Ten Keys to Successful Mediation

By: Rene Diaz (Copyright © 2007)
Former District Judge, Bilingual Mediator & Arbitrator

"Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln, "Notes for a Law Lecture", circa 1850.

Mediation is at its core peacemaking. More precisely, "mediation" can be defined as the involvement of a neutral party in a dispute who facilitates a voluntary settlement or compromise between the opposing parties. The success of a mediation depends upon a number of factors, and the more the individual participants in the mediation are aware of these critical factors, the better are the chances of reaching a settlement. For this reason, I have decided to summarize some of the things I've learned over the past two decades, after participating in hundreds of mediations. I hope this list will not only give participants in the mediations I conduct insight into my mediation philosophy, but also that it will help attorneys explain the process to their clients, and thus, enhance the likelihood of settlement at mediation. Some of these keys are mandatory while others are not, but they all play a vital role in a successful mediation. Here is my list of the Ten Keys to Successful Mediation:

1) **A Genuine Desire to Resolve the Conflict** – This may sound very obvious, but some parties to a law suit may have an agenda to prolong or raise the costs of the litigation, not to resolve it. Therefore, this is a vital question that I may ask the parties when appropriate: "Do you really want to settle the case?" Some lawyers call this element mediating in "good faith." But no matter how you define it, this is an essential to any mediation. If the mediation is to be successful, the parties must have both the desire and the ability to engage in negotiations that may lead to settlement. Although the session may be court ordered and parties may be compelled to attend, mediation is at its root a ***voluntary*** process; each party must, therefore, have a real desire to settle the case or the process simply cannot work.

2) **Full Authority** - All of the decision makers must be present at the session for the mediation to be successful. Furthermore, the decision makers that attend the mediation must have the ability to commit to all of the relief sought by the opponent or at least up to the full amount of the claim. If for some reason an essential decision maker can not or will not be present at the mediation, then please notify the mediator prior to the mediation, since it may be necessary to reschedule the mediation.

3) **Listening** – Listening is different from hearing. Listening is active, while hearing is merely passive. Listening requires a level of maturity, patience and respect that go beyond simple hearing. Effective mediation requires listening to what is being communicated by

your opponent. Listening yields understanding and from understanding comes agreement. The skill of listening does not mean you must agree with your opponent, but it does mean you must be at least temporarily patient and nonjudgmental in taking in what the opponent is communicating. Simply listening to the opponent will help not only the listener to have a better understanding of the issue, but it will also serve as a catharsis for the speaker. If a party truly senses they have been listened to during the mediation, they will often be more inclined to yield in their position and be more inclined to resolve their dispute.

4) **Creativity** - Disputes are often resolved at mediation with new terms that may not have been considered by the parties prior to the mediation. This is the "creative" element of the mediation process; new solutions to old problems will often come up during mediation. These new possibilities of settlement that could form the basis of an agreement are the result of a synergistic process that naturally occurs at mediation when you combine three things: a participant willing to listen; a skillful attorney who is able to adapt to new facts and opportunities, and an experienced, creative mediator who is accustomed to "thinking outside the box." A good mediator will do more than simply convey offers or "carry water back and forth" for the attorneys; a skilled mediator will get the parties to consider new "creative" solutions beyond what either side would have considered alone or without the help of a skilled and dedicated mediator.

5) **Adaptability** – The ability to effectively respond to new or unexpected facts or to creative new settlement options that often arise during mediation is the heart of adaptability and is another key to successful mediation. Adaptability is the hallmark of a good attorney who can react calmly yet instinctively to a new or unexpected situation. We often say that attorneys who do this skillfully in court can, "think well on their feet." But this skill is also helpful at mediation, where the next settlement offer may come with an unexpected document or an unfavorable witness statement. Just as in court, the party who encounters the unexpected is best served at mediation by an attorney who shows adaptability to react and respond in a rational, creative manner. Mediation is not simply about compromise and meeting "somewhere in the middle," it is often about considering new facts and opportunities and then adapting and responding to them in a way that will achieve the client's objectives.

