



**Sotomayor Law**  
Rande S. Sotomayor, Esq.

A  
Newsletter  
on  
Dispute  
Resolution

# M *Mediation* Matters

| May 2014 | Volume 1 | Issue 3 |

## Anger and Hostility in Mediation

*“In one of our concert grand pianos, 243 taut strings exert a pull of 40,000 pounds on an iron frame. It is proof that out of great tension may come great harmony.”*

*~ Theodore E. Steinway*

Let's face it – parties and attorneys find themselves in mediation because they are in the midst of a fight. Many fights can be ugly, whether it's a business, family, or consumer dispute. People feel that they've been treated unfairly, that they've done their best to resolve the conflict, and now it's time to take the fight to the next level – with attorneys and courts.

For one reason or another, they have found their way to mediation. What a great opportunity! The parties have been told that this is an efficient, less costly, less risky, and completely voluntary way to solve the problem on terms all sides control and can live with. They get to the mediation, and what happens? Tempers flare, insults fly, accusations abound, and before you know it, everyone is on their feet, yelling and pointing fingers!

This debacle can, and should, be avoided. But if it can't be

avoided, it can be controlled. Certainly the mediator has many tools to control the situation, but the parties and attorneys have the power to keep things cool. It might surprise many to know that solid solutions can be achieved despite the near-melee. Here are some techniques to try:



**First**, parties and lawyers should know in advance if they have a potentially volatile situation/participant on their hands. Most people know themselves well enough to

be able to predict what could happen if someone presses their “hot buttons.” The key here is to prepare in advance for the worst-case scenario. That means anticipating your “hot buttons” being pressed, imagining your response, reframing your thoughts about how to respond, and practicing a calmer, constructive response.

**Second**, think about what will happen if the party or attorney chooses an approach that will press the opponents' “hot buttons.” Anger and hostility feed on themselves, and when you're in the middle of it, you just can't resist firing back. Again, prepare for this possibility. Remind yourself why you're going to mediation – you will be there to make a deal, not to burn a bridge.

Prepare for your physical response to antagonism and accusations. Think about how you react physically when someone essentially calls you a liar or

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doesn't believe you when you are genuinely telling the truth. Whether it requires taking long breaths, closing your eyes, separating yourself from the situation, or any other method, realize that first diffusing your physical response to confrontation will then allow you to step back, think clearly, and calmly listen to the messages from the other side.

Consider how your response can achieve what you want from the mediation. Isn't it funny to imagine someone yelling at you or trying to exert power or authority over you, with you just sitting there politely listening to what they are saying, and waiting your turn? That's not what your antagonist is expecting,

and that kind of response will be surprisingly disarming.

That leads to a **third** technique. Consider setting aside the "dressing" over the message, that is, the ranting and raving, the loud accusations, the irrational "explanations," the outright lies. To do that, you must separate the emotion from the message by actually listening to what your opponent is saying almost as if you were an outsider.

This can be practiced in preparing for the mediation, but also takes considerable concentration and discipline in the moment. However, the information you will get will be invaluable. You will be able to start to see

the problem from the other side's point of view. You will be able to actually repeat your opponent's concerns back to him or her (instead of focusing on what you want to say). By actually hearing their side of the story, and learning what they think went wrong, you will be able to more effectively convey your own point of view.

That crucial step will put you in the best place to begin real negotiations, brainstorm solutions, and commit to the concept of compromise and acceptance. Exquisite harmony from immense tension – a work of art, like the Steinway concert grand piano.

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## U.C. Davis Study Reveals How Civil Litigants Want to Resolve Their Lawsuits

**W**ith the elimination of state court ADR programs, the shrinking of available courtrooms for civil trials, and the consequent delay in getting cases to trial and resolution, California attorneys must analyze and counsel their clients about how to obtain faster resolution of their disputes.

University of California Davis law professor Donna Shestowsky conducted a multi-jurisdictional

study of civil litigants' attitudes – at the beginning of litigation – toward procedural options to resolve their disputes. In "The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante," 99 Iowa L. Rev. 637 (2014), Professor Shestowsky concludes that litigants prefer mediation to all other procedures except for the judge trial and the procedure where attorneys negotiate with clients present. As between mediation and non-binding arbitra-

tion, mediation was a clear favorite.

Although "the presence of the Judge Trial among the more preferred options impedes general conclusions" (99 Iowa L. Rev. at 674), the revelations of the study have critical importance to attorneys seeking to shepherd their clients through the minefields of dispute resolution.

The data also revealed that litigants were more interested in negotiations that would include the attorneys as well as the clients to negotiations that would involve the attorneys only. They also liked Mediation as much as the former kind of negotiation, but significantly more than the latter type of negotiation. This finding – along with the fact that litigants preferred Mediation to most adjudicative procedures – suggests that litigants want to be present for, and have the option to informally participate in, the resolution process. This finding may come as a surprise to attorneys who assume that they should conduct settlement discussions on their own. Although there might sometimes be strategic reasons for excluding litigants from settlement discussions, lawyers should anticipate a desire on the part of clients to observe or participate in the discussions themselves, and counsel clients on the advantages and disadvantages of that option in light of their particular case.

~ (99 Iowa L. Rev. at 674-675. Footnotes omitted. Emphasis added.)

