BUSINESS LAW TODAY

Mediation as a Dark Art: A Mediator's Message to Parties Seeking to Settle the Difficult Case

By David W. Henry

If, as many mediators will say, the mediation session is the most important day in the life of the case short of trial, why is there not a whole lot more time and attention given to the art of mediation advocacy? How do we teach the mediation process when it is undertaken in a confidential and privileged setting where the attorneys and litigants are by rule or statute precluded from repeating, taping, or otherwise disclosing mediation communications? Finally how many cases resulting in bad outcomes might have been resolved on more favorable terms if a better mediation had been held? Given the prohibitive time, cost, and uncertainty of trial, all of these questions warrant discussion.

We need to rethink the way we approach and teach mediation. So we are clear on terminology, "mediation" as described here is a settlement conference attended by the parties and their attorneys and facilitated by a third-party neutral paid by the parties by the hour or day. Typically, there is an exchange of positions through statement of counsel in a group session with all in attendance, and then private "caucuses" are held at the mediator's discretion through which the mediator explores positions, wants, and needs, and from this creates or solicits offers and counter-offers. If a settlement is not reached after exhausting discussions and there is no plan and perceived benefit in continuing discussions, then an "impasse" is declared.

Part of the problem in becoming better mediation advocates is didactic. Mediation strategy is hard to teach. Mediation is a dark art. One can witness a stinging cross examination, an eloquent closing argument, parrot language from a previously filed brief, and dazzle the jury with rehearsed audio-visual embellishments. No equivalent talent, skill, or transcript can be readily exported from a successful mediation session and offered up as an example of effective mediation advocacy. Lessons learned in mediation pass only by word of mouth, and due to confidentiality concerns, have to be sanitized, generalized, and abstracted. Sterling examples of mediation advocacy cannot be duplicated or recorded. Mediation occurs in a black box where there is no public viewing.

Recognizing the didactic impediments to teaching mediation, we might also ask why the courts don't demand more in the form of preparation. Why are there no mediation case management orders telling the parties and attorneys how to prepare for mediation? Why don't more states follow the Florida model and send every state and federal civil case (save a select few) to mediation before trial? See Florida's Mediation Confidentiality and Privilege Act, Fla. Stat. 44.401, et seq., and Fla. R. Civ. Proc. 1.700–1.750. Why isn't there a court ordered procedure and commonly implemented "to do" list for attorneys and clients to complete before the mediation session starts? Mediations do not come with attendant rules that compel preparation. Consequently, mediation preparation may well be lacking as lawyers focus on the calendar-driven and mandated requirements in the litigation.

Mediation preparation is left to idiosyncrasies of litigators who may have little or no formal mediation training. Why are there no court orders or recognized and well known "best practices" guiding the attorneys and litigants in their mediation preparation? The answers are probably several. Perhaps because judges who set trial orders do not think they should dictate the circumstances under which settlement discussions are had. Perhaps judges dislike mediation or they never considered a pre-mediation order as within their powers. To be sure, we do not want the court to conduct the mediation or enforce arbitrary standards like "good faith" that affect the unfettered right to self-determination. Ideally, attorneys would develop a pre-mediation checklist, because there are

things to be done in advance of mediation that will make the mediation session more fruitful and avoid impasse. But short of that, a "pre-mediation" order might elevate the extent of preparedness and suggest in a helpful way how the parties should prepare themselves to mediate.

We do ourselves and clients a disservice by not effectively preparing ourselves for mediation and for not conducting mediation preparation with the same earnestness as trial preparation. Here the problem is likely one of traditional perception: we don't take mediation as seriously as trial because it is not scripted or rule driven. In mediation, the art of lawyering in the traditional sense, the application of fact to law, and a lawyer's knowledge of evidence and procedure is of little value. Mediation doesn't require "litigation" skills. Plus mediation lacks the drama, emotion, and public spectacle of a trial setting. The mediation is hidden from public view, not recorded in history, and not memorialized in literature or film. Reputations are not made or lost in mediation. The darkness of the art leads to the difficulty in teaching it and thwarts appreciation for its strength and purpose. Those who are the benefactors of great mediation advocacy and who achieve settlement have few ways to convey the greatness of the advocacy or creativity that led to the deal. The confidentiality and privilege attaching to mediation is a limiting factor in the appreciation of this process.

