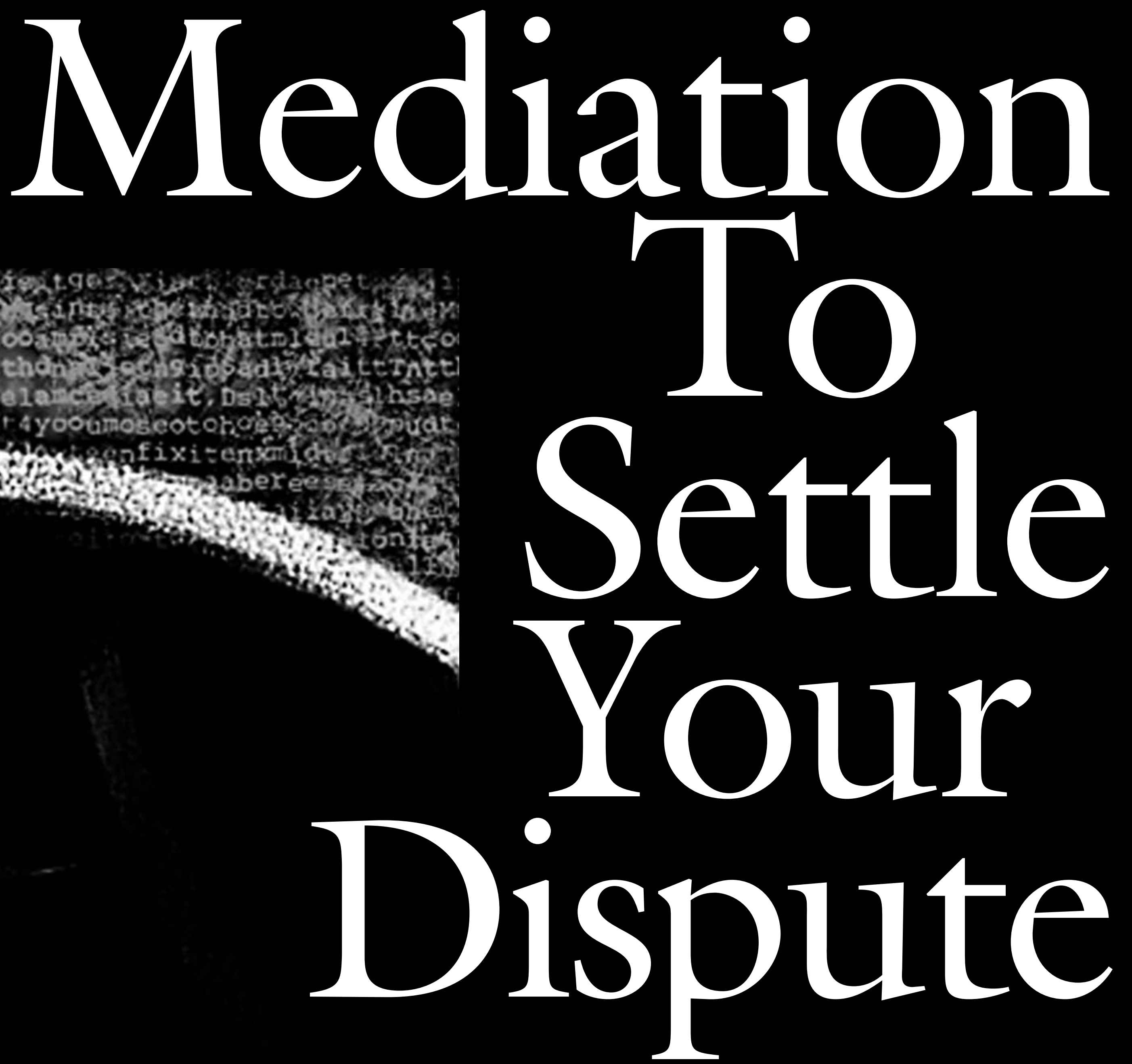
Using

Mediation To Settle Your Dispute



A Guide for Attorneys

by Marc Kalish

I HAVE BEEN CONDUCTING settlement conferences and mediations since 1994. In 1996, I stopped representing clients and devoted myself exclusively to providing third-party neutral services. Based on that experience, I have reached a conclusion about the single most important factor leading to a successful settlement in cases in which the parties are represented by counsel. However, before relating that conclusion, allow me to emphasize that the views and opinions expressed in this article are solely my own and are not based on any scientifically valid research. In fact, they may not be shared by anyone else, although I suspect (and hope) that the more experienced and intelligent mediators out there will agree with a large part of what I have to say.

My conclusion is that the single most important factor in achieving a settlement is the willingness and desire of the attorneys to settle the dispute. I also have learned that many considerations come into play for an attorney in a settlement context. Obviously, the client's wishes come first, but that notion is much easier to express in the abstract than it is to implement in a practical sense. Except when dealing with a sophisticated, litigation-experienced client such as an insurance company, an attorney has a great deal of influence over the client's willingness to settle. That influence may allow the attorney to shape rather than follow the client's settlement desires. Therefore, this article helps attorneys recognize how the client decides to proceed with the idea of settlement. I also offer some suggestions on how to deal with that decision and how to become an effective advocate for the client and for settlement.

What May Influence Your Client's Decision?

The first consideration is the attorney's self-interest. In a personal injury case, the plaintiff's lawyer who has a contingency fee agreement receives a better return on his or her time investment by settling early. On the other hand, the defense lawyer operating on an hourly fee makes more money the longer the case goes on and the more discovery is done. Although this concern always will be present, the attorney must not allow his or her self-interest to affect negatively the client's perception of the best time to seriously consider settlement.

Next, the attorney may want to avoid looking "weak" by advocating settlement. This factor may exist more often than most attorneys would want to admit, but it is most frequently seen in two particular situations.

