

Orange County Bar Association
BANKING & LENDING SECTION MEETING

July 16, 2013

Topic:
How to be a More Effective Advocate in Mediation

Beki's Perspective Pieces

- Goals & Benefits of Mediation – The Bottom Line
- Preparation: It's a Walk, not a Race . . . But be Prepared to Go on a Long Walk!
- Preparation: Plan for Success and Go to Mediation Prepared to Settle
- Preparation: The Personal Impediments to Decision Making, Which Affect Our Ability to Communicate, Negotiate and to Make Decisions About Settlement
- Effective Advocacy: Play to the Right Audience
- Effective Advocacy: Set Realistic Bargaining Goals
- Effective Advocacy: Anticipate and Plan for Impasse



Our panel topic is “How to be a More Effective Advocate in Mediation.” That is a very broad subject that we could spend hours discussing and debating, but we only have about 60 minutes during today’s section program!

So . . . in preparing for today’s program, I decided to write a little something about the parts of this discussion I find most interesting, thought-provoking or useful.

The following are a series of short essays on several narrow topics related to some of the

subjects that will be discussed as part of today’s program. They present my point of view as a mediator and as a student and teacher of mediation. In writing these essays, my goal was to distill and capture not so much what mediation *is* . . . but what mediation *could be* and why it *should be* the “preferred” dispute resolution process for business disputes. There are also some thoughts on how advocates could better understand and utilize both the process *and* the mediator.

The attached essays are written from my current perspective, after years of practice and study, and are thus called “perspective pieces.” There are many points of view in this rapidly changing/developing area, so I do not mean to suggest by any means that what is set forth on the following pages is dogma. They are simply my thoughts and views.

I hope you enjoy reading the following essays as much as I enjoyed writing them. I would love your feedback (pro and con). Please email me at Rebecca@callahanADR.com.



Goals & Benefits of Mediation – A Financial Perspective

Over the past 10 years, approximately 10,000,000 petitions/complaints have been filed in the California state courts each year. Of those, approximately 8,000,000 (80%) are criminal filings, meaning that civil matters represent only about 20% of annual filings and compete for courtroom time and judge attention at the rate of 4:1.

The 2,000,000 annual civil filings include family law, uninsured motorist claims, collection actions and other low-dollar disputes. Unlimited jurisdiction cases – disputes whose dollar value is in excess of \$50,000 – account for only about 10% of all civil filings and only about 2% of total annual court filings.

So, business/commercial litigation disputes are just a small fraction of the 200,000 or so “big dollar” actions filed each year in California courts. Included in that 200,000 are construction, personal injury, employment/workplace, and statutory claim disputes.

According to the statistics compiled by the California Judicial Council, less than 10% of the unlimited jurisdiction cases are decided/determined by a trial on the merits, meaning that over 90% are settled, resolved by dispositive motion or abandoned – pretty much in that order of priority.

The bottom line: Given the imbalance that exists between “big dollar” civil disputes, on the one hand, and criminal / “small dollar” civil disputes, on the other - in terms of competing for courtroom time and judge attention - at the time your action is filed, the statistical odds are that it will be resolved by settlement and **not** by a trial on the merits. The question is: when? And after how much time, effort and money has been invested in the litigation?

In mediation, the discussion is not limited to debating the legal merits of the dispute and frequently includes discussion about reality factors such as the congestion in the courts, the unlikely event that the matter will be decided by a trial on the merits, and the expense associated with taking a matter through trial (and possibly an appeal).

Early mediation provides an opportunity for parties to evaluate and gain an understanding about the nature and extent of the investment they may be required to make in order to obtain a judicial resolution *and* to contrast that evaluation with an assessment of the risks versus rewards associated with a litigation outcome (aka, BATNA, WATNA and LATNA).



BATNA (Best Alternative to a Negotiated Agreement)

“What is the best I can expect from the court if we don’t come to a negotiated agreement?”



WATNA (Worst Alternative to a Negotiated Agreement)

“What is the worst I can expect from the court if we don’t come to a negotiated agreement?”



LATNA (Likely Alternative to a Negotiated Agreement)

"On balance, what is the most likely outcome I should expect from the court if we don't come to a negotiated agreement?"

Once given an opportunity to understand all that is involved in a litigated outcome in terms of the investment of time, resources and dollars, it is not uncommon for parties to change their views about their perceived value of a litigated outcome and, in turn, become more willing to engage in constructive dialogue about how a negotiated resolution might be achieved *after* evaluating the expense associated with a litigation outcome and the above risk-reward scenarios.

The numbers, in terms of the statistical odds that any given business/commercial dispute will be resolved by a trial on the merits, certainly seems to militate in favor of mediating sooner rather than later. And there is really nothing to lose for a California litigant in exploring a negotiated resolution through mediation given the broad confidentiality protections afforded by the California Evidence Code. *Through mediation, everyone gains information and information is king is evaluating a business dispute.*



Preparation: It's a Walk,
not a Race . . . But be
Prepared to Go on a
Long Walk!

Mediation is an intense process that brings everyone to the table, closes the door to the outside world and focuses full / sustained attention on resolution of the dispute at hand. This is in stark contrast to the litigation process which drags out for months, sometimes years, before any resolution is in sight. Despite that intensity, the process itself proceeds at the pace of a walk, not a race.

