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# Mastering Mediation: Getting Your Clients Better Settlement Outcomes

# Before the Mediation:

Rule of Thumb: The better prepared you are for the mediation, the better outcome you will achieve for your client during the mediation. Information is power in a negotiation.

\*Know evidentiary support, BATNA, what other side wants, comparative verdicts, costs & risks

\*Keep in mind that you want to persuade the other side to evaluate the case similar to your evaluation

Set Conditions to the Process when appropriate

Prepare Your Client so not an obstacle to settlement -

- For mediation as the culminating event
- Your role as attorney to be a zealous problem-solver/collaborator – other side needs to feel a gain
- Awareness about process of mediation & need for concessions
- Role of the client. Info to share and when
- Who needs to be there as support? Authority? Decision Making?





## Speak with Your Mediator – Pre-Mediation Caucus

- Protected by Confidentiality
- Identify obstacles & options to settlement & issues particular to your case.  
Info you want to tell the mediator without your client present
- Issue Prioritization
- Relationships (with client and between parties)
- Who needs to be present on the other side
- Allows mediators to ensure you and other side bring important documentation

# Share Your Mediation Brief With The Other Side

1. Strengthens your position at the mediation
2. Often times decision-maker is not in the room
3. Saves time
3. Hard to get other side to change their “headset” quickly
4. Enhances Your Presence in the Room
5. Can submit separate memorandum that contains information that you do not want to share

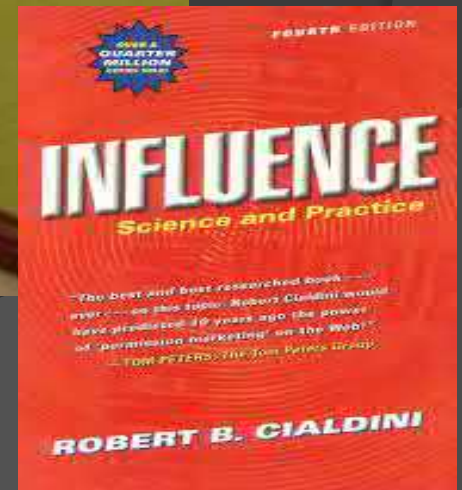


\*Just give big picture, not nuanced arguments

\*Make sure other side (especially insurance adjusters) evidentiary support for damages or will discount it - do not hide the ball

# Play Nice with Opposing Counsel

People give more to people they “like”



# Anchor Wisely (Anchoring Effect)



- People look at numbers in relation to others
- Find the sweet spot
- Fixed pie negotiations resolve at the midpoint of the first reasonable offer and demand
- Studies have shown that the person who makes the first reasonable offer has a negotiation advantage.
- Soften the impact of a large anchor with creative terms or by attaching to damages
- Who goes first? Chris Voss (“Never Split the Difference”) says let other side go first.





# Concessions

- \*Pattern Sends Messages – not too big early
- \*If you stop making concessions & offer something creative, other side will assume you have no more money to negotiate with
- \*Never give a concession without getting one in return
- \*Accompany requests with information – studies show that people give more when given information (\*Triggers)
- **Save some concessions for the end of the negotiation when mediator pushes**
- **No backward step – engenders negative negotiation behavior in other side**
- **How many? Depends – don't let negotiation dance get stale**

# Should You Reveal Your Bottom Line to the Mediator?





# Be Flexible

\*Be Open to Change of processes-  
benefits to joint session & caucus

\*Be Patient with the Negotiation Dance

\*Be Open to and Aware of Mediator Tools, such as,

- Neutral Framing of Messaging
- Hypothetical Offers/Mediator Proposal
- Use of Brackets
- Objective Framework to Determine Valuations

\*Listen - Mediations Can Help You Prepare for Trial

\*While mediator is in other room, get helpful info & figure out  
what you want mediator to ask the other side



# Understand Confidentiality Limitations When Revealing Information

Mediators Want Information – helps us explore underlying interests and find a resolution

- California Evidence Code sections 1115-1128 & FRE, Rule 408 make communications (written & oral) in mediation confidential – not used in civil proceeding
- Limitations:
  - \*Does not protect information from discovery
  - \*Does not apply to criminal proceedings
  - \*Does not make info private (but Fed Confid Statute & Model Rules)
  - \*Unclear if can be used for impeachment
  - \*Casell recently upheld confidentiality for different civil proceeding
- Evidence Code sections 1152 & 1159 recently amended to require attorneys to give written disclosure of mediation confidentiality (Casell)
- Choice of law – on zoom there's particularly a question – each state different
- Draft more restrictive and clear confidentiality agreements if worried



# Consider Bridging Impasse with Creative Resolutions

Create win-win solutions by trade-offs of underlying interests or finding overlapping interests (the goals/interests underlying positions) – people want to be collaborative

Can include: payment plans, reputational rehab, media access, apologies, ongoing personal or business relations, repair, work performance

Can agree to an objective framework for determining value or settlement amount (especially when dealing with the same set of factual info)



# Never Sleep on the Deal

**Memorialize all material terms in writing**

**Consider bringing a draft settlement agreement**



# Negotiation Tips

- Time pressured offers – scarcity effect
- Contingency Agreements
- Use your Power (BATNA, Info, \$, relationship)
- Avoid Argument Dilution
- The More That You Explain, The More Likely You Are To Get What You Want
- Rule of Reciprocity





Good Faith Negotiations are Never A Waste of Time  
Use your mediator to help settle later, give a mediator's proposal, help w stipulations on documents, scheduling, etc.



**Tips to Optimize Settlement Outcomes**  
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**\*Before the Mediation**

Understand your goals, risks, best alternative to a negotiated agreement & worst alternative to a negotiated agreement. Understand other side's goals and interests. Allows you to gain power from information, accurately evaluate your case, find creative resolutions.

Speak to your mediator in a pre-mediation conference about obstacles & avenues for settlement, the process, information that you don't want your client to hear.

Share your mediation brief with other side– gives you an advantage in the mediation so that other side comes with a better case evaluation (you can hide your smoking guns and confidential info)

**\*During the Mediation**

If you are concerned about whether other side is negotiating in good faith, put conditions on the negotiation. If suspicious about motivations, do not reveal sensitive information because it can be used against you. Time the revelation of information so you can use it strategically to extract concessions.

Be appreciative of offers and concessions. Make sure other side knows they have been heard and that you are trying to accommodate their interests. Appearance of collaboration rather than positional bargaining likely will produce more favorable negotiation results. People are pre-disposed to want to collaborate & won't agree without a feeling of gains.

Prioritize discussions about issues that likely resolve in your favor.

Anchor (initial offer/demand) wisely - find the sweet spot that is high enough for concessions but not insulting. Negotiations resolve at the midpoint of first "reasonable" offer and demand. Tactical advantage to making the first reasonable offer/demand.

Creative resolutions can bridge the gap (payment plans, structured settlement, accommodating business or reputational interests, objective framework for determining a settlement amount). Look for a trade off of interests or mutual interests. If other side wants something of low value to you, give it because the "rule of reciprocity" is a social obligation that influences people to repay favors/kind acts.

Place nice – "Likeability" is best way to achieve your goal. Show respect and generosity. It will be reciprocated

If you have any questions, please do not hesitate  
to contact me at ADR Services, Inc.

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