SEPTEMBER 2025



The silver linings playbook for unsettled mediations

Any mediation can plant necessary seeds of resolution

By Hon. Victoria Wood (Ret.)

Ending a mediation without resolution can be extremely, ahem, *unsettling*.

As plaintiffs' attorneys, you devote tons of time to reviewing the case, researching your positions and chances for success at varying levels, and preparing your clients emotionally and procedurally for the day, all before the mediation hours even begin. Many times, you are also fronting your clients' share of the costs, which will often reach five figures for well-vetted neutrals. And then you and your clients will spend hours sometimes over multiple sessions) making your case, countering defense arguments, working nuanced negotiation strategies, and pushing yourselves well past your comfort zones for settlement. When all of this hard work ends in no deal, it's easy to understand why you and your clients feel the dark cloud of disappointment.

Throwing in the settlement towel is not only disappointing for attorneys and clients. I know I am not alone as a mediator when I say that an unsettled mediation is a huge downer for us as well. Not so much because it hurts our prized settlement track records – although I'll admit that does sting a bit. But more so because we do this work out of a strong internal drive to help bring a just and peaceful end to conflict. We thrive on offering people a viable path to faster resolution because we know that litigation is often far more taxing than most people expect going into it. Thus, we take great pride in that palpable sense of relief everyone feels when "the ink is dry" on a well-crafted settlement agreement. When we don't achieve this goal, it's hard not to feel disheartened for everyone involved.

Most of us who engage in mediations are analytically minded professionals who quickly turn our shadow of disappointment over outcomes into a torrent of second-guessing our tactics.

Attorneys might leave an unsettled mediation wondering if they agreed to mediate too soon, if they should have done more predictive analysis or tried to set the clients' expectations lower. Perhaps they should have negotiated differently, maybe started at a higher or lower number or moved the bar faster or slower. There's just no way to know what may have helped.

As mediators, we might also question our own practices and wonder if we could have connected better emotionally, pushed harder on one or both sides, or been less or more evaluative. There is always room for improvement as a mediator, but we usually only subject ourselves to such

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scrutinous hindsight when settlement eludes us.

When we practitioners catch ourselves heading down this needlessly painful path of self-flagellation, it's helpful to remember that hindsight is 20/20 and that some cases are simply not postured to be settled on the day of mediation.

Does that mean you shouldn't have mediated when you did? Probably not. Chances are, you went forward with mediation because you innately sensed the case needed some kind of bolt of energy and that there could be positive ripple effects from the process regardless of the outcome. And most likely, you were right. When handled skillfully by the neutral and counsel, any mediation can plant necessary seeds of resolution that lay the groundwork for at least a smoother litigation process, if not a satisfying settlement when the time is right.

So, the next time an unsettled mediation leaves you feeling dark and gloomy about your case, here are some potential silver linings to consider:

Clarifying what actually matters

Mediation forces introspection that brings clarity.

For plaintiffs, mediation is often the first time they really consider and articulate what they are seeking to achieve beyond the raw numbers. Is it acknowledgment? Accountability? Closure? Financial security for themselves, or for their family? Maybe it is all of the above. Often, exploring and articulating what is involved emotionally can help them realize resolution is about far more than just a dollar amount.

For defendants and insurers, mediation often helps them see their vulnerabilities and can solidify where their risk thresholds lie and what principles are guiding their decision- making.

This clarity is a gift. It distills the dispute to its essence, sharpening focus on what matters most. Even when mediation ends without a final agreement, the parties often leave with a better understanding of the real stakes – and sometimes that understanding fundamentally alters the trajectory of the litigation.

From the plaintiff's perspective, this can mean abandoning low-value distractions and sharpening damages presentations. For defense counsel, it can mean elevating the case within their claims hierarchy or recalibrating risk assessments. For both, it can reset the tone of the litigation from reactive to strategic.

Reality testing in a low-risk forum

One of the superpowers of mediation is reality testing – also known as "gentle confrontation." It's the moment when someone hears, often for the first time, that their assumptions may not hold up under objective scrutiny.

This can happen when opposing counsel gives a preview of a compelling narrative or introduces surprise documentation. It can happen when a mediator, with permission, reframes a party's story and asks, "What if a jury sees it this other way?"

It can also happen when a client finally hears their own lawyer say, "If we go to trial, we just might lose."

Mediation provides a protected environment to deliver – and absorb – these hard truths. It is a forum where parties can lower their defenses just enough to absorb new information, without being forced to concede. That space, when well-managed, is often where the first softening of rigid positions occurs.

Even if a settlement isn't reached, parties often leave mediation more grounded in reality. That shift – especially early in litigation – can dramatically reduce wasted time and emotional investment in unproductive lines of argument or inflated expectations.

Opening the "neutral" communication channel

One of the most important roles that a mediator plays is as a communication bridge.

Litigation, by design, is adversarial. It funnels communication through a narrow and combative channel: motions, declarations, demand letters. Emotion and nuance must be filtered out. That's fine for adjudication. But it's mostly ineffective in helping litigants feel heard.

