

## Some Mediation Tips

BY MICHAEL B. RAINEY, ESQ.

A dispute spins out of control. You and your client do the best you can but it looks like you both are on the way to a starring role in "The Practice." It is one big horror story. In the midst of this dismal situation you get a letter demanding mediation. Now what?

Actually, a notice to mediate is good news. Mediation is simply a type of negotiation albeit more structured than the usual transaction negotiation. It is a forum you and/or your client should feel very comfortable. This article will give you a few practical tips and take some of the mystery out of the process.

### Preparation

As a general guideline I suggest you prepare, dress, and act as if you were making a million dollar listing presentation. How would you dress for such a presentation? What would you know about the prospective listing? Would you bring all the documents and information necessary to make your point and influence your future client? The probability of success in such a listing or a mediation lies in the preparation.

### Proper Attire

Besides dressing appropriately for the occasion it is also important to dress to be comfortable. If your usual business outfit is slacks and an open shirt or a pants suit, this may be your proper attire. The crucial point is for you to be real. Let's face it, if you come across as a phony in any facet of this process, you may raise doubts in all facets.

### A Bit About Jewelry

No matter what other subjects are discussed, often times the last subject on

the table involves dinero, money, coin of the realm. As the Agent is more often than not a "target", ask yourself this. Who looks like they can pay more money; the person with the Rolex President (prominently displayed) or the person who is more subdued? My point is, when you want to portray the aura of success, perhaps well chosen jewelry can be a big asset. However, when you may be called upon to pay damages, you might consider what message you want to transmit by your accessories.

### Know the Facts of Your Issues

Nothing is more frustrating than a party who decides they are going to "wing it" in mediation. It is disrespectful to the mediator, to the other parties, and the process. On the other hand, when a party comes prepared with all the requisite documents, photos, and other demonstrative evidence, they usually come across confident and with veracity. The successful resolution rate increases commensurately.

Remember, the usual backdrop to a mediation is threatened or existing litigation or arbitration. Often times a party will not make any significant movement unless and until they see a viable threat to their position. Why should they compromise or even pay nuisance value if the claimant can not even make a case? This is a good question. Therefore, you must be able to prove a case with competent evidence. This means you will most likely use the evidence in mediation that you would use at the arbitration or trial.

However, a word of caution. Unless the arbitration is binding, you may have to weigh out whether or not you will use your

"killer" impeachment evidence. It makes little sense to bring forth your big guns if there is no chance of resolution or if the decision is not binding. This is the traditional negotiation dilemma. "Do I disclose that which will enhance my chances of settlement" verses "If I disclose this information, will it come back to hurt me?" This is a judgment area and where a good mediator can give you guidance in the private session, ie. caucus.

### Understand the Dynamics of an Apology

The power of an apology will be the subject of another article. Suffice to say, it is often misunderstood, both on its purpose and its delivery. As parents, when our child makes a mistake our default advice is to "Say you're sorry." However, when we commit adult faux pax we find ourselves in an interesting dilemma. We do not apologize to avoid admitting liability hoping we will not get into a lawsuit. However, failing to apologize may be the one thing which drives the other side to the very thing we are trying so hard to avoid - a lawsuit.

In order for the apology to be meaningful, it must be genuine, timely delivered, and given by the right person, to the right person, and about the right thing. In giving an apology one should also remember, the recipient may accept it and forgive but the offending party may still have to pay damages. The good news is, a well executed apology generally mitigates the ultimate damages.

### Summary

Mediation is not unlike going to an important listing agreement. The primary difference is in mediation you have a coach-the mediator-who is there to help you solve a dispute which you have not been successful at resolving by yourself. Follow these tips and you will help them help you to a successful and satisfying resolution of your problem.

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