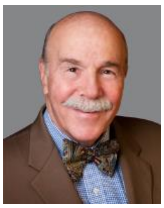


ADR SERVICES, INC.
Your Partner in Resolution

A MEDIATION CHECKLIST

Judge Michael D. Marcus (Ret.)

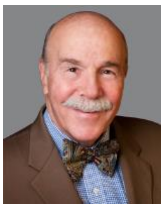
ADR Services, Inc.

There are tactical and ethical considerations involving mediations. The following discussion emphasizes both aspects.

Talk to the client about the purpose of mediation and its benefits and negatives. Left uncovered in California's ethical standards regarding the various phases of mediation, including confidentiality, is whether attorneys have an obligation to advise clients about mediation opportunities. The American Bar Association, Section of Litigation, Ethical Guidelines for Settlement Negotiations does provide some guidance, stating, in Guideline 3.1.1, that "A lawyer should consider and should discuss with the client, promptly after retention in a dispute, and thereafter, possible alternatives to conventional litigation, including settlement." When discussing mediation, it is appropriate that clients also be told about the risks of litigation, including trial, the potential costs of mediation and the financial advantages and disadvantages of settling or going to trial. This analysis may certainly change at mediation, once new facts and arguments are presented, but, preliminarily, clients should be given the opportunity to realistically evaluate the pros and cons of pre-trail resolution. Additionally, when discussing mediation, provide the client beforehand, pursuant to Evid. Code sec. 1129, with a writing containing the confidentiality restrictions in Evidence Code section 1119 and that the client shall provide the attorney with a written acknowledgment that he or she has read and understands the confidentiality restrictions.

Decide when the mediation should be conducted. An early mediation date, either before the complaint has been filed or shortly thereafter, when discovery is in its preliminary stages, benefits the party that is more knowledgeable about the facts and, if successful, saves the parties from mounting legal fees and costs. Superior knowledge can be an impediment to settlement if the other, less informed side, cannot confirm the truth or existence of those facts. Thus, the party in control of the facts should consider whether or not to informally tell the opponent about them. Another downside of a pre-filing mediation is that insurance coverage may not have been established. A mediation calendared shortly before the hearing of a motion for summary judgment/summary adjudication can be effective because the opposing party may not want to risk settlement opportunities if the motion is legally sound and factually supported. On the other hand, if the motion is denied, the opposing party may be emboldened and in a better position to claim that it has a good chance to win at trial or arbitration. A mediation just before trying the matter can be effective because of the uncertainty of what a jury or arbitrator might do and the fear of additional fees and costs, especially if the action will be long or there is a prevailing party attorney's fee clause or attorney's fee statute.

Choosing the mediator. The mediator should be knowledgeable about the process and the applicable law. Select a mediator whose style fits the needs of the case; in other words, do the parties need a mediator who is forceful, soft spoken or can be both? It is also beneficial to work with a person whom the lawyer has worked with previously.



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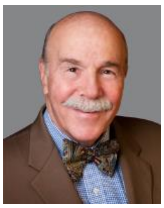
Establish the mediation goals. Settlement is the raison d'être of a mediation. However, even if the parties cannot agree, mediation can be useful for learning more about the opponent's theories and goals, resolving discovery disputes and impressing the opposition by your command of the facts or law.

Discussing the case with the mediator beforehand. A pre-mediation conference may be helpful if there is a need to advise the mediator about attendance issues or even, if you have confidence in the mediator, to mention that a client is unrealistic or difficult. (Such discussions are confidential. See *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, holding that mediation confidentiality applies to any writing or statement that would not have existed but for an impending mediation.) Another reason for such calls is a need to clarify or explain a complicated factual or legal issue that cannot be adequately discussed in a brief.

Be familiar with the applicable legal principles. In anticipation of issues that the mediator may raise, review both the CACI civil jury instructions for the elements of the applicable causes of action and the leading legal texts for additional relevant law. Review the standards and rules applicable to mediations, in particular, the requirement for court-ordered mediations in Rule of Court 3.874 that the parties, their attorneys and insurance representatives with authority to settle or recommend settlement must attend in person, unless excused, as opposed to voluntary mediations which, other than confidentiality, are not covered by any formal rules and that all communications in mediations and writings prepared expressly for those mediations are confidential, pursuant to both Evidence Code sections 1119 et seq. and *Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, *Rojas v. Superior Court* (2004) 33 Cal.4th 403 and *Cassel v. Superior Court* (2011) 51 Cal.4th 113.

