Mediation Advocacy: Winning Ways to Settlement as Your Client's Advocate at Mediation

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SOME THOUGHTS ON DISPUTE RESOLUTION

There has been considerable recent publicity about resolving lawsuits through private mediation services. What is this all about?

First of all, the "litigation explosion" has cooled down these past several years, our court systems are still struggling to keep their calendars current and to move cases along. Actually, our San Francisco Superior Court has done a commendable job of administering its case load, thanks to attentive judges, volunteers from the San Francisco Bar Association who assist in serving as mediators, and case management that forces the parties to bring their cases to a conclusion or be ready for trial within a year or so. Getting a Superior Court case to trial in a year requires careful planning and effort by the parties' lawyers, so there are real advantages to trying to settle early. Early settlements, of course, mean fewer costs for the parties in attorneys' fees and litigation costs. The true lawyer professionals will make a real good faith effort during the initial stages of litigation, and even before a lawsuit is filed, to resolve their differences.

Both our state and federal courts encourage early settlement. There is an Early Neutral Evaluation and Settlement Program ("Alternative Dispute Resolution," Rule 16-8 of the Local Rules of the United States District Court for the Northern District of California) in our federal courts and initial Case Management Conferences in state court cases at which settlement and other resolution alternatives, such as arbitration and mediation, are explored.

Settlement efforts can be conducted in several ways: a) informal negotiations through the parties' lawyers ("the old fashioned way"); b) court supervised mediation and settlement alternatives; and c) private mediation. In my practice I use all of these. However, I find that in state court, the judges are so busy, they really do not have the time to devote long hours (the better part of a day) to the more involved cases. In that case, a Bar Association volunteer lawyer may be available. In federal court, the magistrate judges (lawyers who work full time to assist the judges) usually handle settlement efforts and have more time to do so.

Despite these court supervised programs, another and often used alternative is the private mediator. These services emerged in the 80's and have grown to the point of offering the public, at a cost, settlement, mediation and arbitration services that can be tailored to suit the particular case. The American Arbitration Association is one of the early services which, while originally devoted to mostly arbitration, now offers mediation and settlement programs. The Judicial Arbitration and Mediation Service (JAMS) has offices nationwide with retired judges and trained lawyer mediators, many of whom specialize in particular types of cases. These services, and others like them, provide a valuable resource for resolving disputes. I would say that my firm uses private mediators in at least half of the cases in which we represent a party, usually a plaintiff or claimant. This past year we have privately mediated a case at least once each month and possibly more.

Private mediation services are not controlled by the courts. The parties use them voluntarily; they cannot be forced to go to them. However, because they offer the parties a mediator or arbitrator who can dedicate time and effort to a case (rather than being

distracted by other assignments), they offer a very desirable alternative for the mediation process.

The Judicial Council of California issued comprehensive ethics standards for contractual arbitrations (where the parties agree in a contract to arbitrate any dispute arising out of the contract). ("Ethical Standards for Neutral Arbitrators in Contractual Arbitrations.") These resulted after a series of articles appeared in the San Francisco Chronicle, along with an editorial, all harshly criticizing unethical arbitration practices. The standards require neutral arbitrators to make detailed disclosure of any financial relationship or conflicts of interest between arbitrators and companies, attorneys or parties involved in disputes. These apply to arbitrations where the arbitrator has the *decision making responsibility*, which is often binding on the parties and not appealable except in limited instances. The New York Stock Exchange and the National Association of Securities Dealers have sued to set aside the standards. The California legislature also passed various bills geared to clean up what appeared to be arbitral ethical abuses.

While these standards technically do not apply to mediators, who do not have decision making responsibilities since they use their skills to try to get the parties to *agree* to a resolution of a dispute, mediators should also disclose to the parties any potential for conflicts. This is so that the parties can select a mediator who truly is a "neutral" and even though innocently, may have interests that create a perception of a conflict.

Usually the parties meet in an initial joint session during which the mediator explains his role as a "neutral," confirms that the negotiations are confidential (what is

said or written cannot be used in court), asks questions to clarify issues and positions (usually written "briefs" are submitted beforehand by the parties), and asks if any party wishes to make an initial statement (which is not required).

The parties then go to private rooms and the mediator moves back and forth discussing issues, resolution alternatives, offers to settle and counteroffers, and tries to get the parties to a point where they agree. It is often a difficult and frustrating process, and sometimes it seems as if the parties are not working towards the goal of trying to resolve the case. There usually is a point in time when it appears that the case will not settle, then there is a break through, and the matter resolves. The settlement is then confirmed in writing.

It is the mediator's job to get the parties to that point. Trained professional mediators – retired judges or trained lawyers, and sometimes lay persons (such as in family law matters) – are very good at using their training and skills to accomplish the goal of resolution. However, it often requires the parties to put aside their emotions (often anger, which is the most powerful emotion), to reach a solution acceptable to all parties.

In my practice, I stress early mediation. I use both the court supervised and private services, selecting the one that I believe will have the best potential to achieve the goal of an early settlement. If I can get my client's case resolved early, without the high expense of litigation and the time and risk involved in full blown litigation, I have done the very best for that client. I believe the true professional lawyer shares this goal of an early settlement. With the growth of court supervised programs and the private services,

the parties have resources to explore settlement at an early stage with trained professional mediators who take pride in bringing parties together before they really “take off the gloves” for full blown litigation.

CHAPTER 2

A LOOK BACK AT THE PROCESS OF DISPUTE RESOLUTION

I grew up in the Midwest the son of a lawyer who specialized in defending tort and insurance cases. My Dad, also Guy, was General Counsel for one of the first regional insurance brokerage houses that handled claims for its insureds locally. It was innovative for a brokerage to have that authority, but it worked. My Dad ran that claims operation for several decades until his "retirement" in his late 70's. He was an excellent negotiator and stressed the importance of resolution before trial as usually the best solution. Oh, he knew some cases had to be tried but he subscribed to the line from the Kenny Rogers song, "You got to know when to hold 'em, know when to fold 'em," a phrase that is occasionally heard from my colleagues when talking to a client about settlement.

When I started law practice in the mid 1960's the word "mediation" was not commonly used. I am not sure I heard the word more than a couple of times while in law school.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and negotiated "the file" directly with the plaintiff's lawyer. Often the first real opportunity to negotiate a case was the "Mandatory Settlement Conference," which later became part of the court rules, and which ordinarily was held quite close to trial. Other than direct negotiations, there was little involvement by the court in settlement talks before then. At

that time there were no Case Management Conferences. Courts were ordinarily not very active in the case until a Pre-trial Conference was held, at which time the court might inquire about what settlement talks have taken place, and if the parties were interested in a judge, other than the trial judge, meeting with them to see if some settlement efforts could result in a resolution.

The federal courts were required to provide for ADR procedures in civil actions in the Alternative Dispute Resolution Act of 1988 (28 U.S.C. sec 651 et seq.). Prior to that in 1985, California provided for Mandatory Settlement Conferences in Rule 222, California Rules of Court.

The words "alternative dispute resolution" or "ADR" were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected or appointed to the bench and stayed to retirement. They did not leave these careers until that time. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification for mediators will soon be common, if not required. Standards have been set for mediators in the conduct of a mediation. (See, e.g., Cal. Rules Court 3.850 et seq.) While it seems that there are more mediators than

lawyers, the litigation process seems to demand this resource for dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

Also, lawyers are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning mechanism. That is good because it forces the parties to think about where they are going, what the results might be, and how much it will cost. That is, a "cost/benefit" analysis is part of the initial planning process and evaluation of the case.

One of the very important skills of a true trial lawyer or "litigator" is to know how to leverage a case to the point at which the parties are motivated to discuss settlement. I describe this point as a "plateau for resolution." That is, it is a point where the parties have an opportunity to see what has occurred, evaluate the results for motions and discovery, and then look down the line at what will be done as the case progresses towards trial and a "forced resolution." Does your client want to proceed? Does it know the risks? Is it aware of the significant costs involved? What is the potential settlement range versus the "net" that is likely to result if the case is tried?

Recognition of this plateau and then communicating with the client about the case – both past and future – is an essential ingredient of qualified trial counsel. It is our duty to explore the out of court resolution and advise the client about the several alternatives for direct negotiation, mediation, or other alternatives to dispute resolution, such as non-binding arbitration, submission of the case to a neutral evaluator (or panel) to get a read on the merits and value, or even focus groups to gain information as to how a jury might

perceive a case which can contribute to a client's willingness to negotiate or mediate the matter.

CHAPTER 3

THE NEW LAWYER -- HOW SETTLEMENT STRATEGIES AND OPPORTUNITIES HAVE AFFECTED OUR RESPONSIBILITIES AND FUNCTIONS AS LITIGATION COUNSEL

How will our judicial system work toward dispute resolution in the future, say five, ten or even twenty years from now? What can we expect if we are forced to resolve a legal matter in the state or federal court systems? Will the system find ways to efficiently process both large and small matters? Or, will it remain costly, involving pre-trial depositions, expert witnesses, and trials? Will the courts establish alternatives to full-blown trials that will prove to be effective ways to resolve disputes?

Anyone who has been involved in the dispute-resolution mechanism knows what a laborious and often mysterious process it can be. Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results. Because of the mediator's neutrality, the settlement resolution is more likely to be perceived as just. Mediation is a defined process that is recognized by attorneys and judges. It is a voluntary, non-binding forum in which the parties agree to conduct negotiations using a neutral intermediary who guides the parties through the legal process. The mediator has no decision-making authority. Rather, it is the mediator's duty to work with the parties to agree on the terms for conflict resolution.

During mediation, the attorney's responsibility is both as an advocate and counselor to the client. When advocating an issue, the skills used by an attorney are different than the approach used in a courtroom. An attorney also counsels the client on issues during the mediation.

Mediation helps litigants achieve settlement. When compared to the expense of prolonged litigation, mediation may be the best deal. The client has present use of funds, rather

than the hope of financial recovery later, while also saving money on pre-trial and trial costs, as well as possible appeal. Litigation costs often surprise clients, particularly if expert testimony is needed. The fees for experts are quite high, usually involving several hundred dollars per hour. During the amount of time experts need to prepare, testify at deposition and appear in court, several thousands of dollars in costs may be incurred quickly. Thus, at an early mediation, a major factor in considering whether to settle is the future expense of proceeding without settling.

If possible, it is important to work toward mediation as early as possible so that the client may reach his or her goals. Bear in mind that the client is not going to push early mediation. It is the attorney's responsibility to recognize the advantages of an early mediation and resolution for the client.

Judges rarely are the source of mediation information for litigants because doing so might interfere with the attorney-client relationship. Additionally, judges typically see the litigants only late in the litigation process. Given the central role of attorneys in the litigation process, attorneys may be the most appropriate persons to provide litigants with information about the mediation process.

Research shows that a key factor in litigants' willingness to use mediation is the recommendation and encouragement of their attorneys. For example, "a majority of parties in domestic relations cases (68 percent men and 72 percent women) who chose to use mediation said their attorneys had encouraged them to try it, whereas less than one-third (32 percent men and 18 percent women) of those who rejected mediation had been encouraged by their attorneys to use it." (R. Wisler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations,* 2 Pepp. Disp. Resol. L.J. 199, 204.)

Mediation involves an objective intermediary who negotiates with the parties to avoid or end the highly confrontational and tension-filled process of litigation. From the plaintiff's perspective, it is a means of essentially selling the lawsuit to a defendant, who buys off the expensive and exposure of ongoing litigation. It involves an exchange of offers and counteroffers made in more of an informal business environment, rather than a formal courtroom.

Hostility, anger, finger pointing and accusations are not part of the mediation process. Diplomacy, salesmanship and patience are the bywords. The parties and their lawyers may be firm, tough and even hard-nosed at times, but they need to do it politely and diplomatically. The parties need to be prepared for mediation by having the appropriate attitude before attending the mediation. Unlike a deposition, this is where the client enters the business process of resolving disputes and essentially steps outside of the courtroom.

It is advisable to have a pre-mediation conference several days before the mediation occurs. The attorneys or mediator should describe the role of the mediator; explain that it is the client's decision to settle; and that what takes place at the mediation is confidential. It may not be brought up during a court trial. Many times, the client's perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision making process.

Also, the mediator will often comment on issues and give his or her views on each side's case. The mediator may offer the pros and cons of settlement versus proceeding further. This provides an objective, third-party view of the matter, which may be very valuable.

As the future unfolds, more and more courts will be creating ways for litigants to enter

the mediation process at an early stage. The San Francisco Superior Court recently instituted an early mediation program. The San Francisco Bar Association also has a program for early mediation. The federal court has a program of early mediation and "early neutral evaluation" for several years. The future litigation process will rely more on courts and counsel directing litigants to a mediation alternative to litigation – the earlier the better.

One concern is the reluctance of counsel to guide a case toward the mediation process because of the economic motive of being able to continue to bill a case and earn revenues. Frankly, I have seen evidence of this with opposing counsel in some of our cases. It is indeed troublesome when counsel will not even communicate about mediation even weeks in advance and even after I have offered to work together to get a discovery plan, or an exchange of information so that we can each have access to what we need to evaluate the case before we discuss resolution. In these troubled economic times, when law firms are folding or letting staff go, there is a concern that the motivation for economic survival will override the professional obligations to work towards a timely and efficient resolution of a dispute.

There is nothing to lose by mediation and only much to gain, and it is our duty as lawyers to see that a case is tested in that process. Who knows, a good result on both sides may mean more business rather than less.

CHAPTER 4

WHAT IS A RESOLUTION ADVOCATE?

At our firm we describe ourselves as "Resolution Advocates" and our services as "Resolution Advocacy." Why? Because that is what our clients want. They want their disputes resolved in a timely manner. In fact, I stress Litigation Management and consider settlement efforts as a high priority in that process. Resolution by settlement is seldom anything but a positive result. If the case is meritorious, then the other side needs to know that. If there are disputed issues that create uncertainty in the outcome, then the parties should recognize that the end result is not guaranteed and that should drive them to discuss resolution by settlement, including mediation. If the case goes sour after it is worked up, then the client needs to know that, and a resolution short of trial must be considered to avoid a catastrophic result by trial.

Resolution advocacy includes being prepared to try the case and pursue an appeal if that is the only alternative. But it also means that alternatives to trial must be considered, and the case managed so that it can reach a plateau at which direct settlement discussions or mediation are appropriate for all.

I teach our lawyers to actively manage their cases and to look for resolution alternatives in that process. I define "Litigation Management" as follows: The effective planning, organization, delegation, and supervision of litigated matters so as to gain the advantage crucial to achieving an ***acceptable and timely resolution*** of the dispute.

We are experienced and trained in managing our cases to gain the advantage and finding the best and most effective path to resolution, whether through mediated settlement, trial or arbitration.

We use our skills and experience as trial advocates to provide the vision to see how the case can best be managed for an early and effective evaluation and prepare it for settlement. Most of the time this is done through mediation. Our goal is to persuade our adversaries that direct negotiation or mediation is preferable to challenging our client's cause at trial.

Of course, it is the client's choice whether a settlement is in his, her or its best interest. But our task is to get to that point where the client has the choice after being fully informed on the potential outcome at trial and the cost and burdens of proceeding. Our job is to get the case and the client to that point and to fully advise the client on the merits and demerits of proceeding versus resolving short of trial. And it is our job to get the case to that point in a timely manner, using all the tools available in managing the case to that end.

In doing this, we provide the litigation expertise through consultants and experts who assist in that process, whether evaluating fault or damages, or determining the financial impact a settlement will have on the client personally so that the client can plan for the future. This planning is not possible if the uncertainty of trial is hanging over the client's head. Planning requires certainty to present circumstances. That certainty does not exist if a dispute significantly affects the client and the client's family or business.

Resolution advocacy is a process that allows us to use our litigation skills to assist the client in charting the future and bringing the client's life into focus and on a positive course.

This is what we do, and we should strive to do it well.

CHAPTER 5

CALIFORNIA SUPREME COURT SPEAKS ON MEDIATION CONFIDENTIALITY

The California Supreme Court, Justice Marvin Baxter, one of the court's known conservatives writing the opinion, has spoken on mediation confidentiality. The Court held that the mediation privilege prevents a client from using testimony regarding what his lawyer told him or did during a mediation in a legal malpractice case by the client against the attorney. The point is that a lawyer can commit malpractice at a mediation and no one will hear about it! Fair? Unfair? The reaction is divided. (See, Kichaven, "Mediation Confidentiality and Anarchy: The California Nightmare," The Los Angeles Daily Journal, February 17, 2011, p. 4.)

