatory Settlement Conference Officer - Ventura Superior Court
- Volunteer Mediation Program Unlawful Detainer - Ventura Superior Court

Organizations & Achievements

- State Bar of California
- Florida Bar
- Co-Chair ADR Section of Ventura County Bar
- Southern California Mediation Association
- Los Angeles County Bar Association
- Beverly Hills Bar Association
- Ventura County Bar Association
- Women Lawyers of Ventura County
- ProVisors
- Co-Chair, Emory University Alumni Interview Program

Education & Training

- Doctor of Law, Emory University School of Law (1985)
- B.S. University of Florida, *With Highest Honors* (1982)
- Straus Institute for Dispute Resolution Pepperdine-Caruso School of Law, *Mediating the Litigated Case* (2022)
- Continuing Mediation Education and Training through US District Court, Superior Courts and SCMA

Ms. Dobrin is available throughout California.

LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

FRIDAY, JULY 7, 2023

PERSPECTIVE

Tips for mediating your next wage and hour case

By Michael A. Strauss

While wage and hour law technically falls under the umbrella of employment law in general, a wage and hour mediation is fundamentally different from other types of employment law mediations. Wage and hour mediations involve a lot of math, lack excitement and emotion, and, if the parties' damages calculations are off, can start the day off with an impasse. As you head into your next wage and hour mediation, whether in a class or individual case, the following strategies should prepare you for a successful outcome..

1. Pick a mediator who actually likes wage and hour law.

Not all employment mediators know wage and hour law. Even fewer employment mediators actually like doing wage and hour mediations. If you do not choose a mediator who likes wage and hour law, there is a good chance that your mediator's eyes will gloss over when you start discussing concepts like how to calculate the regular rate or what constitutes a call back for the purposes of reporting time pay.

How do you know your mediator knows and likes wage and hour law? You can always put a call into the mediator you are considering to see if they are enthusiastic about your case. Also, look for mediators who as lawyers tried wage and hour cases or argued wage and hour cases before courts of appeal. Such attorneys likely have a depth of knowledge and underlying love of wage and hour law that compelled them to show off their abilities at the highest levels. Finally, ask other wage and hour lawyers if they ever used your potential mediator.

However you go about choosing a wage and hour mediator, getting one who likes wage and hour law is a critical first step in ensuring that your wage and hour mediation will get off to a good start.

2. Please, please, please prepare a good spreadsheet!

Since you've chosen a mediator who actually likes wage and hour law, your mediator will expect that you come to the mediation with a good damages spreadsheet. At a minimum, your spreadsheet will segregate the damage amounts for each of the claims at issue in the case. Even better would be a pay-period-by-pay-period analysis of the wages or penalties owed for each type of claim. A detailed damages spreadsheet will signal to your mediator that you know what you are doing.

Creating a good damages spreadsheet is just as important for the defense as it is for the plaintiff. A defendant-employer must know its exposure in a wage and hour case. By crafting a detailed damages spreadsheet, the employer's attorney will give her client insight as to the potential liabilities of the case. A thorough spreadsheet will also allow the attorney to spot mathematical mistakes in her opponent's calculations.

3. Seriously consider sharing your brief and damages calculations before the mediation.

While many attorneys are reluctant to share mediation briefs in employment cases, they should reconsider that approach in a wage and hour case. Too much time is wasted in many wage and hour mediations when the parties have divergent views on how to calculate damages. For example, if the plaintiff's damages calculations show potential exposure of $1,000,000, but the defendant's spreadsheet shows maximum liability of $500,000, any move that the plaintiff makes above $500,000 will be viewed by the defendant as unrealistic. Until the plaintiff moves under the defendant's perceived maximum liability $500,000, the defendant will not put real money on the table. From the get go, the parties will be at an impasse, and they can eat up valuable hours of the mediation trying to justify their legal positions and mathematical calculations.

By exchanging briefs and damages calculations well in advance of the mediation, the parties can largely avoid this problem. Lawyers generally are not mathematicians; mistakes in their calculations are common. Rather than point out your opponent's mistakes at the mediation, which can embarrass him before his client and the mediator and put a halt to actual negotiations, the better practice is to reach for the phone and discuss any incorrect calculations you might have found in your opponent's spreadsheet. Maybe it was you who made the miscalculation, and your opponent will justify her calculations in your phone call. Either way, it is much better to hash out these types of disputes before the mediation begins, which will enable the parties to focus on negotiations instead of fuzzy math.

4. Set realistic expectations with your client.

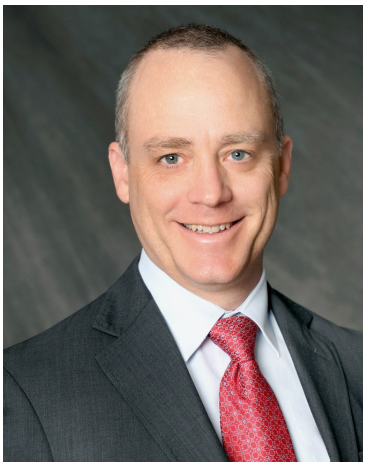
Unlike a FEHA or whistleblower case, where there may be an award of emotional distress or punitive damages that is impossible to predict, the potential damages in a wage and hour case are finite. There is no reason, therefore, for the parties to have unrealistic expectations of what could happen at mediation or, if the mediation is unsuccessful, at trial.

If the plaintiff's attorney has done her job correctly, she will have prepared a solid damages spreadsheet and shared it with her opposing counsel in advance. If the defendant's attorney has done her job correctly, she will have prepared and shared her own spreadsheet as well. The attorneys and their clients should know the extent of the potential damages in the case.

Do not be afraid to show all the calculations – both yours and your opponent's – to your client. Make sure your client understands how you and your opponent are calculating the damages and what factual assumptions both sides are making to build their damages model. Your client should be able to see that the value of the case can be more or less than they thought.

In summary, wage and hour mediations are unlike other employment mediations. But if you pick a mediator who actually likes wage and hour law, create a solid damages spreadsheet, share your brief and damages calculations with your opponent, and set reasonable expectations with your client, you can maximize your chances of obtaining a favorable settlement for your client.

