TRUST & ESTATE DISPUTE RESOLUTION SERIES

PREPARATION

Bette Epstein, Esq.
Hon. James Gray (Ret.)
Hon. Jamoa Moberly (Ret.)

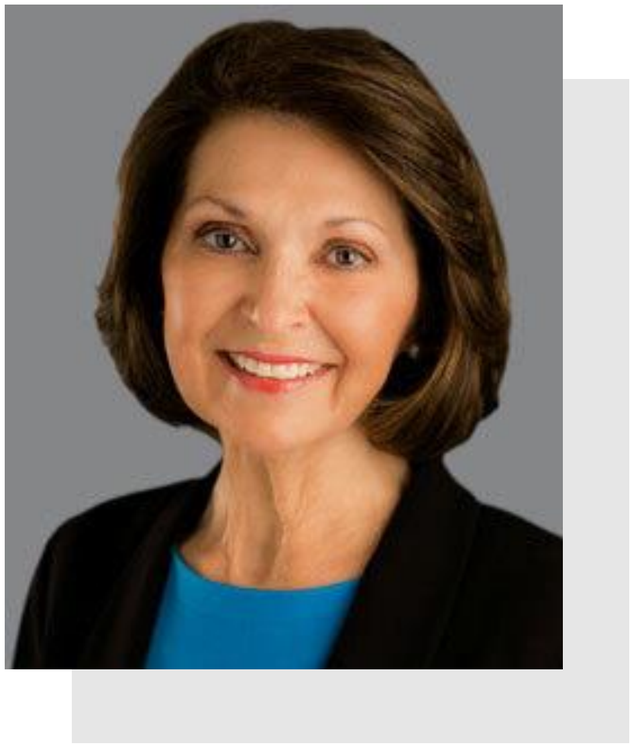
SEPTEMBER 18, 2024

ADR SERVICES, INC.

SPEAKING TODAY

Bette Epstein, Esq.

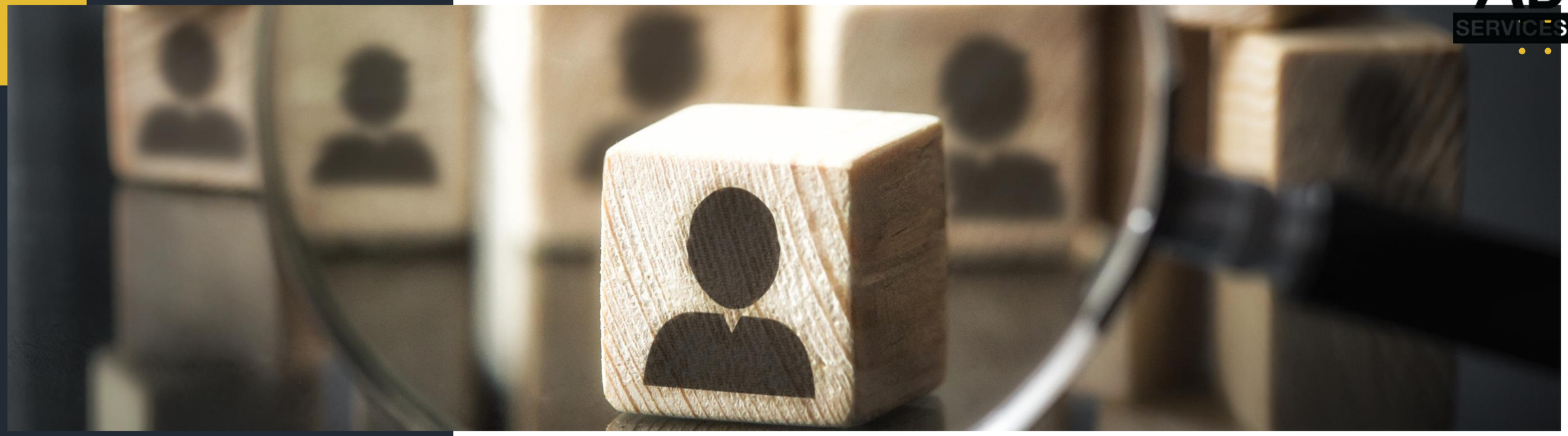
Hon. James Gray (Ret.)



