

TUESDAY, JANUARY 11, 2022

PERSPECTIVE

How mediators can assist attorneys with their difficult clients

By David E. Hunter

Attorneys sometimes must have difficult conversations with a challenging client concerning important issues in evaluating and resolving cases — e.g., jury appeal, evaluation of liability and probable damages. Some attorneys may be reluctant to change a client's point of view. Others may be unable to convince a client to consider moderating their view of the case — e.g., an insurance adjuster who has grossly underestimated the potential value of the case and refuses to change their position on settlement even if the case can be settled for much less than the cost of trying the case. Or a plaintiff who has unreasonable expectations of the outcome of a trial, including the amount of damages that might be awarded. A client may be angry about issues or events that have nothing to do with the issues at hand — e.g., they may be upset about how they have been treated when dealing with other parties to the case or about questions they were asked during their deposition.

What are effective ways to notify a mediator about a challenging client? Some mediators have pre-mediation calls with the attorneys and individual, attorney-only conferences during the mediation with the attorneys.

Before a mediation: The mediator may schedule a brief pre-mediation joint conference with the

attorneys. During this meeting, the mediator may inquire about following up afterwards individually with each attorney. An attorney may also request an individual follow-up meeting with the mediator. An individual follow-up call provides an opportunity for an attorney to speak candidly with the mediator about issues discussed during the pre-mediation call that the attorney may want to keep confidential, such as a challenging client. This method is effective when the attorney is having difficulty with the client before the mediation.

During a mediation: The mediator may ask to speak with the attorneys separately. Or an attorney may ask to speak with the mediator separately, which would thereby provide the attorney with the opportunity to discuss a challenging client privately with the mediator. This method is effective when the difficulty with the client starts during the mediation.

At what stage of the mediation can the mediator communicate effectively with a challenging client? Before the mediator can communicate effectively with a challenging client, they first need to gain the client's trust. The mediator usually starts this process early in the mediation by discovering the parties' views of the case and demonstrating that they are knowledgeable about the facts. The mediator can show the parties that they understand the client's state of mind and that they will consider the client's point of view fairly during the

mediation. This may enable the mediator to help the client accept difficult facts, which should facilitate movement toward resolution.

An attorney with a challenging client can help the mediator and the client build rapport by speaking with the client about the mediator's history as a judge or trial attorney and knowledge of the issues of the case. The mediator can elaborate on their experience handling this type of case and emphasize their impartiality. With the attorney's consent, the mediator can also have a candid conversation with the client, with the attorney present.

The mediator can also strengthen the relationship between an attorney and a difficult client by clarifying everyone's roles during the mediation and emphasizing that attorneys provide legal counsel, not the mediator. This allows the mediator to communicate the strengths of the attorney to the client, thereby improving the attorney's ability to influence the client's decisions.

Before discussing the issues, the attorney needs help resolving with the client, the mediator should discuss with the attorney their own view of those issues and opine generally on how they may be resolved. This may assist the attorney in convincing the client to be flexible.

Before discussing how to resolve the difficult issues impeding settlement, the mediator needs to know the general range of solutions that will be acceptable to all

parties. Once the mediator can define those general parameters, they should be able to advance possible resolutions.

How does the mediator approach a client to lead them to settlement? The mediator, based on their experience, can illustrate how certain facts may be viewed unfavorably by the trier of fact. The mediator can then express their opinions regarding the probable outcome of the case. The mediator may share what may be required to reach settlement through mediation. Using the settlement parameters previously advanced by the parties, the mediator can negotiate compromises the parties must make on specific issues in order to reach settlement.

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