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PERSPECTIVE

20 tips for having a more successful mediation experience

By Jeffrey Kravitz

I was representing a well-known producer in a dispute with another producer. No details necessary. We mediated with one of the all-stars, who asked for a joint session first — i.e., where all sides sit in the same room at the beginning. The mediator walked into the joint session, smiled, and pronounced without introduction, “Do you think that anyone is going to give a damn about you [expletive] [ethnic slur] producers.” The matter settled.

Second case: I represented two young men suing their business partner, who was a vigorous 80-something. We used the same mediator; he used the same language. The 80-something listened through one round and then bolted without settling. We held a second session in front of a settlement judge — a woman who had gone to a fancy law school and played a musical instrument for the lawyers’ symphony. The matter settled.

The lesson is one we learned in our youth: different strokes for different folks.

As a litigant, you need to decide ahead of time what approach will work for you. And importantly, what will likely work for the other side. Here are a few lessons on succeeding in mediation.

1. When is the right time to mediate? Mediation can be productive at *any* stage of litigation, especially early on in the process. Even if you do not settle, you can learn more in one session than in three rounds of discovery.

2. Share your thoughts on a mediator with your client. What does he or she think? Ask them what types of personalities they work with the best.

3. Does your opposition expect deference? Consider hiring a mediator who will play to that mindset. You want an agreement, not a confrontation.

4. Is your client impatient and prone to quick decisions? Look for a mediator who gets to the point rapidly and doesn’t draw out the process.

5. If the other side accuses you of seeking “cheap discovery,” embrace it by letting them know that they too will be learning.



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6. Take the time to know your mediator, if for no other reason than to let your client know that you were doing your research, and to set his or her mind at ease.

7. Take a snack, and make sure your client does as well. Really. Napoleon once said that an army runs on its stomach. You do not need to be flagging, nor does your client. It is common for mediations to work through lunch, and you do not want fatigue early on in the process.

8. Never underestimate the power of a good night’s sleep. We are in a tough profession, with conflicting demands, but the client will never forgive you if you are not at the top of your game for them because you were at the Lakers game the night before.

9. Tell the client to bring additional work with them. Time is money, and there are innumerable breaks and dead spots throughout the day. Clients will appreciate being able to take advantage of those moments.

10. On the other hand, make sure to be *present during the session*. There is nothing less productive than a client (or lawyer) who divides their attention while *in session* with the mediator. We are all slaves to our electronic devices, but the mediator will not be impressed with someone trying to multi-task.

11. Bring a *real* representative to the table. I represented a major international insurer on a multi-million dollar case. They flew in two representatives from overseas for the mediation, which was held the day before Thanksgiving. The opposing insurer had a claims

adjuster present with \$250,000 in authority, even though our demand was \$4 million. Our mediator, a former California Supreme Court justice, was not amused. The other side demurred saying that the person with that kind of money was on the east coast and was likely home enjoying his holiday eggnog. Our mediator said he had two choices: get that person at home or the former Supreme Court justice would recommend to the insurance commissioner that the insurer be suspended from doing business in California. (I do not know whether the justice actually had the ability or power to accomplish that task.) The case settled.

12. To have a seat at the table, *come to the table*. This is a variant on the last point. I have had mediations where one side says that their party will be available by phone or skype. That is not a mediation. I want to see furrowed brows in person.

13. Dress for success. We live in a casual world, where people running for president wear jeans. But mediation is more akin to a court proceeding than a day at the beach. One of my clients was a blue collar worker in Oakland. I showed up and his first salutation was, “Another lawyer in a three piece suit, [expletive deleted].” Sure, it was a Friday afternoon. But he expected me to be in uniform.

14. On the other hand, you want your client comfortable. You do not want him or her worrying over a tie or shoes. The idea of mediation is to make the parties comfortable so they can reach a settlement.

15. Let your client talk. I have heard some of the most amazing things in mediation — and the emotional release is often productive.

16. Do not expect an epiphany; a settlement will do. I have had mediations where former spouses walked out hand in hand. It happens. In each of those cases they did not want to hear about the controversy over Thanksgiving with their mutual kids.

17. Be realistic with your client. I have cautioned clients that if they have 100% of the facts and 100% of the law, they will probably win 75% of the time.

18. Know your case — *every bit of it*. There is nothing worse than a well-prepared mediator and an ill-prepared lawyer. It will hurt you. It will hurt your client. It will hurt the result in your case.

19. If you do not know something, say so. This is what you would tell your client to say at deposition. You are undercutting the mediator and the process if you tell her something that is immediately disproven when she walks into the other room.

20. Concede points. What is really important to your side? Is it an existing lien or future care? Fighting over grace notes does not help anyone — it only prolongs the process and makes you look petty. ■

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