The first occurs in cases with the ongoing "big" client, such as a large corporation involved in many different litigation matters. Consciously or subconsciously, the attorney will want to impress the client with the attorney's willingness and ability to engage in the good fight for the client's interests. If the attorney too readily advocates settlement, there may be the fear that the client will perceive the attorney as lacking the backbone needed to pursue what the client sees as its just causes.

The second situation occurs when a client comes to the attorney seeking a "bulldog" to handle what is most likely a highly emotional case. It is very easy in that situation for the attorney to lose objectivity or to want to avoid having the client view him or her as being on the adversary's side.

The third consideration is a corollary of the previous one, for attorneys do not always want to keep a client. We all have taken cases and clients that we have regretted. One quick way to be rid of them is to settle the case and be done with both. This avoids the difficult situation in which the attorney must "fire" the client or advocate a cause in which she does not really believe. Therefore, the option of settlement can become preferable to half-hearted representation or an unpleasant end to the relationship and a possible malpractice claim.

In addition, the interpersonal relationship among attorneys in the case may affect their willingness to enter into serious settlement negotiations. If personal animosity exists, for whatever reason, the tendency is to want to make life as difficult as possible for the opposing attorney and his client. One way to do that is to impede the settlement process, at least until the last possible minute.

Obviously, these are not the only considerations that play a role in how and why an attorney may influence a client's settlement decision, but they are the ones that arise most often. Now that you can recognize them, what is the best way to deal with them?

Advocating Well for Your Client—and for Settlement

Here are my top ten suggestions (with apologies to David Letterman).

1. Think Settlement the Minute You Get the Case

One of the most difficult tasks in advocating settlement is to overcome the client's early perceptions of the strength of his case—perceptions often created by the attorney when only the client's side of the story is known. For example, the personal injury client who is told in the initial meeting that the case is worth $1 million will be hard to convince later on that he

should settle for $50,000, no matter how the case has been undermined by facts learned during discovery. Moreover, even if the client does settle far below initial expectations, his anger will be directed at his incompetent attorney, whose ineptitude caused a $1 million case to deteriorate. Therefore, be careful in advising the client early on about the value of the case or the likelihood of success. Use all those "lawyerlike" evasive techniques and caveats for which our profession is famous, and document your advice with a confirming letter.

