

## **Some Mediation Expectations and Musings 1,200 Hours Later**

By  
David I. Karp

After more than 1,200 hours of actual time at the mediation table, and without apology for over simplification, I share with you some of my (perhaps naive) musings about others' expectations in mediation. A candid discussion before the mediation between lawyer and client and even between lawyer and mediator may help to manage these expectations.

### **Some Party Expectations**

**My lawyer must saber-rattle.** In mediation, many clients expect the overt advocacy that they see on television. Parties should understand and expect that their lawyers can be more effective in getting to peace by toning down the advocacy.

**The mediation should not take very long.** Most disputants simply do not understand the process and cannot imagine the time it actually takes. I have had mediations abruptly end without resolution due to conflicting commitments that easily could have been avoided if the party had been warned in advance.

**Everyone is here to settle.** Not true. There are often social or business agendas that may cause cases not to settle, and this should be anticipated. Even party emotions can block settlement, although sometimes not (if the mediator is given the time necessary to try to work through them).

**I know I am right, so I do not need to give concessions.** Mostly, people are convinced of their own truth and that "Justice" will prevail. Parties often fail to consider the risk that the judge or jury will be persuaded by the position of the other side. This should be addressed in advance.

**If I explain my position, the other side will be convinced and cave in.** This just doesn't happen. If a party is prepared to realize that the other person's own perceptions will control that person's decision making, appropriate concessions on both sides may occur resulting in settlement.

**My position is reasonable.** What one side believes is reasonable, the other believes is unreasonable. In successful mediations, I have seen that people need to compromise *from* their "reasonable" positions in order to meet the other side.

**The other side should negotiate as I do.** People really need to disabuse themselves of this misconception. Every person and every negotiation is different. Expect the unexpected.

**I will give my bottom line at the outset; take it or leave it.** In my experience, the mediation abruptly ends almost always when this occurs. Parties need to engage in the negotiation process so that they can "save face" or experience the "satisfaction" of "getting the best deal."

#### **Some Lawyer Expectations**

**I should not talk with the mediator ex parte before the mediation.** Nonsense. Mediators are not judges. Ex parte caucuses occur all the time in mediation.

**Only the parties and their lawyers should attend the mediation.** In some cases, I do not disagree. But practitioners should consider whether the additional person or people at the table will actually help the decision making process. Many parties would not dream of deciding on a settlement without prior consultation with, and approval from, a spouse, family member or business partner. In construction disputes, I have often valued having the experts in attendance.

**The mediation should not take more than three hours.** I believe that this expectation has been generated by the distortions of the local Court's Pro Bono Mediator program which provides mediation services without charge for the first three hours. In my experience, most successful mediations in my areas of emphasis (real estate and business) take longer than three hours, usually four to six hours, sometimes more.

**The mediation can proceed with someone available "by phone."** I like to be able to look the decision maker in the eye. In my view, there is a much greater chance of successful resolution if every party and decision maker is at the table experiencing the process first-hand with me. Also such personal attendance tells the other side that the mediation is being taken seriously. Many times people are "insulted" that the other side did not expend the effort or have the interest to attend in person.

**Briefs are not necessary.** Certainly a mediator can pick up the essential facts from joint or private caucuses. A timely brief tells the mediator, though, that the attorney is taking the mediation seriously and has given thought to making the mediation session productive.

**Interpreters are an extra expense and unnecessary.** In one mediation, a Korean party brought his teenage daughter to interpret. She only summarized. My words and meaning were not conveyed accurately or at all. Worse, I had to ask the party about subjects he would never discuss with his daughter. The case did not settle. A different attorney recently brought a professional interpreter to mediation. The simultaneous translation was useful to everyone. The client fully understood what was occurring around him as well as the settlement itself.

**The outcome at mediation will be determined by law.** Although lawyers learn the law and expect that law should govern the outcome, the parties' expectations may be altogether different. Based upon their cultural backgrounds or views, the parties may apply a completely different set of rules or values.

**Mediation should occur before the parties spend a lot of money on attorneys.** Sometimes early mediation *is* a good idea, sometimes not. The parties genuinely may need some discovery to learn about the case, to educate the other side and/or simply to create leverage. Or the parties might need to pummel one another with depositions first to make litigation avoidance a preferred value.

The foregoing paragraphs are just the tip of the iceberg and have been given only to provoke thought about the mediation in advance. Many of them highlight some of the obstacles to resolution. Many more will be experienced again and again. Good communication about these and other expectations, among the lawyer, the client and the mediator, can help the parties achieve their goals in mediation, whatever those goals might be.

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David I. Karp has been acknowledged by the Los Angeles Superior Court for "Outstanding Volunteer Contributions" to the Court's Alternative Dispute Resolution Program, March 2007. He is a full-time professional mediator for real estate and business disputes and may be reached in Van Nuys, CA, at 818-781-1458 or at david@karpmediation.com for private mediation.