Michael A. Strauss *is a mediator at Alternative Resolution Centers (ARC).*



LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
WEDNESDAY, SEPTEMBER 21, 2022

PERSPECTIVE

The importance of trust building in mediation

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By Robert M. Cohen

The process of Mediation has been refined and studied relentlessly since the late 1970's by jurists, academics and ADR professionals. A myriad of law school courses, legal seminars, articles, blog posts and memoranda have addressed the key elements for a successful mediation:

- Selecting a qualified, impartial mediator with subject matter expertise;
- Adhering to the three Ps of mediation - preparation, preparation, preparation;
- Exchanging persuasive yet succinct briefs;
- Constructing a negotiation game plan with alternative options and outcomes;
- Advocating enthusiastically and actively listening;
- Encouraging decision makers to be engaged, respectful and to move beyond anger;
- Defining the true cost of litigation – in terms of dollars, time, energy, and emotion – in the event impasse is reached.

Yet such courses, seminars and articles seldom focus on the importance of trust building as being a critical element in moving the decision makers to consensus and "Yes."

Earlier this Summer I was mediating a mid-six (6) figure dispute between two close family members. The Plaintiff was represented by competent and experienced legal counsel. The Defendant was in Pro Per and relying on advice from numerous attorney friends. This prelitigation mediation was an attempt to avoid costly and emotional family litigation.

Five (5) hours into the mediation, the Pro Per Defendant seemed to be losing energy and focus. I sensed he was disappointed with the process. I asked him, "Do you believe you can trust my communications with you?" His immediate response was, "I trust you as much as I can." The Pro Per Defendant's response was not inappropriate. He had significant monetary skin in the game, as did the other side; meanwhile, I had no skin in the game other than my pride and reputation and I was profiting by their conflict. I decided immediately that I had to have skin in their game too to prove that I was more passionate about resolving their dispute than in making additional fees. I offered to extend the mediation after the scheduled seven (7) hours - for two (2) additional hours at no charge, because I believed it was paramount that these two close relatives put their dispute to rest once and for all. My offer was gladly accepted, and it energized the parties; after several more hours a partial settlement was reached. I am positive my action made the difference.

Though the concept of trust is amorphous, successful mediators recognize that trust is vital to the process. A party that trusts his/her lawyer, the mediator, and the mediation process, is more likely

Robert M. Cohen *is a mediator at ARC Mediation & Arbitration Services.*

to share information, collaborate, lower defenses, concede "wants," and be comfortable with the mediator's guidance. Clearly trust is a rare commodity in today's world: alternative facts, misinformation, half-truths, and plain lies dominate the internet, electronic and print media, political parties, and social action groups.

How then does one build "trust"? Here are a few of the factors:

- Mediator empathy, impartiality and competency;
- Dependability on the part of counsel;
- Respect for the participants and their positions;
- Transparency, authenticity, sincerity and on occasion vulnerability;
- Reliance on and reciprocity with the opposition – putting into action "The Golden Rule."

While counsel must contribute to the trust process, it is the mediator's duty to take the lead. Several ways that seasoned mediators create an atmosphere of trust include:

- Establishing goodwill by reassuring all counsel and parties that the mediator is empathetic to their circumstances and vulnerabilities and by confirming that the mediation is a safe environment for cooperation, collaboration and problem solving.
- Displaying impartiality and reducing the appearance of bias by being patient, working equally with all parties, being inclusive and never displaying indifference.
- Creating rapport by focusing on the needs of the parties and ensuring that they understand the process.
- Identifying each party's wants and needs by asking open-ended questions.
- Communicating a realistic understanding of the dispute, being candid, encouraging, and explaining to each party the gains and losses that any concession will bring about.
- Helping the parties develop clear and realistic expectations while explaining the benefits a mediated settlement will bring.
- Being the benchmark for honesty and integrity.

Trust building is a multilayered and multilateral process that requires continuous effort on the part of all engaged. According to Bryant Uzzi and Shannon Dunlap in their article entitled "Make Your Enemies Your Allies" in The Harvard Business Review: "Research shows that trust is based on both reason and emotion. If the emotional orientation toward a person is negative, then reason will be twisted to align with those negative feelings. When we experience negative emotions, blood recedes from the thinking part of the brain, the cerebral cortex, and rushes to its oldest and most involuntary part, the "reptilian" stem, crippling the intake of new information." "…(In) these situations, the emotional brain must be managed before adversaries can understand evidence and be persuaded."

Noted and much sought-after ARC mediator, retired Superior Court Judge Charles "Skip" Rubin explains how trust is created and the impact it has on the mediation process: "Mediated disputes, by their very nature, begin with the parties distrusting each other. Trust building begins and ends with the mediator but is also dependent on the good faith actions of the parties and their counsel, whose trust in the mediator and process is a sine qua non of settlement."

LOS ANGELES & SAN FRANCISCO
Daily Journal
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FRIDAY, MARCH 6, 2020

PERSPECTIVE

20 tips for having a more successful mediation experience

By Jeffrey Kravitz

I was representing a well-known producer in a dispute with another producer. No details necessary. We mediated with one of the all-stars, who asked for a joint session first — i.e., where all sides sit in the same room at the beginning. The mediator walked into the joint session, smiled, and pronounced without introduction, "Do you think that anyone is going to give a damn about you [expletive] [ethnic slur] producers." The matter settled.

Second case: I represented two young men suing their business partner, who was a vigorous 80-something. We used the same mediator; he used the same language. The 80-something listened through one round and then bolted without settling. We held a second session in front of a settlement judge — a woman who had gone to a fancy law school and played a musical instrument for the lawyers' symphony. The matter settled.

The lesson is one we learned in our youth: different strokes for different folks.

As a litigant, you need to decide ahead of time what approach will work for you. And importantly, what will likely work for the other side. Here are a few lessons on succeeding in mediation.

1. When is the right time to mediate? Mediation can be productive at *any* stage of litigation, especially early on in the process. Even if you do not settle, you can learn more in one session than in three rounds of discovery.

2. Share your thoughts on a mediator with your client. What does he or she think? Ask them what types of personalities they work with the best.

3. Does your opposition expect deference? Consider hiring a mediator who will play to that mindset. You want an agreement, not a confrontation.

4. Is your client impatient and prone to quick decisions? Look for a mediator who gets to the point rapidly and doesn't draw out the process.

5. If the other side accuses you of seeking "cheap discovery," embrace it by letting them know that they too will be learning.

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6. Take the time to know your mediator, if for no other reason than to let your client know that you were doing your research, and to set his or her mind at ease.