In *Cassel* v. *Superior Court*, 51 Cal. 4th 113, 244 P. 3d 1080 (January 13, 2011), the client brought an action against attorneys who represented him in a mediation in a malpractice, breach of fiduciary duty, fraud, and breach of contract action. At trial the attorneys made a motion in limine using the statute relating to mediation confidentiality (Cal. Evid. Code §1119(a), (b)) to exclude all evidence of communications between the client and the lawyer that were related to the mediation, including what was discussed in pre-mediation meetings and private communications between the client and attorneys during the mediation. The trial court granted the motion; the client sought a writ of mandate, which a Court of Appeal granted. The Supreme Court granted review and reversed the Court of Appeal.

Essentially the Supreme Court upheld a broach protection of mediation communications between a client and his lawyer: mediation related communications and discussions between a

client and his lawyer are confidential, and therefore were neither discoverable nor admissible for purposes of proving a claim of legal malpractice.

It also held that the application of mediation confidentiality statutes to legal malpractice actions does not implicate due process concerns so fundamental that they might warrant an exception on constitutional grounds.

So there; that is that! Done, over.

In so holding, Justice Baxter said up front in the opinion:

> "We have repeatedly said that these confidentially provisions [the Cal. Evid. Code cited, *supra*] are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where there is a competing public policies may be affected. (Citations omitted.)"

The ruling also could affect other types of tort or contract claims arising out of mediation practice, including mediator malpractice and insurance bad faith. The ruling has been criticized because it a) prevents the truth from being known, and b) it violates the basic principle that for every wrong there is a remedy. These are points that Mediator Kichaven makes in the cited article.

While Justice Baxter has surrounded the mediation process with an aura of strict confidentiality, his view contrasts with the Uniform Mediation Act (www.nccusl.org). In this Act, a "mediation communication is a privileged." Section 4(a). However, under Section 6(a)(6), "There is no privilege under Section 4 for a mediation communication that is . . .sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct

occurring during a mediation." So, under that approach, the testimony of Cassel, the lawyer, is both discoverable and admissible. It is not protected, and is available in a legal malpractice case, mediator misconduct action or insurance bad faith case. Makes sense to me. It also made sense to the National Conference on Uniform State Laws and those serving on the Advisory Committee on the Uniform Mediation Act and its Reporter, Professor Nancy Rogers of the Moritz College of the Law (a former dean of the law school), and Associate Reporter, Professor Richard C. Reuben of the University of Missouri Law School.

If the rule were otherwise from what Justice Baxter and his colleagues (Justice Chin concurred "reluctantly"[1]) held, would the exception to confidentiality discourage mediation? Mr. Kichaven covers this point and quotes Professors Rogers and Reuben who seem to think not. Also Mr. Kichaven points out that settlement conferences held under the auspices of the court system are not be subject to the mediation privilege in California[2] [although there is a confidentiality as to what takes place which prevents disclosure at trial of the offers, counters and discussions[3]]. So the lawyer could be sued for malpractice for conduct at a court supervised settlement conference but not a private mediation. That does not seem to be right; it is illogical and cannot be rationally justified.

Coincidently a couple of weeks after this case was handed down, in walks a client with a potential legal malpractice claim against his attorney who allegedly sold the client "down the

[1] "The court holds today that private communications between an attorney and a client related to mediation remain confidential even in a lawsuit between the two. This holding will effectively shield an attorneys actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. (See maj. Opn., ante, at p. 28, fn. 11.)"

[2] Cal. Evid. Code §1117(b)(2), which expressly excepts "settlement conferences" held pursuant to the California Rules of Court.

[3] Cal. Evid. Code §1152 relating to "Offers to Compromise."

river" at a mediation, which the client did not find out about until after the deal was done. But the client is now foreclosed from pursuing that claim – or even considering it. An injustice? Who knows as the client will never find out; he cannot.

And, lurking beneath all of this, is another issue: Does the decision raise an ethical problem under Rule 3-400 of the California Rules of professional Conduct, which states: "A member shall not (A) contract with a client prospectively limiting the member's liability to the client for the member's professional malpractice. If a lawyer accepts representation in a case and as part of that representation recommends, and attends, a mediation with the client, is the lawyer in violation of Rule 3-400? In such circumstances, I think not. The insulation from liability results not from the lawyer's contract but from the legislature's adaptation of Evidence Code §1119(a). So the lawyer has not contracted with the client to avoid malpractice. Instead the legislature has simply found that what happens at the mediation cannot be used to prove malpractice. Thus, very simply, does not result from the lawyer's act but a policy implemented by the legislature.

So what will happen now in California? Will there be groups in California who will mount a campaign to the California Legislature to amend the statute to overrule Justice Baxter. With a democratic governor, and a lawyer, Governor Brown, there may be a good chance of altering this rule which puts the clamps on claims that arise from a client's participation in mediation. There is no reason to protect anyone from a sound legal claim if they do not do their job or breach their duties to those to whom they are owed. Professional responsibility is just that – a responsibility to conduct ourselves in any process relating to our representation of a client.

What is more important than the mediation process which is designed to allow clients to explore a settlement alternative to trial. There is no reason to allow any protection from professional responsibility and the standards that we must meet in such an important aspect of the overall litigation process.

I agree with Mr. Kichaven: it is a bad decision, is against the weight of thought and analysis as manifested by the Uniform Mediation Act, and needs to be overruled by the Legislature.

CHAPTER 6

EMPIRICAL RESEARCH CONFIRMS THAT NEGOTIATED RESULTS ARE SUPERIOR TO GOING TO TRIAL

A recent published report of empirical research confirmed that settlement is preferred to trial because the potential result is statistically found to be a better economic result. The newly released study reviews the results on a large number of cases that did not settle after mediation and eventually went to trial and addresses how those cases fared in comparison to the last settlement offer or demand.

The September 2008 *Journal of Empirical Legal Studies*[1], a joint venture of Cornell Law School and the Society of Empirical Studies, has published the results of a quantitative evaluation of "the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations." The study entitled, "Let's Not Make a Deal: An Empirical Study of the Decision Making In Unsuccessful Settlement Negotiations[2]," was done by two faculty members and a graduate student from the Wharton School of Finance, University of Pennsylvania. The study analyzed 2,054 California cases[3] in which the plaintiffs and defendants participated in settlement negotiations unsuccessfully and proceeded to arbitration or trial and compared the parties' settlement positions with the award or verdict. As the study states, it "reveal[ed] a high incidence of decision-making error by both plaintiffs and defendants in failing to

[1] Vol. 5, No. 30, pp. 451-491; available at http://www.blackwellpublishing.com/jels.
[2] The study is the subject of an August 8, 2008 article in the *New York Times*, "The Cost of Not Settling a Lawsuit, 'available at http://www.nytimes.com/2008/08/08/business/08law.html.
[3] These were cases in which results were reported in the thirty-eight month period between November 2002 and December 2005. They involved about 20 percent of all California litigation attorneys.

reach a negotiated resolution[4]."

The study actually builds, as is noted below, on prior research in three studies so that the cases analyzed totaled 9,000 in the past 44 years. It compared the results in selected cases in which the parties exchanged settlement offers, rejected the offers of the other side, and proceeded to trial or arbitration. While the large group of cases were jury trials, court trials and arbitrations were included. The study was based on the report of results from California Jury Research (formerly California Jury Verdicts Weekly), which the authors found reliable.

As it states: "The parties' settlement positions . . . [were] compared with the ultimate award or verdict to determine whether the parties' probability judgments about trial outcomes were economically efficacious, that is, did the parties commit a decision error by rejecting a settlement alternative that would have been the same as or better than the ultimate award."

Prior studies were reviewed and summarized as follows:

- Priest/Klien (1984-1985): Trials occur in "close cases," and plaintiffs and defendants equally make mistakes; plaintiffs win about 50% of the cases that proceed to trial; this is referred to as the "fifty percent implication";

- Gross/Syverud (1985-1986): 529 cases from June 1985 to June 1986 were studied; they questioned the validity of this type of research because the

[4] The study was an update of three prior studies of attorney/litigant decision making. It increased the number of cases used by three times and expanded on the analytical format and variables of the previous studies. As the study states, "Notwithstanding these enhancements, the incidence and relative cost of the decision-making errors in this study are generally consistent with the three prior empirical studies...."

context of the negotiations and relationship of the parties and counsel affected the behavior of the parties;

- Gross/Syverud (1990-1991): Here, 359 cases were studied, and the results conflicted with the 50% distribution of "mistakes"; they found plaintiffs were more likely than defendants to reject a settlement opportunity that was more favorable than the result;

- Rachlinski (1996): He compared final settlement offers with jury awards in 656 cases. His findings were that plaintiff had a higher percentage of error (56.1% of the cases), but the average cost was $27,687, while defendants had a lower error rate (23%) but a greater risk of a bad result, with an average cost of $354,000. He concluded that plaintiffs were risk averse while defendants were risk seeking; that is, the risk of trial in these scenarios benefitted plaintiffs but it cost the defendants significantly[5].

Here is what the researchers found in the most recent study:

- Comparing the actual trial results to rejected settlement offers, the study found that 61% of the plaintiffs obtained a result that was not economically better than the settlement offer, i.e., it was either the same or worse than what was offered;

- In contrast, 24% of the defendants obtained a result that was not economically better;

[5] These findings are consistent with the latest study reported here.

- However, although the plaintiffs experienced more results that were not as economically good as the last offer, the risk of defendants rejecting the last settlement demand was higher.

- When the plaintiffs rejected an offer and went to trial, and did better, *it was not that much better* – an average of **$43,100** over the last offer;

- However, when the defendants rejected the last demand and went to trial, and did worse, *it was much worse* – an average of **$1,140,000** worse!

The study also found that the cost of "decision errors[6]" in failing to accept the opportunities to settle increased between 1964 and 2004. In 1964, plaintiffs obtained worse results at trial than were available through settlement in 54% of the cases, while in 2004 it rose to 64% of the cases. During that same period, the range for defendants went from 19% in 1964 to 26% in 1984 and then declining to 20% in 2004. And, the cases in which neither party committed a decision error decreased from 27% in 1964 to 14% in 2004. Adjusted for inflation, the researchers found that a plaintiff's decision errors increased 3 times, but a defendant's errors were much more costly – increasing 14 fold.

Another interesting aspect of the study is the effect that statutory offers and cost shifting procedures had on the eventual results in cases going to a final decision making process. In California, under Code of Civil Procedure section 998, either party may make an offer of settlement which, if rejected by the other, can shift certain costs, including

[6] A "decision error" takes place "when either plaintiff or a defendant decides to reject an adversary's settlement offer, proceeds to trial and finds that the result at trial is financially the same as or worse than the rejected settlement offer-the 'opps' phenomenon. In absolute terms, the attorney and/or client made a decision error and

those of experts to the other if the result is less favorable than the statutory offer of judgment. The researchers found that instead of encouraging parties to consider settlement because of the cost shifting consequences of statutory offers, these offers had an opposite effect – instead, the parties were more likely to take aggressive settlement positions, resulting in "financially adverse outcomes," than the other parties in the study. The "decision errors" for plaintiffs who rejected these statutory offers was 83% compared to the 61% plaintiffs who were not subject to such. Defendants made "decision errors" in 46% of the cases when facing a statutory offer, whereas the rate was 22% who were not faced with such.

Another finding that may not be surprising is that in cases in which litigants were represented by attorneys who had mediation training and experience, the parties experienced lower rates of "decision error." Indeed, plaintiffs in these cases had a "decision error" of 21%. The authors suggested more research in this area.

It is quite apparent that the most recent study has dispelled the notion that the "fifty percent implication" rules applies. It has established a new dimension of risks for both plaintiffs and defendants in rejecting opportunities to settle. Plaintiffs risk the further costs of litigation and a result that is not that much better, which likely does not justify the investment of time and money in taking a case "to the mat." Defendants, on the other hand, have a huge downside by risking large verdicts against them if they do not appreciate the opportunity they have by a negotiated closure.

The 40 page review of the study's results is worth careful reading. It may also be

important in reviewing the advantages of settlement versus trial with our clients[7].

[7] See also R. Kiser, "How Leading Lawyers Think: Expert Insights Into Judgments and Advocacy," Springer-Verlog, Berlin Herdelferg, 2011 (www.springer.com); "Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients," (same publisher), 2010.

CHAPTER 7

THE THREE "C'S" OF NEGOTIATIONS

Three basic principles are at the heart of settlement negotiations, whether they are direct or supervised in the more formal setting of a mediation: candor, communication, and confidentiality.

The level of candor required depends on the parties, their relationship and the forum. That is, the parties may be more guarded in direct negotiations, whereas in a supervised mediation, the presence of the mediator and the use of such as an intermediary may persuade the parties to be more candid about their case during the negotiations.

Communication is critical to the process. Once the parties stop talking, then there is no chance of a settlement even with a mediator. As long as the parties are talking to each other, even if through a third party, there is a chance for a negotiated resolution.

Confidentiality is also critical to the process. It encourages both communication and candor. The parties must understand that they will not be prejudiced by their exchanges, and that such will not be used against them in subsequent proceedings in the litigation. This assurance of confidentiality is at the heart of negotiations, whether direct or supervised.

These are the three essential underlying principles which allow the parties to reach a point where they together decide if the matter can be resolved. It is the policy that the decision making rests with the parties that requires that the three "C's" underlie and support the process of negotiation.

Without an assurance of confidentiality, the parties are not going to candidly exchange information. Without confidentiality, communication and open discussion are stymied, as the parties will believe that whatever is said may end up being part of the other's case at trial. The integrity of the process of negotiation in any format can only be assured if the parties are confident that their exchanges, disclosures and bargaining will be protected from being used against them in subsequent proceedings. The parties must believe that they will not be prejudiced if they engage in any settlement exchanges.

As the Preface the Uniform Mediation Act states, ". . .[T]he law has the unique capacity to assure that the reasonable expectations of participants regarding the confidentiality of the mediation process are met, rather than frustrated. For this reason a central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings." Not all states treat confidentiality in the mediation process as a "privilege." However, the UMA likens it to the attorney-client privilege. Moreover, the parties themselves have the opportunity to negotiate exceptions to confidentiality or to the use of "evidence" that is likely to be admitted at trial with the understanding that the use in mediation, or negotiations, somehow shields it from us at trial because it has now become "confidential" because of its use in a mediation or negotiation.

The Federal Rules of Evidence do not contain any specific provision relating to communications during mediation. Rule 408 protects some communications during negotiations, but does not address a mediation itself. District courts have specific rules adopted to protect what takes place during a mediation and serve the purpose of carrying out the policies of encouraging candor and communication in supervised negotiations.

The protection of rules and statutes relating to direct negotiations is narrower than the confidentiality which attaches to the mediation process. For example, California Evidence Code section 1152 applies to an offer for compromise or to furnishing something for value to another person who has sustained, or claims to have sustained, loss or damage, and also applies to "conduct or statements made in negotiation thereof…"

Despite the legal niceties, the parties should approach any negotiations with the understanding that they will all cooperate in implementing a principle of confidentiality so that the negotiations can progress towards an agreed upon resolution of the case.

CHAPTER 8

DIRECT NEGOTIATIONS v. MEDIATION – WHY THE MEDIATION PROCESS OFFERS MORE

The old fashioned way was that a case either settled because the lawyers negotiated that settlement directly, or it settled on the court house steps at a settlement conference overseen by a sitting trial judge, other than the trial judge, a day or two before trial. It is different now. Court systems are designed to encourage settlement well before any last minute efforts to resolve a case, and also to encourage these settlements by offering different alternatives to resolution. The most common alternative is mediation, either under a court sponsored program or through private mediators. The latter is an aspect of our profession that has flourished over the past 25-30 years as mediation has become the resolution method of choice.

This process of mediation has also been helped by more aggressive court management of cases with regular status and case management conferences. Rarely does the agenda for these conferences with the court and counsel not include a discussion of setting the case for mediation using either the court services or a private mediator.

What happened to direct negotiations? What has failed in this more informal process – the old fashioned manner of settlement. I have several thoughts.

First, while there are instances in which the lawyers can resolve a case through direct negotiations, a mediation allows the parties to have a period of time – a half day or more -- to devote to a discussion of the resolution of one case, one matter, *without interruption*. In this process the parties and their counsel are forced to get ready – prepare by getting to know the case, conducting discovery or exchanging information informally beforehand, and reviewing the

matter with the client for purposes of assessing the case's value. In other words, there is some pressure, like a trial date, to force the parties to consider the case and whether settlement is the better alternative than incurring the expense and risk of trial.

