

# Tips for lawyers using mediation for personal disputes

By Forrest S. Mosten

Since I started mediating in 1979, I have found that lawyers represent a high percentage of parties who engage me to mediate disputes in their own lives. As first hand participants in the litigation system, lawyers know well the cost, lack of control and game-playing that impacts litigants in the short and long term. Also, by choosing mediation, lawyers often believe that they can mute the litigation power of the other party's lawyer and use their consummate negotiation skills directly with the other party.

Lawyers often push hard to get their own cases into mediation. Unfortunately, I have found that lawyer-parties (more than others) often blow up the mediation process before the first session or walk out before reaching a signed settlement. To be fair, film executives run a close second and medical physicians run third in the mediation catastrophe derby!

If you want to take advantage of the benefits of mediation and the very high rate of settlement, here are some tips for success:

**Mediate early.** Research shows that satisfaction with mediation is highest at the earliest stages of a dispute — before public positions polarize in litigation and financial resources are exhausted that could have been used to fund a settlement. Curb your lawyer tendency that might delay mediation until discovery is completed or legal motions are completed. Actually, many mediators are expert at managing discovery and legal wrangling to help parties focus on getting to the real issues.

**Do not negotiate every aspect of the mediation process.** Since approximately 90 percent of private mediations result in a complete settlement, the goal is to get into mediation ASAP and stay there until you resolve everything. Rather than engaging in draining turf struggles about where the mediation should be held or over-negotiate terms of the mediation contract, try practicing the mantra: "Let it go." Even in the selection of the mediator, unless you know that the mediator proposed by the other side is incompetent or biased against you, accept the other party's nomination rather than spending time and negotiation capital by insisting on your nominee. Such strategy has another benefit: the other party might more readily follow the recommendations of a mediator whom they nominated.

**If the other mediation party is not a lawyer, be patient.** Most parties to a mediation are not lawyers, so take a deep breath and be patient as the mediator explains the process, answers questions, and makes sure that you both understand and are comfortable with the mediation process. Not only might you learn a different style of mediation than you might have experienced, but your patience might allay some fears that your non-lawyer adversary might have. Remember, many people hire tough litigators to overcome their fears to try to balance power — and having a lawyer on the other side is fear producing for most people.

**Your emotions can get in your own way.** You are a spouse, consumer, employer or business partner in the mediation — not just a lawyer. Let your mediator help you when your own feelings come up — and consider utilizing friends, a therapist, a mediation coach or another lawyer to help you prepare for mediation or even come with you. Your emotions may not be a sign of weakness — they actually might motivate movement from the other side as long as you demonstrate your vulnerability rather than your tough side.

**Focus on solving the problem at hand.** Many lawyers use their legal training as weapons during their own disputes (See *Schild v Rubin*, 232 Cal.App.3d 755 (1991), in which lawyer neighbors escalated from basketball noise to an all out litigation war). Resist the temptation to file court actions during the mediation to gain leverage or threaten termination of mediation if a demand is not accepted.

**Do not insist on starting with the most difficult issue.** Effective mediators actually resolve conflict the opposite way. We start with areas of agreement and tackle the easiest issues first to build confidence in the process, build trust and rapport with the mediator, and gain commitment of the parties. (See Stephen Goldberg and Margaret Shaw's "The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three.") By getting the easier issues out of the way, there is less distance to the finish line. Even if the hardest issue is not settled, many parties can write up and sign any resolved issues and limit any necessary litigation.

**Build agreements.** Many lawyers as mediation parties insist on written agendas and/or exchanged settlement proposals as conditions for participating or staying in mediation. Experienced mediators will attempt to encourage dialogue between the parties to tease out underlying interests from which the parties and mediator can fashion mutually satisfying agreements rather than let anger and disappointment at the last written salvo escalate the conflict.

**Treat the mediator as your ally.** Lawyers are trained to have a natural deference for judges, even when they are retired. However, when entering mediation for their own disputes, many lawyers (just like our clients) want to maintain control over the process and result and choose mediators with non-judicial backgrounds and more facilitative mediation styles. Once in the mediation, many lawyer parties hurt themselves by attempting to take over the process and resisting mediator recommendations — in short, getting into control struggles with the mediator. This approach is not only unproductive, but often aligns the other party and the mediator closer together. Try to remember to be a party (not a lawyer) in the mediation and work *with* not against the mediator who is probably working hard to resolve the dispute for both parties.

**The test for acceptable agreements should be: "Can I live with it?"** Lawyers often work very hard to hit a "home run" for their clients in the mediation room and will abort the process and then roll the dice in court if they cannot negotiate their best outcome. When entering mediation for your own disputes, shift your lens to whether you can live with the best proposal on the table and end your conflict. The real goal is to be able to move on in your life especially when you are paying your own additional attorney fees or suffering your own emotional wear and tear that could negatively impact your practice and your life.

**Apply these lessons in your practice for your own clients.** One of the goals of mediation is for parties to learn conflict resolution skills during mediation of their disputes to better communicate and resolve future disputes in their lives at home, at work and in their communities. In the same way, if you are successful in settling your own dispute in mediation with the help of these tips, you might approach your clients' future mediations with new insights and perspectives of how to "Get to yes." (See Roger Fisher, William Ury and Bruce Patton's "Getting to Yes: Negotiating Agreement Without Giving In.")

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