



## **Bring the Decision-Makers to Mediation**

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I recently read an article explaining ways to increase the likelihood of success at mediation. The article presented the advice in the negative, that is, mistakes to avoid. One of the key points presented was: Do not leave the decision-makers at home. I reflected on my experiences and provide the following commentary on this advice, but from a positive—must do—perspective.

Lawyers can easily negotiate in real-time via teleconference, email, and more advanced avenues such as Skype. These channels can likewise involve a mediator. However, intangible, yet critical, aspects are missing from such methods – personality, urgency, and emotion, to name a few. Although mediating in person restores some of those characteristics, many remain absent if the real parties in interest are not present. Moreover, the buck stops with the client when deciding whether to settle her claims.

To a good lawyer, every case is important and deserves vigorous representation. But to the client, her case is often a major life event; or if a company, the case may be a critical turning point in its business. Despite these facts, it is not unusual for decision-makers to “call in” to the mediation or be “on call” to make decisions or provide authority. The rationale behind such arrangement relies primary on the purported notion of efficiency; for example, the party not having to spend a day away from the office or saving the cost of travel. After all, the lawyers handled the majority of the case, why should the client need do more at mediation than just make a decision on figures? Such a role does not require the client’s physical presence.

But, such a view is short-sighted. It leaves out the intangibles. It communicates the wrong message. It sets the wrong tone for the mediation. If the real party in interest is absent, it lowers the sense of urgency and largely removes the emotional and personal elements of the case from consideration. Decisions based on passion may not always be sound, but human emotion and personality are real factors in nearly every case. Those factors must be considered by the mediator, counsel, and the parties during negotiations – not just numbers, cases, and discovery.

As well, the absence of a party communicates the message that at least one may not be taking the mediation (and compromise) as seriously as the other. Such an imbalance starts things off on the wrong foot and sets the stage for failure. If the goal of the mediation is truly to work towards a mutually beneficial compromise, then the decision-makers must be present and ready to participate.