Second, the mediation process allows a party to educate the other parties in the case about that client's case. I can tell you that I have been to many mediations when I knew the other side did not have a full appreciation for my client's case. Once they read the mediation statement, saw the visual presentation, and studied the case, they were much better educated about its value. That would not have happened if we had continued litigating and negotiated haphazardly. Simple demand letters are not always well accepted no matter how comprehensive they are. The mediation process involves a better means of fully educating the parties about the case, if the lawyers and their client do their respective jobs of educating those involved and presenting their case.

Third, a neutral is involved who collaborates with the parties and often performs an evaluative role, giving the parties views on the issues in the case and communicating from a neutral perspective. This gives the parties a *"outside" resource for evaluation* of the case that is presumably unbiased. It brings an additional source of information to the process of negotiation, rather than having two lawyers discussing and trying to settle from their "adversarial" perspective.

Fourth, a mediation provides a *verification* to the resolution process. That is, if a settlement is reached, the fact that it was negotiated through a neutral provides more credibility to the chosen result. An insurance claims representative can report to his employer that this was a mediated resolution through a competent neutral who brought the parties to the point of

settlement. That looks good in the claims file and in the final report on the case to a claims persons' supervisors. This verification process can also be helpful to an attorney who is representing an unsophisticated or reluctant client. It can help that lawyer gain and maintain client control if the mediator can provide a balanced, neutral and persuasive evaluation which supports the lawyer's recommendations.

Fifth, a mediation provides a forum not only for discussion but for memorializing the essential terms and conditions for settlement, and places controls on the closing process. That is, not only are the terms and conditions of the settlement memorialized in a written memorandum of understanding, but the parties can outline the time for presenting closing papers, filing dismissals, and payment of consideration or execution of the terms of settlement.

This is important. Recently I was co-counsel in a case in which other lawyers I was working with handled the negotiations directly with opposing counsel. The negotiations were sporadic, the process was delayed because there was no timetable for presenting closing papers, and it took weeks to bring the matter to a final conclusion because of this process. Very simply, counsel lost control over the negotiation process and it just got away from them.

If the parties are present at the same place on the same day, the whole process can be ironed out and the settlement can be concluded efficiently.

I am not saying that all cases should be mediated. What I am saying is that a mediation provides advantages to the process of closure that are not present in direct negotiations[1].

[1] For more on how mediation has affected the process of direct negotiations, See R. Kiser, "How Leading Lawyers Think: Expert Insights Into Judgment and Advocacy," Springer Verlay (www.springer.com), Chapter 16, "Mediation," Section 16.1.

CHAPTER 9

FIVE FACTORS THAT SUGGEST A CASE IS RIPE FOR MEDIATION

Anyone who has been involved in the dispute-resolution mechanism knows it can be a laborious and often mysterious process. Somewhat over simplified, here is a good way to remove some of the labor and mystery, and describe how mediation fits into the system:

Mediation allows the parties involved in the dispute to sidestep the litigation process, while also getting results. Because of the mediator's neutrality, the settlement resolution is more likely to be perceived as just. It is a voluntary, non-binding forum in which the parties agree to conduct negotiations using a neutral intermediary who guides the parties through the legal process. The mediator has no decision-making authority. Rather, it is the mediator's duty to work with the parties to agree on the terms for conflict resolution. Only if they want to do the parties settle.

So what types of cases are likely to settle at mediation? Here are five factors that, if present in the case, suggest it is one which should be mediated:

- **The parties recognize they have more to lose than if they don't settle**. There is high risk if they do not settle. This means not only must there be a downside risk, but also the parties and their lawyers must recognize and understand that risk. If a party and/or counsel have their head in the sand or are refusing to acknowledge the loss possibility or probability, then this leads to an unrealistic evaluation of the case and a failure to appreciate the benefits of a negotiated result. It also leads to unrealistic demands or offers and responses to such. Lastly, it means a mediator is not talking or listening to reasonable minds. This

state of affairs costs the parties in many respects, including the time and money for a trial that may very well fail to result in a "win" for anyone.

- **There has been cooperation among the parties and their counsel during the litigation process**. This is key. No doubt a case has a greater potential for settlement when the parties are "firm but fair" with one another. They cooperate without compromising their clients' rights or position. They exchange what they know is discoverable and they diplomatically but firmly protect what is not. They prepare their client for participation in the litigation process. For example, I try not to intervene at my client's deposition. He or she is prepared to tell the story, and tell it truthfully. I don't need to make inappropriate speaking objections or interfere with my opponent's questioning unless counsel is violating the rules, being rude, harassing my client, or asking questions about irrelevant or privileged matters. Then, rather than arguing on the record and creating useless transcripts, I state my position and deal with this bad behavior appropriately as the rules permit. But, if we are conducting the case within and in accordance with the rules, the prospective of a cooperative discussion about resolution is highly likely.

- **The parties have engaged in sufficient discovery and an exchange of information so that you know the facts of the case**. You have reached a plateau in the case; each side can look towards the door of trial court and see how the case is likely to play out. Experienced trial lawyers can do this. They "hear" the evidence, they play out the examination of witnesses in their minds, and they anticipate the argument of their opponent. They know how these arguments will sound and how a jury, court, or arbitrator might respond to them. Perhaps the

parties have conducted focus groups and obtained some insight into how a jury might decide. It is the ability to anticipate the "end result" that allows a trial lawyer to properly advise his or her client as to the alternatives of resolution by trial.

- **The parties have non-lawsuit reasons to settle**. There may be non-lawsuit related reasons to settle. The existence of the lawsuit or a "bad" result may trigger losses in business relationships or a negative impact on a business marketing plan. The parties may also have an ongoing business relationship which would be costly to terminate. There are lots of business and personal reasons to settle, and if these are present they will motivate the parties to seek a negotiated result.

- **While the liability, damages or collection issues remain, there is no clear barrier to recovery and payment of any judgment by the plaintiff**. A lawsuit is a three legged stool: liability, damages and collection. All three have to be present in order for the case to have value from the plaintiff's perspective. If any of these three legs are missing, the plaintiff has problems and needs to assess what course is the best way to move forward. Indeed, a modest settlement may be in order in such a case. But if there is no clear barrier to the plaintiff and the stool has some strength in all three legs, then the parties should be talking seriously about resolving the lawsuit. There may be a disagreement over the numbers, but that is why mediation is attractive at a timely point in the litigation process – to save the time and expense of trial, and eliminate the risk of a disappointing result.

CHAPTER 10

TEN BASIC PRINCIPLES TO FOLLOW IN GETTING YOUR CLIENT'S CASE SETTLED EARLY

The mediation process is an opportunity to get results and avoid putting your client through the litigation 'mill.' Mediation is a positive process, but only if you, as the lawyer, have the right approach. You can get great satisfaction by obtaining a good settlement early in the case before large litigation expenses are incurred. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation, which more often than not would only add to the emotional injury already caused by a serious accident, injury or illness which led to the litigation in the first place.

Mediation is a voluntary process in which the parties agree to conduct negotiations of a dispute using a neutral intermediary in a non-binding process. The mediator has no power to decide anything. The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom. The principles below will explain why that is and what you can do as your client's representative to facilitate the mediation process so you can get to the 'goal line' of resolution.

Bear in mind that the client is not going to push early mediation. It is the attorney who must do this, recognizing the advantages of the potential for an early mediation and resolution for the client.

In order to get good results early in mediation, below are the basic principles that should be followed.

PRINCIPLE 1: UNDERSTAND WHAT A MEDIATION IS ALL ABOUT

The first principle sounds easy. You have a date set for mediation; you are prepared to submit a 'brief' outlining your client's cause, so you are read. Not so—wait a minute. Do you really understand what mediation is all about, and what it is not about?

First of all, it is not about courtroom advocacy, at which you are likely highly skilled. It is about a process of using a mediator to get your client into a position of ending the highly confrontive and tension-filled process of litigation. It is a means of essentially 'selling' your client's lawsuit to a buyer, who buys off the expense and exposure of an ongoing lawsuit. It involves an exchange of offers and counteroffers made in more of a business, rather than a courtroom, environment. The whole process should be to work with the mediator and the mediation process of 'giving in' and 'giving in' again to reach an acceptable solution to the dispute.

Hostility, anger, finger pointing, and accusations are not a part of the mediation process, even for you as your client's advocate. Rather, you can be firm, tough, even hard nosed at times, but you can to it politely and diplomatically.

PRINCIPLE 2: PREPARE YOUR CLIENT FOR THE MEDIATION PROCESS

Given this process as I have described it, you and your client need to have the appropriate attitude before you even go to the mediation. You have to prepare your client

for a mediation, not a deposition or trial. This is where the client enters the business process of resolving disputes and essentially steps outside the courtroom. Conduct a pre-mediation conference several days before the mediation. Here is an agenda that will set the client in the appropriate frame of mind to attend and participate in the mediation process:

- Outline how a mediation proceeds.
- Describe the difference between mediation and trial.
- Stress the confidentiality of the session with the other side and in private.
- Stress the fact that the client is not testifying or 'on the record.'
- Advise the client not to speak unless in private session with the mediator.
- Describe the non-binding nature of the process.
- Prepare the client for the 'give' and 'take' of negotiations.
- Discuss the weak as well as the strong points of your client's case.
- Orient the client to the 'economics' of settling versus litigation.
- Stress the fact that the goal is to try to settle, but in an appropriate amount.
- Discuss what happens if the case does settle.
- Discuss what happens if the case does *not* settle.

It is just as important to prepare you client for the mediation as to do the other preparation. A prepared client is a client whom you can control during the mediation process and with whom you will have the highest level of credibility. It is a big mistake to overlook this aspect of getting ready for a mediation.

PRINCIPLE 3: PUT THE PRESSURE ON THE DEFENDANT TO COME TO THE MEDIATION TABLE

From the plaintiff's perspective, there is a reason to want to mediate early—it means early compensation for the client and the end of litigation. A defendant may not be similarly motivated. My rule is: Put their feet to the fire. How do you do that?

Upcoming trial dates will force the parties into mediation, but usually those dates are too far away to encourage mediation in the early stages. I do it another way.

First of all, file the complaint and serve it on all the defendants. I seldom negotiate before filing. The defendants then have to consider hiring lawyers to defend them and incurring the expense of litigation. At the same time, your client's case is on the docket moving towards trial. Second, work up the case and get discovery, both written discovery requests and deposition notices, ready to go, serving them as soon as the procedural rules permit. Third, provide the defendant's representative (even fore the defense lawyers show up) with a letter giving an overview of the case (with a copy of the complaint) and suggesting mediation. You may offer to exchange discovery. For example, I might offer to put up my client for deposition (or interview) for a half day so

that the defense can find out information that they might need to evaluate the case, or even produce other witnesses under my control such as treating physicians, for the same purpose. Usually this is without prejudice to a continued deposition of a plaintiff or witness on other issues, if the case does not settle. In return, you may request a deposition or relevant documents from the defendant.

The point is to not be afraid to be aggressive and eager to get to mediation. An interest in settlement is not demonstrating weakness. To the contrary, it can show confidence and strength, a belief in your client's case, and a willingness to get the facts out on the table. (Of course, this assumes that you have carefully chosen your cases and decided that your client is a worthy plaintiff and has a worthy cause.)

And of course, there is always an early motion to dispose of the case or issues that you believe are favorable to you case. Whatever it takes to put pressure on the defendant will help encourage your opposition to come to the mediation table.

PRINCIPLE 4: GET THE INFORMATION YOU NEED TO MEDIATE

One of the advantages of offering to mediate early and exchange relevant information or discovery is that you have the opportunity to request information that you need to evaluate your case. Of course, you should have whatever is available through independent sources before you have filed your lawsuit. We all know that you cannot always have all that you want before filing, and you often need the power of discovery to obtain additional information from the defendant or third parties.

You cannot afford to go to mediation without the necessary information to outline you case on liability and damages. Thus, a *quid pro quo* for going to mediation is

your adversary producing what it is you need to assist you in evaluating both liability and damages. Do not be bashful. Either get the information informally or promptly send out discovery requests.

PRINCIPLE 5: GET TO MEDIATION EARLY, NOT LATE

Litigation is a business. You maximize your client's recovery by resolving your case at the point at which you have the leverage to get the parties into mediation with the goal of settlement. Some courts, such as the United States District Court for the Northern District of California, have 'early' settlement programs, but even those may not result in a mediation or settlement session for many weeks after the case is filed.

Talk about mediating within 120-180 days of filing the complaint. Even though not all cases can be resolved this quickly even under the best of circumstances, push to get the information and persuade the defense that an early resolution of the case is in the best interests of all concerned.

PRINCIPLE 6: USE YOUR EXPERTS

An important part of any case involving issues that call for expert opinion testimony is to determine early on what those opinions are. Whether a 'percipient expert,' such as a treating physician or an expert retained specifically for the case, it is important to find out what the expert has to say and then use this information in the mediation.

Allow the mediator to listen to your expert. You can schedule a conference call with the mediator and with defense counsel. Conduct a mini-direct examination of the expert and then allow defense counsel to ask some questions. This process can make the mediator's job much easier.

PRINCIPLE 7: SELECT THE MEDIATOR BEST SUITED FOR YOUR CASE

Sounds easy, but choosing the right mediator may be the hardest part. Do you use a lawyer or judge (usually a retired judge)? If the latter, do you want a retired appellate or trial court judge?

Judges work best in some cases and lawyer mediators in others. For example, if you have a case involving a very specialized area of law, such as medical or legal malpractice cases, it may be better to use a lawyer mediator who is experienced in prosecuting or defending those types of cases. They know the law and the peculiarities of that type of litigation, and that can help. A lawyer mediator experienced in the type of litigation may also be preferred in medical negligence or insurance bad faith cases.

However, in potential jury cases, a retired trial judge (even if he or she also was on the appellate court) may be preferable. If the case needs a high powered mediator to assist with client control then possibly a retired appellate judge or federal trial judge can provide the additional presence necessary to make the mediation process work. Find a mediator who has the proper attitude—a strong desire to settle cases during mediation or even later in a follow-up effort. Some mediators do not care if the case settles; they are just concerned with facilitating communication. The better mediator says, "I want to help you settle this case."

PRINCIPLE 8: PREPARE THE MEDIATOR

This could be the most important principle of all. The mediator cannot work if the mediator does not have the information necessary to put your case in front of the opposition. That means a comprehensive brief, first of all, with key documents, damages calculations, and other essential information which the mediator needs. I recommend exchanging this brief with the other side. Let them see your case outlined and presented so they know what they are facing.

I write a private and *confidential* letter—usually several pages—providing only the mediator with additional information about the case. The mediator may want to either discuss the letter with you in private session or use it during the mediation to add to the information used to persuade the other side to bargain. There are many advantages to this 'private letter.' First, it gets you over the hump of your first private session—that is, you have saved time of the first session that the mediator usually has with your side because you have already outlined some of the information you would provide in that first session.

Second, you get the mediator 'into the case' and start the 'juices flowing.' You can also provide the mediator with some ideas (not the 'bottom line') of what your dollar goals might be, but do not give away your final number or dig in your heels. You may change your mind as the mediation session unfolds.

Be prepared to do a bit of 'show and tell' at the mediation to educate both the mediator and your adversaries (counsel and the insurance company representative). This can be done by using a video to provide a 'clip' of some of the potential testimony

from your client, his or her doctors, or other experts (maybe 10-12 minutes on the important issues) or by a live interaction between you and your client during the mediation if you believe the client can handle it and will contribute to the case's potential for settling.

PRINCIPLE 9: BE THE DIPLOMATIC ADVOCATE AT THE MEDIATION—MAKE "LOVE" NOT WAR

One of the ways to achieve the best results in mediation is to be a diplomat. This is a time to remove the 'heat' from the litigation. Avoid anything that results in confrontation. Generally, you may not need to make any type of 'opening statement' since you have served the parties with a comprehensive mediation brief outlining the facts and law applicable, and your client's perspective. Try to do this in a factual, positive and appropriately argumentative manner without personal comments, hostile accusations, and statements that only drive the parties apart rather than encourage the opposition to consider your client's position.

Posturing is also not appropriate and will only anger the other side and probably the mediator. *You must be seen as a positive element in the mediation process*. This means that you should be prepared to recognize and concede weak points, but at the same time be prepared to emphasize and point to your strengths. Simply digging in your heels, or taking inappropriate positions on liability or damages, will not gain you anything but suspicion and distrust. You need to work toward gaining credibility of the opposition and your mediator. That encourages the other side to bargain and the mediator to work for your client in trying to bring the parties to a point of agreement.