2. Pick the Right Time To Discuss Settlement

As a general rule, settlement should come neither too early nor too late in the case. To be an effective advocate in settlement negotiations, an attorney must have a good understanding of the strengths and weaknesses of the case. Therefore, some amount of discovery and legal analysis must occur in most cases. On the other hand, if all that remains is the trial, the client does not have as much to lose by refusing to settle, especially if the possibility of paying the other side's attorneys' fees after an unsuccessful trial does not exist. A settlement decision is primarily a cost/risk-benefit analysis. If most of the costs already have been incurred, one important factor has been removed from the equation, or at least minimized. Also, a client may resent her attorney if the case settles at the last minute, because much time has been wasted and much money has been spent.

3. Choose the Settlement Medium and Neutral Carefully

If the attorneys on opposing sides have a good relationship, they may be able to settle the case without the assistance of a settlement conference or mediation. If that avenue is unavailable or unsuccessful, the first agreement that must be reached is on the method of settlement. Court-sponsored settlement conferences with a judge or judge pro tem offer the cheapest alternative, but they are almost always limited by both the time the neutral has to devote to the process and the neutral's availability on short notice. And although some of my best friends are judges, not all are properly trained in conducting media-

tions. Therefore, you may want to consider private mediation.

The biggest problems with private mediation are cost and selecting a mediator. In Arizona, the range in mediator hourly fees is from $150 to $350 per hour. Some, however, charge by the day or half-day, or approximately $1,500 and $3,000, respectively. Some charge administrative or set-up fees; some charge cancellation fees; and some may not charge for preparation time. Shop around if cost is a factor, but also bear in mind that, in the long run, the mediator's fee will be a small percentage of the cost of litigation.

Sometimes, even choosing a mediator requires mediation because each attorney may have a favorite neutral. In other situations, their inability to agree on anything may spill over to the selection of the neutral. If all else fails, ask the assigned judge or some other person whom all the attorneys respect to select the mediator, perhaps from a short list prepared by the parties. Always consider the mediator's qualifications, training and experience. Finally, decide what type of mediator you want.

There generally are two types of mediators: facilitative and evaluative. A *facilitative mediator* tries to help the parties reach what they believe is a reasonable settlement but does not express (or, ideally, form) an opinion about what the settlement should be. The rationale behind this style is that a neutral cannot learn enough about a dispute from the relatively scant materials provided by the parties and by their oral statements to form a valid opinion about what a reasonable settlement should be.

In contrast, an *evaluative mediator* reads the materials provided by the parties and listens to the positions of all parties, factors in what is known about the venue where the dispute will be resolved absent a settlement and forms an opinion about what should be a reasonable settlement. He or she then tries to steer the parties to settle at or near that amount or on those terms. The rationale behind this approach is that the neutral is a detached, objective, and experienced person who can draw on those traits to make an informed determination of what the parties ultimately will come to see as a reasonable resolution.

Although all good mediators will be flexible and adjust their methods to the particular case, most will tend to fall into one of these two categories. Find out what your potential mediators think of these different techniques and choose according to which style you think will best fit the circumstances of the dispute.

4. Provide Your Mediator With Sufficient Information

Almost every mediator in a litigation context will ask the parties for premediation statements or memoranda outlining the nature of the dispute, the evidence, the law, the settlement history and, possibly, their settlement position. Some mediators will have the parties exchange memoranda; some will ask that they not be exchanged. The reasoning behind the exchange approach is that the parties will be better prepared to address the key issues at mediation if they know in advance how their adversary views those issues. The reasoning behind the no-exchange approach is that the parties will be more forthright if they know that what they tell the neutral in setting the stage for the mediation will not be shared with their adversary.