Analyze the factual and legal strengths and weaknesses of your case. Everyone knows the strengths of their respective cases; the weaknesses are sometimes overlooked. Just as you should be prepared to meet those deficiencies at trial or arbitration, be ready to discuss them with the mediator because that person will surely raise them when meeting with you in a separate caucus. As an example, is there a problem of proving or disproving damages or is one of the witnesses not credible? The best way to anticipate this discussion is to write out the elements of every cause of action and then, in adjoining grids (one for the witnesses and a separate one for physical evidence), insert all of the admissible evidence in support of every element. Be prepared to defend any cause of action that lacks evidentiary support or uses evidence that is arguably inadmissible.

Provide an interesting and timely mediation brief. Attorneys who do not file briefs forgo the opportunity to direct the mediator's attention to issues important to their respective cases and cede to their opponents that same opportunity to influence the mediator with a one-sided summary of the facts and law. Use this opportunity to "sell" your case and impress the mediator with your grasp of the facts and law. Present a persuasive but brief introduction which incorporates the theme of the case and attracts the mediator's attention, followed by a concise review of the pertinent facts, and the damages issue. Do not rehash obvious legal principles; summarize the causes of action and



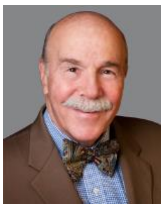
discuss only those issues that are in conflict or are novel. Provide status information, such as the trial or arbitration dates, the results or future dates of any summary judgment motion, pending discovery motions, if any, and the status of settlement discussions. Include exhibits (such as contracts or photographs of accidents and injuries) that truly clarify or explain a factual contention; do not include unnecessary reams of paper, such as voluminous medical bills or entire deposition transcripts, which do not explain or clarify what can be easily summarized in the brief.

Decide whether or not to reveal a "smoking gun." Tactical decisions are not unique to trials and arbitrations. A major decision at mediation is whether to allow the mediator to advise the opposing party about an undisclosed factual or procedural "smoking gun," which supposedly could impact the case at trial. There are no clear answers as to whether that potent evidence should be revealed, but the following questions will help in resolving the conundrum: Is the information really case dispositive? Will it persuade the jury or arbitrator or is its value exaggerated? The impact of evidence is often a subjective matter, influenced by the tunnel vision that a lawyer develops as the case is being prepared. To neutralize such an impact, ask third parties (including the mediator) for their opinions about how important the unrevealed fact is. Will the information be revealed ultimately in discovery? Is the information inadmissible and, thus, could never be used at a subsequent trial? Some facts might have great influence but nevertheless are inadmissible because, for example, they may be irrelevant, hearsay, unauthenticated or have little probative value when weighed against their prejudicial effect. Is the financial cost of developing the "smoking gun" at trial prohibitive? This question is most appropriate as to expert witnesses and the tests they must conduct to establish their opinions. Will the matter probably not be tried because of client reluctance, financial costs or the strong possibility that the matter cannot be won? On the other hand, there may be little incentive to reveal the smoking gun if, in the best judgment of the attorney, the matter must be tried.

Send the brief several days before the mediation. Treat the filing of a brief like a motion and send it to the mediator a sufficient time before the agreed-upon meeting date so that he or she has ample time to analyze and appreciate your contentions. Briefs filed the day before a mediation will be read but will not have the same impact as those sent ahead of time. Besides, a late brief is more likely to be disorganized and omit essential facts, law or argument.

Exchange mediation briefs. Most attorneys do not send their briefs to opposing counsel, which means that mediators must spend valuable time educating the parties about facts and laws in contention. Submitting a confidential brief when a complaint has not yet been filed makes sense but does not when discovery has been completed and trial is not far away. If a party doesn't want the opponent to know about facts, legal theories or argument that are best held in reserve, put them in a separate, confidential brief for the mediator and provide the known facts and contentions in a non-confidential memorandum to be given to opposing counsel. At the end of the day, experience has proven there are few issues a party chooses to keep secret throughout mediation.

Prepare clients for mediation. Just as you would prepare your clients before calling them as witnesses at trial, advise them before the mediation as to the purpose of the proceeding, the goals, mediation procedures (such as confidentiality and the remote possibility of a joint caucus), how to



dress, where to park and how to act when only the mediator is present. Discuss whether they should take an active part in the mediation and, if so, what questions the mediator may ask them. Determine if the client needs a support person to be present, especially if the underlying facts are traumatic. And, because the mediation can be lengthy, advise clients to bring something to read or occupy their time during the lulls when the mediator is not with you. After having prepared the clients, assess their respective willingness to listen to competing facts and theories and to adjust their positions accordingly.

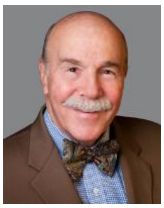
Discuss opening demands or offers with the client. Before the mediation, talk to the client about the terms, including financial, that should be sought initially. This conversation may include how far the clients are prepared to move but, more likely, that part should be reserved for the mediation itself because the dynamic process of mediation will often dramatically impact expectations.