7. Take a snack, and make sure your client does as well. Really. Napoleon once said that an army runs on its stomach. You do not need to be flagging, nor does your client. It is common for mediations to work through lunch, and you do not want fatigue early on in the process.

8. Never underestimate the power of a good night's sleep. We are in a tough profession, with conflicting demands, but the client will never forgive you if you are not at the top of your game for them because you were at the Lakers game the night before.

9. Tell the client to bring additional work with them. Time is money, and there are innumerable breaks and dead spots throughout the day. Clients will appreciate being able to take advantage of those moments.

10. On the other hand, make sure to be *present during the session*. There is nothing less productive than a client (or lawyer) who divides their attention while *in session* with the mediator. We are all slaves to our electronic devices, but the mediator will not be impressed with someone trying to multi-task.

11. Bring a *real* representative to the table. I represented a major international insurer on a multi-million dollar case. They flew in two representatives from overseas for the mediation, which was held the day before Thanksgiving. The opposing insurer had a claims adjuster present with $250,000 in authority, even though our demand was $4 million. Our mediator, a former California Supreme Court justice, was not amused. The other side demurred saying that the person with that kind of money was on the east coast and was likely home enjoying his holiday eggnog. Our mediator said he had two choices: get that person at home or the former Supreme Court justice would recommend to the insurance commissioner that the insurer be suspended from doing business in California. (I do not know whether the justice actually had the ability or power to accomplish that task.) The case settled.

12. To have a seat at the table, *come to the table*. This is a variant on the last point. I have had mediations where one side says that their party will be available by phone or skype. That is not a mediation. I want to see furrowed brows in person.

13. Dress for success. We live in a casual world, where people running for president wear jeans. But mediation is more akin to a court proceeding than a day at the beach. One of my clients was a blue collar worker in Oakland. I showed up and his first salutation was, "Another lawyer in a three piece suit, [expletive deleted]." Sure, it was a Friday afternoon. But he expected me to be in uniform.

14. On the other hand, you want your client comfortable. You do not want him or her worrying over a tie or shoes. The idea of mediation is to make the parties comfortable so they can reach a settlement.

15. Let your client talk. I have heard some of the most amazing things in mediation — and the emotional release is often productive.

16. Do not expect an epiphany; a settlement will do. I have had mediations where former spouses walked out hand in hand. It happens. In each of those cases they did not want to hear about the controversy over Thanksgiving with their mutual kids.

17. Be realistic with your client. I have cautioned clients that if they have 100% of the facts and 100% of the law, they will probably win 75% of the time.

18. Know your case — *every bit of it*. There is nothing worse than a well-prepared mediator and an ill-prepared lawyer. It will hurt you. It will hurt your client. It will hurt the result in your case.

19. If you do not know something, say so. This is what you would tell your client to say at deposition. You are undercutting the mediator and the process if you tell her something that is immediately disproven when she walks into the other room.

20. Concede points. What is really important to your side? Is it an existing lien or future care? Fighting over grace notes does not help anyone — it only prolongs the process and makes you look petty. ■

Jeffrey Kravitz *is senior counsel with Fox Rothschild LLP. He is a neutral with ARC.*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2009 Issue

Lee Jay Berman

12 ways to make your mediator work harder for you

The biggest mistake most attorneys make is not getting all of the value that the mediator has to offer, and for which their client is paying. Many attorneys won't let the mediator get a word in edgewise, tie their hands with respect to what they can reveal and discuss in the other room, and only want to talk numbers with them after lunchtime. Then they complain that the mediator is overpaid. Getting your money's worth from your mediator is your job. You have to dig, prod and push to get everything that you can out of your mediator, not unlike a tube of toothpaste (that is, if you paid several thousand dollars for the toothpaste and only had eight or 10 hours to get all that you could from it). Most attorneys never get to see all of the skills a mediator has because they never make the mediator work hard enough to use those skills.

Remember that experienced mediators have taken and even taught hundreds of hours of classes and workshops in negotiation strategy, and have facilitated hundreds or thousands of negotiations. Seasoned mediators have seen literally thousands of attorneys work their craft. That experience is what you are hiring when you select a mediator to help with your case. But it's up to you to draw upon that talent and make that mediator work hard for you. Accept nothing less from them. Some mediators think that they can coast into their work with a semi-retired, carefree ease. Weed them out early. Expect to work hard to get your case settled, and expect your mediator to work harder.

Here are 12 ways to make your mediator work harder for you. If you take advantage of every one of them, you will get much more out of your mediators, your mediations, and your settlements.

1. Voir dire your mediator

While much has been written about how to select a mediator (mediation experience, references, personality, style and subject matter experience), there is no prohibition on giving a prospective mediator an old-fashioned job interview. Attorneys who fail to do their due diligence in selecting their mediator are not putting their clients' (or their own) interests first. Unlike arbitration, the mediation process encourages and relies upon ex parte communication, and offers the opportunity to speak directly to your prospective neutral in advance of selecting them.

Before investing a full day of your time and your client's, including all the preparation, consider taking the fullest advantage of this opportunity: to make the mediator work to assure you that you won't be embarrassed in front of your client by selecting him or her, and also for you to build that critical rapport as a first step in connecting with the mediator, even in advance of their receiving your brief. In addition to having the opportunity to interview your mediator and survey them regarding their experience and their style to make sure you're choosing the right mediator for this particular client and case, you also have the opportunity to make a credible, early impression. Your time is too valuable, and good clients are too scarce, to risk having a bad experience in mediation. The chances of this can be greatly reduced if you make the mediator work for you before you have even agreed to use him or her.

2. Put them to work early and often!

Some mediators will not arrange pre-mediation calls (either with all counsel or individually). If your mediator doesn't call you for a pre-mediation call, then you *can* and *should* call them. Bend their ear. Take advantage of this second opportunity for ex parte communication, and talk the case over with them. Go beyond arguing your case. Ask them affirmative questions, to see if you can get them to agree with you. Ask what would be most helpful for you to include in the brief. Make sure they understand your professional experience, your client's credibility as well as your theories and arguments. This is also an opportunity to tell the mediator in a private conversation about any issues you might be experiencing with opposing counsel, your adjuster or your client, and anything else you would like them to know while you have them alone (for a second time). Not only is this fully allowed, mediators encourage it.