Part of the problem may stem from the inconsistent use of mediation in civil cases. This results in rather wide and disparate levels of experience in both mediators and mediation participants.

This author submits that for too many, mediation planning is minimal and mostly about the "who, when, and where." Logistics are usually the chief concern, and to be sure, this is important, but there is a higher level of practice to be considered. There is also some skepticism about the process by late adopters that probably accounts for some lack of attention to the preparation process.

In jurisdictions where there is an evolved mediation practice and statistics are maintained, a clear majority of the cases settle at the mediation conference or relatively soon thereafter. Even a slight increase in the number of settlements at mediation would have a profound impact on our clients, the cost of litigation, the dockets, and the burden on the judiciary as a whole.

Some of the mediation sessions that have reached impasse might not have done so with better mediation preparation, and the cause of some failed mediations may have their origins in the inactivity of the attorney in the weeks *before* the mediation conference. Mediation preparation is a meaningful (and also billable) activity that is too often ignored.

Create Your Own Mediation Countdown

Litigators are calendar-driven animals, and so our plan for improving mediation preparation is tied to the lawyer's calendar. Each of the steps we suggest will be tied to a date prior to the mediation. The timing is, of course, subjective, and the time frame is malleable, but the key is to begin thinking in stages. When selecting a date for mediation, leave enough time following mediation to deal with unexpected twists and turns if the case does not settle. It is surprising how many attorneys schedule mediation with little forethought and find themselves mediating on the eve of trial when there is little opportunity to react to new information or positions.

Do not set mediation at the very end of the discovery period. In a well-managed mediation, you almost always learn more about your case and the opposing position. You may also learn there is a corporate representative or attorney that has not properly evaluated the case or does not understand his or her own liability. There is no one-size-fits-all solution. Letting the court set the timetable for mediation may be a mistake. In large cases, it is important to consider that while you may be ready to mediate at a particular time, others may not be for a host of reasons. In the sections below we discuss how to set up the mediation so as to achieve the best chance for settlement.

Selection of the Mediator

While a magistrate judge conducting mediation is expected to keep and maintain discussions as confidential, there is still some risk to the client in mediating with a magistrate. For example, if the magistrate is also making pre-trial rulings, the client's settlement position or an off-hand comment by someone may annoy the magistrate. With private mediators, there is no risk of offending the court in the mediation session. The dynamics of the process suggest that private mediators are preferable. And after the formal mediation conference has ended, a private mediator can bird-dog continued discussions in a way a magistrate cannot.

I almost always defer to opposing counsel's choice of mediator regardless of what side I am on; my evaluation doesn't depend on what others think, but opposing counsel and his or her client might be influenced by a friendly face. If I insist upon a mediator that the other side distrusts for any reason, the intellectual underpinning of the process is threatened. The mediator must be perceived as neutral or favorable by the other side to be the best communicator of your message. This is not unlike the "sponsorship" theory of evidence where the probative weight of the evidence is positively or negatively affected by the proponent of the evidence. Your last offer may be more positively received if it carries the imprimatur of approval of a trusted mediator.

Identify the "Right" Participants

If you represent a corporation or other entity, the day-to-day representative for litigation purposes is not always the best representative for mediation. Think about who should be present. Politely insist that key decision-makers, who initially promised to participate, participate in person. Waiting until a week prior to mediation to learn that your mediation representative is someone different than you planned is potentially ruinous on several levels. Tell any reluctant senior manager that while the day-to-day litigation activity can be delegated, settlement decisions demand his or her personal attention, and that only with that participation are creative solutions possible.

Step outside the four corners of the case. Is someone other than the day-to-day litigation representative a better choice? Does he or she really speak for the collective will of

the company? Has the litigation representative made a poor decision to litigate and is now hesitant to cut his or her losses for fear of repercussions by superiors? If so, you will need to diplomatically cut through to management while preserving your relationship with the day-to-day litigation representative. If you bring someone to mediation who cannot sell a settlement to the company, or refuses to do so, you will have done yourself and the client a huge disservice.

Mediations that lack key and informed decision-makers are like team sports with the star player on the bench. Be polite but firm on attendance. If senior management is unwilling to attend mediation in a case you believe warrants their attention, you may have larger problems. There may be unresolved internal disputes over how the litigation should be handled, and those disputes may preclude a settlement at mediation.

