

Building Credibility During Mediation

Effective Advocacy in ADR

BY LAURENCE R. CLARKE



In a rather surprisingly brief period of time, the process of mediation has become ubiquitous in the legal landscape. With seemingly an ever-increasing frequency, attorneys and their clients are becoming involved in mediation, be it with or without their consent. Although mediation, by definition, is a “voluntary” process, try arguing that concept to a judge who has already decided that your case should be mediated.

In addition to the courts routinely referring matters to mediation, numerous programs have evolved in both the public and private sectors to encourage this practice; mediation requirements are being added to dispute resolution clauses in an array of legal documents; and many attorneys (or their clients) regularly encourage the opposition to engage in this process.

The growth of mediation is also fueled by the scores of judges leaving the bench each year to reap this mediation harvest, as well as by the even larger number of attorneys who proclaim themselves mediators, or at least augment their practices by offering this service. There exists the perception by many that becoming a neutral mediator will lead to a practice free of stress, filled with approbation from grateful disputants, and offering personal fulfillment beyond measure.

Mediation is an integral part of today's law practice, growing in usage, and apparently here to stay. Therefore, of necessity, all attorneys should know how to deal with this process as effectively as possible.

Having practiced civil litigation since 1972, several years ago I augmented my practice by also serving as a neutral mediator and arbitrator, and have done so in approximately 300 matters. In an effort to secure a modicum of exposure to developments in the alternative dispute resolution field, I completed the studies for a Masters Degree in Dispute Resolution, and thereafter taught ADR as an adjunct professor at two local law schools.

This in-depth immersion into dispute resolution led me to reflect on the nature of effective attorney advocacy in mediation and thereafter modify some of my earlier perceptions. Thus, the following random musings of a litigator who morphed into a litigator/ADR neutral are offered in the hope of enhancing attorney effectiveness and credibility during mediation.

I. A mediator is **not** a jury – save your histrionics for trial.

“No one is such a liar as the indignant man.” – Friedrich Nietzsche

II. Carefully consider your strategy in the **timing** of the mediation. E.g. Early in the case to save time and expense, and prior to positions becoming unduly polarized? Later in the case after necessary investigation and discovery have been completed?

“To every thing there is a season.” – The Bible (Ecclesiastes)

III. Take the time to do your homework, and **prepare** for the mediation. Prepare your case, prepare your client and, most importantly, prepare your negotiation strategy.

“People willing to roll up their sleeves seldom lose their shirt.” – Anonymous

IV. Submit a concise and well-reasoned mediation brief – and the operative word is **brief**. Note that the book “Men Are From Mars, Women Are From Venus” was 286 pages; Abraham Lincoln’s “Gettysburg Address” was 269 words.

“Brevity is the soul of wit.” – Shakespeare (Hamlet)

V. Control your emotions, and present a tempered, even-handed description of your case. All parties to the mediation, certainly including the mediator, will respect this approach. Aggressive argument of your position will rarely convince the other side of its merits and, even if it does, they won’t admit it.

“Speak when you are angry and you will make the best speech you will ever regret.” – Ambrose Bierce

VI. Always remember, the other side has – and, if properly motivated, can give – what you and your clients want. Treat them accordingly.

“And do as adversaries do in the law-strive mightily, but eat and drink as friends.” – Shakespeare (The Taming of the Shrew)

VII. Resist the urge to assume the moral high ground during mediation. It rarely contributes to forging agreement.

“The louder he talked of his honor, the faster we counted our spoons.” – Ralph Waldo Emerson

VIII. **Listen** carefully and attentively to all participants in the mediation. Use silence as the effective negotiating technique it truly is.

“We do not live on words alone, despite the fact that sometimes we have to eat them.” – Adlai Stevenson

IX. If resolution is achieved, strive to reduce **all** terms to a signed writing before adjourning the mediation. At a minimum, secure a “deal points” memo, or a recorded oral agreement pursuant to California Evidence Code §1118.

“The Devil is in the details.” – Anonymous

X. Lawyers can disagree without being disagreeable. Strive for more light than fire, and avoid fueling the flames of the dispute during mediation.

“Remember, only you can prevent forest fires!” – Smokey the Bear

Now, go forth and sin no more.

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