The takeaway for lawyers is that clients want to be involved in the resolution procedure. This gives them a voice, self-determination and control over the process and the outcome. With the expertise of the lawyer, and the ability to observe and contribute on their own, clients will be more satisfied with

the outcome, leading to a more durable solution to the dispute.

The most flexible forum for achieving this is in mediation, where the procedure can be customized for each litigant and each type of case. The lawyers' insight into the needs of their clients is crucial in developing the most produc-

tive process, one that meets the clients' needs to participate in the ways they want.

Donna Shestowsky's article is available online: [http://www.uiowa.edu/~ilr/issues/ILR\\_99-2\\_Shestowsky.pdf](http://www.uiowa.edu/~ilr/issues/ILR_99-2_Shestowsky.pdf)

## Attorney Negotiation Tactics - "Puffing" vs. Misrepresentation

California attorneys, and attorneys everywhere, must be aware of and avoid the dangerous pitfalls of overzealous representation. The California State Bar Standing Committee on Professional Responsibility and Conduct has issued a proposed formal opinion regarding the following question: "When an attorney is engaged in negotiations on behalf of a client, what conduct constitutes permissible "puffing" and what conduct constitutes improper false statements of material fact?" The Committee interprets Rule 3-700(B)(2) of the Rules of Professional Conduct of the State Bar of California and Business and

Professions Code sections 6068(b), (c), and (d), 6106 and 6128.

The opinion digest suggests a conclusion that seems rather unremarkable:

Statements made by counsel during the course of negotiations are, generally, subject to those rules prohibiting an attorney from engaging in deceit or collusion. (See Business and Professions Code sections 6068(d) and 6128(a)). Thus, it is improper for an attorney to make false statements of material fact during the course of a negotiation. However, statements about a party's negotiating goals or willingness to

compromise may include allowable "puffery" provided those statements do not contain false statements of material fact.

When an attorney is actually in a negotiation, there may be a fine line between acceptable puffery and improper misrepresentation. The opinion considers the following examples:

1. Attorney's statement that he has a credible eyewitness who will discredit the opposing party's version of events, when in fact he knows of no such eyewitness.
2. Attorney's statement that his client was earning \$75,000 a year for

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- a wage loss claim, including prospective losses, when in fact the client was earning \$50,000 a year.
3. Attorney tells the settlement officer that plaintiff will never settle for less than \$375,000, and that the demand is \$1,000,000, when the plaintiff has in fact told the attorney that his bottom line settlement number is \$175,000.
  4. Defense attorney responds to the settlement demand by saying that defendant's insurance policy limit is \$50,000, when in fact the policy limit is \$500,000.
  5. Defense attorney also responds to the demand by saying that defendant is prepared to litigate the matter and might file for bankruptcy if he does not get a defense verdict. In fact, defendant and his attorney have not even discussed filing for bankruptcy.
  6. The case does not settle at the mediation, but a follow-up mediation is planned, pending exchange of information regarding the wage loss claim. In the meantime, plaintiff has accepted a new job at \$75,000 a year. Plaintiff tells his attorney to conceal the new job at the mediation, and the attorney schedules the mediation for the day before plaintiff starts his job, so he "technically" is not working at the time of the mediation.

The Standing Committee's opinion easily concludes that the conduct described in examples 1, 2 and 4 are impermissible misrepresentations of fact that are intended to mislead the opposing party and attorney. The representations were not the expression of opinion or state of mind. They were verifiable facts, and the attorneys' statements were intended to induce reliance on those facts by their opponents in reaching a settlement. This conduct is ground for disbarment or suspension under Business and Professions Code sections 6128(a) and 6106.

In contrast, the Standing Committee concludes that the representations in examples 3 and 5 are "statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere 'puffery.'" In example 3, the attorney has not made any false statement of fact in discussing plaintiff's "bottom line." In example 5, the statement of defendant's intent to file for bankruptcy depends on what the attorney knows. If he believes in good faith that bankruptcy is a permissible option, then the statement is a fair negotiating tactic. If he knows that bankruptcy is not an option, then the statement is a false statement of material fact.

Finally, as to example 6, the Standing Committee concludes that the client's instruction to the attorney not to disclose the new job would amount to suppression of a material fact, which is the equivalent of a material misrepresentation. The existence of the new job was material because the wage loss claim was the subject of the follow-up mediation. Moreover, while the attorney has a duty to maintain the confidentiality of the client's instruction not to disclose the new job, the attorney must also advise his client that he cannot participate in a misrepresentation or suppression of evidence.

It is true that the opinion is not yet final, pending receipt of public comment. Nevertheless, the opinion suggests a bright-line rule that should be fairly easy to follow: If it is a representation of fact, and it is not true, don't say it. If it is a statement regarding willingness to compromise or negotiating goals, go ahead and give it a shot.

The proposed opinion is open for public comment until May 19, 2014 and can be accessed by clicking on the following link: [http://www.calbar.ca.gov/Portals/0/documents/publicComment/2014/2014\\_PuffinginNegotiations.pdf](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2014/2014_PuffinginNegotiations.pdf)

Rande S. Sotomayor, Esq.  
Rande@SotomayorLaw.com  
www.SotomayorLaw.com  
626-791-5519

Rande S. Sotomayor, Esq. is a mediator and arbitrator with over 30 years of civil litigation, business, and dispute resolution experience throughout California. She is well known for her common-sense and cost-conscious approach to assisting parties and counsel resolve their disputes, especially before or during the early stages of litigation.