PRINCIPLE 10: KNOW THE NUMBERS AND WHEN THE BEST DEAL IS ON THE TABLE

Evaluating damages before the mediation is an obvious essential. In fact, with the mediation brief, if not before, should be a 'demand,' which is your first volley over the bow. It is equally obvious that the initial 'demand' is not a final number and contains room for negotiation. However, that first demand must be calculated to give you the best chance of reaching your desired goal, or at least you should have a goal in mind at which you hope to be able to settle. The 'hoped for' amount may be higher than a 'realistic sum,' so you should keep that in mind when making your initial demand.

All this is idle talk unless you have numbers and calculations to back up your demand, which you carefully outline in your mediation brief with support. Just numbers do not work. What works is a well thought out demand with reports, calculations, and information to support those calculations. It does no good to hold anything back. Put out a serious number and back it up. That will give your mediator information to work with in getting the bidding started.

During the mediation, you also must be watching and listening as the negotiations go forward. The numbers exchanged should be leading you to a point where you can advise your client, based on input from the mediator, as to the point at which it is likely a deal can be struck. You need to be prepared to advise the client on where the negotiations are likely to go. However, my rule is that as long as the parties are talking, there is hope for a settlement. Do not be persuaded when it appears there is an impasse that a successful resolution cannot be reached. In addition, never dig in your heels. If the

mediation does not result in a settlement, there may be an opportunity down the line to restart negotiations. Thus, hope does 'spring eternal.'

CAVEAT: NOT ALL CASES ARE RIPE FOR EARLY MEDIATION. . .

Not every case can or should be settled in an early stage. There are many disputes that require the parties to conduct discovery, resolve legal issues, or test the evidentiary waters through summary disposition process. But there are many cases that can be settled at an early stage.

So, what is the 'profile' of these cases? Here are some checkpoints for the type of case that should be considered for an early resolution. Bear in mind, however, that as the plaintiff's attorney, it is your job to make the first move by presenting a well-written, properly document 'demand' letter with your first figure for settlement, knowing, of course, that there will be some bargaining:

- Your client's emotional situation is not strong enough to withstand full-blown litigation;

- Your client is in need of financial support;

- Your client has other sources of income, such as retirement accounts or savings which are rapidly being depleted;

- An early settlement will allow you to put a financial plan together with your client's resources (such as a structured settlement with tax exempt monthly or annual payments) so that an appropriate financial plan can be constructed for the client;

- Damages are provable and can be supported by documentation; these are solid and, while disputed, they demonstrate real compensatory damages;

- Liability of the defendant/s is *greater than* 50% (which should be the case anyway if you are taking the case);

- The case does not present unique legal issues that are unresolved (which may be a reason to settle as some point, but not early in my experience);

- Your client has considerable documentation and other information about the case which tells a large part of the story which serves as the basis for the lawsuit, so that there are not missing facts to support your claim (the facts *may be* disputed but you have witnesses or documents to support your claim);

- You are in a position to communicate with someone on the defense side who you believe will be interested and motivated to negotiate early; that is, you anticipate that the defense will not be hardliners (try to get to the insurance company before they refer the case out to defense counsel; in these early negotiated or mediated cases, often the in-house personnel will handle them without outside counsel).

There are other factors that may be present to identify.

A FINAL COMMENT

We can summarize this all in four basic keys to a successful mediation:

- Prepare well by giving the mediator what is needed—key documents, damages information, history of settlement negotiations, verdicts in comparable cases, and the 'confidential' information in a private letter.

- Admit your weak points and deal with them—this buys credibility.

- Make sure you have client control; that is the key to getting a settlement done at the time of the mediation. Preparation of the client for the mediation is just as important as preparing the mediator and preparing yourself.

- Be practical. Know the economics of going to trial versus settlement. Remember, a deal done now is a certainty—dollars today. The old adage, "A bird in the hand is worth two in the bush" rings true when faced with the decision to settle.

All in all, a successful mediation results in appropriate compensation for the client and a reasonable fee for your services. It can be a satisfying experience because you have achieved the goal you set out to achieve when you agreed to represent your client—resolution of a dispute. That resolution is far more welcome at an early stage without protracted litigation. Applying these principles should help to achieve that result in those cases you select to mediate.

CHAPTER 11

HOW THE SUBJECT MATTER OF A MEDIATION AFFECTS THE PROCESS

How does the subject matter of a mediation affect the process? Does it make a difference in how you approach the mediation, select the mediator, and conduct the mediation. I think it does in a number of ways. Here are my thoughts.

Selection of the Mediator

This may be the most important factor relating to subject matter. Mediators with subject matter experience likely have an edge over those who do not. I am not saying that someone who is unfamiliar with the subject matter or law that governs the case cannot be effective. But in some cases it really helps to have a mediator who knows how an industry works (insurance for example) or the law (intellectual property or employment disputes). I have been involved in many mediations (sometimes I represent the client in insurance issues but there is an underlying case that is the subject matter of the mediation), and it is really helpful to have a mediator who has already developed a body of knowledge and insight into the area of law which is at issue. It can give the parties – all sides – an edge towards resolution to have a mediator with that special knowledge.

Economic v. Emotional Claims

Cases with simply economic damages – a business dispute for example – require a different approach from those which involve emotional claims. Some mediators are very good an evaluating business losses, but lack the ability to connect with wrongful death or serious

injury cases or other cases in which there is a high emotional component. I am not saying that you should look for a mediator who is a "softie" but some are just more sensitive to cases with emotional issues than others. So what I am saying is that those mediators who have a facility for business cases and who perhaps have less desire to mediate the cases with personal and emotional issues just may not be a good choice for cases in which the latter are significantly involved.

Business Claims

Business cases require a mediator who has a business sense. Judges and lawyers who have been involved in business litigation while practicing or who have been heavily involved in the business side of the practice normally have a better insight into the these cases. I am not saying that those who do not cannot mediate business disputes, but it makes sense in complex business cases to select a mediator who has a head start on getting educated about the case.

Partnership and Closely Held Corporations and Family Business Matters

I do some mediating from time to time. It is not my regular diet as I still enjoy the advocacy of litigation and the challenge of representing clients. One of my most difficult assignments as a mediator, however, was a family business matter involving a closely held corporation. The sister had founded the company and the brother had come in after some time to run it. The sister was the marketing and sales force, while the brother controlled the financing and administration. The father was also a numbers person and worked with the brother. As time went on, the brother and sister did not see eye to eye about much; they could hardly be in the same room. The dispute threatened to sink the company, and outside investors were involved. I was asked to mediate. What a difficult case. Despite my efforts, I could not bring the brother and

sister to a center point. The father refused to help. After premediation exchanges and a full day of mediation, I had to declare an impasse.

My sense is that I would have done better and had a greater chance of success if I had involved another mediator who had experience in family disputes, and perhaps even a non-lawyer. There are professionals out there who specialize in working with families who are wealthy and have ongoing business relationships or who are involved in ongoing businesses in which there are intrapersonal issues that impact the family business.

I tried to get these folks to entertain the idea of involving someone like I have described, but they were so far into the personal issues that it was too late. Had I recognized the severe schism between the brother and sister before the mediation, I may have been able to involve another professional who could help in getting the parties to see the issues and coming to grips with a solution that would save the business.

Next time!

Class Actions

Here, experience counts. There are special issues which arise in these cases, including damages assessments and evaluation of the class claims, administrative issues pertaining to the evaluation of the individual claims of class members and means of distribution, apportioning the payments among various defendants, and attorneys' fees, just to name a few. While I have not been involved in the mediation of a large class claim, I do know from my colleagues that there are some excellent mediators who have had considerable experience with mediating these disputes. So it seems appropriate to search these mediators out and consider them for class actions.

Injury Cases with Multiple Defendants

I find that injury cases with multiple defendants need a special kind of mediator – one who is skilled in dealing with typical plaintiff/defendant conflicts, as well as disputes between defendants and their carriers. Often there will be coverage issues with some of the insurers for the defendants, so those may be involved as well. Thus, you may have at least three layers of disputes: a) issues pertaining to the value of the plaintiff's claim, b) issues pertaining to the apportionment of the loss among the defendants based on tort or contract concepts (tort as it pertains to the apportionment of the loss and contract based on contractual obligations among the defendants and indemnity provisions), and c) disputes between a defendant and its insurer.

Mediators in these cases must be able to stay organized, keep dialogue going at all levels, and create a plan for bringing all the disputes to a head and resolving them at all levels. These are very challenging cases, and you need a mediator who is willing to roll of up his or her sleeves and stay with the process. Sometimes, the ultimate resolution may not happen all at once. For example, there can be an agreement to resolve the main case, but disputes remain among the defendants and their carriers. A creative mediator will know how to manage this type of mediation even if the complete resolution is done piecemeal.

Injury Claims with Complex Liens

Lien claims can provide big hurdles to the resolution of an injury case. Workers' compensation insurers, health insurers, and the government all can stick their noses into a case and stymie the resolution process. I have found that it helps if before the mediation, as plaintiff's counsel, to have contacted any lien claimants, advised them of the mediation, invited them to

attend, and discussed numbers for resolving those lien claims as soon as it is apparent that the parties are headed for a mediation. Once that is done, you should have a discussion with the mediator before the first mediation session about your progress in trying to resolve these claims, and alert the mediator as to the status of your negotiations. If there are anticipated hurdles then the mediator may want to contact that lien claimant or its counsel before the mediation to identify the issues and prepare him or herself for dealing with them at the mediation session.

CHAPTER 12

WHAT TYPE OF NEGOTIATION PERSONALITY ARE YOU?

Before representing your client in negotiations, particularly in the more formalized environment of a mediation, it is important to assess what type of negotiator you are. You, your client, and any mediator who is used, must work together to seek a voluntary resolution. That takes a different persona than the advocate at trial. You are indeed still an advocate, but one with a different presence.

Recently I attended a mediation in which we represented a local auto retailer that made available rental cars for its customers and also to employees. An employee rented a car and was involved in an accident in which he was killed and his passenger was seriously injured. Both sued. Our client was named in the lawsuit even though there was a separate subsidiary handling the rental operation. There was a CGL policy which sought to exclude rental cars. The client's broker had not obtained proper coverage for our client. Faced with a limits demand, the CGL carrier settled and sought reimbursement from our client. We sued the broker as well.

The broker's attorney was difficult. At a mediation of the cases, he exhibited an antagonist and hostile attitude that interfered with the process. He just did not "get it." It made the process difficult because my client and the carrier wanted to settle the case. I just did not understand why the broker's lawyer had to be so difficult. Fortunately, there was a more responsive claims representative from the broker's carrier present, and based on some excellent skills by our mediator, the whole case was resolved.

Negotiating a case is an active and dynamic process which inserts your personality into the case as an advocate for your client, just as it does at trial. The advocacy, however, is different. Instead of simple persuasion, you are using your skills to cause your adversary and his or her client to recognize the vulnerability of their case, and to voluntarily enter into the process of trying to find a point of resolution before trial. Your adversary must be motivated to seek that resolution, and your approach and personality are parts of the process of that motivation.

Each of us presents a personality in negotiations. There are some lawyers I know who are excellent in most all respects but have a hard time switching hats from pure advocacy to negotiation advocacy, which is a much different process. They are tough, hard-hitting lawyers who can push a case, work it up for trial, handle the motion practice, and try the case. However, when it comes to changing gears to a "negotiator," they just don't seem to understand the process well enough to be very effective. As a result, they end up with cases that do not produce good economic results: verdicts between offers and demands, or simply cases where the necessary expense of trial is not warranted, i.e., cases where liability may be strong but the damages or collection of the judgment does not justify a full-blown trial.

My sense of the personality types – generalizing of course – is as follows. Bear in mind that some present a combination of these, or in rare cases, all of these:

- **The Aggressive Type** – no mater what the discussion, this type tries to take over and control everyone by being very aggressive.

- **The Angry Type** – everything seems to evoke an angry response,

sometimes raising the temperature of the negotiations. Not good, obviously.

- **The Hostile/Confrontational Type** – wants to give an opening statement in the first caucus to show his or her clients what a great advocate he or she is and how he or she can get in the face of the other side.

- **The "I Cannot Work in this Process" Type** – just does not understand the process and how one must engage in the "give-and-take" of negotiations. It is a compromise, but this type does not understand that.

- **The "Close to the Vest" Type** – wants to keep everything confidential; will not exchange mediation statements. For some reason, believes that exploring the issues is harmful.

- **The "Unprepared" Type** – just is not ready, and may simply be looking for a way to resolve the case and earn a fee, rather than work the case up.

- **The "Unrealistic" Type** – for many reasons, including lack of preparation or ability to evaluate a case, does not understand the issues or damages; or simply has an highly inflated view of the value or a very low deflated view of the exposure of the client.

- **The "Doesn't Understand the Case" Type** – here there is a lack of legal analytical skills and an understanding of what the case is about – legally and not emotionally, usually is the problem.

- **The "I Get Frustrated with the Process" Type** – has a hard time with the process of "give-and-take" because of impatience, and also lacks a sense of how to move through the process and engage the other side in the negotiation process.

- **The "I am Trying to Get the Case Cheap" Type** – this applies to the insurance company that believes if it goes to mediation, it will get a "good deal," and that its representatives are attending a "fire sale," not a real supervised negotiation. Carriers often approach early mediation this way, rather than taking a serious look at the carriers "down the line" costs plus exposure. Often an insurer will not spend the money to allow its counsel, panel counsel, or coverage counsel to evaluate the case in the real light of day.

You probably can describe others, but each of these represents an impediment to the process, frustrates the other parties and mediator, and simply stands in the way of resolution. For the most part these are "negative" personality types that make it difficult to resolve a case. Those who are not successful in either the negotiation or mediation process most likely exhibit traits of one or more of these types of lawyers in the negotiation setting.

The more positive personality types include:

- **The "I Understand the Process and Can Work in It" Type** – they know how it all works. Their clients are ready to make decisions and they have provided both the mediator and other side with a solid, well organized

statement of the case.

- **The "Diplomatic" Type** – can present the case forcefully in the calm environment of negotiation process.

- **The "I Will be Up Front" Type** – "Candor is a lovely virtue."[1]

- **The "Well Prepared" Type** – refreshingly well versed in all phases of the case. Could start trial shortly because he or she knows the case.

- **The "I Understand the Value of My Client's Case" Type** – realistic about the cost of going to trial vs. settlement; knows the verdict ranges; understands the "present value" of money; has let the client know what the financial benefits are of settlement at this time.

The successful negotiators present a combination of these positive traits. There may be occasional lapses where each of us exhibits one or more of the negative traits during the negotiation process. However, the successful negotiators are aware when these lapses occur, recognize them, and return to exhibiting the positive ones that improve the chances for resolution.

[1] See *Carr v. Pacific Telephone and Telegraph* (1972) 26 Cal.App 3d 537, in which Justice Gardner of the Court of Appeals dissented from the majority which judgment for defendant which the trial court overruled objections to evidence that defendant's absence from the family for a period of time, resulted from his being in jail and also evidence of his extra marital carousing or his "value" to his family. "A defendant, even a rich, soulless corporation, is entitled to show the disposition of the decedent to contribute financially to support his heirs and to show his earning capacity and his habits of industry and thrift since all have a bearing on the value of his life to his wife and family. (McDonald v. Price, 80 Cal.App.2d 150, 181 P.2d 115.) If the decedent had been a hard-working, law-abiding citizen and a paragon of all the virtues of honesty, thrift and probity who supported his wife and children and afforded them a stable home, the plaintiff would be entitles to so prove. If on the other hand, he was irresponsible, philandering, check-kiting jailbird, the jury would be entitled to so know. The jury is entitled to the whole picture-warts, wrinkles and all- not a sterilized, unreal, retouched portrait which amounts only to a shadowy silhouette of the real man. As Mr. Moto, that well-known Japanese philosopher of the 1930's one said, 'Candor are a lovely virtue.'

A major problem is presented when we have an adversary who truly falls into the negative personality types and is stuck there. My experience is that usually this type is reluctant to go to mediation; but if it happens, then you need to have a very candid discussion with the mediator beforehand to discuss how to approach the mediation. It may be that the mediator has to exercise some strong influence on your adversary and his or her client to assess how to approach the mediation process.

