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A word to the wise: sayings can save a mediation

Effective mediation requires attorneys to prepare not only the case but also the client by reducing anxiety, encouraging perspective, fostering compromise and using practical guidance to help move disputes toward resolution.

By Maria A. Audero

Preparing a case for mediation involves a long list of important activities: determining proper timing, assessing risks, defining “wants” vs. “needs,” exploring competing perspectives, identifying non-negotiables, confirming settlement authority, and more.

Preparing a client for mediation involves a long list of other, more personal activities that are equally important: explaining the process, setting expectations, reviewing do’s and don’ts, understanding personal and physical needs, and more.

Much has been written about how and why to go through these preparations, with the message that mediations fail in their absence. Surprisingly little has been written about how attorneys can prepare themselves to best guide their clients through the mediation process. It is this preparation that ultimately could be the most critical part of the mediation, giving clients what they need most when they need it.

Mediation is unfamiliar territory to most clients. It often is a complete and unexpected shift from the adversarial approach they’ve experienced so far, which can cause anxiety for even the most unflappable client. This anxiety can result in reactionary decision-making or, worse, analysis paralysis. Attorneys unprepared to guide their clients through



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the process could fall short, failing to meet their clients’ needs and help the mediator move the case toward resolution.

A host of strategies can reduce a client’s anxiety during the mediation process. These include identifying emotional triggers, pulling the client out for breaks, permitting venting, and encouraging a brief interlude of mindfulness practice. These strategies, however, focus on

reducing anxiety caused by unfamiliarity; they do nothing to eliminate the unfamiliarity to begin with.

Yet this is the most obvious and direct route toward overcoming anxiety-driven behavior. Inject something familiar into the process — a touchstone of some sort — and the tension immediately lessens. Just as a picture is worth a thousand words, a familiar expression works wonders by conveying values, life-truths, and

comfort. It can be as simple as an attorney introducing a well-known saying or adage at the right time.

A few well-chosen words can strike a chord with the client, helping them instantly feel at home in a strange land. The well-prepared attorney fills a small jewelry box with poignant and meaningful verbal gems, ready to pull the choicest one out of the box when the moment calls for it.

Timing matters

As with everything else in life, there is never a perfect time to mediate. There will always be more interrogatories to be served, documents to be obtained, and depositions to be taken. It is an illusion to believe that there is a precise moment to mediate a dispute.

Still, delaying mediation in the pursuit of that last critical morsel of information only perpetuates the “sunk cost fallacy,” the irrational prolonging of the process because of already-invested resources. Even if imperfect, early action generates momentum, moves the ball incrementally forward, and saves financial and emotional resources. Clients intent on dragging things out may need to be reined in and redirected with a quick and pointed reminder:

“Conditions are never just right. People who delay action until all factors are favorable do nothing.”
~ William Feather

Open hands

It can be difficult — if not impossible — to resolve a conflict while remaining hostile, defensive or closed off. An opponent cannot be expected to trust and reach accord with an adversary who represents a real threat. Trust is necessary for conflict resolution; without it the parties will remain divided. In mediation, no resolution will be achieved if one party displays a closed mind. Symbolic gestures, such as open hands, can engender trust; they demonstrate a willingness to be proactive and cooperative, rather than reactive and confrontational.

An open posture — in both body and words — can open the door to compromise. Clients may simply need a thoughtful reminder that extending an open hand at the start of the mediation can pave the way to reciprocal and broader collaboration toward resolution:

“You cannot shake hands with a clenched fist.” ~ Indira Gandhi

Creativity

When facing an impasse, clients should be reminded that the answer to the problem is not to abandon hope; it may be to approach the matter from a different angle. Just because one strategy or route was unproductive doesn't mean that it's

time to give up. Rather, it's time to look for a different approach.

Creativity often is the key to moving a matter forward. An attorney can help by opening the door to other possibilities. Perhaps the client could consider a solution other than money, examine what else might bring happiness and closure, consider payment plans, contemplate resolving only part of the dispute at that juncture. The right words can encourage the client to think outside the box:

“If opportunity doesn't knock, build a door.” ~ Milton Berle

Compromise, not vengeance

Too often, parties come to mediation with an adversarial mentality. They've been wronged and they want their pound of flesh. But, unlike a court trial, a mediation will be successful only when the parties reach a consensus. This will require that they put down their weapons and look for common ground. It's important to acknowledge the hurt and the grievance, but it's equally important to redirect the client toward a compromise. The client should be reminded that half or three-quarters of a loaf is better than remaining hungry. If they walk away with their anger intact, they'll leave empty-handed.

