

Advocacy Tips for Mediation

by Ken Mann | ADR Office of Kenneth L. Mann



TAKE IT SERIOUSLY

Prepare yourself, but also YOUR CLIENT(S), AND THE OPPOSING CLIENT(S). Bring hard copy and DVD or thumb-drive of draft settlement agreement or key points. I'm the facilitator. **You're** the scrivener & it's **your** agreement. Don't say later "omg, I forgot to include a clause about . . ." and **Get It Signed**.



FOCUS ON INTERESTS, NOT POSITIONS

Think Needs, Not Wants: **BATNA** AND **WATNA**.

It's Compromise – Israel/Egypt 1979

- They Got What They Needed, Not What They Wanted.



CAUCUS CONFIDENTIALITY

But downside of not sharing smoking guns with adversary – No Bullets.



EDUCATE THE MEDIATOR...

Including Weaknesses – in your facts, law, difficult client, etc. – **(Credibility is important.)** Use your mediator to say what your client needs but doesn't want to hear. But we don't need the minutiae; we're not ruling.



REMINDE YOUR CLIENTS

- Explain procedure to newbies.
- Informal; client can break for medications, consulting w/counsel, etc. if desired.
- We facilitate but we don't force settlements – they can opt for Vegas, i.e., take their chances on the judge or jury.
- **Explain pros & cons of inadmissibility of unaccepted offers.**



REMINDE CLIENTS OF MEDIATOR'S ROLE

- It isn't judge, jury, arbitrator, clergy; won't be passing judgment, but merely testing your assumptions – and similarly testing your adversaries' assumptions in my caucuses with them.
- DON'T SPECULATE on my time spent caucusing with opponents. The reasons vary.



WHY MEDIATE?

- **This May Be The Last Time You and your client(s) Are In Control Of The Outcome**
- Flexibility & creativity no judge or jury could legally give, e.g., refi; commercial annuity or other creative payment terms; sincere apology; immediate letter to big 3 credit reporting agencies.
- Certainty of outcome vs. "litigation is a luxury sport."
- Time, money, anxiety, distraction, unintended consequences of contingent outcome and delay.
- Usually, privacy of settlement terms.
- NYC: "This case will settle over my dead body." He was sooo right – 7 years later: after a two-week federal jury trial verdict; an appeal; a published opinion exposing their *modus operandi*; a 2nd mediation after reversal & remand – and his death.



YOUR CASE, NOT MINE

I'm a farmer. I simply plant enough impartial seeds for each side to reflect on the potential consequences of continued combat versus compromise. Sometimes it takes more time than one day for the seeds to sprout. But it's up to counsel and parties to water the seeds if you want to harvest a settlement. As a mediator, I'M NOT A WAITER; I'M A CHEF. I don't just run offers back & forth. Negotiations are like a meal. **It's not just what's served, but how and when – garnish, fine china, etc.; no dessert first.** The ceremonial negotiation dance takes everyone's time, but IN LIFE, TIMING IS EVERYTHING, including when and how to frame the acceptable offer. The mediator usually has the best view.



MEDIATION RULES

I have two rules: No interrupting when someone *IS* talking, and only one person mad at a time.

TIP: Anger should be saved for caucus. It is usually counterproductive in joint session.



THINK OUTSIDE THE BOX

Frequently, non-monetary solutions or partial solutions help, e.g., *sincere apologies*, creative payment terms, e.g., gift to charity by defendant in honor of plaintiff; or ingenious equitable solutions.¹





JOINT OPENING SESSION. WHY??? BECAUSE IT WORKS!

Clients see, hear, and observe the opposing perspective(s) first-hand. It forces your opposing counsel to educate themselves **and their client(s)** earlier than otherwise.

- You'll be seeing lots more of each other later, if the case doesn't settle. It has worked successfully for over 25 years in Fla. and elsewhere.
- Try it – **done right**, you'll like it. THE KEY IS TO MAKE CNN-type OPENING STATEMENTS, NOT THE FOX OR MSNBC SCREECHES AND SQUAWKS. You're trying to open their minds and/or wallets, and you don't get that by bullying. Think courtship (the romantic not the judicial kind).



APPENDIX TO PROCEDURE AND REASONS FOR JOINT SESSION FIRST

We start with opening statements by attorneys.

- I caution clients to listen carefully to other side, not because they'll be persuaded – **but because the judge, jury or appellate court may be!**
- Slam dunk??? I formerly cited "the OJ factor" – now, "the Casey Anthony factor."
- Judges, juries and witnesses are human – hidden or oblivious biases and errors – even in criminal cases and high burden of proof.
- Professor Walden: "The only thing that makes the Supreme Court right is that it's last in line."
- And juries also make good faith honest mistakes on the law – My blonde juror's good faith confusion on the "beyond a reasonable doubt" jury instruction when I served as jury foreperson (true story). Although the juror felt sure the defendant was lying like a rug in his testimony that he had borrowed a friend's car and he didn't know the drugs were there, she nevertheless interpreted the jury instruction to mean that the mere fact he testified *automatically* created reasonable doubt. It took 45 minutes for her "aha moment" and her light-bulb to turn on *after* I asked her: "if testifying *automatically* created reasonable doubt, even if clearly lying, how could the State *ever obtain a conviction when a defendant testifies?*"

endnote

- 1 Although it was not mediation but a judicial order at a Saturday evidentiary hearing on our emergency motion for affirmative injunctive relief, the following creativity by the late Hon. Roger Barker exemplifies the imagination suggested for mediation. At the 11th hour, the ex-wife had told our client, a professional athlete, she would not let their daughter fly to the Midwest to attend his second wedding. Only the ex-wife attended and testified. J. Barker ordered: (i) ex-wife to let her attend; (ii) that my partner or I **personally** drive the daughter to and from our local airport and escort her until boarding (and upon disembarking on her return)(this was pre- 9/11); and (iii) that her father **personally** provide 24/7 supervision in the Midwest from her arrival to her departure. The wise judge elaborated on his ruling by explaining to the ex-wife that he was confident her opposition was not from any jealousy over the re-marriage, but was driven purely by heartfelt motherly love and concern for her daughter's safety and welfare. And in that spirit, because of her legitimate concern, and her obvious deep love for her daughter, he deemed it imperative not only that the daughter's safety be protected 24/7 as above – but also that he preserve the very special mother/daughter bond. He explained that if he denied our motion, he was fearful it might damage the mother/daughter bond and the daughter might resent her mother later for having deprived her of attending. The mother/ex-wife left the hearing feeling as if she had won. **(Tidbit:** The ceremonial courtroom where the infamous Casey Anthony murder trial was conducted is named after Judge Barker. Would that the jury and others have had his wisdom).

about the author

Ken Mann (AAA, FINRA, and Private Mediator & Arbitrator; Court Special Master; Attorney; Former CPA; Member, National Academy of Distinguished Neutrals) is an AV® Preeminent® rated Attorney (FL, AZ) for over 25 years. Ken focuses his current practice on alternative dispute resolution utilizing his education, training, temperament, maturity, experience as a mediator, panel chair, member and sole arbitrator since the 1990's, to assist parties and their counsel in achieving civility, certainty, and more efficient and expeditious closure by settlement or arbitral adjudication, as applicable. Ken can be reached at:

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