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One mediator's seven suggestions for resolving your case

With the right authority present, a trained dog might successfully mediate a case

By Robert M. Smith

When I speak about mediation, I am often asked (usually, by newer lawyers) what the basic rules of advocacy are. Are they, they ask, the same as in the courtroom? Well, not quite. Although I do believe a superb trial advocate is very likely to be a superb advocate in mediation – but take into account, please, my bias, given my own background as a definitely-not-superb trial lawyer and English barrister.

I cast aside anecdote here, and try – with great trepidation – to lay out a few basics. This effort, I repeat, is just one mediator's view – and may be all wrong.

This exercise takes me back many years, when I waited in the old San Francisco City Hall Law Library, way up under the Rotunda. I would read old British books on trial advocacy – and, foolishly, seek to put the tactics into practice in my next jury trial. Then...one day, I came to a chapter in a hornbook urging the "appropriate" use of raising one's voice in the courtroom. In quick succession, I had a petrified witness, a jury on the edge of their chairs, an opposing counsel with a very raised voice, and a tolerant, slightly amused judge. (Thank Heaven, it was state court.) Bar license retained, case won.

Seven Suggestions for a successful mediation

1. The presence of power

The decision makers have to be present. It is only a slight exaggeration to say that if this suggestion is complied with, almost any mediator can facilitate a successful result. During a dispute I co-mediated with Tony Piazza, Tony suggested to me that, with authority present, a trained dog could mediate cases to a resolution, and, without authority present, no one could resolve a case.

2. Put your wallet away

Think about whether there are non-monetary issues. Figuring out that there is a non-monetary element and figuring out what it is may require brainstorming in a group and before people are tired. It may also require input from others back at the client's office or home and at your office.

3. Ink it

You and the client might try to figure out on paper in advance how the economic and non-economic elements would get written down in a binding settlement document.

In fact, you might bring a draft of a settlement agreement – something short that captures the main elements. It may avoid two or three hours of wrangling when people are tired and cranky.

4. Docs

Have with you at the mediation documents that are the basis of a contention you are making or that will rebut the other side's position.

This requires thought: You probably can't bring a file box. What documents may prove critical? They probably don't include the Third Amended Complaint or an expert report – the kind of documents that people sometimes bring. But they may include a contemporaneous memo, or a copy of a pivotal legal decision.

5. No offense

Unsurprisingly, it is not advisable to anger the other side in joint session. It tends to make them not receptive to your reasonable suggestions.

You can also go too far the other way: Being unctuous is not helpful.

6. The power of apology

The power of apology by the client himself or herself or the lawyer in – for example – a sexual harassment case can be considerable, if sincerely and credibly presented. It may be imprudent to say this is the worst thing this company has ever done. It may also be imprudent to suggest this was a minor oversight. If you're on the other side, you might talk to your client about the possibility of the other side's offering an apology before they do.

7. Choosing a mediator

You can usually choose the mediator. What are some things worth thinking about?

- Don't pick a vendor, just as you don't pick a firm for an expert or a jury consultant. Choose a particular mediator.
- Consider process expertise. Ask whether the person is an excellent mediator, not whether he or she was a good judge or a good litigator. Those are different skills.
- Select a style. Some mediators are more evaluative than others. Be candid with yourself and the mediator about what sort of process you want. You are, after all, paying for it. Good mediators have a range of styles, just as good litigators do. Some styles are better for some disputes than others.
- Can he or she bend an elbow easily at the polished table in private caucuses with you and your client? And with the other side?
- Think about expertise. How much does the mediator need to know about the subject matter? Many mediators will tell you that mediating a family dispute is not wildly different from mediating a business

dispute or that a foreign letter-of-credit matter is not strikingly dissimilar to mediating the alleged breach of a software agreement or a catastrophic personal injury. Maybe....

• Two things seem important to me, though, if I were doing the picking. I would look for experience – just as you would in a trial lawyer. (I won't forget losing my own first trial – and I won't forget my adversary in it, a slick fellow if there ever was one. He recognized a greenhorn when he saw one.) And I would look for wide-ranging imagination, born of experience. Mediation is an arena where imagination and creativity can be remarkably important.


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