



# Mediation is a process – embrace it

*How to analyze your mediation skills, style and needs*

By DAVE RUDY

Mediation became a fact of civil litigation starting in the late 1980s<sup>1</sup>. From humble beginnings as a virtually unknown process (we used to hear questions like “what is (legal) mediation, why do I need it and why should I pay for it?”) the process has become ubiquitous. Rare indeed is the California civil lawsuit that does not go through at least one mediation session at some point.

Despite its ubiquity, maximizing the mediation process and result still require significant thought and effort. Advocates can improve their settlement skills and approach through serious reflection and analysis.

Most advocates have their “favorite” mediators. But many of those advocates have not thought through and articulated exactly why that is the case. Is it friendship, personality of the mediator? Or is it something much more subtle and deep – the process the mediator uses, the commitment of the mediator, how he/she keeps her eye on the ball, speed or pace, etc.? Or is it simply the results obtained?

At least one critical factor is the process that the mediator uses. Most mediators are professionals. The best mediators have studied dispute and its resolution, how to handle different challenges, pace when and how to shift towards more facilitative or more evaluative postures, how to build relationships quickly with new people (clients, principals, lawyers, experts), when and how to transition to the closing stages, how to handle intra-team differences of style and substance (bridging within your own room), and a host of other process-related factors.

## The process matters

What are the professional “process commitments” of the mediator? How important is result compared to process? Does the mediator care about how your client views the process at the end of the day? Is it important to the mediator whether your client walks out feeling hammered, manipulated, squeezed or treated respectfully, compassionately? Does the mediator care whether the parties get their “day in court” through mediation, especially since mediation will most often be the terminal event in the litigation, pre-empting any subsequent day in Court? In doing your analysis, why not expand this list to include all other relevant questions, to identify in as much detail the exact attributes of mediation process that you most do and do not value?

When a case comes up for mediation, do you go to your “go-tos”? Do you think about or wonder how to expand your list? Do you wonder if there are mediators out there who actually might work better for and with you than some of those you use now?

Thoughtful analysis of your own mediation and settlement practices, skills and process will be invaluable in improving service to your clients, identifying new mediators to add to your list and deciding which mediator will provide you the best assistance for any particular case. Indeed, the exercise recommended here should prove to be quite valuable even if it results in no change at all in how you select mediators or who you choose.

Advocates and their chosen mediators rarely discuss these considerations. There are two ways an advocate can define her desired mediation process: she

must either study the mediation process as a whole<sup>2</sup> or analyze the process(es) used by her favorite mediators.

But before even getting to analyzing a mediator’s process or selection of the right mediator for a particular case, every advocate will benefit from examination of his own skills, deficiencies, preferences, styles and techniques with brutal candor.<sup>3</sup>

## Examining your style, techniques and process

Appraisal/inventory of your skills begins with a simple inquiry: Do you like to negotiate? Are you good at it? Many lawyers do not like negotiation. This writer has discovered that fact from working closely with hundreds of lawyers, many of whom admit it.

Just because you are a lawyer does not mean that you are good at or enjoy negotiating as a professional.<sup>4</sup> Not all advocates look forward eagerly to mediation days. On the other hand, negotiation is a constant professional task for any lawyer in the trial arena. Whether negotiating with clients, experts, witnesses, opponents or even Courts on any number of issues from calendaring to settlement, whether direct one-on-one or mediated negotiation, every advocate will conduct numerous negotiations in the life of each case.

If you do not like to negotiate, are not comfortable with it, even dread the days set aside for that purpose, you have identified a critical threshold issue: what is it about this aspect of the practice of civil litigation that does not sit well with you, and why is that the case? Let us posit a hypothesis that the major or only reason many lawyers are not fond of negotiation is that they do not see themselves as good at it. They may be wrong and overly



harsh in their self-evaluation, or they may be quite correct.

The watershed decision then, is do you want to improve and change your outlook toward negotiation, or would you prefer to focus on other aspects of civil litigation? One choice, for example (and it is used frequently by some) is to assign the primary negotiating role to a partner or trusted associate, and let their skills, wisdom and approach to negotiation combine with your knowledge of the case, analytical skills, relationship with the client, and many other positives you contribute to make a mediation day a “team effort” with all the benefits that flow from that approach.

Your problem with negotiation may be helped by taking negotiation courses or reading negotiation books. But the best negotiators are not so by virtue of a variety of techniques alone. They consistently exhibit an ease with negotiation, a comfort level and an actual enjoyment of the process. When things do not go as they wish in an opponent’s room, they are less likely to criticize the opponent, and more interested in determining what they can do to protect or advance their client’s interest.

In sum, to move your negotiation skills to the next level, you must first both value your negotiation skills, and be committed to improving them.<sup>5</sup>

Assuming that you either are comfortable with negotiation or intend to become so, the appraisal continues. Which is more important to you, settling the case or maximizing the benefit to your client? Do you place greater value on the result or the process?

