

THE Patterson RESOLUTION GROUP

Part 1: Getting Your Client and Yourself Ready for Mediation

Most lawyers begin really thinking about a mediation the day before the mediation. This is a mistake. The first time you should be focused on mediation is the first time you meet with your client.

At that very first meeting, you should tell your client that the vast majority of all cases resolve before a trial and that this case may well be in that group. Explain to the client that trials are distant objects which may not offer the best resolution to the client. Explain that mediation is a process where the client still has a say in what happens.

Throughout the case, the subject of resolution before trial should be revisited with the client and when the attorney is satisfied the time is right for mediation, the client should be advised of this opportunity and hopefully will embrace the chance to resolve her dispute with her input.

Once you and your client have agreed to mediate, there are a number of things you should do to help you and your client be effective at the mediation. First, explain the process of mediation. Clearly explain the mediator's role. Most clients will assume that this person is there to make a decision about the case. Make sure you explain that is not the mediator's purpose. Explain how confidentiality works and its purpose. Tell the client that your role as attorney is much different than in a litigation context. Explain that you will be trying to help the mediator to understand as much as possible. Explain that you must have an open mind and be willing to consider anything which might result in a reasonable resolution of the case.

Second, remind the client that her participation is important and that the mediator will ask questions directly to her and to be prepared to answer fully and openly.

Another related issue in preparation is consideration of who should attend the mediation. The most successful mediations are those where both sides have someone with full authority to settle a case. Everyone has experienced the utter frustration of being at a mediation and reaching a point where the parties are close but the representative of one party does not have the authority to commit without a call to someone else, only to find out that the someone else is in a different time zone and has gone home for the evening and no one has a home phone or a cell number.

A somewhat related issue is where the individual who was involved in the original dispute has a hard time being objective about resolution. If you represent a business, consider carefully the idea of bringing someone other than the individual responsible for the dispute to the mediation. Take the time to tell the client that the early discussions

and numbers are just starting points and not be insulted or shocked by what appear to be offers that are outside the zone of reality. Tell the client that most mediations last the better part of a day and that they should be prepared to go all day if necessary.

Arrangements for children and others should be planned in advance to avoid having to terminate the mediation at an early time. Tell your business client who has flown in from another city to plan to take the first flight out the day after the mediation. You will get a lot of resistance to this request, but you have to have enough time to let the process work. If your client's representative has a 5:30 pm flight, the mediation has to end no later than 3:30 pm. That frequently is not enough time. Explain to them if you have made the commitment to mediate, then you should do everything you can to give the process the best chance to work. A promise of a good dinner at a favorite restaurant after the mediation often helps get over this hurdle.

Part 2: The Mediation Paper

Most mediators ask that the parties submit a pre-mediation paper several days before the mediation. Some mediators ask that it be confidential while others ask that the papers be shared. My personal experience is that confidential papers are the most useful because the attorneys tend to be more candid if they know the information is only going to the mediator.

I have attached a copy of my standard request to the parties, and as you can see I am focusing my requests on getting information that will help settle the case and asking for known impediments to settlement. Despite this request, I often get a brief which would accompany a motion for summary judgment or a copy of such a motion. Most of the time that is of very marginal help.

A good paper should give the mediator a good factual background of the dispute, what the legal framework is for the dispute, and if there are unique legal issues with some information about the law. The positions taken by both sides should be laid out and a frank and honest discussion of what problems exist in your case. If there are personality issues, client control issues, ability to pay issues and the like, they should be discussed.

If there have been settlement discussions, tell the mediator what they were and why you believe you were unable to resolve the case without help. And if at all possible, let the mediator know what potential solutions might include. I do not mean that you should give the mediator your bottom line number, but if there are non-monetary features or components of the case, then let the mediator know what they are. If you have an opinion on what the other party is willing to do, tell the mediator that. The very best papers are those that reflect that the attorney has carefully considered his case and has tried to give a fair and honest assessment of the case.

Part 3: Decoding the Silent Messages

“By a man’s fingernails, by his coat-sleeve, by his boots, by his trouser-knees, by the calluses of his forefinger and thumb, by his expression, by his cuffs, by his movements, by each of these things, a man’s calling is plainly revealed. That all united should fail to enlighten the competent enquirer in any case is almost inconceivable.” Sherlock Holmes

Most of us have seen the various poker tournament shows on television which showcase some of the strangest items of clothing and accessories you can find anywhere. Have you ever thought, what in the world are these people doing? Well, what they are doing is trying to hide what the poker players call “a tell”. Tells are behaviors unknowing people are doing when reacting to good hands, bad hands or outright bluffing. For example, someone bluffing may put their bet up more quickly than they normally do. To the astute player, this tell indicates a bluff. Tests conducted with expert card players playing opponents with dark glasses demonstrate that they win fewer games. The dark glasses are hiding the tells of the eyes.