Be Mindful of Who Else is Attending the Mediation

In emotionally charged cases where there is great animosity between the parties or counsel, consider whether the parties should convene in a joint opening session. In rare cases you may wish to dispense with a joint session, but only if the parties cannot be trusted to behave. Yelling and shouting should never occur, but sometimes lawyers lack the ability to control their clients. Think about the interpersonal dynamics before walking into mediation. Talk to the mediator who can explore this issue on your behalf. Some unpleasantness and hesitancy to meet the opponent is expected. Push past that. Face-to-face encounters are only a concern if there is a real and legitimate risk that the process will be derailed. Some dislike, resentment, or hostility is common and not to be avoided. Clients should feel some discomfort. This is a feeling that promotes settlement.

Make sure every other party has the right representative. Ask the other side who is attending, and if they are not known to you, ask opposing counsel to explain what they do and their position in the company. Be blunt. Tell them that you are committed to having informed decision-makers and you expect the same of them. You need to make the inquiry several weeks prior to mediation so that if you or opposing counsel needs to make a change in participants, it can be accomplished without necessarily moving the mediation date and creating a scheduling problem for others. If the other side appears content to send someone you perceive to be less than ideal, use the mediator to diplomatically intercede. Recognize however, that your ability to effectuate a change in personnel is limited.

Don't Confuse Business Savvy with Risk-Assessment Capability

Once the representative is chosen, you must begin an aggressive period of education 60 to 90 days or more before mediation session. The ramp-up time is proportional to the complexity of the case and the exposure presented. Educate the client on the case, the exposure, the parties likely to appear, and the potential range of demands. Do this in writing. One danger is assuming that the client or carrier representative really understands the case. That assumption is flawed on many levels. Many lay people, though otherwise sophisticated, simply do not understand the summary judgment process, rules of evidence, limitations on testimony, *Daubert* motions, fee exposure, or the time needed to prepare for trial, and have no real experience in assessing litigation risk.

Even if you have written frequently to the client and carrier along the way, do not assume your letters were given great attention. Reading litigation summaries is not always a high priority for some managers. Psychologists will tell you that most non-lawyer clients filter out the bad news in letters.

If you wait until the week before mediation to give a report, there may be a host of problems. You may have settlement authority issues because the projected settlement is greater than anticipated and senior management must therefore be consulted. There may be external or internal business considerations posed by a settlement that you as an attorney have not considered (e.g., how would an injunction as part of settlement affect our distributors and customers?) This can lead to a host of questions and a client-education process you will not have time to complete. Get your pre-suit mediation summary with potential mediation outcomes into the client's hands 30 days or more prior to the mediation conference.

Expectations may be unrealistic for any number of reasons. Make sure that you start managing the expectations early in the process and that your reporting is consistent with the expectations you have outlined. Some clients confuse their own personal success or expert knowledge with their ability to evaluate their case. You are the only professional expert in this area. They are at best amateur evaluators. Evaluating the case is your job, and it is the hardest thing we do. Do not let the client's optimistic perception of the case color your independent evaluation. If the client has been harboring wild ideas that are unrealistic, it is better to air the perceptions or misperceptions several weeks prior to mediation, as opposed to a few days beforehand. Overly optimistic summaries are a recipe for disaster at mediation. If the only pre-mediation report the client reads is the same one you send to the mediator in advance of the mediation session, you will do your client a huge disservice. Give them the good, the bad, and the ugly in a separate report at least 30 days prior and a shorter report to the mediator or position statement for the other side.

Multi-party Considerations

Most defense attorneys do not prepare the *other defendants* for mediation. This is a chronic shortcoming. Co-defendants and their attorneys too often fail to work on the other parties likely to contribute. This is no doubt owing to customary collegiality and "no-finger-pointing rule" between defendants. That no-finger-pointing rule among defendants may make sense at trial, but this is mediation. Irrational, ill-prepared, or plainly clueless defendants whom you believe are not inclined to pay "their fare share" at mediation are not entitled to the benefit of your silence. For whatever reason, too many defendants take a lackadaisical attitude toward the mediation preparation being undertaken (or not) by co-defendants and their attorneys. This

may be the biggest single mistake we see in the realm of mediation preparation in complex cases.

