

Obtaining Better Mediated Settlements

Joe Ramsey

Copyright © 2008

Introduction

In recent years, I have encountered increasing resistance to the mediation format I was trained to follow that has always worked well for me. The primary recurring suggestion from participating counsel is that starting with a joint session is unnecessary or even counterproductive. Usually, I convince counsel that the open meeting is vitally important to success of the mediation. Sometimes I cannot get agreement and dispense with the open meeting only to convene one later when it becomes obvious, usually for purposes of time and cost efficiency, that a joint session is helpful.

This resistance to the open meeting prompted me to consider the characteristics of lawyers in cases I mediate who consistently obtain better settlements. What I have observed is that adherence to fundamental, common-sense considerations at each traditional step of the mediation process consistently yields better settlements.

Ethical Commitment to Early Resolution

I submit without discussion that trial counsel have an ethical duty to shape their representation toward a time-and cost-efficient resolution of disputes. Counsel must therefore make every reasonable effort to know enough about each dispute to give sound and reliable settlement and trial advice. They should do so efficiently and earlier rather than later. This article assumes that trial counsel and clients have decided to make a good faith effort to settle the dispute through early mediation.

Preparing for Successful Mediation

There are three critical early steps to be taken: convince your client to approach the process positively; find out what you need to know to provide sound advice about trial and settlement; and approach the mediation intending to make your best case.

1. Convince your client to approach mediation positively

The success rate for mediation is markedly higher when parties voluntarily agree to the process than when there is some element of coercion requiring mediation. If your client is committed to making the process work, the chances of success are much greater than if the client is just tolerating the process reluctantly or even unwillingly. So the first step to maximize success is to convince your client to proceed with an open, positive attitude.

This is often easier said than done. All of us as trial counsel have had clients who litigate as a “matter of principle.” Other clients want revenge – a pound of flesh, and preferably the red pulsating pound of flesh in the opponent’s chest cavity! Trial counsel need to move clients past emotionally distracting attitudes that divert energy from the goal of obtaining the best legally possible result.

What worked for me as trial counsel and now as a mediator is to keep the parties focused on the **basic reasons to compromise**: A thoughtful and detailed analysis of the **risks of loss** at trial; the **cost** of getting ready and then trying the case; the **inability to predict** with accuracy what the other side may do or how the civil justice system will administer the case; uncontrollable **delay**, which is the insidious country cousin of cost; and the **stress** of litigation. Once the parties fully appreciate at least these basic hazards of trying the case, they are usually more willing to approach mediation with a positive attitude and a willingness to consider reasonable compromise.

2. Find out what you need to know

The standard of care for trial work has evolved in the past 15 or 20 years to require more formal discovery. Many cases will require extensive and expensive formal discovery absent settlement. However, experienced trial counsel can often inform themselves sufficiently to provide informed advice on trial and settlement without extensive formal discovery. This is especially true in document intensive litigation when the documents themselves often reliably commit the parties to predictable positions. So how do you get what you need?

The first and obvious source of information is your client. Counsel should spend whatever time it takes to question not only “the boss” but also each person employed or retained by the client who has relevant information. Too often, counsel do not probe deeply enough to get all available information. This initial investment in time is crucial and should be done as soon as reasonably possible. Years ago I learned that the long time administrative assistant to a busy President/CEO is often a gold mine of direct information and can locate paper or electronically stored documents and the key personnel who are likely knowledgeable. Contact with key people should be made personally by lead trial counsel.

Counsel who convince their clients to spend the money **at the outset to retain an outside consultant on key issues** consistently get a more reality-based assessment than those who wait and rely instead on in-house personnel. The problem is the human nature of denial. The client and key people involved in the activity that led to litigation almost always believe they acted appropriately. They are not objective and will, at least subconsciously, deny the possibility that they were involved in a bad situation. Clients resist early retention of outside consultants as an unnecessary expense. Counsel’s job is to convince them that it is penny-wise and pound-foolish to delay getting an independent and objective assessment.

