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How to 'win' a mediation

By Elia Weinbach

Winning a mediation sounds like the newest oxymoron. How do you win a process that is entirely voluntary? Where a mediator can push you into a position you don't like, but where you can walk away when you don't like how the process is going? And, what exactly does winning mean anyway? In this context?

You wouldn't ordinarily be asking these questions in regard to a trial, a motion for summary judgment, a demurrer or motion to dismiss, a motion for a new trial or judgment notwithstanding the verdict, or an appeal. You generally know what winning means. Typically, prevailing on or defeating a motion, obtaining a favorable verdict or avoiding an unfavorable result.

Let's face it. Few civil cases get to trial. Some categories of cases have settlement rates at mediation better than others. There's a whole body of literature on which types of cases tend to do better in mediation than others. That's not the focus here. The bottom line is that the vast majority of cases do not get to trial. Many cases are abandoned, refiled, merged into other cases, or the reason for the lawsuit no longer exists. We know the reason for relatively few trials — anticipated costs, risk-aversion, time. Other than family law cases and perhaps law partnership disputes, few lawyers voluntarily engage in litigation as parties. There's a reason for that: Lawyers have "inside knowledge."

So mediation has its place. But winning?

Even if you can't win your mediation, and the mediation turns out to be unsuccessful — as

defined by the lack of a settlement — you can still improve your chances of persuading your adversaries that their position is weaker than they thought.

How? Let's use a now-popular verb — to pivot. Consider how to pivot your case to maximize the chances of winning at a mediation.

1. *Get your mediation brief in early.* It almost seems too easy to follow this tip, but it never ceases to surprise how many advocates wait until the last possible minute to submit their mediation briefs. True, submitting a brief early or on time doesn't assure that the mediator will read it immediately, but the reverse is almost always true. Submitting the mediation brief late will almost always ensure that the brief will be read late, or in a rushed way. Moreover, it conveys a message to the mediator. Either that you are not prepared or are not really interested in seeing that the mediation will be successful.

2. *Have an executive presentation in your mediation brief listing what you are seeking and the three reasons you should prevail.* Remember when you used to browse at the all-too-many dwindling bookstores? Think of how you would browse. You might start reading the first page and decide whether you wanted to read further or buy the book based solely on the short read that you had. Have you ever graded papers? If you have, you probably remember that the first paragraph of a student's paper told you whether this was going to be a good or a mediocre paper. There is an analogy to opening statements. Almost all trial learning holds that the jury makes up its mind after the opening



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statement. When you read your mediation brief, the first paragraph, but certainly the first page, should be enough to inform the mediator of what your client wants. And why the result you seek for your client is warranted.

3. *Concede when you should, stand firm when you don't want to.* The mediator will undoubtedly point out weaknesses in your position and/or strengths in your adversary's. It is a mistake not to acknowledge these points. Why? If you don't, you will not likely get the mediator to advocate your position when you want the mediator to do so. Like a judge or jury, maintaining credibility is incredibly important. You're not in a trial but you really are with the mediator. You are trying to convince him or her just the way you would with a judge or jury of the merit of your position.

4. *Be ready to explain your theory and method of calculating damages.* It's startling to me that when I ask attorneys how they calculated a number (damages/attorney fees/fees and costs to get through trial), I find that the number is almost always a throw-away. Let's see how high (or low) it will fly. It's like a kite. The

mediator understands that your initial numbers are not the "real" numbers but make sure you have a reasoned explanation for how you got to whatever numbers you are proposing. It goes back to credibility.

5. *Be prepared with comps.* Every case is different. Unique. The mediator knows that but as in the real estate industry, there is a range of values that is within the reasonable range, and a great number of values and potential outcomes that are outside the reasonable range. Be ready to explain how your number is within the reasonable range with examples. Either from your own experience from reported decisions (e.g., Verdicts and Settlements). But don't just rely on one or two outcomes unless they have unusual persuasive power. It's not all that helpful to cite a few results from different jurisdictions where the facts are not obvious. I'm not suggesting that you do a statistical analysis of all outcomes in a particular set of cases but it's helpful to give the mediator a well thought out analysis of why your case should at least fit into a range of potential outcomes.

Pivot your case to maximize your chances of winning mediation

Bear in mind that the mediator generally has an advantage over you in that he or she has presided or participated in a larger volume of cases than you have. Not always, but the mediator generally should know what is a reasonable range of outcomes in your type of case. If he or she doesn't, expect to be questioned as to what you think is a reasonable range of outcomes for your type of case. And expect to explain how you made that determination. Credibility.

6. *You have a weak spot or two:* be prepared to acknowledge it and deal with it. If you were preparing for trial, you know that not all your witnesses are going to be great. You know that there is no 100 percent case. You do not have a sure fire case that 100 percent of the time will result in a verdict in your favor.

Be prepared to deal with that reality. Your adversary will. Be prepared to discuss with the mediator what you think are weak points in your case and how you will deal with them. Why not at a mediation when you know that approximately 95 times out 100, you are not going to trial?

7. *Responding negatively to a mediator's proposal.* Whether you accept or reject a mediator's proposal is, of course, entirely up to you. If, however, you reject the mediator's proposal, you should be prepared to discuss with the mediator at some point, either immediately after the proposal

or after the mediation, why you rejected it and what might have been a better proposal (and why). That is, if you want your matter to settle. Which presumably you do given what you know about the odds of your case going to trial, the cost it will take to get to trial, the inconvenience to your client. The point is that you should consider a "failed" mediator's proposal as a step along the way, and not the final step. If the mediator's proposal is not accepted, and you rejected it, you typically will not know whether the other side accepted it or not. That is a piece of information you should seek from the other side as soon as possible. Again, if your desire is to resolve your matter.

8. *Have an exit strategy.* "This is my last and final offer/demand" is not an exit strategy (nor is finding the closest exit door). The mediator knows it isn't. So do you, so avoid it. If you want the mediation to succeed, but it doesn't, plan on how you want to exit. What do you want to convey to your adversary? To the mediator? That you are going to trial no matter what?

9. *If the mediation is unsuccessful, contact the mediator and ask the mediator what he or she thinks could have made it successful.* A good mediator should not rest and should not take no for an answer. The mediator generally has a limited time to spend with you.



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It's important to view mediation as a process that is ongoing, very similar to trial preparation. If you are preparing for trial, you will often discover that the odds of success will change, particularly during the last 90 days before trial. Witnesses whom you thought were stellar may not be so stellar as trial approaches. You may have gotten feedback from family or friends or law colleagues or mock juries that will surprise you. One of the most difficult things for a lawyer to do is to be objective about the chances of prevailing in a case. That's entirely natural.

10. *Prepare.* This is the last point but, of course, it is the first as well. You would prepare an opening or closing statement. Why not the same preparation for

a mediation? Not just an opening or closing. You are like most lawyers. At some point, perhaps many points, you try out your case on your spouse, your friends, your partners, your secretary, if it is a substantial case, on a jury consultant. You get feedback from all of these sources and you modify your approach. Perhaps several times. During the course of the mediation you should be prepared to answer tough questions from the mediator. You don't want to wing it. You will look unprepared in front of the mediator and your client. You can't anticipate every question but you should be prepared with "talking points" just the way any skilled politician is when he or she is questioned in an interview or press conference. You are that politician during the mediation. You may think it is distasteful to think that you have to think in terms of talking points. Or that you are a politician. Don't.

Good luck.

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