

FRAMING THE DISCUSSION WHEN MEDIATING GENERAL CIVIL CASES

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Managing Roles and Relationships

It is important for mediators in civil cases to clearly identify and communicate the nature of the roles and relationships of everyone in the mediation session.

The mediator must be able to pay attention to the nature of the relationships between all the people in the room, not just the parties in the dispute.

The combination of persons present can vary but, typically, may include:

- Mediator
- Party 1 – can be more than one person
- Party 2 - can be more than one person
- Other parties (e.g. cross-defendant)
- Person with ultimate settlement authority. Example - party represented by insurance adjuster, governmental or corporate representative.
- Attorney for party 1
- Attorney for party 2
- Attorneys for other parties
- Support person/witnesses for each side

Agreement should be reached by all participants as to the presence in the mediation session of other persons not named in the case, including the presence of attorneys.

Mediator's role

The mediator's role is to empower the parties to a self-determined, informed, independent decision about the outcome of the dispute, and to encourage them to recognize each other's point of view and come to a better appreciation of each other's needs, as well as their own needs.

It is not the mediator's role to push for agreement or to act as an advocate protecting the rights of parties. The parties themselves determine whether the outcome is satisfactory.

Emotion

It is extremely important for the mediator to use his/her active listening skills to acknowledge the parties' emotional experience, even if the conflict presents itself as a purely economically based dispute.

Litigation is often intimidating and stressful for parties. Sitting in the room with attorneys and strangers who are encouraging open and forthcoming discussion can feel really risky and frightening. At the very least, appropriately acknowledging that for the parties can help build trust and give them a chance to calm down enough to entertain the idea of moving off their positions towards a more collaborative resolution to the problem.

Internal/External Interests

When a party feels heard and understood, s/he is more likely to hear and understand the other party. Parties are also more likely to get clearer about what their own interests and goals for are for resolving the dispute. They, then, are more receptive to collaborating on solutions.

If there is an underlying emotional interest driving the dispute, failure to adequately address it can close down communication and distort the way parties address their own and each other's needs.

Considering the relationship between the disputing parties

Keeping the emotion in perspective can be tricky. The mediator needs to pay close attention to what matters most to the parties. The mediator should explore the nature of the relationship between the disputing parties. If it is of a personal nature or there was a lack of communication that seems to have caused the conflict, addressing emotional interests may lead the way to resolution. If, on the other hand, the dispute is the result primarily of an arms length transaction, focusing too much on emotion can derail the mediation very quickly, inflame the parties and cause the mediator to lose the parties' and their attorneys' confidence.

Discussing the law Legal issues should be addressed in ways that are accessible to the parties. The mediator should develop enough legal literacy to be able to explain basic legal concepts to the parties, whether they have an attorney or are self-represented.

When parties are represented, it is important to engage their attorney in any discussion regarding relevant law. The attorney should be invited to explain the law. The mediator can use active listening and reframing to translate if the parties are having difficulty understanding the concepts. The mediator also should contextualize the importance of the legal discussion into a frame that addresses any emotional or pragmatically based interests which the parties may have.

As with emotion, it is important that the law be given the appropriate dimension. The law needs to be translated and integrated into the discussion in a way that keeps the parties' interests primary. Focusing too much on the law or allowing attorneys to get stuck in their legal postures can cause the discussions to spin at

the surface and make it impossible to get the parties' true concerns: thus, frustrating the chances for attaining any resolution that works for both parties.

Are the parties in mediation voluntarily or as a result of a court order?

The emotional volatility of parties can be affected by whether they entered mediation voluntarily or were mandated to attend pursuant to Code of Civil Procedure sections 1775 et seq. Even though judges may order parties to mediation, the mediator should take the time to explain that attendance alone fulfills the obligation to participate. The court can not and will not order the parties to reach a settlement. In the interests of preserving litigants' rights to access to justice, they are always entitled to a hearing if they choose to end the mediation for whatever reason.

Taking time to get agreement on ground rules and making sure that the ground rules are observed can help to maintain a safe environment. Paying particular attention to how anger may be expressed can both allow for appropriate emotional expression and prevent out of control behavior.

