

WHAT TO CONSIDER WHEN PREPARING (YOUR CLIENT) FOR MEDIATION

Written by Hon. James P. Gray (Ret.)*

Over the last nearly 40 years, I have been involved in hundreds of mediations and settlement conferences, covering a wide variety of cases—including all kinds of civil and probate disputes. During my 25 years on the bench as a trial court judge, I held settlement conferences on nearly all of my own cases. For the past 14 years, I have served as a mediator on many cases concerning a variety of legal issues. Although every case involves its own unique set of facts, disputes and parties, the mediation *process* generally applies equally across the board.

So, what are mediations and what good do they do? In a nutshell, mediations assist parties in resolving their disputes voluntarily, usually with a neutral mediator as the agent to help them through the process. Why is this helpful? Because, as you may have noticed, litigation is expensive, both financially and emotionally, and perhaps even more importantly, it utilizes a lot of time that could otherwise be used more productively. Over the past four decades, I have learned that mediation is one of the most important and powerful tools that we as legal professionals can use.

My extensive experience has also taught me first-hand that one important consideration many attorneys often overlook is preparation of their clients for mediations. Of course, I recognize that attorneys are busy. I also acknowledge that preparing for the mediation itself takes time, as meticulous effort and thought are put into analyzing the case, thinking through possible outcomes, and drafting an always-stronger brief. While preparing the client may seem like the least pressing matter when gearing up for mediation, it is often the most important but overlooked aspect. Client preparation almost always makes a substantial difference in the success or failure of a mediation. Why? Because a more informed and prepared client is often more receptive to a reasonable proposal and agreement to settle a dispute.

So how do attorneys “properly” prepare their clients for mediations? The answer is, of course, it depends! But there

are some universal considerations. Below are some tips and examples generated from my experience with mediation efforts that may be helpful to consider when preparing your next client for mediation.

I. EXPLAINING THE DIFFERENCE BETWEEN MEDIATIONS AND TRIALS

Attorneys spend most of their days engulfed in the legal process. As such, legal terms and procedures become second nature to them. So, it is easy to forget that most clients (fortunately) have never been involved in litigation. Consequently, what may seem like basic terms and processes to an attorney can be completely foreign to clients which, in turn, can cause a lot of stress and anxiety. For example, some clients have never even heard the term “mediation” before they became involved in litigation, or they may use the term mediation and trial interchangeably. That is why it is critical to take the time to explain to your client what a mediation is and the difference between a mediation and a trial, including the benefits and risks of both, before engaging in the mediation process.

Often you may find that although, in theory, an explanation may be simple, the actual wording may be difficult to generate as you want to keep your explanations easy to follow. Over time, you may develop your own style. For example, in my practice I like to use a baseball analogy. Thus, right in my introduction I explain, in baseball lingo, that during a mediation you will give up your ability to “hit a home run” because the opposing “team” will not voluntarily agree to that result. So, if you want to hit a home run, you will have to go to trial to have that chance. But you also give up your right to “strike out” because, similarly, you will not agree to that result. In sum, mediations virtually always end up with a compromised result, like “hitting a ground-rule double.”

While a baseball analogy may not work for everyone, it does help the baseball-loving client conceptualize what a mediation will look like. But you may want to consider developing your own analogy that leaves a meaningful impression upon your client.

II. SETTING EXPECTATIONS

The hardest cases to settle are those in which clients come into them with unreasonable expectations. Of course, the root of those expectations can vary. It could be pure matters “of integrity.” Or it could stem from an attempt by the prospective attorney to get the client to sign up with them in the first place by unrealistically increasing the client’s expectations. But take caution because when that is the case, no one will come out ahead. Why? Because even if the attorney later gets a good resolution at mediation, or a good judgment at trial, their clients will still not be satisfied because they were misled into thinking that they would win the world. So, ultimately, that means no repeat business or referrals to other potential clients.

Attorneys will do both their clients and themselves a favor by setting their client’s expectations to be reasonable prior to engaging in mediation. This involves seriously discussing the risks of pursuing litigation, as well as the potential benefits. It also includes discussing the benefits of engaging in mediation to end their dispute once and for all. Or, how about voluntarily exchanging some pertinent information or documents and then setting up a mediation right away, instead of going through the more laborious process of filing suit and litigating for a while before addressing an ultimate resolution? Of course, there are outside considerations, like how litigious the opposing party or counsel is, and there are other approaches as well, but you get the idea.

