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Mediating with Goliath

By Jeff Kichaven

How can solos and small-firm lawyers—the Davids—ever get a fair shake in mediation against the Goliaths? Actually, it’s easy, and this article will explain how.

First, let’s ask, who are these “Goliaths” whom the solo and small-firm “Davids” fear? Are they your big-firm opposing counsel? The international corporations and insurance carriers you’re suing? No. If you’re well-prepared and conscientiously put your client’s interests ahead of your own, big-firm opposing counsel and their hoary clients won’t scare you.

I learned this in dramatic fashion from a small-firm “David” who was actually named Don. Don’s clients had a legal malpractice claim against a senior partner in a big firm, the kind of firm that has its name on the side of its building. This defendant was represented by two senior partners from another big firm, which also has its name on the side of its building (probably several buildings across the country). We had four mediation sessions spanning fifteen months. The two big firms tried to wear Don down, but he wore them down instead. His clients received a large, fair settlement.

Afterward, Don told me his secret, the key to his approach. He said that he’d been in small firms for his entire forty-year career, almost always against large opponents. As he recounted it to me, his mentor taught him always to remember that it comes right down to—whether it’s the key deposition, standing up in court on major motions, trial—it’s always really just one lawyer against one lawyer. If you’re better prepared, there’s nothing to fear.

One lawyer against one lawyer! Like Dempsey against Tunney, the Dodgers against the Giants, Evert against Navratilova, it’s a battle of titans and a fair fight. No, big-firm opposing counsel and their clients are not the “Goliaths” the small-firm “Davids” fear.

Rather, the “Goliaths” the small-firm “Davids” have to fear are, sadly, mediators. If the mediator is against you and aligned with your big-firm opponents, you’re on the short end of a two-on-one, and the fight is not fair.

Over the years, countless solo and small-firm “Davids” have expressed this concern about mediators. This fear will never go away. Solo and small-firm “Davids” will always ask, “How can we protect ourselves from the risk the mediator will put his thumb on the scale for the big guy, the repeat player, the fellow member of his establishment?”

To find the answer, we first need to identify the source of the mediator’s potential power to tilt the scales against you. Then, we can figure out what to do about it.

While this may surprise you, the source of the mediator’s potential power to tilt the scales against you is… You! Yes, your own decisions and conduct in the mediation are what give the mediator the potential power to abuse you and your client.
Let’s consider the nightmare scenario solo and small-firm “Davids” fear most. As you enter the mediation, you and the plaintiff you represent have analyzed the case and decided you should settle for no less than 80 (on a scale of 1-100). After hours of wrangling, you have reduced your demand from 125 (admittedly, an extreme opening demand) to 85, and told the mediator you’re getting close to the end of your rope.

Down the hall, the defendant’s team tells the mediator that while they could pay up to 90 to settle, it would really make them look good in their supervisors’ eyes if they could bring this in around 75. They remind the mediator—as if they need to—that they are big clients for him, and for the mediation company where he works, and (cracking their knuckles as they speak), they look forward to many, many more mediations together.

As this nightmare scenario continues, the duly chastened mediator walks into your room, head bowed, shoulders slumped. He sits down and slowly looks up, brow furrowed. His eyes balefully look skyward. “I’ve tried everything, everything, with them,” he sighs and shrugs. “I’m so sorry. They are just so stubborn. It’s like talking to a wall. I begged them to be more reasonable. But the most I can tell you they will pay, the top, is… 70.”

Seventy! You’re shocked. The case is worth more and everyone knows it. Your client can barely handle the stress of litigation, though, and would sure rather get cash now instead of years from now, after trials and likely appeals. Still… 70…? You look the mediator dead in the eye and tell him you need more. You lower your demand to 80 and tell the mediator it’s your bottom line. You look serious. The mediator nods glumly and leaves.

Next, the mediator goes downstairs for a smoke. He returns a couple of unrelated calls. After a while, he comes back and tells you he has decided to make a “Mediator’s Proposal” at (you guessed it) 75. The mediator says that, while it may be a tough sale, he thinks the other side will bite. In fact, he may or may not have communicated a Mediator’s Proposal at 75 to the other side at all. It’s not actually necessary; he knows he has the 75 in hand as his repeat customer’s dream-come-true number.