As you work with your clients in preparing for the mediation, it is helpful to remember that the mediation process is not so much about finding truth or justice as it is about searching for options and crafting solutions. Parties should be prepared to understand that the mediator has no power to force anyone to do anything. While the mediator is friend to all in seeking a negotiated resolution, he/she is not an ally or advocate for anyone at the table.

The dispute can only be settled when all parties and counsel agree, which means that some level of persuasive conversation and negotiation needs to occur at the mediation. Parties and their counsel should plan in advance about how to make statements that strike a balance between passion and diplomacy, keeping in mind that one goal of mediation is to get the participants speaking *and listening* to one another.

Many times parties (and their counsel) come to mediation expecting to start by exchanging offers and demands, even when they have not had settlement discussions of any kind before arriving at the mediation. Negotiation is certainly part of the mediation process, but it occurs after the parties have settled in, engaged in constructive dialogue about the dispute and outlined a framework within which both sides are willing to negotiate. This takes time. The higher the level of preparation and communication skills, the faster the process moves. And the reverse is also true.

Most cases that come to mediation do not involve clear indicators of liability or easily determined damages with a ready source of payment. The cases that go to mediation generally have one or more challenges that make the outcome uncertain and that uncertainty works to motivate both/all sides to consider a negotiated outcome. Some common scenarios that present are:

- conflicting versions of the facts where there is some level of uncertainty as to how the conflict in the evidence will be resolved by the trier of fact at trial;
- a novel legal issue on which there is no binding precedent or a split in the lower courts that have considered the issue, thus introducing some level of uncertainty as to how conflicting views of “the law” will be resolved by the trial judge;
- uncertainty about how to value damages, even if there is liability;

- multiple actors among whom liability/responsibility must be apportioned;
- outside factors over which the parties have no control that affect the value of what the parties are arguing about (e.g., title disputes where the market for the property in question is volatile or fluctuation; IP disputes where there is a limited window of opportunity to commercialize the property); and/or
- reality factors such as a party's financial condition or externalities unique to the party that have either elevated or demoted the importance of the dispute.

Because it is the difficult case that finds its way to mediation, parties should be prepared to hear about things that do not necessarily coincide with their view of the dispute or what they think is the right / fair / reasonable outcome. At some level, these are difficult conversations to be had because they challenge the positions parties have taken in the very public forum of the courts and sometimes the press. In any event, both sides will need to be given the opportunity to state their case and to engage in some level of dialogue about that case before either side is ready to engage in a meaningful negotiation. Parties should be prepared to expect this dialogue session and to participate in it.

The parties and counsel who do the best in mediation are the ones who are mentally and physically up for a long walk. They have cleared their calendars for the day and removed as many external pressures and distractions as possible. They have come prepared to diplomatically state their views *and* to talk about what they know or anticipate the other side wants to talk about. They have come prepared to tie their proposals to reasons, and to talk through those reasons with the other side. Bottom Line: They have come to fully vet whether a negotiated resolution is possible and to give that opportunity clear-headed consideration..



Preparation: Plan for Success and Go to Mediation Prepared to Settle

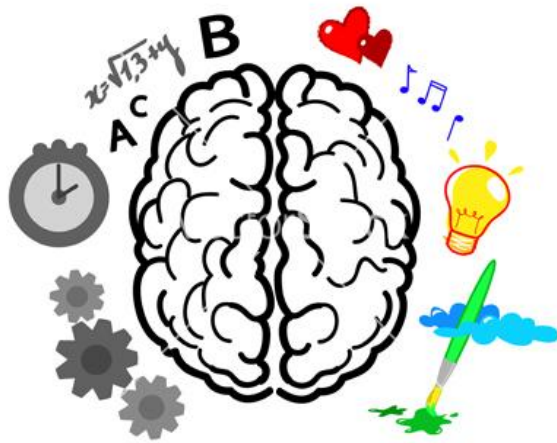
An axiom is a self-evident truth that requires no proof; a universally accepted principle or rule. The number one axiom of dispute resolution is that all disputes come to an end at some point in time. In mediation, how that axiom plays out is a matter of choice left to the parties.

That leads to the second axiom of dispute resolution, which is that a dispute belongs to the parties who created it; they own it and are the ones responsible for its existence. Party choice on how to resolve a dispute is a cornerstone of mediation, the idea being that the parties most directly affected by a dispute are – given the right circumstances – the ones who are best able to resolve it; that the best resolution is likely to flow from the parties themselves. Mediation is all about creating the right circumstances for the parties to mutually agree that a negotiated resolution is in their respective strategic best interests.

I am always surprised when, at the start of a mediation, the opening remarks of the attorneys and/or clients include something along lines of “this case will never settle.” Statistically, that mindset is unwarranted because most cases are resolved through settlement (not trial), and 70 to

80% of the cases that go to mediation are resolved at mediation or shortly thereafter. So my suggestion with regard to mediation preparation is to plan for success at mediation, talk about what the client's settlement objectives are, work with the client to outline a set of discussion points, help the client prioritize its settlement goals, and (if necessary) educate the client on the negotiation process. [Namely, it's not a two-step dance. It's a series of moves and counter-moves and will take time and patience all around the table.]

One of the many goals of mediation is to arrive at a settlement. So my additional suggestion on how to plan for success at mediation is for attorneys and their clients to give some advance thought to what type of documentation might be necessary *and* to bring drafts of possible settlement language or even a draft settlement agreement itself to the mediation in hard copy and electronic format.



