Civil settlement techniques: strategic tools for mediation success

By Hon. Richard D. Aldrich (Ret.), JAMS

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After more than 50 years in the legal profession — first as a civil trial attorney, then as a California trial judge, and finally as an Associate Justice on the California Court of Appeal — I've learned that resolving disputes outside the courtroom requires more than just legal acumen. It takes strategy, timing, emotional intelligence, and a deep understanding of both people and process.

Litigants are often frustrated by the rigidity of the court system. Mediation offers them something litigation often doesn't: a voice.

Mediation isn't just an alternative to litigation — it's an opportunity. In this article, I'll share some core techniques and practical insights that every attorney should know when approaching a civil settlement.

Why mediation works

Mediation is a voluntary process, and that's its strength. Litigants are often frustrated by the rigidity of the court system. Mediation offers them something litigation often doesn't: a voice. It gives parties the chance to be heard, to participate directly in resolving their dispute, and to shape the outcome.

For attorneys, mediation means faster resolution and significantly reduced costs. But for any of that to happen, the right people need to be in the room — with full authority to settle. Without that, the process stalls before it even begins.

Mediators also benefit from a pre-mediation statement from each side. These briefs orient the mediator to the facts, claims, and emotional tone of the case, setting the stage for meaningful dialogue.

Understanding bargaining styles: distributive vs. integrative

Most attorneys are familiar with distributive bargaining — what I call the "negotiation dance." It's a zero-sum game. One side starts high, the other low, and the two gradually move toward a midpoint. It's adversarial and assumes a fixed pie. Concessions are calculated and guarded. Tactics can include ultimatums, withholding authority, silence, or even gamesmanship like "good cop/bad cop."

Timing is critical. If a midpoint offer is made too early, it may be taken as a sign of weakness. If made too late, the moment may pass.

In contrast, integrative bargaining — which many attorneys find less familiar — is about collaboration. Instead of arguing over how to divide the pie, the parties (with the mediator's help) look for ways to expand it. They focus on interests, not just positions. For example, one party may value long-term security more than a large up-front payment. Another may be driven by principle, fairness, or preserving relationships. Identifying these interests allows for creative, customized settlements.

Techniques that move the needle

As a mediator, I've learned to treat negotiation like a game — not to trivialize it, but to remain adaptable and strategic. Some techniques that consistently prove effective:

- **Mini/Maxi Agreements**: These create a settlement range regardless of what an arbitrator later awards. For instance, if the claimant agrees to a $70,000 cap and the respondent a $30,000 minimum, both sides are protected from extreme outcomes and encouraged to resolve the case.
- **The Split-the-Difference Offer**: This should only be used at the end of a long day of meaningful back-and-forth. Done too early, it polarizes. Done at the right moment, it can close the deal.
- **Patience and Perseverance**: I once mediated a case with a $650,000 demand and a $35,000 offer. After eight hours, we settled for $260,000. It happened because everyone was willing to keep talking — and I was willing to keep going as long as they were.

Structure matters

Sometimes, how money is paid matters as much as how much is paid.

Lump sum settlements may tempt parties, but they carry risks — especially in personal injury cases. Funds can be depleted quickly, leaving claimants vulnerable.

Structured settlements, on the other hand, offer periodic payments over time. They require attention to several factors: present value, medical needs, insurance solvency, annuity ownership, and tax implications. Attorneys can even structure their own fees, reducing immediate tax liability.

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For claimants with disabilities or on public assistance, a special needs trust may be essential to preserve eligibility for government benefits. These trusts require careful planning, lien resolution, and trustee oversight to ensure compliance.

Good faith settlements and multi-party strategy

Some state statutes and case law provide incentives to settle early. For example, under California Code of Civil Procedure § 877.6, in cases involving multiple defendants, a settlement made in "good faith" bars claims for indemnity or contribution from non-settling defendants. The non-settling defendants will then be responsible for all of the plaintiff's damages. This can be a powerful tool because it's a way to put pressure on the non-settling defendants to settle and settle early in the litigation.

The *Tech-Bilt* factors guide courts in determining whether a settlement qualifies as having been made in "good faith." (See *Tech-Built v Woodward Clyde & Associates*, (1983) 38 Cal 3d 48.) The Court held that a dismissal for a waiver of costs was a "good faith" settlement. The case involved the dismissal of a cross complaint where cross-complainant argued that a co-defendant's agreement to waive costs in return for a dismissal of the cross-complaint against it by a co-defendant was made in good faith, thus barring the co-defendant from filing a cross-complaint against the dismissed defendant for implied equitable indemnity.

Code of Civil Procedure § 877.6 as set out in the code requires:

- The settling party's proportionate liability;
- Settlement amount vs. potential exposure;
- Insurance limits;
- Financial condition of parties;
- Any signs of fraud or collusion.

Use this strategically. Settling early with one party can shift pressure onto others — often motivating faster global resolution.

A word on Mary Carter agreements

California and several other states also have a tool available known as Mary Carter (see *Booth v. Mary Carter Paint Company*), agreements or "sliding scale" settlement which caps the financial exposure of defendant and often guarantees the plaintiff a promised recovery from the settling defendant.

It also allows a settling defendant to remain in the case to litigate liability. The settling defendant remains in the case because that defendant has made a promise to plaintiff or claimant of a sum certain of recovery, regardless of the outcome at trial or arbitration. Therefore, if the settling defendant has promised the plaintiff a recovery of $50,000, then if the judgment against the non-settling defendant is only $25,000, under the Mary Carter agreement, the settling defendant would only owe the plaintiff $25,000. So the settling defendant remains in the case to insure there is a verdict against the non-settling defendants that will reduce the settling defendants' promise to pay the plaintiff.

While not universally recognized, they are permitted in California with appropriate disclosure to the trier of fact to ensure fairness. These agreements can be a tool for risk management — if carefully structured and transparent as they cap the financial exposure of defendant and guarantee the plaintiff a promised recovery from the settling defendant.

In these cases, the settling defendant guarantees the plaintiff a certain sum of money, regardless of the result against the co-defendants. But see *Booth v. Mary Carter Paint Co*. 202 So.2d 8, where the Appellate Court of Florida held that Mary Carter agreements would no longer be recognized in the trial courts of Florida. California still recognizes Mary Carter Agreements, but the agreement must be disclosed to the trier of fact.

Final thoughts: trust, neutrality, and strategy

As mediators, we must remain dollar neutral. We can't favor one side or push a particular outcome. Our job is to uncover interests, assess timing, identify opportunities, and protect confidentiality. Attorneys should trust that mediators who do this well won't leak bottom lines or strategic positions — credibility is everything.

Ultimately, settlement is possible when everyone plays the game well. That means knowing when to push, when to listen, and when to stop talking. Whether you're representing a plaintiff or a defendant, remember: your demeanor and preparation can either open doors or close them.

Mediation isn't magic. But with the right techniques, a clear head, and a bit of perseverance, it can work wonders.

About the author

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