An Attitude Adjustment Can Get You Further in Court-Ordered Mediation

By Leonard S. Levy

Unfortunately, many attorneys who represent clients in court ordered mediation approach the process as if they consider it a waste of time. Some even go so far as to create a self-fulfilling prophecy by failing to do many things, and taking actions counterproductive to successfully mediating the matter.

When many parties and their attorneys arrive at a court-ordered mediation, they seem to have believe that, because the mediation is free for the first three hours; it is therefore worthless; that the mediation may be premature or otherwise inappropriate; and that the matter is unlikely to settle.

Parties may be mystified by the fact that they have been ordered to participate in a voluntary process. (See Advisory Committee Comment to California Rules of Court, Rule 1620.3)

They may have also become frustrated when they are told no further court panel members are available to provide the free service they have come to expect, almost as a matter of right, or that all available attorney mediators have been taken, leaving only nonattorney mediators available.

By slightly altering this mindset—viewing the process as an opportunity to achieve something positive, and taking a few simple steps to achieve that goal—attorneys can achieve great results for their clients.

The first step is to realize that the mediation is not free. Someone is paying for the time, and that person is the mediator. That time is valuable, and should be recognized by the attorneys and parties as such.

Many mediators have a mediation practice sufficient to allow them to mediate full time. Those who do often also volunteer for court mediation, recognizing that their practice has grown because the court program allowed them to hand out so-called free samples of their mediation services.

These mediators continue to volunteer not only to give back to the system, but also to meet potential consumers of their mediation services.

If the court panel does not have a mediator available, or if the panel mediator you want is not available because he or she has reached the maximum number of pro bono mediations for the month, contact the mediator to see if he or she is available on a private basis.

Another hint: Work on your client's attitude and, while you are at it, look at your own approach.

You've been ordered to be there "voluntarily," but don't treat the appearance like a prison sentence. If you go in with a negative attitude, you are less likely to achieve your client's goals.

The proper attitude for mediation is an open mind, and a willingness to be flexible. If you or your client are focused simply on the fact that you don't want to be there, it is unlikely to be productive.

A third piece of advice: prepare a brief and serve it on the other side.

The preparation of a brief will assist the mediator in advocating your client's position to the other side, especially if the mediator is provided the brief some time in advance of the mediation and has the opportunity to think about its contents. Preparing a brief will also help you focus on the issues.

Serving that brief on your opponent will help convince your adversary that you are serious about the matter. A brief which sets forth the case will help the mediator and parties focus on the issues that are truly in controversy and to work toward resolving those issues in a minimum amount of time.

Anything confidential can be stated to the mediator in private, whether in a separate cover letter or in private caucus.

Unless you have already conveyed them to your opponent, do not include settlement demands in the brief. Until the mediator has had the opportunity to discuss the case with each side, springing such a demand in a brief can create an impediment.

Investigating the mediator's background to determine whether the mediator is qualified to deal with the issues involved in the case is also a good idea. If the mediator has a Web site, visit it. Contact the mediator and discuss the types of issues involved in the matter to get a feel for the mediator's ability to deal with those issues.

Don't necessarily assume that because a mediator is not an attorney, he or she lacks the ability to conduct the mediation. There are a number of nonattorney mediators with backgrounds, training, and ability who are every bit as well-qualified as attorneys or retired judges to deal with complex matters.

When you meet, bring the parties with the authority necessary to settle the matter. (See California Rules of Court, Rule 1634.) It is generally not sufficient to have someone "available by phone."

While in some situations it simply is not convenient or cost-effective to have the person in authority present at a mediation, if the decision maker is not present, resolution is more difficult.

If you're unsure whether it is necessary for an individual, such as a representative of an insurance company, to be present or simply available, it is extremely important that you discuss this with the mediator before the date set for the mediation. This will allow the mediator to deal with the potential for a message of disinterest created by that person's absence.

Bringing the parties necessary to resolve the issues is also important.

This is different from having everyone with necessary authority present at the mediation. Very often, a party to litigation, although possessing the authority to determine whether or not to resolve the matter, cannot make a decision without input from a parent, spouse, significant other, or some other person. To make the most of any mediation opportunity, try to determine just who must be present for your client to make up his or her mind.

While, of course, it is not the role of the mediator to determine factual or legal issues, you can at least obtain the mediator's impression of any particular argument or body of evidence. Think of the mediator as fulfilling a role which an attorney, as forceful advocate of his or her client's position, might hesitate to fully embrace: that of "agent of reality."

Even if the case cannot settle at that particular point in time, accomplish what can be accomplished. Many times a mediation session can expedite the flow of information such that the parties can less expensively determine, based on all available factors, whether it is better to resolve the matter through settlement or take it to trial.

The court-ordered mediation presents an opportunity to decide what discovery is truly necessary to put the matter in a position in which the parties can productively discuss settlement. The parties might provide commitments to each other to conduct certain discovery in a particular time frame, to voluntarily produce documents or even to resolve discovery disputes which might otherwise require court intervention.

Finally, use the time wisely. If the matter appears unready for mediation, use the mediator's time to gain any assistance the mediator can provide to move the matter closer to a settlement posture.

It is a very rare mediation in which something positive cannot be accomplished, even if the parties are not ready to resolve the matter by the mediation cut-off date. Some mediators will allow you to schedule an additional session, using the balance of the initial three hours on a pro bono basis.

Court-ordered mediation is more than the oxymoron of "parties being ordered to participate voluntarily" in a process. It is an opportunity to accomplish something positive for your client. Treating it otherwise is simply an opportunity lost.

Leonard S. Levy is a full time mediator and arbitrator, most recently practicing law with Levy, McMahon & Levin in Encino.