Preparation: The Personal Impediments to Decision Making, Which Affect Our Ability to Communicate, Negotiate and Make Decisions About Settlement

Mediators come to the table with a certain amount of influence: their character, reputation, verbal ability, physical appearance, communication skills, charisma, knowledge and expertise, etc. But there are limits to what a good mediator can do as relates to his/her ability to influence the will of another human being. This perspective focuses on the not so obvious impediments to decision making, which may affect the ability of a party (or counsel) to communicate effectively, negotiate and make decisions about settlement.

Neurological Impediments. Neuro linguistic programming deals with the mental processes our brains use to acquire information and gain knowledge: e.g., thinking, knowing, remembering, judging and problem-solving. It is here that we encounter cognitive and motivational biases, which can interfere with a person's ability to problem-solve and make decisions.

A cognitive bias is a habit of the mind; a bias in the way we think.

A motivational bias is a habit of the will; a default reaction aimed at maintaining our comfort zones.

Working together, cognitive and motivational biases prevent us from engaging in problem-solving because, in our respective minds, our *interpretations* trump the facts. They also influence our perception of risk, our understanding of the problem to be resolved, our evaluation of the value/merit of our case, our evaluation of the value of offers made by the other side, and our evaluation of the value of offers we make.

The most common cognitive biases that I see in mediation are “Overconfidence” and “Confirmation.” Overconfidence is defined in the American Heritage Dictionary as being excessively confident or having unbounded optimism. The Greeks called it *hubris* (or pride) and labeled it one of the seven deadly sins. The effect of overconfidence is a well-established bias in which someone’s subjective confidence in their judgments is greater than the objective accuracy of those judgments. Overconfidence is a cognitive barrier because it allows us to believe or feel that we know more than we really know and increases the odds of impasse in a negotiation setting because we cannot bring ourselves to move off of a position that appears to be an obvious truth. Overconfidence leads people to discount low probabilities¹ and to overestimate attractive consequences.²

Overconfidence goes hand-in-hand with “confirmation bias,” which causes us to seek out evidence that confirms an existing belief, theory or hypothesis, and to place more emphasis on facts that support our desired outcomes and to discount or disregard contradictory evidence. This bias is self-confirming. The more evidence we accumulate in support of our position and the more time we spend on research and analysis, the more firmly we hold on to that belief and the less inclined we are to consider anything to the contrary. Litigation is like a Petri dish for confirmation bias

¹ E.g., a 30% chance of winning is viewed as something better than it really is.

² E.g., discounting the prospects of losing at trial or getting something less than what defendant has offered to settle for the chance of getting public retribution through negative publicity about the lawsuit.

because it builds a case around one side of the story and encourages sorting through facts to find those that fit our theory of the case (disregarding or discounting those that do not). The result in mediation is the same as in trial: the parties tell and have lived two very different versions of the same dispute, and those versions frequently cannot mutually co-exist. The challenge in mediation is to get the parties to broaden their view of the dispute and their understanding about how courts handle conflicts in the evidence.

Overconfidence and confirmation bias present challenges in mediation because they result in a *miscalibration* of subjective probabilities and a *misperception* of objective realities.

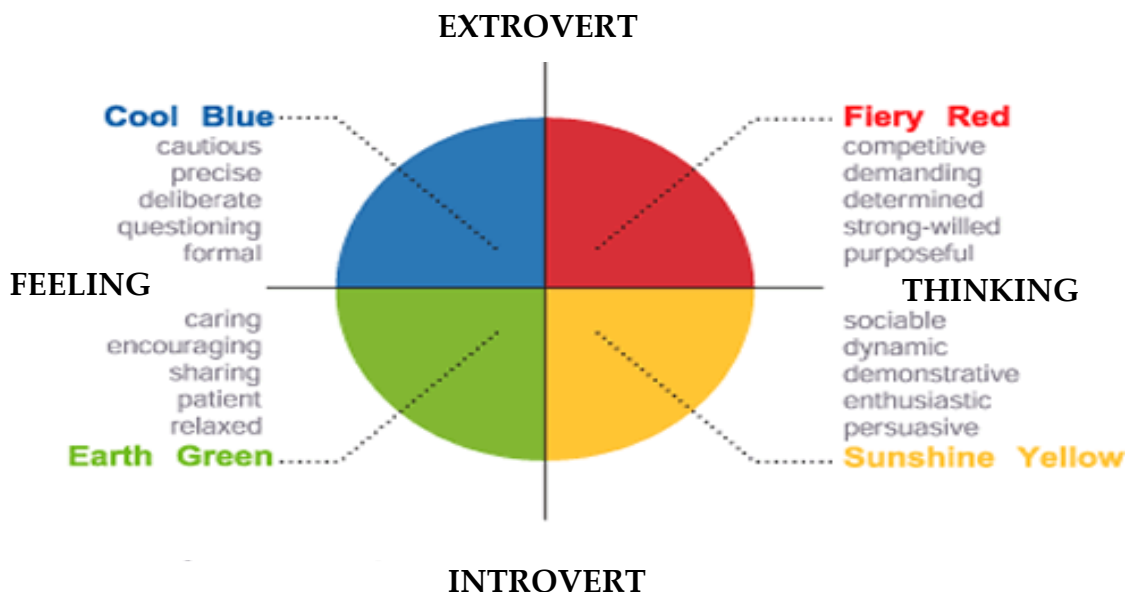
Learning Points re Neurological Impediments:

