

**Effective Mediation Advocacy:
Tapping into the Powers
of the Mediator**

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Hon. Joyce Kimbler

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The theme:

- **Don't** enter mediation passively
- Work to influence the neutral and the process
- Think: What can the mediator accomplish for me or my client?

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Tactics Must Be Modified

- Advocacy must change:
 - Unique opportunity to talk to other party
 - But your audience is biased
- Negotiation must change:
 - Two (or more) negotiating partners:
 - Opponent, Mediator, perhaps also insurer
 - Clients are usually present, parties separated

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Use a mediator to support a "hard" bargaining strategy

- Mediator can cushion impact of tough bargaining strategy
- Possible to couple a hard "public" stance with a positive "private" signal
- Tell mediator what to say to other side about your viewpoint



Culture Bubble v. Fine Arts Fabricators

- CB planned theme park; contracted to buy stage lifts from FAF
- Parties reached agreement in principle in March and signed a written contract in April.
- Contract said the lifts were to be delivered in 12 weeks; best efforts to deliver by 7 June
- Opening set for 22 June; lifts arrived 17 June
- The bases of the lifts were larger than the contract specifications



- CB refused delivery, cancelled its opening week, refunded tickets (\$60K) and modified performances the first summer
- In December CB bought replacement lifts with smaller bases and lower lifting capacity
- CB sued FAF for \$1.88M:
 - Return of its \$80K deposit
 - \$120K to cover the additional cost of replacement lifts
 - \$880K for lost revenues, \$800K for lost reputation
- FAF counterclaimed for \$100K in lost profit on the contract



Use a mediator to educate an unrealistic opponent – or client

- Preliminary Qs
 - Is the obstacle really the merits?
 - What's the key issue?
 - How specific an evaluation do you want?
- Direct the mediator to key evidence, bring in key witness
- Look for a mediator willing to use evaluation, but only when necessary



Ask the mediator to explore options

- Attorney and mediator can pursue different, but complementary, strategies
 - Ask mediator to pursue creative options
 - Lawyer can focus on money demands, options or both or one now and other later



Use a mediator's perceived neutrality

- Ask the mediator to offer your proposal or argument as her own
- Ask the neutral to certify the fairness of a proposal
- Ask mediator to deliver unwelcome information to the other side – or your client



Ask for information about the other party

- Ask the mediator about other side's attitude or intentions
- Discuss what mediator will say to them about you
- Use mediator as a sounding board on how your tactics will be received in the other room



Use a mediator to convey and conceal information

- Mediators are pledged to protect the confidentiality of confidential information
- They are also expected to:
 - Facilitate the flow of information
 - Promote settlement
- How to manage the tension between these goals?



An example:

- A commercial case. It is 8 pm. The parties are at \$240K and \$90K
- In caucus the plaintiff tells the mediator he'd settle at \$175K, and authorizes a "public" offer of 225K to the defense
- Defense lawyer is upset: "They won't go below 200; the most we'll pay is 125. We'd go to 100 but we're wasting time. We might as well leave!"

What can the mediator say without violating confidentiality?

What can she say if she thinks each side would go to 150?



Ask the mediator to focus on issues or make points with the other side

- Ask the mediator to focus discussion on a key issue
- Ask the mediator to emphasize particular goals (money, relationship repair, business interests)



Use a mediator's impasse-breaking skills

- If mediator appears ready to quit, ask him to keep going
- Ask mediator to use - or avoid - specific tactics
- Consider how a step or tactic will affect later bargaining



If mediation fails...

- Ask the mediator to
 - Pursue the parties and try again
 - Set up litigation to facilitate negotiation
- Remember: For best results
 - Be an active customer
 - Ask: *What can the mediator do for you?*



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