FROM COURTROOM TO CONFERENCE ROOM: SOME LAWYERS' THOUGHTS ON MEDIATION

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Every lawyer with a litigation practice must work at mastering mediation skills. The skills of an effective courtroom advocate are very different from the skills of an effective lawyer at mediation. This article analyzes, from the perspective of trial lawyers, how to approach and manage a mediation to achieve the best results for your client. The thoughts contained in this article are based upon the authors' experience with mediations and their discussions with lawyers and judges who act as mediators. Some of the discussion below will seem obvious, but lawyers' failure to manage mediation issues to achieve good results is distressingly common.

What is mediation?

Mediation is a process where the parties agree to try to settle a dispute using a third party neutral to facilitate, manage and preside over a structured settlement process. The mediator is often a retired judge, a sitting judge, or a seasoned litigation attorney.

At the mediation conference, the parties participate in a joint session with all parties, the lawyers, and the mediator present and then split into separate groups. The mediator then shuttles between the groups with messages, analysis, and persuasive or evaluative commentary until the dispute is settled or the negotiations end.

The rise of mediation.

As the number of cases brought to trial has decreased in recent years the use of mediation has increased. Mediation has become popular because it can be an effective and less costly way to settle litigation. It is a particularly effective tool when there is a good bit of emotion involved or where you believe your opponent has not properly identified the weaknesses of their case to the client. The intriguing question is why mediation is so popular and so effective. The analysis of this question is critical in developing mediation practice skills.

The reason mediation is effective includes some combination of the following:

1. The parties have more control over the outcome as compared to the win/lose result that often occurs in litigation. There is also more flexibility in structuring an outcome.

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2. It is sometimes difficult to predict what a jury (or judge) will do in deciding a case.

3. A settlement ends the cost, stress and inconvenience of continued litigation.

4. The mediation process includes important emotional and psychological effects that allow settlement, including the parties' opportunity to be heard by the other side. Unlike litigation, mediation allows the parties to talk directly to each other. A good mediator will conduct the mediation to allow each side that opportunity. Further, most parties that devote substantial time to a mediation become invested in the process and often desire to reach a compromise if possible.

5. The effects of a skilled mediator with credibility. The mediator's comments can serve as an important reality check to the parties. Preparing for mediation also forces the parties to take a critical and realistic look at their positions.

There is also significant value in considering why mediation efforts fail. A "failed" mediation is when the case does not settle or your client agrees to bad settlement terms. Mediations fail because:

1. The lawyer has not properly prepared for the mediation.

2. Anger, hostile presentation, and tricks or surprises. United States Magistrate Judge Urbanski observed wryly "the tricks never work."

3. Mistakes by the mediator.

4. A party does not participate in mediation with the good faith intent to reach a resolution.

5. A party succumbs to litigation fatigue and just wants to end the litigation on any terms and at any cost.

Be mindful of the reasons that mediation either succeeds or fails.

Before Mediation

Good lawyers know that the best way to settle a case is by getting ready for the trial. In every communication with the opposing side, the lawyer must demonstrate competence and the readiness to try the case. Proper mediation preparation is also good trial preparation.

The first key step is the early evaluation of the case including the realistic consideration of its strengths and weaknesses and investigating the facts and learning the applicable law. The lawyers should share the case evaluation with the client. These steps will avoid surprises and establish realistic expectations.

The litigation can then go through the appropriate pleading, discovery and motions phases until the facts and legal issues identified in the evaluation are confirmed or adjusted to meet reality. The timing of mediation depends on the case. It is generally helpful to have at least some discovery done to fill out the fact issues. It also helps if some event is imminent, such as a summary judgment, an important motions ruling, or trial. If the dollar dispute is relatively low, early mediation is advisable before both sides have reached the point that neither side can afford to settle.

The Psychology of Mediation.

