Wrong-way mediation

The Top Ten ways not to settle your personal-injury case at mediation

By Robert M. Tessier

How have your settlement rates at mediation been lately? Are you happy with the settlements you are obtaining at mediation? Do you think you could be doing better for your clients at mediation?

If you have been disappointed with your results at mediation, then read on for some practical advice and recommendations to consider from a mediator who has successfully mediated over 4,000 personal-injury cases. It is my hope that giving consideration to each of the "10 things" discussed below and implementing the suggested best practices will increase the chances of a successful mediation for your client.

While mediators are at their core a relatively helpful group, in the interest of full disclosure, my motivation for writing this article is two-fold. One, I see too many cases result in no settlement for very deserving plaintiffs at the first mediation. Two, a mediation session resulting in no settlement is another case I will tirelessly follow up on until trial. So, if I can help you increase your chances of a good settlement and a happy client at mediation, then it's a win-win!

Because there are so many articles about things to do before mediation, my point of view for this article is to highlight some of the things that occur repeatedly in mediation that seem to be significant impediments to achieving a settlement. A few of these suggestions may seem counterintuitive, and even the opposite of how you have approached mediation for many years. For those things, I ask for your thoughtful consideration and an open mind.

10. Marking your brief as confidential

This one may seem controversial to many lawyers. After all, we "grew up"

submitting confidential MSC statements going back to the 1980s. Everyone believes a mediation statement needs to be confidential. *Au contraire*.

A confidential brief really is unnecessary. Very rarely does a mediation brief contain anything truly confidential. Most mediators will ask plaintiff's counsel whether there is anything in the confidential brief that they do not want shared with the other side, and rarely does anyone say yes. A mediator needs to be armed with information that can be shared and discussed with the other side in order to be effective. Handcuffing the mediator with a "confidential" brief impacts his or her ability to be effective.

A confidential brief really has two very bad side effects. One, the process is slowed down because the defense may or may not have all of the information about the nuts and bolts of your case (e.g., amounts of medical expenses and names of providers, details of your client's loss of earnings claim, etc.), so valuable time is spent in session on these issues. Two, problems like these could have been avoided if the other side had a non-confidential brief with these details with sufficient time to review and analyze them.

Some lawyers say that they don't want to submit a non-confidential brief if the other side is going to submit a confidential brief. That is a fair point. Therefore, it would be best to have *all* briefs be non-confidential. That is what I request in all of my mediations. It is also true that the plaintiff has the burden of proof, so whatever critical non-confidential information you have about the plaintiff's harms and losses should be in the hands of the defense decision makers in plenty of time for them to consider it. When the defense has not obtained everything important through discovery before mediation day, please consider a non-confidential brief no matter what type of brief they serve. The chances of a successful mediation are reduced when the defense sees or hears critical information for the first time at mediation.

Suggested best practice: Submit a non-confidential mediation brief. If there are details which you feel must be kept confidential and the mediator must know these details, submit *separately* a short email or writing for "the mediator's eyes only" to alert him/her to those details. Or just call the mediator if the details are too sensitive to be put in writing.

9. Submitting a late brief

Many of the best mediators in the personal injury world are former practicing lawyers in the field. We still remember how a busy practice can result in submissions being late, and so are very forgiving. Nevertheless, a late brief (especially if it is lengthy) is not much better than no brief at all, particularly when it is accompanied by a "document dump" of hundreds and hundreds of pages of exhibits.

Picking up on the discussion of non-confidential submissions, a late submission, particularly if it contains new information such as recent medical care, surgical recommendations, or an analysis of plaintiff's economic harms and losses, can have disastrous effects at mediation. This is a tremendous unforced error. To understand why, let's look at how the defense gets settlement authority in most cases.

Normally, at some point before mediation, maybe days but hopefully weeks before, the defense attorney will analyze what he or she has obtained through discovery (interrogatories, production requests, subpoenas, and depositions) and provide a report to the claims adjustor. In most, but not all cases, the attorney will provide insight into case value. If you've made a demand, it will be reported. The adjustor will then review the letter from the attorney, and documentation provided, and then make a recommendation and/or request to his or her superiors or claims committee for settlement authority. That authority is how much money the adjustor will have in his or her pocket at the start of mediation.

That timeline is critical. A late brief with a lot of new information, not heretofore known to the defense, that could drive value upward, cannot be considered *before* settlement authority is extended. As a result, the authority for the case may not be in line with the plaintiff attorney's expectation or the evidence.