Hon. Jamoa Moberly (Ret.)

CLIENT PREPARATION

- UNDERSTANDING THE MEDIATION PROCESS (VS. ARBITRATION)
- BE PREPARED TO TELL THEIR STORY
- BE PREPARED TO EVALUATE SETTLEMENT OPTIONS AND MAKE A BINDING DECISION THAT DAY
- HAVE ANY INDIVIDUALS NECESSARY TO PROVIDE SUPPORT ATTEND THE MEDIATION
- CONSIDER REALISTIC EXPECTATIONS: FINANCIAL AND EMOTIONAL DIFFERENCES BETWEEN MEDIATED SETTLEMENT AND TRIAL
- GRIEF PROCESS



ATTORNEY PREPARATION

CHOOSE THE RIGHT MEDIATOR FOR YOU AND YOUR CLIENT

ATTORNEY PREPARATION

Have all the information necessary to facilitate client making a binding decision:

APPRAISALS	**MEDICAL RECORDS**
TAX ADVICE	**REAL ESTATE PROFESSIONALS**
ACCOUNTINGS	**RECORD PRODUCTION**
INVENTORY OF TANGIBLE PERSONAL PROPERTY	

ATTORNEY Preparation

BE PREPARED TO WEAR PROBLEM-SOLVING HAT RATHER THAN LITIGATOR HAT, E.G. CREATIVE THINKING V. ADVERSARIAL POSITIONING

AVOID SURPRISES, E.G. RAISE ALL ISSUES THAT NEED TO BE ADDRESSED EARLY ON IN THE MEDIATION PROCESS.

DRAFT PRO FORMA SETTLEMENT AGREEMENT WITHOUT RECITALS AND BOILERPLATE AND SHARE WITH OPPOSING COUNSEL SO AS TO EXPEDITE SETTLEMENT PROCESS.

PURPOSE OF YOUR MEDIATION BRIEF

(It really does matter and we really do read them!)

- Background for mediator and framework for settlement
- Be candid
- Identify areas of agreement and potential low hanging fruit
- Focus on areas of contention and why - identify areas of potential compromise
- Share some or all of your brief
- Lastly, close with terms of your proposed settlement

MAXIMIZE YOUR BRIEF - SUBMIT IT EARLY

- Helps you to focus
- Gives mediator chance to digest it
- Some mediators will not have pre mediation conference until all briefs received

PRE MEDIATION CONFERENCE

- Consider asking case manager to calendar it along with mediation date
- Some cases merit an early call
- Usually occurs after briefs received
- Generally covers what is not in your brief
- Soft issues; client expectation, opposing counsel discord, ‘smoking gun’
- Can ferret out last minute prep to do, persons who should or should not attend or documents needed by mediator
- Helps to put your case on top burner for your mediator and helps their preparation

THANK YOU

KEEP IN TOUCH

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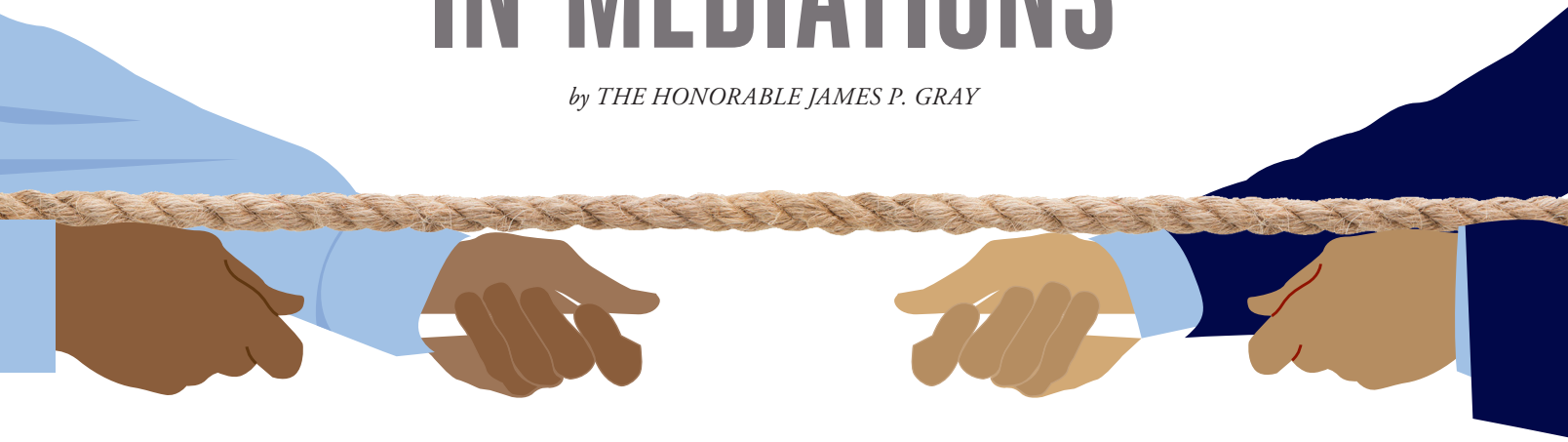
FIRST THINGS FIRST IN MEDIATIONS