We think mediation is effective because of the important emotional and psychological components of the process. This includes use of a third party neutral cloaked with authority, the time invested by the parties with the goal of resolution in mind, and the role of the third party neutral to highlight the strengths and weaknesses of each side's case. The lawyer should try to make certain that the client understands four things related to the emotional and psychological aspects of the process

First, the mediator has been hired to settle the case. The mediator represents the deal and only the deal; the mediator is not necessarily interested in justice or fairness. Good mediators generally have strong and assertive personalities and have little trouble expressing themselves forcefully.

Second, the mediator will identify and emphasize every weakness in your case – and then go to the other room and do the same thing to the other party. Your client must be prepared for this reality.

Third, the process necessarily involves incremental movements by each side; the give and take of the negotiation process. The client must be prepared to exercise patience and perseverance as offers are exchanged back and forth.

Fourth, the lawyer must prepare the client for the possibility that the mediation will not end the litigation. If the other side does not participate in good faith and/or it becomes clear that the process will not result in an acceptable result, the client must be prepared to walk away.

From the lawyer's perspective, mediation offers an excellent opportunity to change the other side's perception of the case because the lawyer has the opportunity to talk directly to the opposing party without the filter of opposing counsel. A lawyer, therefore, has to establish credibility and a good rapport with the other side, recognizing that mediation is a collaborative non-confrontational process.

Premediation Steps.

Independent Negotiation.

It is essential for each party to exchange offers and demands before the mediation session, as a precondition to mediation, to minimize the possibility of a wasted mediation effort and reduce the temptation for gamesmanship. The exchange also gives at least a framework for analyzing

competing expectations. The exchange requires the lawyers to take an updated look at the case, plan a settlement strategy, and involve the client. A lawyer should not use mediation as a substitute for talking with the other side and trying to negotiate a settlement.

Choosing the Mediator.

Picking the right mediator depends on the characteristics of the case and the parties involved. The lawyer should analyze what problems exist on the path to settlement. Does your client have unrealistic expectations? Too emotional? Naive about the uncertainties at trial? You should take a hard look at the other side as well. Is the opposing party too zealous? Unable to objectively analyze the facts or law? A lawyer can establish a great deal of credibility with the mediator, or opposing counsel when appropriate, by accurately identifying the obstacles to settlement. The mediator should be selected with a steady eye on what characteristics will allow the mediator to overcome the expected obstacles. The best mediators have the ability to adapt to these obstacles. Judge Harris observed that "no one size fits all" and it is important to select a mediator that can adapt to the mediation environment and "keep things going."

Acting as a mediator is a skill in which training and experience is critical. Sometimes a retired judge brings a level of authority and credibility that is essential to reaching a settlement or convincing a recalcitrant lawyer or client. If the lawyer anticipates that the mediator will have to assert an independent evaluative role to make the other side more realistic – then pick an assertive mediator. Specialized cases, like construction or patent law, sometimes need a mediator with expertise.

The Mediation Agreement.

The parties should enter into a mediation agreement addressing cost sharing, confidentiality, and other matters. The act of signing a mediation agreement is sometimes a helpful commitment to the process.

Getting ready.

Getting yourself and your client ready involves five major elements. First, you have to develop your key settlement arguments including the specific organization of your themes and the other side's weak points. Judge Harris noted that it is important to put all your cards on the table and not hold anything back for trial. The judge observed that so many cases today resolve prior to trial; hence, more reason to play your best hand early. Consider nonmonetary factors that can be elements of a settlement. You should also consider identifying nonmonetary factors that can be used as "bargaining chips" at the mediation. This technique allows for concessions on significant but comparatively painless points.

Second, you have to educate your client about the mediation process and have them participate in finalizing the settlement strategy. The client should be counseled on likely future litigation costs if the matter is not resolved at mediation and their likelihood of success at trial so that they are able to participate in a cost/benefit analysis necessary at mediation. The client should understand that your role at mediation is very different than your role at trial; you will be trying to develop a

rapport with the other side so that resolution can be reached. They should know that expressing anger, sarcasm or disrespect is likely to result in failure of the mediation. John McCammon aptly stated that lawyers must "educate their client that they will not be Rambo in mediation." Further, the client should be told that they are likely to hear things that do not like from the other side and to not react in a manner that may halt the negotiation process. Your client must understand what they are walking into and not be surprised as to how the mediation process will take place. You should also prepare your client to talk directly to the other side if and only if you think this can be done in an effective manner. It may be advisable to have your client apologize to the other side; but only if such apology can be delivered in a heartfelt manner.

