



Lee Jay Berman

12 ways to make your mediator work harder for you

The biggest mistake most attorneys make is not getting all of the value that the mediator has to offer, and for which their client is paying. Many attorneys won't let the mediator get a word in edgewise, tie their hands with respect to what they can reveal and discuss in the other room, and only want to talk numbers with them after lunchtime. Then they complain that the mediator is overpaid. Getting your money's worth from your mediator is your job. You have to dig, prod and push to get everything that you can out of your mediator, not unlike a tube of toothpaste (that is, if you paid several thousand dollars for the toothpaste and only had eight or 10 hours to get all that you could from it). Most attorneys never get to see all of the skills a mediator has because they never make the mediator work hard enough to use those skills.

Remember that experienced mediators have taken and even taught hundreds of hours of classes and workshops in negotiation strategy, and have facilitated hundreds or thousands of negotiations. Seasoned mediators have seen literally thousands of attorneys work their craft. That experience is what you are hiring when you select a mediator to help with your case. But it's up to you to draw upon that talent and make that mediator work hard for you. Accept nothing less from them. Some mediators think that they can coast into their work with a semi-retired, carefree ease. Weed them out early. Expect to work hard to get your case settled, and expect your mediator to work harder.

Here are 12 ways to make your mediator work harder for you. If you take advantage of every one of them, you will get much more out of your mediators, your mediations, and your settlements.

1. Voir dire your mediator

While much has been written about how to select a mediator (mediation experience, references, personality, style and subject matter experience), there is no prohibition on giving a prospective mediator an old-fashioned job interview. Attorneys who fail to do their due diligence in selecting their mediator are not putting their clients' (or their own) interests first. Unlike arbitration, the mediation process encourages and relies upon ex parte communication, and offers the opportunity to speak directly to your prospective neutral in advance of selecting them.

Before investing a full day of your time and your client's, including all the preparation, consider taking the fullest advantage of this opportunity: to make the mediator work to assure you that you won't be embarrassed in front of your client by selecting him or her, and also for you to build that critical rapport as a first step in connecting with the mediator, even in advance of their receiving your brief. In addition to having the opportunity to interview your mediator and survey them regarding their experience and their style to make sure you're choosing the right mediator for this particular client and case, you also have the opportunity to make a credible, early impression. Your time is too valuable, and good clients are too scarce, to risk having a bad experience in mediation. The chances of this can be greatly reduced if you make the mediator work for you before you have even agreed to use him or her.

2. Put them to work early and often!

Some mediators will not arrange pre-mediation calls (either with all counsel or individually). If your mediator doesn't call you for a pre-mediation call,

then you *can* and *should* call them. Bend their ear. Take advantage of this second opportunity for ex parte communication, and talk the case over with them. Go beyond arguing your case. Ask them affirmative questions, to see if you can get them to agree with you. Ask what would be most helpful for you to include in the brief. Make sure they understand your professional experience, your client's credibility as well as your theories and arguments. This is also an opportunity to tell the mediator in a private conversation about any issues you might be experiencing with opposing counsel, your adjuster or your client, and anything else you would like them to know while you have them alone (for a second time). Not only is this fully allowed, mediators encourage it.

3. Brief them well

Require your mediator to read and understand the case like you do. Of course, this will take you distilling it down into digestible form. Give your mediator a chronology. Don't get excited and jump to the good parts first. Tell the story the way it happened – from start to finish. Give dates and time frames. Then, avoid repeating, avoid bold, italics and exclamation points. Your outrage doesn't persuade a mediator; your facts must. Most mediators you will be using have seen hundreds of cases, if not over a thousand. If your facts don't stand on their own, elaborate language and punctuation only draw the mediator's attention to that.

Bad behavior by bad actors does not require emphasis. Seasoned mediators can see a case developing. They can see it crescendo, they can judge liability and evaluate damages if they are laid out in an organized fashion, but more impor-

See Berman, Next Page

tantly, they also understand what you are saying in between the lines. Any mediator who has been mediating for 10 to 15 years has read thousands of briefs and can read very clearly what you are saying (and not saying) about your client, your adversary, opposing counsel, your case, and your settlement posture without you actually having to say it directly. This is the best reason not to let your first-year associate write your mediation brief.

Mediators really do form opinions about attorneys, especially ones who are new to the mediator, by their writing prowess. If you had your associate draft your brief and you signed it, you have communicated to the mediator that either you do not write very well or that this case is not important to you. You undermined your credibility before the mediation has begun. A well-crafted brief, threaded throughout with covert information, is more important than your reputation because it is real to the mediator. It is what is in the mediator's hands before the mediation. And, if you tell the mediator your confidential thoughts regarding settlement in a private brief, you can shave hours off your mediation time.

The same advice applies for telling the mediator about recent settlement discussions. Nothing is a bigger waste of time than getting almost to lunch time only to hear for the first time that the number just put on the table was offered last week in direct settlement, and that the last couple of hours have been a waste of time. Write well and put your mediator to work long before the mediation begins. Work harder to pass along subtle information, prepare your mediator privately, and give them what you need them to know to help you out. But expect them to learn everything you spell out, and if they miss it, make a note of that.