by THE HONORABLE JAMES P. GRAY



So the parties and their counsel have gathered in your offices for a mediation . . . now what? Let me share with you some tips on what I do that I have found to be successful for a number of reasons both for private mediations and for Mandatory Settlement Conferences.

Begin by being friendly and human in your introductory comments, but also serious, because these things set the tone. I almost always keep all disputing parties separate from each other unless there is truly a good reason to do otherwise, and I usually begin by meeting with the plaintiffs. So here, basically, is how I begin my sessions.

Hello, and welcome, my name is Judge Gray and I am glad you are here. I was a judge for twenty-five years on the trial court here in Orange County. But I retired more than nine years ago, so I don't have any enforcement authority anymore, which now makes my professional life the same as my home life has always been. As a result, you don't have to convince me of anything because I won't be your judge, or on your jury if you have one, or even your arbitrator if you pursue that route. Nevertheless, I do have a lot of experience in disputes like yours, have settled many, and have also seen some juries deal with them, with varying results. As a result, I have some opinions that I will share with you.

When it comes down to it, you are retaining me to help you resolve your case. Today, not next month, or even next week. As a result, when I am with you I will focus upon your vulnerabilities, and you certainly have some. Why do I do that? Because if I were to say that every time your attorney Ms. Jones argues a point she will win, that is not real world—even as Ms. Jones would grudgingly admit. So, since you have some risks, I will stress your vulnerabilities so that I can help you face reality. But cheer up; when I am in the other room with the defendants, I will focus upon their vulnerabilities, and they certainly have some as well. In fact, it might put a smile on your face to hear me talk with the defendants, which you will not be able to do, but it also might make the defendants somewhat pleased to hear me talk to you, which they will not be able to do either. As a result, I am in the dissatisfaction distribution business. So today I will probably make everyone unhappy with me. But tomorrow, once this case is resolved and you can get back to doing something more constructive, you might think I was not so bad after all.

Actually, your attorney probably knows more about my reputation than I do, but one thing I do know is that I tend to be quite blunt. Maybe my "bedside manner" could be improved, but I have found that generally the parties appreciate hearing the straightforward thoughts of someone who is experienced and neutral. And this helps them do a reasonable cost-benefit analysis.

So, the first decision you will have to make is whether you are going to make a business decision, or base your decision upon something more emotional. There is simply nothing wrong with "Not a penny for tribute," or "I will not be extorted," or "This is a matter of principle," as long as you recognize that these more emotional responses may be controlling your decision. Of course, your attorney and I can only give you some

recommendations, but the decisions are yours. And if you understand that they are based upon something other than a business decision, both of us will have done our jobs. (Almost all of the time, parties say they are not deciding based upon emotion, but that often is not true. So later in the day, I will remind them of what they said to me earlier in the day.)