Persons with authority shall attend the mediation. If the mediation is court-ordered, California Rule of Court 3.874, subd. (a)(1) and (2), requires the personal attendance of the parties, their counsels and insurance representatives at all mediation sessions, unless excused. The excused person must then notify the mediator by letter or electronically confirming that excuse or permission. Even if the mediation is voluntary, it is advisable to have the client and insurance representative in person or accessible by telephone because resolution of the dispute is more realistic when the decision makers are present to hear about the benefits of settling and/or the downsides of going to trial.

Prepare a participation list for the mediator. Under California Rule of Court 3.874, subd. (b)(1), the parties are now required, at least five court days before the first mediation session, to serve a list of their mediation participants (which includes the parties, attorneys, representatives of parties that are not natural persons and insurance representatives) on the mediator and all other parties. Supplemental lists must be served promptly to reflect the presence of additional persons.

Determine whether any witnesses, other than the client, should attend the mediation. As in a trial or arbitration, consider what witnesses, other than the party, will best present the factual portion of the case. Is there a credible witness who can corroborate the client's version of the facts when the client's credibility is under attack? Alternatively, consider using a declaration when that witness is unavailable. Such considerations should not be limited to lay witnesses. While experts are commonly used only in construction defect mediations, they can be effective whenever an issue of liability rests substantially on their opinions and their identities are already known to the opposing party.

Use demonstrative evidence and other illustrative aids. Rely, as you would at trial, on physical evidence and illustrative charts to emphasize the key points in your case. (There certainly is no rule prohibiting such aids.) Such evidence can clarify or amplify the testimony of witnesses, make abstract concepts real and more vivid and make a case look stronger than it might really be. Provide a chronology to clarify confusing events, such as the dates in a construction defect or legal malpractice claims. Produce a video that dramatically emphasizes an important aspect of your case (for example, the day-in-the-life of the plaintiff or portions of a witness's taped deposition).



Whether the matters involve a business breach, an employment action concerning an allegedly wrongful termination, a property dispute or injuries caused by a vehicle accident or defective product, the facts can always be enhanced by the use of applicable correspondence, contracts, charts, pictures or, even more dramatically, a PowerPoint presentation of these same items. In other words, make your case more interesting and powerful by playing to the mediator's visual senses.

Bring essential documents to the mediation. Attend mediations with all of the pleadings, correspondence, discovery and exhibits in hard copy or laptop accessible, since it is often necessary, when discussing the case with the mediator, to refer to a complaint or answer, deposition transcript, interrogatory response, or memorandum to support or contradict an important issue. If the needed writing or exhibit is not available, the lawyer must then ask a person at his/her office to fax or e-mail the document. And, if the requested item cannot be found or forwarded, its immediate effectiveness is lost with resulting negative consequences.

Prepare an opening statement if there is going to be a joint caucus with the opposing party and its counsel. If you have confirmed that the mediator shall convene a joint caucus, prepare remarks for that session which address the legal and factual strengths of your case and why you shall prevail at trial. At the same time, avoid comments that will only inflame the opposing party and its counsel.

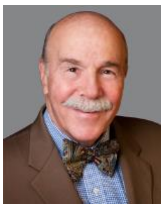
Assess opposing counsels and their clients. Before the mediation, develop a good idea about the strengths and weaknesses of opposing counsel. Is this person experienced, knowledgeable and prepared or flying by the seat of his or her pants, blithely ignorant of what it will take to try this case? Such information is helpful in putting a value on the case and assessing the risks of going to trial.

Assess the opponents' negotiating tactics. Does the plaintiff or defendant have a practice of usually making extremely low or high demands or offers? If so, it is not unexpected that the other side's first response may anticipate that tactic and similarly be in the "insult" range.

Assess the opposing parties' financial condition or insurance status. It is unproductive for a plaintiff to make a demand in the "insult" zone if the defendant does not have the financial means to respond with a reasonable sum, especially if bankruptcy is a foreseeable option. In such circumstances, it is more productive for the plaintiff to keep the first demand in a zone which will create movement and the reality of a financial payout. As for the plaintiffs, evaluate whether they need to settle for financial reasons or can afford to litigate?

The trial date's impact on settlement. A mediation that takes place well before trial may result in a lower settlement; on the other hand, the net gain or loss for both parties might be more favorable because less has been paid for legal fees and related costs. In contrast, the threat of an imminent trial may result in a different settlement and at greater financial costs. The opening demands and offers in both situations should reflect these contingencies.

