2022 BASIC TRIAL SKILLS SERIES
#6 MEDIATION

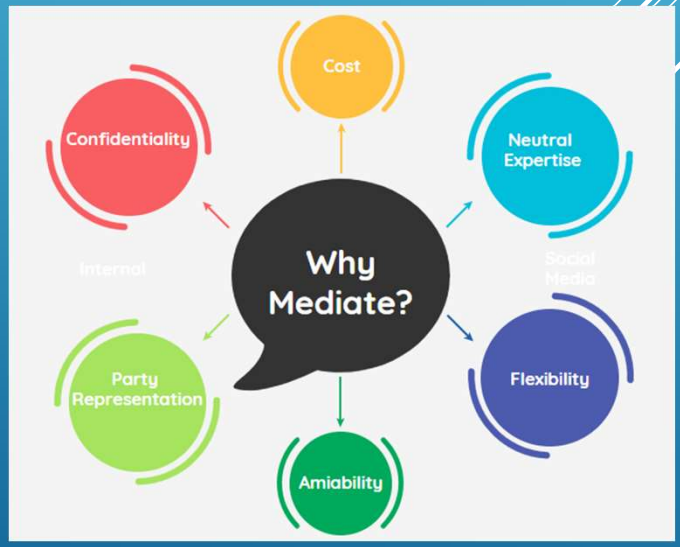
Presented by Mediators Lauren Tate and Thomas Crosby

CROSBY ADR

Tate & Associates

What Is Mediation and Why Participate

- Client's "last chance" to control their own destiny
- Voluntary
- Mediator's role
- Confidential (Evidence Code §1119 (c))
  - *"All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."*
- Client saves cost of litigation and controls risk
- Free discovery (of substance and/or strategies and/or problems)?



When Does Mediation Start

- Start mediating when you first get a case
- Be strategic not formulaic
- Pre-mediation conduct/relationships impact mediation

Pre-Mediation Conference

- Importance of Conference
- How to prepare
  - Have a clear intent
- What to discuss in conference
  - Anticipate barriers to settlement
  - Tell the mediator what you need from her
  - Talk about logistics
  - Design process with mediator

Mediation Brief – Audience, Tone and Objectives

- Who is your audience
  - Mediator: Help the mediator help you and your client
  - Opponent: Educate Don't Intimidate
- Writing style and length
- What to include
- Tone - Do's and Don'ts

Preparing for Mediation: Both You and Your Client

- Yes, it is very important!
- Appearance
- Authenticity
- Prepare for difficult but obvious questions – be prepared to give answers to current complaints, past complaints and be ready to deal with the obvious issues raised by the "other side"
  - Example for PI plaintiff: You had two prior surgeries to your back, how will you convince a jury that this fall is the reason that you can no longer work?
  - Example for premises defendant: Your floorwalker did their inspection within 10 minutes according to the checklist…how will you explain this to a jury when it likely takes 20 minutes to simply walk the premises?

Joint Session(s) at Mediation – Pros and Cons

- Pre-Zoom and Zoom
- Benefits/risks of a joint session
- Reasons counsel and parties are trending against – Tom's View
- Reasons joint session is making a comeback – Lauren's View
- Preparing parties and counsel before a joint session

Basics of Negotiating at Mediation

- Prepare in advance and control expectations of client
- Explain *compromise* settlement!
- Handling stratospheric demands and avoiding insulting initial offers
- Messaging and signaling with offers
- Try to anticipate a bottom line:
  - BATNA
  - WATNA
  - Honest appraisal of attorney's fees and costs of suit
  - Honest appraisal of CCP §998 and consequences
  - Spend time with your client explaining the plus and minuses and the risks of not settling

Basics of Negotiating at Mediation (continued)

- "Hard Ass" or "Reasonable" Negotiating
  - No "right way"
  - Each case is unique
  - Each party is unique
  - Each mediator is unique
  - Sometimes you don't have a choice…it is client's decision ultimately