Then, there are two realities that I will share with you that you may not have thought of before. The first is that, in your case, and in all other cases as well, what actually happened is irrelevant. Strange as it may seem, what actually happened doesn't make any difference whatsoever. The only thing that matters is what can be *proved* to have happened—and that is not always the same thing. So, if you can't prove it, put it out of your mind. And, of course, if you think about it, that is the only way we can do business. If you had a one-on-one discussion with the defendant, I can tell you exactly what you said, what you meant, and what the other person said as well. And that is whatever the jury *says* you said. (Thus, talking to a defendant, "Yes, we understand that you never sexually harassed your employee, but that employee/plaintiff will say you did, and who will the jury believe? You, the evil big corporation employer, or the little guy? It is a risk." This often strongly helps by giving the defendant an "out" to settle the case while still fully maintaining complete innocence of wrongdoing.)

The second reality is that in a mediation, to use a baseball analogy, you will give up your right to hit a home run. Why? Because the settlement is voluntary, and the other side will not agree for you to hit a home run. So if a home run is what you seek, such as being made whole for your psychological trauma, or receiving punitive damages, you will have to go to trial to get that result. But you will also give up your right to strike out, because you will not agree to that. So if you want to hit a solid "ground rule double," I am your guy. That's why we're here.

For defendants, I also frequently promise that I will ask them to pay more than the case is worth, particularly in a personal injury case. Why? Because, as a practical matter, unless the plaintiffs get some money in their pockets from the settlements after paying their expenses and legal contingency fees, they simply have no benefit in settling the case. In this situation, the plaintiffs can take the case to trial with virtually no risk other than some emotion and lost time. So even paying more than the case is worth is still worth it for the defendant to be rid of the case and all of its risks.

For other cases in which there is an attorney's fees award for the prevailing party, I hammer on that risk. Not only will you be paying your own attorney's fees, but think of the expense and how you would feel paying for your opponent's. And if there is no such provision, understand that every dollar you give to your attorney will never be seen again. And Ms. Jones charges at least $23 per hour? (Whereupon Ms. Jones smiles and agrees she charges at least that much.) These are realities, and helping parties to face those realities is doing them a favor.

So now we will be acting as if we all have rolled up our sleeves, and are negotiating to buy a used car. While I now go and introduce myself to the defendants, since you are the plaintiff, I will ask you to begin the negotiations with a demand. Of course, you are a business person, so you know that you should make your opening demand high enough to give you some flexibility, because the numbers will only be reduced from here. But please make the number low enough to give the defendants some reasonable hope that the matter should settle.

And then I'm off to set a similar stage for the defendants. Of course, there are many more approaches as the mediation progresses, such as focusing upon accountings, dealing with personalities and claims of righteousness, the psychology of numbers, and, if all else fails, making mediator's proposals, but those will have to be left for later columns.

The Honorable James P. Gray *is a retired judge of the Orange County Superior Court, a private mediator and arbitrator for ADR Services, Inc., and the author of* Wearing the Robe: the Art and Responsibilities of Judging in Today's Courts *(Square One Press, 2009). He can be reached at jimpgray@sbcglobal.net.*

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I am in the dissatisfaction distribution business. So today I will probably make everyone unhappy with me. But tomorrow, once this case is resolved and you can get back to doing something more constructive, you might think I was not so bad after all.

WHAT TO CONSIDER WHEN PREPARING (YOUR CLIENT) FOR MEDIATION

Written by Hon. James P. Gray (Ret.)*

Over the last nearly 40 years, I have been involved in hundreds of mediations and settlement conferences, covering a wide variety of cases—including all kinds of civil and probate disputes. During my 25 years on the bench as a trial court judge, I held settlement conferences on nearly all of my own cases. For the past 14 years, I have served as a mediator on many cases concerning a variety of legal issues. Although every case involves its own unique set of facts, disputes and parties, the mediation *process* generally applies equally across the board.

So, what are mediations and what good do they do? In a nutshell, mediations assist parties in resolving their disputes voluntarily, usually with a neutral mediator as the agent to help them through the process. Why is this helpful? Because, as you may have noticed, litigation is expensive, both financially and emotionally, and perhaps even more importantly, it utilizes a lot of time that could otherwise be used more productively. Over the past four decades, I have learned that mediation is one of the most important and powerful tools that we as legal professionals can use.