Evaluate the benefits of making the first demand or offer. Typically, plaintiffs and defendants are comfortable with the former making a demand and the latter responding to it. Both sides,

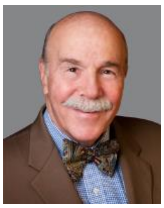


however, should consider the advantages and disadvantages of sticking to or deviating from this order rather than maintaining the status quo. Going first allows that party to set the table for ensuing negotiations. To some extent, every ensuing movement and negotiation is a reflection of that first move. Having the other party open allows the responding side to evaluate the initial move. What kind of message is being sent? And what type of message should be sent in response? Going second thus has its own advantages. Consequently, who goes first or second should not be set in stone; instead, as in who kicks off in a football game, it should reflect the strengths and weaknesses of both sides on that particular day and whether starting off on offense or defense is a plus or minus.

Puffing and misleading statements at mediation. Although attorneys have an ethical obligation to not make a misleading statements to opposing counsels (see Business and Professions Code section 6068, subdivision (d), requiring attorneys to employ only such means as are consistent with the truth when representing their clients and ABA Model Rule 1.4, Guideline 4.1.1 providing that lawyers may not make material misrepresentations, or knowingly affirm false statements by others, during settlement discussions), mediation confidentiality negates the application of that principle to mediations. (See *Foxgate Homeowners' Association v. Bramalea California, Inc*., supra, 26 Cal.4th 1 holding that a mediator may not report a participating attorney's misconduct to the trial court and *Cassel v. Superior Court, supra*, 51 Cal.4th 113 holding that mediation confidentiality applies to all communications at mediation, including those between an attorney and his or her client.) California Rule of Professional Conduct 3.3, which states that "(a) A lawyer shall not: (1) knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer," does not apply because the mediators are either retired jurists or never were so. However, a misleading statement to a judge in a mandatory settlement conference, as opposed to a mediation, is disciplinable. (See *In the matter of Jeffers* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 211 [Representing to a mandatory settlement judge that the client, who had been subject to a conservatorship and whom the attorney knew had died, did not believe he was responsible for the accident or the resulting injuries and wanted the matter to be tried].) Despite the lack of an enforceable sanction at mediation for misrepresentations, attorneys' reputations for such behavior among experienced mediators will suffer.

Evaluate a worst case scenario if the case does not settle. While there is nothing wrong with being confident about your case, think ahead to what will have to be done to try the matter if it is not resolved at mediation and, more importantly, realistically evaluate the chances of achieving your goals at trial.

Inform the client about settlement negotiations. "A lawyer must keep the client informed about settlement discussions, and must promptly and fairly report settlement offers, except when the client has directed otherwise." (ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations 3.1.4.) In that regard, it is always preferable that clients be physically present at mediations so that they are aware of negotiations. Note, however, a defendant client need not be consulted about the settlement or its terms if the client is covered fully under an insurance policy that gives the insurer the right to settle the matter without the insured's consent. [*Fiege v. Cooke, et al.* (2005) 125 Cal.App.4th 1353-1356].)



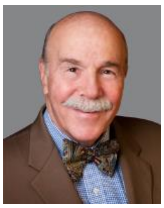
Make reasonable demands and offers. Unreasonable demands cause unreasonable offers and vice versa; they also cause delay and stalemate. Unreasonable positions often result from a concern that a more sensible demand or offer will compromise the attorney's bargaining position. To this, I respond poppycock. (I might use stronger language, but I'm concerned that children might read this paper.) An example should suffice: Assume the first demand is $750,000 or the first offer is $5,000 when both sides know the case is worth between $75,000 and $125,000. Isn't the plaintiff better off initially demanding $300,000 and making the next move a small one, if the responding offer is also small, instead of dropping to $710,000, $675,000 and $635,000 and so on until, in exasperation, both sides agree to brackets, which hopefully move the parties to where they should have been long before? To ask this question is to answer it.

What message do you want to convey? An extremely high or low offer, depending on which side you represent, can express a strong belief in your case, an unwillingness to negotiate, naiveté or inexperience. Amounts in the "agreement" and "reasonable" zones more readily show a willingness, for whatever reason, to settle the case.

Be familiar with the various negotiation processes used in mediations. Ordinarily, negotiations begin with the exchange of solid numbers, known as **"distributive" or "market-place" bargaining**. This process may cease being fruitful because of unrealistic expectations, a disagreement over material facts, the failure of one side to have sufficient settlement authority or the absence of an essential party. In that instance, the mediator has options, including, most often, the use of **brackets or ranges**. Brackets are the use of two contrasting numbers to create a range for continued negotiations. Brackets bring new energy because they enable the parties to make bigger moves without compromising their credibility because brackets are conditional or amorphous, since a party is indicating it will move only if the other side is also willing to move. The mediator may propose a bracket which has two contrasting numbers. More often, the parties, themselves, propose their own brackets so that four numbers are involved. Brackets, through their mid-points, can send a message about the parties' goals. Generally, after a couple of bracket moves, when the numbers have become more reasonable, the parties may return to distributive or marketplace bargaining.

