

What a Mediator Brings to the Table

By Daniel R. Cofran, J.D.

You're smart. Your lawyer's smart. He or she has probably told you what a good result would be for your case. So why haven't you been able to settle the case?

Most likely, the stage hasn't yet been set for a "shared moment of objectivity." After all, your lawyer's been spending his or her time aggressively asserting your position.

How can a mediator make a difference? Isn't he or she just another lawyer? No. A mediator brings two skills to the table.

First, many mediators are experienced lawyers who use their legal skills objectively to analyze the strengths and weaknesses of all parties' positions.

Second, they frequently have special mediation training prescribed by their states' supreme courts on how to work as a peace maker.

Mediators combine the two skill sets to be "reality agents" for the parties in a mediation.

Mediator as a Lawyer

The starting point for any settlement is an objective legal analysis of the strengths and weaknesses of your and the other party's position.

Of course, your lawyer and the other party's lawyer have done that, but lawyers are naturally competitive. The competitive drive can dilute what otherwise would be his or her cold, objective evaluation of a case.

The mediator, on the other hand, is neutral and "doesn't have a dog in the hunt." In private caucus sessions he or she can *confidentially* be frank and help the attorneys and parties better appreciate each side's legal strengths and weaknesses.

Technical legal analysis is only



part of the picture. Lawyers have what they call a case's subjective "warmth." A position may be correct as a technical legal matter but seem unfair or too "picky" to be taken seriously by a jury or judge, lacking "warmth." Facts drive cases, not the law. An experienced lawyer mediator has the objectivity to help the parties better understand their cases' warmth.

Mediator as a Peace Maker

Mediators are trained beyond the law to settle cases. For example:

Turn Down the Heat. Mediations are conducted in non-threatening, informal settings. Mediators are trained to conduct mediations in a way that reduces hostility and prevents outbursts.

Focus, Focus, Focus. Mediators quickly sort through the legal and factual issues to focus on what's really driving a dispute and drop what's expendable.

Put It in English, Please. Mediators translate complicated legal issues and facts into understandable language and scenarios for the parties.

Dick Tracy. Mediators probe the issues and frequently bring to light new facts not appreciated by one or both parties, developing new perspectives leading to settlement.

Where's the Pain? Mediators go beyond the facts and law that make up the parties' *outward* dispute and focus on the parties' interests that actually *drive* the dispute. Frequently a dispute isn't just about money. Someone's subjective sense of fairness likely has been violated and needs to be addressed, either with some form of acknowledgement or a frank but sensitive appreciation that life sometimes falls short of fair.

Settlement Proposals. The parties make their own settlement proposals and counter proposals in a mediation. The mediator, however, helps develop those proposals in separate, *confidential* caucuses, frequently suggesting what will or will not elicit a favorable reaction. The mediator may also deflate extreme demands. The mediator can suggest new ideas for settlement alternatives not considered by the parties.

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According to the American Bar Association, 70% to 80% of mediated cases settle. The skills a mediator brings to the table drives those numbers.



Dan Cofran, a Best Lawyer in America, has practiced law for 40 years in corporate and commercial litigation, commercial real estate transactions and land use law. He long has been active in Kansas City civic affairs, including service on the Kansas City, Missouri City Council, many organization boards and as the recipient of a number of civic honors.