1. A settlement is not likely to be achieved until the conflict between the parts of the brain is resolved – all around the table! In preparing for mediation, consider whether there might be biases as work on your side, as well as the other side, and give some thought as to how the mediator might help objectify the dispute and open the door to problem-solving discussions and meaningful negotiations.
2. Resolution and reconciliation require the content of the various brains at the table to shift and change. This is a very “present tense” process and discussion. What happened in the past is a fait accompli. There is nothing that anyone at the table can do to reverse or its impact or resulting consequences. But, the people at the table can put the dispute in perspective in terms of what is going on currently in their lives/businesses and where the dispute fits in all of that. Litigation and preparation for trial live and continually revisit the past. In preparing for mediation, it might be helpful to take a look at what is going on in the present, and give some thought as to how those circumstances and events might influence a negotiated

outcome and create an opportunity for the parties to have something constructive to talk about.

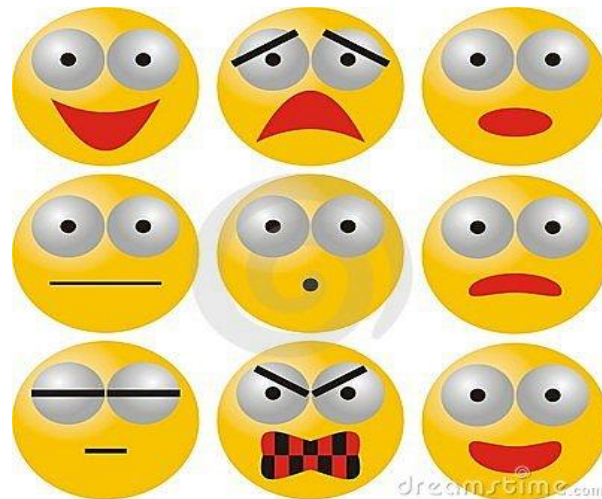
Psychological Preferences. In 1921, Carl Gustav Jung theorized that there are four principal psychological functions by which we experience the world: sensation, intuition, feeling and thinking. Of these four functions, Jung proposed that one is dominant and influences how we perceive the world and make decisions. Katharine Cook Briggs and her daughter Isabel Briggs Myers took Jung's theories one step further and put the theory of psychological types to practical use through the Myers-Briggs Type Indicator (first published in 1962). The underlying assumption of the MBTI is that we all have specific preferences in the way we construe our experiences, and these preferences underlie how we define and perceive our interests, needs, values and motivations.

The following is one diagram of how psychological preference behaviors are described:



Learning Points re Psychological Impediments: In preparing for mediation – no matter what behavior(s) might manifest themselves at the mediation – you should help your client be prepared to answer the following questions: *What is it that you want? Are you getting what you want by doing what you're doing in this mediation / in the litigation?*

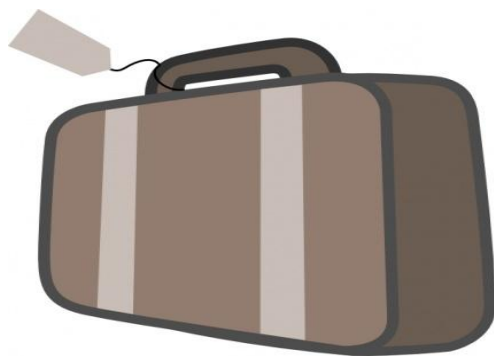
Emotional Impediments. Our brains do not make a distinction between physical threat and social insult. Both can trigger an emotional response, the four most common emotions are anger, fear, injustice and betrayal. Emotions are not based on reasoning and thus do not promote rational analysis, discussion or decision making. And expressed emotions frequently invite an emotional response from others.



In the context of mediation, emotional impediments occur in the form of venting. A lot of attorneys prepare their clients to use mediation to get all that's bothering them off their chest. That's fine, but if it's your client that is doing the venting or if you're faced with an adverse party that needs to vent or if both/all sides need to vent, it's going to take a while before constructive dialogue or negotiations can begin. Emotions are non-negotiable, so when they are the drivers, there can be no meaningful negotiation until the emotional driver is identified and acknowledged. [E.g., You thought Party X was your friend and feel that you have been betrayed and taken advantage of by Party X doing Y.]

Learning Points re Emotional Impediments: Emotions permeate the decision making process. They get in the way of productive conversations, and are the number one cause of impasse. In preparing for mediation, you might want to consider what kind of emotions might be in play on your side or the other side. If high emotions are in play, alert the mediator so that he/she can be prepared to work with whoever on working through those emotions. High emotions – especially fear and anger – distort “rational” conversation and decision making.

Personal Baggage. We all have personal baggage that we carry around with us in the form of strongly held values and beliefs. Our brain aggressively rejects information that runs counter to closely held values and beliefs, and puts up protective barriers so that we can hold on to closely held values and beliefs.