At some point in the mediation (especially, bracketing), it may become obvious to the mediator that a party is disinclined to make meaningful or significant moves. When that occurs, the mediator should attempt to find out, with an absolute promise of confidentiality, what that party is attempting to achieve. This discussion may reveal that the party has limited authority or sees the value of the case much differently than does the opposing party. If it's an "authority" issue and cannot be resolved immediately by a telephone call, the options are either to recess the mediation or have the mediator make a proposal, which is kept open so that the party with the "authority" problem has an opportunity to resolve it.

Another option, when an impasse occurs, is **"Wouldya-couldya."** After lengthy negotiations have taken place and with some sense of how the parties value their respective cases, the mediator, on his own, "floats" a settlement term to one side or, alternatively, asks that same party what it is



trying to settle the case for. The mediator then may discuss with that party the term's reasonableness or probability of success. (This process is always undertaken with the promise of absolute confidentiality.) If the mediator believes the suggested settling term is achievable, he or she may, at an appropriate moment and without any telegraphing, discuss that term with the opposing side. The subject is dropped if it does not produce a favorable response. However, if there is some comparability between the "wish lists" for the two sides, the mediator will then attempt to narrow the divide between the two positions until unanimity (and a settlement) is achieved.

"**Best and final" demands or offers.** This negotiating step often occurs after an impasse in negotiations and, unlike "take it or leave it," allows for further negotiations because it is not absolutely final. It is used when one party believes the only way to resolve the conflict is to have the mediator make a proposal.

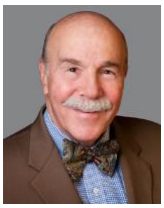
A **mediator's proposal** is an effective negotiating technique. The mediator proposes a settlement on terms in writing that will most probably be acceptable to all of the parties. There are no rules when a proposal should be made. Experience, has shown, however, that it is most effective when the parties have reached a stalemate and all other settlement options have been considered and/or exhausted. By that time, a reasoned proposal has a substantial chance of being accepted, because the mediator, after much discussion and negotiation, should be seen by all concerned as informed, knowledgeable, fair and credible.

A mediator's proposal should not be imposed on a party who does not want it. It is extremely unusual for parties to reject the concept, since it is not binding and, because of confidentiality, does not set a floor for future discussions; regardless, a mediator should not submit one if a party says, "Don't do it."

Generally, a proposal has two approaches: it either reflects the mediator's educated guess as to settlement terms that will be acceptable to everyone or, alternatively, it is the mediator's evaluation of what the case is "worth." Because of the potential disparity between the two types of proposals, mediators should advise the parties which approach they are using. Depending on the wishes of the parties, it can be kept "open" for a short period of time or for several days.

It is not uncommon for parties to suggest that a proposal include certain terms or language, such as, if by a defendant, that the settlement be confidential, there be liquidated damages for a breach of confidentiality and that the settlement sums be paid in installments or, if by a plaintiff, that all sums be paid in full within a certain period of time after execution of the release and settlement. If specific requests have not been made, the proposal should cover all material issues discussed by the parties, such as, for example, the monetary amount in controversy or who is to obtain possession of the contested property. As a practical matter, parties have little problem in subsequently resolving less important issues not covered in the proposal when the major ones have been agreed to.

The timing of the response to a proposal is up to the parties. It is preferable to obtain immediate answers so that, should it be accepted, a settlement agreement can be finalized right away, thus



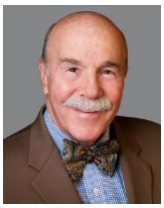
preventing anyone from having second thoughts. However, persons with the authority to accept or reject a proposal may not be present or attorneys may need additional time to talk to their respective clients or adjusters about the proposal's terms. When that occurs, attorneys should advise the mediator that the period of time the proposal should be kept "open," which can be for one day or more.

A mediator's proposal can ask for just the attorneys' responses, both the attorneys' and the clients' responses or just the clients'. The proposal is generally not binding if signed only by attorneys since the parties, themselves, have not executed it. (Note, as discussed previously, that an insurer can settle a case without the insured's consent if the policy gives the insurer that right [see *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350].) If all of the parties have signed and agreed to the proposal, it can become a binding document. The downside of a binding mediator's proposal, in this instance, is it may not contain all necessary terms. Therefore, it is better to first obtain only the participating attorneys' approvals of the proposal and then allow them to create a comprehensive release and settlement executed by their clients.

