



The magic of mediation

It may seem like magic when a case settles. Here are five guiding principles to make that magic happen.

BY RANDY WALLACE

I cannot count how many times I have heard these four words uttered about mediation. No matter how hard, complex, emotionally charged, anxiety producing, or chaotic, the magic of mediation seems to find a way for intelligent people to make sensible decisions to solve their problems.

In other words, mediation resolves cases that people think will never settle. For years I wondered what produces this magic or perhaps what factors increase the likelihood of producing it. I discovered five guiding principles, each linked to the others. I made this discovery while hiking the Pacific Crest Trail in 2017 and reflecting over the hundreds

of mediations I had participated in as a lawyer and a mediator. I offer my observations for your consideration.

1. Mindset of the mediator

A mediator must believe down to the marrow of his or her bones, that all cases can and will resolve. He or she must have an unwavering commitment to this belief. Unless the parties tell the mediator not to do any more work towards settlement, “the” mindset is “it ain’t over till it’s over.”

2. Objective of the lawyer and client

Mediation participants must want settlement and have no doubts that settlement is their objective. What is in doubt

are the terms and conditions of that settlement. It’s the job of the mediator to find those terms and conditions and put them on the piece of paper at the end of the day with signatures attached. How a mediator does this is part of the magic, which segues to preparation.

3. Preparation

In the legal profession, the mantra is preparation... preparation... preparation. A mediator must be the most prepared person in the rooms as to every aspect of the case that effects resolution. How does this happen? The parties and the lawyers can make it so if the mediator asks the right questions about the issues and poses those questions in an appropriate way. The answers to those questions



will tell the mediator the necessary information that leads to the intersection points for resolution. But it will not happen without Principles 1 and 2.

4. Impasse: Opportunity vs. obstacle – “Double O”

Every mediation reaches impasse. The parties are firmly committed in their positions. Each has what he or she believes are appropriate, necessary, and correct reasons for not negotiating any further. Each believes his or her position is the most righteous one. Unless the other side gives in and makes a move, they are done. These situations often create the most conflict, anxiety, and emotional turmoil. The level of discomfort can be palpable. Good mediators use this zone of discomfort to change an obstacle to an opportunity.

5. Listen-Observe-Learn-LOL

A mediator does not learn when his or her mouth is open. He or she cannot

hear and assimilate the content and context of the words or observe body language if the mediator does most of the talking. Learning does not take place without listening and observing and the more learning that occurs, the better the mediator can listen and observe. This process is a circle with no beginning or ending. Each time the circle is circumnavigated the terms and conditions for resolution become clearer.

Conclusion

These principles are what I learned in the past forty years in the legal business and my reflections while hiking alone over many miles on the PCT. I offer readers the following suggestion: In your next mediation keep a watchful eye open to these five principles, and perhaps, shazaam, the curtain hiding the magic will open.

Randy Wallace practiced law as a litigator for 40 years and worked as a mediator for



Wallace

25 years. He served as President of the Marin County Bar Association in 2015. He joined the Resolution Remedies panel as a mediator – special master in 2017. He has hiked from Campo, California (the Mexican Border) to Highway 58 (Tehachapi), Kennedy Meadows South to Horseshoe Meadows and from Echo Lake (South Lake Tahoe) to Ashland, Oregon totaling 1,250 trail miles. In 2017 he became a confirmed through hiker, a hiker that hikes more than 500 miles in a single journey on trail. He will complete the California portion of the PCT in 2019, totaling 1,717 miles. He will continue his journey in Oregon and Washington to complete all 2,650 miles. Email: jrwallacelaw.com.

