

MEDIATION ADVOCACY

How to get the most out of your next mediation

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Speaker – Rebecca Callahan



Rebecca is a full-time mediator / arbitrator with offices in Newport Beach, California. She also does work as a mediation / arbitration consultant. She is a member of the **American Arbitration Association's** commercial mediation and arbitration panels. Her area of expertise is business disputes.

Rebecca earned a master's degree in dispute resolution from the Straus Institute where she is an adjunct professor. She earned her law degree from UC Berkeley (Boalt Hall) and her undergraduate degree from USC.

For more information, please visit Rebecca's website at www.callahanADR.com.

Program Topics:

1. Mediator selection
2. Advocacy in the context of mediating the litigated dispute
3. Preparation techniques that work to advance the mediation process or promote settlement
4. Advocacy techniques that don't work to advance the mediation process or promote settlement
5. Why does any of this matter?
6. Final thoughts re axioms that explain why mediation as an alternative to litigation/ arbitration works
7. Q&A

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Program Goals:

I hope you will leave today's programs with some **new ideas** about how to:

- (1) use mediation,
- (2) select the mediator
- (3) "read" the mediator and enlist his / her help

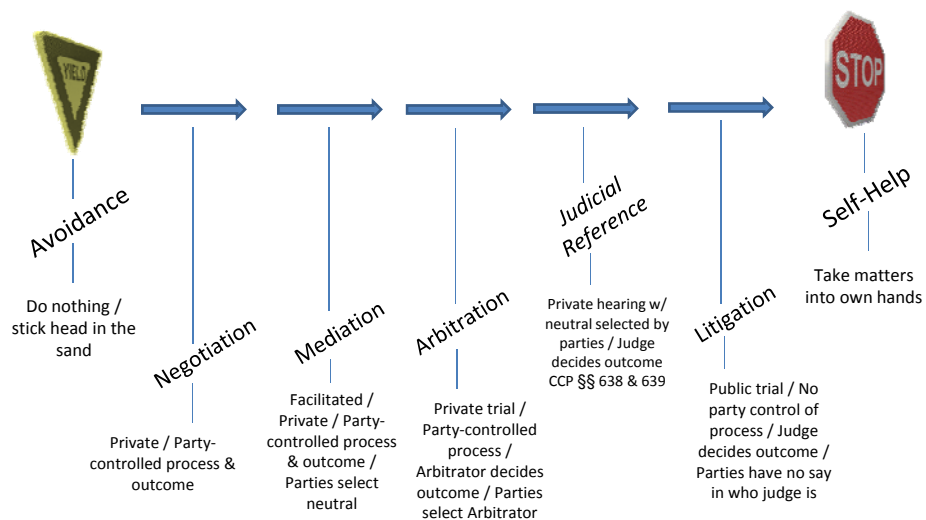
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Program Handouts:

- Callahan Article on Mediation Advocacy
- Callahan Article on Reservation Points
- Callahan “Plan for Success” – Preparation Checklist
- Callahan Article on Special Rules for Mediated Settlement Agreements
- Kiser Study Article
http://www.adrmediate.com/docs/Susan_Hammer_OSB%20Bulletin_Feb-Mar09.pdf
- *Playboy v. Sheppard Mullin* Article
<https://www.cacd.uscourts.gov/sites/default/files/documents/Leave%20the%20Odds%20for%20Vegas%20July%2010%202015.pdf>

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Dispute Resolution Continuum



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“If the only tool you have is a hammer,
you tend to see every problem as a nail.”

- Abraham Maslow

*We often hammer away at the same old
problems in the same old way because we
know of no other way.*

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Selecting the Mediator

This is an **important** decision. While mediators have no power to decide the dispute, they have tremendous **influence** over the process and the outcome because they:

- Provide analytical input
- Direct and redirect the “conversation”
- Make proposals and suggestions about settlement options
- Carry messages between / among the parties that are frequently reframed, colored, filtered, edited, etc.
- Receive secret information in caucus which, while not shared with the other side, might influence their reframing and direction efforts
- Offer opinions, recommendations, suggestions, views in an effort to move one or both or all parties *off* of their positions