If one party accepts the proposal and the other rejects it, the mediator should not tell the rejecting party that the other side accepted it because that would give the rejecting party an unfair advantage in future negotiations. The rejecting party should know only that it did not accept the proposal. The accepting party knows, however, that the other side rejected the proposal and, to obtain a settlement, will probably have to change its settlement position. However, the world has not come to an end, if one side has rejected the proposal. As for the accepting party, the mediator should ask how much more it can "move"; as for the rejecting party, the mediator should attempt to determine why it rejected the proposal or what its settlement terms are. In either instance, the mediator should find out how far apart the parties are and continue, either in person, by e-mail or on the telephone, to discuss settlement prospects with them.

Other less common settlement options are **"split the baby,"** which simply involves dividing equally the amount between the last demand and offer. It works best when the difference is relatively small and can be used in conjunction with "wouldya-couldya;" **"baseball,"** where, as in baseball arbitration, the parties submit their respective numbers to the mediator. The number closest to the mediator's valuation is accepted. This method is rarely used because it is unpredictable; "**Hi-Lo" -** If the case cannot settle at mediation and if it shall be tried to a court, jury or arbitrator, the mediator may suggest that the parties agree beforehand that any judgment or award shall be no greater or less than two specified amounts, to which the parties agree. **Arbitration or court trial –** The prospect of arbitrating the matter, rather than trying it to a jury, may be acceptable to the parties if the case does not have strong emotional appeal and holding down costs is an important consideration for both sides. Because the mediator has heard so much about the case, it is preferable that he or she not be the arbitrator. However, if the parties want to use the mediator, the mediator must, pursuant to Rule of Court 1620.7(g), inform the parties, inter alia, of the consequences of their having previously revealed confidential information.

"Take it or leave it" is a party tactic rather than a mediator's device. One of the parties, either because of limitations on its authority to settle the matter or out of frustration, tells the mediator it



wants to make a "take it or leave it" demand or offer. The mediator should warn that party that it has to "walk" or promptly leave the mediation if the demand or offer is not accepted because to continue negotiating, after a rejection, impairs the offeror's credibility. Obviously, this tactic is used sparingly since it is drastic and often rejected.

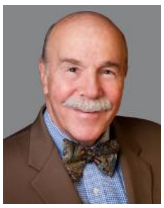
Be flexible. Every case is different even if it appears, on first blush, to be a generic wrongful termination, breach of contract or trip and fall. Besides the unique facts of every case, all parties and their counsel bring different expectations, personalities and perspectives to the process. What has worked in one instance is not guaranteed to work in another. Flexibility, not rigidity to a system or process, is the best approach. Be willing to consider all reasonable options and arguments presented by the mediator. Flexibility goes hand-in-hand with good faith. In the mediation context, it means that the parties will be open to changing their minds; it is the polar opposite of rigidity.

The client shall be knowledgeable about the settlement terms. "A lawyer can exercise broad general authority from a client to pursue a settlement if the client grants such authority, but a lawyer must not enter into a final settlement agreement unless either (a) all of the agreement's terms unquestionably fall within the scope of that authority, or (b) the client specifically consents to the agreement." (ABA Section of Litigation, Ethical Guidelines for Settlement Negotiations 3.2.1.) The reasons for a client to be present during negotiations also apply when the settlement is arrived at. And, the *Fiege v. Cooke* exception also applies.

Bring the outline of a long-form settlement to mediation. Having an almost-completed long-form settlement document at mediation, gives that party an advantage because, initially, it can frame the terms of that document. Experience has also shown that delayed preparation and execution of a settlement may result in prolonged discussions of seemingly meaningless terms and, more important, one of the parties may have buyer's remorse and back out.

If the parties want the settlement agreement to be disclosed to the trial court and enforceable, include language that "It is the intent of the parties, pursuant to Evidence Code sections 1122(a)(1) and 1123(b) and Code of Civil Procedure section 664.6, that all of the terms of this agreement may be disclosed to a court of law and shall be enforceable and binding upon them in a court of law." (See *Simmons v. Ghaderi* (2008) 44 Cal.4th 570.) If the parties want the court to retain jurisdiction to enforce terms in the agreement, pursuant to C.C.P. section 664.6, and, in the meantime, the case is to be dismissed, insert "If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement," and attach the executed settlement to the dismissal request. (See *Mesa RHF Partners, L.P. v. City of Los Angeles* (2019) 33 Cal.App.5th 913.)

The following Mediation Messages also contain helpful, irreverent and entertaining comments about mediations.