The third often productive source of early and relatively inexpensive information is the other parties to the litigation. I recommend what I have come to view as the **Trial Lawyer’s Golden Rule**: Do unto opposing trial counsel as you would have them do unto you. Lead off by offering information you know the other parties are entitled to obtain. Accept the

possibility of a one-way street if the gesture does not immediately result in a reciprocal offer to exchange information in a civil, professional, non-combative, and much less expensive fashion. In my experience trying cases and as a mediator, trial counsel confident enough to start with a cooperative attitude more often than not evoke similar cooperation. The potential saving in time and money can be immense.

There will be cases in which the other side does not reciprocate. In such cases, trial counsel may well have to initiate **some minimal discovery** to get missing information needed to give sound mediation advice. The temptation is often to engage in preliminary “paper discovery,” and, if the discovering party gets a legitimate professional response, such discovery should be relatively time and cost-efficient. However, what should be routine and innocuous “paper discovery” too often escalates into World War III with the wrong opposition and/or a law and motion judge unwilling to enforce discovery rights. In these cases, a short key deposition or two may be more productive and less expensive than “paper discovery.”

3. Decide to disclose and show your best case

This final pre-mediation consideration is less a preparatory step and more a tactical decision about your approach. The goal of mediation is to convince adverse parties that your case is strong and that they would be well-advised to compromise sufficiently to resolve the dispute. Within the mediation process, you are protected by confidentiality, and nothing can be used against you if mediation fails to achieve settlement. Therefore, you should put your best case on the table. The other side already knows much of what you know and certainly will be entitled to discover what you know. If your best case does not convince the other side to compromise, perhaps you need to re-evaluate your own position. The up side is that your presentation will sufficiently impress the opposing decision makers to settle. Having mediated over 3,000 civil disputes, I am sure that there must have been isolated instances when holding back was the wise approach. However, I cannot now recall even a single such instance.

Assuming you have opted for detailed disclosure, the traditional approach to mediation affords two major opportunities to convince the other side and to educate the mediator sufficiently to help you get the settlement you want: One major opportunity is the mediation brief; the other is the open or joint session with all decision makers in the same room.

The Mediation Brief

Almost without exception, when I am privileged to work with highly capable trial lawyers committed to a *bona fide* “good faith” effort to settle at mediation, I get a well-organized mediation brief comparable to some of the better trial briefs I have seen. There is usually a detailed factual presentation with page and line references to depositions and other documents. Multiple exhibits are relatively common. Unless the law is basic, better briefs include sophisticated legal analyses with citations to appropriate authorities.

In confirming time and place for the mediation, I urge counsel to provide me with their briefs and to exchange them at least two or three working days before the date set for formal mediation to begin. In a complex multi-party case, I suggest an even earlier exchange. This is

simply another application of the **Trial Lawyer's Golden Rule**. You certainly want all information you can get about the other party's position, and you want it in time to assess it and consider what recommendations you can make to your client based on the other side's presentation. Surely the other side feels the same way.

Thus, I strongly suggest that a full disclosure be made as soon as reasonably possible. Even if you suspect that your opponent is at least generally aware of your position, assume that she is not. You should also assume that she will consider your position and that she will need time to inform and advise her client. Competent counsel will not act on new information without assessing it carefully. New information presented at the eleventh hour almost always causes delay and defers reasonable decision making.

For the mediator, it *does* matter whether you provide your brief reasonably in advance as opposed to the last minute. Your job is to persuade the other side to compromise, and a major tool at your disposal is the mediator. So you need to be sure the mediator understands your position and is fully informed. The more ammunition you give the mediator, the stronger the arguments the mediator can make on your behalf.

Initial Joint Session

The second early opportunity for trial counsel to make the best case in a mediation is the initial joint session attended by all counsel, all clients, the clients' decision makers, and the mediator.

1. Reasons for conducting an initial joint session

At an American Arbitration Association mediation training in the mid-1980s, I was taught that mediation should begin with a joint meeting among all parties' decision makers, counsel, and the mediator. In that meeting, counsel for each party is expected to set forth the strongest position on all issues. Ideally, the presentation should be in the nature of an opening statement, non-argumentative, and addressed to the mediator so that counsel for one party does not end up directly addressing another party or lawyer.

One important reason for an initial joint meeting is that the parties can hear first hand how their opponents view the dispute. Counsel should have advised their clients of the strengths and weaknesses of the case. However, honest perceptions of zealous advocates often differ drastically even when looking at the same evidence. Moreover, even if all clients are fully advised, it is important for the parties to hear the opposing views presented professionally and by capable, well-prepared counsel. A new appreciation of the reality of litigation inevitably results.