4. Arrive early and meet with the mediator alone

Get to the mediator's office early and ask if you can talk with the mediator alone before the "formal mediation" begins. Ask questions, clue him or her in on client or adjuster issues, and connect

if you have not met before. A good handshake and three or four minutes of good conversation start the day off on the right foot. Then, bring the mediator over to meet your clients. Introduce them and facilitate a short, light conversation between the two of them. This can range from, "Marge, tell the mediator how your back is feeling today" to "Turns out you and Jim both went to UCLA!" This gives you two brief moments to take the mediator's temperature (and pulse, if necessary) and let him or her take yours and your clients. Doing this allows everyone to become humanized, look into each other's eyes, make a little small talk and shed the armor of playing the roles of "attorney," "client" and "mediator" when you sit together. When the attorney and client are on a more human level with the mediator, it makes the mediator work harder because they cannot simply convey numbers to you. And human nature dictates that it is harder to break bad news to people we like, so in some cases, this can be a negotiating advantage.

5. Enlist them as a strategic partner

Bring your mediator around to your side of the table – literally. When you have them alone in your first private session, enlist their help and draw them away from neutrality and into partiality by asking them how they would play your hand, if it was theirs. Acknowledge your case's weaknesses, then ask them, "What am I missing? What do you see that I am not seeing? How would you oppose me if you were on the other side? What would your opening argument be?" Make the mediator work harder by working up the case with you, and then see if you can lure them into working with you to craft a settlement strategy for the day. Be careful not to answer your own questions. If you ask the mediator a pointed question about case flaws, value or strategy, make sure you get their answer. In these key moments, whoever speaks first, gives in. If your mediator is on the fence about offering opinions, wait them out, press them, and if they won't give you their thoughts about what you should do, then ask them to play the other side and tell you what they would do if they were the

other side. Use the mediator like you would a colleague you might enlist to help you evaluate a case.

6. Make the mediator respond to your offers first

Use your mediator as a sounding board. You deserve to know what the mediator thinks of each offer before he leaves the room to present it (don't accept politically correct neutral speak here), and how he thinks the other side will respond to it. If you really want to put him on the spot, make him tell you what kind of reciprocal concession he thinks you should be able to expect from the other side before he leaves the room to deliver the offer. That will put him under the gun to try to achieve the concession he told you to expect when he is in the other room. Consider his feedback and be flexible to it. Remember, your third, fourth and fifth offers don't matter! They could be anything, as long as you're getting the movement you want from the other side.

So, if the mediator feels better about one number over another, it is best to let him go with the number he feels good about and sell it sincerely, than to send him with one that he doesn't like and has to try to hide his raised eyebrow when he presents it.

One strategy I've seen that really works well is to give the mediator two numbers, either of which would be acceptable to you, and ask the mediator which number he likes better. If he picks the lower of the two every time, then call him on it. An honest mediator will tell you when your contemplated move is too large. If you haven't ever heard that from a mediator, then you are not working him hard enough. Think about it – how much do you really learn from a mediator if you argue with him and win in each round? By giving them two numbers, you get to learn about them, how much you can trust them, and whether they are really paying attention, rather than simply shuttling numbers. As a master strategist, these are the things you really need to know for later, when the negotiation is getting down to real money. You have to

See Berman, Next Page

know that when they walk into your room and say, “That’s really all there is.” that you can trust them, and if you haven’t learned about them during the mediation, then you don’t really know how much you can trust them.

7. Make them explain your offer completely

Naked offers may sound sexy, but they’re really just bare. A fully dressed offer explains the reasoning behind it, the thinking that went into it, the analysis and the message that is conveyed along with it. You can write this down: The intent of any offer is more important than the content of that offer. It is always more important, with every offer, that the other side knows your intent. Your offer is a message to them, but if you send over a naked number (or have a mediator) that only says, “They’re at \$850,000,” then you leave the other side to make up their own story about you, your offer, your strategy and your intent.

Take control of the other side’s impressions by filling in the gaps for them and insisting that your mediator convey the entirety of your meaning, complete with the nuance you intend. This is why your mediator needs to be highly articulate, expertly nuanced and deeply attentive to you and your client. If they’re not getting your message or seem only interested in your naked offer, then ask to speak to opposing counsel and convey it yourself.

You should never feel handicapped by a mediator who can’t convey your message the way you want it conveyed. Additionally, make sure that your mediator raises *all* of the issues relating to settlement long *before* you start to reach the numbers. Mediators who take their eye off the ball can leave you arguing with opposing counsel about settlement terms like confidentiality, release language, taxation and other deal terms at the end of a mediation when you thought you had agreed because you agreed on a number. Make sure they are on top of these issues early on and doing their job to flesh out all of the relevant issues. In fact, doing so can sometimes take the focus off of the numbers at a strategic time in the

afternoon when the negotiation needs a change in focus.