CHAPTER 13

CLICHES THAT APPLY TO NEGOTIATION AND SETTLEMENT

You don't have to go to the law books to find the basic principles which apply to negotiation and settlement. In fact, these basic principles may be ones you learned growing up, and possibly used before you ever entered law school. They are from clichés[1] that we all have heard and probably used in our personal lives, but do they apply to our work as trial lawyers and litigators? Here are some I apply regularly:

1. You Can't Get Blood Out of a Turnip.

"'You can't get blood from a stone.' You can't get something from someone who doesn't have it. The proverb has been traced back to G. Torriano's 'Common Place of Italian Proverbs.' First attested in the United States in the 'Letters from William Cobbett to Edward Thornton.' The proverb is found in varying forms: 'You can't get blood out of a stone; You can't get blood from a rock; You can't squeeze blood from a stone; You can't get blood out of a turnip, etc....'[2]"

The application to the negotiation and mediation process is that you have to have a flush

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[1] **cli·ché** also **cliche** (kl$\bar{e}$-sh$\bar{a}$') *n.*
1. A trite or overused expression or idea: *"Even while the phrase was degenerating to cliché in ordinary public use . . . scholars were giving it increasing attention" (Anthony Brandt).*
[French, past participle of clicher, *to stereotype (imitative of the sound made when the matrix is dropped into molten metal to make a stereotype plate).*]
Synonyms: **cliché, bromide, commonplace, platitude, truism**
These nouns denote an expression or idea that has lost its originality or force through overuse: *a short story weakened by clichés; the old bromide that we are what we eat; uttered the commonplace "welcome aboard"; a eulogy full of platitudes; a once-original thought that has become a truism.*

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www.freedictionary.com/cliche

[2] Random House Dictionary of Popular Proverbs and Sayings, Gregory Y. Titelman (Random House, New York, 1996).

target as a defendant, either because of insurance coverage or assets that are reachable through any collection effort. This is the third part of the three legged stool analogy of selection of lawsuits: liability, damages and collection!

2. You Get More Flies with Honey than Vinegar.

"...The proverb has been traced back to G. Torriano's 'Common Place of Italian --- Proverbs.' It first appeared in the United States in Benjamin Franklin's 'Poor Richard's Almanac' in 1744, and is found in varying forms...."[3]

The importance of this one is that diplomacy is critical to successfully negotiating a resolution to a lawsuit. Some might thing that the vigorous advocate who attacks like a pit bull will get his or her way. In my experience, that does not work in mediation, and maybe even in litigating a case. The most successful lawyers at negotiation base their "power" in negotiating on a high degree of knowledge about their case and the law and facts applicable, as well as personal skills of persuasion. Those who bang the table, and conduct themselves like attack dogs gain little respect. The diplomatic negotiator gets others to listen, believe and reach agreements. Leave the vinegar bottle at home, and take your biggest honey jar to the negotiation table.

3. It Ain't Over 'Til The Fat Lady Sings.

The meaning: Nothing is irreversible until the final act is played out.

"Just to get this out of the way before we start: is it *'til*, *till* or *until*? You can find all of these in print:

[3] Id.

It ain't over 'til the fat lady sings
It ain't over till the fat lady sings
It ain't over until the fat lady sings

"You might even find versions with *isn't* instead of *ain't*. Grammarians argue about *'til* and *till*; I'm opting here for *till*. Okay; so who was the fat lady? If we knew that, the origin of this phrase would be easy to determine. Unfortunately, we don't, so a little more effort is going to be required. The two areas of endeavor that this expression is most often associated with are the unusual bedfellows, German opera and American sport.

"The musical connection is with the familiar operatic role of Brunnhilde in Richard Wagner's *Götterdämmerung*, the last of the immensely long, four-opera *Ring Cycle*. Brunnhilde is usually depicted as a well-upholstered lady who appears for a ten minute solo to conclude proceedings. 'When the fat lady sings' is a reasonable answer to the question 'when will it be over?', which must have been asked many times during Ring Cycle performances, lasting as they do upwards of 14 hours. Apart from the apparent suitability of Brunnhilde as the original 'fat lady' there's nothing to associate this 20th century phrase with Wagner's opera.

"All the early printed references to the phrase come from US sports. Some pundits have suggested that the phrase was coined by the celebrated baseball player and manager, Yogi Berra, while others favor the US sports commentator, Dan Cook. Berra's fracturing of the English language was on a par with that of the film producer Sam Goldwyn but, like those of Goldwyn, many of the phrases said to have been coined by him probably weren't. Along with 'It's déjà vu all over again' and 'The future isn't what it used to be,' Berra is said to have originated 'The game isn't over till it's over.' All of these are what serious quotations dictionaries politely describe as 'attributed to' Berra, although he certainly did say 'You can

observe a lot by watching,' at a press conference in 1963. In any case, 'the game isn't over till it's over' isn't quite what we are looking for, missing as it is the obligatory fat lady.

"Dan Cook made a closer stab with 'the opera ain't over till the fat lady sings' in a televised basketball commentary in 1978. Cook was preceded however by US sports presenter Ralph Carpenter, in a broadcast, reported in *The Dallas Morning News*, March 1976: *Bill Morgan (Southwest Conference Information Director)*: 'Hey, Ralph, this... is going to be a tight one after all.' *Ralph Carpenter (Texas Tech Sports Information Director)*: 'Right. The opera ain't over until the fat lady sings.'

"Another US sporting theory is that the fat lady was the singer Kate Smith, who was best known for her renditions of 'God Bless America'. The Philadelphia Flyers hockey team played her recording of the song before a game in December 1969. The team won and they began playing it frequently as a good luck token. Smith later sang live at Flyer's games and they had a long run of good results in games where the song was used. Sadly, Ms. Smith sang *before* games, not at the end. If the phrase were 'It ain't started until the fat lady sings,' her claim would have some validity.

"Whilst printed examples of the expression haven't been found that date from before 1976, there are numerous residents of the southern states of the USA who claim to have known the phrase throughout their lives, as far back as the early 20th century. 'It ain't over till the fat lady sings the blues' and 'Church ain't out till the fat lady sings' are colloquial versions that have been reported; the second example was listed in *Southern Words and Sayings*, by Fabia Rue and Charles Rayford Smith in 1976.

"Carpenter's and Cook's broadcasts did popularize the expression, which became commonplace in the late 1970s, but it appears that we are more likely to have found the first

of the mysterious fat ladies in a church in the Deep South than on the opera stage or in a sports stadium."[4]

Here the application of this phrase to negotiation and mediation is consistent with the meaning set forth above. As long as folks are talking to each other about resolution, there is hope. Thus it is critical in negotiations to keep the dialogue ongoing. I recently was involved with a co-counsel whom I reluctantly let lead the negotiations in one of our cases. Instead of following this principle of continuing to communicate, he consistently dropped the ball and insisted that it was the other side that should call. The dialogue was inconsistent and often nonexistent, and he took no advantage of the momentum that was built up from time to time in the direct negotiations. The case took forever to resolve (several months), when it should have been resolved in a several days of talks, and it took a mediation and more legal fees to finally get it done.

Communication in settlement is the key. Trying to settle cases is no longer viewed as a sign of weakness. Make the overture of, "Let's talk." Then keep the talking going until the case is resolved or each side says "I have given you my last, best and final offer," and the case cannot settle.

4. Know When To Hold 'Em, and Know When To Fold 'Em.

This is an expression that emanates from the Kenny Rogers song, "The Gambler." It refers, of course, to the skill that a successful poker player has in knowing when to stay in or

[4] www.phrasres.org.uk/meaning/it-aint-over -until-the-fat-lady-sings.html

drop out of a hand. We use it in all kinds of business and personal situations to describe the decision to stay in the battle or drop out and fight another day.

The words go:

"You got to know when to hold 'em; know when to fold 'em,

Know when to walk away; know when to run.

You never count your money when you're sittin' at the table.

There'll be time enough for countin' when the dealin's done."

No doubt this refers to the skill of knowing when the right deal is on the table and making the judgment of settlement vs. trial; a skill which all of us wish we had developed to a perfect sense of predicting the future of how a case will end up when it is tried, appealed and the final gavel is dropped and judgment entered. While none of us has the crystal ball to use in advising our clients, we use our education, experience and skills to provide our clients with our best judgment of whether a settlement opportunity provides the preferred result rather than going to trial. The uncertainty of the future and the eventual decision making process emphasizes the need to make a concerted effort to settle.

5. Here Today, Gone Tomorrow.

"This phrase was coined by Aphra Behn (1640-1689) who Virginia Woolf, in 'A Room of One's Own,' canonized 'as the first professional English woman writer.' From 'More Than A Woman: A few of our favorite unsung heroines,' Page 62-63, B*tch - feminist response to pop culture, Issue No. 35, Spring 2007.

"Wikipedia also cites Virgina Woolf in stating this 'fact' (she doesn't say it as quoted however, if that's what those quote marks mean (http://etext.library.adelaide.edu.au/w/woolf/virginia/w91r/chapter4.html)."[5]

The point for us here is that negotiations can get cold and parties can back off if the negotiations seem to be going nowhere, or there is no ongoing communication. Keep talking; try to resolve terms as you proceed. The more you can agree upon as you proceed, the greater the chance there will be success at the end of the discussions. So an offer on the table needs to be answered with an acceptance, counter or some additional basis for discussion.

6. A Bird in the Hand is Worth Two in the Bush.

"This proverb refers back to medieval falconry where a bird in the hand (the falcon) was a valuable asset and certainly worth more than two in the bush (the prey). The first citation of the expression in print in its currently used form is found in John Ray's *A Hand-book of Proverbs*, 1670, which he lists it as: 'A *[also 'one']* bird in the hand is worth two in the bush.' By how much the phrase predates Ray's publishing isn't clear, as variants of it were known for centuries before 1670. The earliest English version of the proverb is from the Bible and was translated into English in Wycliffe's version in 1382, although Latin texts have it from the 13th century: *Ecclesiastes IX* – 'A living dog is better than a dead lion.'

"Alternatives that explicitly mention birds in hand come later. The earliest of those is in Hugh Rhodes' *The Boke of Nurture or Schoole of Good Maners*, circa 1530: 'A byrd in hand - is worth ten flye at large.'

[5] www.phrases.rog.uk/bulletim_board/53/messages/1005.

"John Heywood, the 16th century collector of proverbs, recorded another version in his ambitiously titled *A dialogue conteinyng the nomber in effect of all the prouerbes in the Englishe tongue*, 1546: 'Better one byrde in hande than ten in the wood.'

"The Bird in Hand was adopted as a pub name in England in the Middle Ages and many of these still survive. The term *bird in hand* must have been known in the USA by 1734, as that is the date when a small town in Pennsylvania was founded with that name[6]."

A deal done in negotiations means finality, certainty, and conclusion, rather than no closure, uncertainty and no resolution. You have to consider the impact that money or accepted terms have on the future. Your client can now put his/her/their life back together as best possible, recovery can begin, and the drain of litigation is over. What a relief for most people!

[6] www.phrases.org/uk/meansing/a-bird-in-the-hand.html

CHAPTER 14

SOME BASICS OF NEGOTIATING AT MEDIATION

When I started law practice in the mid-1960s the word “mediation” was not commonly used. I am not sure I heard the word more than a couple of times while in law school at Hastings College of the Law, University of California. If I did, it meant something different than it means today – some type of evaluative process that was not necessarily related to bargaining to get a settlement.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and negotiated “the file” directly with the plaintiff's lawyer.

The words “alternate dispute resolution” or “ADR” were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected and appointed to the bench and stayed to retirement. There were no jobs as private mediators to lure them away or provide employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification will soon be available and standards will be set. While it seems that there are more mediators than lawyers, the litigation process seems to

demand this resource for dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

The mediation process is an opportunity – a time for you, as the legal representative of your client, to avoid putting your client through the litigation "mill" (aka: process) and get results. I see mediation as a definite positive process, but only if you, as the lawyer, have the right approach. I enjoy trials and arbitrations, court hearings, and appeals. But, after all these years, I get great satisfaction when I am able to get a good settlement early in the case before we incur large litigation expenses. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation, which more often than not would only add to the emotional injury already caused by a serious accident, injury or illness which led to the litigation in the first place.

To put this in perspective, we are talking about how to get your case resolved early in the more formalized process of mediation. Mediation is the voluntary process in which the parties agree to conduct negotiations of a dispute using a neutral intermediary in a non-binding process. The mediator has no power to decide anything. The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom.

Also, lawyers – and courts -- are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning and case management mechanism. That is good because it forces the parties to thing about

where they are going, what the results might be, and how much it will cost. That is, a "cost/benefit" analysis is part of the initial planning process and evaluation of the case.

In order to get good results in mediation, there are basic principles that I have found should be followed. Here are the "Ten Principles for a Successful Mediation":

- **Principle 1**: Understand What a Mediation Is All About
- **Principle 2**: Prepare Your Client for the Mediation Process
- **Principle 3**: Put the Pressure on the Defendant to Come to the Mediation Table
- **Principle 4**: Get the Information You Need to Mediate
- **Principle 5**: Get to Mediation Early, Not Late
- **Principle 6**: Use Your Experts
- **Principle 7**: Select the Mediator Best Suited for Your Case
- **Principle 8**: Prepare the Mediator
- **Principle 9**: Be the Diplomatic Advocate at the Mediation: Make "Love" Not War
- **Principle 10**: Know the Numbers and When the Best Deal Is on the Table

Effective resolution of disputes should be our goal. Perhaps that is trial, but more often it will be a negotiated result. And, in most of those cases, from what I can see, there is an intermediary – a mediator – who will assist the parties to that end. I encourage

all to make sure that all cases are tested in the negotiations arena.

CHAPTER 15

DO LAWYERS REALLY UNDERSTAND WHAT IS NECESSARY TO PREPARE FOR MEDIATION?

Recently I was invited by our local legal publication to be one of five persons on a Mediation Roundtable to discuss mediation techniques. We were interviewed by a moderator on various topics about mediation. I was the only lawyer in private practice on the panel. The others were all mediators, three were lawyers who are now doing full time mediation and the other was a retired trial court judge who for the last seven years has been mediating privately with a local service.

What I heard shocked me: Lawyers don't know how to prepare for a mediation, and most of the lawyers who attend mediations just are not doing a very good job. The mediators all explained the hurdles they had to overcome. Their chief complaints could be listed as follows:

- There is no strategy or plan by the lawyers for their clients;
- The briefs submitted are "too brief," and cursory;
- The lawyers have not prepared the client for the process; the clients have little understanding of how a mediation works and what can be accomplished;
- The parties are hostile to each other, or the lawyers are, which detracts substantially from the need to candidly communicate;
- The clients are not prepared to discuss "the numbers"; the client has no idea what the value of the case is;

- The lawyers have not discussed mediation as an alternative to trial – i.e., the "present value" of money (i.e., a settlement) versus the uncertainty of a recovery in the future;

- The client believes that the mediator is going to decide something and does not understand the role that the mediator plays as a neutral.

- The mediators spend too much time (one said 30%) of the initial time doing what the lawyers should have done to educate the clients;

- The lawyer is impatient with the process, so the client is as well.

So there you have it. The perception of at least these mediators was that we are not doing a good job for our clients by taking advantage of the mediation process, participating in it and educating our clients so that they have a real opportunity to resolve their cases. They seemed to uniformly agree that the "mediation process" begins with education by us of the client about that process and how the client can gain from the dialogue about the case and perhaps achieve a resolution of the dispute.

In my experience, the "mediation process" begins when the client first meets with our lawyers and staff to discuss the case. It is important for us to factor in mediation as part of the Litigation Management Plan, and make it an event in the process of representing the client just like a deposition or hearing on a key motion. We discuss mediation as a way of testing the case as well as posturing it for resolution. We also advise the client how a mediation works, what its advantages are, and alert the client to mediation as part of the evolution of the case – a main event for which we will prepare just like we prepare for trial. I also stress that our advocacy is not comprised by our

participating in a mediation. Indeed I tell clients (after I agree to take the case) that offering to mediate is a show of confidence and strength in our position, BUT that mediation involves looking realistically at the issues – liability, damages and collection of any judgment – and the costs of going to trial in comparison to the value of a settlement.

Since courts are sending many cases to mediation and parties seem more interested in participating, we need to be more mindful that clients need to be educated from day one about this important part of the litigation mechanism. While many courts require lawyers to inform their clients about this process at the outset, it seems that at least my mediator colleagues believe we need to pay more attention to, involve and educate our clients, and make this a part of the ongoing discussion of the case.

CHAPTER 16

ARE YOU READY FOR MEDIATION?

Getting ready for direct negotiations or a mediation session begins when you first meet your potential new client. A lot goes on in the first meeting. First of all, you have to assess if this is a case you want. I call it passing the test of the "three legged stool" of a good lawsuit: strong liability, solid damages, and an ability to collect those damages from wrongdoing defendant(s) (who hopefully has large assets or sufficient insurance coverage).

Of course, you may not know all there is to know about the collection aspect if you do not yet have the relevant insurance information. Fortunately, the procedural rules provide a means of determining what coverage may apply, but a lawsuit has to exist first before the information is obtained. It is rarely volunteered! (See, e.g., Fed. R. Civ. P. 26(a)(1)(A)(iv).)

