

[The New Lawyer — How Settlement Strategies And Opportunities Have Affected The Responsibilities And Functions Of Litigation Counsel](#)

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Anyone who has been involved in the dispute-resolution mechanism knows what a laborious and often mysterious process it can be. Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results. Because of the mediator's neutrality, the settlement resolution is more likely to be perceived as just. Mediation is a defined process that is recognized by attorneys and judges. It is a voluntary, non-binding forum in which the parties agree to conduct negotiations using a neutral intermediary who guides the parties through the legal process. The mediator has no decision-making authority. Rather, it is the mediator's duty to work with the parties to agree on the terms for conflict resolution.

During mediation, the attorney's responsibility is both as an advocate and counselor to the client. When advocating an issue, the skills used by an attorney are different than the approach used in a courtroom. An attorney also counsels the client on issues during the mediation.

Mediation helps litigants achieve settlement. When compared to the expense of prolonged litigation, mediation may be the best deal. The client has present use of funds, rather than the hope of financial recovery later, while also saving money on pre-trial and trial costs, as well as possible appeal. Litigation costs often surprise clients, particularly if expert testimony is needed. The fees for experts are quite high, usually involving several hundred dollars per hour. During the amount of time experts need to

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prepare, testify at deposition and appear in court, several thousands of dollars in costs may be incurred quickly. Thus, at an early mediation, a major factor in considering whether to settle is the future expense of proceeding without settling.

If possible, it is important to work toward mediation as early as possible so that the client may reach his or her goals. Bear in mind that the client is not going to push early mediation. It is the attorney's responsibility to recognize the advantages of an early mediation and resolution for the client. Most courts, however, distributed alternate dispute resolution materials shortly after a case is filed and either urge counsel to pass the materials on to the client or require them to do so. However, unless the attorney couples this with some counseling on the availability and value of mediation, it is questionable if receiving this material has much impact on the client.

Research shows that a key factor in litigants' willingness to use mediation is the recommendation and encouragement of their attorneys. For example, "a majority of parties in domestic relations cases (68 percent men and 72 percent women) who chose to use mediation said their attorneys had encouraged them to try it, whereas less than one-third (32 percent men and 18 percent women) of those who rejected mediation had been encouraged by their attorneys to use it." (R. Wisler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 Pepp. Disp. Resol. L.J. 199, 204.)

Mediation involves an objective intermediary who negotiates with the parties to avoid or end the highly confrontational and tension-filled process of litigation. From the plaintiff's perspective, it is a means of essentially selling the lawsuit to a defendant, who buys off the expensive and exposure of ongoing litigation. It involves an exchange of offers and counteroffers made in more of an informal business environment, rather than a formal courtroom.

Hostility, anger, finger pointing and accusations are not part of the mediation process. Diplomacy, salesmanship and patience are the bywords. The parties and their lawyers may be firm, tough and even hard-nosed at times, but they need to do it politely and diplomatically. The parties need to be prepared for mediation by having the appropriate attitude before attending the mediation. Unlike a deposition, this is where the client enters the business process of resolving disputes and essentially steps outside of the courtroom.

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It is advisable to have a pre-mediation conference several days before the mediation occurs. This is two-fold process: The mediator may conference (by phone usually) with counsel for the parties, either one on one or together to discuss the mediation, insure that the parties are ready, and that mediator has what he or she needs to make the process work. Counsel should also meet with the client to discuss the process, cover important aspects and get the client ready for the negotiation and decision making process of attempting to reach a resolution of the dispute.

Three aspects are important to stress; First of all the client needs to know that this is not a binding process; there is no third party who is going to decide the case and impose that decision on the client. It is client's decision to settle. Second, the client should understand that this is not a confrontation. No one is going to testify. It involves an exchange of information so that the parties can be informed and negotiate. Third, the client must understand that what takes place at the mediation is confidential. It may not be brought up during a court trial.

The client should also be encouraged to keep an open mind as the process takes place. Many times, the client's perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision making process. It is important for both counsel and the client to listen to what the other side says and also to the mediator's comments. The mediator will often comment on issues and give his or her views on each side's case. The mediator may offer the pros and cons of settlement versus proceeding further. This provides an objective, third party view of the matter, which may be very valuable.

As the future unfolds, more and more courts will be creating ways for litigants to enter the mediation process at an early stage. The San Francisco Superior Court recently instituted an early mediation program. The San Francisco Bar Association also has a program for early mediation. The federal court has a program of early mediation and "early neutral evaluation" for several years. The future litigation process will rely more on courts and counsel directing litigants to a mediation alternative to litigation - and the earlier the better.

One concern I have is that I am seeing some reluctance of counsel to guide a case toward the mediation process because of the economic motive of being able to continue to bill a case and earn revenues.

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Frankly, I have seen evidence of this with opposing counsel in some of our cases. I have also heard this concern expressed by my trial lawyer colleagues and some mediators. It is indeed troublesome when counsel will not communicate with me about mediation even after I have offered to work together to get a discovery plan, or an exchange of information so that we can each have access to what we need to evaluate the case before we discuss resolution. In these troubled economic times, when law firms are folding or letting staff go, there is a concern that the motivation for economic survival will override the professional obligations to work towards a timely and efficient resolution of a dispute.

There is nothing to lose by mediation and only much to gain, and it is our duty as lawyers to see that a case is tested in that process. Who knows, a good result on both sides may mean more business rather than less.

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