

# WIMPY MEDIATORS VERSUS KICK-BUTT MEDIATORS

by MICHAEL G. BALMAGES

**M**ediators are often described as “facilitative” or “evaluative.” Facilitative mediators bring the parties together, provide a safe space for them, serve them chocolate chip cookies in the afternoon, and try to help the parties reach a mutually satisfactory resolution of their dispute. *Kumbaya*. Evaluative mediators tell you their opinions on probable outcomes and the costs and hardships of getting to those outcomes. *Telling it like it is*, they often recommend settlement terms.



Most mediators are some of both. They provide the cookies and their opinions. In my experience, although they greatly value the cookies, most lawyers prefer the mediator's opinions. And they want them unequivocal and in favor of their client. Selecting a mediator is like picking a jury. Everybody says that they want a "neutral" neutral, just like everyone says that they want a fair and impartial jury. The truth is that, just like with a jury, many, if not most, lawyers want a mediator who is unequivocally on their side.

A recent case in which I was the reluctantly agreed-upon mediator illustrates this. There were four law firms involved: One firm representing the plaintiff/seller of the property, two firms for the real estate professionals, and one firm representing the lender. The case involved alleged malfeasance in connection with the sale of a large industrial building.

The seller sued everybody, including the buyers who were nowhere to be found. All of the defendants cross-claimed against each other. Early on, there had been an unsuccessful mediation with another mediator and now, three years later and hundreds of thousands of dollars in legal fees and costs later, on the literal eve of multiple MSJs and trial, the parties wanted to mediate again. They wanted to try mediation again because plaintiff's counsel had separately made new settlement demands to all the parties, demands that were very high but not as very high as they had been for the past three years.

I mentioned that I was reluctantly agreed-upon as the mediator. Only one of the law firms had mediated with me before, and they suggested me as the mediator. This suggestion was met with a strong negative reaction as all the other defense counsel insisted on a retired judge from "such-and-such" resolution service where the retired judges are known for kicking butt and taking names. Those lawyers demanded a mediator who was going to tell the plaintiff and his lawyers that their case was bogus and they needed to walk away from it right now. They did not want a wimpy mediator from one of the big mediation providers who would try to understand the good and bad aspects of the plaintiff's claims—claims that were, to them, clearly bogus. The problem was that they needed this kick-butt mediator right away, and all of the perceived super-heroes from "such-and-such" resolution service were already busy slaying other plaintiffs' lawyers. As a result, they ended up with me.

In their briefs, in their separate pre-mediations calls with me, and in my initial separate caucuses with them and their clients,

all of the defense counsel insisted that I immediately tell plaintiff and his counsel that the plaintiff is disreputable, that his lawyers are lazy, that his case is meritless, and that he had better settle right now for nuisance value before he loses everything. This unanimous defense instruction was super-charged by the fact that plaintiff's separate opening demands at the mediation were now "policy limits" demands, which were way higher than the demands that plaintiff had made just a couple of days prior in private conversations with each of the defense lawyers. Defense counsel were angry. I responded that, although the idea of me immediately informing plaintiff how evil he and his lawyers are and how bad his case is was a great idea, I thought I might take a slightly different approach. My approach would involve getting to know plaintiff and his lawyers, hearing their side of the story, discussing some

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of the potential problems with their claims, and trusting in the process (ala the Philadelphia 76ers). I thereby validated defense counsel's initial fear that I was a wimpy mediator.

After hundreds of mediations and a thousand MSCs it still amazes me how well the process works. Seemingly irreconcilable demands and offers get resolved. Amounts plaintiffs say they will never accept because it's a matter of principle get accepted. Amounts defendants say they will never pay because they'd rather pay their lawyers get paid. The process is what counsel often refer to as "the dance," the seemingly endless offers and counters-offers which the other party usually characterizes as a waste of time and not being in good faith. Sometimes it is a fast dance like the Jive, but mostly it's a Minuet.

My seller/brokers/lender mediation went on for eleven hours and the case settled. It settled well below policy limits and a little above

what the defendants wanted to pay. Plaintiff's counsel needed a little help with their client and defense counsel and their adjusters needed a little convincing that there were a few possibly questionable moments in how their clients handled the transaction. Time and the process provided that help. At the end, defense counsel admitted that the process worked despite the fact that I never chastised the plaintiff or his lawyers.

From my perspective, the two keys to achieving a settlement are rapport and persistence. The mediator needs to develop rapport with the parties and with their counsel. To develop rapport, I talk and I listen, and I talk and I listen, and I talk and I listen. I talk about anything and everything. Where'd you go to school? Where do you live? Pickleball? Grandkids? The Rams, Dodgers, Clippers, Lakers, Kings, Chargers, Ducks, Bruins, Trojans. The weather? I almost always find something that the litigants and I mutually relate to. Same with counsel. All of that takes time. And so does persistence. When a lawyer tells me, "we're done," I ask them to stick around for a few more minutes while I go talk to the other side. I buy time, time to lighten everyone up and time to let me think about where to go next. I experiment with ideas such as, "If I can get them to here, would you think about going there?" I keep trying. What I want counsel to have is patience. Patience with me, patience with the other side, and patience with the process.

Counsel often feel strongly about the righteousness of their cause and demand that the mediator feel as strongly about it and so tell opposing counsel. They often express impatience with the mediator who does not immediately do that. Some mediators carry counsel's water and are counsel's "go-to" mediators. Some take a different approach. 🍷

*Michael G. Balmages is a mediator, arbitrator and discovery referee with ADR Services, Inc., and a former Chair of the OCBA ADR Section. He has presided at more than 500 mediations and more than 1,000 MSCs as a temporary judge in the Orange County Superior Court. Mr. Balmages may be reached at mbalmages@adrservices.com.*

*This article first appeared in Orange County Lawyer, April 2023 (Vol. 65 No. 4), p. 46. The views expressed herein are those of the author. They do not necessarily represent the views of Orange County Lawyer magazine, the Orange County Bar Association, the Orange County Bar Association Charitable Fund, or their staffs, contributors, or advertisers. All legal and other issues must be independently researched.*