Another reason for a full exchange of views in a joint session is time and cost efficiency. I was taught and still follow the practice of elaborating in some detail on four major motivators for compromise that are always involved to some extent: risk of loss, litigation costs, delay, and stress. Sharing this insight with all parties at a joint meeting saves the time of repeating it in private caucuses as many times as there are parties. It also underscores that all parties are affected by these factors and all face similar decisions. They should realize that they all share a

common goal of dealing with the same hazards – even though the same hazards may affect each party differently.

Setting forth your client's position directly in a joint session enables you to say it the way you want to say it. Although all experienced mediators are careful listeners, there is always risk that something will be lost when counsel advises the mediator in private session and counts on the mediator to convey the desired message to the other side. Counsel who say it themselves in joint session reduce to zero the chance that something important will be lost in transmission. In addition, by spelling out your position in detail, you enable the mediator to reinforce your arguments when meeting privately with the opposition.

Finally, the combination of all of these reasons for the joint meeting is that the parties become engaged in the process from the outset. The chemistry is different when the clients hear the issues together. The stage is set for follow-up on all issues in the private sessions.

2. There is rarely a sound reason for *not* conducting an initial joint meeting

The reason I hear most often to forego an open meeting is that there are strong emotions and setting forth the positions of the parties will likely inflame and even be counter-productive. A related concern is that opposing counsel will offend one's clients and cause them to retrench rather than approach mediation willing to consider reasonable compromise. In my experience, there is little merit to these objections for several reasons: First, if the mediator takes control and requires a civil and non-inflammatory process, no one should be seriously offended. Second, volatility is part of litigation, and venting is not necessarily bad. Third, the mediator will be able to reinforce the point that no event in the litigation is as benign as mediation; a party that cannot endure mediation needs to compromise and settle.

I believe that the only sound reason for a client not to attend an initial joint session is that doing so might impair her health. I have been convinced on occasion with elderly and/or otherwise infirm clients that even the relatively mild stress of a joint meeting might be harmful.

Whenever I confer with other mediators or attend mediation training, there is unanimous and strong agreement that the initial joint session is critically important and should not be eliminated except in extreme and rare circumstances. I continue to start with such a meeting even if there has been an earlier session or a failed Mandatory Settlement Conference. At a minimum, it is easier to share perceptions of the parties in a single open session concerning whatever has transpired since the previous session.

3. At a minimum, counsel should give a detailed and thoughtful opening statement

One of the most successful lawyers in the Sacramento region presents imaginative power point presentations in virtually every case I have mediated with him, and I am sure that he does the same thing with other mediators. He outlines the entire case logically. He supports factual assertions with excerpts from deposition testimony, excerpts of other documentary evidence, photographs and graphic artistry. In doing so, he provides detail needed for thorough analyses by decision makers. Perhaps more importantly, he sends the message that he is ready to try the

case. Whether one goes to this extreme, counsel should be prepared to lay out the case in an opening statement.

4. Whether to involve clients directly in the joint session is another question

I try to encourage counsel privately before the joint session to invite their clients to speak up in the joint session. Counsel sometimes object, usually because they fear the client will not make a good impression, and sometimes because they fear the stress will be too great. The more successful lawyers prepare their clients and invite them to speak on one or more issues. In addition to giving the opposition a glimpse of the client's personality, the client is more invested in the process.

Common Negotiating Problems/Solutions in Mediation

As a mediator, I regularly encounter certain recurring problems during negotiations toward settlement. I will identify and discuss five such problems and how I try to solve them, in the following order: (1) The most vexing problem is negotiations that start with a clearly unreasonable position, especially if money is the only or clearly the most important matter in dispute. (2) Extreme distrust by one or more parties can paralyze the process. (3) Diametrically opposed perceptions of the same evidence is not uncommon. (4) A marked change in negotiating direction well into the process can derail progress and set the process back. (5) Finally, until a settlement is reached and reduced to writing, vacillation and doubt too often block progress and may predict buyer's remorse even after agreement is reached. Obviously two or more of these problems may be happening at the same time.

