
Five Keys to Mediating with Power



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After litigating for more than 30 years, Robert B. Jacobs now mediates challenging real estate, business, construction, personal injury, trust and probate cases. In 2020 he served as Chair of the Contra Costa County Bar Association ADR section and Co-Chair of the Alameda County Bar Association ADR section. Since 2017 he has served as one of the update authors for the CEB treatise Real Property Remedies and Damages and is a co-author of CEB Practitioner (Real Property). He received his mediator training from Northwestern University in Chicago, Illinois. Reach him at Bob@attorney-mediator.law

Disclaimer

The following materials are provided as a survey presentation for educational purposes only. They are not intended to constitute an exhaustive nor a comprehensive treatment of the subjects addressed. Persons with specific issues, cases or questions should consult original sources of legal authority or competent legal counsel.



(Almost) monthly Newsletter
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Five Mediation Power Points:

I. Marshal the Logistics

II. Get What You Need

III. Get the Other Side What They Need

IV. Get the Mediator What They Need

V. Work Effectively with the Mediator

Introduction

Mediating with(out) Power:

The Opera Tickets

Question: What's the fastest way to end a mediation unsuccessfully?

Answer: Have a key player leave

Five Keys to Mediating with Power

I. **Marshal the Logistics**

A. Make Sure All Necessary People Participate

1) All necessary decision makers

(Note: these may not all be parties)

- 2) Influential non-parties such as beneficiaries, influential family members, “significant others” or key “friends”
 - a. If they won’t participate all day in person or by Zoom, have them available by phone
- 3) All Settlement Agreement Signatories
 - a. Power of Attorney may be (or may not be) adequate (but bring the POA)

4) Potential Cross-Defendants

- a. They may help fund your settlement
- b. In exchange they buy peace
- c. Don't answer "no" for them

B. Lay the Groundwork for Full Participation

- 1) Make sure your clients have the entire day (and evening) available
 - a. Airline flights (“Well, I thought it would be over by now”)
 - b. Child care issues (“but it’s challenging/expensive/whatever”)
 - c. Tickets (event tickets/opera/ball games)

- 2) Secure meeting facilities that are fully available (without a hard stop)
- C. Prepare for a day free from technical issues
- 1) Camera, microphone, speakers
 - 2) Cell phone as audio (and video) backup
 - 3) Download and test the Zoom app
 - 4) Ensure clients have sufficient bandwidth

- 4) Printers at home (or e-sign alternative)
 - a. Ability to print, scan and email a settlement agreement
 - b. DocuSign or Adobe Sign capability
- 5) Pre-mediation Zoom conference (not only to check connections, equipment and software familiarity but the environment as well)

D. Stamina (and Morale)

“One cannot think well, love well, sleep well, if one has not dined well.”

- Virginia Woolf, *A Room of One's Own*

II. Get What You Need

A. Prepare the Roadmap to Resolution

1. If it's a breach of contract case – get the documents, estimates and/or bids you need to calculate your damages

2. If it's a specific performance case (such as for the purchase of a business) – identify all the licenses you need, how you'll get them and how you'll get the other necessary items for completing the transaction

3. If it's a construction cessation case – calculate your delay claims and get the bids to finish the job

4. If it's a construction defect case – identify the scope of the defects and get your repair bids

5. If it's a probate, trust litigation or other family based case – look for and identify any non-monetary values that may hamper settlement

- a. Sometimes the value is the money
- b. *Sometimes the value is what the money represents*
- c. Money can represent power, control, morality, ethics, a sense of rightness, a sense of fairness, a ledgerbook mentality, a way of keeping score

“They need to learn a lesson”

“I can’t let them get away with that”

“I’m not going to stand by and let this happen”

“I don’t care how much I get. I just don’t want them to get more”

“Dad (or Mom) wouldn’t have wanted it this way”

“It’s the principle of the thing”

III. Get the Other Side What They Need

A. Assess the Other Side

- 1) Do they understand the Law?
- 2) Do they understand the facts?
- 3) What are their values?

a. *Mediator Question: “What do you think the other side wants (or needs) in order to settle this case?”*

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- B. If they don't understand the Law, educate them
- 1) Forego long string cites. But unless you know otherwise, don't assume they know the key law supporting your position. *Cite (and discuss) statutes and powerful case law when it's available (and identify it as such).*

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- C. If they don't know key facts then bring them up to speed
- 1) Include key documents as exhibits to the mediation brief (this can help the mediator)
 - 2) In appropriate cases let the other side see the strength of your case through your eyes by photos taken from your perspective and which powerfully demonstrate your position

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- 3) Is a “free client mini-deposition” appropriate?
 - 4) Consider inviting key expert or percipient witnesses to participate – to show what the other side can expect at trial
 - 5) If the case turns on expert testimony, consider having your experts available (even if you don’t invite them to attend)

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- D. Evaluate the case from the other side's perspective
- “What do they need to receive from me in order to understand the strength of my case (and that they have a problem?)”