8. Have them be your eyes and ears

While there is some disagreement about the ethics of sharing the “temperature” in the other room, I have had two very telling instances of sitting in on a mediation as a consultant to a party: one when my brother sued his general contractor, and the other when my other brother went through divorce mediation. When the family mediator in the latter case came back into our room and said, “She has melted down. She is a puddle on the floor in the other room.” There was no question about where things were, and that it was time for a new approach to bring her back into reality. In the construction case, when the mediator came back and said, “She’s so nervous, she can’t sit down, she’s pacing around the room. If I didn’t know better, I’d swear she was on coke!” Knowing this allowed my brother to make more informed strategic decisions about the size and timing of his next offer.

If you are in one room for the majority of the day, you do not get to see firsthand whether the other side is frustrated, bored, wearing down, boiling over or at the tipping point. In some cases, this information can be more important than the amount of their last offer. The non-verbal cues such as the attitude behind an offer and the flexibility surrounding it will determine how you respond to it as much as the offer itself. You need to know who is driving the bus in the other room, including how that may change as the day progresses. Expect your mediator to paint a picture for you so that you can use all of the context to your advantage. Ask your mediator each round or two how their temperature is in the other room. You will make more informed decisions, and the mediator will be of more value to you.

9. Have them give you your choices

While you may see two or three options for responding in a certain circumstance, your mediator may see another option or two that you do not. Ask them to review the available choices as they see them. Remember, if you’re hiring

a professional, expect that they have studied negotiation theory, game theory, distributive bargaining and integrative bargaining, and should be expert in architecting a negotiation that will result in a settlement. Put that expertise to work for you. It is a well-known fact that most untrained people negotiate in a way that is consistent with their personality. Nice people negotiate more collaboratively, and competitive people like to play hardball. But your mediator should be skilled in both styles and more. So, make them work for you and offer you options before you narrow to one choice for your next move.

10. Have them tell you when enough is enough

By late in the day, your mediator has spent many hours watching and gauging the patterns and ability of the other parties and their lawyer(s), feeling the ebb and flow, watching control shift from attorney to client and back again. Your mediator is best equipped to know when the other side is at the end of their rope in the negotiation, and when “no” really means “no.” Make them opine, and give that considerable weight. Ask the mediator what he is relying upon in concluding what he concludes, and make him show you his logic and reasoning.

11. Make them work until the end

There are some mediators who are quitters. When 5:00 p.m. comes, they will leave, right in the middle of a mediation, no matter how close a settlement may be. Do not accept this from your mediator. No matter how big a “name” a mediator has, do not ever hire him again, and make sure that every other advocate you know hears about it if a mediator quits on you. Some mediators will also quit when a deal is reached – literally sitting down in the far corner of the room and letting counsel, who have opposed each other all day, try to iron out a difficult or complex settlement agreement, or worse, leaving and telling the parties that it is not their job to facilitate the writing of the settlement agreement.

See Berman, Next Page

While it is *never* the mediator's job to write the settlement agreement, given that one would have a hard time suing a mediator for drafting language that disadvantages their client or failed to foresee a problem down the road, it is the mediator's job to facilitate the discussion until the signatures are all on the page. After all, the settlement agreement is just an extension of the negotiation between the parties. Many attorneys say that the most important quality in a mediator is an iron rear end — one who can sit there as long as it takes to get the job done. Your mediator should be the last one out of the room, when a settlement has been reached, and especially if one has not (yet). Your job may need to be keeping the mediator working until the ink is on the paper. Do not accept less from your mediator.

12. Expect them to work after it's over

Any mediator worth his salt will be committed to you until the case is settled. Seasoned mediators see mediation as a

process, rather than a day. If the initial mediation session ends, make sure that your mediator continues to work for you. With mediators who are either so busy that they don't have the time to adequately follow-up or with those who are not as aggressive as you would like, you may have to prompt them to call the other side. There is no shame in calling the mediator if you haven't heard from him or her for a few days after an unsuccessful mediation and prompting them to call the other side with a "routine follow-up call" (rather than indicating that you called them first). If your mediator required a jump-start, you can certainly provide the motive power, as a last resort. Ideally, you want your mediator to remain tenacious after a mediation session that didn't end with a signed settlement agreement, and in some cases, you may have to initiate that conversation.

Conclusion

In these economic times, attorneys are paying more attention to mediators' fees. Consider that focusing just on fees is a lot like buying a car based solely

based on its price, without ever asking how big the engine is or what options it has. If you are making your mediator work hard in all of these ways, you will get your clients value for every dollar. Now that you have these 12 ways to make them work harder for you, you should have much better results in your mediations.

Lee Jay Berman began as a full-time mediator in 1994, successfully mediating over 1,300 cases in his 15 years. He mediates privately as well as through the American Arbitration Association. He is a Fellow with the International Academy of Mediators, a Diplomat with the California Academy of Distinguished Neutrals, was Mediator of the Year for the U.S. Bankruptcy Court in 2006, and was named to the Daily Journal's Top Neutrals in 2008. Also a prominent trainer in the field, he founded the American Institute of Mediation and was Director of Pepperdine's "Mediating the Litigated Case" program from 2002-2009.