Written and Signed Mediated Agreements

- Important to enforce settlement! CCP §664.6
- Who Can Sign?
  - Previously the agreement must be signed by the party against whom it was to be enforced
  - **Amendment** to CCP §664.6 – Attorney can sign on behalf of client
  - ***Warning:*** *an attorney who signs the writing on behalf of a party* ***without express authorization to do so*** *shall, absent good cause, be subject to professional discipline.*

Written and Signed Mediated Agreements (continued)

- Have a checklist ready:
  - Basic Terms of Settlement
    - Parties
    - Payment amount(s)
    - Deadline for payment
    - Dismissal with prejudice
    - Full Release of all current and future claims
    - Express Purpose: to enforce under CCP §664.6
  - Provides for later "robust" settlement agreement and release
  - Other Issues
    - Confidentiality
    - What to do if later there is a dispute over the agreement?
      - return to mediator?
      - prevailing party entitled to collect attorney fees and costs?
  - Everything is negotiable…but know what is important to your client in advance and get it involved in the negotiation process early…no surprises – avoid "just one more thing…"

QUESTIONS?????

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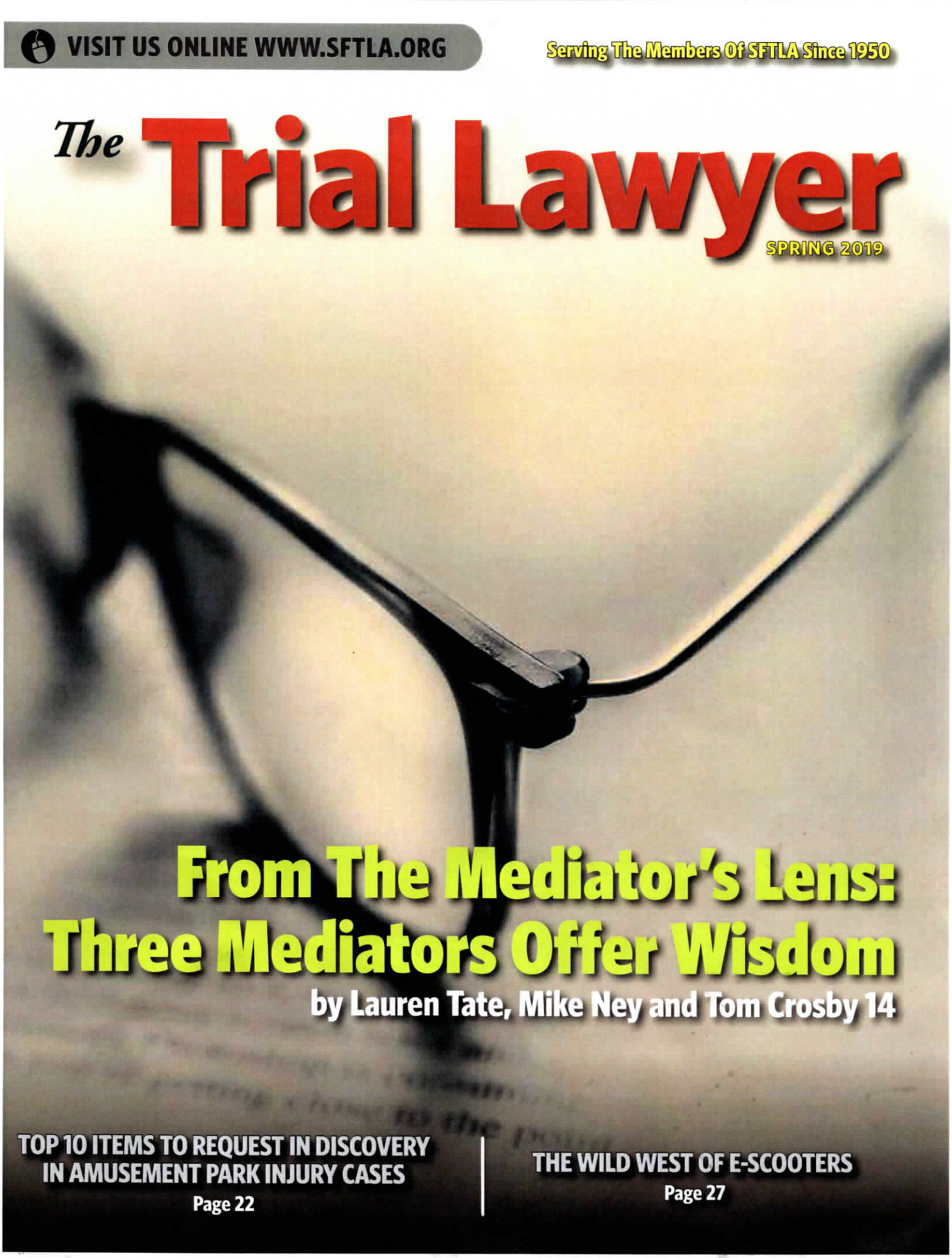