This situation sometimes results in the defense pulling up stakes and leaving the mediation without a meaningful offer being extended, or worse, the defense will simply ignore the late-provided information and become recalcitrant. If your goal is to blow up the mediation for some strategic or tactical reason, a late-submitted confidential brief with a lot of new information is one of the best ways to do it.

All of these concerns are over and above the difficult practical situation the mediator is put in with a late brief of any significant length. The least desirable practice is for you to walk in a long brief with every medical record in your file attached on the day of mediation. Hopefully you feel that your mediator's role is to facilitate the best possible settlement attainable. Dropping a 10-pound confidential brief on the mediator on the day of mediation is the least effective way to achieve that end. Mediators do not have adequate time to review and digest it.

Suggested best practices Numbers 10 and 9 should really be read together. Whenever possible, submit a concise non-confidential brief in plenty of time before the mediation for the defense to review and analyze everything you consider relevant to a fair evaluation of your client's case.

8. Failing to prepare your client for the mediation

Believe it or not, every once in a while (pre-pandemic), I had to introduce the plaintiff to his or her lawyer at the mediation! That of course is the worst possible scenario. But aside from that type of disaster, a little preparation can be very helpful to the process.

Client preparation should involve a few basic steps, and most mediators will

go over some of the nuts and bolts of the process early on. The first step is to prepare the client for the difficulties in the early rounds of mediation. Unlike buying a car, a house, or a carburetor at a swap meet, a personal injury negotiation is both intensely personal and intensely maddening in the early goings. Most mediators are content to have the negotiation structured any way the lawyers want (whether to have the client involved in the early rounds when the insulting numbers are in play for example).

The second step is to prepare your client for an open conversation with the mediator about harms and losses. This is critically important if you believe there will come a time when the mediator will be helpful to you vis a vis your client at crunch time. Thus, please consider allowing some "getting to know you" time with your client early on, focused on your client's harms and losses. In these early discussions, the plaintiff is not only put at ease about the process, but also discusses elements of the case such as intangible harms and losses that might not have been fully communicated beforehand.

One common trait amongst the best mediators is a conversational style. A friendly discussion about harms and losses allows the mediator to be educated as to how the incident has adversely affected the plaintiff, and at the same time allows the client to feel like his or her feelings and injuries are important and cared about. These discussions often result in better settlements ultimately, especially when the mediator is made aware of the questions the defense has about the damages picture beforehand. Many an obstacle can be avoided or sidestepped as well.

Yet, there are still many attorneys who prefer the old MSC model, which put the plaintiff out "in the chairs" with no interaction with the mediator. Honestly, if you don't trust the mediator to talk with your client, and get to know him or her, you might have selected the wrong mediator for your case!

Of course, the mediation is yours. Your client has paid for the time, so if your preference is to sequester your client throughout the process, most mediators will work with that preference. However, the risk is that your client may be harboring an unmet need, such as needing to share with someone neutral how the incident has changed their life.

When I look back on cases I have not settled at mediation (and I promise, no specific war stories), my biggest regret within my control is that I did not spend enough time with the plaintiff. On the other hand, on those days when I have "pulled a rabbit out of the hat" and settled a case no one thought had a chance of settling, the single biggest factor for that magic was the engaged plaintiff who felt heard and respected throughout the process.

Mediating most dangerously and controversially for some has involved the plaintiff engaging directly with the decision makers on the defense side. I know that sounds crazy to some of you, but in the right case, and under the right circumstances, it is powerful. It is the mediation process at its most exquisite and real when all the sides are agreeable and respectful and let the "magic" unfold. Never hide a stellar plaintiff from the decision makers!

Lastly, those early discussions allow a rapport to develop. Your client will feel more relaxed about the mediator, whom they have just met, as well as the process. I believe that folks in a less stressful or less reactive state will make better decisions for themselves.

Suggested best practices: Prepare your client for three things. One, the process will be boring at times, but you can speak freely to the mediator about your harms and losses. Two, the first hour or two of the mediation will result in low offers that feel insulting. Three, the ultimate decision will be yours as to whether the case settles.

