

Things Excellent Lawyers Do in Mediation

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I have had some thoughts lately about what I have seen excellent lawyers do for their clients in mediation and would like to share several of these with you. This list is of course not meant to be exhaustive and I would invite any of you to add to this list with feedback from your own experiences. That said, what are some of the things I have seen excellent lawyers do for their client when in mediation? Here are four.

#1: Excellent Lawyers Understand Their Client's *Needs* and *Wants* and Help Their Clients Keep Their Eye on the Ball during the Negotiation Process

First and foremost, excellent lawyers have taken the time to understand their client's *needs* and *wants* in advance of the mediation session. They can differentiate between the two and they make sure that the mediator can differentiate between the two. Certain things may be non-negotiable or maybe the client is confusing *needs* and *wants*—considering everything to be a *need* when really some things are *wants*. It's the *wants* that can be negotiable when you're not willing to negotiate on things that are *needs*.

An excellent lawyer clearly understands these things, keeps them in mind, and has prepared the client to differentiate between those as well. They've also made sure that in the pre-mediation conference call with the mediator, or in their briefs, they advise the mediator of some of those things. Counsel's understanding of their client's *needs* and *wants* is what keeps the negotiations on track from their perspective. That said, flexibility is key, and a *need* may become less of a *need* for the client as the day progresses. Clients with excellent lawyers receive help from their lawyers to be flexible and to think big picture. *If I give up this for that, what will it bring me?* A good night's sleep and getting back to living one's life unencumbered by the stresses and risks of litigation for one thing. Some might call that "peace"!

#2: Excellent Lawyers Are Logical and Supportive of Their Client

Excellent lawyers for their clients in mediation tend to be logical and not given to histrionics or drama. They understand the process and they understand *the give and the take* and these sorts of things. They're knowledgeable. They're knowledgeable about their case and knowledgeable about where they think they can negotiate or not. They're knowledgeable about their client's *wants* and *needs* (#1 above). They're knowledgeable about the law and the facts, and they put them together very well. They're prepared. They've taken the time to prepare themselves, not to just say, "*Oh I've got a mediation tomorrow, here, let me pick up the file and head on out...*". No, they've prepared in advance.

They've talked to the mediator in advance in a pre-mediation conference call. They've provided the mediator with a useful mediation brief. They may have shared a brief with the other side to alert the other side to what their positions are, *which I think is a wonderful thing to do - sharing documents or a mediation brief, and keeping the confidential information for the eyes of only the mediator*, sharing far in advance so that the other side has time to consider the points raised.

Ultimately, excellent lawyers are supportive of their client in a personalized way. They're nice to their client and do not get caught up in emotion. They recognize what their client wants and will help the client get their points across. They are optimistic but realistic and practical. There's a lot that can go into being supportive but suffice it to say that excellent lawyers are supportive of their client and their client's position, in a knowledgeable, logical, and prepared way.

#3 Excellent Lawyers Maintain a Positive Demeanor and "Hold the Calm"

Excellent lawyers for their clients in mediation "hold the calm", which can mean many things. That said, there's a wonderful book by Heshia Abrams called [*Holding the Calm: The Secret to Resolving Conflict and Diffusing Tension*](#) (this is where I get the phrase "holding the calm" or "hold the calm" that I use here) that I highly recommend for anyone who negotiates – with anyone, for anything – in business and in life. The book's advertised highlights speak to skills shown by excellent lawyers in mediation:

- Speak into the ears that hear you;
- Be the grown-up in the room;
- Listen to what is not said; and
- Create small, winnable victories

What do I mean when I say, “hold the calm”? Well, one aspect is of course that excellent lawyers in mediation don’t mirror client feelings of negativity that can come about as the day gets long. They keep a positive face about them, instilling client confidence and cementing relationships - both with their own client and between the parties if appropriate. They negotiate strategically and creatively, with discipline and flexibility. They stay positive and avoid pessimism. They figure out ways to make things happen. They maintain control of the negotiations and always act and negotiate in ways that are ethical, not putting their bar card at risk because of something the client might want.

Excellent lawyers “hear” what is being said beneath the surface. They in turn phrase comments and responses in ways that speak to the person on the receiving end, keeping the negotiations going even at points when settlement may not look especially promising. What is it that the other side will hear when you phrase your client’s *wants* or *needs*? What is said directly? What is said by not being said? How does the tone of voice impact the words being used? Excellent lawyers in mediation understand the importance of actively listening to understand – and to then negotiate with words that can achieve success at the mediation, however “success” is defined for that mediation.

Ultimately, excellent lawyers in mediation size up the situation and strategically negotiate in ways that bring positivity to the discussions, giving “hope” to the parties for settlement, so that they can see a road ahead without the dispute or lawsuit in their life. If the day ends with no settlement, their clients understand why the case has not yet been settled and leave with a plan for next steps.

#4 Excellent Lawyers Actively Work with the Mediator to Provide a Good Settlement Process for the Case.

I cannot overemphasize the value to a client of having a lawyer who will make suggestions to the Mediator as to how they think the case might be able to be settled. Every case is unique and counsel are best situated to understand the nuances that might help lead to settlement. When counsel suggests ways to me that might be a helpful way to approach negotiations, I listen. Counsel know their cases and clients in ways that the Mediator never can. They have been living the case for years. They know their opposing counsel. They know the jurisdiction, judges, and juries. They know what impediments to settlement might exist for their client and for the other party. This type of input can help shorten the time it takes in the mediation session and it can help get a settlement done. I have had it happen on several occasions where counsel suggested an

approach or “process” they thought would be effective, which suggestions I have heeded, to the benefit of the parties. Excellent lawyers in mediation are active participants/partners in the settlement process and do not abdicate their role to the mediator.

Conclusion

How the lawyer manages the negotiations during the mediation session, ranging from the amounts being offered or demanded, to the words that are used in connection with the negotiations, to the lawyer’s relationship with the client, to the ability of the lawyer to read the room – and all things in between - differentiates the excellent lawyer from a good lawyer. As an attorney told me once, and this is a direct quote: “Mediation Day is a Very Important Day”. Indeed, it is. Seize the day and make it count.