From The Mediator's Lens: Three Mediators Offer Wisdom

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FROM THE MEDIATOR'S LENS: THREE MEDIATORS OFFER WISDOM

BY LAUREN TATE, MIKE NEY AND TOM CROSBY

LAUREN TATE

There are a number of circumstances that either make resolution more difficult or prolong mediation. While there are logistical hurdles to achieving resolution, there are also other important factors that determine not only the outcome, but how the parties will feel about the settlement. With that in mind, here is my not entirely conventional Top 10 list of how to ensure a successful mediation. Get ready to strike the pose and succeed!

10. Work with the Mediator Before Mediation

Even if you haven't yet written your mediation statement, there is tremendous value in speaking to the mediator well in advance of the mediation. The discussion may help solidify your approach and guide you in preparing your statement and addressing the factual and legal issues more effectively. You may also realize that either you or the defense need additional information, and the mediator may be able to facilitate that. Use the pre-mediation conference to decide whether and how a joint session will be most effective and to discuss barriers to settlement, and trust the mediator to construct the process she believes will be most efficient and successful.

9. Be Open to a Joint Session

Increasingly in California, both sides are resistant to a joint

session, which I believe is a missed opportunity. While having attorneys speak in a joint session often serves only to make everyone angry, don't shy away from a joint session for that reason. Unless there is a reason that the parties simply cannot be in the same room, there is immense value in even a short joint "meet and greet" gathering during which the mediator explains the process. If the defense attorney or defendant has not met your client, don't pass up the opportunity to have the defense meet and hear from the plaintiff as it will make it more difficult to vilify her. Likewise, don't pass up the chance to have the plaintiff meet the defense as it may make her more open to hearing the defense position. If nothing else, the parties will have looked one another in the eye and acknowledged one another as human beings. Physically coming together initially also signals an emotional willingness to come together in resolution.

8. Use the Joint Session to Overcome Hurdles

If there are issues that you know will be barriers to settlement and you can do something about them at the outset, do it at the joint session. For example, if the plaintiff is angry about the incident, the way the claim was handled pre-litigation, or how long the process took, have the mediator determine if the defense can address that upfront in a genuine way. A joint session can help diffuse intense emotions early on. Again, work with the mediator in advance so all parties have a clear sense of how a joint session might either help diffuse issues or potentially make things worse. (Beware the fake apology!) Trust the mediator to craft the joint session to promote a sense of hope and vision about resolution.

7. Don't Waste Mediation Time

Doing the work prior to mediation will prevent you from wasting costly mediation time. Keep in mind that defense attorneys and adjustors need to document their files and justify the authority requested. Make their job easy. Get final lien information if possible and at least start lien negotiations before mediation and get agreement regarding Howell numbers. Make sure the defense has the documentation of other damages such as wage loss so that the defendant/carrier comes to mediation with authority that can settle the case. Use the mediator to assist with damage issues ahead of time during the pre-mediation call, as she can find out from defense what it will take to move the needle. On the other hand, when issues do arise at mediation that could not have been avoided and preclude resolution that day, the mediation can still be successful. The mediator can determine what information is needed and the effect it is likely to have, and get agreement on a timetable for providing it to the other side and reopening negotiation either with another in-person session or by telephone.