7. Forgetting about medical causation

This one is the biggest substantive omission seen at mediation. It comes up principally in cases when the plaintiff has had prior or subsequent injuries to the same body part. The defense will invariably hire a doctor to examine the plaintiff, and the doctor will review every old medical record that can be found. Their doctor will render an opinion in a report stating to a reasonable medical probability that the subject incident did not cause the need for the surgery or other care administered, but instead it was because of (fill in the blank for prior or subsequent incident). This report is sent to the mediator with the defense brief.

The plaintiff, in response, often provides no medical report establishing medical causation. The surgeon is silent on the question. Sometimes the plaintiff has not disclosed any prior complaints to the same body part to the surgeon. The case then proceeds to mediation.

In this scenario, the plaintiff and her attorney are going to be very disappointed with the offers made. The defense will make the point that no doctor for the plaintiff has opined on causation, and the doctor hired by the defense has. Naturally, the defense will put all their eggs in the defense doctor basket and make substantially reduced offers. Most often the mediation is unsuccessful, and the parties may agree to return if and when the issue is addressed by the plaintiff's treaters or medical experts.

Anecdotally, when I look at the jury sheets, I see many cases defensed on the issue of causation. The issue of substantial factor found at CACI 430 is daunting enough for the jury when trial time comes, so having eyes on this problem is good practice at every stage of the case. For purposes of trying to settle your case at mediation, do not ignore the question of medical causation prior to mediation. Just because the defense has not raised it to any great extent before mediation does not mean they won't raise it at the mediation. This issue has to be addressed at some point before trial, so to maximize the chances of a fair settlement, sooner is better.

Suggested best practice: Whenever your client has had prior or subsequent injuries to the same body part, be prepared at

mediation with a medical report discussing the issue of medical causation.

6. Dropping a last-minute life care analysis on the table to start the mediation

One tactic that has become more prevalent at mediation in the last few years is coming to mediation with a last-minute Life Care Analysis. Unlike a fully vetted Life Care Plan (which is normally prepared in concert with the planner and a physician after extensive review, containing specifics consistent with other expert's reports), the last-minute analysis is a couple of pages long with a laundry list of possible interventions not vetted by a physician. It is often internally inconsistent, disagrees with the treating physician's recommendations, and has prices that no defense attorney or adjustor would ever believe are remotely reasonable.

So far, in the dozens and dozens of times I have had a last-minute Life Care Analysis presented for the first time at the start of the mediation, I have seen *zero* dollars for them. The best thing that happens is that the defense just ignores it and negotiates with the authority they brought to the mediation. The worst thing that happens is that the defense doesn't make an offer (especially when this tactic is coupled with "wrong-way mediation" below). Either way, it is not money well spent.

Mediators are not opponents of a well-prepared Life Care Plan presented in a timely fashion. In fact, it can be effectively used when exchanged well in advance of the mediation. The best attorneys with the best cases will make good use of such a Life Care Plan, both in settlement discussions and in front of a jury.

Suggested best practice: Avoid presenting the last-minute Life Care Analysis on the day of mediation. Instead, spend your money on a well-prepared Life Care Plan and exchange it well in advance of mediation if you want the defense to seriously consider it.

5. Communicating a demand for the first time with new information regarding your client's harms and losses

Another alarming tactic at mediation of late is to wait until the mediation begins to communicate a demand. This is a tactical mistake for a couple of reasons.

First, you have missed the opportunity to anchor your case value with an initial demand before the defense evaluates the case. The defense attorney or adjustor who reviews the case to determine settlement authority without a demand from the plaintiff will often evaluate the claim lower than if they have a comprehensive demand in their file at the time of review. You want the opportunity to have your voice heard *before* the committee meets to discuss value, not after.

Second, if your demand is made for the first time at mediation and is accompanied by new information in the form of new medical records, or of earnings-loss documentation that the defense did not have before, then your starting demand is probably going to be at such a high number that the defense will end the mediation before it begins. For example, if the defense has been provided records documenting conservative care for your client before mediation, but then you come to mediation with new evidence that your client recently had a fusion surgery, or a neuropsychological evaluation documenting a TBI that was not disclosed before, there is a very high probability your demand will be significantly higher than the defense is expecting, and they will see the case as one that cannot be settled at the mediation session.

Obviously, your client has to get the care he or she needs when they can get it. And during Covid, that has proven challenging.

The issue is not whether your client should or should not get necessary care. Rather, the issue is the timing of mediation and the making of a demand relative to this care. A scenario such as the one sketched above probably ends up with a failed mediation, and a request from defense counsel to have time to re-evaluate the case based on the new information.