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Selecting the Mediator

Problem Definition

Narrow _____ Broad

Legal Issues
bargaining in the shadow
of the law
backwards looking

Interests & Needs
bargaining based on what
the parties want or need
to have addressed or
accommodated today in
order to say "yes"
forward looking

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Selecting the Mediator

Problem Definition

Narrow _____ Broad

<i>Legal Issues</i>	<i>Economic Issues</i>	<i>Personal Interests</i>	<i>Economic Interests</i>	<i>Societal Interests</i>
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Selecting the Mediator

Mediator Role

Evaluative

- order
- recommend
- offer a suggestion
- educate about what others have done
- ask permission
- wait to be asked
- never provide substantive input

Facilitative

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Selecting the Mediator

Evaluative

- order
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- never provide substantive input

Facilitative

Narrow

Broad

Legal Issues - bargaining in the shadow of the law

Interests & Needs - what the parties want or need to have addressed or accommodated today in order to say "yes"

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Advocacy in the Context of Mediating the Litigated Dispute



The definition of "advocacy" is pleading, advancing, championing or supporting a cause or proposal.

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Advocacy in the Context of Mediating the Litigated Dispute

For mediation to succeed in achieving a negotiated resolution of the dispute, there needs to be a *constructive dialogue* about the problem and *persuasive conversation* about possible settlement options or terms – including such things as

1. the litigation alternative & how it compares to the possible solutions
2. the uncertainties of the litigation outcome
3. the uncontrollables associated with the litigation process, the marketplace or life in general
4. other risks that are attendant to the no-resolution alternative
5. lost opportunity costs
6. what's in it for the other side
7. why the negotiated outcome possibility makes sense under the circumstances at hand

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Advocacy in the Context of Mediating the Litigated Dispute



Mediators don't settle cases

Parties do.

No mediator has ever paid the consideration or signed the release or otherwise lived with the consequences of a settlement.

What mediators do is create an environment in which the parties and their attorneys can do their best job of negotiating, and then they help facilitate those discussions.

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Mediation Advocacy Techniques that Work

1. Plan for who needs to be at the mediation
 - ✓ to tell the story
 - ✓ to explain the theory of the case
 - ✓ to talk numbers
 - ✓ to make in-game adjustments to the pre-mediation case evaluation
 - ✓ to make in-game adjustments to the settlement goals defined in advance of the mediation
 - ✓ to make the ultimate decision re "deal" or "no deal"
 - ✓ to bear responsibility for the "deal" or "no deal" decision

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Mediation Advocacy Techniques that Work

2. Give some thought to when is the right time to sit down and try to talk about settlement?
 - ✓ before or after the filing of the lawsuit
 - ✓ before the case is “at issue”
 - ✓ before discovery is taken / completed
 - ✓ before or after the hearing on a dispositive motion
 - ✓ before or after reaching impasse in your private negotiation efforts

Q: Is there something going on in the client's or the other side's life or business that would promote or disincentivize settlement discussions at this moment in time? At some future moment in time?

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Mediation Advocacy Techniques that Work

3. Set a realistic settlement number that is based upon something more than the predicted trial outcome.*

Identify risks that are avoided by settling and assign a value that is then subtracted from (Plaintiff) or added to (Defendant) the predicted judgment value.

Do this analysis both ways so that you can have a *persuasive* discussion about why the other side should change its position in your favor.

**There is empirical evidence through the Kiser Study that attorneys are not very good at predicting outcomes at trial. [Handout](#).*

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Some possible considerations ...

- ✓ If the subject matter of the dispute concerns property that has a fluctuating market value, what is the value of capping that loss / capturing that value today? By what degree might the market change to your disadvantage pending the outcome at trial?
- ✓ If the case turns on the availability and testimony of a third party witness, what is the value of avoiding the risk that the witness will or won't show up? will or won't testify in your client's favor?
- ✓ If the case turns upon who the judge or jury believe, what is the value of avoiding the risk that the judge or jury rejects your client's / your expert's testimony?

