

Dealing with a challenging client during mediation

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While mediation has certainly gained popularity among civil litigators in California, our clients are not always easily convinced that mediation is the right choice -- after all, they deserve their day in court. The resistance to mediation is a challenge that can be overcome, but the client's hesitation can linger, even up until the day of mediation. Fortunately, there are steps you can take to ensure a positive experience for your client.

Prepare the client for mediation early. Laying the groundwork for a successful mediation starts weeks, or even months, before the actual mediation. As your client's trusted counsel, you'll not

only listen to your client's recitation of the facts and collect your client's important documents and evidence, but you'll also listen for the underlying emotions in your client's story. Your client may express anger at being wronged. Or, your client might say things like, "it's not about the money, it's about the principle." From time to time, ask your client what they mean by these comments and consider what kind of hurt your client needs to heal. Sometimes, an apology from the opposing party can be part of a mediation discussion, so you'll want to make a note of that for the future.

Know your client's quirks. You are familiar with your client's personality, at least as it pertains to your representation of their legal concerns. Will your client need so much time to vent that time limits are in order? Or will your client need extra time in the morning to tell the mediator their story? Will the client bring anyone, such as a family member or business associate, to the mediation and if so, will that person help or hinder your mediation efforts? Do you anticipate erratic behaviors, like storming out of the mediation early? If so, what will you do? Consider your client's "currency." That is, when they have agreed in the past to your recommendations during representation, were there any values, such as costs, that seemed important? A client who seems reluctant to mediate may benefit from more face-time and discussion about their concerns or even from postponing the mediation if possible.

Remember the big picture. Before and during mediation, emphasize the benefits of alternative dispute resolution. Without mediation, your client will spend much more money and time to solve their legal problem, and they may lose at trial. You will probably find yourself explaining, more than once, what mediation is and why it is in the client's best interest to mediate. Once the client understands the benefits of mediation and

agrees to it, you'll also want to discuss the general format of the day and agree on the parameters for settlement amounts. Build in breaks, make sure there is adequate food, and, if the client has traveled a long distance and expects to catch an evening flight, manage the client's expectations for the length of the session.

Listen carefully during breakout sessions. During the mediation, you and your client will have opportunities to speak alone with the mediator and also with counsel and the opposing parties. During these sessions, as you have hopefully done before the mediation, continue listening to what the client emphasizes. Perhaps your client states they felt victimized or tricked by the opposing parties' actions. You and the mediator will want to support the client in those feelings so the client will become more trusting of the mediation process. You'll want to understand any sticking points, such as the feeling of victimization, early in the day. Observing whether your client has difficulty accepting responsibility for their actions is also crucial; a client may never accept responsibility, but they can still settle a case if they understand the (costly and time-consuming) alternatives to mediation.

Reiterate the weaknesses and strengths of your client's case. As the mediator shuttles back and forth with counterpoints and counteroffers, you'll also want to analyze with your client the weaknesses of your client's case and the strength of any evidence or arguments to overcome those weaknesses. This evaluation, even though it should not be new, may prove difficult for your client to hear. Stand your ground. You'll also want to use the costs and time-consuming nature of litigation as leverage, instead of focusing on whether your client's or opposing parties' actions are "right" or "wrong".

Use the mediator to your advantage. Depending on your relationship with the mediator, you can use him or her as a foil or to help corral your client. Suppose your client becomes frustrated and shuts down after the opposing party's response to their most recent offer. If your client wants to make an offer that you know will not move the mediation forward, you may be able to use the mediator as an ally. You can invite the mediator to speak with your client, explain the client's proposed counteroffer, and ask the mediator what they think, with the hope that the mediator can provide a dose of reality to your client. Alternatively, the mediator might be able to talk about the costs of litigation, the costs of losing at trial, and the amount of time all of this would take in an effort to convince the client to propose a more realistic counteroffer.

Prepare the client for settlement and non-settlement outcomes. Mediators often say that at the end of a good mediation, no one will be happy. Your job, besides getting in the ballpark of what your client can live with, is to affirm the client's participation in the mediation process and validate the client's choices. Sometimes mediations do not resolve in one session, and if your client is especially challenging, you may need a follow-up call or two with the mediator to discuss alternatives to mediation (litigation) and the costs associated with such a choice.