Therefore, it is not recommended to orchestrate deliberately this kind of last-minute reveal of new damages information. At best, mediation becomes a two-step process after the re-evaluation is completed. But at the same time, sometimes it cannot be helped due to busy schedules that plaintiffs get medical care in real time, and often right before mediation.

Suggested best practice: Don't wait until you prepare your mediation brief to make a demand unless absolutely necessary due to your client's ongoing care. If your demand is based on new and important information not previously known to the defense such as a recent procedure or evaluation, get that recently acquired information to the defense *outside of the mediation privilege* as soon as you have it.

4. Arguing the "lid is off" for the first time at mediation

Now is the time to discuss the elephant in the room. Many of the tactics discussed in this article may have at their core the intention of exposing the carrier to extra-contractual liability for failing to settle a given case at or within the applicable policy limits. While it is beyond the scope of this article to analyze the issue of when a "lid is off" or is not off a particular policy in a particular case, it is important to point out that any attempts to use mediation to accomplish that goal are likely thwarted by the mediation privilege and protections under the California Evidence Code concerning communications made at mediation.

Because items such as briefs, and events such as discussions at mediation, are not going to be of value to you in any subsequent suit for extra-contractual liability, mediation is not the appropriate venue to attempt to place a carrier in a position where there is the potential for extra-contractual liability. Bearing this fact in mind, it is suggested that if you

believe you have a case that subjects the carrier to extra-contractual liability, that fact should be reflected by a demand and evidence submitted to the carrier well in advance of mediation. Waiting for the mediation to spring a demand over policy limits because you believe the "lid is off" is one of the fastest ways to stop a mediation before it begins. The reason is based on how carriers assess their risk of extra-contractual exposure.

It bears remembering the extra-contractual liability is just that: it is exposure *of the carrier* to liability *outside of the risk* it took on when it wrote the policy for its insured. The determination of whether there is such risk and extending authority for that risk is normally made by a group within any given insurance company *outside* of the typical chain of command. In other words, if you really believe there is extra-contractual liability and want money for that potential exposure, it will take time to have the right people review and analyze the carrier's potential exposure to that risk. Thus, springing an extra-contractual demand for the first time on the adjustor who shows up for your mediation has an extremely low probability of netting you any extra-contractual money for the possible risk.

Some carriers in the face of your extra-contractual demand will instruct the adjustor to not negotiate and bring the file back for further analysis. That's a waste of money for the mediation. On your best day, an adjustor will stay and negotiate with the authority they have (which will not include a premium for extra-contractual risk given the last-minute demand for same). Because the determination of extra-contractual risk is outside the scope of work of the adjustor at your mediation, it is unlikely you will obtain any premium (i.e., more money) because you have made an extra-contractual demand, if you do it for the first time at mediation.

All of this does *not* mean that extra-contractual claims are not real, or not valuable. In every case I have mediated where extra-contractual money has been in play and offered, the plaintiff's attorney has always demanded it before mediation and orchestrated the mediation to allow the necessary decision makers to be present. For you to have a good faith chance at obtaining a settlement inclusive of extra-contractual monies, consider the suggested best practice below.

Suggested best practice: If you truly believe the carrier is in a position where extra-contractual liability is a real possibility, then consider a different tactic than showing up at mediation for the first time demanding extra-contractual money.

Well in advance of mediation, a demand for extra-contractual money accompanied by the timeline or documentation you believe supports such a demand should be in the hands of the defense. "Well in advance" is recommended to be weeks before mediation at the earliest. Then, there should be assurances from the defense that someone with authority to consider the carrier's extra-contractual issues should be present and prepared to meaningfully participate. You might even consider it a pre-condition if you and your client believe it would be in your interests. Often the defense will engage separate counsel to advise on the issue. That counsel should also attend the mediation.

3. Threatening to bring in another lawyer to try the case

If you have been successfully working up the case and generated good respect for your abilities as a lawyer throughout the litigation, then probably you have garnered respect from your adversary. That respect can translate into dollars to settle your case. You hurt yourself with a threat of bringing in someone else to try the case during the mediation.

If you truly feel outgunned, or outlawyered by your adversary, or if the case is beyond your expertise or capacity to handle on your client's behalf, then of course you and your client should consider teaming up with a more seasoned trial lawyer. The issue is the timing of making such a threat and the threat itself, not the notion of teaming up. Don't do it at mediation. It makes the defense think you perceive a weakness in yourself or your case. It can have the *opposite effect* with your opponent.

