

Mediation Advocacy

THE VIEW FROM ACROSS THE TABLE

By Geoff Drucker

PART 2 IN A 2-PART MEDIATION SERIES

At trial, litigators must know how to craft and present arguments in a manner that convinces judges to rule in their favor. At mediation, the litigator's goal is no different.

Advocacy is the art of convincing the other side to part with what your client most wants and require as little in return as possible. The better understanding you have of the other side's point of view and the better the impression you make during negotiations, the more persuasive you can be. Here are some key mediation practice tips:

Timing. Nearly 100 percent of cases settle before trial, so every litigator knows settlement talks are inevitable. Once you know enough to value a case, seize the initiative by suggesting mediation. Declaring your readiness to talk shows confidence, not weakness, and can establish credibility with the other side.

Attitude. If you want to reach agreement, be agreeable. You want to come across as competent, pleasant, and reasonable. Save the theatrics, combativeness, and intimidation tactics for the courtroom. Let the facts speak for themselves: explain the evidence that supports your client's viewpoint without adding editorial comments. The message you want to convey is that regardless of how you or the opposing side thinks the case should be decided, litigation is risky. Explain why a jury might see the situation differently than they do, or how a judge might arrive at a different conclusion regarding the law. Steer clear of the absolutes litigators

often employ. If you describe your arguments as "clearly correct" and "completely supported by the case law," and theirs as "frivolous" and "wholly unsubstantiated," the other side will feel obliged to respond in kind.

Those across the table will be far more willing to listen to what you have to say about risks and pitfalls of litigation if you demonstrate you are willing to listen to what they have to say. How thoughtfully you listen can have just as great an impact as how persuasively you speak.

Preparation. Because most voluntarily mediated cases settle, mediation is not a side show—it is the determining event. So you owe it to your client to prepare just as rigorously as you would if you were going to trial. Know the facts and procedural history, and carefully assess the time and costs associated with proceeding to trial. Litigation risks include not just the chances of losing but also the price of winning.

Your client needs to be just as prepared as you are. This means having clear goals and interests, adequate settlement authority, a persuasive opening statement, and a willingness to consider alternative points of view and compromise where appropriate.

Information sharing. A key reason parties opt for mediation is the negotiator's paradox: Sharing information increases the odds of reaching agreement, but the other side may be able to use the information to gain a more advantageous agreement. You can greatly reduce the risks of disclosure by taking full advan-

tage of opportunities to communicate *ex parte* with the mediator. The mediator may be able to address your concerns without revealing any of the specifics you do not want the other side to know.

In addition, the mediator can help you phrase and time overtures to the other side for maximum impact. You can also ask the mediator to convey your settlement proposals as if they were his. Parties often react much more positively to a "neutral" proposal than one they think came from the other side.

Patience. Mediations often consume an entire day or stretch across several days. At times the pace seems glacial, and gaps between offers look like yawning chasms. Do not panic. Show the other side you and your client are willing to stay the course. Mediations often play out remarkably like Hollywood movies: sharp conflict at the beginning, many surprises along the way, and, just at the moment when all hope seems lost, a happy ending.

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READY RESOURCES

■ *Mediation Practice Guide: A Handbook for Resolving Business Disputes, Second Ed.* PC # 4740056. Section of Dispute Resolution.

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