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HOW TO INCREASE THE ODDS THAT YOUR MEDIATION WILL BE A SUCCESS

by Richard A. Heller

As a result of my past career as a probate and commercial litigator, and now, as an active mediator, I find that lawyers and their clients participate in mediation for a lot of different reasons: because the Court told them they have to go to mediation, because they want to try to intimidate or scare the other side into accepting a settlement out of proportion to the merits of their case ["If we don't get what we want, we're leaving! We're out of here!" —in the first hour—], because they want "free" discovery or to see the other side's "smoking gun," and sometimes because they really want to settle a case. This article is intended for those who really want to settle their case.

As a practicing lawyer I had several mediations in which Justice Howard B. Wiener served as the mediator. More than once I remember him saying something along these lines at the outset of the mediation: "I was a trial judge for X years, then I was a Justice on the Court of Appeal for Y years, and now I've been a mediator for Z years." [His resume online says he has served in over 5000 cases as a mediator, arbitrator, and private judge.] He then would say that in his experience, the "sure winner" case loses 20% of the time and the "sure loser" case wins 20% of the time.

Assuming Justice Wiener is right, that means that in negotiating a settlement, the range of settlement offers and counter offers should realistically be in the range of 20% to 80% of the case value. So, say that your damages are $100. If you go to trial and win, you may win the $100 (perhaps less what it costs you to go to trial...and defend the appeal) or you may win nothing. Take the odds into account in making your demand and in responding to the other party's demand. Too many mediations fail because the demand is for $100.00 and the counter is $0.00. Then the next demand is for $98.00 and the next counter is for $3.00. The negotiations inch along, going nowhere. One side or the other—or both— gets frustrated by the unwillingness of the other side to engage in genuine negotiations and loses interest. The mediation fails before it even gets going. Don't let that happen to you.

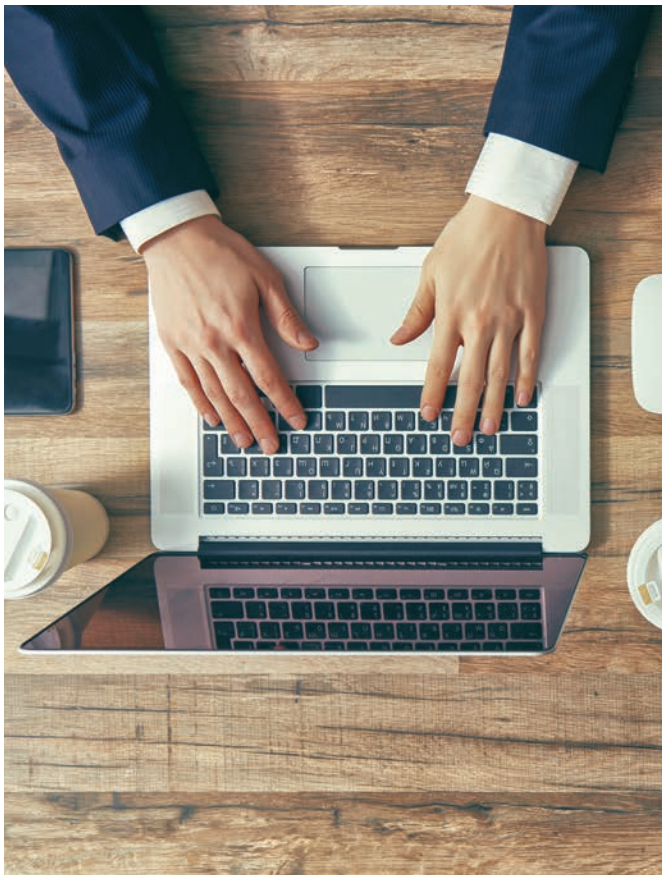
So, the question is: *how do you use a mediation to get to the right settlement terms?* **This article will offer a few suggestions.**

MEDIATION BRIEF.

As a mediator, I find that the best brief is exactly that: brief. Take some time with your mediation brief. It will be most effective if it is short (5-10 pages in most cases) and to the point. I've seen 20-30 page briefs that don't cite any law. That makes it tough on the mediator and reduces the odds of success. To be most effective, the brief should address the law and facts both pro and con to your position. Credibility is all important in mediation, just as it is in trial. It is better to address the weaknesses in your case up front than to let your adversary be the first one, or the only one, to do so. I know there is a push to share your briefs with your opposition, but I think it is more important to be straightforward with the mediator than to share your brief with the other side. During the mediation you can authorize the mediator to disclose your brief or your "smoking gun" or not, but it does not help anyone to conceal it from the mediator.

Address both liability and damages. I've seen mediations where one side is absolutely sure they are right on liability—and have briefed it extensively—but have not thoroughly analyzed exactly what damages are available for the alleged wrong committed. Cite authority for the damages sought. Use jury instructions, if applicable to your cause of action, to demonstrate what damages are available.