III. SOLUTION VS. RESOLUTION

As an attorney you have probably figured out that, unlike with mathematics, the practice of law rarely involves a *solution*, but rather seeks a series of *resolutions*. Of course, many clients come into the litigation process firmly believing that they are in the right and entitled to be made completely whole, whatever that may look like. But that is also why it is important to impress upon your clients, prior to engaging in mediation, that most human disputes have no *solution* and a mediation, at best, can achieve a resolution that will help them move forward in their lives.

For example, if someone runs a red light, hits your car, and breaks your leg, to be made whole would involve not having had your leg broken in the first place, and a return of all of the pain and loss of opportunities that accompanied it. Clearly, no one can make that happen. Instead, a resolution may involve the payment of some amount of money to

help with the costs of the injury. Prepare your client for the idea that if they are successful, they will likely receive, and should only expect, artificial results, not perfection—on any of their complaints. That is a reality of life. Similarly, this would be the case at trial, albeit it will cost more time and money (and emotional burden) to get there.

IV. IF YOU CAN'T PROVE IT, PUT IT OUT OF YOUR MIND

Generally, there are three sides to every story: your client’s version, the opposing party’s version, and what actually happened. A client may be so convinced of their version of events that they lose sight of what can actually be proven at trial. So, prior to a mediation, you should sit down with your clients and impress upon them that what actually happened in their case (or what they think happened) is irrelevant. The only thing that matters is what can be *proved* to have happened—and that is not always the same thing.

For example, a party may have had an oral discussion with the opposing party that, if believed by a judge or jury, would probably make a huge difference in the outcome of the case. But, everyone can be sure, the opposing party will certainly have a different recollection of what was said and done. So that is where independent corroboration comes into play. Was anyone else present during the conversation? Was the discussion later memorialized in writing? Impress upon your client, before committing to mediation, that unless something can be proven through corroborating evidence, it will likely not carry the day. Thus, “if you can’t prove it, put it out of your mind” is a good mindset to take into mediation. It may not always be fair, but it is the only way the legal system can do business.

V. THE PRESENCE OF THE DECISION-MAKER

Many mediations fail because the actual decision-maker or makers are not present or even available. What is a decision-maker? Well, if your client is a human being, that is the person who decides whether the case can be resolved or not. More commonly, if your clients are groups of individuals (e.g., multiple siblings contesting a trust), it will take each of those individuals agreeing to settle the case before actual settlement can occur. But what about a corporation, insurance company, homeowner’s association, or partnership? Those groups almost always have officers or other agents who are vested with the power to make decisions, and those are the individuals who should either be present in person at the mediation or, at least, fully available by Zoom or by telephone until the mediation is concluded. Why? Because if they are not included, no final decisions can or will be made successfully.

Consider the situation where one side's decision-maker has limited authority based upon a prior meeting with other decision-makers about "what this case is worth." In that situation, it will be difficult to convince both that person as well as the others "back in the office" to change their proposed resolutions, either upward or downward. Every reasonable effort should be made to avoid this trap! Plus, you do not want to taint mediation efforts by wasting everyone's time. Therefore, it is important that both you and your opposing counsel make every effort to ensure the actual decision-maker(s) *for all of the parties* are personally present at the mediation or, as a fallback position, that they are at least available by Zoom or telephone.

VI. WHEN THE DECISION-MAKER'S MISTAKE LED TO THE LITIGATION

If you have a situation in which it was your client's decision-maker's action that led to the litigation being filed in the first place, that case will probably not be settled for more than "nuisance value," *unless* you are able to convince that person that you believe that "probably any reasonable person *who had only the information that was available to you at that time* would have made the same decision." Otherwise, you will likely get stuck hearing things like: "We will be vindicated at trial!" Or, if we lose, we can always blame "that stupid jury," or "that stupid judge," or even "our own stupid attorney"—but never me! If you have a situation like that, advise your mediator in advance and collaboratively try to come up with a plan to address such a scenario. Otherwise, unless you can get a different decision-maker to attend, mediation will probably be a waste of time and money.

VII. THE COST

Everyone understands that litigation is expensive, and no one understands that better than your client who writes those big checks. So, the topic of money, more often than not, will make clients listen up and listen good. I often emphasize that fact at mediations by saying something like: "Hey, I have an idea, let's give all of the money at stake to the attorneys! And that is the direction you are traveling at this point." In addition, if there is a provision for attorney's fees to be awarded to the prevailing party, I also tell them: "And if you think that paying your attorney's fees is fun, imagine how much fun it would be to pay the attorney's fees of your opposing party!" Or, again depending upon the circumstances, I often tell the parties that no prevailing party is entitled to attorney's fees, they are only entitled to *reasonable* attorney's fees. So, for example, even if it costs you \$100,000 in attorney's fees to prevail at trial, if the total judgment is only \$90,000, your chances of being awarded more than \$50,000 in reasonable attorney's fees are slim. Similarly, plaintiffs settling at mediation for a smaller amount or defendants paying a somewhat larger amount would

often still be a good business decision because it would avoid the emotion and loss of productive time and effort of going to trial—the costs of which are hard to assess.

