



How to win at mediation the Bill Walsh way

As Walsh ran scripted plays, so too should your mediation moves be

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Mediation has become the most common and effective alternative for resolving disputes. Knowing how to “win” at mediation has become as essential as any trial skill.

Losing to the virtual jury

In the context of mediation, the actual jury has now been replaced by a “virtual jury.” More often than not, the mediator (whose stature is enhanced by the fact that he or she is usually old enough to remember what it was like to try cases – or in the case of retired judges, preside over trials) has become the self-appointed predictor of what this imaginary jury will do. Mediators use this power to influence party perceptions and case valuations.

For example, if you are representing a plaintiff in a trip-and-fall case, the mediator may conjure up colorful stories from his days in the courtroom where premise liability cases, with much better facts than yours, invariably resulted in defense verdicts. As your client’s vision of sugarplums slowly shrivels into raisins, and you feel your resolve start to crumble, the mediator will pile it on by alluding to reported jury verdicts showing the statistical likelihood of a defense verdict.

While it is always important to consider the mediator’s judgment, it is even more important not to lose sight of

the fact that the mediator *may not have a clue how your case is actually perceived by the other side.*

Move the ball down the field like Bill Walsh

In order to ensure that you do not leave money on the table if you are representing the plaintiff, or conversely, overpay if you represent the defendant, you may want to take a page out of the playbook of legendary coach, Bill Walsh.

In his 10 seasons as the San Francisco 49er’s head coach, Bill Walsh’s record was 102-63-1, a .617 winning percentage. In 1993 he was elected to the Pro Football Hall of Fame. One of the things that made Coach Walsh so successful was his strategy of preparing his first several plays before the game. Walsh would run these scripted plays regardless of field conditions or how the defense was aligned.

Applying this technique to mediation, you would carefully consider your settlement range before the mediation, then script a series of descending demands. Your settlement range is the “goal line” that your “plays” are directed toward. Each move should be justified by a new piece of supporting evidence or argument. Now you are ready to take to the “field.”

This strategy will help keep your emotions in check and guide you methodically to your goal line. You will be less likely to move precipitously or

prematurely when the mediator starts channeling the imaginary jury or tests your resolve with “concerns” about your case. Knowing in advance what your “plays” are, provides a sense of control and minimizes the danger of getting carried away by your own emotions (fear) or the “noise” generated by the mediator or opposing counsel.

After you have executed your scripted plays, the case will have either settled within your range or you will have a clear idea what the other side is willing to pay and why. If there is still a sizable gap, you can resort to more traditional negotiation techniques to close the gap or suspend the mediation process to develop more evidence favorable to your position. If you choose the latter approach, suggest that the mediator stay involved by follow-up phone conferencing.

There are many things that ensure a successful mediation including a well-written brief and timely exchange of information. When combined with this powerful technique, you will dramatically increase your odds of obtaining the best possible settlement for your client.

Bradley Bostick has 23 years of civil litigation and trial experience – both plaintiff and defense – in the Bay area, concentrating in personal injury, product liability and premises liability. He has mediated over 100 cases and is a graduate of UC Berkeley and Golden Gate Law School (1983).



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