A client consumed by thoughts of revenge cannot appreciate the destructive nature of their chosen path, including possibly exacerbating the initial dispute. The well-known words of a sage of peaceful protest may be enough to remove the blinders:

“An eye for an eye only ends up making the whole world blind.” ~ Mahatma Gandhi

Making decisions

Clients can be so overwhelmed by the options before them that they become paralyzed. An indecisive client may spend countless hours evaluating the various options, seeking to find just the right solution or avoid a bad one. But this consumes valuable time in what often becomes a costly effort of “perfection chasing” — the impossible ideal of a flawless finish.

Taking active steps — even imperfect ones — drives progress, while staying silent or refusing to choose stalls resolution completely. For a

client who is indecisive in mediation, the outcome will be an impasse that leads to trial and its attendant costs and delays. A simple reminder from their attorney could make all the difference:

“In any moment of decision, the best thing you can do is the right thing, the next best thing is the wrong thing, and the worst thing you can do is nothing.” ~ attributed to Theodore Roosevelt

Shared humanity

When people are wronged, they may ascribe the worst qualities to the party who wronged them. That person or entity is a monster, an ogre, devoid of human attributes. Although common, and often understandable, this view is anathema to a productive and successful mediation. Until the client sees the opponent as a human being, even though flawed, progress will be slow and limited.

Trust and compromise only happen when parties respect each other and recognize their shared humanity. The client should be reminded that everybody makes mistakes and exercises poor judgment. That the other person did so in this case isn't proof of bad character or bad intent. The blame game must end:

“Never ascribe to an opponent motive meaner than your own.” ~ John M. Barrie

Civility

Alas, too many clients have watched courtroom dramas and view their cases as “good-guys vs. bad-guys,” their opponents as the devil incarnate. Such a mindset might work in the courtroom, but it has no place in mediation.

Dehumanizing the other party can certainly feel good, but it produces no good result. The more the client insists on attacking and belittling the opponent, the farther away compromise and resolution lie. The best way to move toward agreement is by being agreeable:

“No one in the history of mankind has ever been insulted into agreement.”
~ Arthur Brooks

Moving forward through reframing

When clients focus on their own experiences and feelings, they may fail to see other ways of looking at

their matters. They can miss opportunities to make progress and reach resolution. When pulled out of their internal mindset and shown the larger picture, they can view issues from other angles, hear things differently. Reframing allows them to reshape and reinterpret their disputes.

The attorney can help the client constructively reframe a conflict, see beyond their own limited field of vision. A few choice words can provide a fresh way of looking at things:

“The only difference between stumbling blocks and stepping stones is the way in which we use them.” ~ Adriana Doyle

Don't give up

Sometimes, the process can seem unending and resolution impossible. Clients may want to throw up their hands and walk away from the mediation, but this can be premature. As the parties share their stories and observations, they take baby steps toward mutual understanding and agreement. The light at the end of the tunnel becomes clearer.

When hours have passed with only minor moves toward resolution, mediation fatigue may set in and resolution may start to appear too distant, if not unlikely. These clients may simply need a reminder that it is never over until it's over and that, at some point, there is bound to be a breakthrough. A war story or two about similar situations that ultimately resulted in settlement could reinforce the virtue of perseverance. What once seemed impossible could be within reach:

“It always seems impossible until it's done.” ~ attributed to Nelson Mandela

Good enough

Clients come into mediation with strong feelings and, sometimes, unrealistic expectations. Resolution only happens when they understand the benefits of the trade-off, the emotional and financial costs of going to trial versus compromising their position. A few simple questions can start them thinking practically and constructively: “If you reject this settlement today, how much more money will you spend to get to trial?” “What will your life look like over the next 12 months if this lawsuit

keeps going?” “Is winning this specific point worth risking the entire deal?”

It’s really just as simple as making orange juice. The squeeze might be their emotional turmoil and sleepless nights or the thousands of dollars they spend on attorneys’ fees, expert witness costs, and depositions. The juice might be a final verdict after years of stress or a net negative judgment. The effort spent squeezing those last drops, or pushing for inconsequential changes, may be a case of diminishing returns:

“The juice ain’t worth the squeeze.”
~ Unknown

Conclusion

The sayings I share are just a few examples of the wealth of wisdom that lies at our fingertips and in our collective minds. There are dozens of others we all remember — “counting chickens,” “perfect, enemy of good,” “book by its cover” — that are worth dusting off in the moment if needed.

It only takes a few measured words to shift minds and change the mediation dynamic. When a client is anxious, unsettled, and struggling to understand the process, these words could make all the difference. They’re life lessons

that communicate a lot in a few syllables. A client who hears them through the noise of the process quickly may become grounded, calmer, and more primed to resolve the dispute. Attorneys are well-served to keep them handy.

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