



Mind Your Own Business – and Succeed at Mediation

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Mediation is a mix of art and science. You need to do your research, prepare your case, and put on your psychologist hat – both to figure out what is best for your client and what motivates the other side. But it can be dangerous and counterproductive to worry too much about the other side.

We all have our own style in trial and mediation and that is how it should be. Just like a jury can tell if you are faking it and trying to be someone you are not, the same is true for your adversary during a mediation. The ruse of acting tough is quickly dispelled if you really are not comfortable with that persona or if you are not prepared to back up the bravado with action. And threats are seldom effective unless you and your client are truly willing to make good on them.

But what often happens is that a party in the mediation becomes too wrapped up in what the other side is doing. They worry about what signal is being sent and, more to their detriment, they want to respond in-kind to the actions and moves from the other room. This allows the other side to control the mediation and also can take you out of your comfort zone or make you act in a way that really is not beneficial to your client. Rather than responding to the other side's moves, it is more productive to go into the mediation with a plan. Know what you want to accomplish and have a plan about how you are going to conduct the mediation to reach your goal. That way, if the other side is unreasonable, you do not undermine the mediation by being even more unreasonable. You can stick to your plan and continue to move to your end game. As you do that, you should let the mediator know that you are not responding to the other side, but rather moving in what you believe is a productive direction. That way, your moves won't be misinterpreted.

This is not to say that you should ignore the message from the other room. Sometimes they might tell you that you can do even better than you thought you could. Sometimes they might tell you that they are not hearing what you are saying and you need to communicate in a different way. But I have seen mediations collapse because of egos and parties feeling that the other side is being unreasonable so they need to be even more unreasonable to prove who is tougher. When that attitude is played out in both rooms, the mediation is often doomed. If you have a plan and stick to it, you are more likely to be successful. And remember, you can stop the negotiations once you have reached your end game, regardless of where the other side is at that time. When you make it clear that you are about done and you mean it, they can then decide if they want to become reasonable and settle or go home.