A value is a judgment of what is important to us

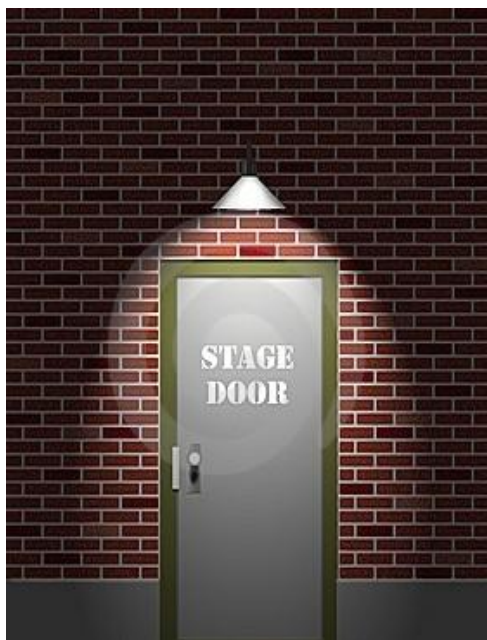
A belief is an expectation based upon our personal, cultural rules

Learning Points re Values and Beliefs: These are matters of the heart and head, and are rarely altered by offering up opposing “facts.” Like emotions, values and beliefs are non-negotiable. When values and/or beliefs clash, the challenge in seeking a negotiated resolution is to build around a common value (e.g., peace) and exploring ways to accommodate both or minimize the importance of values and beliefs in defining the outcome. Another tactic you should anticipate is an analysis/question by the mediator as to whether a party’s stated values or beliefs are consistent with what that party is seeking/demanding at the mediation.

Bottom Line Conclusion.

Mediated conflict resolution is not a “one size fits all” formula. The cycle of hypothesis building and testing is the basic strategy that serves as a foundation to the process – but has to be modified to deal with the specific obstacles encountered in a particular dispute, the personalities of the people involved, and the present circumstances of the parties as they present themselves at the mediation, cultural differences, different value systems, etc.





Effective Advocacy: Play to the Right Audience

The tendency of both parties and counsel in mediation is to direct their comments and make their pitches (or pleas) to the mediator. But the mediator is not the one who has to be persuaded. *It's the other side.* The challenge to both/all sides is to get the other side to give them what they want. Not easy! Especially when the parties see the dispute and their potential litigation outcomes quite differently.

The reality is that in any good settlement, no one gets everything they want or all that they feel they are entitled to, but everyone gets something. And that something is better than the risk and expense of not settling on the offered terms and proceeding with the litigation. So, why then do so many mediations start with aggressive position taking and aggressive rhetoric and sometimes demonization of the other party and/or its counsel? That kind of conduct during the course of the litigation is generally one of the reasons why no constructive settlement dialogue has occurred between the parties *before* the mediation. So, why would that conduct *at* the mediation be effective?

From the mediator's perspective, the impression I get is that the strategic object of such a presentation is to gain the mediator's approval and turn the mediator into an advocate for one side and against the other side. But such a strategy misunderstands the mediator's role in being at the table in the first place and fails to appreciate the mediator's number one ethical duty while sitting at the table: the duty of neutrality. The mediator is like Switzerland: friend to all, ally of none.

So if the mediator is not at the table to help measure or determine who is right / who is wrong; who has the better/weaker case; who will win/lose, why is he or she there?



Communication. To be the person responsible for initiating communication (if the parties are not talking) or facilitating better communication (if the parties are already talking)



Shepherd the Process. To be the person responsible for chairing the mediation session and administering it in a way that fair, respectful and even-handed to all involved.



Agent of Reality. To be the person responsible for introducing "reality" and verifiable objective criteria; to question extreme positions and unrealistic goals; to point out where a party's stated goals or actions are inconsistent with that party's stated values; etc.



Trainer. To be the person responsible for education about the mediation process and party control / party choice.



Scapegoat. The person who may take responsibility or blame for putting an unpopular/difficult issue or “reality factor” on the table so as to allow the parties and/or counsel to maintain their integrity, to save face, etc.



Leader. The person responsible for making recommendations to the participants aimed at moving the negotiations forward, continuing constructive dialogue about key issues, maintaining the fairness and integrity of the mediation process.



Coach & Role Model. The person who demonstrates constructive communication skills and sets the tone; the person who provides encouragement and guidance as parties make forward moves in talking about the problem or putting settlement option / ideas on the table.



Information Manager. The person who disseminates non-confidential information learned in private caucus as the circumstances seem to invite or warrant.

The foregoing are just a few of the many roles mediators play. My suggestion for effective advocacy in mediation is to give some thought about what roles you think you need the mediator to play and tell him/her! For example, while you believe that your client has the stronger case, you appreciate that the outcome will be largely determined by a credibility contest between the parties or their expert witnesses or both. Who does the trier of fact ultimately choose to believe in resolving this conflict in the evidence? You are not comfortable discussing these matters with the client because you are concerned that it will undermine your relationship with your client and cause your client to believe that you are not a zealous advocate. The mediator is going to want to put the risks/uncertainty of trial on the table. If you agree, you can let the mediator handle/be responsible for initiating that discussion.

For another example, while you have told the client about the costs associated with preparing and sitting through trial, you are not sure that the message has totally registered with the client. Money matters and the uncertainties of litigation can be difficult subjects for attorneys and clients to discuss, especially as they prepare for trial. You can use the mediator to orchestrate this discussion about BATNA, WATNA AND LATNA.

For another example, you can educate the mediator on your pre-mediation settlement efforts *and* tell him/her where and why those efforts got stuck, the purpose being to develop a game plan for how your side might communicate more effectively with the other side and whether those communications should be handled in joint session or private caucus (with the mediator carrying messages between the rooms).

