

The power of appreciation and finding merit in what others say, feel, and do

Using appreciation to create an emotional connection and overcome resistance to unpleasant facts in order to achieve better outcomes in mediation

By Bradley Bostick

As a mediator for 17 years and a practicing attorney, I have learned firsthand the value of using appreciation to bring parties to the table and increase the likelihood of a reasonable settlement. This article will show you how to harness appreciation before and during mediation to obtain better results.

The need to feel appreciated

A basic human need is to feel appreciated. The cost of showing appreciation is generally negligible and almost always results in a feeling of goodwill on the receiving end. In the context of a case, applying these principles early and often can reap dividends such as facilitating the exchange of information and incentivizing your counterpart to work towards a more favorable settlement.

Show appreciation early and often

One way to express appreciation is to show a genuine interest in what the opposing side thinks is important about their case. This can occur during the first phone call. This is where the negotiation begins, long before you start talking about numbers. Invite the insurance representative to express their point of view. No matter how misguided you think some of their points may be, you show appreciation by simply allowing them to proceed uninterrupted.

When they are finished, thanking them and telling them you understand where they are coming from can be enough. Beyond just listening and "getting it," sometimes it may be useful to take the added step of summarizing their position.

Whether or not you mirror back what you have heard, allowing them to say their piece increases the likelihood that they will be more responsive to your counterarguments, without becoming defensive. This does not require agreement on your part, although conceding obvious problems with your case will help you gain credibility.



Appreciate the person behind the role

Appreciation goes beyond the specific issues in the case to include an appreciation for the role the other side has to play, and the struggles, frustrations, and challenges inherent in that role.

For example, the house counsel who may be overworked and unrecognized will appreciate any acknowledgement on your part. Getting to know your opposing counsel's

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professional and personal trials and tribulations and showing support can pay huge dividends.

So, try to find something in common. Maybe they have kids going through the same challenges as your kids. "Your kid is a Fortnite junkie too?" A defense attorney or claims representative who feels appreciated on a personal level is more likely to accommodate you in discovery and lobby on your behalf when it comes to getting authority.

Showing appreciation to the plaintiff

Mediators routinely use the power of appreciation. For example, I start almost every mediation caucusing with the plaintiff's side to establish a bond with the plaintiff. After a few introductory remarks like, "Nothing bad will happen today." Or, "I am not a judge and will not be telling you what to do," I let them know that my job as a mediator is to understand what they think is important, so that I can share that with the other side.

I then invite them to tell their story with as little interruption as possible. I validate their experience and encourage them to express their feelings – even when it may not be germane to the legally relevant issues. Sometimes it turns out there was a dismissive reaction from a store clerk, a defendant motorist with a bad attitude or a non-responsive claim representative that drove them in part to take legal action.

Whatever it is, giving them an opportunity to fully express themselves creates the space for them to consider the less favorable aspects of their case. This becomes important later in the process when so-called "reality testing" and managing expectations takes place.

At this point, I am taking in who they are, what happened to them, and where they see their life going – without judgment. I don't put a time limit on this or try to hurry them along.

When the plaintiff feels fully appreciated (perhaps for the first time) without judgment, a bond with the mediator is established. This trust allows the mediator to bring up the more sensitive aspects of the case in a productive manner.

Most people naturally only want to hear the merits of their case. They acknowledge problems with their case either reluctantly or not at all. It doesn't help that the litigation process tends to be polarizing. Hearing what is wrong with your case from the opposing side – either directly or in an opposing brief – can create a wall of resistance.

As a side note, it can sometimes be unwise to send the defense brief to your client before the mediation. At a minimum, some mental preparation is advised. Even a relatively mild defense brief can trigger distrust and anger, especially when there is any reference to the client's credibility. The client is unlikely to realize that a brief is often filled with distortions and specious arguments. And the parts of the brief that may be valid can still send many clients through the roof.

This is where the mediator's earlier efforts to show appreciation and establish trust will pay off. The mediator can present the other side's arguments (always in separate caucus) in a way that overcomes a lot of the reflexive resistance that most people have when hearing negative facts about their case – and by extension, about themselves.

This works because the mediator is transmitting information from the other side without endorsing it, (but where appropriate, helping the party appreciate the potential risk the opposing party's concerns might pose at trial).

The mediator is the buffer that reduces the charge associated with what may sound like personal accusations or attacks. The mediator can present these facts in a way that minimizes reactivity and leads the client to understand that to make an informed decision about their case, they will not only need to hear "bad and ugly" facts, but welcome the opportunity to do so.

If properly framed, the plaintiff will be grateful to hear what potential factual, legal, or credibility problems exist now rather than after committing time, money, and emotional uncertainty – only to be blindsided with some potentially fatal impeachment at trial. And in doing so, they will come up with some helpful and sometimes novel counterarguments that neither their attorney nor the mediator had thought of and will become engaged participants in the process.

Show appreciation for the defense

I also try to show appreciation in the other room. When talking to a claim representative, for example, I may start out by acknowledging the strengths of the defense position, trying to be as inclusive as possible. "From your point of view, I can see this is a case of minimal vehicle damage, delayed treatment, a preexisting condition, no wage loss. What else am I missing?"

After getting all their points on the table, I will pivot and point out some of the positive aspects of the plaintiff's case that would be hard for them to deny. That will always include my impression of the plaintiff when it is favorable.

Knowing that I totally understand and appreciate her position, the claim representative is open to appreciating the positive elements of the plaintiff's case without thinking about the counterarguments in her favor.

Admittedly, not everyone is going to be responsive to your appreciation offensive. Some counsel may be too strongly identified with their roles to modify the behavior. While I would contend that even these tough nuts can be opened with persistent effort, switching to a firmer or even aggressive approach may be warranted. Based on my experience, this should rarely be necessary.

Show appreciation for the mediator

Mediators are also human, after all. Letting them know that they are working

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hard, effectively connecting with your client, and not giving up – even when things look bleak – will keep your mediator motivated to keep pushing through whatever obstacles are encountered during the process.


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Bradley Bostick has mediated over 2,000 cases since 2005. He is also a plaintiff's attorney specializing in catastrophic injury cases. In a previous life, he was a defense counsel for a multi-lines insurance company. Every day he strives to show appreciation for the privilege of serving as a mediator and working with many talented and interesting people.

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