

February 2003

## *Achieving Client Solutions* **on Mediation Strategies**



### **Does it Make Any Sense to “Play” the Mediator?**

By Douglas H. Barker

---

“...if there is motivation to settle, a “hard line” attitude toward the negotiations can send the wrong message.”

Some lawyers believe that the mediator is someone who ought to be manipulated or “played.” Those lawyers tend to take very aggressive and uncompromising positions with the mediator.

Apparently, the strategy is to send the following message: “Mediator, you would best spend your time working the other side because there will be no meaningful compromise or movement from my client.”

The strategy can be successful, especially in those rare cases when the other side is determined to settle the case at any cost. However, in the typical case, a dispute that could have been settled ends in non-agreement because a lawyer sent a false message of “no compromise.”

Obviously, an essentially uncompromising position is understandable if there is truly very little interest in settlement (begging the question, “Why are you in mediation to begin with?”).

However, if there is motivation to settle, a “hard line” attitude toward the negotiations can send the wrong message. There is risk that the mediator will take you at your word, and settlement will be discouraged.

*Continued on next page*

## Does it Make Any Sense to “Play” the Mediator? (continued)

### Case Study

By way of actual case for purposes of illustration, plaintiff has sustained a rather significant knee injury. Plaintiff’s demand is in the realm of \$100,000, with an indication that plaintiff is not willing to compromise any further. The defense makes an initial offer of \$15,000. The defense expresses a willingness to increase its offer substantially, but it is not willing to do so if the plaintiff is “dug in” at \$100,000. In the face of *impasse* (prompted by the plaintiff’s uncompromising demand), the mediator proposes a number: \$75,000. As it turns out, plaintiff agrees to accept the mediator’s number, but the defense rejects it. Some weeks later, the case settled (outside mediation) for less than \$25,000. There is little doubt that, if the plaintiff’s counsel had been open with the mediator as to plaintiff’s settlement goals, plaintiff would have achieved settlement for *more* than \$25,000 at mediation.



Douglas H. Barker is managing partner of Barker Law Group, practicing in the areas of civil litigation and mediation.

For more information, please call him directly at (619) 682-4801 or via email, [dhb@barkerlawgroup.com](mailto:dhb@barkerlawgroup.com).

### Goal Achievement

Do not regard the mediator as your adversary. Instead, deal with him or her as your advocate—as someone who is going to work to achieve a settlement opportunity acceptable to you and your client.

If the mediator is made fully aware of your settlement goals, but is unable to meet those goals in his/her work with the other side, you and your client, quite obviously, can walk out of the mediation with non-agreement. However, if the mediator knows your settlement goals, the chances that he or she can achieve those goals are greater than if the mediator is being “played” by you.

**BARKER • WALTERS** | A Professional  
Law Corporation

444 West Beech Street, 4th Floor, San Diego, CA 92101  
Phone 619 / 682-4040 • Fax 619 / 220-7056  
[www.barkerwalters.com](http://www.barkerwalters.com)