ADR SERVICES, INC.
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MICHAEL D. MARCUS'S MEDIATION MESSAGE NO. 74

ATTORNEYS' PET PEEVES

I asked lawyers with whom I regularly mediate what "pet peeves" they have about the mediation process. Their responses, which I've been assured are only about other mediators and not me, provide valuable reminders about what attorneys want out of mediation; their thoughts also provide me the opportunity to comment briefly about their complaints.

"Not respecting a lawyer's evaluation. Harping on 'risk' in general, without respecting what the lawyer has already considered. I usually know the risk part, and I know the damages part. I may not have weighted something right and that is what I want to hear about, because that goes into my evaluation." MDM: It's nigh impossible to gain the respect of a lawyer when you don't respect that lawyer's arguments.

"Having a negative attitude about the case." MDM: The process must be a positive one for all involved, regardless of the outcome. The mediator is responsible for setting the tone.

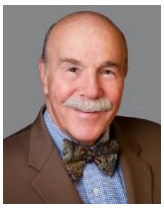
"Active, not passive, participation by mediators. The mediator should provide constructive suggestions; educate each side about the other's positions and goals; update the parties during the day with summaries of where matters stand, what has been accomplished (if anything), who has made concessions and what points of dispute need to be developed." MDM: As I've said before, mediators are not potted plants; they must be actively involved in the process.

"Fail to communicate offers or demands." MDM: This is basic mediation 101; the case cannot settle if a party doesn't know the other side's positions. Besides, the failure to communicate a position is another form of disrespect, if not just plain sloppiness.

"Giving up on the mediation process too soon. I paid for a whole day mediation and, after less than two hours, the mediator said it wouldn't settle. I felt like we were ripped off." MDM: This is inexcusable. Mediators must begin every mediation with the mindset that every case can be settled, regardless of the circumstances. And they must maintain that approach until every angle has been thoroughly explored and exhausted. Or, as Jimmy Valvano once famously said, "Never give up. Never give up."

"Divulging, without consent, a party's negotiated position." MDM: Confidentiality is the cornerstone of mediation. A mediator who has divulged, without consent, a party's material fact, might as well pack up his or her bags and move to South Dakota.

"No follow up if the case did not settle." MDM: Not all cases settle at mediation. Nonetheless, the parties expect or hope mediators will stay involved – and they should, even if it is without additional fee or charge.



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MICHAEL D. MARCUS'S MEDIATION MESSAGE NO. 114

FREQUENT COMMENTS BY ATTORNEYS AT MEDIATIONS

The following comments are frequently made by attorneys during mediations. I have provided irreverent interpretations of what the speakers may be saying or intending.

"We expect significant movement from (the opposing party)" or "They need to make a big move." **MDM's observation** –The speaker sounds like a doctor performing a yearly physical.

"This is not a six figure case." **MDM's observation** – The defense is not so subtly signaling that the case has to settle below $99,000 while, at the same time, the plaintiff's demand is somewhere around $600,000.

"We don't want to create a floor." **MDM's observation** – Is the speaker in linoleum sales? How can a floor be created when mediation negotiations are confidential and cannot be referenced in future discussions should the mediation be unsuccessful?

"Their offer (or demand) is not in the ball park." **MDM's observation** – This is a mixed metaphor because a ball hit out of the park is most desirable.

"Why are we here (when negotiations are not going well)" – **MDM's observation** – What am I, an existentialist? Where's Jean Paul Sartre when I need him?

"They're not here in good faith (when the offer or demand doesn't meet expectations)." **MDM's observation** – How does the speaker know this? Has he or she a hidden microphone in opposing counsel's room?

"They're the ones who wanted this mediation (when the negotiations aren't going well)." **MDM's observation** – Interestingly, opposing counsel is saying the very same thing.

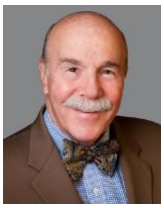
"I hate brackets." **MDM's observation** – The attorney has probably never used brackets before because they're effective when market place bargaining has stalled.

"This is not my first rodeo." **MDM's observation** – If it isn't, why are you gripping the arms of your chair like you're afraid of falling off?

"We don't want to send the wrong signal." **MDM's observation** – These lawyers think they're traffic guards.

"I'm not bidding against myself." **MDM's observation** – Self-flagellation is unseemly.

"I increased my offer by 100% while they've only decreased their demand by 25%." **MDM's**



observation – What the speaker didn't mention is that the client increased its offer from $5,000 to $10,000 while opposing counsel decreased his or her demand from $300,000 to $225,000.

"They're negotiating with Monopoly money." **MDM's observation** – Hasbro should be advised that counsel is engaging in the dilution of a trademark. An alternative to the foregoing comment is "Our money is real money."

"We're running out of room." **MDM's observation** – Well, then, get a bigger room.

