LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, APRIL 9, 2021

Tips to master mediation advocacy, part 1

By Stephen Sulmeyer, J.D., Ph.D. and Hon. Wynne Carvill (Ret.)

What are the keys to success for lawyers representing clients in mediation? There are many possible answers to that question, but after a year of doing virtual mediations, we thought it would be helpful to look at this from a new perspective: Have the ways to master mediation advocacy changed since March 2020? If so, how? Or have they remained the same? Based on our experiences as a mediator in private practice and a settlement judge and, more recently, our experience as neutrals here at JAMS, we've boiled our answers down to 13 mediation advocacy tips.

Mindset

Come to mediation to problem-solve rather than to win. More often than not, we find that lawyers prepare for and handle mediations as if they are appellate oral arguments. They have one or more themes supported by multiple legal arguments — all designed to convince the mediator they should win. It usually starts in their mediation statement, which is typically written as a legal brief, and continues with what they initially say when we meet in mediation. In our meeting, they often open with a comment like "We have a slam dunk. You need to figure out how to convince the other side that they don't really have a case."

This is an unhelpful mindset for mediation. A far more effective mindset requires understanding the distinction between preparing for a court hearing and preparing for a mediation. In court, it's all about marshaling your arguments, evidence and witnesses in order to convince the trier of fact to rule in your favor. It's a battle, a zero-sum game, one winner and one loser (and very often two losers). In mediation, it's not about convincing a decision-maker that you have the better case. It's about negotiating a mutually acceptable agreement with the other side. How you prepare, and how you prepare your client(s), for mediation is thus very different from preparation for trial.

Here is the key to operationalizing this difference: Don't come to mediation to win; come to settle. In litigation, there is (nominally) a winner and a loser. In mediation, there have to be two winners if the case is going to settle. Accordingly, come prepared to engage in joint problem-solving. At the same time, don't be naïve — some lawyers are committed to negotiating in bad faith and seeking opportunities to exploit their opponents. Others come to negotiate, but they have only one gear: positional bargaining. Regardless, don't let your mindset be dictated by your opponent's. Come prepared to settle, with your eyes and your mind wide open. This holds true for virtual as well as in-person mediations.

Attitude

Check aggression at the door. In one of our mediations, there was a very aggressive attorney who was completely dismissive of the other side and would cut me off whenever I tried to suggest ways the parties might find a compromise. Early on, he turned to the client and said, "This is why I was against mediation: Mediators won't recognize what this case is really about and will only embolden the other side into thinking their case has some merit." Unsurprisingly, the case did not settle.

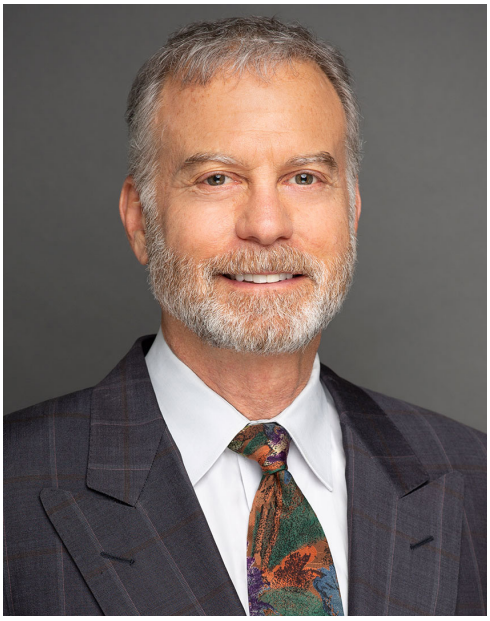
As Bernie Mayer explains in his book "Beyond Neutrality", arrogant, aggressive and obnoxious behavior in the mediation advocate is not effective. Our own experience corroborates this. As we see it, effective mediation advocacy requires a firm commitment to joint problem- solving, including transparent efforts to discover and address interests and alternatives. This means leaving the game-playing behind. It does not, however, mean abandoning advocacy, but rather advocating for a mutually acceptable solution.