Are attorney fees available for the cause of action at issue? If so, does the prevailing party have a right to recover attorney fees? Or are attorney fees only available in the discretion of the Court? Or are they only available to the plaintiff or petitioner? For example, "When a plaintiff proves 'by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [Welf. & Inst. Code] Section 15610.30, in addition to compensatory damages ... the court *shall award* to the plaintiff reasonable attorney's fees and costs." *Arace v. Medico Investments* (2020) 48 Cal.App.5th 977, 982 (italics added). In such a case, the award of reasonable attorney fees was mandatory and available only to the plaintiff. It is not that unusual for the same facts to give rise, for example, to



causes of action for undue influence, or conversion, or elder financial abuse, or all three. It may be that without the elder abuse claim, attorney fees are not available at all. So, in the brief be sure to address whether fees may be recovered, based on what authority, and by whom. If the case is not one in which attorney fees may or must be awarded, let your mediator know that as well. The cost of completing all discovery and pre-trial motions (out of state depositions? motions to compel? motions for summary judgment?) and the cost of bringing the case to trial are considerations the parties and the mediator should take into account.

If you attach exhibits to your mediation brief be sure to explain why the exhibits are attached and what in them you want the mediator to focus on and understand. If the exhibits include spreadsheets, explain what conclusion in the spreadsheets you want to be sure the mediator understands. If a discovery response or deposition transcript is provided to the mediator, explain what you want the mediator to notice.

When I was a freshman in college I had to take what was affectionately called "bonehead English." I had to take it before I could take real college English courses. We were taught—in essence—that an essay should have five paragraphs. In the first paragraph, tell them what you are going to say. In paragraphs two, three, and four, say it. In paragraph five, tell them what you said. I don't think a mediation brief is really that different.

SETTLEMENT AGREEMENT.

Does the following scenario sound familiar? You spend all day in mediation, you finally reach agreement, everyone is exhausted, but you know it is crucial to get the settlement details written up and signed. Now you spend the next few hours trying to write up and agree on the written version of your settlement. The other side—or your own client— is then too tired to focus on the draft settlement agreement and suggests the parties write up the agreement the next day and sign it then. You are concerned that one party or the other may have "buyer's remorse" if everyone sleeps on the deal before signing an agreement. This is a recipe for mediation failure.

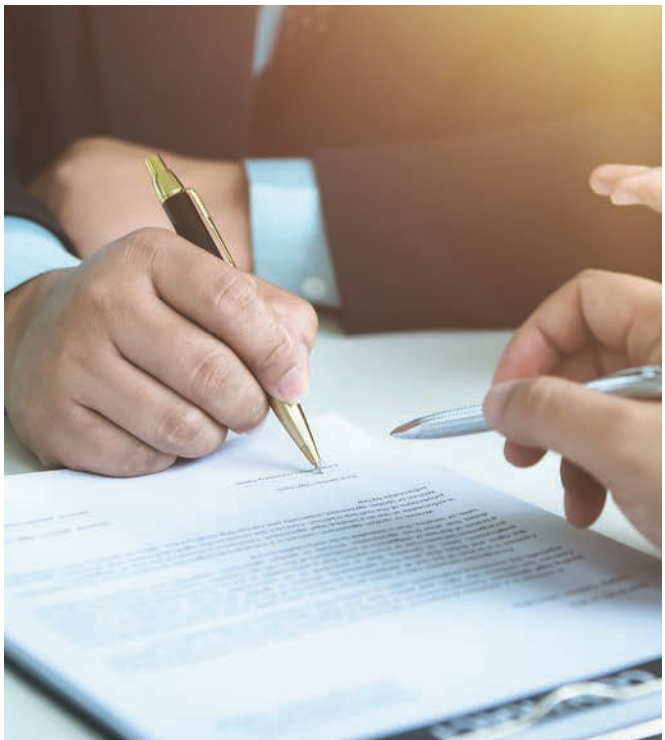
The easy solution is to write up—and see if the lawyers can agree on—a draft settlement agreement before the mediation starts. As a mediator, I've found that this is even more important in the age of virtual mediations. It can be extremely challenging to try to draft and exchange and edit a complex settlement agreement quickly when the parties are not all together in the same location.

If you have a draft settlement agreement ready in advance, you can be sure to include what you think is most important and you won't have to try to decipher all the nuances of what the other side is saying—or not saying— late in the day on the fly when everyone is tired. It is a good idea to exchange drafts of the settlement agreement with opposing counsel in advance of the mediation. You can leave blank the key terms to be resolved at the mediation, but you can address a lot of other key issues in advance. Who will be the parties to the settlement? In what capacities? As individuals? As fiduciaries? As beneficiaries? Will the releases be mutual? General? Limited? Will all parties to the mediation enter into releases? What is being settled? All claims? Causes of action? Accrued and not accrued? Known and unknown? What about attorney fees? Will the parties bear their own attorney fees? Or will the trustee, for example, be able to have the trust pay the trustee's attorney fees? What about rights to future accountings or other rights implicit in being a named beneficiary? What about defenses based on the same facts as the causes of action? I had a case in which the other party claimed that notwithstanding the general release he entered into, he could still rely on the same underlying facts to defend himself for not fulfilling his part of the contract. It's a lot easier to add something to the release language making clear that the releasing party cannot assert the claims offensively *or* defensively than it is to litigate that issue in the follow-on litigation.