Bottom Line: Your audience is the other side. Effective advocacy in mediation is quite different from advocacy in the courts. While you need to be prepared on the substantive, legal merits of your client's case, simply arguing those merits will not get the job done. Mediation is a facilitated negotiation. The parties thus need to do more than simply square off and shout their positions and demands across the table. The following are some suggestions for additional areas of preparation:

- Come to mediation after advance discussion with your client about what it really wants and needs (in lay person or business terms) *and* bring a set of discussion points aimed at passing this information to the other side.
- Come to mediation after having done some advance thinking about what it is the other side really wants or needs *and* bring a set of discussion points aimed at obtaining this information from the other side.
- Come to mediation prepared and willing to talk through the tough issues, which invariably include discussion about your client's WATNA (the other side's BATNA) and the expense and uncertainty associated with litigation.

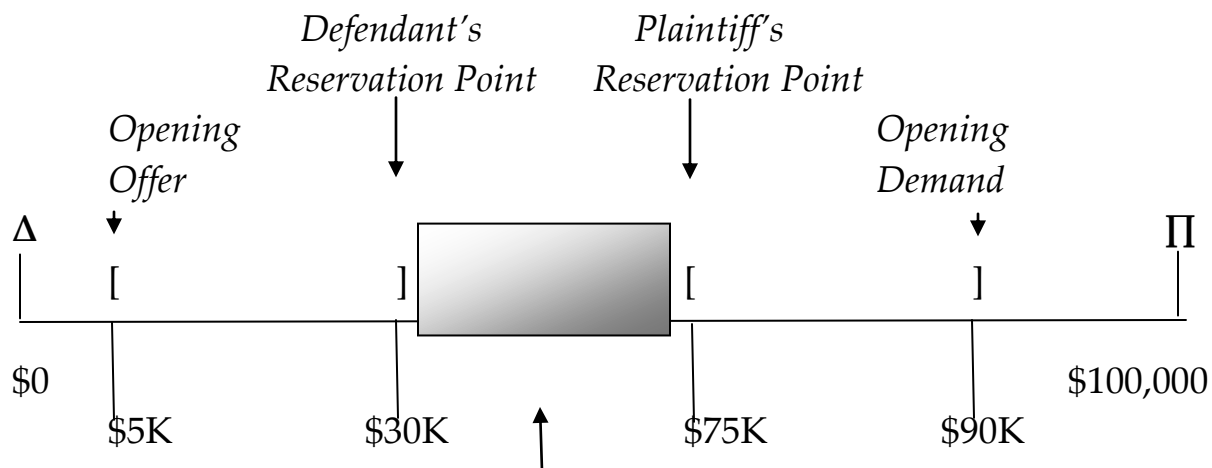
- Come to mediation prepared to assess the parties' present circumstances and to put the dispute in perspective in terms of what is currently going on in their respective lives and whether a litigation outcome is going to meet their current needs or satisfy their expectations.³.
- Come to mediation with a strategy or game plan about how you would like to use the mediator and the various communication vehicles available in the mediation process.

³ E.g., parties who have suffered a loss frequently say that they want to be "made whole." But even with a "win" in litigation, the party usually has to pay for the process in time, money, stress, lost opportunity, etc. and is frequently dissatisfied with the litigation outcome, especially (on plaintiff's side) if the judgment is not collectible.



Effective Advocacy: Set Realistic Bargaining Goals

One goal of mediation is to get disputants talking to the point of “problem-solving” discussions and negotiation. In the context of the litigated dispute where parties are represented by attorneys, the disputants usually come to mediation with a defined range of what they think constitutes a “reasonable settlement” and that range is usually determined by the attorney’s analysis of what he/she predicts the judgment after trial will be discounted by some percentage. For example, plaintiff’s counsel might say that the case is worth between \$X and \$Y and that the plaintiff has an 80% chance of winning. Defendant’s counsel, on the other hand, might say that the defendant should prevail, but has a 20% chance of losing with between \$A and \$B. If you were to graph what the parties’ pre-mediation ranges looked like, it would look something like the following:



This is where the “real” negotiation begins.

It is the rare case where parties' pre-defined settlement ranges overlap because both sides tend to over-value their "best case" and then discount from that assumption. Settlements achieved during a mediation feel and are perceived as "compromises" because they require parties to move beyond their pre-defined reservation points. In the example above, defendant's reservation point was \$30,000 as the most it would offer and plaintiff's reservation point was \$60,000 as the least amount it would accept. It does not too much matter what the basis of each party's pre-defined reservation point is, the fact remains that their negotiation challenge is to stay at the table and negotiate within the gap between their respective reservation points. This is where a mediator can help by, among other things, helping the parties identify, discuss and quantify both dispositive and non-dispositive contingencies and other factors that may not have been considered in the parties' pre-mediation evaluation of the case for purposes of settlement.

There are numerous procedural hurdles that can be put in the path of both parties in the hopes of eliminating some or all of that party's claims or defenses, or significantly impairing the presentation of their case. All cases have them! Dispositive contingencies are part of each side's "worst case" analysis. These contingencies need to be identified, evaluated and weighed and an adjustment needs to be made for the *risk avoided* by settlement.