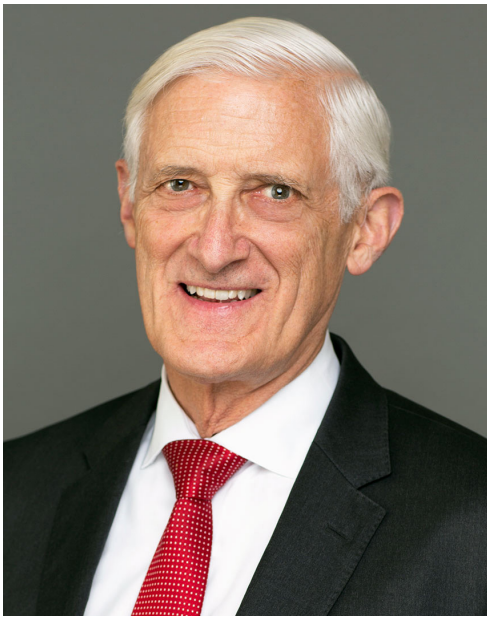
You can do this without implying you lack confidence in your case. The best advocates in mediation signal confidence in their case but do so in the context of being open to joint problem-solving, which itself implies a recognition that both sides have to receive value from any proposed agreement if the case is going to settle. So coming to mediation to settle means having an attitude of guarded optimism and open-mindedness about working together.

In our experience, virtual mediation actually facilitates the appropriate attitude adjustment. Interacting with the mediator on a screen without others in the room (even if all are attendees on the same side) has a tendency to temper aggressiveness, lower the temperature and promote a constructive approach to the process. The effect is significant enough to lead many mediators to argue that the virtual process is superior and should be given preference even after we emerge from the pandemic. But whether proceeding virtually or in person, we are clear that posturing, aggressiveness, bullying and similar behaviors are not conducive to the joint problem-solving that is necessary for successful mediations. ■

Stephen Sulmeyer, J.D., Ph.D. *is a lawyer, psychologist, mediator and arbitrator with JAMS and collaborative law practitioner in Marin County.*

Hon. Wynne Carvill (Ret.), *a former judge ofthe Alameda County Superior Court, is a mediator and arbitrator with JAMS.*





LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, APRIL 16, 2021

Tips to master mediation advocacy, part 2

By Stephen Sulmeyer, J.D., Ph.D. and Hon. Wynne Carvill (Ret.)

In our last installment, we talked about the appropriate mindset and attitude advocates should have in mediation. In this installment we will address preparation. Too often, lawyers prepare for mediation as they would for oral argument. They muster their arguments and favorable case authority and, instead of evidence, simply argue based on surmise, assumption and argument. Such an approach makes it hard to settle. In addition to knowing your evidence, case - law and arguments, be prepared to discuss the strengths and weaknesses of both sides' cases. After all, a huge piece of what we're all here to do is jointly come up with a value of the case. Even if this exercise is done in separate rooms, with a reluctance to share anything that might be useful to the other side at trial, it's still crucially important to provide not only evidentiary and legal support for your assumptions about the value of the case, but also *your evaluation of the relative strengths* of your and the other side's evidence and argument.

Also, the best advocates are those who consider in advance the obstacles to settlement and ways to overcome them. Accordingly, think about how best to get the other side to engage in joint problem-solving. Are there trust issues going into the mediation? How might you address these? Are there personality issues? How might these be dealt with? Good preparation typically involves at least the following:

Client Preparation

Preparing your client for mediation versus preparing your client for trial. Typically, lawyers either don't prepare their clients to participate and simply assume they will be observers or, if they do prepare them, it is a dress rehearsal for trial direct. But the goal in mediation, unlike litigation, is not to *convince*, but to *connect*. If possible, explore what the possibilities are for your client to connect with the client on the other side. Unless this is a personal injury case, odds are they know each other, so you'll have some idea of what the obstacles are.