Do you think of yourself as “impatient” in negotiation? Do you tire easily of the “game” or “dance” and want to “get to it” instead? Do you regard your settlement skills as advanced and refined, or do you believe they need work? Do you set other commitments during the negotiation day and try to use them to accelerate the pace? Do you regard protracted negotiation as wasting time?

Is your focus during mediation on numbers, or are you more attentive to process? How important to you is the quality of your client’s experience of the day? Do you work with your client step by step, or do you call the shots until the final decision? When dollars are discussed, do you want your client in or out of the room? Does the mediator have unrestricted access to your client, or do you direct when the mediator can meet with your client and what subjects will be discussed?

### **What is your style? What techniques do you prefer?**

Are you a control freak? Do you use mediators to help refine and implement negotiation strategy, or do you prefer to keep your “cards close” and not let the mediator even know your strategy, much less help you make decisions about it? Do you trust the mediator? How far, and in what ways? Do these answers depend on who the mediator is? Then ask the questions with respect to each of your favorites.

How do you approach mediation differently than a one-on-one settlement conversation with your opponent? Differently than when you are buying or selling a car or a house? Do you use the mediator more as an asset you can use in negotiation, or as a restraint on the process, or as the one charged with guiding all parties to settlement?

Do you view setting client expectations and dealing with “client control” issues as the mediator’s problem, or do you actively play a role? To what extent do you see your job as a counselor and to what extent as strictly an advocate and negotiator through the settlement process? When there is a mediator involved, does your view of your role as advocate vs. counselor change?

Do the answers to these questions vary depending on which mediator you are working with at the moment?

Do you ask for and pay attention to the “temperature” in the other room(s)?

Do you want to know who appears to be in charge? Are you curious whether one or all of the other team are unhappy, tense, relaxed, joking or somber? Is the mediator a source of “human intelligence” for you? Do you prefer a mediator who negotiates with you (and your opponent) or as an extension of your team (while simultaneously being an extension of the other team(s))? How much process control do you (willingly) give to the mediator?

Are you a theatrical negotiator? Do you threaten walkouts, or even sometimes get to the elevator before you are begged to return? Are you an emotional negotiator? Do you allow yourself to get drawn into the contest, or are you cool and detached no matter what? Have you ever said you were insulted by an opponent’s move? Did you truly feel that way, or were you “showboating”?

Are you likely to acknowledge to the opponent that your case is not perfect – to be willing to admit and discuss your risks, either in an exchanged brief or through the mediator, or both? How easily and how often do you make concessions visible to the opponent during negotiation?

### **• In money negotiation?**

Do you favor “payback” (“tit-for-tat”) negotiation? Have you ever made a large move in response to a small move? Do you support offers with a reasoned basis, or prefer to just talk numbers or do you do both depending upon circumstances? Do you discuss negotiation strategy with the mediator, or ask her to step outside while you are deciding what to do?

### **Preparation**

What do you do to prepare for a mediation? When do you start to prepare? Does anyone other than you assist you in the preparation? How much time do you spend with your client in preparation? How much time do you spend on the brief? Do you try to contact the mediator privately before the mediation begins? Are you uncomfortable with “ex parte”



communications before the hearing starts? Do you typically exchange briefs? Do you routinely present two briefs – one shared and one confidential? Do you talk to your opponent about the mediation before it begins?

Do you set “bottom lines” before or during mediation? Do you discuss “bottom lines” with your client before mediation? During mediation? Do you announce them to the opponent? Do you share them with the mediator?

What do you do to set expectations on behalf of the members of your team (client, co-counsel, other advisors)? Do you actively set expectations of the mediator? Of the opponent?

Do you make suggestions to the mediator before the mediation about how he might be most effective in this case? Do you think about mediation logistics: number of rooms required, where the mediator ought to start, what the discussion agenda should be, whether the parties should assemble in joint session or remain in separate rooms in caucus, whether the negotiation can be concluded in one day or will need to be continued, etc.?

### What process is best for you?

Think back over your last 10 mediations and answer these questions for each of them (if there were other participants in your room, include them in answering the questions):

Articulate your goal in each case. Did you achieve it?

Did you “max” the result for your client?

Did your client leave feeling relieved, exhausted, beaten down, pleased, feeling that the process was fair and the result was understandable and agreed to, or that the process was unfair and the result was imposed by you, the mediator or the opponent?

Did your client believe that you did an excellent professional job?

Did your client leave feeling that you fought hard and obtained a result that was “fair,” or that she got sacrificed and now has to live with injustice?

Did you leave feeling relieved, exhausted, beaten down, pleased?

Did you believe that you did an excellent professional job?

Did you leave feeling that the result was “fair”?

Were you (privately) enthusiastic during the negotiation?

How often were you angry or frustrated; how often were you enjoying yourself?

Were you bored during the negotiation?

Were you in control throughout the negotiation?