There are sometimes things external to the lawsuit that could affect the value of what is at issue, the finances or stability of one or both parties, etc. These contingencies are frequently the answer to "What could possibly go wrong?" Just like dispositive contingencies, these outside influences need to be identified, evaluated and weighed and an adjustment needs to be made for the *risk avoided* by settlement. For example, the impact of avoiding fluctuations in the stock, financial or real estate markets; the impact of avoiding negative publicity about the lawsuit and adverse verdict; the impact of removing a contingent liability from a balance sheet.

Other factors may be difficult to quantify but nevertheless bearing upon the rational value of a case for purposes of settlement as compared with *possibly* obtaining a judgment in the future. For example: What is the judge's track record with respect to the efficient (or inefficient) management of a trial? Does the judge have a known predisposition with respect to summary judgment, jury voir dire, motions in limine, foundational issues, use of scientific information? Has the judge decided similar issues in other cases and, if so, which way did he/she rule? What is the experience or skill level of the attorney(s) on the other side? What is the known or perceived ability (or inability) of the defendant(s) to satisfy a judgment? All of the foregoing are *risk factors*. When a risk is avoided through settlement, a discount adjustment is appropriate.

The bottom line is that in order to properly evaluate a settlement opportunity, it should be compared to the net present expected value of the case – after discounting for remaining fees and costs that would be incurred in going to trial and the risk of contingencies and other factors avoided - not the predicted judgment value.



Effective Advocacy: Anticipate and Plan for Impasse

Impasse in mediation is sometimes referred to as a “deadlock” – a situation where the disputants have become “firmly locked or have exhausted their ability to make offers.” It has also been defined as:

- a situation in which no progress can be made or no advancement is possible
- a situation that is so difficult that no progress can be made
- a predicament affording no obvious escape
- a difficult without solution
- an argument where no agreement is possible

These definitions make impasse sound like an insurmountable obstacle; a dead-end with no available detour. But impasse or deadlock is frequently the reason why parties come to mediation! They have engaged in pre-mediation negotiations and have exhausted their own resources and need help or they have been so entrenched in their respective positions and

arguments that they have been unable to open any sort of settlement dialogue. So, impasse is obviously surmountable because convening the mediation will operate to break the first impasse.

In mediation, impasse is generated and controlled and typically is caused by one of the following:

- **Social Errors** – meaning when one side's verbal insensitivity or aggressiveness drives the other side into withdrawal or rigidity
- **Process Mistakes** – meaning when one person prematurely paints himself into a corner
- **Misjudging** – meaning coming to mediation with unreasonable expectations, excessive posturing or playing cards too close to the vest for too long
- **Reservation Points** – one or both sides reaches the outer limits of a pre-defined settlement negotiation range and now must readjust and reevaluate the value of settlement versus proceeding with the litigation
- **Good Old Fashioned Giving up Too Soon** – which is effectively impatience with the process and coming to mediation with an unreasonable expectation about how quickly the other side should be able to move or how many moves and counter-moves might be required to strike a deal.

When impasse occurs in mediation, there is a simple roadmap that many mediators use:

1. Identify that impasse has occurred; that the parties are stuck;
2. Review where the parties are in their negotiations (early, mid-stream, close to the finish line) and what agreements, concessions, accommodations have been made;
3. Revisit the parties' interest in seeking a negotiated resolution and seek commitment to continue working towards that end; and
4. Apply strategies as may be appropriate.

For me, what strategy is applied to break impasse depends on where in the negotiation process the parties have gotten stuck.

- Early in the negotiations (“Get the Ball Rolling” impasse strategies)
- Late in the process, after considerable negotiation effort *and* movement all around the table (“Roadblock” impasse strategies)
- Late in the process, after considerable negotiation effort and movement *and* after trying various “Roadblock” strategies that have failed (“End Game” impasse strategies)

A description of some of the above strategies is set forth in Appendix A.

Bottom Line: It is the rare mediation that does not include at least one impasse incident. Effective advocates will prepare their client for impasse and will likewise be familiar with and ready to respond to whatever technique the mediator tries or proposes.

APPENDIX A

STRATEGIES FOR BREAKING IMPASSE

Early in the Negotiations – Get the Ball Rolling

1. Brainstorming

- Separately or with all parties
- All options considered – no censorship
- Mediator postpones any evaluative input
- No decisions – just options
- Decision are made after everyone has a chance to synthesize the information and discuss the various options

2. Take Stock / Persevere and Project Optimism

- Verbal inventory of progress so far
- Highlight opportunities that have been put on the table
- Encouragement – with a little bit more work, the parties will succeed in crafting a settlement
- Keep the parties talking
- Return to communication about an issue, interest or need that is unresolved

3. Evaluative Feedback / LATNA Assessment by Mediator

- Mediator makes a candid assessment of the dispute as to its likely outcome in court or the value of a legal claim or defense
- Encourage further risk analysis of what might happen in court
- Delay any evaluation as long as possible and keep it as general as possible

4. Reality

- Here's where the negotiations stand right now
- Explore what might happen in court if a negotiated settlement is not achieved
- Leading questions vs. mediator evaluation (What do you think might happen if . . . ?)

- Introduce the possibility of negative evidence, jury confusion, judge error (Have you considered how a judge or jury might react to . . . ?)
- Test assumptions vs. reality (Does your damages analysis assume that real property values will stay or go up? How do you reconcile that with our weak/struggling economy?)