3. Brief them well

Require your mediator to read and understand the case like you do. Of course, this will take you distilling it down into digestible form. Give your mediator a chronology. Don't get excited and jump to the good parts first. Tell the story the way it happened – from start to finish. Give dates and time frames. Then, avoid repeating, avoid bold, italics and exclamation points. Your outrage doesn't persuade a mediator; your facts must. Most mediators you will be using have seen hundreds of cases, if not over a thousand. If your facts don't stand on their own, elaborate language and punctuation only draw the mediator's attention to that.

Bad behavior by bad actors does not require emphasis. Seasoned mediators can see a case developing. They can see it crescendo, they can judge liability and evaluate damages if they are laid out in an organized fashion, but more impor-

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tantly, they also understand what you are saying in between the lines. Any mediator who has been mediating for 10 to 15 years has read thousands of briefs and can read very clearly what you are saying (and not saying) about your client, your adversary, opposing counsel, your case, and your settlement posture without you actually having to say it directly. This is the best reason not to let your first-year associate write your mediation brief.

Mediators really do form opinions about attorneys, especially ones who are new to the mediator, by their writing prowess. If you had your associate draft your brief and you signed it, you have communicated to the mediator that either you do not write very well or that this case is not important to you. You undermined your credibility before the mediation has begun. A well-crafted brief, threaded throughout with covert information, is more important than your reputation because it is real to the mediator. It is what is in the mediator's hands before the mediation. And, if you tell the mediator your confidential thoughts regarding settlement in a private brief, you can shave hours off your mediation time.

The same advice applies for telling the mediator about recent settlement discussions. Nothing is a bigger waste of time than getting almost to lunch time only to hear for the first time that the number just put on the table was offered last week in direct settlement, and that the last couple of hours have been a waste of time. Write well and put your mediator to work long before the mediation begins. Work harder to pass along subtle information, prepare your mediator privately, and give them what you need them to know to help you out. But expect them to learn everything you spell out, and if they miss it, make a note of that.

4. Arrive early and meet with the mediator alone

Get to the mediator's office early and ask if you can talk with the mediator alone before the "formal mediation" begins. Ask questions, clue him or her in on client or adjuster issues, and connect if you have not met before. A good handshake and three or four minutes of good conversation start the day off on the right foot. Then, bring the mediator over to meet your clients. Introduce them and facilitate a short, light conversation between the two of them. This can range from, "Marge, tell the mediator how your back is feeling today" to "Turns out you and Jim both went to UCLA!" This gives you two brief moments to take the mediator's temperature (and pulse, if necessary) and let him or her take yours and your clients. Doing this allows everyone to become humanized, look into each other's eyes, make a little small talk and shed the armor of playing the roles of "attorney," "client" and "mediator" when you sit together. When the attorney and client are on a more human level with the mediator, it makes the mediator work harder because they cannot simply convey numbers to you. And human nature dictates that it is harder to break bad news to people we like, so in some cases, this can be a negotiating advantage.

5. Enlist them as a strategic partner

Bring your mediator around to your side of the table – literally. When you have them alone in your first private session, enlist their help and draw them away from neutrality and into partiality by asking them how they would play your hand, if it was theirs. Acknowledge your case's weaknesses, then ask them, "What am I missing? What do you see that I am not seeing? How would you oppose me if you were on the other side? What would your opening argument be?" Make the mediator work harder by working up the case with you, and then see if you can lure them into working with you to craft a settlement strategy for the day. Be careful not to answer your own questions. If you ask the mediator a pointed question about case flaws, value or strategy, make sure you get their answer. In these key moments, whoever speaks first, gives in. If your mediator is on the fence about offering opinions, wait them out, press them, and if they won't give you their thoughts about what you should do, then ask them to play the other side and tell you what they would do if they were the other side. Use the mediator like you would a colleague you might enlist to help you evaluate a case.

6. Make the mediator respond to your offers first

Use your mediator as a sounding board. You deserve to know what the mediator thinks of each offer before he leaves the room to present it (don't accept politically correct neutral speak here), and how he thinks the other side will respond to it. If you really want to put him on the spot, make him tell you what kind of reciprocal concession he thinks you should be able to expect from the other side before he leaves the room to deliver the offer. That will put him under the gun to try to achieve the concession he told you to expect when he is in the other room. Consider his feedback and be flexible to it. Remember, your third, fourth and fifth offers don't matter! They could be anything, as long as you're getting the movement you want from the other side.

So, if the mediator feels better about one number over another, it is best to let him go with the number he feels good about and sell it sincerely, than to send him with one that he doesn't like and has to try to hide his raised eyebrow when he presents it.

One strategy I've seen that really works well is to give the mediator two numbers, either of which would be acceptable to you, and ask the mediator which number he likes better. If he picks the lower of the two every time, then call him on it. An honest mediator will tell you when your contemplated move is too large. If you haven't ever heard that from a mediator, then you are not working him hard enough. Think about it – how much do you really learn from a mediator if you argue with him and win in each round? By giving them two numbers, you get to learn about them, how much you can trust them, and whether they are really paying attention, rather than simply shuttling numbers. As a master strategist, these are the things you really need to know for later, when the negotiation is getting down to real money. You have to

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know that when they walk into your room and say, "That's really all there is." that you can trust them, and if you haven't learned about them during the mediation, then you don't really know how much you can trust them.

7. Make them explain your offer completely

Naked offers may sound sexy, but they're really just bare. A fully dressed offer explains the reasoning behind it, the thinking that went into it, the analysis and the message that is conveyed along with it. You can write this down: The intent of any offer is more important than the content of that offer. It is always more important, with every offer, that the other side knows your intent. Your offer is a message to them, but if you send over a naked number (or have a mediator) that only says, "They're at $850,000," then you leave the other side to make up their own story about you, your offer, your strategy and your intent.

Take control of the other side's impressions by filling in the gaps for them and insisting that your mediator convey the entirety of your meaning, complete with the nuance you intend. This is why your mediator needs to be highly articulate, expertly nuanced and deeply attentive to you and your client. If they're not getting your message or seem only interested in your naked offer, then ask to speak to opposing counsel and convey it yourself.

You should never feel handicapped by a mediator who can't convey your message the way you want it conveyed. Additionally, make sure that your mediator raises *all* of the issues relating to settlement long *before* you start to reach the numbers. Mediators who take their eye off the ball can leave you arguing with opposing counsel about settlement terms like confidentiality, release language, taxation and other deal terms at the end of a mediation when you thought you had agreement because you agreed on a number. Make sure they are on top of these issues early on and doing their job to flesh out all of the relevant issues. In fact, doing so can sometimes take the focus off of the numbers at a strategic time in the afternoon when the negotiation needs a change in focus.