Whether the memoranda are to be exchanged or kept confidential, try to be as honest as possible with the mediator and yourself. Avoid treating the mediation as an opportunity to win your case. The mediator, by definition, has no power to decide factual or legal issues. Rather, try to be as objective as possible in discussing the strengths and weaknesses of all parties. If documents are central to the dispute (e.g., a dispute over a commercial lease), provide the mediator with a copy. If particular deposition testimony is critical to an issue in dispute, provide it also. The more information the mediator has in advance, the better he or she will be able to plan and conduct the session.

Another aspect of preparing the mediator is to advise him or her of any problems you are having with your client. Sometimes, the lawyers agree on what a reasonable settlement would be, but one or both clients cannot be convinced by their respective counsel. By asking to meet privately with the mediator before the session or in a premediation telephone conference, this can be explained, and the mediator will be better equipped

to deal with the reluctant client.

5. Be Totally Prepared

By preparing an honest premediation memorandum, you also will help yourself get ready for the mediation. An effective negotiator needs to have as much relevant information as possible at his or her disposal. If your adversary takes an erroneous factual or legal position during the mediation, you must know precisely how to expose the error. Likewise, you must be aware of the current law governing your case. Recent appellate decisions can be critical in how a mediation turns out, especially if one party is familiar with new law and the other is not. It would be a shame, to say the least, to settle for less than is appropriate because you thought the law was against you when a recent decision clarified the law in your client's favor.

6. Be Professional and Assist the Mediator

A mediation should be a relaxed and civil proceeding, even if the litigation has not been. Help the mediator set a conciliatory tone for the session by being polite and by avoiding condescending remarks and behavior or statements that may provoke an emotional response and further polarize the parties.

Leave your advocate's hat at the caucus room door. Most mediators will use the caucus method in resolving disputes in litigation. By meeting privately with the parties and their counsel, the mediator can establish a rapport with the litigants, provide a neutral shoulder to cry on and better play the devil's advocate while trying to persuade the litigants to see the dispute from their adversary's perspective. The attorney can assist the mediator in caucus by being open and honest with the mediator and the client. Now is the time to discuss frankly the weaknesses of your case and the strengths of the other side. If you are hesitant to do this, remember that the stronger your buildup of your client's case, the harder it will be to explain a loss at trial. And there are few experienced trial lawyers who have not lost cases that they were sure they were going to win. Use the confidentiality of the caucus to help the mediator educate your client on the risks of proceeding. In turn, a good mediator will help you by emphasizing to the client that this should be taken not as a sign of weakness but as a sign of your professionalism and experience.

To be professional and assist the mediator, be reasonable and objective. Taking extreme positions or asking for something that you know the other party would never give will poison any chance of settlement.

7. Be Flexible and Keep an Open Mind

Not every mediation will adhere to the same format. In highly emotional cases such as wrongful death or partnership dissolutions, the mediator might decide it best to avoid the typical opening session in which the lawyers present their cases to the other side; instead, she or he might proceed directly to caucus. In fact, some mediators avoid these opening statements in all cases, believing they start the mediation off on too much of an adversarial note. Trust the mediator's judgment.

In some cases, such as the drafting of a purchase and sale agreement, time in caucus may be limited, with most of the time spent together discussing particular provisions. Be ready to adapt to different methods or to suggest them when you think it would be appropriate.

Just as there are different ways to conduct a mediation, there are many different ways to settle disputes. Without reaching an overall settlement, the parties can agree on an abbreviated trial, with or without a high-low agreement; a binding arbitration; a trial limited to certain issues (e.g., damages only); or other types of resolutions. Give some thought to these alternatives before going to the mediation, and be familiar with such alternatives in the event that the mediator or another party suggests them.

