

# Weapons for peace

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*Mediation is becoming a staple of pretrial practice—but your expertise is trying cases. Wondering how you go about ‘winning’ at mediation? Hint: A lot depends on your attitude.*

Mediation is here to stay. Increasingly, courts are turning to mediation—mandatory or otherwise—as a way of managing burgeoning dockets. The ever-rising cost of litigation has caused a corresponding decrease in the percentage of cases going to trial. The many uncertainties inherent in arbitration are creating a demand for mediation as an alternative there, too.

Does this mean trial lawyers should beat their swords into plowshares? Absolutely not. Trial lawyers still need warrior skills. They need to know how to fight discovery battles, wage a campaign through motions, and, if necessary, defeat the opposition in court. And they still need to be able to analyze a case for its trial potential, strengths and weaknesses, and jury appeal. But clients need, want, and often expect their litigators to have mastered peacemaking skills as well.

As a trial lawyer and mediator, the biggest mediation mistake I have seen litigators make is to treat mediation as an extension of war-making, requiring the same skills and approach. There is an old saying: “If the only tool you have is a hammer, every problem looks like a nail.” Likewise, if the only advocacy skills you have developed in your career are for convincing a judge or jury to see the case your way, every forum looks like a courtroom.

Advocacy in peacemaking is different. The audience is different. The analysis is different. The presentation is different. All are equally challenging.

Mediation is more than just a ping-pong match over numbers. It is no easier or less demanding than a trial. It requires the advocate’s warrior skills and insights, but also the diplomat’s finesse in analysis and presentation.

## Mediation goals

Unlike a trial, the overall aim in mediation is not to convince the other side—or the mediator—that your client is right. Your opponent’s agreement on facts and issues is both unnecessary and unlikely. Your goal is not to persuade op-

ponents that they are wrong about the issues, but rather to persuade them that settlement is in their interest, given the risks they face in further litigation and the benefits they can obtain from your proposals.

The difference is subtle but important. Clients—even the most sophisticated, experienced executives and in-house counsel—are remarkably wedded to supporting the rectitude of their own (or their enterprise’s) actions and positions. When you tell them they are wrong, that they don’t understand the facts or the law, you evoke an inherent defensive mechanism, a reaction that makes them want to fight.

You want the focus to be on risk. Emphasize that, right or wrong, your opponents are going to have trouble successfully proving their point(s) at trial. In a complex case, there usually are many issues that can go one way or another. Frequently, each issue has multiple possible outcomes—great, good, bad, or terrible. The multiplicity of issues and permutations in a complex case makes risk analysis complicated, but it makes demonstrating the existence of risk easy.

Demonstrating all the procedural and substantive uncertainties can shake your opponent’s confidence in his or her ability to control or reliably predict the final result. Granted, your opponent should have done this analysis and heard about palpable risk from his or her own counsel. But the opponent surely will not have heard it spoken as clearly as you will speak it. And demonstrating your professionalism and preparedness may give the opponent pause about meeting you at trial.

Describe, for example, how evidentiary rulings may go badly for your opponent, not how sympathetic your client will be. The sympathy card won’t play well, while demonstrable vulnerabilities in an opponent’s own evidence are bound to have a sobering effect. If you keep your focus on demonstrating risk rather than righteousness, you can score points by delving into the details—the admissibility of important proof, items

of evidence that are overwhelming on a point, witness vulnerability—that affect the strength of your opponent’s positions, without inciting emotional defensiveness. Even if the weaknesses in your case are more numerous and more serious, you can create doubt about your opponent’s ability to prevail.

## Presentation

How you present yourself in mediation is just as important as what you say. Your attitude should say, “Let us reason together,” not “We have the upper hand.” The debate over the effective-

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ness of heavy-handed behavior at trial—bullying, exaggeration, incivility, and the like—is for another day, another place. Wherever you stand on that topic, the effective attitude for mediation is one of openness, cooperation, respect, and civility.

This admonition is true in every mediation, but particularly in the complex case. Corporate executives, managers, and in-house counsel all may be used to the rough-and-tumble realities of the business world, but most also expect a modicum of diplomacy in their interpersonal dealings, and most have substantial egos. So do the lawyers advising them.

In short, nobody in the room will react well to feeling bullied. More than likely, backs will be raised, defensive mechanisms will be activated, and humbling the bully may become more important than settling the case. Yes, the mission is to show that you have the upper hand; but the manner must not be high-handed. Counsel who seem highly competent and highly likable, rather

than intimidating, set a much better stage for success.

Similarly, the way you speak about the case should evidence a realistic approach. Present a calm, reasoned, objective analysis, not a bullheaded defense for every iota of your case. There is yet to be the case where one party has no weaknesses. If you are able to acknowledge yours, where appropriate, you will get more credit when you talk about your strengths. When your adversary points out a vulnerability, acknowledge the possibility that this view may carry the day, but remind the adversary

how his or her proof on that issue or a related one can go awry.

Remain objective. Resist the temptation to attribute bad motives to those affiliated with your opponent. Stick to nouns and verbs, and avoid adjectives. If you characterize opponents’ factual positions as fabrications, their need to defend their honor may trump their desire for resolution. The existence of differing views and recollections in a case does not necessarily mean someone is lying. Even if you can prove that an opponent is lying, that pleasure should be left for trial.

You may, however, point out that the only version of events that is corroborated is yours. This is objective, not insulting, and much less likely to trigger a

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defensive response. Show the documents that undercut your opponent's position. Mention the likelihood that a jury or arbitrator will see bias in someone's account. These are discussions of evidence, not accusations.