8. Have them be your eyes and ears

While there is some disagreement about the ethics of sharing the "temperature" in the other room, I have had two very telling instances of sitting in on a mediation as a consultant to a party: one when my brother sued his general contractor, and the other when my other brother went through divorce mediation. When the family mediator in the latter case came back into our room and said, "She has melted down. She is a puddle on the floor in the other room." There was no question about where things were, and that it was time for a new approach to bring her back into reality. In the construction case, when the mediator came back and said, "She's so nervous, she can't sit down, she's pacing around the room. If I didn't know better, I'd swear she was on coke!" Knowing this allowed my brother to make more informed strategic decisions about the size and timing of his next offer.

If you are in one room for the majority of the day, you do not get to see firsthand whether the other side is frustrated, bored, wearing down, boiling over or at the tipping point. In some cases, this information can be more important than the amount of their last offer. The nonverbal cues such as the attitude behind an offer and the flexibility surrounding it will determine how you respond to it as much as the offer itself. You need to know who is driving the bus in the other room, including how that may change as the day progresses. Expect your mediator to paint a picture for you so that you can use all of the context to your advantage. Ask your mediator each round or two how their temperature is in the other room. You will make more informed decisions, and the mediator will be of more value to you.

9. Have them give you your choices

While you may see two or three options for responding in a certain circumstance, your mediator may see another option or two that you do not. Ask them to review the available choices as they see them. Remember, if you're hiring a professional, expect that they have studied negotiation theory, game theory, distributive bargaining and integrative bargaining, and should be expert in architecting a negotiation that will result in a settlement. Put that expertise to work for you. It is a well-known fact that most untrained people negotiate in a way that is consistent with their personality. Nice people negotiate more collaboratively, and competitive people like to play hardball. But your mediator should be skilled in both styles and more. So, make them work for you and offer you options before you narrow to one choice for your next move.

10. Have them tell you when enough is enough

By late in the day, your mediator has spent many hours watching and gauging the patterns and ability of the other parties and their lawyer(s), feeling the ebb and flow, watching control shift from attorney to client and back again. Your mediator is best equipped to know when the other side is at the end of their rope in the negotiation, and when "no" really means "no." Make them opine, and give that considerable weight. Ask the mediator what he is relying upon in concluding what he concludes, and make him show you his logic and reasoning.

11. Make them work until the end

There are some mediators who are quitters. When 5:00 p.m. comes, they will leave, right in the middle of a mediation, no matter how close a settlement may be. Do not accept this from your mediator. No matter how big a "name" a mediator has, do not ever hire him again, and make sure that every other advocate you know hears about it if a mediator quits on you. Some mediators will also quit when a deal is reached – literally sitting down in the far corner of the room and letting counsel, who have opposed each other all day, try to iron out a difficult or complex settlement agreement, or worse, leaving and telling the parties that it is not their job to facilitate the writing of the settlement agreement.

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While it is *never* the mediator's job to write the settlement agreement, given that one would have a hard time suing a mediator for drafting language that disadvantages their client or failed to foresee a problem down the road, it *is* the mediator's job to facilitate the discussion until the signatures are all on the page. After all, the settlement agreement is just an extension of the negotiation between the parties. Many attorneys say that the most important quality in a mediator is an iron rear end – one who can sit there as long as it takes to get the job done. Your mediator should be the last one out of the room, when a settlement has been reached, and especially if one has not (yet). Your job may need to be keeping the mediator working until the ink is on the paper. Do not accept less from your mediator.

12. Expect them to work after it's over

Any mediator worth his salt will be committed to you until the case is settled. Seasoned mediators see mediation as a process, rather than a day. If the initial mediation session ends, make sure that your mediator continues to work for you. With mediators who are either so busy that they don't have the time to adequately follow-up or with those who are not as aggressive as you would like, you may have to prompt them to call the other side. There is no shame in calling the mediator if you haven't heard from him or her for a few days after an unsuccessful mediation and prompting them to call the other side with a "routine follow-up call" (rather than indicating that you called them first). If your mediator required a jump-start, you can certainly provide the motive power, as a last resort. Ideally, you want your mediator to remain tenacious after a mediation session that didn't end with a signed settlement agreement, and in some cases, you may have to initiate that conversation.

Conclusion

In these economic times, attorneys are paying more attention to mediators' fees. Consider that focusing just on fees is a lot like buying a car based solely based on its price, without ever asking how big the engine is or what options it has. If you are making your mediator work hard in all of these ways, you will get your clients value for every dollar. Now that you have these 12 ways to make them work harder for you, you should have much better results in your mediations.

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Daniel Ben-Zvi

Nine ways to be ready for mediation

Boiling it all down to nine points on which you will want to be prepared

[Ed. Note: This article originally appeared in the Daily Journal and is reprinted with their permission.]

Once the mediator and a date for mediation have been selected, the question then is how best to prepare for the mediation. Attorneys know how to prepare for trial: motions in limine, evidence, witness exams, and opening statements. How to get ready for mediation is not as obvious. Here are nine suggestions for counsel to best prepare for mediation.

1. ***Don't resume settlement negotiations prior to mediation.*** Mediation is typically elected after counsel has explored settlement, found the parties too far apart and initiated litigation. Once the parties agree to mediate, it is then best not to negotiate further until the mediation. Offers made or positions expressed a short time before the mediation may set a floor or ceiling for the negotiation and can create unrealistic expectations. The mediator's function and expertise is to set expectations and guide negotiation in ways to maximize the opportunity to reach agreement.

2. ***Discuss procedure with the mediator***. The mediator is there to be of service to you. It is your negotiation. If you feel strongly about whether there should or should not be a joint session, let the mediator know. If the mediator disagrees, be open-minded. Trained in what works in the ebb and flow of the process, the mediator will recommend whether, when and what kind of joint session should be held.

3. ***Have a meaningful private conversation with the mediator***. It can be helpful to meet with the mediator without your client present to candidly discuss strengths and weaknesses of the case. You can also request the mediator's assistance to guide your client to a more realistic position. In mediation, unlike arbitration, ex parte communications are not only appropriate, but encouraged. Thus, you can raise these and any other points with the mediator at or before the mediation.