Overall, was it a good day for you? For your client? What three things did you appreciate or enjoy most, and what three least, about the mediation?

Was the mediator an ally or an adversary? Does the answer hold for the whole day, or does it change at different times during the process?

### Make it easier on me

If you don’t enjoy negotiation, have you ever worked with a mediator that made the day easier for you while arriving at a good result? If so, what were her qualities? Think back over that day and recall the moves that were made and the conversation that was had. What was it about that mediator that made your negotiation day better than usual?

Stay with these questions for a little while, and they will lead you into many more, and ultimately into an intensive analysis of your own settlement goals, skills and deficiencies, and preferences. Make an honest appraisal of your negotiation skillset. This is the first step to becoming a better negotiator and specifically in tuning up your performance in mediated negotiation.

### “Beat me down, that’s an order!”

Decades ago, this writer was mediating a complex multi-party case. In the middle of a caucus, the lawyer interrupted and asked to speak privately with me. “My job,” he said when we were alone, “is to be a jerk,” (he used a much

coarser word) “and take extreme positions completely loyal to my client. Your job is to beat me down and force me – reluctantly – to a realistic settlement position.” He raised his voice: “Do your job!”

I told him (as delicately as I could) that he had picked the wrong mediator. Has a conversation of this genre ever occurred between you and a mediator? Have you ever thought it but not said it?

We have just scratched the surface. Your analysis that proceeds from this review should be deep and far-ranging. In conducting it, some things will undoubtedly jump out at you. By being reflective of many things you do intuitively, you can much better identify what works for you and what does not, and why. You can determine what kind(s) of process is best suited to your strengths and style and what kind(s) is not.

There is a major caveat, however. Some of your answers will reveal weaknesses or deficiencies in your style or skills that really need to be addressed. If you prefer a process that will result in a less favorable outcome for your client, then you need to consider changing what process you desire. In other words, both goals – tuning up your skills and identifying your preferred mediation process – need to stay on the table throughout.


Take, for example, impatience in negotiation. This writer is of the view that impatience is never a positive quality in a negotiator.<sup>6</sup> First, it portrays a negotiator who is not in total control, and therefore a negotiator who is unlikely to maximize the client’s result. Second, it places a burden on the negotiation process that does not improve either process or result. Third, in mediated negotiation it will inevitably cost you (and your client) some control of the process.

Rather than opt for a mediator and a process that accommodate your impatience, you should at least consider becoming more patient. Try expecting and planning on a long day instead of a short one. Try to avoid other commitments



that conflict with the mediation; it may not end on time. In that way, you can reduce tension and frustration with a long negotiation and make it more productive for both you and your client.<sup>7</sup>

As you examine the various aspects of your skills, deficiencies, goals and process, it is critical to distinguish aspects in which you ought to try to improve from those which should guide your selection of a mediation process.

*Dave Rudy celebrates his 25th anniversary in 2016 as a full-time mediator and part-time arbitrator, beginning with the opening of Bates Edwards Group in San Francisco in 1991. Before his career as a neutral, he tried many jury and court cases to verdict (including one of 13 months' duration). He has extensive experience in mediating employment and wage-and-hour class actions as well as in a number of other case types. He is affiliated with ADR Services. Based in San Francisco, his practice takes him throughout California and into other states.* 



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## Endnotes

<sup>1</sup> Some date the beginnings of commercial mediation to the early '90s, when lawyer-mediator groups like Bates Edwards in San Francisco began. Some lawyer-mediators began their practices earlier, but common awareness of mediation and popular use among lawyers and courts did not begin until the early '90s.

<sup>2</sup> There are many excellent resources available in print.

<sup>3</sup> Fortunately, this appraisal need not be shared with *anyone*. The goal is your personal improvement in maximizing your advocacy and results in mediation. Your assessment can remain well secreted so that you can be truly honest with yourself not only about strengths, but about weaknesses and deficiencies as well.

<sup>4</sup> Traditionally, it has been assumed that lawyers are good negotiators. Indeed, when the author went to law school (in the early 1970s) there was no such thing as a negotiation course for lawyers-in-training. It is apparent however that every single lawyer needs and can benefit from negotiation training and skills refinement.

<sup>5</sup> Even though this self-appraisal needs to be as objective as you can make it, being overly self-critical is not helpful. For whatever reasons, this writer's anecdotal evidence and personal observation over decades shows that many negotiators are far better at it than they perceive themselves to be. And take heart that if you can identify what you don't like about negotiation, the probability is high that you can improve it.

<sup>6</sup> Feigned impatience may be a successful technique. Here we refer to actual impatience.

<sup>7</sup> All of this is not to say that negotiation should be unlimited in length. There is a relationship between value negotiated and length of negotiation. It is inefficient and uneconomical to pay a mediator for 12 hours of work in what should be a 4-hour negotiation. The impatience being considered is an outside imposition of unrealistic brevity imposed not by the case requirements but by the personality or attitude of the negotiator.