Prepare your client for joint sessions as well as separate caucuses. Prepare them to tell their story in a way that fosters connection; i.e., in a non-accusatory, non-blaming way. If your client angers the other side because of their words demeanor, settlement may be that much harder. This is equally true in joint sessions and separate caucuses. So be sure to consider the following questions: What is likely to trigger your client? What are the obstacles to creating a constructive working relationship between both sides? Coach your client on how to actively listen to the other side, regardless of whether they're in the same room. Also, it's important that your client feel heard by the mediator, so rehearse, roleplay, practice and coach your client as to the best way for them to tell their story so they feel heard and understood.

It's equally important to prepare your client for the positional bargaining that will take place in separate caucuses. Make sure they understand the reality of this aspect of the process — how the game is played — and that they don't take undue offense at the other side's proposals. Remember that offers and counteroffers are *encoded communications*, so help your client clarify the message they want to send with their proposals and help them decipher the messages the other side is trying to send. Reflexive responses to the other side's positions are counterproductive and lead to impasse. While virtual mediations tend to dampen reactivity to some extent, this kind of preparation is vital virtually or in person.

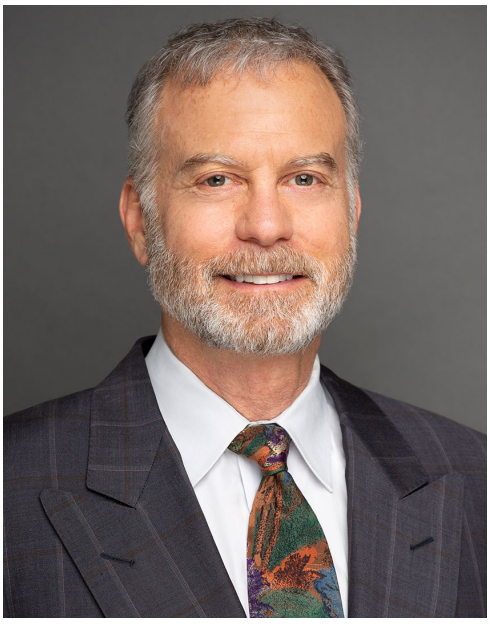
Interests

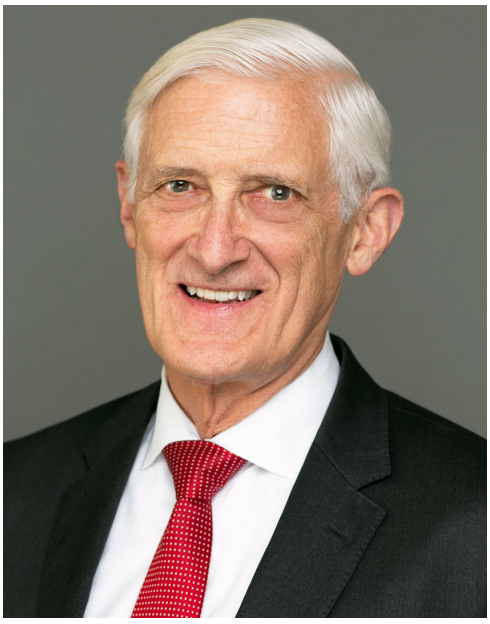
What are your client's and the other side's interests? Identify the issues and think about the interests of both sides. What's really at stake for each side? What really matters to them? Don't limit your exploration to material interests — consider both sides' *non-material interests* as well (e.g., saving face, wanting an apology, wanting recognition or acknowledgment). What core needs do your client and the other side have? What identity issues are at play? Never underestimate how important and powerful these non-material interests can be to both sides.

An example of this arose in a badfaith denial of insurance coverage case that one of us mediated. While the lawyers were duking it out over how the law should apply, I asked the plaintiff, who was looking bored, "What is this case about to you?" "Justice," he replied. Apparently, he had been given the run-around and felt disrespected by the defendant insurance company. When I asked him what he would've done had he been treated with respect, he said, "I probably would've just walked away." The case settled based on an apology, retraining for the adjustor and a generous cash payment to plaintiff — and both sides were pleased with the result.

