

MAXIMIZING MEDIATION SUCCESS: PRACTICAL TIPS FOR ATTORNEYS

By Andrew Weiss, Weiss Mediation

Too often, attorneys treat mediation as a routine formality rather than a decisive moment in their client's case. Approximately 97% of civil cases settle before trial, with the vast majority resolved through mediation. For most cases, mediation is the real trial—the forum in which the case is resolved. Approaching mediation without careful preparation, strategic planning, and a clear understanding of the case's strengths and weaknesses can undermine both credibility and results. Success, therefore, requires the same intensity, focus, and preparation that attorneys bring to trial. The following pointers offer practical guidance for maximizing your client's chances of achieving a favorable outcome.

BE PREPARED AND PREPARE YOUR CLIENT

Preparation is the foundation of effective mediation, yet it is not uncommon for lawyers to present without a thorough command of the facts, the evidence, the applicable law, or their burdens of proof. Being unable to answer basic factual, evidentiary, legal, or damages questions signals a lack of preparation and can erode client confidence. How can one competently settle a case without fully understanding it? The answer is simple: they can't. An attorney who displays a fluid command of the case will be more persuasive, command greater credibility, project confidence, and will be in a stronger position to achieve a satisfactory result for their client.

Equally important is preparing the client for mediation. The process should be explained to the client well in advance of the session. Counsel should have a frank, candid, and realistic discussion about the strengths and weaknesses of the case, likely outcomes at trial, and a reasonable settlement range. If there is a client control issue or a genuine disagreement between attorney and client about these issues, the best time to resolve it is before mediation. To be effective during mediation, attorney and client need to be on the same page, working together toward a single goal—achieving the best outcome. In cases where attorney and client cannot agree, it can be helpful to alert the mediator in advance so the mediator can focus on these issues before the parties begin negotiating in earnest.

SUBMIT A GOOD BRIEF

Although mediators do not decide cases, their perception of your client's position influences how they frame risk, evaluate proposals, and communicate your arguments to the other side. A well-written brief can be persuasive; conversely, a bland, perfunctory, or poorly written one can create a negative impression. Well-written doesn't necessarily mean long. A concise but compelling brief is usually more impactful than a lengthy, rambling one. Exhibits should be included if they highlight and support the more powerful contentions in the case. Many attorneys are over-inclusive in attaching exhibits, forcing the mediator to focus on minor details and distracting attention away from the main points. As with all good legal writing, care should be taken to avoid exaggeration, snarkiness, and hyperbole, as these undermine credibility. The tone should be professional. Personal jabs at opposing counsel or disparaging comments about an opposing party are rarely appropriate and can be quite off-putting to the reader.

A well-crafted brief should aim to establish your side as the most credible and dependable source on the facts and the law. This is especially true with respect to damages. Inflated or artificially minimized figures quickly erode credibility, making it more difficult for the mediator to persuasively convey your position.

HAVE A PLAN

Counsel and their client should discuss, in advance, what they are willing to offer or accept at mediation. The plan should be realistic and factor in the strengths and weaknesses of the case and likely outcomes at trial. It is essential that the client start mediation with a realistic view of the case; otherwise, mediation time may be diverted from negotiating to managing client expectations.

Waiting until the day of mediation to have this discussion is unwise. Parties may be in an unfamiliar environment and feel pressured, fatigued, or outnumbered, making planning more difficult. Once a plan is formulated, it is generally best to adhere to it. Exceptions may arise if new, unexpected, or prejudicial information is disclosed at mediation. When case-altering information is revealed at mediation, parties and counsel must be prepared to reassess and, if necessary, adjust their strategy. Mediation, like trial, is a dynamic process, and both counsel and client must be flexible enough to adjust to unforeseen developments.

Overall, having a plan demonstrates intentionality, which conveys confidence to the other side—particularly when coupled with an unequivocal willingness to take the case to trial if your client's settlement objectives aren't met. By contrast, being aimless, indecisive, or flying by the seat of one's pants during negotiations signals weakness and a lack of confidence in the case. Knowing in advance what your client is willing to offer or accept is also important because it makes clear when an impasse has been reached.

NEGOTIATE RATIONALLY

Negotiate consistently with your plan. Whenever possible, avoid gimmicks such as "tit-for-tat" negotiating—simply parroting small incremental moves made by your opponent. This reactive style rarely achieves productive results and, more often than not, creates frustration on both sides. In some cases, it can even lead to unnecessary and premature termination of mediation. Instead, negotiate in reasonable increments toward your planned limit—and stop when you reach it. If the other side negotiates irrationally or unrealistically—persistently making unreasonably high demands or offensively low offers—stick to your plan. Do not let their negotiating style distract you from your strategy.

