WINNING AT MEDIATION

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You never count your money when you're sittin' at the table,
There'll be time enough for countin' when the dealin's done
~ Kenny Rogers

Every lawyer who has ever attended a mediation is a mediating expert. They know all they need to know about winning the mediation: When to mediate; what client representative to bring; what to put in the mediation brief to get the mediator "on your side"; what secret witnesses and evidence to keep secret; what the opening demand/offer should be; when to accuse the other side of bad faith; and when to make the "last, best, and final" demand/offer. They know when to *hold 'em, when to fold 'em, when to walk away, and when to run*. Or, so they think. We certainly thought we did. Now that we are mediating, however, we are not as sure now as we were then, that we knew everything about mediating. What we have learned is that there are no hard and fast rules about how to mediate. By its very nature, mediation is (or should be) flexible and dynamic, solution-oriented, and not rigidly bound to a set of absolute rules. What we offer below are guidelines for "winning at mediation."

The Best Time to Mediate: The best time to mediate is when the case first comes into your office. Get it out of the way; save both parties lots of money and headaches. This has appeal, saving money is good, and sometimes "early" mediation is required by contract, as in real-estate purchase and sales disputes. But, most of the time, early mediation does not work because it is too early.

The Best Time to Mediate: The best time to mediate is on the day of trial at the courthouse steps. This works more often than "early" mediation but it comes at a high price. The price of many years and dollars, and the turmoil and disruption of litigation. One of the main upsides of settling a case is avoiding most of the costs and headaches required to get to the courthouse steps.

The Best Time to Mediate: Usually, the best time to mediate is when you have enough information to mediate. Plaintiffs need to find out what the defenses are and what evidence is backing them up. What are the text messages and emails sent by your client that explicitly contradict his or her claims? What are the numerous customer complaints that the employer received? Defendants need to see the late-night text messages from the manager to the employee asking her to meet up for a drink and how hot she looked today.

The Best Time to Mediate is when sufficient depositions and document productions or other exchanges have occurred to answer these questions, but experts have not yet been disclosed. On the other hand, one of the worst times to mediate is when there is a pending dispositive motion. Counsel are positive that they will prevail and their intransigence level is at its highest; and besides, the client does not want to waste all that money it has paid for the summary judgment motion, so it might as well get a ruling. Sometimes, however, a pending MSJ makes for the best time to settle, especially if it is a well-founded motion and the opposing party wants to avoid the fees associated with opposing it and the real possibility of being thrown out of court.

There are no hard and fast rules as to when to mediate, just guidelines.

Whom to Bring to the Mediation: Bring the CEO to the mediation. Bring the adjuster's boss and that boss's boss if that's where the authority is. Frequently, too frequently, the "client" at the mediation has limited settlement authority. That person has to call or text or send smoke signals to the person with real authority if negotiations are to be fruitful. Bring the insured unless there is absolutely no reservation of rights, and no chance that the insured will have to contribute to settlement or pay part of a judgment. Insureds often do not understand that it may be their personal assets on the line. Also, the trial lawyer needs to be there, the person whose personal assets are on the line.

Experience tells us that the hardest person to settle with is the person not in the room—the father of the plaintiff who is a retired lawyer or the wife of the defendant who will divorce him if he pays anything to settle this complex case. These decision-makers need to be in the room. Mediation is a process, a goal-oriented yet challenging process, where the real decision makers need to personally experience the often slow, agonizing, and nerve-rattling process, and be compelled to stare at their own face up close (without makeup) in the mirror at 11:00 p.m. to see the case for what it really is. As hard as that sounds, every millisecond is worth it when the case settles. (And if it doesn't settle, the bulk of the process will be worth it anyway as everybody learns a lot about their own case and their opponents' case).