4. ***Be prepared with the most persuasive law and facts.*** In addition to coming into mediation flexible and ready to negotiate, attorneys should be prepared to

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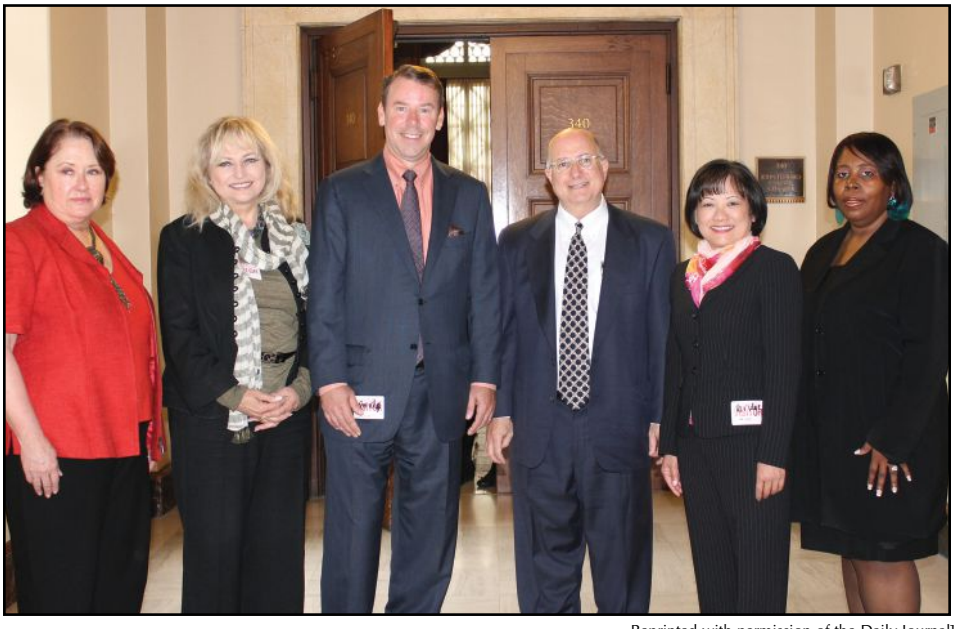
DANIEL BEN-ZVI AT THE PODIUM DURING LOS ANGELES MEDIATION AWARENESS WEEK.

argue their best case. The decision to mediate does not lessen your duty to be a zealous advocate. Before mediation, a brief is submitted either for the mediator's eyes only or shared with the other side. In the latter case, the mediator may then be provided also with a supplemental brief or letter for the mediator's eyes only. It is critical to provide the mediator with controlling precedents and governing laws. Also quite helpful are verdicts in similar cases (particularly from the courthouse in which your case will be tried) and reported settlements in similar cases. Be prepared to argue your position from the head and, in cases with a compelling emotional component, from the heart.

5. ***Have present at the mediation the decision makers and those upon whom the party will rely***. The insurance adjusters and other key decision makers, including anyone the party would rely on to make a final decision such as a spouse or confidante, should be present. If a decision-maker cannot be in attendance, the mediator and the opposition parties should be informed before the mediation to assess the alternatives, e.g. telephonic appearance.

6. ***Share what you plan to do in the litigation should the case not settle in mediation***. Be ready to share, for the most part, what production and other discovery you intend to pursue if no settlement is reached, including party, witness and expert depositions. You should be ready to approximate the length of trial and share which kind of experts you intend to use.

7. ***Have an estimate of the fees and costs incurred and projected fees and costs should the case not settle***. These figures of past and future expenses are clearly relevant in a mediation where attorney fees and costs are recoverable by the prevailing party by law or contract. These numbers may also be of use by the mediator in cases where fees and costs are not recoverable.



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KEY PRESENTERS AT CITY HALL FOR THE 8TH ANNUAL 2012 CITY OF LOS ANGELES MEDIATION AWARENESS WEEK.
From left: Barbara Brown, President of Southern California Mediation Association; Lucie Barron, Director of ADR Services; Joseph M. Barrett, Vice President of Consumer Attorneys Association of Los Angeles; Daniel Ben-Zvi, Chair and Mediator with ADR Services; Diane Mar Wiesmann, President of Association of Southern California Defense Counsel; and Renata Valree, Director of the City Attorney's Dispute Resolution Program.

8. ***Consider the value your client places on being free of the anxiety and uncertainty caused by the ongoing dispute.*** Most parties tend to find the anxiety of being engaged in an ongoing conflict deeply uncomfortable. Their tolerance for living with the uncertain outcome of a prolonged litigation is unique to their individual temperament, but most will ultimately place a value on being able to trade uncertainty for certainty. In order to effectively exhaust the mediation opportunity, one should not just account for the unknown future ruling and the real costs to get there, but also the value to the client in achieving immediate certainty and peace.

9. ***Be prepared with specific terms to include in a settlement agreement or memorandum of understanding.*** Most mediations that settle end with the signing of a settlement agreement or at least a memorandum of understanding intended to be binding and enforceable under California Code of Civil Procedure section 664.6. Most mediators will have a form memorandum of understanding and settlement agreement which you can edit to add the particular terms required for a settlement for your type of case. You should be cautious of adding unenforceable terms. Some plaintiffs' attorneys still try to add a certain term – that upon default of a payment, judgment shall enter for an amount higher than the balance due – despite the likelihood of it being invalidated as an unenforceable penalty. Many attorneys find it helpful to come to mediation with a prepared draft of a settlement agreement on their laptop computer.

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Hon. Dalila Corral Lyons (Ret.)
MEDIATOR, SIGNATURE RESOLUTION

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

Mandatory settlement conferences are not mediations

KNOWING THE DISTINCTIONS, ESPECIALLY ON CONFIDENTIALITY, CAN HELP MOVE YOUR CASE TOWARDS SETTLEMENT

While the primary goal of both a mediation and a mandatory settlement conference (MSC) is the same – to settle a case – there are important differences between the two. Knowing those differences can help attorneys successfully settle their cases in either forum. More importantly, fully understanding and appreciating how the two processes diverge may help ensure the enforceability of any resulting settlement agreements.

This article will discuss practical issues I found myself addressing when I served as a settlement judge conducting MSCs in Los Angeles Superior Court, as well as the insights I've gained as a neutral conducting private mediations.

Confusion

During the MSCs I presided as a judge, I frequently observed counsel's confusion regarding the distinction between the two processes. They would, without thinking, refer to MSCs as mediations, even at times labeling their MSC statements "Mediation Briefs." Counsel would also mark their MSC statements "confidential" and not share them with opposing counsel.