1. Unreasonable starting positions

Especially when money is the only matter in dispute, a major recurring deterrent to good faith compromise arises when the parties assert **unreasonable positions at the outset**. Since plaintiffs seeking money damages usually begin the negotiations with an opening offer or "demand," plaintiffs often set the tone for at least the initial exchanges of offers. Unless the opening offer by the plaintiff is moderated somewhat, it frequently invites a "like kind" response: "That's absurd. I'll show them what's unreasonable. Offer them \$1.98!" Almost always, this bad start takes valuable time to get the parties back into a range where both sides begin to experience some anxiety. I characterize this initial challenge getting from the "ozone" to the "twilight zone" in which both sides begin to realize that they will be better off reaching settlement.

I try to expedite the voyage to the "twilight zone" in several related ways. First, I encourage the parties and their counsel to share an objective evaluation with me in confidence. In this process, we are able to expose and discuss weaknesses in the parties' positions. Often a plaintiff will end up agreeing with me in private caucus that, on her "best day," she is not likely to get more than \$X from a jury. Similarly, a defendant will often end up agreeing in private caucus that, on her "best day," a jury will likely find her liable for something in the range of \$Y. Usually, this approach does facilitate getting to resolution more quickly.

I often suggest a variation of this approach, especially if one side decides that the other is “not dealing in good faith” and refuses to respond to the last “non-offer.” I assure both sides that I will persist with the process as long as there is any hope but that I have an ethical obligation to find out sooner rather than later if there is no hope. Most of the time, with that in mind, both sides will re-evaluate their positions and tell me in confidence what they see as the least plaintiff will accept and the most defendant will pay. Even though the parties are probably still negotiating with me, most of time I can get a pretty clear idea what will settle the case, and settlement follows relatively quickly.

2. Extreme distrust

Sometimes the parties distrust one another to such an extent that distrust precludes reason and shuts down communication altogether. Disabling distrust occurs most often when one or more parties perceives the opposing position as a betrayal or a personal attack. Examples include family business disputes, estate disputes, long time business relationship break-ups, and many employment cases. I have seen extreme examples when the parties refuse even to be in the same room with one another. In such cases, there is an almost automatic rejection of whatever the opponent suggests on the reasoning that what the opponent suggests must be rotten and toxic. The initial challenge for counsel and the mediator is to find a way just to communicate negotiations.

This refusal to consider anything the other side suggests can be overcome in one or more of several related approaches. One solution is to have all sides submit what they consider to be a reasonable overall solution to the mediator who then makes a proposal based on the combined suggestions. In an especially malignant property dispute between neighbors, this approach proved dramatically effective. Each side had predicted darkly in private that the opposition would make specific demands that were absurd and unreasonable. I was delighted to find that neither side suggested anything remotely close to what the opposition had expected. So we started on a much more positive basis than either side had expected – with a proposal made by the mediator rather than communicated by the other side through the mediator. Since the source was not the opposition, each side listened and reacted rationally.

Counsel and the mediator can also work together to have an independent source suggest a solution. The mediator is a logical independent source, and fresh solutions often evolve from an exchange of ideas among counsel, the parties, and the mediator. Occasionally, I have carried this approach a step further by suggesting and getting authority from counsel to act as an intermediary to find independent expertise. A simple example is getting an independent real estate appraisal in a dispute in which both sides are convinced the other side has found and paid for a partisan appraiser.

If all else fails, patience and understanding usually work. In one memorable case in which the parties literally refused even to be in the same room, counsel and I simply out-last-ed the parties and patiently and assiduously communicated until compromise began to emerge. In another, we recessed the traditional mediation, and I was allowed to meet separately at each attorney’s office for lengthy meetings that finally revealed the causes for the disabling distrust and led to a solution.

3. Diametrically opposed perceptions

It is surprising how often well-prepared and intelligent opponents looking at essentially the same evidence perceive key issues in opposite extremes. I call this the “black/white” problem: One person points to a cat and exclaims: “Look at that beautiful black cat!” The other side looks up in amazement and exclaims: “What on earth is wrong with you? That cat is snow white!”

Zealous advocates do perceive the same evidence differently. In modern litigation, often involving voluminous documents, it is understandable that perceptions will differ. But the black white problem also arises when zealous advocates draw opposite inferences from the same undisputable evidence.