Advise your client who should attend, what clothes to wear, the fact that the process may take many hours and other mundane but important points. The lawyer and the client should carefully discuss who will be the party representative. Parties with authority to settle the case must be in attendance. Mediators often cite this factor as one of the more common reasons that mediations fail. Consider how certain personalities may interact when selecting participants at mediation.

Third, prepare a mediation submission including a brief memorandum, the key pleadings, the key exhibits, and any case law with which the mediator should be familiar. The parties generally exchange these materials. The mediation submission should be concise and address the strengths and weaknesses in your case.

Fourth, have a private discussion with the mediator. These private discussions can help the mediator prepare, and identify problem areas, including problem personalities. Private discussions with the mediator permit you to be certain that the mediator understands your legal theories and the facts. It is also an opportunity to identify for the mediator any potential obstacles towards settlement.

Finally, prepare for success. Make a list of agreement points that are essential to your client if there is a settlement. Bring a draft agreement with you to the mediation. Carefully analyze the tax consequences of the possible settlement alternatives.

The Premediation Conference Call.

A premediation conference call among the mediator and the lawyers is helpful to address who will be attending the mediation, logistical arrangements, and the exchange of submissions. Mediators generally require that each party be represented by a person with appropriate settlement authority as well as lead counsel. In cases involving insured parties, a representative of the insurance company is often required. Personal injury cases should be analyzed to determine if there are any third party liens involved. If liens are present, agreements to resolve them should be addressed prior to the mediation. Participants should attend in person as participation by telephone is seldom effective.

Logistics.

The lawyer should make sure that there are adequate facilities available for the mediation including at least two conference rooms and word processing capabilities. Mediation sessions

should start in the morning and the participants should keep enough flexibility in their schedule to allow enough time for completing the process. It is also important that facilities are selected that are comfortable for the participants recognizing that the parties may be there for several hours. Encourage your clients to bring food and drink so as to stay comfortable.

It can be an important and helpful gesture to arrange and pay for good box lunches for everyone to be delivered to the mediation. If you are planning on using power point or other presentation technology, arrange for the necessary facilities.

The Joint Session

We asked Judge Urbanski what was the most important thing about the joint session at the beginning of mediation. Judge Urbanski observed that that a "soft-spoken matter of fact presentation" is quite effective. Similarly, John McCammon observed that "zealous advocacy" does not work; instead, mediation requires a "collaborative process." John commented that so many of the things that work in the courtroom are a complete failure at mediation—for example, at mediation listening is more important than talking; speaking softly is better than speaking loudly and being open is better than hiding information. It may be more effective to present information in a more neutral manner rather than in a more traditional advocacy style. John described one of the most effective mediation presentations that he had ever observed portrayed the strengths and weaknesses of the case so effectively and fairly that one would not know which side the lawyer represented. This resulted in disarming the other side, establishing credibility and a strong rapport that led to a successful mediation.

The joint session should be conducted in a conciliatory tone. Forcing the other side into a defensive posture may result in the failure of the process. Judge Harris commented that a bulldog or abusive approach is "likely to cause people to get pride" hurting the chances of a successful mediation. The lawyer with good mediation skills will express appreciation for everyone attending and a desire to resolve the dispute on a fair basis. Each side makes a presentation. Whether or not the clients participate in these presentations depends on the case and the clients.

As noted above, this is the lawyer's opportunity to change the other side's perceptions – of the facts, the merits of your case, the weaknesses in their case, and the capabilities of the lawyers. The lawyer gets to speak directly to the other party in a structured and effective setting. Some lawyers effectively use power point, medical illustrations and other presentation technology in these joint sessions. Exhibits and demonstrations can be used to great effect and the ability to present the appropriate emotional aspects of the case, consistent with the nature of the case, is a valuable skill.