It must have appeared to the attorneys in my MSCs that I was a stickler for using precise language, and I'll admit that I was. There are important reasons for distinguishing between the two types of settlement hearings, particularly concerning the shield of confidentiality – a benefit that applies to mediations but does not encompass MSCs.

The confusion among attorneys is not surprising. There are few reported cases explaining the differences between an MSC and a mediation. In *Raigoza v. Betteravia Farms* (1987) 193 Cal.App.3d 1592), the court explained at least one of the obvious differences – MSCs are conducted by sitting judges at no cost to the litigants while mediations are conducted by retired judges (or attorneys) for a fee – but neither caselaw nor literature fully explicates the full list of distinctions between these two settlement vehicles. This article will attempt to fill that void.

Confidentiality

Evidence Code section 1117(b)(2) expressly excludes MSCs from the mediation rules governing confidentiality

This fact can be a shocker for attorneys who assume their MSC sessions will be protected from disclosure. Unless stipulated otherwise, their MSC statements, as well as all other documents and writings generated during the course of the MSC, may be admitted at trial or otherwise made subject to disclosure.

Confidentiality is a core tenet of mediation

It significantly promotes communication between the parties and their mediator and thus can facilitate the resolution of even the most difficult cases. When parties feel comfortable opening up and sharing sensitive matters with the mediator, the mediator, in turn, has deeper insights into what is driving their demands. They can then work with both sides to structure a settlement that addresses these fundamental issues. In the case of *Rojas v. Superior Court* (33 Cal.4th 407), the California Supreme Court acknowledged this dynamic when it observed that "confidentiality is essential to effective mediation."

Mediations are governed by the broad rules of confidentiality set forth in Evidence Code sections 1115 through 1129, which specifically address communications made during mediation proceedings. The law provides that unless

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the parties agree otherwise, statements and other communications made during a mediation may not be disclosed outside the mediation.

Evidence Code section 1122 provides that a communication or writing made or prepared for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible in court or otherwise disclosable only if all parties expressly agree to its disclosure. It may also be disclosed if it was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree to its disclosure, and it does not disclose anything said or done or any admission made in the course of the mediation. The communication or writing, scrubbed of mediation details, may also be used for attorney discipline and compliance purposes.

Different confidentiality rules for MSC

MSCs, in contrast, are subject to different confidentiality rules. These court-mandated hearings are governed by rules 222 and 3.1380 of the California Rules of Court, which sets the framework for MSCs but does not address matters such as confidentiality. In Los Angeles, MSCs are also subject to Local Rule 3.25(d), which simply lays out the process for conducting the sessions.

Unlike a mediation, for which confidentiality is a fundamental requirement, an MSC is subject to the far more limited confidentiality rules of Evidence Code section 1152, which excludes from evidence offers of compromise and negotiation of offers of compromise to prove liability for the loss or damage. Although this confidentiality rule is often referred to as a "privilege," it is simply an evidence-preclusion rule. Federal Rule of Evidence 408 similarly deals with offers to compromise, excluding from evidence compromise offers, statements, and conduct.

While the parties in an MSC may agree to confidentiality terms as protective as those provided in mediations, such confidentiality is not a requirement under the Evidence Code. For example, in the Los Angeles Superior Court stipulation (LASC Form no. CIV 287), the parties may stipulate to treat as "confidential information" the "contents of any written Settlement Conference statements, anything that was said, any position taken, and any view of the merits of the case expressed by any participant in connection with any Settlement Conference."

Neutral immunity

Both the MSC settlement judge and the mediator are governed by Evidence Code section 703.5. With limited exceptions, neither an MSC judge nor a mediator is considered competent to testify in a proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with the MSC or mediation. This provides protection in both types of proceedings against disclosure by the judge or neutral, but it does not afford any additional confidentiality shield for MSC communications.

Mandatory vs. voluntary

One of the salient differences between MSCs and mediations is that MSCs are mandatory, while mediations are voluntary. This distinction may seem innocuous, but it will become clear how impactful it can be.

In an MSC, the parties must be ordered by the court to appear and pursue settlement of their dispute. An MSC may be ordered at the request of the parties or on the court's own motion. (LASC Local Rule 3.25(d).)

When a judge orders a case to an MSC but the parties are not ready to engage in meaningful negotiations, the litigant should inform the judge. It serves no purpose to conduct an MSC that has no chance of resolution. Where an MSC presents a good opportunity for the parties to resolve their dispute, they should agree upon the optimal time frame for working toward a settlement.

Because an MSC cannot be conducted on a matter that has not been filed in court, the parties might decide to go to mediation before filing the lawsuit. At other times, it may be best for them to schedule the MSC or mediation only after key depositions have been taken.

The intent of MSC proceedings is essential to move as many cases as possible out of the judicial system by encouraging parties to resolve their disputes through settlement. This saves precious court resources and reduces the backlog of cases against which courts struggle. Programs such as Resolve Law Los Angeles support this mission by using qualified attorneys as volunteer settlement officers for MSCs mandated by the superior court.

Mediations, on the other hand, are completely voluntary and within the control of the parties and their counsel. Because disputing parties in mediation have chosen to bring their case to a mediator, the likelihood is generally greater that they will resolve the dispute. With the support of counsel and the mediator, the parties have a strong foundation for negotiating and structuring a settlement agreement that satisfies their unique issues and concerns.

Sharing briefs with opposing counsel

When an MSC is mandated, rule 3.1380(a) of the California Rules of Court requires that MSC "statements" (not briefs) be submitted (not filed) to the court and that they be served on opposing counsel five court days prior to the MSC. Marking an MSC statement "confidential" may appear to the judge that it was not served on opposing counsel, as required. This may delay the process of obtaining compliance with the service requirement.

In a mediation, the briefs are not required to be shared with opposing counsel. Such briefs are, as noted above, considered confidential. If parties in an MSC want to provide the settlement judge with a confidential statement, they must lodge a confidential brief with the settlement judge in addition to the non-confidential statement shared with opposing counsel.

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Although it is not a requirement for mediation, many mediators favor exchanging briefs between the parties, just as is required in an MSC. They believe this can expedite the process by better focusing on the mediation. When the parties are familiar with the other sides' positions, they may be more open to compromise and settlement of contentious issues.

