

Mediation: An Effective Way to Connect with Clients

BY JOHN BATES JR.

Most legal professionals think of mediation merely as a process to settle cases, but it also presents incredible marketing opportunities. The process allows you to work collaboratively with your client and to showcase your skills for preparation, advocacy, and negotiation. Managed properly, mediation can solidify your relationship with your client and help you to develop future business.

Negotiation is all about communication. When each side is able to hear, understand, and appreciate the other's position, and the opportunities or consequences that flow from it, the more likely parties are to reach an agreement. In a properly conducted mediation, the mediator creates an environment conducive to effective communication. The mediator's charge is to convey the respective parties' points of view in a way that will ensure they are received and sincerely considered. If accomplished, a settlement will result 90 percent of the time, enhancing a lawyer's standing with his or her client.

Spending a day with your client in this kind of environment can create a lasting bond. How often do you have a captive audience in an intimate setting where you can demonstrate your professional skills, interact on a personal basis, and probably solve your client's problem? From a business development standpoint, you should recognize this opportunity and make the most of it.

Involve the Client from the Outset

Proposing mediation to your client is normally a positive thing because it shows you are looking for cost-effective ways to manage the litigation, but the timing is critical. Oftentimes, in the early stages of litigation your client is upset and wants blood. Be sympathetic. If your client's competitor has just hired away your client's key scientist along with the ideas for a new product, your client will not be thinking about compromise. At this stage, if you begin by explaining how

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most civil cases settle, you could damage your relationship because your client may think you are not willing to go the distance. Your best course would be to explain how to win, not how to settle. Eventually, after events have unfolded a bit, you can explore settlement options. Certainly you can safely raise the subject if the other side initiates a settlement overture, if you anticipate the court proposing it at a status conference, or if the client asks you for a litigation budget. To preserve your role as “hired gun,” you might consider designating a colleague to act as an alternate dispute resolution specialist, to explain the realities of civil litigation and the benefits of mediation.

Once your client is open to exploring the mediation option, explain the process. Remind your client that it is entirely voluntary, nonbinding, and confidential. Be sure that your client understands that, unlike at trial, he or she retains control over the outcome. The mediator is not making a final decision; he or she merely creates an opportunity for the parties to do so.

Involving your client in selecting the mediator is a good way to connect. You can demonstrate your knowledge of the case and the appropriate person to mediate it. If your client has participated in the selection and the mediator measures up to your assessment, your credibility, and that of the mediation process, will be enhanced and your client will come away with a positive reaction, whether or not the case settles.

Involvement of the Client in Session Preparation

Most clients like to be involved, and want to have input, in getting ready for and participating in the mediation session. By seeking your client’s collaboration, not only will you gain the client’s appreciation but you will also frequently gain invaluable insights from him or her. If nothing else, having relayed the information and knowing that it has been received will raise your client’s confidence in you. Solicit ideas from your client and get his or her reaction to your plan to manage the process. This back-and-forth will unify you as a team and give your client tremendous comfort. He or she will learn just how important you are to achieving a satisfactory result. At the very least, you should establish with your client the strategy (goals) and the tactics (approach) for the mediation. Keep in mind

THE KEYS TO CONNECTING

Involvement of the client from the outset:

- Explain the process.
- Explain the realities of litigation, that 98 percent settle.
- Explain what needs to be done to maximize leverage at mediation, which is far less than what is necessary for trial.
- Solicit your client’s ideas.
- Involve your client in mediator selection.

Involvement of the client in preparing for the session:

- Solicit input from your client on briefs.
- Establish who is going to do what.
- Establish strategy (goals) and tactics (approach).
- Interact with the mediator.
- Preview client for what to expect at the mediation session.

During the session:

- Find a balance between controlling the situation (protecting your client) and allowing your client to be involved (respecting your client).
- During downtime, look for ways to learn about your client and to share your attributes.
- Work collaboratively with your client and the mediator to explore all avenues to settlement.
- Listen carefully and react to the needs of your client.

that your client may well have more experience in negotiations than you do, so you will want to acknowledge his or her skill and take full advantage of it.

During these discussions, remind your client that what you need to do to maximize your leverage at the negotiating table is far less than what you would have to do to win at trial. You and your client must decide what you will need for the mediation and then, if the matter does not settle, what you need to do to get ready for trial. Equipped with a budget, you can demonstrate to your client how you are using mediation as a cost-effective way to manage the litigation. If the case does not settle, no doubt your client will blame the other side, enabling you to do whatever is necessary to win at trial.

In any premediation conferences with the mediator, consider inviting your client to participate. However, understand that if your client is involved, to maintain symmetry the mediator will have to invite the other party, which could be problematic. You can always ask for a private conference with a mediator, providing your client an opportunity to get acquainted with the mediator and to elevate your client’s comfort level with

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the process. Make sure to confirm with the mediator that these discussions will be treated as confidential.

Always prepare a mediation brief. Let your client see a draft, and solicit his or her input. You should allow enough time for your client to reflect on the matter so that your offer for suggestions is perceived as sincere. In that way, you may even obtain some useful information.

Stay Connected with the Client

During the mediation session, look for ways to engage your client and foster your relationship. As you know, there can be a lot of “downtime” when the mediator is meeting with the other side. Use this time productively to learn about your client’s interests and things you have in common. Look for opportunities to share your own attributes and personal background. Spending time with your client, where you are both trapped in a conference room, is a bonding experience. Throughout the session, stay in touch with your client. Never abandon him or her, and always be aware of your client’s needs

and make sure they are met, whether they are process driven or personal. In essence, make sure your client is comfortable. This will foster communication, enhancing the chances for settlement, and it will strengthen your professional and personal relationship. ■

John Bates Jr., based in San Francisco, has practiced law since 1974 and mediated full time since 1990. His mediation firm merged with JAMS, the nation’s largest private provider of alternate dispute resolution services, in 1994. Bates can be reached at jbates@jamsadr.com. A previous version of this article appeared in the ABTL REPORT (Summer 2008, Vol. 17, No. 3), the newsletter of the Northern California chapter of the Association of Business Trial Lawyers. It is reprinted by permission.

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