6. Prepare Your Client

I both want and expect to talk to the parties about the law, risks and expenses of trial, and 998 Offers at mediation. This is what I refer to as "The Ghost of Litigation Future" visited upon the parties at mediation so that they "wake up," fling open the figurative window, ask "What day is this?" and realize that it's not too late to resolve the case before the future nightmare comes to pass. However, clients are often hearing about the burden of proof hurdles, costs, and risks for the first time. Unless there is a reason you want the client to hear this first from the mediator, realize that it takes a lot of time to educate and revise unreasonable expectations. If a client comes to the mediation with a good sense of the issues involved, what she needs to prove, and defendant's anticipated position, she will feel more in control and have more realistic expectations, and the resolution will take less time.

5. Give Up Control - Well at Least a Bit

Nothing makes attorneys crazier than not being in total control all the time! You have chosen a mediator you trust. A good mediator will quickly establish that trust with your client as well, and once that occurs, be mindful and trust the process. Be flexible enough to allow the mediation to take a course you might not have expected, and focus on issues that you might not have realized were important – often those are the real impediments to settlement. The parties may need to work through conflict and emotions. Trust the mediator to keep control of the mediation and protect the parties, even if conflict makes you uncomfortable. Allow the mediation to take the course it needs to take. Mediators and attorneys both need to know "when to get out of the way" and allow the case to resolve.

4. Don't Forget That Defendants Are People Too

If your client is going to be hearing things that are difficult to hear, don't lose the opportunity to have the defense describe the process by which they evaluated the case, explain what information was considered (plaintiff's deposition, medical records, review of other cases involving similar injuries, etc.) and communicate to the plaintiff that a lot of thought and, hopefully, respect went into the decision. The defense can make important concessions, for example, that the plaintiff's credibility is not an issue or that the injury was significant, and shift the focus on the issues that are really in dispute, such as liability. A plaintiff who believes that her case has been thoughtfully and respectfully evaluated will be far more open to hearing numbers with which she disagrees, and will be less likely to have a negative emotional reaction to hearing defendant's position.

Lauren Tate Ms. Tate has served as a mediator in all types of civil cases since 2012. She is particularly skilled at maintaining control of negotiations and reaching settlements in emotionally charged cases

Tom Crosby left a successful litigation practice to follow his passion for resolving disputes and is now a fulltime mediator under Crosby ADR. Tom's diverse and successful litigation career now serves to inform him of the needs of plaintiffs, defendants, and their counsel in mediation.

3. Take Time to Envision a Good Resolution and State Your Intention

Before you even write your brief or speak to the mediator, seriously think about what a good resolution means for your client. Is it only money? If so, what does paying or receiving the money represent to your client? Is it repairing a relationship, your client being able to continue to work with the other party in the future, repairing reputations, repairing trust? Examine what needs to be accomplished and why, what your client's needs and interests are, and what is actually necessary, not just desirable, to resolve the case. State your intention out loud to yourself. Keep your intention firmly in mind when making your initial demand and consider whether it is consistent with both your intention and your vision of the mediation. If you cannot state your intention clearly, then you probably need to clarify with your client. You will be amazed at the power of forming and stating your intention ahead of time. Then carry your intention throughout the mediation, and ask if what you are doing is moving your client toward that result.

2. Strike the Superman/Superwoman Pose

Don't lose sight of the fact that for most clients, this process is intimidating and scary, or at least stressful. Before heading into the mediation, remind your client that the purpose of the mediation is for her to understand the issues, risks, and benefits of settling so she can make the best decision. The client should be proud that she chose to come together with the other side to make every effort to resolve the case. Remind your client that it took courage for her to go to mediation and that she is in control. Have her strike a power pose, maybe with arms outstretched like Superwoman, at least figuratively. Your client should feel empowered and hopeful before she goes into the mediation. Okay, attorneys, you try it too. Strike that pose and see what happens.