VIII. FAITH IN YOUR MEDIATOR

If you do not have faith in your mediator, you chose the wrong one. Often attorneys are familiar with the mediator they are mediating with through prior personal involvements, through word of mouth, or otherwise. But clients often will know nothing about the mediator with whom they will be working. Therefore, it is important to brief your client about who their mediator is, what prior experiences and results you and other attorneys have had with that person, or any other information that may instill faith in your client that the mediator is there to help them resolve their dispute. This can be an incredibly effective tool because when the clients have faith in their mediators, the clients will be more likely to listen to and be influenced by their opinions and suggestions.

IX. THE DISSATISFACTION DISTRIBUTION BUSINESS

When I do my introductions to the parties, I usually tell them that I see my mandate as being to help them resolve their cases globally and today. As part of carrying out my mandate, it is my job to help them make a good business decision. And, as their attorney, you also have the same job. Of course, I also tell them that, as the decision-maker, they are free to adopt the position of "Not a Penny for Tribute!" or "I Deserve Total Vindication!" or "I want to have headlines in the *Los Angeles Times* that 'Jonathan Jones Prevails!'" That is the client's prerogative. Although, I also usually explain that I really do not think that the *LA Times* will care one way or the other.

As attorneys and mediators, it is incumbent upon us to point out to the clients that insisting upon certain outcomes is usually not a good business decision. Therefore, the scenario usually goes: "When I am with you, I will focus upon your vulnerabilities and weaknesses, because that will help you see your case more realistically. But cheer up, when I am with your opponents I will focus upon their vulnerabilities! So, if the opposing parties were to hear me talk with you, it would certainly put smiles on their faces. Of course, this will not happen because these discussions are confidential. But, on the flip side, when I am with the opposing parties, I will focus upon their vulnerabilities. So, if you were to hear me speak with them, it would certainly put a smile on your face, which will also not happen, because that is also confidential. As a result, as a mediator I see myself as being in the 'Dissatisfaction Distribution Business' because I will make everyone unhappy with me. But you will like me better tomorrow when you wake up and understand

that your dispute has been forever resolved and put behind you.”

Thus, take some time to impress upon your client that you are on their team and, in a sense, so is the mediator. We all want them to make a good business decision, even if it stems from some dissatisfaction distribution.

X. MEDIATOR'S PROPOSALS

If the case does not settle through the back-and-forth negotiation process, before the parties walk out of the mediation most mediators offer what is called a “Mediator’s Proposal.” Different mediators approach their proposals differently. My general procedure is to tell the parties that this is not where I am attempting to “do justice,” or “be fair,” or to “try the case,” but rather it is simply my opinion as to the highest number I could get the defendants to pay and the lowest number that I could get the plaintiffs to accept, plus other compromise terms depending upon the circumstances.

Usually, a mediator’s proposal signifies that the negotiation process is now over. All each side needs to do is provide a “yes, we will,” or a “no, we won’t” answer. And if one side says yes and the other says no, mediators will usually not tell the party that said no that the other party said yes. And, since the proposal is still covered by the mediation

privilege, the clients will not hurt themselves in any future negotiations. This process is successful with me about seventy percent of the time.

It is important to check with your mediators in advance to confirm that they make a mediator’s proposal if the parties’ negotiations are not successful. Explain the mediator’s proposal process to your client in advance of the mediation so they are not caught off guard and know what to expect if that process is invoked.

XI. CONCLUSION

As with anything else in the practice of law, advance preparation helps and, with each experience, a new lesson is learned. I hope that some of these suggestions about what you and your clients should do to prepare for mediations will be helpful. And if they are, you might want to visit my website at www.JudgeJimGray.com for more of my writings on mediations and other litigation practices. More “justice” goes to those who are well prepared!

**James P. Gray is a retired Judge of the Orange County Superior Court, the author of Wearing the Robe: The Art and Responsibilities of Judging in Today’s Courts (Square One Publishers), and presently serves as a mediator, arbitrator and discovery referee with ADR Services, Inc. in California.*