A common mistake is attempting to "anchor" the negotiation with a number that is unfettered to the facts or the law. While anchoring can be an effective negotiation tool when grounded in a defensible analysis, opening with a demand or offer that is patently unrealistic often backfires. A plaintiff who begins with an inflated figure that bears no reasonable relationship to provable damages—or a defendant who responds with a token offer that ignores clear exposure—does not gain leverage; instead, they lose credibility. Extreme numbers can signal that a party is posturing rather than negotiating in good faith, making it harder for the mediator to move the discus-

sion into a productive range. Effective anchoring requires discipline and rational justification. Numbers that are supported by evidence and risk analysis tend to frame the negotiation constructively; numbers that are "ridiculous" tend to stall it.

Avoid being punitive in your negotiations—it is rarely effective. Do not negotiate out of spite by increasing prior demands or lowering prior offers. Few things will derail mediation faster than backpedaling. Also, don't threaten to terminate mediation unless you and your client really mean it. It is surprising how often a party conveys an offer or demand as "take-it-or-leave-it," and then continues to negotiate when that offer or demand is rejected. Continuing to negotiate after giving a "take-it-or-leave-it" ultimatum undermines your and your client's credibility.

ALLOW YOUR CLIENT TO PARTICIPATE

For your client to respect the outcome, they must understand and actively participate in the process. Some attorneys insist on doing all the talking at mediation, effectively excluding the client from the discussion with the mediator. While there may be rare situations where this is a good idea, most clients want to be seen and heard. Telling their story and expressing their feelings is an essential part of reaching a mutually acceptable resolution. Allowing the client to speak also helps the mediator gauge whether they understand the process and are genuinely engaged in the negotiations. Preventing the client from speaking rarely helps and can leave them feeling that the settlement was imposed on them without their input and informed consent.

MANAGE YOUR EGO AND FOCUS ON CLIENTS

This is your client's case, not yours. Mediation should not be about the attorneys' personalities or egos—it is about the parties and their interests. When mediation becomes a contest of wills between lawyers, positions harden and rational risk assessment gives way to pride. The focus must remain on your client's interests, not on competing with opposing counsel. Keeping your ego in check ensures the process stays constructive and focused on achieving the best outcome for the client. Remember: the case is not about you.

BE CIVIL

Litigation is competitive and cases can be hard-fought, resulting in bad feelings and lack of trust be-

tween opposing parties and counsel. Nevertheless, it is an ethical obligation for attorneys to conduct themselves professionally and civilly. Hostility toward the other side does not foster an environment conducive to compromise and resolution; in fact, it has the opposite effect. The attorneys should keep their focus on what is best for their respective clients, which may require keeping personal emotions in check.

CONSIDER SETTLEMENT OPPORTUNITIES AFTER MEDIATION

Even if the initial mediation session does not result in a settlement, parties and counsel should remain open to further negotiations. Cases mediated closer to the trial date are more likely to resolve than those mediated earlier in the litigation. Maintaining flexibility allows parties to revisit discussions, even when positions initially seem polarized. By keeping the door open, attorneys preserve opportunities to achieve a resolution that benefits their clients.

CONCLUSION

Ultimately, successful mediation results from careful preparation, strategic planning, and credibility built throughout the process. Attorneys who enter with a clear command of the facts and law, a realistic assessment of risk, and a willingness to engage constructively—rather than posture reflexively—create momentum toward resolution. By preparing clients for the emotional and financial realities of compromise, communicating candidly with the mediator, and focusing on problem-solving rather than point-scoring, counsel can turn mediation into a decisive opportunity for meaningful resolution. For most civil cases, mediation is not merely a routine formality—it is the moment when the case is decided.

About the Author

Andrew Weiss is a Past President of the Fresno County Bar Association and is now a mediator based in San Luis Obispo County, serving California's Central Coast and beyond. He is Past Chair of the ADR Section of the SLO County Bar Association and has been named a Southern California Super Lawyer in ADR for six consecutive years. Mr. Weiss mediates a wide range of civil disputes, including personal injury, business, real property, construction, employment, and insurance matters, both in person and via Zoom. More information is available at www.arweissmediation.com.