Sometimes parties ordered to mediation vary in their competence to mediate and may have health issues that limit their ability to easily comprehend their options and make autonomous choices. In such cases, the mediator should take the time to speak about all the issues in plain English, checking in with the parties throughout that they understand whatever concept or option is being discussed.

Both parties have representation

There are often both benefits and challenges when attorneys are present at mediation. Understanding how to work collaboratively with attorneys can greatly enhance the opportunities for successful resolution.

Some Benefits:

- Attorneys act as legal experts
 - Mediation briefs help explain the law and the parties' positions (See California Rule of Court 3.874(b) (2)).
 - Mediator is process expert, lawyer content expert.
- Attorney can save face and stay in role as advocate with participation of a mediator.
- Contribute ideas for settlement.
- Agents of reality for their clients. (See BATNA/WATNA article).
- Provide support for and control over their clients.

- Can help mediator craft enforceable agreement.

Challenges:

- May have trouble controlling their client. The mediator can help with this by using his/her skills to calm the client and help him/her focus.
- May have resistance to mediator maintaining control of the process and/or to mediation as a party centered process (as distinct from settlement conference). The mediator can help build trust by acknowledging the attorney's concerns through respectful and appropriate active listening and reframing. The mediator should then be willing to negotiate with all participants on how to proceed.
- Because the attorney has an ethical obligation to act as a zealous advocate for his or her client, s/he may have a difficult time switching from competitive to collaborative posture. The mediator can support the attorney in making the shift by contextualizing for the attorney how his/her arguments relate to the parties' interests and concerns.
- Focused on their clients' position and uncomfortable or seemingly unable to get to underlying interests, especially if there is a strong emotional component to the dispute. The mediator can help by using his/her skills to address the emotional issues, contextualizing them in relation to the frame of the legal discussion.
- Impatience with the process and push for solution too quickly.
- They are human too and their interests/concerns may need to be acknowledged by the mediator to get cooperation.
- May have to contend with ultimate settlement authority in the hands of someone other than the party. For example – insurance limits.

During the contracting phase, who will go first and the role of all persons in the room will be negotiated. Suggest that the parties sit closest to the mediator and that the attorneys sit next to their respective parties.

The mediator may suggest ideas for the role of the attorney. One might be that the attorney let his/her client speak first, then contribute with his/her thoughts about the conflict and discuss his/her perspective on how the law relates to evaluating the conflict and potential for resolution. Another suggestion might be that the party speaks and that the attorney act solely as support person without speaking other than during caucus with his/her client and/or the mediator.

The mediator can be an important support person for both attorneys because the mediator allows the attorney to stay in role as an advocate for his/her client's interests, while also providing the opportunity for participating in ways that move the parties towards negotiation that is interest rather than purely positionally based.

Sometimes the attorneys and the mediator will caucus without the parties present to discuss technical legal issues. This should only be done by agreement of all participants in the process.

One party is represented by counsel and the other is self-represented

The mediator needs to recognize if there is an imbalance between the parties in their understanding of the law. S/he should be familiar enough with the legal concepts and procedures to explain them to the self-represented party in plain English so that they fully understand before they make any decisions.

It is also important during the contracting phase to negotiate the role of the represented party's attorney.

Both parties are self-represented

The mediator should take the time to adequately explain his/her role as a process expert, and not a decision-maker. Self-represented parties often conclude that the mediator is employed by or reports to the court, so explanations of the mediator's role and impartiality are to be made clear.

The mediator should explain, in plain English, any and all relevant legal or court procedural terminology and concepts for information purposes.

In order to empower both parties to make fully informed decisions, encouraging them to educate themselves or seek expert legal or other advice may be appropriate.

Regardless of what the mediator may know about parties' rights, the parties themselves decide what the outcome will be and what the standard of satisfaction with that outcome will be. Even if the mediator is concerned that parties are potentially forfeiting their rights, the decision is theirs to make. The mediator's role is to ensure that the parties fully understand all the options available to them so that they are empowered to make an independent and informed decision.