The mediator's work disrupts that dynamic. We speak directly to both sides, separately and confidentially. We listen not just to the words, but to the emotion beneath them. We translate fear, frustration, and stubbornness into language the other side is able to absorb. We test proposals, massage the messaging, and provide crucial context for otherwise bristly communications.

And sometimes what makes a settlement proposal palatable is more dependent on who delivers it than on the content of the proposal itself. Hearing a proposal directly from an attorney you may have been fighting with for a year over discovery requests is never going to land as well as when you hear it from a neutral – one who's spent a day listening, validating, and building trust.

Even after a "failed" mediation, if the parties leave with a functioning communication channel through the mediator, future resolution becomes far more likely. That's because the mediator now understands the players, the pressure points, and the personalities. We can shuttle proposals post-session. We can call out unproductive framing. We can remind parties of their better angels. That continuing connection often becomes the quiet hero of resolution.

Surfacing information and informal discovery

Early mediation often reveals what hasn't yet been said – or discovered.

Plaintiffs may present key damages theories, photos, or medical narratives that haven't made it into formal disclosures. Defendants may share insight into their internal decision-making process or liability concerns that aren't captured in the pleadings.

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This kind of informal discovery doesn't just aid in valuation. It can also shift the strategic terrain. Sometimes, a plaintiff realizes they need more medical records or a stronger causation expert. Sometimes a defendant realizes their best witness has credibility issues.

Rather than flailing in the dark, both sides walk away from mediation with a better map of the case. That map often leads them to more fruitful settlement discussions down the road – or at least more efficient and directed litigation.

Preserving relationships in the face of conflict

While many civil matters don't involve ongoing relationships between the parties, that does not necessarily make them completely impersonal.

Certainly, you can have employment cases where a plaintiff still works in the defendant's industry and may anticipate having continued interactions with its employees. You can also have personal injury or wrongful death cases where family dynamics, community reputations, and emotional closure matter deeply. Or you may just have various insurance-related matters wherein defense counsel and adjusters may likely face the same plaintiff's counsel again in the future.

Mediation offers a dignified, confidential forum to preserve a degree of civility that litigation tends to erode. It gives space for apology or acknowledgment – not necessarily legal admissions, but human ones. It allows parties to vent and feel heard, often for the first time since the injury occurred.

These moments may not settle the case, but they can soften the battlefield. And softening the battlefield, in turn, can make settlement more feasible sooner than might have otherwise been the case.

Educating clients and managing emotions

For plaintiffs, litigation through the courts is often their first encounter with the system. It's stressfully uncertain, confusing, and – let's face it – frustratingly slow.

Mediation gives clients something rare: an opportunity to speak their truth directly to a neutral – often a person who used to wear the black robe. A day where they can tell their side, ask questions, and be part of the discussions and problem-solving. That sense of participation and understanding can dramatically improve their decision-making, by making it more big-picture oriented rather than emotionally driven.

This is especially true when the mediator helps manage expectations and explains the litigation arc. Sometimes just seeing a neutral remain emotionally unaffected and hearing them objectively paraphrase each side's perspective of the case can help calm anxiety and reduce impulsive decisions.

Plaintiffs who feel heard are less likely to sabotage settlement talks. They're also more likely to trust their attorneys. That trust, in turn, empowers attorneys to make the strategic calls they believe are best for the case rather than reactive ones it seems their clients need to hear.

Creating a path forward

There is really no reason for an unsettled mediation to signal stalled progress. Quite the opposite.

Mediators often help the parties create concrete next steps: document exchanges, expert evaluations, follow-up discussions, structured offers, or follow-up mediation sessions. These action items keep communication alive and create forward momentum.

And, importantly, mediators can continue to stay in the loop. When invited, we check in periodically, offer to host follow-up discussions, and can keep the conversation going behind the scenes.

I've had many cases "settle themselves" weeks or months after a session simply because a communication bridge remained open. I love for counsel and clients to claim those victories at the finish line, but also know the foundation was laid at the earlier, seemingly "unsuccessful" mediation.

Conclusion: Look for the silver linings

Of course, our goal as practitioners is always to resolve our cases on the day of mediation. Neutrals, in particular, are trained to stay infinitely optimistic and to almost never give up hope that we'll be able to utter that joyful phrase, "We have a deal!" We will implement every tool in our peacemaker playbook before accepting a no-deal conclusion.

But when the occasional walkaway does happen, we do our clients, and ourselves, a disservice by focusing on failure, without considering the wins.

A mediation that ends with new clarity, better communication, and a plan for next steps can be considered a win. A mediation that de-escalates hostility and empowers attorneys to work collaboratively is a win. A mediation that saves months of discovery posturing or avoids a breakdown in trust is a win. A mediation that breathes new momentum into a stagnating case, is a win.

If we follow this playbook for the dark cloud of unsettled mediations, these silver linings can light a path to productive litigation progress and optimal ultimate resolution.



Wood

Retired Judge Victoria Wood served the California Courts for over two decades at both the trial court and appellate level. Now a mediator, arbitrator, and discovery referee with ADR Services, Inc., she handles a wide range of civil matters, including personal injury, employment, business, contract, and construction defect disputes. Judge Wood is known for her broad command of substantive and procedural law, as well as her ability to connect well with parties and guide high-conflict cases to resolution.

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