Other assessments have to be made, including determining if this is the type of client that your firm can work with, wants to represent, and for which you can provide the necessary legal services. Can you help the client reach his, her, or its goals by representing that client in the disputed matter? Is a negotiated resolution likely? If so, is the client interested in that instead of litigating for principle or vindication (not good reasons to litigate in my view with the exception that some cases need to be brought to clarify the law or establish a legal precedent)?

I believe that most cases should be mediated if direct negotiations are not successful or are not practical. For example, there may be several parties and the only

way to achieve a "global" resolution is to bring all the parties together before a single neutral.

After making these assessments and accepting the case, what else needs to be done to work towards the first goal of seeing if the case can be settled? If mediation is contemplated, then here are some items to ponder about your preparation for the mediation process. Remember you have to prepare your client, yourself, AND the mediator. The mediator will only know the positives about your client's case from what you disclose about the case in your mediation presentation. This can be done in a well drafted and organized mediation statement, a private letter to the mediator written in confidence, and any visual information such as mediation video (which I almost uniformly prepare).

The job of the mediator is to try to get the parties to agree on the terms of resolving this conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom. You have to assess how you will approach the prospect of settlement and what the best strategy is for getting to mediation. What is the best plan for getting the other side interested in negotiating, and how can I best implement that plan so as to get them to accept that "invitation" earlier rather than later?

Here are some thoughts:

- What is the attitude of the other parties and their counsel to the case? Are they rational and realistic, or are they hardball players who want to drag the case out? Can I deal with them? If not, what do I need to do to get

them interested in exploring settlement?

- What documents do I need to assess my case and to decide on an approach to settlement and possible mediation?

- What depositions do I need to take?

- What will the other side need to be able to asses the case? Should I try to provide this information informally?

- Should I have a dialogue with opposing counsel about conducting some discovery to bring us to a point where a meaningful mediation can take place?

- Are there any parties to align with me in this process? How should I approach getting that party to work with me in getting to a point at which mediation is an attractive alternative to trial?

- What does my client need to know to be able to make decisions regarding settlement? How should I approach this process and what should I do to get it started? (I like to keep my client very closely informed about the case using telephone and voice mail, if necessary, and email as means of communication.)

- What eventually is the mediator going to need to be effective in a mediation? Will I be able to provide this, and how should I go about getting what is needed?

- Should I involve consultants or potential experts in this workup of the case

towards settlement? (I frequently get my experts in the case early or use consultants who may or may not eventually become expert trial witnesses to assist in determining what information is needed, how to get it, reviewing documents, preparing for depositions, and assisting in getting the case ready for mediation.)

- Do I need court assistance in getting the parties to a meaningful mediation if they are not interested in direct negotiations? If so, how do I approach getting it? (Usually I ask for assistance at the first Case Management or Status Conference.)
- What is the time line that will help us achieve the goal of direct negotiations or mediation?
- What materials will I need for a mediation? What will my Mediation Statement look like?
- Will I need a private letter to the mediator?
- Will I need a video, and what should it include?
- Where does this all fit into my Litigation Plan for this case?
- How can I best achieve my client's goals in this process?

On balance, getting yourself ready for mediation is the best way to prepare for trial if that is eventually what takes place. I often find that planning and preparing for direct negotiations or a mediation forces me to think about the case early, consider my theories and the defenses that I will face, look at my client to determine the impression

that client will have on a court or jury, assess the strength of the evidence, and focus on getting the case ready for whatever alternative is used for resolution.

CHAPTER 17

PREPARING YOUR CLIENT FOR MEDIATION: WINNERS WIN, WHINERS LOSE!

Martin Peterson, Ph.D., is a long time colleague of mine. He is a litigation consultant who has been providing these services for 30 years. He tells this story:

In a recent case, our 25 year old female client had been sexually harassed on a work site by having a work elevator dropped on her while working underneath it.

This was intended to teach her a lesson! The elevator crushed her spine. The other side continued to discount her, offering a low settlement. We went to mediation.

She waited in another room until everyone had assembled for the start of the mediation. She then wheeled into the room, directly approaching the defendants' attorney.

She leaned forward out of the wheelchair, extended her hand and said, "Thank you so much for coming here today. I appreciate your concern and efforts."

She then wheeled around the room, shaking everyone's hand and thanking each person for taking time to come to the mediation. When she got beside her lawyer, she said, "Time to get to work" and wheeled herself out of the room.

Her demeanor and behavior added another $1Million to the settlement.

Winners help their attorney win; whiners hinder their attorneys.

Well, my good friend and professional colleague is very correct. The client is a key to a successful mediation in many ways. While the story that Dr. Peterson relates is

unique in my experience because of the ability of this client to impact the mediation environment, it is important that our clients be well prepared for the mediation process. This does not mean preparing them to make a presentation, or influence the other side in the way that Dr. Peterson relates, but it does mean making sure the client is ready to participate in the process. This means also making sure the client understands what the process is designed to do, and how it works.

In some cases, the other side may have already seen and heard from the client in deposition. I would be reluctant to participate in a mediation as a defendant unless I had some insight into who the plaintiff is and what impression that plaintiff will have on the fact finder, court or jury. Whether a deposition is the proper means of assessing that depends on the case. I have often offered up the client for a limited deposition to the defendant for this purpose, or even an informal interview.

In some cases, like wrongful death for example, where you have a surviving widow and children, or parents in a case involving a death of a child, an interview may be all that is needed – a "looksee" is enough. The same may be true with a catastrophically injured plaintiff. These are highly emotional cases, and it is just a matter of assessing that level of emotionality and its influence on the outcome. So, I welcome a brief deposition session or interview of my plaintiff client for this purpose.

But there are other aspects where preparation of the client is required. It is just as important to prepare the client for the mediation as to do the other preparation. A prepared client will be able to make decisions as the mediation progresses on what terms and conditions of a settlement are to be considered and acceptable. Often, the client's

perspective on settlement will change as the mediation progresses. That is good because the client hears what the other side has to say and can consider the points and counter-points of the case and factor those into the decision-making process.

Here are some thoughts:

- Prepare for the Process: Your client needs to be prepared for the process by having the appropriate attitude before attending the mediation. I usually have a pre-mediation conference several days before the mediation. During this conference I describe the informality of a mediation, that it is not a trial as the mediator has no power to decide anything, and that the mediator's role is to facilitate negotiations and resolution. I also describe the "give" and "take" of the process, and tell the client not to be discouraged by this bargaining process, nor be offended by it.

- Understand Confidentiality and What that Means: *I also make sure the client understands that what takes place at the mediation is confidential*. I stress that nothing which is said or done during a mediation can be brought up in court during the trial of the client's case. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.

- Get Down to Business: This is where the client enters the business process of resolving disputes and essentially steps outside the courtroom. I stress that it is the client's decision whether to settle, and I make sure the

client has all necessary information to make an informed decision about whether or not to settle.

- A Chance for an Objective View of the Case: I explain that the mediation is a chance for us to get an objective view of our case, so we should listen carefully to what the mediator says. The mediator will often comment on the issues and give his or her views on each side's case and the pros and cons of settlement versus proceeding further. This provides an objective, third-party's view of the matter, which can be very valuable.

- Using the Proper Words: The proper words should be used in getting the client ready for a mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or words of war and combat have no place in getting a client ready for mediation and setting the right tone for the negotiation process. This is not war; this is negotiation and compromise, so words appropriate to that process should be used. I prefer words like, "educating the other side about our case," "working with the mediator [and the other side] to resolve the dispute," "resolution," "settlement," and "compromise." I also stress that we are not giving in, and these words don't mean that. I remind the client that it takes all parties having the same attitude to get a settlement that works for all.

- Settlement is Voluntary; There is No Decision Unless All Agree: Some clients think a mediation is an arbitration and the neutral will decide the

case. I stress that no one is forcing the parties to settle. A deal will be done only if all agree to all terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort may be used to make clear what a settlement means in the client's case and how the client can benefit from this process.

Here are some more thoughts:

- Do you give the client your views on the settlement value of the case, or do you reserve that for discussion during the mediation?
- What do you tell the client about the expectations at the mediation?
- Clients will often ask: What is my case worth? What will the other side offer? How much should I expect to get? What should I be prepared to settle for? Why should I take anything less than full value?

I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement.

There are three ways to approach this:

- Don't give the client a number at all, but tell the client that a "demand" should be made first (if you are the plaintiff), and you and the client need to see how the defense responds and what the mediator says before you line up any numbers;
- Give the client a reasonable but fairly wide range for settlement,

suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to the higher number;

- Just set a rock bottom "walk away" number and work from there.

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement, whether directly negotiated or resulting from a mediation:

- The costs of further proceeding;
- The certainty of a settlement versus the uncertainty of a result by trial or arbitration;
- The emotional drain on the client and family or business partners;
- Adverse publicity that might result;
- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;
- The present value of money in hand versus the chance of a greater gain at trial [which can very much effect, and in fact lower, a client's unrealistic expectations];
- The positive impact on life planning of having money now rather than the long wait through trial and appeal.

I try to go over the major points in favor of a mediated resolution. I point out that a mediated result is a business-like way of resolving a dispute through a third party neutral who may comment on the issues in the case. The client should be ready to engage in this process and understand that this can be a productive, positive way for resolution. And, the client has control over the outcome! That is not true if the case is left to a jury's discretion.

CHAPTER 18

THE LAWYER'S ROLE IN PREPARING THE MEDIATOR FOR MEDIATION

Let's not forget that as our client's advocate at mediation we have a job to do in preparing the mediator. Before the Mediation starts, the mediator knows only what he learns from the submissions of the parties beforehand. He can learn more about the parties' respective positions during the mediation, but it is important to give the mediator as much information about the facts of the case, the opinions of experts, the legal issues, and your client's position in advance so that the mediation day can progress without the mediator having to probe counsel for more information that was not provided initially.

Mediation Statements

I am frequently surprised at the skimpy mediation statements that my adversaries submit. Often they submit just a few pages which outline not much more than the answer to the complaint, or they misstate or mislead the mediator as to the facts or law.

Seldom are our mediation statements less than 30 pages. They contain a detailed factual recitation that is usually in a chronological order with headnotes broken down by date range, event or some description. We try to make the factual recitation interesting so that it tells a story. In short, we tell the mediator: "This is what the court and jury are going to hear about our client's case!"

We also include summaries of what our experts are going to say about liability and damages, often in a separate section of the mediation statement with a separate topic heading devoted to "Expert Opinions."

Then we outline the law focusing on key cases (often attaching one or two cases with key parts highlighted for the mediator). Most often our discussion of the law is based on the jury instructions that we believe will be given by the court. If we are mediating either before a dispositive motion is filed or after it has been filed and before any hearing, we will use a separate section of the brief to advise the court why our motion will be granted or a defense motion will be denied. If our brief has been filed, we will submit a copy of key moving papers to the mediator.

The opening of our mediation statements is usually entitled, "What is This Case About?" In two or three paragraphs we try to outline the essence of the case and the claims of our client – how our client has been irreparably injured by the conduct of the defendant.

We construct our mediation statement so that after the mediator reads this introduction and the first new pages, he/she will say: "I got it."

Exhibits

The proof of the pudding is in the eating. That is what exhibits are all about. They not only establish facts but verify the statements in a mediation statement. We include exhibits, which are organized as they are referenced in the mediation statement. Again, we highlight key portions which verify our story about the case. While we do not want to overwhelm the mediator with more than can be absorbed in a reasonable amount of preparation for his/her role as mediator, we also don't hold back if we need to verify the facts or expert opinions that support our client's case.

Videos

Seldom do we attend a mediation without a mediation video. These videos can include family photos (in a death or serious injury case), videos of locations where an accident takes place, a series of photos of damaged vehicles or products that are the subject of the case, reenactments and computer simulations, news segments from television reports, interviews of witnesses (such as family members about the value of the lost relationships in death or serious injury cases), key documents with important portions highlighted or enhanced, and event interviews of expert witnesses.

Material that is specially prepared for the mediation and that is not otherwise available to the parties may be labeled as confidential. We always put an admonition at the beginning and ending of our video that it has been specially prepared for the mediation and is deemed a confidential mediation submission. We cannot protect inclusions which are otherwise discoverable or admissible, but we can protect our work product from being used at trial. (Cal. Evid. Code § 1119(b); *Stewart* v. *Preston Pipeline Inc.*, 134 Cal.App.4th 1565, 1576 (2005)["videotapes…were…covered by the mediation-confidentiality provisions of section 1119 to extent that they were prepared for the purpose of, in the course of, or pursuant to, the mediation in the underlying action."].

Private Letters

The confidential, private letter to the mediator is an effective tool in preparing the mediator before the mediation. We use this letter as a means of:

- Advising the mediator who will attend the mediation on our client's behalf, giving a brief description of their role (client's family,

consultants/experts and our attorneys);

- Providing the mediator with additional information about our experts and consultants (e.g.. medical reports from consultants who have evaluated a part of the case and advised that their opinions would not support a particular damage claim);
- Demonstrating structured proposals;
- Submitting written statements from witnesses that the other side has not obtained in discovery;
- Providing information on insurance and our comments regarding the carrier's position and approach;
- Providing comments on apportionment of liability among several defendants;
- Providing comments on prior dealings with defense counsel and/or the parties or carriers involved;
- Relaying thoughts on how the negotiations might progress.

The private letter assumes that the formal mediation statement will be exchanged.

I am an advocate of exchanging mediation statements. Maybe it will not tell the other side everything, but it will put your case before your adversary. Unless the adversary knows that case, how can its counsel evaluate your position?

Pre-Mediation Conference

I am also a fan of a pre-mediation conference with the mediator. This serves several purposes. First of all, the mediator can outline what is important to him/her (i.e. what information is deemed important for the neutral). Second, the mediator can advise the parties of the date for a timely submission of the written submissions. Third, the parties can exchange ideas on how the mediation should be approached. And, if the parties need additional information before the mediation, they can request such.

Timing of the Mediation Submission

I also believe that any mediation submissions should be provided at least week before the mediation. In fact, weeks before is not too early. It is not effective to submit a several page statement a day or two beforehand. If counsel cannot do better, then the mediation should be continued to a date that will allow the parties to have a full and timely exchange of information, and the mediator will have what he/she needs to give them the best chance for resolution.

CHAPTER 19

DOES YOUR ADVERSARY AND HIS/HER CLIENT HAVE THE RIGHT ATTITUDE ON MEDIATION DAY?

Last column I discussed whether you, as counsel for your client had the right attitude going into mediation day— but what about your adversary and his/her client?

What do you know about the other side's willingness to settle the case and interest in real resolution? He/she may simply be interested in getting "free discovery" or in trying to convince you and your client to take less than the case's "good faith" value.

Obviously if the opposition – either the client or client representative (aka: claims person) or his/her lawyer—is not fully engaged in the process of mediation, the chances for wasting the day are high. To avoid such waste, find out beforehand the temperature of your opposition, to encourage a focused mediation. This will increase the likelihood of settling the case. Here are some ways to get a read of the folks on the other side:

- Direct Contact: There is nothing wrong with a face-to-face discussion or a phone call to discuss how best to approach the mediation. Too often we rely on email to conduct our case discussions. Email is fine for routine matters and confirming dates for case activity and calendar items. I, however, am a bit "old school"; I like to talk to counsel personally face-to-face or by phone to gauge the level of interest. There may be some puffing but if you have a professional relationship with your adversary, you should be able to break through and determine if there is a real interest in settlement.

- Talk to the Mediator: Most mediators I know want to settle cases. It is how they gain a reputation as a "closer." If you have doubts about the sincerity of your opposition in reaching a reasonable settlement, and direct contact is not in the cards, talk to the mediator. I have found mediators willing to contact opposing counsel and have a private and preliminary discussion to test the waters. Timing may be an issue, as your opposition may have other work, may be preoccupied with other matters, or simply cannot reach his/her client; a later date than you had hoped for may be preferable.

- Talk to Others: Find out who has mediated with your adversary previously and call them. I often use a *listserv* for the San Francisco Trial Lawyers Association (but make sure your adversary is not tapped into it) or I call colleagues to learn if anyone has some background on opposing attorney and his/her client.

- Read the "Tea Leaves": Sometimes you can discern an adversary's interest in a mediated result by reading the papers in your case. If there is hostility, mediation may calm the waters and focus the parties on resolution rather than further fighting. Briefs or discovery responses can reveal hostility, bitterness, anger or other emotions that serve as a barrier to a fruitful mediation.