Just as in an MSC, parties in mediation may orally share their confidential information with the neutral. Counsel should give careful consideration before sharing all or some of the facts or arguments with opposing counsel. It may not be wise to share certain facts with the other side, but opening up to the neutral can facilitate meaningful negotiations. When the mediator fully understands what matters to a party and has that party's consent, they can share with the opposing side crucial information that can help break down roadblocks and reach a resolution.

Content of briefs

In MSCs, the content of the "briefs" submitted to settlement judges is dictated by California Rules of Court, rule 3.1380(a), which provides that an MSC "statement" must contain a good-faith settlement demand; an itemization of economic and noneconomic damages by each plaintiff; a good-faith offer of settlement by each defendant; and a statement identifying and discussing in detail all facts and law pertinent to liability and damages in the case as to that party.

According to Local Rule 3.25(e) of the Los Angeles Superior Court, written statements submitted to the court "must contain a concise statement of the material facts of the case and the factual and legal contentions in dispute." It must identify all parties and their capacities, contain citations of authorities, and list all damages claimed.

Los Angeles Superior Court judges generally limit the MSC statement to five pages, exclusive of exhibits, and the statement must bookmark exhibits with reference to the relevant pages in the exhibit and highlight the relevant section.

There are no such rules or orders for mediation briefs. Briefs are often submitted in a single-spaced letter format, and they can be of any length and include as much or as little information as the parties choose to share.

Who can attend

For MSCs, California Court Rules provide that trial counsel, parties, and persons with full authority to settle the case must personally attend the MSC, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the MSC.

Under Local Rule 3.25(d) of the Los Angeles Superior Court, unless expressly excused for good cause by the judge, all persons whose consent is required to effect a binding settlement must be personally present at the MSC, including parties, insurance adjusters, and entity party's representatives.

Attendance by a required person will only be excused if the judge approves a stipulation or an ex parte application.

In contrast, nobody is ordered or required to attend a mediation. However, for a mediation to truly be productive, attorneys and all parties should appear or, at a minimum, be on call. However, having parties on call is generally disfavored by some mediators, who prefer that they have the opportunity to connect with and communicate in real time with the parties.

Can a party bring a support person to an MSC or a mediation? For mediation, there is no problem including support people. At an MSC, however, a party must request permission from the settlement judge before including a support person. That person must be bound by any confidentiality provisions of the proceeding via a stipulation so that they don't proceed to post on social media or elsewhere what was said during the MSC.

Both the settlement judge and the mediator ultimately want to settle the case before them. If a support person will help in obtaining that result, generally their participation will be welcomed. When conducting MSCs, I often granted these requests. Support persons were frequently critical to reaching an agreement.

Length of proceedings

In Los Angeles, MSC judges typically conduct two MSC sessions a day, each three-and-a-half hours. Under certain circumstances, the participants may request a one-day MSC. When I served as an MSC judge, I liberally granted such requests in complex matters or those involving numerous parties. Because settlement judges are often crunched for time, given the high volume of cases before them and two-a-day MSCs, they are rarely able to provide additional support to parties or their counsel.

In mediation, the process is far more liberal. Mediations are generally scheduled to consume one full day, although some neutrals will conduct half-day mediations. Given the longer duration of most mediations, mediators typically have more latitude to provide support to the parties, helping them prepare settlement agreements after reaching a consensus, and conducting pre-mediation conferences or post-mediation follow-ups.

Interpreters

The Los Angeles Superior Court provides interpreters in court proceedings to ensure meaningful participation in the judicial process for individuals with limited English proficiency. (See Gov. Code, § 68092.1.) In MSCs, if the parties request an interpreter, the court must provide one at the court's expense. That interpreter must be certified or registered with the Judicial Council of California.

In mediation, parties requiring language assistance must provide and pay for their interpreters. Mediators may have rules about whether the interpreter must be certified, but no law sets such requirements. As such, it might be

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

possible for a party to bring a friend or relative to serve as the interpreter, as long as that party assumes all risks associated with mistranslation or misinterpretation of communications during the mediation. If a non-certified interpreter is used in the mediation, counsel may want to consider having a certified interpreter translate the settlement agreement.

Foreign language

MSCs are judicial proceedings governed by Code of Civil Procedure section 185, subdivision (a), which requires that all proceedings be conducted in English. Even if all participants in an MSC, including the settlement judge, speak the client's foreign language, they must still conduct the proceeding in English. (Code of Civ. Proc., §§ 20-23, and *American Corporate Security, Inc. v. Su* (2013) 220 Cal.App.4th 38.)

In mediation, on the other hand, there is more leeway to depart from English. The entire proceeding may be conducted in a foreign language spoken or understood by the counsel, parties, and mediator. It can be extremely productive to communicate in the client's native language if they are non-English speakers, with the consent of counsel. Since I speak Spanish fluently, I find that communicating in Spanish with a Spanish-speaking client is much more productive, as they are fully engaged, which facilitates settlement.

Costs

MSCs are provided at no expense to litigants. Mediations, in contrast, involve private neutrals whose services are not inexpensive. It might seem like a simple choice, but the calculus is more complex than dollars and cents.

MSCs are mandated by the court and thus are not always successful, but they can be an important equalizer in the pursuit of justice. MSCs offer an avenue for settling disputes for litigants of limited means who may not be able to afford mediation. But MSCs are subject to time restrictions, regulatory, and other constraints that could sometimes impede full resolution of legal matters.

When litigants invest in mediation, they have a horse in the race and should be motivated to work toward settlement. Longer sessions and confidentiality encourage greater candor and openness toward compromise. And without the limits attendant on judicial proceedings, mediators can suggest more creative solutions to the parties and explore alternative approaches to resolving their disputes.

Conclusion

The distinctions between mediations and MSCs may appear at first blush to be mostly academic or ministerial, but they can be very significant. Using precise terms to distinguish the two processes is important, particularly as to the key distinction of confidentiality. A full appreciation of each process's rules, procedures, and nuances can further the likelihood of settlement in either forum. Most importantly, understanding the distinction may ensure the enforceability of the settlement agreement.

Hon. Dalila Corral Lyons (Ret.) is a neutral with Signature Resolution. *She served 18 years on the bench of the Los Angeles Superior Court, the last three years as a full-time judge conducting mandatory settlement conferences. Judge Lyons was appointed by the California Supreme Court Chief Justice as a member of the California Judicial Council, the policy-making board for the judicial branch. dlyons@signatureresolution.com.*