Stephen Sulmeyer, J.D., Ph.D. *is a lawyer, psychologist, mediator and arbitrator with JAMS and collaborative law practitioner in Marin County.*

Hon. Wynne Carvill (Ret.), *a former judge ofthe Alameda County Superior Court, is a mediator and arbitrator with JAMS.*





Monetary and Non-Monetary Considerations

It's not always just about the money. The foregoing example illustrates the importance of looking for non-monetary considerations that may bridge the gap between the parties. Are there non-monetary remedies that might be available and might be of interest to your client? Explore these. Brainstorm together. What kinds of emotional reparations are possible and desirable? Help your client evaluate their alternatives in a realistic way.

With regard to money, discuss your client's BATNA (best alternative to a negotiated agreement) and know their reservation value (i.e., their true bottom line). In other words, it's vital that your client have a clear view of what their alternatives are should the mediation fail. Monetizing these alternatives (e.g., cost of going to trial and appeal, chances of recovery of any judgment) is critical. Equally important is to come to the mediation with clearly identified, realistic goals, by which we mean your client's highest legitimate expectation of what they could achieve. The importance of managing your client's expectations cannot be overemphasized.

Value Creation

Discuss with your client what some value-creating opportunities might be. That is, don't just think about how the pie can be divided; think about how it can be enlarged. By thinking about value creation in advance, you will naturally remind yourself not to focus solely on the distributive aspects in your upcoming mediation. Also, if you have some ideas that sound plausible and attractive to the other side, it will be easier to invite them to problem- solve with you.

An example of value creation arose in a patent infringement case involving a major infringer and competitor that one of us mediated. The settlement made the defendant an authorized distributor of the plaintiff's products, with mutually-agreed upon trust-and-verify provisions. The defendant was a brilliant salesman, and both sides stood to profit. This is the kind of possibility that should be identified in your preparation and included in your mediation plan. ■

LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, APRIL 9, 2021

Tips to master mediation advocacy, part 3

By Stephen Sulmeyer, J.D., Ph.D. and Hon. Wynne Carvill (Ret.)

In the last two installations we discussed mindset/attitude and how to prepare for a mediation. In this installment, we will discuss joint sessions and mediation statements.

Embrace Joint Sessions

Don't refuse joint sessions. Whether meeting virtually or in person, joint sessions are your opportunity to assess the other side's sincerity, gauge witness credibility, learn new information, make connections and engage in joint problem-solving and value creation. Separate sessions can feel safer, but the exclusive use of caucuses comes at a price. When separate caucuses are used exclusively, everything has to be filtered through the mediator. Connections cannot be made, and there is the risk that the mediator will not convey information, particularly nonverbal communication, as effectively as your hearing and seeing it directly from the other side. In our experience, separate caucuses are best used to allow each side to conduct case valuation privately, as well as to formulate proposals and responses to counter-proposals. Joint sessions are best used to discuss the creation of value and the possibility of non-monetary remedies, as well as the repairing of relationship ruptures. So, ideally, there will be at least some joint-session time; and if that's the case, you should consider what can go well and what can go wrong.