I have had defense interests, when the threat has been communicated, say "Good. Let's get (insert name of famous trial lawyer here) in the case. I've dealt with them before. At least they know what they are doing." Then the mediation goes off the rails.

Lastly, many of those famous trial lawyers who get named at mediation take umbrage at their names being bandied about at mediation to try to extract better settlements. Many seasoned claims adjustors, particularly on big exposure cases, will know the name of the lawyer of whom you speak, and even his or her cell phone number. If they reach out to that lawyer after you threaten to bring him or her in the case and he or she has never heard of you and/or your case, you have hurt your reputation and your case even more. That has happened!

Suggested best practice: Team up on cases when you feel it is in your client's best interest, but never threaten to bring in another lawyer to try the case for the first time at mediation.

2. Being unprepared to deal with lienholders

A personal-injury settlement is algebra. We have to solve for "x" which is the amount the client gets in his or her pocket. In order to solve for "x" we need to know the total settlement, the attorney's fees and costs, and the amount needed to satisfy lienholders. The trickiest variable is the amount of the liens.

The four liens that are most common are 1) Governmental liens such as Medicare/CMS and Medi-Cal/DHCS; 2) Workers' Compensation liens; 3) Private health insurance lienholders such as Kaiser, Anthem, etc.; and 4) Contractual liens by providers or factoring companies normally acquainted with the plaintiff's attorney. Each poses its own degree of difficulty in handling.

Typically, every plaintiff's attorney's office has a person or department that wrestles with lienholders. Governmental and private health insurance lienholders tend to be more knowable before mediation as reductions are statutory or based on common fund, etc. Therefore, for purposes of this article we will leave those aside, and instead focus on how to handle the workers' compensation lien and contractual lien holders.

The workers' compensation lien can be asserted with a lien, or a complaint-in-intervention. For purposes of mediation, having the lienholder either participating or on an active standby will allow the conversation about satisfying the lien to run smoothly in most cases. The majority of lawyers who represent the lienholder in workers' compensation cases are specialists and are going to be prepared to have an open conversation about what they can do to work with you.

A mediator with experience in cases involving workers' compensation cases can be invaluable in that "sub-negotiation" on the plaintiff's side of the negotiating table. Generally, it is better to try to work with the lienholder than not in the vast majority of cases for many reasons beyond the scope of this article.

The trickier liens to deal with in mediation can be the contractual liens. With the *Howell v. Hamilton Meats* and *Pebley v. Santa Clara Organics* decisions, there has been an entirely predictable explosion of medical care provided on a lien basis. Unfortunately, it can be difficult at mediation to get an exact reading on how much money will be necessary to satisfy the lien claims of these providers during mediation. That difficultly then can make it challenging for the plaintiff to make a decision about settlement, as he or she does not know this variable. Understandably, many plaintiffs want to know the net recovery to them before being comfortable agreeing to a settlement.

Most mediators will not intrude in your discussions with these lienholders. But if there are problems you have in dealing with lienholders, there are things a mediator can do to help, among them a mediator's proposal.

In situations where you cannot get an accurate enough or secure enough read on how much contractual lienholders will accept as payment in full, consider allowing the mediator to do a proposal. In this way, you can approach the lienholder with your proposed figure to pay them in order to secure the best net recovery for your client. Because the plaintiff has not committed to the settlement (he or she is mulling over the proposal figure) the lienholder is likely to be as reasonable as possible to help make a settlement happen when approached with a proposal rather than a settled case. The key is to be open with the mediator if you are having issues with the lienholder, and then enlist his or her help to maximize the recovery to your client.

Suggested best practice: Do all you can to be prepared with an approximate price for medical liens to share with your client. If you are having issues with providers, share these issues with your mediator in confidence and brainstorm possible solutions. Experienced mediators have seen these issues countless times and may offer helpful suggestions, among them a mediator's proposal.

1. Going the wrong way to start mediation

I have saved the most toxic mistake for last. It is so frequent now that I have nicknamed it "Wrong-Way Mediation." It is the biggest reason within the plaintiff's lawyer's control that causes a case not to settle before the mediation really begins. My odds of settlement on wrong-way mediation day are 10% or less. Russian Roulette has similar odds.

Some may be asking, "What is wrong-way mediation?" If you have to ask, I am loath to tell you for fear you might try it someday. Please don't.