There is only one good way to find out if the co-defendants share your views and expectations. Ask them. Telephone calls 30–40 days prior to mediation (or more in big cases) are critical. Do the other attorneys really understand their exposure? What do they think of your client's case? Do they have coverage you do not know about? Defamation, copyright, and trademark claims, for example, are notoriously underreported to insurers by even experienced attorneys. Don't be afraid to make the coverage argument for the co-defendant. Ask all parties who they are bringing to the mediation. Suggest they bring someone equal in stature to your representative. From all of this, you will find you have consensus or divergent views. Either way, you will have advanced your understanding of what is likely to happen at mediation.

Flush out the unprepared or seemingly uncooperative co-defendants well in advance of mediation by well-timed questions, forcing them to explore the merits and aimed at gaining consensus before the actual mediation conference. Ask them to consider a pre-mediation joint defense offer. Whether they make an offer is unimportant. It provides a basis for discussing expectations. Discuss contribution percentages and probable exposure. Again, the discussion will reveal perceptions related to liability and damages. If one party seems intent on low-balling the money and wants a picnic at mediation, quietly encourage others to stick some fire ants in their basket. Many times the impediment to settlement is in the defense camp, not with the plaintiff. Figure out who will be an impediment to settlement well before the mediation conference and apply behind-the-scenes pressure. Start the dialogue 30 or 40 days before mediation or more, so you will have time to shape or change impressions and thinking if necessary.

Concluding Comments

The tasks to be performed 30, 60, or 90 days prior to a mediation session are not widely articulated in articles or CLE materials. Mediation is a far superior dispute resolution tool compared to trial. No one has to appeal from mediation. Mediation temporarily supplants the longer litigation process. Mediation is often described as a "break" from the litigation, and that mindset (suggestive of a holiday) is not conducive to careful planning and analysis. Unfortunately, because the mediation process itself has few formal rules, this may explain why there are few instructional guidelines for teaching preparation. Like a good day of fishing, the key to a good day at mediation is preparation beforehand. The best fisherman cannot overcome the wrong bait, tackle, or water conditions. Make telephone calls to all of the attorneys *two or three months* prior to the mediation. At a minimum, give or get a demand. In multiparty cases, figure out where the obstacles to settlement lie. Identify the potential impediments to settlement and problem decision-makers 30–60 days prior to mediation when you can still do something about it. Be a polite busy-body. Find insurance coverage for others early in the case. If you will be expecting settlement contributions from other defendants, use your good relationship with the plaintiff's attorney to throw rocks at stubborn uncooperative co-defendants who do not seem willing to pay their fair share.

Try to "pre-mediate" with your client by proposing offers or demands. If you have a corporate client, make sure you have the true and best voice of the company. Find out beforehand if there are unresolved internal debates. If you have worked hard prior to the mediation, there will be fewer surprises or at least anticipated obstacles, and thus you will have an increased chance for consensus leading to settlement.

Focusing on your client's wants and needs is too simplistic. The truly effective mediation advocate and participant knows before mediation how the other parties are likely to react to one another and which party may be the most difficult player. If the mediation unfolds in a way that is close to the client's expectations and the expectations of the other parties, everyone will have less anxiety and have more affinity for a deal, because their experience is intellectually shared. A case should never impasse due to an informational deficit, a lack of authority, fear of the process, or internal political or emotional barriers to settlement. Many of those problems can be overcome if identified in the days and weeks before mediation. Settlements at mediation have their start in the preparation that gets done by counsel in the weeks and months before the formal conference. Good preparation efforts before mediation are rightfully billable and meaningfully benefit the client by giving it and the other litigants the best opportunity to settle the case if desired.

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ADDITIONAL RESOURCES

For other materials on this topic, please refer to the following.

Dispute Resolution Committee

Find more information at the Dispute Resolution Committee's website, and be sure to check out the committee's Podcasts by clicking here.

Business Law Section 2014 Spring Meeting

Program: The Essential Components of a Successful Corporate Dispute Resolution Program, and How to Ensure an Efficient Arbitration Process Using the AAA's New Commercial Rules

Thursday, April 10, 2014,
8:00 AM - 10:00 AM
Presented by: Dispute Resolution

BLS Programs Material Library

Cross-Border Deals: State of the Art of International Negotiation, Mediation and Arbitration (PDF) (Audio)
2013 Annual Meeting