8. Know When To Keep Your Mouth Shut

Although this advice fits within several of the foregoing recommendations, it warrants its own heading. If you have something to say that may antagonize your adversary, wait until caucus and mention it privately to the mediator. Even if it is conveyed to the other side, the mediator probably will put it a bit more diplomatically.

In caucus, let the mediator be in charge and set the tone. Many mediators like to use the initial caucus to develop a relationship with the client, so give your neutral the latitude to do that. Remember that it is not your settlement, but the client's. At least let her believe she is in control of her destiny. You will be given an opportunity to express yourself if you wait your turn.

Leave your advocate's hat at the caucus room door. … **Now** is the **time to discuss** frankly the **weaknesses of your case** and the **strengths** of the **other side**.

9. Do Not Back Yourself or Your Client Into a Corner

Try to avoid taking hard-line positions during negotiations. For example, unless asked by the mediator, do not characterize a demand or offer as the "bottom line." Even if your client is convinced at that point that he is not willing to go any further toward a compromise, withholding that characterization from the mediator will let him or her believe the possibility exists to get a little bit more movement if it will settle the case. For example, if the plaintiff's "final" demand is $105,000, and the defendant's "best" offer is $95,000, that case should settle. But if the parties have told the mediator

that their figures are "bottom lines," the mediator's options become limited in trying to lead the parties to a point somewhere between those two figures.

A second reason to avoid that characterization is to keep open your client's options. If a position is labeled a "bottom line," a party will be more reluctant to move off of it: Pride or fear of appearing to "cave in" should not prevent a reasonable settlement—which is not to say there may not come a time when the mediator may ask the parties to advise as to just how far they are willing to go. And that leads to a final suggestion.

10. Don't Quit Too Soon, But Don't Not Beat a Dead Horse

Notwithstanding the idea of avoiding the "bottom line," if the parties are far apart and no real progress is being made, the mediator very well may ask them what is the most they are willing to do. But that does not necessarily mean the end of the mediation. Cases do settle after that point, even when the parties' positions are very far apart, if the mediator can use the disparity to help the parties recognize that their own view of the probable outcome is so far removed from that of their adversary that a fresh look is prudent. That is when an attorney really can shine as a settlement proponent.

If an attorney steps out of the advocate's role and tries to view the dispute as a detached juror or judge might, she may recognize the possibility that the other side's view of the probable outcome might not be so farfetched after all. An attorney may defend adamantly her own view in the mediation, but she also should consider how difficult it will be to explain a trial outcome that proves that the adversary's view of the probabilities was correct.

A good mediator will try to determine if a point has been reached when a case is not going to settle and so inform the parties. Wasting the parties' time and money serves no valid purpose. But before ending the mediation, expect the mediator to try to set the stage for further settlement negotiations. For example, if an impediment to settlement is a disagreement about what a third-party witness will say, the mediator may suggest that the mediation simply be recessed until after that witness is deposed or interviewed. Or if one party is convinced he will prevail on a summary judgment motion, the mediator might suggest a follow-up session if the motion is denied. And remember that settlement negotiations can continue without reconvening the mediation. The parties should recognize that they can build on whatever progress was made in the mediation in continuing to work among themselves toward resolving the dispute short of trial.

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Conclusion

Settlement is an interactive process. In most cases, the attorney's desire to settle will influence the client strongly when settlement is truly in the client's best interest. Although a mediator can assist in the process, by definition he or she cannot force a settlement. Finally, remember that no matter what anyone else thinks about the settlement, you will make one person happy when you submit a stipulation for dismissal—the assigned judge.

*From 1980 through 1996, **Marc Kalish** was a civil trial attorney in Phoenix with both large and small firms. Except for a 10-month period in 1999 when he served as a full-time judge pro tem in the Maricopa County Superior Court, since 1996 he has limited his practice to providing third-party neutral services. For more information on his mediation experience and qualifications, visit his Web site at* http://www.arizonamediator.com.