

How to Win in Mediation

by Robert E. Margulies

Since mediation is a conciliatory process in contra-distinction to litigation, which is confrontational, the idea of winning in mediation may seem odd. But there are ways in which a client can win in mediation.

In order to win in mediation you must focus on the client's objective to efficiently and cost-effectively dispose of the dispute. Some experienced litigators will argue that if a dispute is resolved early without the benefit of full discovery, clients will be under-represented, since they may pay or receive more or less than is due. Generally, experience tells us that in resolving a dispute, in most instances, limited information is necessary for a decisionmaker to act. Although it might be preferable to make a decision based on a full record, the financial and emotional cost of creating that record often is not worth the time and trouble to the client.

Mediation provides a setting different from litigation, in that the principal or decisionmaker is mandated to participate in the process. In litigation, the principals are usually not full participants in the litigation until their deposition is taken or there is preparation for trial. Even then, their commitment is temporal. Since over 98 percent of all cases settle before full adjudication, what mediation offers is both cost saving and a creative participation by the parties in the solution to their dispute.

When approaching a mediation proceeding, several positions that may be counter-intuitive to an experienced litigator may be employed. When the party who is the most likely payer in the litigation suggests a mediator, embrace that suggestion unless you do not trust that the proposed mediator can keep a confidence. Think about it — if you want to convince the other side to pay you money, half the battle is won when they have expressed confidence in the neutral.

In setting the ground rules for the mediation, you should determine whether the mediator is facilitative or evaluative. If the mediator is evaluative, in that he or she will call the case, then unless you are assured that they are going to call it favorably to you, you should be disinclined to use that mediator. New Jersey Rule 1:40-2(c) defines facilitative process as including mediation where the mediator does not impose his or her "... own judgment regarding issues in dispute." The Standards of Conduct for Mediators clearly recognizes that New Jersey follows the tenet that the parties shall self-determine their fate, therefore, reinforcing the facilitative nature of the mediator's role.

Next, you should prepare your client to actively participate in the mediation session, and suggest under most instances that the principal address the adversary when making an opening statement. Most lawyers, in preparing for a mediation, are inclined to tell the client to say nothing unless the lawyer has the opportunity to have a private conversation with the client in advance. This advice merely frustrates the process. In a business

dispute, for instance, clients are usually fully aware of the advantages and disadvantages of their position. Use their knowledge and expertise to your client's advantage by having the client prepared to advocate their position as well as evaluate the other party's position.

After the opening session, the parties usually break into caucus groups, and the mediator utilizes shuttle diplomacy between the groups in order to identify interests and positions of the parties and help them create solutions.

The mediator may also focus on important information that each party needs in order to evaluate their own position and that of their adversary. During the down time when the mediator is sitting with the adversary party, proactively take the time to evaluate your position and put yourself in the shoes of your adversary, so you can see what they need in order to resolve the matter. A classic example of a creative and efficient solution may be as simple as an apology. In employment litigation involving wrongful termination, where emotions can border on the extreme, the offer of an apology may not only take the edge off, but may be valuable in reducing the funds that exchange hands.

In approaching mediation, try to step back and consider how you approached life before you were a lawyer. Strip the armor, the sword and the mallet from your position and focus on solution rather than combat. In that way, you will find that you can gain an advantage for your client and literally win in mediation.

Robert E. Margulies, is a partner at Margulies, Wind, Herrington & Knopf, P.A., in Jersey City and Freehold. He is also president of the Justice Marie L. Garibaldi American Inn of Court for Alternative Dispute Resolution and a member of the Supreme Court CDR Committee. This article is provided under the auspices of the New Jersey State Bar Association's Dispute Resolution Section to further the professional education of New Jersey lawyers.