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# The Value-Added Attorney

## HOW TO MAKE THE MOST OF THE COURT REQUIRED MEDIATION PROCESS

A recent study of thousands of California litigated cases revealed that many attorneys participate in costly decision error for their clients during mediation; 61% of plaintiffs and 24% of defendants passed on offers in mediation that were better than their adjudicated result (See "Let's Not Make a Deal," Journal of Empirical Legal Studies, September, 2008). Parenthetically, before defense counsel shouts for joy over only making errors 24% of the time, it should be noted that the same study noted that such defense errors were often a lot larger in magnitude than the average plaintiff error. My own anecdotal experience suggests that when a case doesn't settle during mediation it is often because counsel fails to take advantage of and fully utilize the mediation process.

The "value-added" attorney who has chosen to make the most of the mediation process approaches it openly and conscientiously works to develop the best options for the client short of going to trial. Ultimately, those attorneys who do not pre-judge the process and instead approach it as a meaningful step in guiding the client are the ones who will reduce client error and ultimately maximize their client support and working relationship.

The brief 4 point checklist making the most of the mediation process for your client is:

### 1) Prepare the mediator:

A mediation statement or brief that details, amongst other things, a) the basic factual scenario that drives the cause of action, and any disagreement on the facts that has been revealed by discovery or otherwise, b) the law governing the cause of action, or generally what plaintiff has to prove to prevail at trial or arbitration, c) any documents upon which the cause of action is built or not supported (as the case may be), including details on damages, d) the current status of the case, including where the parties are in the discovery process, and e) any pre-mediation discussions that have taken place regarding settlement, including any §998 letter exchange.

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I have sometimes had counsel tell me that given the amount of damages at stake, their cost-benefit analysis suggests that they need not prepare a mediation statement. This flies somewhat in the face of reason, given the study above suggesting that clients often do better at mediation than at trial and the fact that many more cases settle during mediation than go to trial (therefore, playing the percentages, the maximum effort should be at the mediation stage). Also, if so little money is at stake, what does that suggest about the cost-benefit analysis of spending thousands of dollars preparing for, and participating in, a trial or arbitration, when a mediation statement is a fraction of that amount?

### 2) Use the Mediation to Determine your BATNA:

Mediators are trained to assist you with determining what your BATNA (Best Alternative to a Negotiated Agreement) may be, so take advantage of that. Use the mediator to get realistic feedback on your case. Our own psychological make-up often drives counsel to consider only the facts that are favorable to their clients and discount the facts supporting opposing counsel's party (See "Psychological Impediments to Mediation Success," Ohio State Journal on Dispute Resolution, 2006). Only by using the neutral feedback of the mediator can most parties really understand how the strengths and weaknesses of their case may ultimately play out. Many attorneys intend to follow-up on the mediation with their own §998 letter. If the letter is going to be a maximum value to your client, developing a realistic number for that letter is more likely to be a skill developed by counsel who fully utilizes the mediation process.

Be careful not to unintentionally circumvent your own ability to utilize the mediation for your client's benefit by signaling to the mediator or the other party that you are not open to discussion. Comments such as "we are not going to listen to them" or "don't let them tell you they are the victims" only prevent you from having an opportunity to hear facts that are perhaps negative to your case and support the opposing party. Since the opposing party is likely to present those positions at trial, you may have ultimately limited your ability to evaluate the likely outcome of the litigation.

### 3) Use the Mediation to Calibrate with Your Client:

As part of using the mediator to process your BATNA, the client cost to litigate this matter should be "on the table" and, if necessary, presented by the mediator. This is true even if there is a contingency fee involved, because that affects the valuation of the ultimate adjudication and potential settlement offers. In addition, allowing the mediator to process the unfavorable facts to your case with your client will allow for some more intelligent decision making. At the end of the day, if you have utilized the process fully and you don't settle, your client will share the full risk of proceeding to trial. This is because your client should have full recognition of the value of the case (seen through a neutral's perspective) as well as the cost to pursue to trial versus the alternatives that are being offered at mediation.

***When a case doesn't settle during mediation it is often because counsel fails to take advantage of and fully utilize the mediation process.***

The study of litigated California cases referenced above did not factor in additional attorney fees and costs clients incurred in going to trial. This suggests that the study may understate the magnitude of error made during mediations by parties in getting the best value for their case. Since client satisfaction with their counsel is almost entirely dependent upon the outcome of their case and the costs to litigate the same, it is always in counsel's interest to process the risk of going forward as well as ultimate costs at mediation…perhaps the only time you have the opportunity to share the unfortunate side of the news through another mouthpiece (the mediator).

### 4) Use the Mediation to Develop a Working Rapport with Opposing Counsel:

Although many cases settle at the mediation session, many cases also settle in the weeks immediately after the session. Sometimes counsel and clients need more time to digest the information shared during mediation in order to process their best alternatives. Settlement in the weeks after mediation is possible if counsel have worked diligently with the mediator to establish a rapport or build on an existing rapport. Veiled threats such as "do you understand how much it will cost you to litigate this matter" when it clearly will cost your party just as much only drive the parties further apart and serve no purpose other than to cut off any benefit from the mediation process.

There may be good reasons why a case should go to trial and cannot settle in mediation, including the fact that there may be questions of law that can only be settled by an adjudicator or that clients, advised appropriately by counsel, determine that there are better alternatives than the choices available at mediation. However, whether you view a mediation result as a "win, win," or "not lose, not lose," or somewhere in between, the wealth of information available to us indicates that most cases either settle or should have settled at mediation for the best client outcomes. Not utilizing the process fully, even if it is court required, means that counsel is taking unnecessary risks with client satisfaction and is fighting long odds on gaining better outcomes.

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