A lawyer sometimes must resolve the dilemma of whether to use good evidence when the other side does not know about it or has not recognized its significance. One way to resolve the dilemma is based on whether your client wants the case to settle. If you think the case will settle and your client prefers a settlement – evidence that helps the case is useless in affecting its settlement value if the other side does not know about or understand the significance of the evidence.

An effective presentation should be crafted with knowledge that your audience is the opposing party. You should talk directly to the party. You will want to highlight the strengths of your case and diffuse any weaknesses in your case. Your presentation should be delivered in a courteous yet compelling manner. Any comments or questions posed by the opposing litigant or counsel should be respectfully heard without interruption and responded to completely. You should turn off cell phones and blackberries so that you can actively listen and observe your opponents verbal and nonverbal communication.

The Private Caucus

The private caucus includes opportunities to reevaluate aspects of the case in light of the other side's presentation or the mediator's comments. Waiting for the other side to go through that evaluative process can involve long periods of – waiting. The parties can expect the mediator to become more assertive and more evaluative late in the process. Again, the lawyer should prepare the client to expect these developments. The lawyer should also seize the opportunity to request that the mediator highlight strengths of your case to be communicated to the other side.

Particularly in commercial litigation, there are opportunities for creative negotiations involving nonmonetary aspects of a settlement that address the parties' interests other than just money. The best mediators will push each party to identify what interests are behind their litigation positions and how an agreement can be crafted to address those interests.

Lawyers should not be shy about requesting that the parties and/or the lawyers be brought back together to discuss certain issues if shuttle diplomacy does not appear to be working. If it appears that a certain personality is creating an obstacle in the mediation process, it is critical to identify it immediately and attempt to fix the problem.

The client should also be counseled that things they say in private caucus to the mediator may be repeated to the other side. Hence, they should be thoughtful about what is said to the mediator.

The Many Faces of the Mediator

Every mediator has different talents and strengths. It is critical that the lawyer do his or her homework prior to the mediation and talk to others that have worked with the mediator to understand the mediator's particular style. The lawyer must prepare the client for the possibility that the mediator will express his or her negative evaluation of their case. Judge Urbanski observed that some lawyers want the mediator to do the negotiating for them. It is, however, the lawyer's job to marshal the positive arguments, disprove and minimize the opposing arguments, and give the mediator the tools to dismantle the other side's position and undermine their confidence in their case.

On the other hand, there is a natural tendency to treat the mediator as an authority figure with the corresponding desire to hear what this authority figure thinks about the dispute. The lawyer, however, must make sure that the client is not unduly awed by the authority of the mediator and cannot let the mediator push him or her around. If a client who has not been properly prepared

hears a mediator make negative comments about their case, they will be understandably distressed.

Finally, it is an accepted practice that judicially appointed mediators do not tell the trial judge about the mediation proceedings and related communications. If there is doubt or concern about this issue, it should be discussed frankly with the mediator.

Deal/No Deal

If the case is settled, it should be reduced to writing and signed before the parties leave. A settlement template should be brought, preferably on a laptop, that can be easily edited.

If there is no settlement, the effort may not have been wasted. Settlement negotiations can continue either with or without the mediator. If the parties are dissatisfied with the initial mediator, they can choose another and try again. In any event, the lawyer has had the opportunity to influence the opposing party's analysis.

Mediation and negotiation skills are a critical component of a necessary larger skill set for lawyers. Lawyers have trained for centuries in the techniques associated with the battle of litigation. The art of collaboration with the opposing lawyer, the mediator and the opposing party necessary at mediation is still a relatively recent skill still being honed by lawyers. In many respects good trial techniques are the opposite of good mediation techniques. A good result will generally follow so long as the lawyer is prepared, understands the issues and recognizes that advocacy in the courtroom is very different than advocacy at a mediation.