- Put Some Pressure On: Don't underestimate the power of pressure – significant written discovery requiring your opposition to reveal its case,

focused requests for admission that require the other side to admit or deny key facts (and reveal the facts about any denial), or deposition notices can gain your adversary's attention. These tactics can result in an enhanced interest in negotiations. Sustained pressure can get a case to mediation quickly, but that pressure must be consistent. If you serve discovery, be prepared to "meet and confer" and file motions to compel if there is unjustified resistance, meritless objections or evasive responses.

- Write a Letter or Email: Face-to-face or direct contact may be too aggressive. If so, an email or letter inquiring about a real interest in negotiating the case is worth a try.

- Past Experience: Past experience with the defendant or opposing counsel may be telling. We have had cases against various insurance companies on more than one occasion. I have a good feel for how some of them approach litigation— some are willing to explore resolution at an early stage, some are not. Often they use the same lawyers, so past experience in those cases can give you a good read on the prospects for a successful mediation and the timing for such. The timing may be early, after some discovery (such as your client's deposition has been taken), or after an exchange of information.

- Check Out Other Mediations Involving Counsel or Parties: I have mediator friends who have experience with insurance company defendants. They often discuss what they've heard about those

companies' attitude and approach to mediation, without revealing confidences. I frequently talk to colleagues about other law firms and those firms' dealings with certain clients we see in our financial litigation, wrongful death and injury cases in which insurance companies are heavily involved (and other litigation in which there are repeat defendants).

These are just a few thoughts on assessing how your adversary and his/her client may approach mediation. It is a good idea to assess and discuss this with your client before committing to the process.

CHAPTER 20

USING EXPERTS OR CONSULTANTS AT MEDIATION

One of the best techniques for settling cases at mediation is to take a consultant or expert witness with you to the session or at least have them available by telephone. I have used this approach in many cases with considerable success. The manner in which this is done varies depending on the complexity of the case, the extent of the consultant's or expert's involvement, and what disputes or unresolved issues depend on expert testimony.

Here are some examples:

- In an insurance long term disability bad faith case, plaintiff suffered from a serious inflammatory bowl disease. There were issues about the nature and extent of her medical problems, and the affect it had on our public defender client, who was frequently under the stress and pressures of her courtroom and client work. Her gastroenterologist was several hours away from the mediation site. We interviewed him on video for the mediation in a mini direct examination and offered the defense the opportunity to talk to him on the phone – with the interview protected by the confidential nature of the proceedings – to ask any questions for clarification. They did. The conversation lasted about 45 minutes, and the case settled well at the end of the day.

- In a complicated tax shelter fraud case involving the use of life insurance in what was touted to be a legitimate tax free deferred compensation

program, our life insurance consultant attended the mediation with us to help the mediator understand the case, evaluate the defense's position, and review the settlement terms. It turns out the representative of the defendant and our consultant had a long time relationship of trust. That certainly helped in achieving a settlement. Even if that had not been the case, our consultant was invaluable in assisting us in getting to a settlement

- In a wrongful death case involving an charming 25-year-old eldest daughter of a Filipino family, we had two consultants – one an "all purpose" coordinating consultant on highway design and other issues (he helped coordinate and interpret the work of the those serving as expert trial witnesses), and another on the Filipino culture and the role of the family in that culture. The second expert was very persuasive on emphasizing the expectations of parents in that culture for the support of their children, particularly the eldest, as the parents grow older and less able to care for themselves. This was an important part of our case for economic and non-economic damages. Both experts were outstanding, and we got an excellent result for our clients in the settlement.

There are other examples of how consultants and experts can be used at mediation. For instance, we often prepare a mediation video with 20-40 minute mini direct examinations of experts or consultants [even if the consultant is not going to be an expert trial witness] to explain our position or provide information to the defense about technical or medical issues in the case. We use consultants in some cases where there may be several expert trial witnesses eventually,

but we use a consultant to address multiple expert issues. We have medical consultants who work with our firm who have broad knowledge and can provide an overview of the case without requiring us to call on several witnesses or treating physicians and incur that expense for the mediation. Sometimes the consultant will use the records and reports of the treating physicians or expert trial witnesses (if they have been obtained) to portray the issues and provide an analysis. Again, we use the protection of the mediation's confidentiality when these consultants are used. In most cases, I get an agreement from the defense that we can bring this consultant to the mediation for this purpose and that the defense will honor the confidentiality protection. I have never had my opposition decline to accept this offer.

To me, using consultants and experts at mediation is a very positive tool in specific cases in which there are medical or technical issues that need to be addressed. In doing so, we need to be efficient so the consultant can provide effective way to assist the mediator and your opposition in understanding your client's case.

THE TOP TEN REASONS WHY CASES DO NOT SETTLE AT MEDIATION

BY: GUY O. KORNBLUM[1]

Here are my top ten reasons why cases do not settle at mediation with some brief comments about each. You probably can add more. But give these some thought.

No. 10: **You are not ready**. This is an obvious reason, so not much need be said. It is better to postpone a scheduled mediation if you believe that you are simply not at a readiness level that will maximize your client's chance for a productive and successful day.

No. 9: **Your client is not prepared**. What have you done to educate your client about the mediation process and its important aspects? Is your client prepared to discuss the economics of settlement? Are his/her expectations reasonable? Is your client willing to listen to the other side and the mediator about the issues? Does your client understand this is a non-binding process in which he/she does not have to testify or even say anything, and that the mediator is not a decision maker? Have you explained how the process works, so that your client understands this is not like being in court? Most importantly, does your client understand the concept of confidentiality? Finally, if your client is going to say anything, have you

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rehearsed what is to be said and planned for it?

No. 8: **Your opposition is not prepared or does not understand your case**. Sometimes this is difficult to assess. I have on occasion called opposing counsel to determine for myself if he or she understands the case or issues, and also if the claims representative or client representative is well informed on the issues and will be present to participate in the mediation. I want the check writer there. If there are problems in this arena, I call the mediator to see what can be done to insure that the client representative has authority to negotiate in the financial arena into which I believe the case falls.

No. 7: **The mediator is not prepared or ineffective**. Frankly, I have experienced a few situations in which I was sorry that the chosen mediator was selected. This is particularly true when the mediator a) limits his or her participation in caucuses with your client and you (e.g. does not provide constructive guidance on how to posture demands and responses to offers), or simply wants to be a messenger to transmit demands and offers back and forth. There are some occasions in which the mediator has been ineffective and I have had to guide the mediator during the mediation. Believe it or not, in the couple of instances in which this has happened, we have achieved a settlement. Essentially, however, we were negotiating directly with an intermediary to carry the mail back and forth. That is not my idea of how a mediation should be conducted!

No. 6: **The emotions of the parties or their counsel interfere with the process.** We all know that in many cases, the emotions of the parties run high. In those cases, a mediation is likely to fuel them despite the best counsel from a lawyer. First, it is important for you to assess if this will be the situation on your client's mediation day. Second, if that is the case, then

obviously you need to counsel the client to see if emotions can be tempered. You might also discuss potential hot points with opposing counsel and involve the mediator so that tensions can be tempered and the day managed with the clients in control. Most important is to be honest in assessing the circumstances so that you can anticipate any problems of this kind interfering with the process.

No. 5: **The parties do not understand the economics of the case.** This is a common problem in mediation. Clients must understand and be prepared for talk about dollars and cents. What is the realistic potential for damages if liability is found? What are the various scenarios for a jury or court on the damages issues? Given these, what is it going to cost to get there, and what numbers might a party see at the end of the day? The defense must also understand the exposure. I respectfully refer you to the September 2008 Journal of Empirical Legal Studies (Vol. 5, No. 30, pp. 451-491)[2], a joint venture of Cornell Law School and the Society of Empirical Studies, in which there are published results of a quantitative evaluation of "the incidence and magnitude of errors made by attorneys and their clients in unsuccessful settlement negotiations." The study entitled, "Let's Not Make A Deal: An Empirical Study of the Decision Making In Unsuccessful Settlement Negotiations,"[3] was done by two faculty members and a graduate student from the Wharton School of Finance, University of Pennsylvania. The study analyzed 2,054 California cases[4] in which the plaintiffs and defendants participated in settlement negotiations unsuccessfully and proceeded to arbitration or trial, and compared the parties' settlement positions with the award or verdict. The study "reveal[s] a high incidence of decision-making error by both plaintiffs and defendants in failing to reach a

[2] Available on line at http://www.blackwellpublishing.com/jels.
[3] The study is the subject of an article in the New York Times, August 8, 2008, "The Cost of Not Settling a Lawsuit," Business Day, available at http://www.nytimes.com/2008/08/08/business/08law.html.
[4] These were cases in which results were reported in the 38 month period between November 2002 and December 2005. They involved about 20 percent of all California litigation attorneys.

negotiated resolution."[5] I discussed this study in my December column last year.

No. 4: **The parties lack credibility.** The Three C's of mediation are: Credibility, Confidentiality, and Communication. I work very hard to gain the confidence of my opposition and avoid hostilities. Our clients may disagree, vent, and be angry during the litigation, but counsel must establish a credible basis for dealing with each other. If so, there is a high chance that the mediation day will be successful. If not, then the mediator should know that the parties are having difficulty communicating, and the lawyers are too!

No. 3: **The parties are not candid with each other and the mediator.** Misleading a mediator or an adversary will only lessen the ability of the parties to work together. Advocacy at mediation is different from advocacy in the ordinary process of litigation. I don't mean to suggest that being dishonest is acceptable in any way at any time. However, the spin doctors don't do well at mediation. It is important to recognize the issues, and discuss them candidly and honestly with the mediator and even the opposition. Open discussion leads to a fair assessment of the case which leads to resolution.

No. 2: **Client expectations are too high.** This is a corollary to the principle that the parties understand the economics of the case. A plaintiff may have expectations of a recovery which are not justified given the picture regarding liability, causation and damages – and maybe even collection. A defendant may believe that a mediation is a "fire sale" for the plaintiff. On both sides the costs of proceeding must be assessed. Without a clear understanding of the economics of the case, the parties cannot bargain responsibly.

[5] The study was an update three prior studies of attorney/litigant decision making and increased the number of cases used by three times and expanding on the analytical format and variables. As the study states, "Notwithstanding these enhancements, the incidence and relative cost of the decision-making errors in this study are generally consistent with the three prior empirical studies. . . ."

No. 1: **Counsel is unable to control the client**. We have all had experiences in which a client simply will not process the information we provide, as well as our advice and counsel. Each of us all has ways to get around and pierce through the stubborn exterior of a client. But sometimes we are not as successful as we would like. I do not hesitate to have a private conversation with our mediator about the expectations for client behavior. Often I find a mediator can have a great influence on a client by repeating – perhaps in different words – the message about the case that the client seems to resist hearing.

Getting the job done at mediation requires a thorough understanding of the process, knowing how to prepare and avoiding the barriers that impede the process and prevent a successful day. What I have outlined should help to focus your attention of effective representation of your client in the mediation process.

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CHAPTER 22

LISTENING TO THE STORY AS A TOOL IN MEDIATING

Being able to listen is an important trait in our profession. We need to hear what our clients recite as "their story" and develop a plan around that story for resolving their dispute or obtaining compensation for the wrong done to them. From the day we first meet our clients we must open our ears to their plight, a tragic injury, a loss of a loved one, a business or investment that has been stymied by wrongdoers. Whatever the matter, it is important that we understand both what happened, how it happened, and what relief is available to bring the clients back to where they were before.

Listening is an important part of negotiations. We must listen to our opposition to understand the other side's views as to the facts or story of the case. Without a clear understanding of their position, we cannot fashion responses, nor put together a plan for representing our clients. What is their story? Who are the story tellers in the "theater of the real" (i.e. the trial court)? How will the sides be viewed by the trier of fact – court or jury? How will the story tellers be perceived? Will the trier of fact hear our story or theirs? Thus, we have to anticipate these questions and answers to the questions in planning the case and managing it for our client.

I often talk about the "laser beam to resolution," i.e. the shortest line to a fair ending of the dispute in obtaining rightful compensation of our clients. That first test of this plan is in direct negotiations. Generally I try to engage the other side in an early dialogue about the case, but at that point I am trying to listen to their story. I need to hear their version as soon as I can. I don't just rely on the pleadings or discovery. I want to

hear it from them or their counsel.

If direct negotiations don't work, then mediation is next. By that time I may have listened to witnesses in deposition, or heard the oral argument of counsel at a motion or listened to counsel during a deposition with objections that may reveal the other side's thinking. All along the way I am listening to what is being said by those participating, including the judge's comments at case management conferences or hearings.

A mediation provides another opportunity to listen and hear – this time from a neutral whose views are important because they should provide an objective assessment of the stories being told by the parties in their briefs and sessions with the mediator. But it is important to the process for you as counsel for your client to listen and hear what is being said. Then, you need to discuss what has been heard with your clients and, again, listen to how they respond. Are they rational? Do they understand the issues? Are the responses purely emotional? Do they understand the litigation process and how they can lose as well as prevail? What is a "win" in their minds? How does that track with a realistic appraisal of the case and the probable results? Do they understand the value of the opportunity, logic and rationality of resolution by mediation, and how that process can work for them?

All of this requires you, as counsel for your client, to be a good listener, and to hear what is being said. Then you must translate that into a dialogue with your clients, and a mediator if that is the process you are involved in, so that a course can be fashioned which leads to a positive resolution of your clients' case.

Listening, hearing – important qualities of counsel in providing high quality representation for your clients in the dispute resolution process!

CHAPTER 23

USING VIDEOS AT MEDIATION

Using videos at a mediation can be an excellent supplement to a mediation statement. It is a great way to provide the visual information that your adversaries and the mediator need to evaluate the case. Over the past several years, I have submitted a confidential mediation video in at least 75% of the cases I have taken to mediation. Personal injury cases are especially susceptible to the use of a video. It is an excellent way to tell your client's story. We seldom go to mediation without a video in serious injury or wrongful death cases.

We have had two highway wrongful death cases go to mediation in the last few months. We used videos in both, and they both settled for top value. Both involved defendants who were governmental entities. Here is how we approached each with video:

Case No. 1: This was a case by a 42 year-old widow with no children whose husband, a law firm accounting employee, was killed when a teenager driving his parents' Mercedes was speeding down a roadway that had a history of cross-over accidents. Because of infighting between a County and City, separate governmental entities, a four lane expressway running for about 2.5 miles between two main streets in San Mateo County, California had no raised median barrier. After a death case a few years ago, a partial six foot raised median barrier was installed but only over about 25% of the roadway. Then our client's husband was killed when the recently licensed teenager missed a curve on an unlighted section of the road. Fortunately his parents had liability coverage of $1.5 Million, but the case was worth more.

After a period of aggressive discovery during which we uncovered more details about the infighting over who was going to pay for the remainder of the barrier, we scheduled a mediation. Our video contained:

- An introduction to our client and her husband with compelling photos of them at their wedding, on vacation, with family and friends;
- A segment from a news broadcast showing the accident scene;[1]
- Photos of the cars in position after the accident;
- A computer reenactment of the accident demonstrating the speed of the teenager's car, and also providing evidence that a raised median barrier would have still prevented the head-on collision;
- A video of the roadway before the accident;
- Photos of the barrier being completed over the entire segment of the roadway a few months after our client's husband was killed; and
- More compelling photos of our client, her husband and family.

We were careful not to oversell the message here: Could this accident have been prevented? Should it have been prevented? The video told the story. The case settled with the County, who essentially controlled whether the barrier would be built and was

[1] Not all what we put on a mediation video is admissible. While we try to stay as close as we can to the evidence that we believe a jury will hear, that is not always possible. We concentrate more on telling the video story and not overly concern ourselves with the fine points of admissibility. We assume that at trial, the jury will hear and see most of what we put on the video in some form.

the impediment to it not being fully completed before our client's husband was killed, paying a significant amount to complete the global settlement.

Case No. 2: The second death case was more difficult. An errant driver who was likely having difficulties from insulin insufficiency crossed over on the upward side of a hill trying to pass two vehicles. Clearly he was negligent. He struck a vehicle being driven by the 25 year-old Filipino daughter of our clients. The decedent lived at home with her parents and her sister, who was younger and a student at the University of California at Davis. She was beautiful inside and out, as was her sister. The family was extremely close following the cultural pattern of her heritage.

The problem was the driver had 15/30 coverage. The State of California maintained the road which was an old farm road that had been repaved and redone in a patchwork manner. Over the years it became a major thoroughfare between Interstate 80 and Central California. Despite the heavy increase in traffic, and some major accidents, it was not improved the way it should have been. The stretch where our clients' daughter was killed was particularly dangerous because of a series of hills that impeded drivers going in her direction from having a line of sight for oncoming vehicles, and also because of raised areas along her right that prevented her from escaping safely off the roadway should a car come as the driver's car did. The decedent was essentially trapped in this area, with no way to see far enough ahead and no where to go if she could see a vehicle coming toward in the wrong lane of traffic.