5. Story Telling

- Tell a story about another case or similar situation that did not turn out as planned/hoped
- Introduce the concept of “decision error”

6. Visual Aids / Net to Plaintiff

- net to plaintiff based on possible litigation outcomes:

-0- \$5K \$25K \$75K

\$45K

compare settlement – net \$45K – to possible litigation outcome & note the progress that has been made through the mediation.

- discuss “affirmation bias” – could that be distorting plaintiff’s appreciation of the settlement offer on the table
- discuss “decision error” – study shows that plaintiffs tend to over value their cases and reject settlement offers that 66% of the time are better than their actual outcomes.

7. Time Out

- Take a break / grab a bite to eat / take a walk

Standstill After Considerable Effort – Road Block

1. Settlement Games / Gap is Small

- Everyone's locked in and the divide is not that great
- Split the difference
OR
sometimes you just need a clever way to help the parties make the last move without blinking first
- Play a game: for the last \$_____, loser pays
flip a coin
play a hand of blackjack
play a game of dice
- Baseball: Mediator and parties put a # on a piece of paper and in a sealed envelope. Whoever's # is close is what gets paid
- Lottery: Parties put ## in a hat and mediator draws one. The number drawn is what gets paid.

2. Blind Offer

- If I can get the other side to come down from their "bottom line," will you go up from your "bottom line"?

Is there any # above / below your bottom line # if it will get the case settled? E.g.,

Bottom Line:	\$90,000	\$100,000
Adjusted Bottom Line:	\$93,500	\$96,000

- Still don't have a settlement, but the gap is so close – ask if you can reveal the numbers to both sides. Turn cards over.

- Note that the parties are only \$2,500 apart after starting the mediation six-figures apart and negotiating in five- and six-figure increments.
- Split the difference or play a game

3. Conditional Offer

- Go to plaintiff. You're stuck & they're stuck.

If I can get defendant to move a step, will you move a step?

If I can get the defendant to increase its offer, would you respond?

If I can get the other side to come up \$_____, will you come down \$_____?

4. Bracketing

- Establish a high and low end for offers and demands
- Suggest monetary "ranges" that you feel might anchor the parties in a zone that they can negotiate within
- If I can get defendant to move a step, will you move a step?

5. Double Bracketing

- In private caucus, ask each side to bracket a range of settlement amounts that comes as close to the insult zone as possible
- Bracketing is confidential, but focuses the parties' thinking on movement
- After seeing the parties' respective "brackets," assess whether settlement is possible and what you might need to do to move them closer

6. Best Settlement Offer

- What is the most you would pay / least you would accept to not go to trial in this case?
- Mediator asks permission to float that number to the other side – not an offer, just testing the waters

7. Expanding the Pie

- Is this matter related to other claims / matters?
What if we can deal with those items today?
- Are there additional parties?
What if we can include them in this process?
- Is timing a factor because of other things going on in a party's life or business?
What if we get everything resolved today?

8. Mediator's Rorschach Test

- I know you're not going to pay more than / accept less than \$_____, but how about:

\$95,000

\$93,000

\$92,500

Throwing numbers out, trying to get a response as to how far you might be able to push someone beyond an intractable position.

End Game – When Everything Else has Failed

1. Blind Bid

- When two or more parties are negotiating over the same object – such as a piece of art or a single parcel of real property – have them give you their last, best confidential offers to buy the object. The highest bidder wins.

2. Partial Deal / Contingent Deal

- When you are unable to settle the entire case, explore whether the parties might be willing to resolve some by not all of the matters in dispute or with some but not all of the parties in a multi-party case
- Partial settlement sometimes creates its own momentum that either keeps parties at the table or brings them back at a later point in time.

3. Net to Client

- Settle today, no risk, no trial costs or fees – what is net to client today?
- Don't settle and go to trial, what is most likely outcome (somewhere between BATNA and WATNA), what will it cost to get that result – what is likely net to client after trial?
- And what if "X" is spent going to trial and the client loses? How happy/unhappy will he/she be?
- Is the offer on the table worth considering / countering?

4. Time Value of Money

- You've been fighting for 2 years.
- If you'd settled this matter 2 years ago, you could have done "X" at "Y" value – today, value is less than "Y". Lost dollars due to fighting.
- Where are you going to be 2 years from now? What "Y" opportunity are you missing?

5. The importance of being right

- Basically, ENE after the fact
- Do the deal, but request non-binding decision from the mediator re the merits of the dispute based upon the briefs and matters discussed during the mediation.

6. Mediator's Proposal

- Silver bullet – number on a piece of paper that both sides can accept or reject without the other side knowing unless both accept.
- *Not* an evaluation of the case – just a number the mediator picks that he thinks can get the case settled.
- Have to make sure ALL parties want the suggestion. If any party does not want the suggestion, mediator cannot use this tool.
- *Note:* Frequently used / overused to avoid the intellectually honest negotiation. Major problem with this approach is that it often uses confidential information that the mediator has come by in private caucus.

7. Med-Arb

- Re impasse issue, how about referring that issue to arbitration to have it resolved quick and dirty
- Re arbitration of sticking issue, can propose “Hi-Lo”

If arb award comes in below the “low” number, then the compromise number will be the agreed upon low number.

If arb award come in above the “high” number, then the compromise number will be the agreed upon high number.

If the arb award is in between, then that's the number.

Arb will cost \$_____ -- or can add those dollars to the current settlement pot today.