

Care and feeding of your mediator

BY VINCENT P. FORNIAS

Congratulations on acquiring your very own mediator! We know you probably worked very hard to find him. Now that he or she is finally in your possession, please take a few minutes to familiarize yourself with his simple operating instructions to keep him healthy and happy, helping him to be everything you would ever need him to be!



(1) Avoid last-minute surprises—the classic “drive-by” issues. Do not appear at mediation with new and expensive information (such as recommended surgeries or life-care plans) that your opponent will not be able to realistically process and address. Remember that corporate defendants, and especially insurers, are slow, cynical and deliberate bureaucracies that operate and act upon timely submission of documentation. You can minimize this speed bump by simply reviewing your file a few weeks

before the mediation to be sure that something fundamental has not been overlooked in your submission to opposing counsel.

(2) Do your best to assure that authority figures will be present at mediation. Although more of an issue with corporate defendants than with personal injury plaintiffs, do not overlook the “favorite aunt” whose arbitrary non-legal advice over the phone, absent her investment and education in the actual give-and-take of a “live” mediation process, can wreck your chances of a consensus. There admittedly is also the complicated problem of insurance adjusters prohibited from traveling or with “set” authority. Half the battle in a mediation is one of perception—that all parties are on a level playing field, willing to listen, and subject to massaging of their pre-mediation positions. Unless your mediator can at

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least communicate by phone with “The Wiz” in all caucus rooms, that perception of equality breaks down and dramatically impacts the chance of resolution.

(3) Many able mediators have a fairly hectic professional schedule that may keep them away from their desks for days at a time. If you are submitting something to be reviewed before the mediation, do not assume that your submission sent the day before the mediation will reach him in time to review it. He may be in out-of-town mediations several days running or that day’s mediation may have run late. If your goal is to have him be familiar with your submission, be sure to send it far enough in advance to give him the opportunity to review it. Online submissions help alleviate this problem, but do not assume that bulky online attachments are a substitute to the security blanket of having the actual photographs or medical records available at a moment’s notice when needed at the mediation.

(4) Once the mediation is scheduled, it is a very bad idea—no matter how trusting a relationship you might have with opposing counsel—to have unilateral communications with him concerning goals or expectations or authority. This rule carries over into post-mediation discussions

where the mediator is attempting to follow up toward a settlement. Remember that by choosing to mediate, you have delegated to your mediator the task of modifying expectations necessary to settle the case. Your *ex parte* discussions with your opponent may undermine much of what the mediator may be trying to do within the confidentiality of a mediation setting. The concept of “reactive devaluation” is real and crucial in this process. No matter how sincerely you share your limitations with your close associate who happens to represent your opposition, that information will be framed by him or his client as data coming from the opposition—and subject to further negotiation.

(5) Meet or confer with your client beforehand and impress upon him both the strengths and the weaknesses of your case. No case is perfect. This fact alone keeps mediators in business. Ask the client to be open-minded. A mediation is not about winning or losing. It is about getting done, not getting it won. On this one day in this dispute, it is not about confrontation. It is about collaboration.

(6) Do not place your mediator in the no-win position of having to negotiate the allocation of his fee at the start of mediation. He has learned through experience that

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this must be agreed upon at the start, so that he is not victimized by representations that the parties will discuss this issue at the conclusion, then have a party accuse the other of bad faith negotiating and refuse to pay a share of the fee. Surely you have “bigger picture” issues to address at your mediation than to get bogged down on who pays what for the process. Try if at all possible to agree before the morning of mediation.

(7) Take a few minutes the day before your mediation to reflect on what you really want to communicate in the opening joint mediation session. There are countless benefits to such a session, and it should almost never be completely waived, although it should be tailored to the specifics and needs of each case. Above all, do not undermine your mediator's mission by resorting to “scorched earth” personal attacks that challenge both your credibility and the ability of the mediator to help forge a collaborative atmosphere leading to consensus and closure. The very best opening presentations are those that highlight not only the advocate's preparation, but also a tacit acknowledgement that there may be another side to his client's story, maintaining a willingness to listen.



(8) Your mediator's effectiveness is dependent not nearly as much on his ability to digest data as it is on his skill in reacting to the individual dynamics of what is occurring in the various caucus rooms during a mediation. As your “weatherman” in the other rooms, he is attempting to navigate through a myriad of emotional or bureaucratic issues that may not be part of the “official” agenda, but can make or break productive discussions. Do not hamper his task by insisting on a step-by-step, “cookie-cutter” negotiation process if he has perceived that the dynamics in this particular mediation make that process a recipe for impasse and failure. If you cannot have faith in your mediator to gauge the temperature in the other rooms and guide you through what your best approach might be on this particular day—then you have chosen the wrong mediator.

(9) Be aware that appearances and perceptions are crucial in a mediation setting. Always be polite and conciliatory, but do not be overly affable with opposing counsel. You would be amazed at how normally objective clients will react emotionally to ostensibly harmless friendly exchanges in the context of a mediation. Also remember that sometimes private caucus rooms are far from soundproof. Your most

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sincere presentation of conciliation and contrition in an opening joint session may be sabotaged when an opposing party walks down the hall and hears uproarious laughter (or worse!) behind your closed doors.

(10) All mediators to some degree expect gamesmanship and “puffery” from the parties. It is one thing, however, to play the negotiation game. It is another one entirely to make a confidential commitment to a mediator and later attempt to renege on it. Such a tactic hurts not only your credibility and professionalism but is devastating to the ability of any mediator to maintain the confidence of the parties.

(11) Too many parties assume that a case that does not settle on mediation day will just as easily settle with follow-up telephone or email discussions. Especially in multi-party mediations, there is no substitute for face-to-face contact between your mediator and the parties and for securing the benefit of that day's hard-earned momentum. Additionally, the reality of hectic professional schedules and the inability of a mediator to stop everything else in a telephone-tag exercise make such

an alternative both frustrating and inefficient. It is well worth postponing the pre-scheduled flight and staying a little longer to “get ’er done.”

(12) If you absolutely have to postpone or cancel a mediation (which sometimes is unavoidable), please remember that most mediators who mediate as their primary profession have reserved that day for weeks or months for your mediation only. It will be impossible for them to slot in a replacement mediation without at least several weeks' notice. As a professional courtesy you should diary the file weeks beforehand to be sure “all systems are go.” If something needs to be done before you can mediate, at least give your mediator a fighting chance to save his day. If you must cancel on the eve of mediation, do your best to reschedule with the same mediator whom you have just cost a day's wages.

(13) Lastly and above all else, please be sure to laugh passionately and uncontrollably at all pathetic attempts by your mediator to infuse lame or tacky humor to your mediation. If not, it can cost you dearly! 📌



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