Counsel and the mediator can usually overcome this problem by meticulously identifying what each side is relying upon and then analyzing it together. This exercise rarely fails: Either one side has to concede or both sides realize that the evidence is not as clear as perceived. Confronted with reality, denial usually dissipates and then evaporates, and we move on to the next issue.

4. Marked changes in negotiation direction

In most mediations, a certain rhythm develops, with the parties consistently making positive compromises narrowing the distance between the sides. Sometimes, one party will disrupt this rhythm by making a marked change in direction. When this occurs, the result is almost always negative. At a minimum, negotiation slows or stops while the opponent absorbs the new information and formulates a response. At the extreme, the change can be perceived as sufficiently drastic that the opponent wants to go home. This problem usually arises in one of two contexts.

In the first context, money is the only issue. In money negotiations, the plaintiff starts at a higher amount than she is willing to accept after an exchange of reasonable compromising positions. As negotiations proceed, the plaintiff continues to demand less while the defendant continues to offer more. I call this the “North/South” rule: plaintiffs must continue south, and defendants must continue north. There is a major disruption when this rule is violated. If plaintiff reverses direction and demands more, the defendant is not likely to respond with a higher offer. Similarly, if defendant offers less, the plaintiff is not likely to respond favorably. Derailment is imminent, and mediation will fail unless counsel and/or the mediator can get the negotiations back on track.

The other context in which a late change of direction can threaten the progress and rhythm established in the mediation arises from the injection of a new and usually non-monetary issue. As an example, in a case of alleged professional negligence when defendants always want confidentiality, a plaintiff may first agree to confidentiality but then renege later in the process. As a related example, the parties identify the issue early and agree that any settlement will be confidential, but, late in the negotiations, the defense demands substantial liquidated damages if there is a violation of the confidentiality provisions.

In either context, a late directional change is usually the result of poor preparation or a failure to anticipate that the problem might arise. In the North/South context, neither party should be so ill-prepared as to realize in mid-negotiation that the case has more or less value. Similarly, in professional negligence cases, counsel and the mediator should have anticipated these confidentiality problems and put them on the table much earlier. In both types of late directional change, counsel for the side asked to respond to the change should be able to rely on the mediator to get matters back on track.

5. Vacillation and doubt

Vacillation and doubt can jeopardize settlement at two different times. First, even though the parties are proceeding toward resolution, either or both parties can begin to second-guess the concessions they have already made. Second, “buyer’s remorse” can threaten the enforceability of a negotiated settlement even if it has resulted in a written agreement. Both problems will be considered briefly here.

Second-guessing during the negotiating process is not an unusual human response from parties who started the process with a high confidence level but have kept open minds and feel that they have compromised enough – maybe too much. Counsel for such a party will likely inform the mediator that the client is experiencing some doubts and may even backslide. The mediator will likely react accordingly and seek closure from both sides or risk losing the settlement. Experienced counsel has presumably advised the client throughout the negotiations and should therefore work with the mediator to keep the process on course.

“Buyer’s remorse” after a negotiated settlement has been reached will still jeopardize the settlement if one party has second thoughts and tries to back out. Experienced counsel and mediators will insist that the parties enter into a signed agreement to memorialize the settlement. If the settlement is reached after litigation has commenced, a provision in the settlement agreement that the parties acknowledge performance may be enforced by motion pursuant to CCP section 664.6 should make the settlement iron-clad. Even if litigation has not been commenced, counsel and the mediator should include a provision that any party may require performance by filing an action to enforce performance and then moving to enforce pursuant to CCP section 664.6. To my knowledge, this kind of provision has not been tested, but it seems likely most courts would view such an attempt to preserve a settlement favorably.

Parties can include in the written settlement agreement reached in mediation provisions requiring the parties to submit to binding arbitration before a properly selected arbitrator if any disagreement arises in the more formal documentation of the settlement after mediation or in the performance thereof. I have used such a provision in hundreds of settlements. To my knowledge there has never been a problem with enforcement. In a handful of cases, some arbitration was required, and it resulted in preserving and enforcing the settlement.

Conclusion

I hope sharing these observations will help trial counsel consistently obtain better mediated settlements. As in virtually all legal matters all of us undertake, if the matter starts right, it usually stays on course. One important key to successful mediation is a carefully planned and executed mediation brief and participation in an initial joint session.