There is a statistic that should give all email, twittering and face booking devotees pause. There is an 80% chance of a miscommunication with email compared to a 37% chance when dealing face to face. So in a mediation context, being able to pick up the information someone is transmitting nonverbally is gold. Why is it important to understand and read these communications? Because somewhere between 60%-93% of all communication is nonverbal. So if you are not paying attention then you are missing most of everything a person is communicating.

I read an article in the WSJ recently about a CEO that was ousted by the board and he was quoted as saying this action came out of nowhere to him. He did not see it coming. That is probably true, because he was not paying attention to the nonverbal communications that were being given to him. So what we are talking about here is body language as the transmission of information through facial expressions, gestures, touching, physical movements, posture, body adornment, voice tone and volume.

Let’s look a few things to help you read people better:

Arms: Arms folded on a person’s chest is indicative that a person feels threatened in some way. But there is more. When a listener folds her arms, tests indicate that she is more likely to have negative thoughts about the speaker and is paying less attention. A variation of this, the double arm grip, is viewed as a sign that the person is uncomfortable and likely not accepting what the speaker is saying.

Hands clenched together in a mediation is likely a signal that she believes she is not convincing the other party. It is a sign of distress and concern.

Steepling: This is where the fingertips are touching each other, which looks like a church steeple. It is generally accepted as a sign of high confidence in a position.

Eye Blocking: This is a strong sign of disbelief and disagreement.

Knee Clasp: When a participant clasps both knees and shifts her weight on the feet, that is a clue that she is ready get up and leave.

Lying & Deceiving: What we really want is help in determining when another party is lying to us or is trying to deceive us. The most reliable indicators of lying are the automatic gestures a person makes because they lack the ability to control them.

Allan & Barbara Pease, *The Definitive Book of Body Language* 91-92 (2004)

Joe Navarro, *What Every Body Is Saying*, 147-148 (2008)

Covering the mouth with a hand when talking can be a sign that the speaker is lying. **Touching the nose** is also a possible sign of lying. The reason you see this is because when a person is intentionally lying, their blood pressure increases. This cause an itching of the nose which in turn results in the nose rub. **Rubbing of one's eyes** is also a sign of lying. It is the brain's attempt to avoid having to look at the person being lied to. **Collar manipulation:** This is similar to the nose itch. You tell a lie and your blood pressure increases, your neck sweats and you have to pull the collar away from your neck. **Eyes:** Ask most people and they will tell you someone is lying if they don't look you in the eye. Unfortunately, that is true for some but not most liars. A more reliable indicator is blinking. A person lying will increase their blinking substantially. **Pupil dilation:** We talked earlier about the poker players wearing dark glasses. The tell they are hiding is the dilation of their pupils. A player's eyes will naturally react to a good hand and a bad hand. So if the player has a full house, his excitement cannot be hidden in his eyes. If you are paying attention, you get the tell. Women are better at this than men.

Context: It is critical to remember to make your observations in context. Jo-Ellan Dimitrius, whose name you may recognize as one of the consultants to the O.J.Simpson defense team, gives a great example of the importance of context. "When I first met him, he was sitting at a table. He was thin and somewhat hunched over; he looked like a bird with a broken wing, afraid and isolated. He had a nervous smile and an awkward way of doing just about everything. Soon after, when he got to know me better, he began drawing pictures for me, usually of small animals. Rabbits were his favorite. He was quite a good artist. You probably imagine a small, timid man would wouldn't hurt a fly, but I'll add a few more pieces to the puzzle: The table this man was hunched over was the defense counsel's table in the courtroom where he was on trial. He was handcuffed at his wrists and ankles. He was afraid, isolated, and nervous because he was facing the death penalty for killing thirteen mostly elderly women. And why did he draw me pictures of small animals? I don't know. I suppose it was because he liked to draw and it kept his mind off the trial. He was Richard Ramirez, the Night Stalker, who remains on death row today."

The point she makes is simple. You really need to consider the entire surroundings and circumstances of each body signal you see. You cannot view body language in a vacuum or in isolation. Body language, read along with verbal language, should match up. **This is called congruence.** Chances are good that if there is no congruence, the individual telling you something may not be telling the truth. With such a high percentage of our communication being non-verbal, it is critical that you learn to look for and read the body language given in a mediation.