

Mission: Mediation

FOCUS COLUMN

By Leonard S. Levy

The "maximum potential outcome" in mediation means coming as close as possible to achieving a result in which your client's interests are served to the greatest possible degree. This usually includes the recovery of as much money as possible, or the payment of as little as possible, but often also includes agreements that achieve results not possible in arbitration or trial. Achieving this requires convincing an adversary that it would be in the adversary's best interest to agree to resolve a dispute on terms acceptable to your client.

Here are a few examples of what should and should not be done to assist clients in achieving the best outcome at mediation.

1. Give your client an idea of what the mediation process involves, and the role of the mediator.

Unsophisticated clients may not perceive the mediator as someone who helps the parties understand their alternatives through an appreciation of the strengths and weaknesses of each other's case. If a joint session is the first setting in which a client learns that the mediator is not an arbitrator, that client will be disappointed in the attorney, the mediator or both. Familiarize your client with the process of mediation, rather than simply relying on the mediator to do so.

The client expects his or her attorney to be a strong advocate of the client's position. This often translates into the client's expecting the attorney to present something akin to a forceful closing argument at trial, and being disappointed when this does not occur in the mediation context. What is generally called for in a joint session is a statement designed to persuade or enlighten the other party. Explain this to your client.

2. Educate your client on the risks if the matter does not resolve.

Often, attorneys fail to discuss the true costs of litigation or arbitration, generally the alternative to a mediated solution. One topic rarely discussed in advance of a mediation session is the effect of a Code of Civil Procedure Section 998 offer or demand, although the last offer at mediation often becomes a "998 number." It usually comes as a surprise to clients, especially in a case in which liability is a major issue, that, as a result of a verdict of less than the statutory offer, the plaintiff actually might owe money to the defendant. This type of surprise does not engender a client's confidence in his or her attorney.

If the last discussion about "going forward" costs was at the time the client signed the retainer agreement, revisit that discussion before mediation, including what discovery might have revealed and the extent to which the initial case evaluation has changed.

3. Be prepared to share facts with your opponent.

Very rarely are the facts surrounding the case unknown to both sides before trial. Despite the fact that mediation presents an opportunity to demonstrate how much trouble your opponent is in, many attorneys are reluctant to share information helpful to the mediator in advocating the client's position, because it would provide "free discovery."

On some rare occasions, you do not want to share information because it will give away a tactical trial advantage. Indeed, a fact unknown to your opponent that impeaches his or her key witness is not something you want revealed if it will work to your client's disadvantage in trial if the case does not resolve. But sharing facts gives each side the opportunity to engage in dialogue that allows for the more-accurate assessment of risk, and resolution through