Briefs: The briefs should be brief. Tell the mediator who the parties are, and who is suing whom for what. Keep it simple. Include only the *key* facts, ideally in chronological bullet points, not a novella. Cite only the most pertinent legal authority, not every element of the case and every jury instruction, and maybe just list the causes of action. Keep in mind that mediators are experienced lawyers who are familiar with the general law in the area applicable to your case; they do not need your law review article to explain every nuance of the applicable law. Are there cross-complaints and, if so, for what? Bullet point defenses? Are there MSJ/MSAs decided or pending? And, never, *ever* attach your MSJ to the brief. We are not going to read it. What about 998s, expired and outstanding? What discovery has been served and what's left, and what was learned? (Again, bullet points will do.) Have experts been designated? How many and what types? Prior MSCs? Prior Mediations? Prior demands and offers? Attorney's fees exposure; basis and amount? Trial date? Trial budget? All of this should be in five or so pages or less. No exhibits if you can help it—it's better to incorporate excerpts from the *key* exhibits into the brief (screenshots are great!). This is not because mediators don't like to read or don't want to spend the time; it helps them

more efficiently focus on the goal—settling YOUR case—rather than tracking documents and arguments about disputed or undisputed non-material facts.

Settlement Demands and Offers: Plaintiffs should make a settlement demand before the mediation. Do not ask for a million dollars at the mediation having never ever made a prior settlement demand. It inevitably results in audible gasps and histrionics (and no talent agent is present). Defendants should make a responsive offer before the mediation. Plaintiffs: if you are going to demand more at the mediation than your last prior demand you need to have really good reasons for that. Nothing elicits a charge of "they're not here in good faith" than a higher demand at the mediation. Defendants: if you're going to offer less at the mediation than your prior offer, be prepared for the same charge of lack of good faith. The effect of these bad faith charges is to slow everything down while we eventually work everyone back to the pre-mediation demands and offers and then start negotiating from there. This is your time and money being spent!

A plaintiff's opening offer demand should be high but not ridiculous. So much time is spent getting plaintiffs into a reasonable range to allow real negotiations to begin. That may just be human nature, but it is not an efficient use of the mediation time. The same applies to opening offers. Often, they are ridiculously low in a reflexive response to the opening demand. (Oh yeah? Take that!) Instead, work towards your goal regardless of how ridiculous the other side is.

Good/Bad Faith: In almost every case the other side will accuse your side of bad faith and you will accuse the other side of bad faith. We do not spend a lot of time worrying about that or even conveying it. The other side never thinks that they are there in bad faith and neither you nor we are going to so convince them.

Smoking Guns: Regarding secret witnesses and evidence, and the smoking gun that the other side does not know about, experience tells us that the other side does know about it and is going to discount it anyway. If you want to get the case settled and you actually do have something of value that the other side does not know about, and that will cause the other side to have pause, you can hold that evidence until deposition, or until trial impeachment and see how that works out for you, or you can ***use it now*** and possibly settle your case.

Last, Best, and Final: We prefer not to convey them as "last, best, and final" but some mediators will convey them as such if you insist. That said, we have not met many last, bests, and finals that are last, best, or final. So why bother?

Mediator's Proposals: Mediator's proposals work, but only if the parties have negotiated for a while and they are within striking distance of each other. We often give the parties a few days to consider the mediator's proposal and it continues to amaze us how often the parties agree to accept or pay an amount that they emphatically said that they would never pay or accept.

> [M]ediators are experienced lawyers who are familiar with the general law in the area applicable to your case; they do not need your law review article to explain every nuance of the applicable law.

Settlement Agreements: Be prepared to sign a settlement agreement at the mediation unless you have a very good relationship with opposing counsel. Settlement agreement terms that are often at issue include to whom payment is to be made, satisfaction of liens, payment of costs and expenses of suit, who is to be released and the extent of the releases, confidentiality, non-admission of liability, non-disparagement, tax treatment of payments, liquidated damages for breach, court retention of jurisdiction (Cal. Civ. Proc. Code § 664.6), attorneys' fees for breach of the settlement agreement, and the use of and terms of a stipulation to entry of judgment. Don't count on getting an apology or acknowledgement of fault.

Despite their many similarities, each mediation is *sui generis* and exceptions to these guidelines abound. Generally speaking, however, these tips for "winning at mediation" are a good place to start.

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