And the No. 1 tip for successful mediation....

1. Don't Check Your Humanity at the Door

Regardless of whether the other party is a personal injury plaintiff or a CEO, she is, first and foremost, a human being with vulnerabilities, fears, and hopes all informed by experience. I am often amazed by the strength of a person with seemingly no power or the vulnerability of an apparently powerful, sophisticated business person. I have mediated with a senior vice president who, when I dug down, was at his core embarrassed and fearful about the dispute, and framing the resolution to address those issues was critical. It is also remarkable to me the large number of people who have suffered some type of major trauma in their lives, whether physical, emotional, or financial, and I learned quickly not to make assumptions about a person's experiences or what is motivating her actions. Regardless of how you feel about the other party or her position, try to acknowledge her humanity. Understand that you cannot, in fact, walk in someone else's shoes. The same holds true for opposing counsel. Always be respectful and kind. Don't be afraid to be friendly and even

funny, when appropriate. Listen and respond respectfully and the case will settle itself. Ultimately, we are put on the earth to take care of one another, and we need to make that happen.

TOM CROSBY

In real estate the old saw is "Location, Location, Location." For successful mediations I suggest *"Attitude, Attitude, Attitude."* Specifically, I recommend practicing attitudes of Trust, Honesty, and an Open & Willing approach.

Trust

Pick a mediator that you trust and then (sometimes against all litigation instincts to control anything and everything) actually trust the mediator and the mediation process.

Pick a mediator that you trust? This falls under the easy to say, difficult to do category. What characteristics are paramount in trusting a mediator?

Trust your mediator's judgment? Trust your mediator's competence? Trust your mediator to keep confidences? Trust your mediator to both accurately and effectively convey important issues to the "other side?" Trust your mediator to listen to both you and your client and to understand your collective needs? Trust your mediator to be honest with you and your client? Trust your mediator to develop a rapport with your client? Sometimes even when you don't like it, trust that you have a mediator who is not afraid to call you out on your "malarkey." Yes... Yes... Yes... Yes... Yes...Yes...Yes and Yes!

Judgment, competence, confidentiality, and communication skills should be obvious and fundamental prerequisites, and they need no additional commentary for this audience.

Finding a mediator that can develop a rapport with your client through his/her demeanor, ability to listen and who demonstrates such listening is a much more subtle but no less important requirement. Although you may want to control everything (notice a theme?) there may come one time in a successful mediation when it will be necessary for your client to completely trust what the mediator is saying. Likely it may even be something that you desperately want your client to hear but because of the case-intake history, your prior advice, your need to appear confident for your client, etc., you need such information to come from someone other than you (i.e. the mediator!). This is where a good rapport between the mediator and your client (developed over the course of the mediation) becomes critical.

Given truth serum, good trial lawyers will admit thinking that they can persuade anyone, anytime and whose knee-jerk reaction is to try and do so at every turn. Again, trial lawyers want to control the outcome. However, this attitude can sometimes undermine appropriate compromise and dispute resolution. When this is the case, you need a mediator who is not afraid to be honest with you and who is not afraid to "call you out" on unproductive nonsense. Although we glossed over "judgment" above, as not requiring further commentary, a mediator exercising good judgement will "call you out" politely or privately and separately from your client.

Once you find a mediator that you trust, give up "control" and trust the mediation process. In most successful mediations there is an ebb and flow. In most mediations nobody knows in advance exactly how the mediation will play out. Nobody knows exactly what issues and interests will be key. In my experience, however, there will be just a few significant issues or interests that ultimately form the foundation for finalizing a "deal." Because the mediator is the only one who is privy to the issues and interests paramount to both sides, and because it is a mediator you trust, you need to let the mediator do his/her magic. Allow the ebb and flow. Trust the process!