My extensive experience has also taught me first-hand that one important consideration many attorneys often overlook is preparation of their clients for mediations. Of course, I recognize that attorneys are busy. I also acknowledge that preparing for the mediation itself takes time, as meticulous effort and thought are put into analyzing the case, thinking through possible outcomes, and drafting an always-stronger brief. While preparing the client may seem like the least pressing matter when gearing up for mediation, it is often the most important but overlooked aspect. Client preparation almost always makes a substantial difference in the success or failure of a mediation. Why? Because a more informed and prepared client is often more receptive to a reasonable proposal and agreement to settle a dispute.

So how do attorneys "properly" prepare their clients for mediations? The answer is, of course, it depends! But there are some universal considerations. Below are some tips and examples generated from my experience with mediation efforts that may be helpful to consider when preparing your next client for mediation.

I. EXPLAINING THE DIFFERENCE BETWEEN MEDIATIONS AND TRIALS

Attorneys spend most of their days engulfed in the legal process. As such, legal terms and procedures become second nature to them. So, it is easy to forget that most clients (fortunately) have never been involved in litigation. Consequently, what may seem like basic terms and processes to an attorney can be completely foreign to clients which, in turn, can cause a lot of stress and anxiety. For example, some clients have never even heard the term "mediation" before they became involved in litigation, or they may use the term mediation and trial interchangeably. That is why it is critical to take the time to explain to your client what a mediation is and the difference between a mediation and a trial, including the benefits and risks of both, before engaging in the mediation process.

Often you may find that although, in theory, an explanation may be simple, the actual wording may be difficult to generate as you want to keep your explanations easy to follow. Over time, you may develop your own style. For example, in my practice I like to use a baseball analogy. Thus, right in my introduction I explain, in baseball lingo, that during a mediation you will give up your ability to "hit a home run" because the opposing "team" will not voluntarily agree to that result. So, if you want to hit a home run, you will have to go to trial to have that chance. But you also give up your right to "strike out" because, similarly, you will not agree to that result. In sum, mediations virtually always end up with a compromised result, like "hitting a ground-rule double."

While a baseball analogy may not work for everyone, it does help the baseball-loving client conceptualize what a mediation will look like. But you may want to consider developing your own analogy that leaves a meaningful impression upon your client.

II. SETTING EXPECTATIONS

The hardest cases to settle are those in which clients come into them with unreasonable expectations. Of course, the root of those expectations can vary. It could be pure matters "of integrity." Or it could stem from an attempt by the prospective attorney to get the client to sign up with them in the first place by unrealistically increasing the client's expectations. But take caution because when that is the case, no one will come out ahead. Why? Because even if the attorney later gets a good resolution at mediation, or a good judgment at trial, their clients will still not be satisfied because they were misled into thinking that they would win the world. So, ultimately, that means no repeat business or referrals to other potential clients.

Attorneys will do both their clients and themselves a favor by setting their client's expectations to be reasonable prior to engaging in mediation. This involves seriously discussing the risks of pursuing litigation, as well as the potential benefits. It also includes discussing the benefits of engaging in mediation to end their dispute once and for all. Or, how about voluntarily exchanging some pertinent information or documents and then setting up a mediation right away, instead of going through the more laborious process of filing suit and litigating for a while before addressing an ultimate resolution? Of course, there are outside considerations, like how litigious the opposing party or counsel is, and there are other approaches as well, but you get the idea.

III. SOLUTION VS. RESOLUTION

As an attorney you have probably figured out that, unlike with mathematics, the practice of law rarely involves a *solution*, but rather seeks a series of *resolutions*. Of course, many clients come into the litigation process firmly believing that they are in the right and entitled to be made completely whole, whatever that may look like. But that is also why it is important to impress upon your clients, prior to engaging in mediation, that most human disputes have no *solution* and a mediation, at best, can achieve a resolution that will help them move forward in their lives.

For example, if someone runs a red light, hits your car, and breaks your leg, to be made whole would involve not having had your leg broken in the first place, and a return of all of the pain and loss of opportunities that accompanied it. Clearly, no one can make that happen. Instead, a resolution may involve the payment of some amount of money to help with the costs of the injury. Prepare your client for the idea that if they are successful, they will likely receive, and should only expect, artificial results, not perfection—on any of their complaints. That is a reality of life. Similarly, this would be the case at trial, albeit it will cost more time and money (and emotional burden) to get there.

