# HOW TO R.A.I.S.E. YOUR MEDIATION GAME

## Top tips for success

*By Michele Kern-Rappy*

Mediation presents inherent challenges, as mediators are tasked with navigating parties who arrive with conflicting interests, fraught histories, varying psychological dynamics, and differing levels of commitment to the process. Beyond the immediate legal dispute, abstract issues including power and revenge often emerge. Yet many litigators receive inadequate training to navigate these complexities.

Litigants referred to court-annexed mediation are often stuck in a litigation mindset. To combat this, I created a roadmap—based on over 35 years of experience and over 7,000 mediated civil cases—that serves as a practical guide for early mediation. This article explores that roadmap, called R.A.I.S.E., which stands for Rapport/Recognize/Risk/Research; Active listening/Acknowledge/Adapt; Insight; Strategize/Solutions; and Evolve/End with agreement. Implementing R.A.I.S.E. certifies each party is able to describe its goals, economic and non-economic interests, financial risks, relationships, and desired yet reasonable outcome.

### THE R

**Rapport.** An optimistic and appreciative mental state creates increased balance in our nervous system, which creates more efficient brain function. Negative mental and emotional responses such as anger, frustration, and/or anxiety create disorder and inefficiency. When groups of attorneys are stressed with clients in their office at a mediation, it is essential to take the key step of building rapport through gestures of kindness or a show of appreciation to create a positive mood.

**Recognize.** Taking time at the outset allows practitioners to identify not only the concrete issues at the heart of the dispute, but also the more abstract, underlying dynamics that often drive conflict. Recognizing the emotions, biases, and hidden motivations beneath the surface is a critical first step toward emotional regulation. Once these forces are acknowledged, parties are better positioned to engage in clearer thinking, more rational analysis, and, ultimately, more reasonable and sustainable decision-making.

**Risk.** Anchoring is a cognitive bias where the initial number presented establishes a psychological reference point that heavily influences subsequent decisions. Plaintiffs often use anchoring strategically to frame potential jury awards, but it carries significant risk for

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defendants. The emergence of "Nuclear Verdicts"—massive, unpredictable jury awards—can destabilize businesses, raise costs for consumers, and prolong litigation. These outcomes underscore the critical need for careful calibration of expectations and offers in high-stakes mediation.

Effective risk management in early mediation is essential to narrowing the gap between inflated Nuclear Verdicts and reasonable damage assessments. For the defense, it is particularly critical to engage in "reverse anchoring" by arriving to the mediation armed with independent calculations and concrete evidence capable of countering exaggerated claims.

To frame negotiations, parties must prepare a thorough economic analysis to establish a defensible settlement range. This involves assessing each stage of the litigation, identifying key legal and factual vulnerabilities, and evaluating how specific risks may alter the case's financial trajectory. A realistic assessment requires calculating the client's Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA), assigning probabilities, and grounding settlement discussions in data-driven analysis.

**Research.** Parties need not complete discovery to reach an informed and durable negotiated agreement. In the absence of formal discovery, voluntary and transparent information exchange is crucial. Counsel should proactively engage with the mediator to establish a structured protocol for the timely exchange of essential materials, such as pre-mediation statements, medical records, police reports, and other relevant documentation.

Rigorous preparation and targeted information sharing enable mediators to identify potential areas for compromise, anticipate emotional dynamics, and craft solutions aligned with the parties' interests. The focus must remain on fostering meaningful negotiations; not trial preparation, recognizing that not every issue will be exhaustively explored.

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### THE A

**Actively listen and Acknowledge.** In the initial joint session, silence is often the most powerful tool. Begin by listening, without the pressure to respond. Suspend judgment and create space for the other party to express their experience and perspective. Reflecting back what you have heard shows understanding and builds rapport. Remaining open to the other person's emotions, without becoming defensive, lays the groundwork for trust. This reservoir of trust can become invaluable later in the process when negotiations become difficult or emotionally charged.

**Adapt.** Be patient; go slowly and carefully. The breakdown of trust between parties often develops over years, and rebuilding it is rarely achieved in a single session. Restoring a foundation of trust may require time and patience. By remaining adaptable, mediators and participants alike can foster an environment conducive to meaningful dialogue and sustainable resolution.

### THE I

**Insights gained.** In caucus, exchanging of insights should be approached with calm curiosity, creating space for reflection, creativity, and dialogue. The mediator plays a vital role—summarizing discussions, offering impartial observations, and, with the parties' consent, introducing potential settlement ranges. These practices shift the dynamic from rigid, position-based bargaining to more collaborative, interest-driven negotiation.

Even well-prepared clients may require time to absorb legal complexities, evaluate risk, and accept potential outcomes. Pressuring parties into premature offers or counteroffers can derail progress. A thoughtfully paced mediation creates space for clarity, alignment, and a more durable agreement.

### THE S

**Strategies and Solutions.** Strategic planning requires identifying potential obstacles and proactively developing solutions. When emotions are heightened, it becomes especially important to be prepared with an action plan to navigate impasse. I often employ a whiteboard to visually map out options to all participants while in caucus with them to create a sense of optimism, a pause for reflection, and a platform for renewed problem-solving. Attorneys can utilize their own tools to explore innovative pathways toward resolution. These collaborative efforts restore momentum and strengthen engagement in the negotiation process.

### THE E

**Evolve the dispute and End in agreement.** Effective mediation fosters collaboration by encouraging parties to move beyond rigid positions and instead explore the deeper interests that underlie the conflict.

From building rapport to managing risk, and from reframing positions to restoring trust, each stage of mediation offers an opportunity to shift perspectives and foster durable resolutions. In an era of increasing litigation costs and emotional fatigue, early mediation—anchored by thoughtful tools like R.A.I.S.E.—offers a smarter, more humane path forward. ■

*With assistance from Erika Narod and Zhanna Green*