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The peril of certainty in mediation, part 2

Seven ways counsel can test conviction before mediation so confidence remains useful when it meets a skeptical room.

By Greg Derin

In part 1 of this series, I described a familiar figure at the mediation table: a litigant, or sometimes a lawyer, who has moved from confidence to certitude. This is someone who no longer sees merely a strong case but rather sees no serious possibility of losing.

That shift matters because it is measurable. Empirical negotiation studies show that certitude can obstruct objective assessment of potentially advantageous resolutions. Add an identity-based grievance, and a client could end up resisting a fair resolution not because the number is wrong, but because accepting it feels like accepting the other side's account of what happened.

The danger lies not in being confident but in holding onto a level of confidence that becomes immune to testing. Counsel's practical task is to preserve vigorous advocacy while making settlement psychologically and analytically possible for the client. Seven habits can lay the groundwork for a productive mediation before certitude hardens in the room.

Seven habits for mediation

1. Write the other side's closing argument. Before drafting the mediation brief, have someone in the office — ideally not the lawyer who has lived with the case — write two pages arguing the opponent's position as persuasively as possible: best facts first, weakest facts explained away — the sympathetic version of the story. This is uncomfortable, but



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discomfort is the point. A client who has only heard their own closing argument for six months will find a potentially fair settlement number implausible on its face. A client who has also seen the other side's best closing position may find the same number intelligible.

2. Ask an uninvested colleague to evaluate the case cold. A partner or associate with no stake in the outcome, and ideally no prior exposure to the file, should read the key documents and give a plain assessment: What would you tell a client walking in the door with these facts? Even experienced, objective and appropriately zealous advocates can read evidence through the gravita-

tional pull of their own case theory. Fresh eyes catch the assumptions that have become invisible to everyone who has lived inside the case — the inference that hardened into a fact, the document treated as dispositive because it once felt persuasive, even the risk no one has recently re-priced.

3. Put the four questions from part 1 in writing. What is the other side's best fact? What is hardest to explain? What must the fact-finder accept for a high-end result? What happens if the key issue breaks the wrong way? Asking these questions in conversation invites a confident, practiced answer. Asking the client and counsel to write out the answers

— and to show their writing to each other — produces something closer to an honest one. Written answers are harder to soften in the moment than spoken ones, and they create a record counsel can return to when a number on the table looks unreasonable on first impression.

4. Price the downside, not just the target. Before mediation, put a number — even a rough one — on the plausible adverse outcome, not only the likely one. Most litigation planning stops at the number the client wants and the number counsel expects to get. Few clients have ever seen, in writing, what the worst defensible outcome actually costs in dollars, time and disruption.

A client who has priced that outcome in advance can experience a mediator's proposal or insight as valuable data. A client who has not may experience the same proposal as an ambush, or dismiss it as pressure applied for the sake of settlement.

5. Separate the settlement conversation from the vindication conversation. If the client needs acknowledgment, a non-monetary term or simply to be heard, identify that need before the session and keep it from surfacing for the first time at the table, disguised as a rejected number. This is where the nonnegotiable issues from part 1 belong, such as a non-admission clause, confidentiality, a business protocol going forward, return of property, an agreed reference or assurance about future conduct. None of these may require conceding legal merits. They do, however, give a client who is fighting for something other than money a way to get there without holding the overall settlement hostage to that fight.

6. Rehearse the mediator's questions, not just the presentation. Anticipate what a skeptical neutral might ask, and answer honestly in preparation — before the client hears the question for the first time from someone outside the case, possibly in front of the other side. Counsel can prepare the client with a simple line: "The mediator may press hard on points we believe we have already answered. That does not indicate doubt about our case. It is just how the mediator helps us see our choices clearly."

7. Run a premortem, not just a case analysis. Gary Klein introduced the premortem technique in the *Harvard Business Review* in 2007. He wrote that when we assume a project has already failed, then identify every plausible reason why, we obtain valuable perspective. Reasoning backward from an assumed failure

surfaces risks that ordinary forward-looking confidence often misses. The same exercise translates directly to litigation. Ask the trial team to assume the case has already been lost, or the arbitration award has already come in low, and write down every reason why. A team asked to defend its confidence produces more confidence; a team asked to explain a hypothetical loss uncovers the risks that its confidence was hiding.

None of these seven steps requires the client to concede the merits. Each turns certainty into examined judgment, which is what a mediator, judge or jury will, in the end, demand.

What happens in the room

During mediation, counsel should keep the door open for this kind of decision-making rather than close it off. A well-conceived mediation brief, as well as the advocate's conduct during the session, can make all the difference. A good brief presents the strongest facts, the governing law and the damages theory. It also helps the mediator see what is really in dispute: credibility, causation, contractual meaning, expert proof, authority, timing and interests other than money. Candor is not concession. Counsel need not write the opposing brief. But a lawyer who shows both strengths and risks gives the mediator something to work with and signals good faith.

During the session itself, rhetoric matters. A lawyer who declares a case a "slam dunk" in public, in front of the client, could turn later movement into what that client will see as a betrayal by their own advocate. The client might even believe their lawyer has made retreat costly before any offer has even been discussed. Forceful advocacy clarifies a case; performative certainty hardens it.

The same discipline applies to a disappointing offer. Rather than treat-

ing it as proof of bad faith, counsel should ask what it reveals. Does it involve liability, damages, insurance limits, timing, authority or an interest not yet on the table? Is there a misunderstanding worth correcting?

Mediation tools

Three mediation mechanisms come up often enough at this stage that they are worth naming plainly. Counsel who understand these tools are less likely to mistake their use for weakness. A bracket is a conditional move in which each side agrees to negotiate within a stated range — for example, "we will move to \$400,000 if you will move to \$600,000" — without either side committing to a final number. Brackets test whether a deal is in the neighborhood before either party exposes its real position.

A conditional offer ties a number to an unresolved fact or contingency, letting the parties negotiate around a disputed issue without first litigating it to conclusion.

A mediator's proposal is a specific number or term the mediator puts to both sides confidentially, usually late in the session, on a take-it-or-leave-it basis. Because neither side sees the other's answer unless both accept, it lets a party say yes without appearing to have moved first.

None of these tools requires a party to abandon its position on the merits. Each will let the parties test a resolution without conceding the underlying argument, which is precisely why they work for clients who are not yet ready to say they might be wrong.

None of these tools are signs of weakness; they provide an avenue for uncertainty to be managed before it becomes irreversible.

Conclusion

When he wrote, "I detest a man who knows that he knows," Oliver Wendell Holmes, Jr. was not counseling

timidity. He was warning against the point at which further inquiry no longer feels necessary because the answer already seems obvious. Francis Bacon made the same point more gently in *The Advancement of Learning* in 1605: "If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties."

Counsel need not manufacture doubt for its own sake. Asking what we know, what we infer and what the conflict actually means to the client does not undermine advocacy. When done before mediation, rather than during it, such discipline sharpens advocacy, restores judgment and settles cases.

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