Honesty

Relax! I am not suggesting that you be honest with your settlement authority, your "bottom line," or your settlement strategies. Call it honesty with a small "h."

However, if you trust the mediator and you have become willing to trust the process, it is incumbent that you are honest with the mediator about certain interests of your client. If you have a client that has privately told you "I will never go to trial," I recommend that you tell the mediator that your client really wants to get this case settled. If you have a client whose interests are not just about the money, but who may also need an apology or some other interest met, be honest early in the process so that the mediator can figure out when and how to get this need satisfied.

Open and Willing

I open my mediations by thanking the parties for being "open and willing" to the process. Sometimes that is the truth; the parties and their counsel are actually open and willing to the process and trust the process in its entirety. Sometimes it is simply a hope. Nevertheless, I have found that the mere suggestion at the outset of mediations, more times than not, leads to a level of openness and willingness to participate in the process in a way that helps lead to a successful resolution between the parties.

Thomas C. Crosby

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Professional Summary

In July 2016, Tom Crosby decided to close Crosby & Rowell and pursue his dream of a full-time mediation practice. Tom's prior litigation practice included claims of personal injury, wrongful death, toxic torts, railroad hearing loss, professional malpractice, sexual harassment, wrongful termination, public entities and commercial disputes. He has represented both defendants and plaintiffs.

Experience

Crosby ADR - Mediator	July 2016 – Present
Crosby & Rowell LLP	May 2001 - July 2016
Gordon & Rees LLP	June 1983 - April 2001
Crosby, Heafey, Roach & May	October 1981 - June 1983

Education

Mediation Training by Steven Rosenberg *Advanced Mediation Training*	October 2017
Mediation Training by Steven Rosenberg *Facilitative Mediation*	February 2017
Straus Institute for Dispute Resolution, Pepperdine School of Law *Mediating the Litigated Case*	February 2005
UC Hastings College of the Law	May 1981
Santa Clara University	May 1977

Mediation Affiliations

- Board -The Mediation Society
- Co-Chair - ACBA ADR Executive Committee
- Board – Contra Costa County Bar Association ADR Section

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Lauren Tate has more than 30 years' experience handling a wide variety of cases through trial including personal injury, medical malpractice, premises liability, product liability, intentional tort, real property, and contract disputes. Lauren's mediation practice encompasses those same areas. Lauren is particularly skilled at maintaining control of negotiations, managing expectations and helping the parties reach settlements in emotionally charged cases. She is adept at connecting with the parties, engaging them in the process, and making sure that they are heard, feel empowered, and are committed to lasting resolution. With a strong belief in the power of mediation, Lauren brings to bear her extensive legal experience and emotional intelligence to create an atmosphere in which all of the necessary legal and non-legal issues are addressed and cases are resolved.

EDUCATION AND MEDIATION TRAINING

JURIS DOCTORATE — MAY 1986
University of California, Davis, School of Law
Admitted to the California State Bar, December 1986
BA, ECONOMICS, UC BERKELEY — JUNE 1982

MEDIATION TRAINING

Mediation Certificate Program, Steven Rosenberg	October 2012
Advanced Mediation Training, Steven Rosenberg	October 2015
Mediation and Collaborative Practice, Woody Motsen	April, 2016
Strauss Institute for Dispute Resolution	June 2016, 2018
Pepperdine University	
Advanced Mediation Skills and Techniques	
Working Creatively With Conflict – The Center for Understanding In Conflict	April 2021

COURT ADR PROGRAM PANELIST

Alameda County Mediation Program Panelist
Contra Costa County Superior Court ADR Program Panelist
Marin County Settlement Conference Panelist
San Francisco Settlement Conference Officer

MEMBERSHIP

Alameda County Bar Association, Contra Costa County Bar Association
National Association of Women Lawyers, Queen's Bench