# Know When to Say No in Mediation

**By Norman Brand, Esq.**

150 Lombard Street, Suite 3
San Francisco, CA 94111-1133
Phone:(415) 982-7172
Fax: (415) 982-8021
Email: adrmaster@abanet.org

Are there cases you should not mediate? Probably. Are there times you should say "No" in mediation? Absolutely. The difficulty for most practitioners is that they say "No" to mediation, rather than saying "No" to a specific proposal made during a mediation. And by failing to try mediation, they miss an opportunity for early and expeditious settlement of a client's lawsuit.

This dilemma often occurs when a lawyer must decide whether to mediate a case that involves an important "principle" for the client. Some clients – and lawyers – fear that mediation will inevitably result in forcing their side to abandon principle in order to focus on dollars. The opposite is often the case.

For example, let's look at a sexual harassment lawsuit in which you represent the defendant company, whose CEO believes she is being held up. Plaintiff's story is that he was regularly patted on the rear, called "Studmuffin," and had his groin stared at by his female supervisor. You have done some investigation and a bit of discovery, and you cannot find anyone in the workplace to corroborate plaintiff's story. The supervisor denies she engaged in any physical or verbal wrongdoing, or that she ever looked at plaintiff improperly.

Plaintiff claims that a former employee, who was fired for poor work performance, will corroborate his story. After deposing this prospective witness, you are convinced that the story is phony and will not hold up if you have to litigate. Since your client believes this is a holdup by a disgruntled employee who quit before he would have been fired, she says: "millions for defense of the suit, but not one penny to this sleazeball." After your careful explanation of the likely costs of defense, your client has offered $5000. to settle the suit for "nuisance value." But she has made it clear to you that she thinks this is a holdup and that she does not want her company to appear to be an easy target for former employees who raise false claims. Plaintiff has turned down the settlement offer.

Should you mediate this case? Some defense lawyers would not want to mediate, for three reasons. First, they fear signaling the other side that they are convinced there is some merit to the lawsuit. By stonewalling, they feel they will send a message that the only possible settlement is on their terms. Second, they fear that by going to mediation their client will necessarily have to come up with more money, thereby rewarding a "bad actor." Third, they do not want to waste the client's time with discussions of irrelevancies, or subject her to being hammered by a mediator. Are these worries justified?

First, after years of articles and lectures, most lawyers are aware that an offer to mediate does not indicate "softness" in an opponent's position, or a defendant's imminent capitulation. If you want to avoid even the appearance of asking the other side for

something, neutral agencies, such as AAA, can act as intermediaries to actually arrange the mediation. Mediation has become accepted as simply another tool to speed the resolution of lawsuits, and suggesting it holds almost no danger. In fact, it may offer precisely the way out that plaintiff has been seeking.

In our example, if plaintiff's lawyer has developed reservations about the case, mediation offers an honorable way out. While this case may have appeared to have great potential initially, plaintiff's lawyer may have to re-assess the potential after some discovery. Mediation can offer plaintiff's lawyer the opportunity to preserve a good client relationship by using the mediator as a "lightning rod." During the course of the mediation, the mediator becomes the focus for the client's anger and disappointment. If the mediator gets the client to accept a realistic view of the case, his demand may come within defendant's range of settlement. If the mediator cannot change the client's view of the case, the defendant can continue to maintain her principles and say "no" to inflated settlement demands. At the very least, mediation can provide the opportunity to settle a case that might otherwise take on its own momentum – and cost both sides far more than it is worth.

There is another side to this, of course. Some plaintiff's lawyers believe that if they make a show of reluctantly agreeing to mediate, and then posture before the mediator – insisting upon their unshakable confidence in the case – they can settle a weak case on their own terms. Wrong. There is an inviolable principle in mediation: "You cannot make chicken salad out of chicken excrement." If you have a lousy case, a mediator is not going to be able to make it look like a sure winner. And a wise mediator will not argue with the defendant who says "no" to your settlement demands.

Second, it is a common perception that if you go to mediation the defendant has to come up with more money in order to settle the case. Certainly, unless there have been significant discoveries about the case between defendant's last offer and the mediation, it is unlikely that the case will settle for less than you previously offered. In fact, if you intend to simply offer less, and say "No" just to teach plaintiff a lesson, there is little point in mediating. Also, you are unlikely to have a successful mediation if you insist that your last offer is "off the table" and your opponent must convince you to make that offer again.

But it is not always true that the defendant has to come up with additional money in order to settle. There are rare cases in which a highly accurate assessment and a reasonable offer have been made. These cases are rare, because we normally have incomplete facts and a bias towards believing the version of the facts which comports with our own view. When you have that kind of case, however, your client does not have to increase her offer just because she agreed to mediation. She can continue to say "no." While mediators want to settle cases, they realize that realistic assessments and well-founded "principles" are forceful constraints on settlement. And they will try to help the parties settle within those constraints.

On the other hand, you may not have made an accurate assessment of your own exposure and you may have more risk than you have acknowledged. If a mediator is able to assist in identifying this risk, you may want to pay something more to settle the case. In that instance a continuing "no" does not reflect principle, but positional bargaining. But, what if your assessment is dead accurate and your client's real goal is to establish a principle which will be valuable as a precedent in her company?

If the principle your client is trying to establish is that you cannot make money by bringing a false claim against this company, there may be a settlement that establishes that principle, but is higher than what you initially offered. For instance, if you knew what the

other side's expenditures had been, you might be able to come up with a settlement figure that is consistent with your principle, but is higher than your original "bottom line." In fact, if you took an "interest based approach," in which you identify your interest in the case – rather than a "bottom line" – you could identify a settlement range within which you could maintain your principle while allowing your opponent to disengage. If the client and his lawyer have to allocate loss – instead of gain, – your principle has been upheld.

What if the mediator were able to discover, and was permitted to convey to you, the information that the plaintiff had an outstanding bankruptcy, as a result of his having pursued this case – instead of employment – for the last two years? Would it help your client to maintain her principle, while offering a larger amount to resolve the case, if you knew that the plaintiff would get only a small fraction of the actual settlement? In an employment case I mediated these sorts of facts allowed the defendant to measure its continuing costs against a higher current expenditure, in light of its principle. The case settled.

Third, while we tend to focus on money, non-monetary demands may be highly relevant to settling a dispute. If through mediation you discover some non-monetary inducement which the other side values, your client would be ill advised to keep saying "No." Instead, she can keep saying "No" to demands that she increase her monetary offer, while evaluating other demands to determine if they are consistent with her principle.

For instance, in our example the plaintiff might be seeking a palatable alternative to admitting he is trying to hold up the company. If he told the mediator that he saw himself as defending men who are victims of sexual harassment, that might provide an opening for a face saving device to end the suit. Suppose plaintiff demanded that the client issue a statement to her workforce that sexual harassment was intolerable, irrespective of the sex of the harasser. If that was sufficient to end the lawsuit, at the figure offered by the defendant, would she find it offensive? Assuming that her company is committed to preventing sexual harassment, probably not. Thus, a lawsuit could be ended without abandoning an important principle.

Next time you're considering saying "no" to mediation, consider this: you can mediate without abandoning principles. In fact, you can mediate to uphold your principles.

*This article first appeared in the* Daily Journal *(San Francisco and Los Angeles) on May 6, 1994. This updated version is excerpted from the original.*