IV. IF YOU CAN'T PROVE IT, PUT IT OUT OF YOUR MIND

Generally, there are three sides to every story: your client's version, the opposing party's version, and what actually happened. A client may be so convinced of their version of events that they lose sight of what can actually be proven at trial. So, prior to a mediation, you should sit down with your clients and impress upon them that what actually happened in their case (or what they think happened) is irrelevant. The only thing that matters is what can be *proved* to have happened—and that is not always the same thing.

For example, a party may have had an oral discussion with the opposing party that, if believed by a judge or jury, would probably make a huge difference in the outcome of the case. But, everyone can be sure, the opposing party will certainly have a different recollection of what was said and done. So that is where independent corroboration comes into play. Was anyone else present during the conversation? Was the discussion later memorialized in writing? Impress upon your client, before committing to mediation, that unless something can be proven through corroborating evidence, it will likely not carry the day. Thus, "if you can't prove it, put it out of your mind" is a good mindset to take into mediation. It may not always be fair, but it is the only way the legal system can do business.

V. THE PRESENCE OF THE DECISION-MAKER

Many mediations fail because the actual decision-maker or makers are not present or even available. What is a decision-maker? Well, if your client is a human being, that is the person who decides whether the case can be resolved or not. More commonly, if your clients are groups of individuals (e.g., multiple siblings contesting a trust), it will take each of those individuals agreeing to settle the case before actual settlement can occur. But what about a corporation, insurance company, homeowner's association, or partnership? Those groups almost always have officers or other agents who are vested with the power to make decisions, and those are the individuals who should either be present in person at the mediation or, at least, fully available by Zoom or by telephone until the mediation is concluded. Why? Because if they are not included, no final decisions can or will be made successfully.

Consider the situation where one side's decision-maker has limited authority based upon a prior meeting with other decision-makers about "what this case is worth." In that situation, it will be difficult to convince both that person as well as the others "back in the office" to change their proposed resolutions, either upward or downward. Every reasonable effort should be made to avoid this trap! Plus, you do not want to taint mediation efforts by wasting everyone's time. Therefore, it is important that both you and your opposing counsel make every effort to ensure the actual decision-maker(s) *for all of the parties* are personally present at the mediation or, as a fallback position, that they are at least available by Zoom or telephone.

VI. WHEN THE DECISION-MAKER'S MISTAKE LED TO THE LITIGATION

If you have a situation in which it was your client's decision-maker's action that led to the litigation being filed in the first place, that case will probably not be settled for more than "nuisance value," *unless* you are able to convince that person that you believe that "probably any reasonable person *who had only the information that was available to you at that time* would have made the same decision." Otherwise, you will likely get stuck hearing things like: "We will be vindicated at trial!" Or, if we lose, we can always blame "that stupid jury," or "that stupid judge," or even "our own stupid attorney"—but never me! If you have a situation like that, advise your mediator in advance and collaboratively try to come up with a plan to address such a scenario. Otherwise, unless you can get a different decision-maker to attend, mediation will probably be a waste of time and money.

VII. THE COST

Everyone understands that litigation is expensive, and no one understands that better than your client who writes those big checks. So, the topic of money, more often than not, will make clients listen up and listen good. I often emphasize that fact at mediations by saying something like: "Hey, I have an idea, let's give all of the money at stake to the attorneys! And that is the direction you are traveling at this point." In addition, if there is a provision for attorney's fees to be awarded to the prevailing party, I also tell them: "And if you think that paying your attorney's fees is fun, imagine how much fun it would be to pay the attorney's fees of your opposing party!" Or, again depending upon the circumstances, I often tell the parties that no prevailing party is entitled to attorney's fees, they are only entitled to *reasonable* attorney's fees. So, for example, even if it costs you $100,000 in attorney's fees to prevail at trial, if the total judgment is only $90,000, your chances of being awarded more than $50,000 in reasonable attorney's fees are slim. Similarly, plaintiffs settling at mediation for a smaller amount or defendants paying a somewhat larger amount would often still be a good business decision because it would avoid the emotion and loss of productive time and effort of going to trial—the costs of which are hard to assess.