You are in a pickle. While 75 is not enough to be fair, it’s not so unfair as to be dismissed out of hand. And, the mediator has put his imprimatur behind it. When you talk to your client about 75, he starts to sweat. Seventy-five! It’s not enough. But, he’s not a wealthy man, either. When was the last time he saw that much money in one place? His thinking dances with what he could buy with the 75 in hand (less your fee and his costs, of course). He starts thinking about getting his life back when litigation ends. Then he blinks. He says yes. He takes 75.

Despite lingering doubts because of the lack of transparency of it all, you think the mediator is somewhat of a hero for getting the big, bad defendant all the way up to 75. But the defendant would have settled at anything up to 90. The mediator has played you for a fool.

Have you been there? Have you been there, and not been aware you were there?

More importantly, what can you do to make sure you are never stuck there (again)? How can you take care that a mediator never becomes “Goliath” to your “David,” and uses his power to tilt the playing field against you? To answer this question, we must return to the issue of how mediators get the powers of “Goliath.” Then, the contours of an appropriate ounce of prevention become clear.

REMEMBER THE SOURCE OF THE MEDIATOR’S POWER—IT’S YOU!

A famous anecdote proves the point. It’s the story of the extraordinary Brendan V. Sullivan, Jr., of Washington, D.C.’s Williams & Connolly, best known for his defense of U.S. Marine Lieutenant-Colonel Oliver North in the aftermath of the Iran-Contra scandal in the 1980s. According to Sullivan’s Wikipedia page,

Sullivan shot to national prominence in 1987, when he represented Oliver North in televised congressional hearings over the Iran-Contra scandal. During the hearings in front of the Joint House-Senate Iran-Contra Committee, chairman Daniel Inouye suggested that North speak for himself, admonishing Sullivan for constantly objecting to questions posed to North. Sullivan famously responded,
“Well, sir, I’m not a potted plant. I’m here as the lawyer. That’s my job.”

Yes, a lawyer is not a potted plant. Yet at too many mediations, lawyers act like potted plants allowing mediators to take primary (or even sole) responsibility for conducting face-to-face communications with the other side and drafting the contracts (confidentiality agreements at the beginning, and settlement agreements at the end) which often bookend the mediation day. Lawyers too often sit by, intimidated by the mediator’s high status or forceful personality, as mediators seize, and lawyers acquiesce in the mediator’s seizure of, excessive responsibility for what goes on.

This acquiescence by lawyers can raise serious ethical as well as practical problems. Rule 3-110, California Rules of Professional Conduct, limits the extent to which lawyers can delegate responsibility for lawyering tasks to others who do not have the lawyer’s professional responsibilities—including the duty of undivided loyalty—to their clients. This limitation continues in new Rule 5.3, California Rules of Professional Conduct, effective November 1, 2018. Mediators, whatever their ethical duties are or aren’t, do not have a duty of undivided loyalty to anyone. Mediators work for all sides. Therefore, mediators are clearly in the class of people to whom lawyers cannot delegate excessive responsibility for lawyering tasks. Drafting contracts and conducting face-to-face negotiations are, equally clearly, lawyering tasks.

DON’T GIVE MEDIATORS THE POWER TO HARM YOU

The solution to the problem is now straightforward. Remember that the mediator works for you, you do not work for the mediator. You must supervise the mediator, the mediator must not supervise you. Ultimate responsibility for the representation of your client’s interests belongs to you and you alone, not to the mediator. While lawyers work in concert with mediators and value the mediator’s counsel and input (the mediator, after all, sees things at the other end of the hall which you never see), as far as your client is concerned, the buck always stops with you. So you must keep more responsibility for lawyering tasks yourself. When you do not delegate those tasks to the mediator, the mediator never gets the opportunity to use the power to perform those tasks against you.

Here are some concrete steps you can take:

Exchange Mediation Briefs

When you exchange mediation briefs, you control the message the other side gets about your case, and the message you get about theirs. You and the other side can prepare more comprehensively to join the issues and move them forward more efficiently on the mediation day. Sure, the mediator will have input, some of it perhaps highly evaluative. But both you and the other side will have the primary sources for evaluation, your respective analyses of the case in the mediation briefs, unfiltered by the mediator’s biases (and everyone has biases).

