
RAPPORT IS THE MEDIATOR'S ULTIMATE TOOL

by MICHAEL G. BALMAGES





Humor is mankind's greatest blessing.

- Mark Twain

In this protracted and nasty litigation that ended up in mediation, I represented the head of construction of a major builder. It was a privately held company at which my client had worked for thirty years. He and the owner of the company had become friends and had even built their houses on adjoining lots in Newport Beach. My client had a written employment contract with the company that allowed him to work on his own projects even if the projects competed with the company. The contract specified that he did not have to offer his private projects to the company or even inform the company about them.

While working on two major multi-unit projects for the company, my client and an employee of one of the sub-contractors on those two projects also began “flipping” houses and small apartment buildings. They’d buy them, fix them up, and sell them. My client did not tell his boss about this side business; he did not think that he had to. In retrospect he should have told his boss as that might have saved him the misery of the next five years. The boss found out about the side “flipping” business from another contractor who was working on both the company’s projects and on my client’s side projects. The boss immediately fired his thirty-year employee/friend and, within three weeks, sued my client (and his wife and son!), my client’s investment partner, and the investment partner’s employer for usurping corporate opportunities and allegedly using corporate assets to work on their private projects. The plaintiff’s discovery responses and experts calculated plaintiff’s damages at \$7,000,000.

Spoiler alert: The case did not settle. It was tried . . . in four parts. It was “quad-furcated” in Complex in the Orange County Superior Court. The first of the four trials was on the usurping corporate opportunities claim. My client won—no usurping; no damages. The second trial dealt with the main claim that my client and his investment partner used corporate assets on their private projects. Here is where the \$7,000,000 damages claim was. Plaintiff “won,” if you can call it that. The trial court on its own came up with a theory that the plaintiff was entitled to get back one-half of my client’s salary for one-year and awarded the plaintiff \$112,000. The third trial involved the co-defendant and his indemnity claim against his employer. My client and I were just observers at this third trial. The fourth trial concerned my client’s cross-claim against the plaintiff corporation for reimbursement of his attorney’s fees and costs under Corporations Code section 317(d). My client won on this fourth phase and the court awarded him approximately \$700,000.

One more note. Plaintiff moved for attorney’s fees after it won the \$112,000 in the second phase. Through its moving papers we learned that plaintiff

had spent approximately \$5,000,000 litigating the case, all for a recovery of \$112,000 and for the pleasure of reimbursing \$700,000 of my client's fees and costs.

The case was highly litigated. Over the course of five years, eighty-four depositions were taken, more than a million pages of documents were produced, thousands of interrogatories and requests for admissions were served and responded to, numerous discovery and other motions were filed, and a discovery referee became rich. All of it very acrimonious. Our side came to really dislike their side, attorneys included, and, clearly they felt the same about us.

Mediation was suggested on several occasions and attempted twice. For the first mediation, counsel for the plaintiff suggested a retired justice of the court of appeal from one of the big mediation providers. My client agreed. This mediator had his work cut out for him. He just did not do it. He was the wrong personality for this job. This case needed an evaluative mediator who was going to hammer both sides with the risks and the extreme expense they were likely to incur. Instead, we got the most "facilitative" mediator I have ever encountered. He simply conveyed factual allegations and demands and offers back and forth without offering any opinions of substance. Worse yet, he did not engage with the parties or counsel. No joking, no storytelling, no sympathy, no empathy, no connection.

The second mediation occurred over a year later. This time the mediator was a very well-known (non-retired judge) mediator, also with one of the large mediation providers. Very dynamic and forceful and very evaluative—so evaluative that he told my client and his co-defendants that they were the bad guys in this story and that they were going to lose at trial. That did not go over well. But that was not what killed this mediation; this was: In our separate caucus room were my client, my client's wife, my law partner, and myself. I made various charts on the white board: pros and cons, points and counter-points, demands and offers. I labeled our side of the charts "Good Guys" and I labeled the opposing party's side of the charts "Rat Bastards"—a throwback to my 1960s college days and a label that was greatly appreciated by my clients and which we rallied behind. This was my style or, rather, my personality: to be enthusiastic, to be a cheerleader, to be on your side. A "me and you against the world," sort. A "you've got a friend in me," sort. The mediator came into our room, looked at the white board and without saying a word, walked up to it and

erased "Rat Bastards." He then lectured me on how inappropriate and counterproductive it was for me to so characterize the opposing parties. He also added that his assistant might come into the room and see the vulgarity. He left the room. I said to my clients, "F**k him," went back to the white board and re-wrote "RAT BASTARDS" in all caps. The mediator came back in and was very unhappy with me. The mediation ended.

Contrast that with another case I had with another mediator from the same mediation provider. In that case, I represented a retired founding and name partner of a major law firm who, as retiring partners sometimes do, was suing his former firm, still named after him. It


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had to do with how the firm forced him out and kept his money. This case was also highly litigated and very acrimonious. A mediation was scheduled with another retired justice of the Court of Appeal. I again made charts on the white board and labeled our side of the charts "Good Guys" and the opposing parties' side "Rat Bastards." Only this time, the mediator, in the same building, in the same conference room, walked into our room and chuckled and said "Let's see if we can get those 'Rat Bastards' to pay you some money." The case settled.

In fairness to both of the mediators on the first case, that case was never going to settle. The plaintiff had decided to ruin my client and had the money to do it. To them, it didn't

really matter if they won or lost as long as they ruined my client.

Rapport is the most important tool that the mediator has; rapport with counsel and rapport with the litigants. If the litigants and counsel like the mediator, if they trust the mediator, if they relate to the mediator, the case has a much better chance of settling. To develop rapport, the mediator has to learn about the litigants' and the lawyers' lives and their families and their interests. The mediator has to listen to them and share with them. I spend a significant portion of my mediations digressing into where people were born, where they grew up, where they went to school, how many kids they have, what they do, what their kids do, where they vacation, what teams they root for, and so on and so on. When I discover something we have in common I explore it. I also do the most dangerous thing a mediator can do: I tell jokes or I say funny things. I agree with the Roman poet Horace who said "Mix a little foolishness with your serious plans. It is lovely to be silly at the right moment." Sometimes, however, that backfires. As my wife often cautions me, not everyone thinks I am as funny as I think I am. But when it works, it works. It's worth the risk.

The first mediator described above developed no rapport. He did not connect at all with the parties. He was just a messenger. The second mediator was a buzz-kill. "Rat Bastards" offended him and he called my client a bad guy. The third mediator recognized an opportunity to connect, and help us see if we could get some money from those "Rat Bastards." He had a sense of humor and connected with me and my client. He was our kind of mediator! 

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