"They're going in the wrong direction." **MDM's observation –** The only wrong direction occurs when a party walks out of mediation without a settlement.

"Where did they get that demand or offer?" **MDM's observation** – Only a proctologist can answer that question.

MICHAEL D. MARCUS'S MEDIATION MESSAGE NO. 137

MEDIATION MUSIC: THE MEDIATION CONCERT HALL

There is a correlation between popular song titles and what happens at mediations. Consider the following:

"Welcome to my world," Dean Martin 1958. Mediators ask the parties and their counsel to come to mediation and to trust the process.

"I'm a believer," the Monkees 1966. That comment is music to a mediator's ears.

"Take this job and shove it," Johnny Paycheck 1977; "Workin' for a livin'," Huey Lewis and the News 1982; "Back on the chain gang," The Pretenders 1982. The theme songs of employees who are suing for job-related causes of action.

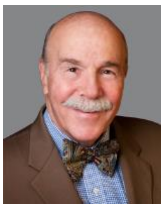
"Get a job," The Silhouettes 1957. A former employer's advice to a former employee's lawsuit.

"Money for nothing," Dire Straits 1985. How employers feel about settling baseless employment claims.

"That's what friends are for," Dionne Warwick 1985. Parties occasionally provide statements or declarations by friends in support of their facts.

"We belong together," Mariah Carey 2005. The mantra of claimants in a class action or PAGA matter.

"I heard it through the grapevine," Marvin Gaye 1983. Unfortunately, the grapevine (i.e., hearsay) is not very helpful in litigation.



"Fly me to the moon," Frank Sinatra 1964. The unrealistic expectation of an unreasonable demand or offer.

"One is the loneliest number," Three Dog Night 1969. $1,000; $10,000 or even $100,000, depending on the circumstances, can be a discouraging number for negotiating purposes.

"Yakety yak," The Coasters 1961. Sometimes there's too much talking, and not enough progress, during the separate caucuses.

"Listen to what the man says," Paul McCartney 1976. Mediators hope attorneys tell their clients to listen to what mediators tell them about the facts, law and possible outcomes.

"Tired of waiting," The Kinks 1965. It's 2:00 p.m., the parties have been at it since 9:00 a.m., and a monetary demand has not yet been made.

"Light my fire," The Doors 1967. One party is looking for an offer or demand that shows progress.

"Stayin' alive," Bee Gees 1977. The negotiation phase just got revitalized by a positive demand or offer.

"I gotta feeling," The Black Eyed Peas 2007. One of the parties or attorneys has just read something positive into an opponent's latest move.

"No reply," The Beatles 1964. A party refuses to respond to the last offer or demand because it considers it to be unreasonable.

"Keep a knockn'," Little Richard 1958. The perfect response when a party has stopped negotiating.

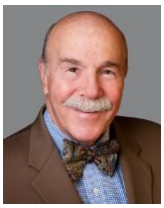
"I'm walkin'," Fats Domino 1957. The threat to leave, rarely real, by a party when it says that mediation is not working.

"Please stay," The Drifters 1957. The response when a party threatens to walk.

"All shook up," Elvis Presley 1969; "Tossin' and turnin'," Bobby Lewis 1961. Something negative or positive happened during the mediation which shook up one of the parties.

"Let's spend the night together," The Rolling Stones 1967; "Dance the night away," Van Halen 1979; "Night moves," Bob Seeger 1981. The mediation may take longer than planned.

"You can't always get what you want," The Rolling Stones 1969. "But if you try sometimes well you might find you get what you need"; i.e. despite existing obstacles, reasonable results are still achievable.



"(I can't get no) Satisfaction," Rolling Stones 1965. The Stones had not yet become philosophers.

"That's life," Frank Sinatra 1966; "It's all in the game," Tommy Edwards 1958; "I'm a loser," the Beatles 1964; "While my guitar gently weeps," The Beatles 1968; "I will survive," Gloria Gaynor 1978. A fatalistic approach when a party's goals or expectations have not been achieved.

"Luck be a lady," from Guys and Dolls 1950; "Could this be magic?," The Dubs 1956. When things are not going well, relying on luck or magic to turn things around.

"It's over," Roy Orbison 1962; "End of the road," Boyz II Men 1991. Despite everyone's best efforts, the matter is not going to settle that day.

"**Call me," NAV 2017.** The mediator is going to follow up the unsuccessful mediation with phone calls to the attorneys.

"The great compromise," John Prine 1972. A settlement has been achieved.

"Take the money and run," Steve Miller Band 1976. From a plaintiff's perspective, it's a great deal.

"Hallelujah" chorus from Handel's "Messiah;" "Happy days are here again," Ager and Yellin 1929. The feeling of euphoria when a resolution or settlement is achieved.