"Wrong-Way Mediation" begins with a demand that is substantially higher than the last number the defense heard when they agreed to mediation. Suppose you have a case where you asked for the $1,000,000 policy limit. You get a $25,000 offer. You counter at $900,000. You get a response of $40,000 and an invitation to mediate. You accept.

You submit a mediation brief on the day of mediation, and for the first time make a demand of $3,000,000, and state in your confidential brief that "the lid is off" and drop a last-minute life care analysis on the table to justify your starting demand.

The odds of getting an offer in the first two hours in this situation are low, and the chance of settlement at mediation is minimal. Why?

It's game theory in action. It is well understood that our instinct and our rational mind will lead us to cooperate when we feel the other side is cooperating, but also compete when we feel the other side is competing. With that in mind, how will the defense take a $3,000,000 start after the pre-mediation negotiation where you left off at $900,000?

Not well is the short answer. A lucky mediator will have a seasoned adjustor who will ignore the $3,000,000 start and the last-minute life care analysis and negotiate by starting with saying they will offer $50,000 if there is a counter under the last demand of $900,000. That's a lucky mediator. You can then treat that as a bracket and bracket back, suggesting your playing field. That is how a crafty mediator can possibly sidestep and settle the 10% of wrong-way mediations!

Most of the time however, the defense adjustor won't bid, or will lower their offer! Why? Because wrong-way mediation moves are the ultimate competitive move, and every instinct will tell the defense to compete. The most extreme form of competition would be to "vote with your feet" and leave without engaging. A tit-for-tat move would be to lower the last offer from $40,000 to $15,000 (reducing offer by roughly one-third after you triple your demand).

I cannot stress enough how detrimental this tactic is to get your case

settled no matter what your goal. Hypothetically, in our imaginary case, if your goal for settlement was a range of $600,000 to $750,000.00, you will never know if the adjustor would get into that range by starting the process with a wrong-way move to $3,000,000. If your goal was to get over the policy of $1,000,000, you will never do it with a wrong-way move for the first time at mediation. You needed to make such a demand well in advance.

If your goal was to see the defense's top offer for the case, you won't see it at mediation with a wrong-way move like this without looking dreadfully weak and making giant moves off $3,000,000. Lastly, if you were trying to "pop the lid" with your demand, you can't do that at mediation either, because it's all confidential. In other words, there is no strategic or tactical advantage to wrong-way mediation. It does not work. The cases that do settle on wrong-way mediation day do so *in spite of* the wrong-way start, not because of it.

Perhaps there are changed circumstances to your case that you believe justify the wrong-way move? You may be right. But if that is true, then don't make your belief known for the first time at mediation. As discussed earlier, well in advance of mediation, make your extra-contractual demand, support it with whatever new information there is, and plan to move your mediation date if the defense is not prepared to engage with you given the new information.

If you sense the passion with which I write this section, you are perceptive. A mediator's job at its essence is to show the plaintiff the best possible settlement number he or she can get in what feels to them like a long and slow process. Oftentimes your client was injured years before the mediation date, and patiently has waited for what feels like an eternity to finally have a chance to feel like a human being whose harms and losses are heard and acknowledged by a neutral party. Then the real work begins setting about presenting each side's case to the other, their strengths and weaknesses, in order to try to get to a meaningful negotiation and potential settlement.

A wrong-way mediation day almost always short-circuits that job. The mediation becomes about the wrong-way start and people get furious on both sides over the gamesmanship, and the mediation stops being about the plaintiff's injuries. The case is almost always not settled, but more importantly, the plaintiff is left in a worse position than before the mediation, and leaves upset overall.

Suggested best practice: Never, ever do wrong-way mediation in a case you actually want to try to settle at your mediation. If you must increase your demand from the last number heard by the defense when they agreed to mediate due to changed circumstances, do it well in advance of the mediation, provide reasoning or evidence to support your move, and be prepared to reschedule your mediation if that new information causes the defense to need to re-evaluate.

Conclusion

If you have read this article and don't recognize anything you are doing in mediation, then it does not appear you are making any unforced errors in your mediation preparation and technique. If, however, some of the recommended "don'ts" are standard procedure for your mediations, and you are not happy with your results at mediation, I hope that I have given you some things to think about. Maybe give some of the suggested best practices a try to see if you and your clients are happier with mediation. I'm always happy to hear your viewpoints, pro or con, at robert@tessiermediation.com.


Tessier

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