

# DAILY REPORT

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## Tell Them What You Need: A More Open Approach to Mediating Complex Cases

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In complex commercial cases, including intellectual property cases, lawyers and their clients often agonize over whether juries will understand the complicated business, technical and legal issues in their legal cases. But even if you win the case, will you get what you need?

Settlement of a litigated case is attractive because the parties control the outcome of the case and get what they need—whatever that may be and it is not always just about the money. Creative resolutions, beyond what a court can award, become possible in settlement. This self-determination, coupled with the elimination of further cost and risk, is why the vast majority of complex cases settle before trial, often with the help of a mediator.

Mediation is a voluntary process that can be described as an “assisted negotiation.” The joint session with both parties (even if it is only a “meet and greet”), is followed by individual party caucuses with the

mediator, whether in person, online or by video. The mediator then engages in shuttle diplomacy by delivering facts, positions, offers and counter offers to each side. A good mediator, however, does more than act as a go-between. When appropriate, the mediator will provide case evaluation, analysis and risk assessment to help both parties focus on possible solutions. Ideally, the negotiations should really begin before the parties start the mediation.

In the mediation of many complex cases, the parties often arrive better prepared to argue the law, and why they should prevail, than to discuss ways to resolve the case. But the other side already knows your legal position. What they do not know is what you need to settle the case. Mediating without telling the other side what you are seeking is like refusing to tell someone what you want for your birthday, and being disappointed when you don’t get it.

Instead of honing legal arguments, you should prepare for mediation by: defining your problems; considering

settlement options; and, most important, giving the other side time to consider your proposals *before* the mediation.

Start by defining the problems apart from the breach of a contract or the infringement. Those problems usually involve the harm you have suffered (for example, lost sales, exclusivity or reputation in the marketplace) or reasonably foreseeable problems such as the loss of a needed product line or component part, or the loss of a valuable business relationship.

Determine what information you need to know. If your party does not have the information but the other side does, ask the mediator to facilitate an informal exchange of information between the parties before the mediation. Define the problems in terms of needs: What has to happen to solve your party’s problems? Equally important, but often not given as much thought, is what the



other party needs to solve its problems. If the needs of both parties are not met, the case will not settle. Once you have defined these problems in terms of needs—both yours and theirs—you will be ready to consider possible settlement alternatives.

Consider and communicate possible solutions in advance of the mediation. Contact people who are knowledgeable about the problem, as well as people who are in a position to authorize a settlement, and brainstorm possible solutions. In a business dispute, that group may include salespeople, engineers, accountants and public relations people in addition to the ultimate decision-makers. Encourage creativity and do not dismiss any idea as ridiculous. That off-the-wall idea might be possible or it might be modified by other members of the group into a viable solution.

For example, in a copyright case I mediated, a former licensee took a new license. (Plaintiff needed to preserve relations with its existing licensees and get attribution and recognition of its work's contribution to a derivative work.) In a patent case, the defendant was allowed to export and sell its inventory in foreign countries where the plaintiff did not have patent protection. (Plaintiff wanted to stop sales in the U.S.; defendant needed to sell the inventory to pay damages.) In a trademark case I mediated, defendant's global product manager arranged for the plaintiff, a private-label manufacturer, to make sales presentations to his foreign regional product managers as part

of the settlement. (Plaintiff needed an entrée to sell its new products in new markets.)

Give the other side's decision-makers time to consider your settlement options before the day of the mediation. Communicate the settlement terms you are considering, even if they are just concepts (for example, a monetary component and future or continuing business). Use the mediation statement to speak directly to the decision makers on the other side.

Mediators usually ask the parties to provide a mediation statement, stating possible settlement alternatives, in advance of the mediation. Mediation statements are often given solely to the mediator for the mediator's confidential use, but there is nothing prohibiting you from giving yours to both the mediator and the other party.

Providing a non-confidential mediation statement affords the decision makers on the other side a chance to think about and vet the possible resolutions you are proposing. Another, but less direct, way to reach the same result is to ask the mediator to "sound out" your settlement concepts with the other side when the mediator engages in individual pre-mediation conference calls.

Make an opening statement at the mediation. In the COVID-19 era, this can easily be done on a Zoom Video Conference instead of leaving it to the mediator to tell the other side what you need to settle, say it yourself. A non-argumentative presentation of the facts, law and possible

resolutions that is coupled with logic and reason can convey a genuine interest in resolving the case and open a dialogue about what your needs are. Speaking with conviction about the merits of your case, highlighting any facts or laws on which the parties agree and acknowledging areas of uncertainty in your case will give you credibility with the mediator, opposing counsel and the business-people who have authority to settle the case.

**Joyce B. Klemmer, Esq., is a JAMS neutral with more than three decades of experience in intellectual property litigation. Ms. Klemmer has effectively resolved hundreds of cases in the areas of copyright, patent and trademark infringement; trade secrets; and related commercial disputes involving contracts and licenses. She can be reached at [jklemmer@jamsadr.com](mailto:jklemmer@jamsadr.com) and is available to resolved matters via video, web or audio conferences in order to comply with guidelines and precautions taken in light of the COVID-19 pandemic.**