One of the most effective lawyers I can recall seeing in mediation showed a PowerPoint presentation that included selected documents and an analysis of them that was devastating to his adversaries. He maintained a calm, low-key demeanor that projected confidence but did not require the opponents to eat

phases of proceedings: case preparation, filings, motions, discovery, hearings, trial, appeals. And put specific dollar ranges on each phase.

This kind of specificity gives credence to numbers that will inevitably seem high to everyone affected, at least at first. It also allows for meaningful discussion of the various cost components—the type of discussion that will lead to the realization that the total cost of litigation you put forward is not an exaggeration.

Providing a detailed discussion of future litigation costs is a way of pointing

your opponent's ongoing contacts, business dealings, or relationships be affected? Finding a way to deal with these kinds of issues can increase your currency with the parties in question and thereby increase the likelihood they will agree to your proposals.

### Timing

While choosing the right time to initiate mediation efforts can be helpful, most often there is no magic moment. There is much to be gained, in time and cost savings, by mediating early—and little to be lost. Mediation is informal and flexible. If it becomes clear that issues are not ripe for resolution, a responsible mediator will suggest that additional work—litigating a motion about admissibility of evidence or for summary judgment, taking an expert's deposition or conducting some other type of discovery—be completed before mediation continues.

It is important that enough be known about the dispute, whether it's reached the formal claims-filing stage or not, to allow for a thoughtful evaluation of what the issues are likely to be, where weaknesses may be felt, and what components should be considered as part of a resolution.

Bringing all affected parties to the table may be important. In the as-yet-unfiled matter, have all those likely to be named in the caption been identified? Do they all need to be at the table for a meaningful resolution to be achieved? If a settlement is reached with a particular party or parties, will it make it more difficult to resolve issues involving other parties later? Everyone needs to understand enough about the substance of expert issues to evaluate what questions will be raised and the nature of opinion evidence available to each side.

Getting to the table in multiparty matters is especially challenging because of the need to obtain agreement from everyone. Here, another old saying applies: If you want something done right, do it yourself.

Consider taking the lead in bringing the case into mediation to ensure this process is approached in a productive fashion. Will one mediation process be

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crow. They recognized the strength of his negotiating position without getting their backs up, and the matter settled relatively quickly, given its substantive complexity and emotional content.

A note about credibility: Few things will impede negotiations more than a sense that one is being made the fool. If an opponent believes you are hiding the ball or selling false facts, he or she will resist accepting even the most reasonable settlement proposal from you.

Concerns about candor evolve in many ways, and solutions must be tailored to the situation. If you suspect that this concern exists in an adversary's mind, work hard to find a way to show that it is unwarranted. Certainly, if the tenor of relations between you and opposing counsel is the source of the distrust, consider bringing in a colleague to handle the mediation.

### Content

In addition to preparing an effective summary of the substantive and procedural issues, calculate the likely costs of continuing to litigate. While this factor is tossed around in virtually all mediations at some point, actual dollar amounts are seldom stated in the discussion, weakening the impact of this important factor. Break the analysis down into the various

out that you will diligently pursue the matter on every level available to your client, without appearing to threaten abusive litigation tactics. You subtly gain added credibility as a serious contender who is ready to go the distance and already has a plan to do so.

Demonstrative evidence can be helpful for making your point—about litigation costs as well as other aspects of the case. Having a chart showing likely expenditures in the various categories mentioned above, for example, will aid discussion. It will also serve as a visual reminder throughout the mediation of what not settling truly entails. Just as they do at trial, demonstrative pieces keep everyone's attention on the issues you believe are important, the ones that promote your analysis.

After pointing out the risks and costs of trial, the next step is to show there is a way to resolve the matter that makes more sense than leaving resolution in the hands of jurors or arbitrators or judges. Frequently, this involves more than just dollars and cents.

Step out of your litigator's shoes and think about the case from a holistic perspective. Does your opponent have concerns about publicity? Might the result here set a precedent he or she won't want to live with in future litigation? Will

adequate to resolve the issues between the tiers in the caption, as well as among the stakeholders within them? By providing leadership on the questions of whether and when to mediate, you can also help determine what process should be used and, later, how questions within your own group will be resolved.

Another aspect of the timing issue arises when you are ready to put the pieces of your proposal on the table. Your timing here can be critical in determining how the other side reacts and whether your desired quid pro quo is met. The mediator can provide useful guidance based on experience and insights from private discussions with the other players, so ask him or her for advice on what cards to show and when.

### **Client involvement**

Clients need to understand the rationale and methodology of mediation. Explaining your approach will spare you at least some of the angst clients have about their counsel stepping out of warrior mode. Once they understand that your cooperative attitude is not a sign of weakness, but rather of your expertise in dispute resolution, they will be more comfortable with the process and more helpful in preparing for it. Clients can and should play an active role.

Do not assume that your client already understands the differences between the approaches to litigation and mediation. Mediation is becoming a staple of pretrial and prearbitration practice, but the level of practice varies greatly. Clients who have been through mediation before might or might not have come away with a favorable view of it.

Both the uninitiated client and the experienced, cynical client can benefit from your analysis of how and why mediation works. Demonstrate your own thoughtful understanding of the process and how it can save time and money.

Understanding how to integrate the weapons in your trial lawyer arsenal with those essential in mediation will give you an advantage over less-well-versed opponents. It will increase your value to your clients and—perhaps most important—your comfort, enjoyment, and success in your practice. ■