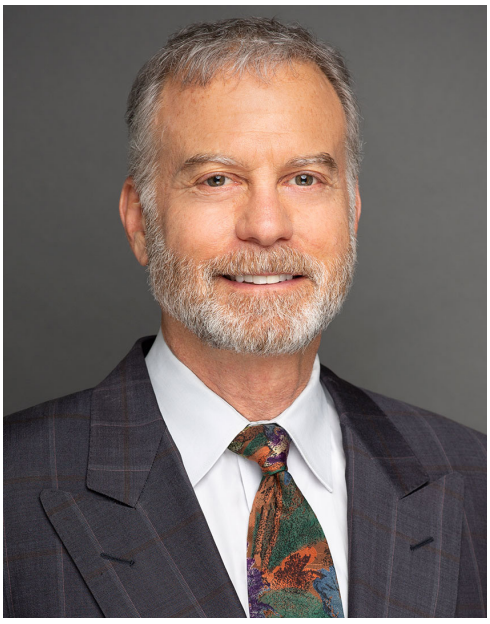
Lawyers and mediators alike often fear joint sessions because they are afraid that World War III will break out. We believe such fears are largely unwarranted, especially in a virtual proceeding where the mediator can use the mute |button to give different people the floor and thereby avoid a free-for all. But whether the mediation is face-to-face or virtual, it is best to prepare for the discomfort that will likely arise from being in the same room with the other side. Ask yourself: What is likely to trigger you? You've undoubtedly dealt with your opposite number prior to mediation. How well do you get along? Remember, this is not a debate; it's not about scoring points with the mediator or the other side. The goal is to create a *constructive working relationship* with the other side, both lawyer and client. Therefore, be respectful, clear, transparent and, above all, centered, regardless of what the other side does. Listen and reflect on what you've heard, regardless of whether you agree with it. Show your unwillingness to let anything the other side does or says bother you.

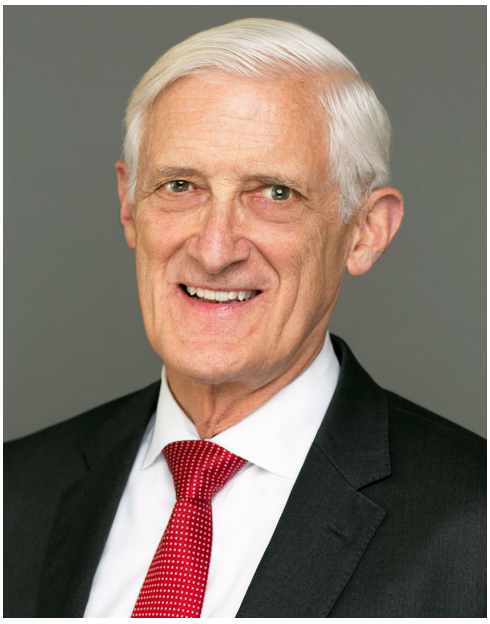
Depending on the case, a joint session may be useful at the start or later on in the process. An example of successfully starting with a joint session occurred in a trade dress case one of us mediated. The lawyers were reluctant to meet together, but I prevailed on them to at least start in joint session. During the defendant's lawyer's opening statement, he said, "And they didn't even send us a cease and- desist letter before filing this lawsuit!" This was an emotional outcropping that alerted me to the presence of previously unidentified emotional issues. After asking a few clarifying questions, I quickly discovered that there was some negative history between the plaintiff and defendant, including a lot of mutual distrust and dislike. I asked them both: "How do you want to feel when you walk onto the trade show floor and see your opposite number?" The defendant replied, "I want to feel like we're honorable competitors." I turned to the plaintiff and asked, "How does that sound to you?" "That sounds great to me," The plaintiff replied. I then asked, "What if you were to be honorable competitors right here, right now?" We then proceeded to settle the case right there in the opening joint session, with the two inventors literally pulling out their slide rules and compasses, and designing changes to the defendant's product that made it non-offensive to the plaintiff. We even added protocols to their settlement agreement to operationalize their being honorable competitors, and established a hotline to maintain open channels of communication.

By contrast, in emotionally charged cases, it may be too risky to start with a joint session, but be open to having one later. In one employment case, for example, there was no opening joint session, but later in the process, the employee/ plaintiff was helped by being able to tell the employer the full story and its impact on the employee's life. By the time the joint session was held, the employer understood the purpose and the need simply to hear the plaintiff, not argue and simply acknowledge the pain the plaintiff experienced. In another case, the employer committed to make some modest policy changes that caused the plaintiff to accept a lower monetary settlement amount.