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- ✓ If the case involves complicated facts and/or legal issues, what is the value of avoiding the risk that the judge or jury makes a mistake or gets confused on a key issue ? What's the value of avoiding the time and expense of an appeal?
- ✓ If the case is ripe for summary adjudication, what is the value of avoiding the expense and potential adverse rulings associated with such proceedings?
- ✓ What is the value of recovering money today versus 3 or 5 or 10 years in the future?
- ✓ What is the value of opportunities lost or not being pursued because of the time, money and other resources being allocated to the litigation?

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Mediation Advocacy Techniques that Work

4. Be prepared to talk turkey!

(A) If you're the plaintiff, prepare an itemization of damages and explain / substantiate the factual basis for those damages, especially as relates to punitive, exemplary, emotional distress and consequential damages. Consider making a demand in advance of the mediation, especially when insurance is going to be at the table – *and* do this well in advance of the mediation so as to give the defendant's insurer or executive decision makers an opportunity to evaluate your client's claim and reassess what has been reserved / authorized for settlement.

(B) If you're the defendant and plaintiff provides you with the above, be prepared to respond and to explain / substantiate the factual and basis for your response on an item-by-item basis. Come to the mediation prepared to respond to any pre-mediation demand.

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Mediation Advocacy Techniques that Work

5. In private with your client, take a broader view:

(A) How does the client define or understand a litigation victory?

(B) Is that relief available realistically? at all?

(C) Has the client anchored on the top number of the range you gave him / her / it?

(D) How does the client define or understand a litigation loss?

(E) What is the potential financial impact of a litigation loss?
Can the client afford it?

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(F) Even though you think the client has a “good case,” does the client understand the risk and uncertainty associated with having a judge or jury decide the matter? That irrespective of your estimate (e.g., 80/20), if the matter is decided against client, that consequence is borne by 100%.

(G) Where does the dispute *presently* fit into the client’s life? Has anything changed that might affect / alter how the client views or values a settlement?

(H) Win, lose or draw, can the client afford to take the matter through trial? through an appeal?

(I) What is the firm’s level of commitment with regard to client’s representation? Only so long as fees are paid current? Only through trial? For however long it takes?

(J) Where is the case in terms of the original budget estimates? What is the current estimate re how much it will cost to take the matter through trial?

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Mediation Advocacy Techniques that Work

6. Look for opportunities to expand the pie:

- ✓ Are there tax consequences of a judgment that can be avoided, minimized, structured, delayed by a settlement? If so, what potential value does that planning have to both sides?
- ✓ Is there something that one or both sides really wants or needs or values that is not available through the litigation, but could be put on the table to discussion? E.g., an existing relationship? a future relationship? an apology? an explanation?
- ✓ Are there other circumstances that might motivate one or both parties to be more amenable to settlement? E.g., age? health? change in family circumstance (a death, a birth, a marriage)? change in business circumstance (M&A opportunity, founder leaving, restructuring)?

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Mediation Advocacy Techniques that Work

7. Have a bargaining plan:

- ✓ Is there anything in what you want that you think the other side may be willing to give or concede to you? *If not, what's your plan on how to move them?*
- ✓ Is there anything that you may be willing to give or concede to the other side? *If so, what are you going to propose that they trade to get it?*
- ✓ Prioritize what you want to achieve
- ✓ Prioritize what you might be willing to give up
- ✓ Have an opening move and a tentative set of moves to achieve your settlement goal (shared with the mediator)

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- ✓ Have a settlement goal (not to be shared with the mediator) that you have worked out with the client would be a good settlement in terms of risks, costs and uncontrollables avoided and other interests, needs and circumstances accommodated
- ✓ When setting reservation points with the client, leave yourself room *and* specify clear qualifiers so that it is possible to make "in-game" adjustments at the mediation if warranted. *Handout re "reservation points"*

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Mediation Advocacy Techniques that Work

8. Plan for success – take a draft settlement agreement to the mediation.
9. Miscellaneous
 - ✓ Discuss and agree upon client role
 - ✓ Will visual aids help with storytelling? negotiation?
 - ✓ Read the other side's brief & prepare a reasoned response aimed at getting discussions going - not "winning" the argument. *Rethink not sharing your brief!*
 - ✓ Prepare yourself and client to be patient – with the process and with the other side
 - seismic shifts take time
 - people process information and decision make at different rates of speed – *You can only work as fast as the slowest person at the table*

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Why does any of this matter?