Have an Opening Joint Session

A critical part of the mediator’s job in 2018 is to determine whether an agenda can be tailored for an Opening Joint Session which will be productive and constructive. The so-called “plenary” Opening Joint Session of the 1990s (where the mediator asks one side’s lawyer “what do you have to say?” and then asks the other side’s lawyer “what do you have to say?”) is no more utilized today than the 1990s hit “Macarena” is still played at weddings and Bar Mitzvahs. Both seem quaint and outdated.

In 2018, when a mediator can read the briefs and talk to the lawyers before the mediation day, and the lawyers can read each other’s briefs, all involved can often work together to find issues which can be discussed directly in an Opening Joint Session, without being filtered through the mediator’s biases, to move the negotiation forward. Many times, a good issue for this agenda is the measure of damages. This issue rarely involves direct criticism of a party’s conduct and is often key to the appropriate settlement amount.

When you insist on delivering and receiving messages directly, you take power back from the mediator. The mediator loses the power to deliver messages in a way that doesn’t serve your interest. Neither can the mediator deliver the other side’s message to you in a way that may exaggerate its merit.
Of course, there will always be a few cases where mediation briefs should be confidential and the sides should not sit in a room together. When Opening Joint Sessions are curated, not plenary, though, the number of cases where you should avoid them will fall.

**Conduct Face-to-Face Negotiations Yourself**

As long as mediators take sole responsibility for running offers and demands back and forth with so-called “shuttle diplomacy,” solo and small-firm “Davids” will never lose the fear that the mediator may manipulate the negotiation against them and in favor of the large repeat players on the other side. The answer? Do more of this important work yourself, in consultation with and chaperoned by the mediator as necessary.

Here’s how it may look, in a nutshell:

After a curated Opening Joint Session, the mediator meets (typically) with the plaintiff’s side to discuss the issues further and formulate an opening demand. The mediator, having had some communication with the defense side, can offer some informed opinions (without violating confidences) about how the defense might respond to whatever the demand might be.

Plaintiff’s counsel and the mediator might then meet with defense counsel, an “attorney summit.” Either the mediator, or more likely plaintiff’s counsel, might express the opening demand. It generally has greater conviction when plaintiff’s counsel does it. Plaintiff’s counsel can judge defense counsel’s response directly, and answer any questions. This provides valuable, unfiltered information in both directions. It deprives the mediator of the power to tell plaintiff’s counsel that defense counsel was any more shocked by the opening demand than they actually were. Counsel then report back to their clients, with or without the mediator’s assistance as appropriate. This process of attorney summits and private conversations between lawyers and their respective clients can continue through several rounds of negotiation. Sometimes, but less frequently, it may be appropriate for a mediator alone to shuttle an offer or demand.

Ultimately, the defense may make an offer and say it’s their top dollar. When plaintiff’s counsel reports this to her client, her client will almost surely ask, “Do you believe that’s all we can get?” Plaintiff’s counsel must be able to answer with a convincing “yes” before plaintiff will consider accepting, for this “top dollar” will almost certainly be below plaintiff’s subjective evaluation of what the case is worth. How much better it is for plaintiff’s counsel to be able to answer that question after hearing defense counsel say it directly, rather than relying on what may be the manipulative or biased hearsay statement of the mediator as to the defense side’s state of mind. Again, direct communication deprives the mediator of the power to tilt the negotiations against you.

When picking mediators, solo and small-firm “Davids” should ask mediators, as part of their due diligence, whether those mediators employ processes such as these or instead hoard power over the negotiation. “Davids” cannot just ask the open-ended question, “Can you be fair to me and my clients?” Who would ever answer “no”? It would be as useless as the same question in jury voir dire. “Davids” should ask mediators for references to other solo or small-firm practitioners, to ask whether the mediator treated them fairly and respected their responsibilities toward their clients, or instead became “Goliaths.”

Solo and small firm “Davids” must guard their own roles in mediations jealously to ensure they retain the power necessary to discharge their fiduciary duty of undivided loyalty to their clients. To do this, they must conduct more lawyering tasks for their clients themselves.

**ENDNOTES**