Stephen Sulmeyer, J.D., Ph.D. *is a lawyer, psychologist, mediator and arbitrator with JAMS and collaborative law practitioner in Marin County.*

Hon. Wynne Carvill (Ret.), *a former judge ofthe Alameda County Superior Court, is a mediator and arbitrator with JAMS.*





Mediation Statements

A mediation statement is your first opportunity to connect with the decision-maker on the other side. As a result, don't write for the mediator, and don't write as if the mediator were a judge or arbitrator. The statement should be written to reach the lawyer and — most importantly — the client(s) on the other side. This could be your best (and possibly only) chance to talk directly with the other side. Write it with the primary intention of reaching him or her. Given this goal, you don't want to inflame the other party but get them to see your client's perspective and communicate a willingness to see theirs and engage in joint problem- solving.

Consider the difference between a statement that opens with "The plaintiff's case has no factual or legal foundation and will certainly be dismissed on summary judgment" and one that starts with "While we have confidence in our legal position, we welcome the opportunity to exchange views on what happened and whether there is a way to resolve the matter that is mutually acceptable."

Parties that don't exchange mediation statements are getting off on the wrong foot. If there really is something you don't want the other side to know, leave it out of the statement and discuss it privately with the mediator. Don't put it in the statement and then decline to exchange the statements. Doing so only costs you your best chance to talk directly to the client or decision- maker on the other side and set the right tone for the mediation. Obviously, this is true whether meditating in person or virtually. ■

Reprinted with permission from the *Daily Journal*. ©2021 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.

LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, APRIL 30, 2021

Tips to master mediation advocacy, part 4

By Stephen Sulmeyer, J.D., Ph.D. and Hon. Wynne Carvill (Ret.)

We previously discussed mindset, preparation, joint sessions and mediation statements. In this piece, we will discuss the relationship with the mediator and issues that arise during the mediation.

Communicating With the Mediator in Advance

It's always a good idea to speak with the mediator in advance of the mediation session and share any concerns that you may have, such as if your opposite number is a particularly difficult person or you have concerns about your own or the other side's vulnerabilities in attending mediation. Advise the mediator of any potential land mines of which you are aware or you fear might be hidden somewhere. This is also a good time to discuss whether a joint session would be helpful and, if so, when in the process it should be used. It could be at the outset or later in the mediation.

Reality-Testing and Client Control

The mediator cannot always do the necessary reality-testing with either side without risking his or her neutrality. If your client has unrealistic expectations, whether for the mediation or its alternatives, it's your job to be the voice of reason and reality. Try to anticipate possible client-control issues and, if possible, discuss them with your client. While a mediator can provide a useful reality check, the mediator's effectiveness is maximized if he or she is reinforcing concerns you have already discussed with your client rather than raising concerns you have either not discussed or downplayed with your client.

Mediators tend not to want to undermine an attorney in the eyes of the client but often are placed in that position by an attorney who has not been candid about the risks and expense of litigation. The mediation is more likely to succeed if you have discussed the vulnerabilities in your case in advance rather than having the client exposed to them for the first time by the mediator.

Don't Ambush

In one mediation involving wrongful termination, the plaintiff chose to surprise the mediator and the defense by raising for the first time at the mediation that the "real reason" for the termination was that the plaintiff was a whistleblower and his allegations implicated the CEO in possible fraud. As the defendant was a publicly traded company, the impact was to kill the mediation because of the need of the company to investigate the claims and consider whether they presented disclosure obligations for the company. More broadly, be mindful of the impact on the other side of disclosures of information, and give them an opportunity to investigate them in advance and/or process how to cope with them. Where possible, provide ways for them to save face. People fight more desperately when there is no escape route. If you surprise and corner the other side, they are more likely to terminate the mediation than suddenly capitulate.