6) **Confidentiality** – This is one of the mandatory "keys" to mediation. There are two levels of confidentiality inherent to the mediation process: First, there is confidentiality of communications that occur at the mediation session; these mediation-related communications are inadmissible in evidence and may not be raised in court; nor should they be discussed with parties who are not directly related to the mediation or the law suit. This confidentiality protects not only the statements made at mediation but also any settlement offers conveyed during the session. Second, there is yet another level of confidentiality that covers anything told privately to the mediator during individual caucuses, which are separate sessions conducted with the mediator but outside the presence of the opposing party or their attorney. These private communications with the mediator may not be disclosed to the opposing party, unless the mediator is specifically authorized. The dual layers of confidentiality should encourage the parties to candidly discuss the strengths and weaknesses of their case freely and openly with the mediator.

This is essential to a realistic assessment of the case. (Note: there are narrow exceptions to the confidentiality rules that cover potential criminal behavior, e.g., abuse of a child, which must be disclosed to the proper authorities).

7) **Honesty** – In order for the mediation to work, each party must be completely honest three levels. First, the party must be honest with himself or herself about the potential weaknesses of their case. This honesty requires the ability to be fair-minded, realistic and able to make a decision free of bias or self-deception; it is often achieved only after consultation with their own attorney. Second, it goes without saying that a client must be completely honest with their attorney; they must be honest not only about the favorable and unfavorable aspects of the case but also about priorities. For instance, the client must tell their attorney which positions in the lawsuit are fixed or immovable and which positions are flexible and could be compromised under the right circumstances. Third, honesty with the mediator is required. There is no reason to hold back from the mediator since you have the dual layers of protection offered by the confidentiality rules. In short, with very narrow exceptions, neither the things said at the mediation, nor the settlement offers made during mediation can be used against a party in any future court proceeding, (See Key No.6, above for more details regarding the two levels of confidentiality). Honesty is protected at mediation precisely because it is so essential to the process.

8) **Reciprocity** – It is a universal truth that something must be given in order to get something in return. The converse is also true – if you give something, you will get something in return. Not surprisingly, this law lies at the heart of effective negotiation and equally applies to a successful mediation. You might say the process of give and take is the life blood of mediation.

9) **Cooperation in the Process** – The nature of mediation requires cooperation. Even if a party is skeptical about the process, but they nevertheless cooperate by listening and following the attorney's (or the mediator's) suggestions, at a minimum they can gain a better understanding of their opponent's position. Following the attorney's or the mediator's suggestions on how and when to "send a message" or what "message" to send can greatly benefit parties who cooperate in the process. Cooperation can also generate new positions or creative solutions that no one may have previously considered. The parties must also cooperate in following the mediator's direction on when to terminate or adjourn the mediation. The mediator is in a unique position of knowing each party's secrets, and therefore, is in the best position to know either when the mediation should be adjourned, when an impasse should be declared or if settlement is close at hand. Cooperating with the mediator is absolutely essential to a successful mediation.

10) **Knowledge** – The participants in the mediation must have both an understanding of the facts of the case and of the governing laws that apply to the controversy in court. Understanding the facts of the case, which includes adequate discovery and preparation, together with knowledge of the applicable law will usually lead to a reasonable assessment of the case, which is halfway down the road towards settlement. Sometimes the parties acquire this knowledge at the mediation. For instance, parties often learn new facts about the case at mediation, or perhaps they are confronted for the first time with novel

arguments on how the law applies to certain facts. (Note: This is one area where a knowledgeable mediator, with actual courtroom or judicial experience, can make a difference by helping the parties to analyze the new facts or the new legal arguments). Regardless of when or how the knowledge is acquired, the parties must have sufficient information available to make an informed choice about resolving the case. One might say: at mediation, knowledge equals power … the power to obtain a favorable settlement.

Can a case settle at mediation without all of these factors present? The answer is, "maybe"; but an awareness of these keys and the consistent application of them during mediation will greatly increase the likelihood of resolving the case. By applying the "Ten Keys to Successful Mediation," attorneys can have a much better chance of settling their case at mediation and fulfilling the role of wise "peacemakers" that Abraham Lincoln wrote about over one hundred and fifty years ago in the opening quote excerpted from Lincoln's famous, "Notes for a Law Lecture."