Should the lawyer sign the settlement agreement? In *Monster Energy v. Schechter* (2019) 7 Cal.5th 781, the California Supreme Court held that the attorney's signature approving a settlement agreement as to form and content could indicate the attorney both recommended the settlement and intended to be bound by its provisions. (*Id.*, at 785.). In that case, the lawsuit against the lawyer was allowed to go forward.

When is the settlement agreement binding? Is it binding only on signature? Only after Court approval? Only after payment is made? Only once the time to appeal has expired? Be sure to spell this out clearly.

How can you enforce the settlement agreement? Must you ask the Court to retain jurisdiction to enforce the settlement? If so, how do you do that? Take a look at *Mesa RHF Partners v. City of Los Angeles* (2019) 33 Cal. App. 5th 913 [For example, can the request that the Court retain jurisdiction be made by the attorneys for the parties or must the parties make the request?] Can you enforce the agreement on ex parte notice or only following a noticed motion? Why not attach to your draft settlement agreement a proposed stipulation and order to be signed *by the parties and their attorneys* asking the Court to retain jurisdiction to enforce the agreement?



PREPARING YOUR CLIENT AND YOURSELF FOR THE MEDIATION.

I was a trial lawyer for most of my 43 years practicing law. It took me a while to learn that how my client (or the opposition's client) looked and acted was one of the most critical factorsin determining the outcome of a case. You want your client to make a good impression on a judge, a jury, and a mediator. So, stress to your client that their appearance and behavior at the mediation is key. They should look professional and act in a courteous manner.

As a mediator, I think this is just as true in virtual mediations as in-person mediations. It really does not make a good impression for you or your client to point your video camera at the ceiling, or at the papers on your desk, or at the kitchen table while eating lunch, or—this really happened—at yourself while flossing your teeth on camera. It is hard to "un-remember" that.

I had a tough case a few years ago in which my client [no, really?] had taken some pretty questionable actions. Her adversary showed up at his video deposition in shorts and a ratty t-shirt and about three days of unkempt beard. He was unfocused, impolite, and arrogant. (Again, credibility is all important. It is key that your client appear and be believable and likable.) I felt a lot better about my case after that deposition. Both you and your client will be evaluated by the mediator and that evaluation will influence the mediator's assessment of your case and will be reflected in the mediator's recommendations. Make a good impression. It will likely translate into a good result.

PAY ATTENTION TO WHAT THE MEDIATOR SAYS.

I always told my client to pay close attention to what the mediator says. I would select particular mediators because I respected their experience and expertise. Even if they disagreed with my opinion about the case, I still wanted the benefit of their different perspective. Sometimes, believe it or not, I might have had blinders on about some aspect of the case or just didn't fully appreciate the significance of something the mediator saw. The mediator might well be wrong...but so might the judge or jury.

TELL THE MEDIATOR HOW TO HELP YOU SETTLE THE CASE.

A closing thought: tell the Mediator how she or he can help you settle the case. What are the roadblocks you see? What is a likely path to success? What can the Mediator do to help? You know the case better than the mediator. Use that knowledge to your advantage. As a mediator, I call all counsel — and the parties — prior to the scheduled mediation to ask what I can do to help get the case settled. For virtual mediations, I also offer to counsel and their clients a free Zoom test session with our tech experts to make sure all participants are able to connect on Zoom and understand the basics of using Zoom. My goal is to get the mediation off to a fast start and to make sure everyone involved is comfortable participating in a virtual mediation session.

These are just a few tips and things to think about when heading to mediation. With the delays caused by Covid-19, it is more important than ever to make a success of your mediation.

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Before retiring in 2019, Richard practiced law for 43 years. For the last 37 years, Richard was a trial lawyer handling a wide variety of business and Probate Court cases. Richard was selected by Best Lawyers as the 2019 San Diego "Lawyer of the Year" for his work in Litigation - Trusts & Estates. He had previously been selected as the 2016 San Diego "Lawyer of the Year" also for his work in Litigation - Trusts & Estates. For the last 17 years of his legal career, Richard was a partner at Procopio, Cory, Hargreaves & Savitch LLP. He was the leader of Procopio's Litigation Team for five years, from 2009 through 2013. He is a trial lawyer with extensive trial experience. His law practice emphasized complex high-stakes litigation involving trusts and estates and business and commercial litigation. Many Probate Court cases have a business and real estate component. Richard's trial experience—including jury trials—proved quite valuable in handling such cases.

For more information or to schedule a case, please contact Kathy Purcell at kpurcell@westcoastresolution.com or (619) 238-7282.