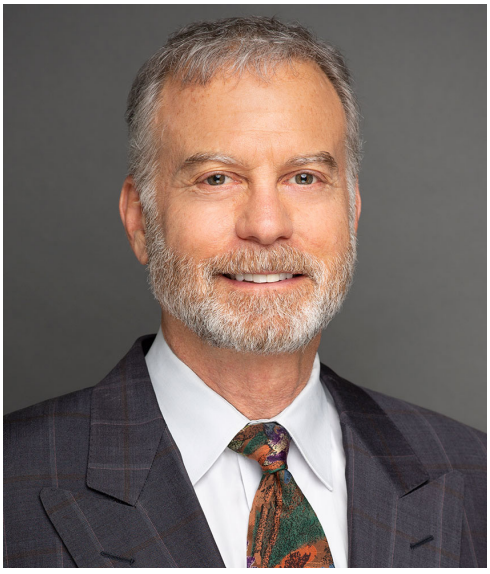
Trust the Process and Don't Rush to Solution

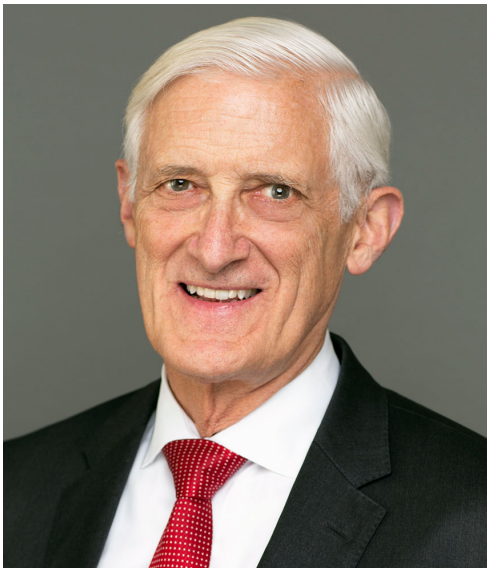
It's vital for both sides to have their "day in court" and to feel heard. Mediation is a process and must unfold over time. Don't try to get to the end game too soon. Don't just be in "fixing" mode. Don't be afraid to let things get uncomfortable and messy. Trust the process and follow it, rather than force it. Watch for the conflation of emotional and legal issues, which can lead to impasse. There is no legal solution to an emotional problem, only an emotional solution. Make time and space for the *emotional case*, as it is present in every dispute, whether mediated virtually or in person.

For example, in a family law case one of us mediated, the husband refused to even talk about selling the family home, in which he was still residing. Notwithstanding reams of evidence that he couldn't afford the house even when he and his wife were living together, the husband refused to budge and was angered by attempts to get him to see things differently. Finally, the mediator said to him, "Tell me what's important to you about holding onto the house." The husband replied, "That's where she's going to come back to me." Utter stillness in the room. The wife was clearly moved, and she very tenderly explained that that was not going to happen. They then had a conversation that gave the husband closure. Afterward,

Stephen Sulmeyer, J.D., Ph.D. *is a lawyer, psychologist, mediator and arbitrator with JAMS and collaborative law practitioner in Marin County.*

Hon. Wynne Carvill (Ret.), *a former judge of the Alameda County Superior Court, is a mediator and arbitrator with JAMS.*





the husband looked at the spreadsheets and said, "I can't afford this house! We've got to sell it!" Impasse dissolved.

Bring a Draft Agreement

Bring a draft form of agreement, and don't leave it to the end. Very often if both sides have compromised on a tough issue and then a term sheet is brought out for the first time, some difference on a relatively minor term can be a deal-breaker when the same issue could have been easily resolved early on. If counsel have a good working relationship drafts should be exchanged in advance with the key points left blank. If drafts have not been exchanged, bring one to the mediation (or provide it via email if the mediation is virtual) and share it with the mediator. It may alert the mediator to an issue not previously recognized. It also gives the mediator a topic that can be brought up as a change of subject where one is warranted in the process. Working on a shared draft agreement early on also reduces the risk of a party raising entirely new demands late in the day.

Mediation advocacy is more art than science, and we therefore have much to learn from experience, both our own and that of others. We hope you have found this series to be helpful, and we welcome your thoughts and comments. We can be reached at ssulmeyer@ jamsadr.com and wcarvill@ jamsadr.com. ■