VIII. FAITH IN YOUR MEDIATOR

If you do not have faith in your mediator, you chose the wrong one. Often attorneys are familiar with the mediator they are mediating with through prior personal involvements, through word of mouth, or otherwise. But clients often will know nothing about the mediator with whom they will be working. Therefore, it is important to brief your client about who their mediator is, what prior experiences and results you and other attorneys have had with that person, or any other information that may instill faith in your client that the mediator is there to help them resolve their dispute. This can be an incredibly effective tool because when the clients have faith in their mediators, the clients will be more likely to listen to and be influenced by their opinions and suggestions.

IX. THE DISSATISFACTION DISTRIBUTION BUSINESS

When I do my introductions to the parties, I usually tell them that I see my mandate as being to help them resolve their cases globally and today. As part of carrying out my mandate, it is my job to help them make a good business decision. And, as their attorney, you also have the same job. Of course, I also tell them that, as the decision-maker, they are free to adopt the position of "Not a Penny for Tribute!" or "I Deserve Total Vindication!" or "I want to have headlines in the *Los Angeles Times* that 'Jonathan Jones Prevails!'" That is the client's prerogative. Although, I also usually explain that I really do not think that the *LA Times* will care one way or the other.

As attorneys and mediators, it is incumbent upon us to point out to the clients that insisting upon certain outcomes is usually not a good business decision. Therefore, the scenario usually goes: "When I am with you, I will focus upon your vulnerabilities and weaknesses, because that will help you see your case more realistically. But cheer up, when I am with your opponents I will focus upon their vulnerabilities! So, if the opposing parties were to hear me talk with you, it would certainly put smiles on their faces. Of course, this will not happen because these discussions are confidential. But, on the flip side, when I am with the opposing parties, I will focus upon their vulnerabilities. So, if you were to hear me speak with them, it would certainly put a smile on your face, which will also not happen, because that is also confidential. As a result, as a mediator I see myself as being in the 'Dissatisfaction Distribution Business' because I will make everyone unhappy with me. But you will like me better tomorrow when you wake up and understand

that your dispute has been forever resolved and put behind you."

Thus, take some time to impress upon your client that you are on their team and, in a sense, so is the mediator. We all want them to make a good business decision, even if it stems from some dissatisfaction distribution.

X. MEDIATOR'S PROPOSALS

If the case does not settle through the back-and-forth negotiation process, before the parties walk out of the mediation most mediators offer what is called a "Mediator's Proposal." Different mediators approach their proposals differently. My general procedure is to tell the parties that this is not where I am attempting to "do justice," or "be fair," or to "try the case," but rather it is simply my opinion as to the highest number I could get the defendants to pay and the lowest number that I could get the plaintiffs to accept, plus other compromise terms depending upon the circumstances.

Usually, a mediator's proposal signifies that the negotiation process is now over. All each side needs to do is provide a "yes, we will," or a "no, we won't" answer. And if one side says yes and the other says no, mediators will usually not tell the party that said no that the other party said yes. And, since the proposal is still covered by the mediation privilege, the clients will not hurt themselves in any future negotiations. This process is successful with me about seventy percent of the time.

It is important to check with your mediators in advance to confirm that they make a mediator's proposal if the parties' negotiations are not successful. Explain the mediator's proposal process to your client in advance of the mediation so they are not caught off guard and know what to expect if that process is invoked.

XI. CONCLUSION

As with anything else in the practice of law, advance preparation helps and, with each experience, a new lesson is learned. I hope that some of these suggestions about what you and your clients should do to prepare for mediations will be helpful. And if they are, you might want to visit my website at www.JudgeJimGray.com for more of my writings on mediations and other litigation practices. More "justice" goes to those who are well prepared!

** James P. Gray is a retired Judge of the Orange County Superior Court, the author of* Wearing the Robe: The Art and Responsibilities of Judging in Today's Courts *(Square One Publishers), and presently serves as a mediator, arbitrator and discovery referee with ADR Services, Inc. in California.*