- E. Determine whether you can help the other side accomplish their goals without giving up yours – an “outside the box” approach (when it’s not a zero sum game)
- F. Avoid Fatalism. Examples:
 1. “Either the case will settle or it won’t. It doesn’t make a whole lot of difference what I do”

2. “The attorney/client on the other side is completely intransigent. Maybe the mediator can get them off the dime – but probably not”
3. “The other side is so unreasonable that it’s not worth the money preparing any kind of significant brief because they won’t budge anyway”

Even if the other side has been consistently telegraphing a hard-line position, they aren’t necessarily immovable. *They may be communicating a different message to the mediator.*

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- G. When you write your brief, remember 1) who you're dealing with and 2) the purpose of the mediation
- 1) Mediation is often a process of changing people's minds (and hearts)
 - 2) Consider the likely effect of *insult* or *insinuation* in the persuasive process
 - 3) Overstatements, broad-brush claims and ultimate facts are rarely persuasive (but concrete evidence of specific wrongdoing can be like gold)

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- F. When it comes to the persuading other side, the purpose of the mediation brief is two-fold:
- 1) It should persuade the other side that they have a problem, or
 - 2) If your case is presented to an impartial third party (i.e. a judge, juror or arbitrator) that such third party would believe the other side has a problem

IV. Get the Mediator What They Need

A. Include key documents as Exhibits

- 1) Actual documents are more powerful than summary
- 2) Key documents can provide the mediator with additional information

B. Why is this important?

- 1) Powerful mediators explore the strengths of your case with the other side
- 2) A concise brief with streamlined facts, clear legal analysis and citations to strong authority gives a mediator a lot to talk to the other side about.

C. Submitting the brief early provides the mediator with runway (if the mediator reads it early)

- 1) Thoughtful and analytical mediator review
- 2) An opportunity to add/invite additional parties
- 3) An opportunity to request key documents, photos, witnesses or analysis
- 4) Citation review

V. **Work Effectively with the Mediator**

Two key points

- A. Listen closely to the mediator
- B. The mediator can help you with your own client

A. Listen closely to the mediator

1) The mediator may have information for you about how the other side is viewing their own case

2) The mediator may have information for you about how the other side is viewing your case

Knowledge is power

1) The mediator may have valuable information for you that you might otherwise miss out on if you focus only on telling the mediator about your own case. Educating the mediator about your own case is a necessary first step but the mediator is being exposed to lots of information from the other side and their perspectives and values. *Some of this information may be valuable to you in forming your own case evaluation and your settlement proposals.*

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- 2) In appropriate cases consider asking the mediator such questions as:
- a. What seems to be important to the other side? (This is a powerful “open ended” question)
 - b. Is there anything the other side is looking for that isn’t monetary?

c. Is this claim/issue/dispute about the money *or is it about what the money represents?*

d. What's the emotional tone in the other room? It could be one or more of several things -

1. Anger
2. Stubbornness
3. Vengeance
4. Calm

B. The mediator can help you with your own client. Clients know that mediators are neutrals and have no stake in the outcome. Powerful mediators can confirm many of the same things you may have been trying to tell your clients about the uncertainty and cost of litigation and the emotional toll it exacts on many people. Powerful mediators can be highly effective in helping clients adjust their expectations and in lending an air of reality to the litigation process. Clients who believe the justice system rights all wrongs are frequently ripe for an unpleasant – and disappointing – surprise following a trial. If your client is unyielding and has unrealistic demands or expectations, a powerful mediator can significantly help educate your client about life in the law.

D. Mediation often involves a highly complex set of evolving issues and evaluations. Preparation through effective briefs can be key. But the mediation process happens in real time with little or no time for additional preparation, assessment or evaluation. A mediator you “click” with can be of inestimable value in settling your case. If you find yourself in need of a mediator, consider choosing a mediator who:

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- 1) Is quick on their feet (i.e. taking in information, processing it, organizing it and then presenting it)
 - 2) Can make lightning-quick assessments and evaluations of legal arguments
 - 3) Understands human nature and motivation
 - 4) Is approachable, credible and engenders trust
 - 5) Is calm, even-tempered and stable

Two Sidenotes:

- Use humor as appropriate. Emotions are high; people get tired. Both sides need to be able to endure the process or it may end prematurely. Some humor and light banter can alleviate some of the stress so that parties can stand to stay at it for the many hours often required for resolving challenging cases.

- Dine well. Food is compelling. Morale can flag, especially when people get angry, frustrated or emotional. Good food can be a bright spot in an otherwise long and difficult day. It may cost a bit more, but good food raises spirits, and good morale and stamina may be prerequisites for successfully enduring a long day of mediating.

Mediation newsletter is available upon request on a complimentary basis – send an email to Bob@attorney-mediator.law

Questions