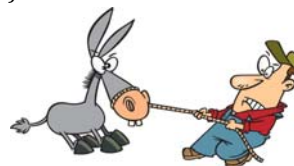
Because there is a disturbing trend of clients suing their attorneys for "settlement malpractice" in both contexts – when they do and when they do not settle. It's a good idea to have a serious discussion with the client about the risks of litigation and giving value to those risks.

Cases Where Clients Settled with Their Adversary and Then Sued Their Lawyer

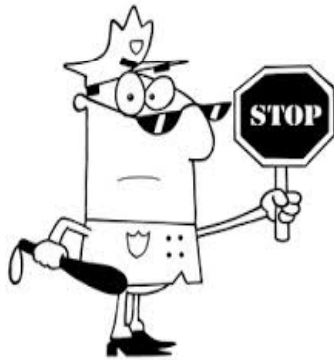
Cassel v. Superior Court, 51 Cal. 4th 113, 124 (2011)
Filbin v. Fitzgerald, 211 Cal. App. 4th 154 (2012)
Roldan v. Callahan & Blaine, 219 Cal. App. 4th 87 (2013)
Syers Properties III, Inc. v. Rankin, 2014 WL 1761923 (1st Dist., May 5, 2014)
Amis v. Greenberg Taurig LLP, 235 Cal. App. 4th 331 (2015)

Cases Where Clients Did Not Settle / Did Not Like the Result at Trial and Then Sued Their Lawyer

Moua v. Pittullo Howington Barker Abernathy LLP, 228 Cal. App. 4th 107 (2014)
Playboy, Inc. v. Sheppard Mullin, Los Angeles Superior Court, Case No. BC579105 (filed Apr. 17, 2015)



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What are deficient or ineffective advocacy techniques in the context of mediating the litigated dispute?

Not surprisingly, these "techniques" are frequently what cause or contribute to impasse at mediation.

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1. Vilifying and/or insulting the other party or counsel
 - ✓ not a message that will be carried
 - ✓ not a message that invites negotiation
 - ✓ "fightin' words" ... not what mediation is about
2. Setting an artificial time limit on how much time will be committed to the mediation (e.g., 3 hour mediation session to settle a dispute that has been in the courts for 2 years)
3. Sending "appearance counsel" or an attorney who is not responsible for advice-giving to the client or for taking the matter to trial
4. Planned or scripted "venting"
5. Coming prepared / willing to discuss only the virtues of the client's case and none of the negatives, risks, reality factors, etc.

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6. Holding cards too close to the vest – not sharing information necessary or material to persuading the other side to move off of its position
7. Playing games aimed at fooling the mediator and using him or her as an instrument of deception or misinformation
8. Not giving thought or consideration to the things that do work to advance the mediation process and promote settlement dialogue
9. Not taking time to prepare / winging it
10. Limiting / pegging the client's settlement number to the predicted "*judgment value*" of the case.

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CLOSING REMARKS

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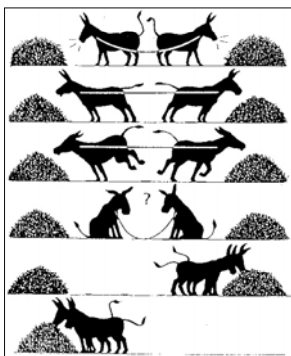
Dispute Resolution Axiom #1:



A dispute belongs to ...
...the parties who created it.

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Dispute Resolution Axiom #2:



The parties most directly
affected by a dispute - given the
right circumstances - are the
ones who are best able to
resolve it.

Therefore, the best resolution
is likely to flow directly from ...
...the parties themselves.

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Dispute Resolution Axiom #3:



All disputes end...
...sometime.

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Dispute Resolution Axiom #4:



Mediation is not a “one size fits all” process!

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Dispute Resolution Axiom #5:



The two most powerful
warriors are patience
and time.

- Leo Tolstoy

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Time for
Questions

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