

Overcoming Emotional Impediments

How a Mediator Can Help You Move an Intransigent Client Toward Settlement

By **Frank R. DeSantis, Stephen D. Williger, M.S.S.A. & Nicole K. Wilson**

We've all been there. The case in front of you is perfect for mediation – perhaps, among other reasons, because the litigation costs will exceed the maximum possible recovery, the parties have a continuing relationship they want to preserve, or neither party wants to air the dispute in public. Your client, however, thinks that mediation is a waste of time and money. After a number of discussions you convince him to mediate, but you worry that he will not take the process seriously. Nevertheless, you fully prepare for the mediation.

When the day of the mediation arrives, your client is not actually kicking and screaming as you enter the conference room for the initial joint session, but his crossed arms and icy glare make it clear to everyone that he does not intend to cooperate. You aren't sure what is causing his intransigence, but you know that unless he changes his attitude the mediation is doomed.

Under these circumstances, what can a mediator do to move your client toward successful settlement?

#1: Determine Why Your Client Refuses to Cooperate.

Sometimes clients have strong emotions that are preventing them from engaging in a process such as mediation. Perhaps there is anger with the opposing party over a situation unrelated to the current litigation, or deep hurt over the opposing party's "betrayal" in the current situation. Whatever the reason, your client may be reluctant to discuss these emotions with you, either because he does not think they are relevant to the litigation or because he thinks

discussing them with his attorney would be unprofessional. Or, he may not even realize that these emotions are in play. And while you may sense those emotions bubbling below the surface, you may be equally reluctant to discuss them with your client, either because you feel unprepared to discuss emotions instead of facts and legal arguments or because you are concerned about causing embarrassment. However, these emotions may be the impediment that ultimately leads to an unsuccessful mediation.

The mediator may be in a better position to identify why your client refuses to cooperate. Your client may be more willing to discuss emotional issues with a neutral mediator during a private caucus than he is with you. In that case, a few open-ended questions – e.g., "is there anything else you would like to discuss?" – can bring out the emotional issues that are impeding progress. If the open-ended questions are not enough, the mediator can ask more direct questions, including questions that you may not feel comfortable asking your client, in order to identify these roadblock issues.

#2: Allow Your Client to Vent.

Of course, identifying the impediment is only the first step. Once the emotional issue is identified, it must be addressed in a way that allows your client to move forward with the mediation.

In some circumstances, the mediator may be able to do this simply by allowing your client to constructively "vent" his emotions about the situation to a neutral listener in a confidential setting (the private caucus).

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Venting can help release negative emotions, such as anger, frustration or anxiety, and help restore emotional equilibrium. Further, simply hearing his thoughts spoken out loud may allow your client to put his issues into perspective. The mediator can listen thoughtfully to your client and acknowledge that he has been heard.

Maybe the tantrum you were dreading in the mediator's lobby is exactly what your client needs – in the privacy of a caucus with the mediator – to move forward.

#3: Obtain an Apology or Acknowledgement for Your Client.

Even venting, however, is not always enough to eliminate the roadblock to your client's participation. Even though your client's primary goal is to obtain the best possible business resolution to the pending legal dispute, as a secondary consideration he may want an apology for the perceived wrong inflicted by the opposing party, or at the very least an acknowledgement of the impact of the opposing party's behavior on him. At the same time, however, your client may be reluctant to demand an apology or acknowledgement, because "needing" an apology or acknowledgement may be perceived as a sign of weakness in the negotiation or because he believes that an apology or acknowledgement given in response to a demand is less genuine.

Once the mediator has identified the emotions in play, he or she may determine that an apology or acknowledgement would remove your client's impediment to good faith negotiations. The mediator can use a private caucus with the opposing party to suggest that a sincere apology (or acknowledgement of the impact on him) be offered to your client, to facilitate reaching a settlement in the dispute. In that scenario, your client has not lost any ground because he has not "demanded" an apology or

acknowledgment, and the apology or acknowledgement has not lost any value because it comes unsolicited from the opposing party. (We recognize that a savvy client may realize that the apology or acknowledgement originated with a suggestion by the mediator, rather than with an offer from the opposing party, but for purposes of removing the impediment this may be sufficient.)

#4: Distinguish the Current Situation from a Previous Experience.

Not every emotional roadblock arises from the facts and legal issues at issue in the current mediation. Two common situations are: your client has a lingering issue with the opposing party not directly related to the current dispute, and your client is projecting his experience from a previous dispute involving different parties onto this dispute. An effective mediator can identify those unrelated facts and issues and either include them in the resolution of the matter at hand or defuse them and get them off the table.

Your client may be reluctant to engage in mediation because of lingering issues with the opposing party that the opposing party thinks are resolved or forgotten. As a hypothetical, while the current dispute involves the existence and use of an easement over your client's commercial property, your client is still upset that the opposing party refused to join a neighborhood organization created to improve the overall profitability of area businesses. Your client may not even realize that this is still gnawing at him, and the opposing party may have forgotten that this was ever an issue. An insightful mediator can ask the right questions to identify this unrelated issue, and then either facilitate a resolution (such as including the opposing party's participation in the neighborhood organization as a term of the settlement) or defuse the situation and assist your client in focusing on the issues on the table for this mediation.

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Or, your client may be reluctant to engage in mediation because he is projecting his experience from a previous dispute onto this mediation. As a hypothetical, your client may feel that in a previous dispute he made too many concessions and left money on the table; because of that he would rather not settle this matter than make the same mistake twice. A talented mediator can ask the right questions to identify this previous experience, and then defuse it by distinguishing it from the present situation. Now your client can proceed with a clean slate rather than a mountain of baggage.

Moving Forward

Once the mediator has identified the issue that is holding your client back from engaging in the mediation, and addressed and removed that impediment – for example by providing a neutral listening ear, obtaining an apology or acknowledgement from the opposing party, or distinguishing the current situation from a previous experience – your client should be ready to move forward with the mediation in a cooperative and productive way. Your client should also be more receptive to the excellent legal and business advice you have been providing all along, but which he has been unable or unwilling to hear because of an emotional roadblock. The stubborn, willful skeptic who entered the first joint session has been replaced by the rational businessman who hired you in the first place.

Now the mediation may begin.

FOR MORE INFORMATION

For more information, please contact:



Frank R. DeSantis, Partner

216.566.5514

Frank.DeSantis@ThompsonHine.com



Stephen D. Williger, Partner

216.566.5655

Stephen.Williger@ThompsonHine.com



Nicole K. Wilson, Counsel

216.566.5623

Nicole.Wilson@ThompsonHine.com

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