But there was another problem. We had little in the way of economic damages. Under the California rules (resulting from Proposition 51 passed in 1986; Cal. Civ. Code

sec. 1431.2), a defendant at fault is responsible jointly for all economic damages. However, for non-economic damages, a defendant is responsible only for that portion of these damages that is equivalent to its percentage of fault. The State argued for either no liability or a small percentage fault, which would keep the verdict low.

Our video contained segments showing:

- The heavy flow of traffic on the segment of road where the decedent was killed (at 7 a.m. in the morning during "commute" hours);
- Photos of the accident area, and the vehicles (we chose the less grizzly ones; indeed there were some that were gruesome);
- A series of videos showing the path of each vehicle which clearly demonstrate the lack of visibility on the approach to four hills in sequence, and the high bank on the driver's right preventing any exit of the roadway even if she saw a vehicle in time to try to avoid it; the "trap" was clear;
- An interview of the decedent's cousin about the family relationship and the close knit family unit that this Filipino family enjoyed;
- An interview of the decedent's sister showing again the close family relationship; and
- Various family photos from vacations and holidays.

I should add here that the interviews of the family members were outstanding. Both the cousin and sister were compelling – genuine, intelligent, completely credible, and appropriately emotional at the right time. They would have been outstanding

witnesses at trial. Even the State's counsel openly conceded at mediation that we had an excellent non-economic case after he saw the video. He had taken the depositions of the parents, but he had not really touched on the relationship issues as much as we had hoped. We had to bring the evidence on this issue to him.

This case also settled on the strength of the video, plus one our of experts on highway design attended the mediation with outstanding drawings showing the configuration of this old farm road and how it had only been paved but not altered to avoid the dangerous condition that was created by the grades and configuration of the hills in the area where our clients' daughter was killed.

I have other examples of how video has supplemented our mediation statements and other parts of our mediation presentation. Personal injury and death cases are good cases for visual information. Medical cases often lend themselves to video presentations. I often get a treating physician to do an overview of the medical issues with charts, models or other illustrations to supplement the written medical presentation. Strong visual stimuli will assist in supporting your written presentation.

I usually try to keep them no more than 60 minutes. In fact, I often tell my attorneys and staff to keep it to a "classroom hour," if they can.

We also always put appropriate titles on the video and put a statement such as the following at the beginning and end: "This video presentation has been prepared for this mediation and is intended to be a confidential mediation video for the negotiations under the supervision of [mediator] on [date]." Sometimes I cite to the statutory or court rules protecting this information.

Pictures are definitely worth many words here, and are a great supplement to a well organized and comprehensive mediation statement.

CHAPTER 24

MEDIATION AS A DISCOVERY TOOL

So the case does not settle at mediation! Disappointment perhaps, but there are other benefits to going to mediation. One of them is the exchange of information that takes place between or among the parties. This is particularly true of a mediation that takes place early in the case, or at a certain point in time after the parties have exchanged limited information. Even though a mediation takes place, it is sometimes the case that the parties simply do not know enough about the other side's position or the facts of the case; therefore, productive negotiations just don't happen. Or, it may be that the perception of the parties is just quite different and more information needs to be exchanged before settlement can be reached.

We had an employment discrimination case recently that I thought had some real merit. It was different from other employment discrimination cases in that the employee was still being paid in full; however, he had been reassigned, and had not been allowed to pursue some job opportunities that had been posted by the company. He had documented a series of events that looked as if he had an actionable case, and some very large damages since he was only 55 and had several years of employment left. It appeared he was being shunted aside primarily because of his age, although he was African American and believed race was also an issue.

The employer – a major national corporation that advertised highly its emphasis on non-discriminatory practices – really wanted to mediate the case before any litigation was to commence. The employer had a program in place for pre-litigation mediation, and

offered to pay the cost. A free looksee at their defenses.

We huddled and decided to accept, and I am very glad we did. We found out a lot about our case, and what damages we might claim, and the other side was able to hear from us. As a result, we have all agreed to give the matter a month or so (no statute problems) to contemplate a possible resolution that might avoid litigation and potentially lead to continued employment – a real positive for our client. The early exchange of information allowed us to find out more about the case and assess its merits. Likewise, the employer had the opportunity to do so. We all gained by the early exchange of information and could each reassess our position and possibly avoid a costly and very unpredictable fight.

So, mediation can be very productive as a discovery tool and opportunity to learn more about your client's case, and what the other side has to say IF the parties come in good faith, with a view towards getting the important facts on the table. But if one side is attending simply to demonstrate that it is playing hardball and merely wants the other side to capitulate for reasons that are not meritorious, then a mediation is not worth the time or money.

One issue that you face is how much you tell the other side. For example, what if you have significant negative information on the other party, or impeachment potential; do you share that? Maybe not. Maybe it has to be saved to avoid the adverse party being able to defuse this potential damaging evidence. Or, it might be that you can disclose the essence of this information in a private letter to the mediator, and can go over its substance and level of importance in your case in a private caucus. That is a judgment

call that you as counsel need to make. If you follow this approach and hold it back or disclose it only to the mediator, the mediator might use it if he or she believes it may result in closure. Again, that is something you and the mediator need to discuss to put together a strategy.

My experience is that an early mediation is a valuable tool if the parties are really interested in obtaining a resolution without protracted litigation. Even if the case does not settle, there can be an exchange of information that allows the parties to re-evaluate the case. If necessary, they might fashion out a limited discovery plan, complete that part of the discovery process, and reconvene for a later session at a time when they are more ready to talk about a solution.

If the parties come in good faith, settlement or not, a mediation can be a good means of obtaining more information about the merits of your client's case. A good faith exchange of documents and facts can lead to an early evaluation of the case so that a resolution can be achieved.

CHAPTER 25

THE OPENING STATEMENT AT MEDIATION – YES, NO, MAYBE!

One question that generally comes up when preparing for a mediation is whether counsel should give an opening statement in a general session before the actual negotiating begins. A subquestion is if an opening statement is advisable, what type of presentation should be given? What should be the purpose, content and tone?

Should An Opening Statement be Given: Is There a Purpose?

In my view, an opening statement at mediation should not be given if it will create hostility or divisiveness. Sometimes a client will want a preliminary statement to assuage that client's own anger and hostility towards the other side. That is not a valid purpose because it will not contribute to the mediation process. Anything that escalates the tensions between the parties or heightens the temperature in the room is not a desirable tool for mediation. In short, an opening statement should not be adversarial, but should be devoted to demonstrating an attitude of wanting to reach a resolution of the dispute at hand.

Otherwise, whether an opening statement is given depends on its purpose. That is, it must have a purpose first of all, and that purpose must contribute to the mediation process. The best reason for an opening statement is to add information to the process or explain the position of the party delivering it if the information is not already available, or there needs to be clarification of that party's position. Despite a comprehensive written presentation, there may still be issues or positions that need clarification. If so, an opening statement should be used to provide additional information about a party's case.

One of the occasions where I find an opening useful is to clarify damages claims. There may be questions about the relationship of injuries to an accident, or about special damages, past and future. There may be medical issues; questions about future medical care, rehabilitation efforts, and income earning capacity once the injuries have stabilized. These questions may have come up in a pre-mediation conference, so the parties may want to address those issues with additional information that has developed.

However, an opening statement is not a time to rehash what has been spelled out in a mediation statement or just review what the parties already have had an opportunity to absorb. The opening statement is appropriate if it will help focus the parties on the issues to be addressed at the mediation, and provide additional information useful to moving the parties closer to a bargained result.

What Should be the Tone?

As noted, hostility and an adversarial tone do not contribute to the process. An educational and informational tone is the right one to choose for this type of presentation. Successful "across the table" negotiators do not achieve desired results with this approach in any format. As a voluntary process, mediation will not be successful if the parties display their anger and bitterness (despite its presence) to any joint sessions. Venting can be done privately, but not when the parties caucus.

Anything less than a high level diplomatic approach will only lessen the chance of settlement. This is not to say that the parties should appear to be begging for a result, but a high level of professionalism and willingness to explore settlement options should be the attitude of all involved once any joint session is over. The spirit should be: Let's try to get it done!

An *appropriate* opening statement can be a valuable tool for working to a positive end result.

What Should It Contain?

The answer to this question is obvious: information that adds to the other side's basis of information, clarifies issues or facts in the case, or makes the position of a party clearer to the mediator and other parties.

I like to use a supplement, either an outline or a PowerPoint presentation. However, these tools should be used simply to give the presentation some structure, not to overwhelm the parties with more paper or numerous slides with crammed detail. The opening statement, as I envision it, is a summary of information so that the issues and facts have a clearer focus, and the mediator and the parties can begin negotiating around their dispute.

One further point: An opening statement is often a good time to concede facts or issues. For example, I have had mediations in which the defendants said in their opening that they were not going to focus on liability because they had worked towards an apportionment among themselves. This allowed my client to focus on evaluating the case for settlement purposes and discussing damages. Obviously that was good news, and it also made the mediation day a productive discussion of some serious and real damages questions.

Be Creative; You May Involve Others!

You can be creative with an opening statement at mediation. You do not have the constraints that you have at trial. For one, you can discuss the facts without worrying about objections, admissibility or argument, although you certainly do not want to fall into an

argumentative statement that will violate the appropriate "tone" that I think should be used.

Second, you can involve others. Frequently I take an "all purpose" expert or consultant with me who can present an overview of the technical aspects of the case. For example, our medical consultants, retired physicians who assist in reviewing the medical aspects of our cases, sometimes attend to explain injuries, comment on causation and answer questions, while recognizing that they are not our expert trial witnesses. I also use consultants whom I regard as good "translators" of technical arenas, and who can give an overview of aspects of the case. They are highly credible, and what they present is done within the confidentiality of a mediation and with the understanding that they are not going to testify at trial, but are serving as consultants. This expert overview can be provided at a lower expense than if you asked two or three experts to attend or provide video statements for mediation purposes only.

Clearing the Opening with the Mediator

On mediation day it is the mediator's show. So, I want to clear the agenda with the mediator before I plan on making any opening statement. The mediator may not want it. He or she may want me to forego an opening initially and save it for later in the day if it is believed some comments in a joint session will help the parties in their negotiations.

If an opening is invited, I usually give the mediator some idea of my approach to make sure it blends in with the mediator's agenda and approach to the settlement discussions. No surprises - at least not for the mediator!

A Final Comment

You should let your client know about the difference between the opening statement at the mediation and at trial. The client may expect a gang-busters trial lawyer's presentation. Perhaps if an opening statement is to be given, you should ask the client what his or her expectations are, and then inform them of the purpose and reasons for your presentation and generally how and what your are going to say. That way the client's expectations are appropriate for the day, or at least for the initial joint session.

CHAPTER 26

THE OPENING DEMAND AT MEDIATION: HOW TO VIEW THE FIRST SHOT OVER THE BOW

"Or what king, going out to wage war against another kind, will not sit down first and consider whether he is able with ten thousand to oppose the one who comes against him with twenty thousand? If he cannot, then, while the other is still far away, he sends a delegation and asks for the terms of peace."

Luke 14:25-33

Assessing when and how to approach your adversary about mediating a claim presents a challenge to any of us representing a client in litigation. Even more challenging, I find, is determining what the initial demand should be. As a lawyer frequently representing the plaintiff in litigation, I feel the responsibility to not only provide the opposition with a clear statement of my client's case but also one that justifies considering settlement. You have to start someplace, and it is customary for me – as is usually the case – for the plaintiff to make the first bid – the initial demand for settlement. I also customarily submit that number in an initial demand package, or if negotiations are focused on a mediation, in the mediation statement which I submit at least two weeks – and sometimes earlier – before the mediation takes place.

The question is what should that number be?

Let's talk strategy and let's also talk about how the client views the numbers. First of all, I certainly avoid giving the client a bottom line number before the mediation or even at the mediation -- or a number which I recommend be the "bottom line" for settlement. Negotiations can change the view about a case. That certainly is true about a mediation. Much can be learned during the day about the case which can change its value.

My San Francisco Bar colleague, Michael Carbone, a full time mediator who writes regularly on the topic of mediation, says this about concocting settlement demands and

strategies: “Clients are often fixated on what the bottom line should be. This approach is understandable, but should nevertheless be discouraged. A demand number, a target (or ‘wish’) number, and a walkaway number can all be discussed with clients, but with the caveat that one or more of these numbers may need to change during the course of the mediation.” (M. Carbone, “Resolving It,” Vo.l 1, No. 10, October 2010.)

So you have to remain flexible regarding the numbers during the mediation.

But back to the initial demand. If it is too high, it invites resistance to negotiations by the opposition. If it is too low, then, of course, you are essentially bargaining below where you should be to drive the case value to an acceptable settlement point. The initial demand has to leave room for negotiation. We all know it is to get the process started, and is not the number that is expected to be the final settlement number. Similarly, the defense is not expected to put its “last, best and final” number on the table in its first offer.

Here are some thoughts on how to structure that first shot.

- **What are the economics of the case? Have you presented a strong case and support for the damages to be claimed at trial? Are there soft spots?**
- **How does the opposition negotiate? Are they hardnosed or cooperative? Will they listen to the mediator? Is every first demand from a plaintiff considered unreasonable, or are they likely to respond to an invitation to bargain?**
- **Does your case have aggravated liability facts which adds potential to the outcome?**
- **Do you need lots of negotiating room?**
- **Is there an expectation that the plaintiff will show considerable movement during the negotiations?**

- **Who is the mediator and what his the approach likely to be taken by the neutral? No matter what the initial demand and offer, will the mediator work to get the parties into the "field of play" (aka: the reasonable negotiating range)?**

In determining that first demand, first look at the hard economic damages which are likely to be viewed as clearly related to the wrongdoing. Second, if there are soft numbers in addition, which may be questionable or have less evidentiary support, they still should be cranked into the demand to provide negotiating room. Third, in a personal injury case, the claims for future medical expenses, and also impairment to earning capacity should be quantified and supported. Fourth, you have to obviously evaluate the potential for general damages, past and future..

Often I have jury verdicts research done to try to find comparable cases with verdicts that can serve as a basis for evaluation.

Once I pencil out these numbers, I then place a value on the case using a range of a low result, mid result and very good result. After that I decide what additional sum I need to add to this number to negotiate given the factors outlined above. Maybe I need to add 30-50% to give me negotiating room, possibly even more if I think the other side is going to expect more give than take on the plaintiff's side.

I also need to dispel the notion that the settlement number is mid point between the initial demand and $0, which sometimes suspect is the perception of the defense. That is rarely the situation from my perspective.

The point is that the first demand must have a rational basis in light of the potential damages claims, so outlining those claims first is critical. They have to appear solid, and not unreasonable or if potentially unreasonable, perhaps just above the line of reasonableness.

The defense will likely advise the mediator that the initial demand as way too high in any event (of course it is high, but it is designed to start the bargaining process), so giving yourself some room to come down without compromising your ability to negotiate is important. Remember, you can always go down, but not up! So, if you going to err, be it an err that is high, not low!

CHAPTER 27

GETTING AROUND THE IMPASSE AT MEDIATION

You and your client have mediated for a full day. The mediator has worked hard. But there is no deal and the parties are still a ways apart. An impasse has been reached, and the prospects for breaking through look dim. What happens next?

There are a number of possibilities and skilled mediators know how to deal with what you would hope is a temporary "blip"' in the negotiations.

First of all, your client should be prepared for this. I normally tell my clients that this is our first day of real negotiations. We would not be going if we were not prepared and interested in settling. But we are just one side. The defendant(s) may or may not have the right attitude about settlement, or may be fighting among themselves as to their respective shares.

Second, I have a basic operating principal in mediations. If the parties are talking there is hope, so KEEP TALKING if you are interested in getting the job done and a resolution of your clients' case.

So what are the alternatives if the parties reach the end of the day or it's apparent during the mediation day that they are stuck and the process has bogged down?

No. 1: Use a "mediator's field of play": Here the mediator proposes a "demand" and "offer" which each side must accept. That is, the plaintiff must agree to make the proposed "demand" and the defense (if more than one then perhaps a joint offer) agrees to the proposed offer. Once that occurs then the parties negotiate further. This approach is used when the plaintiff is holding back and making "demands" that are too high and the defense is standing on

an offer that one might characterize as "way too low." That is, each side is being unrealistic. The approach I describe forces the parties into an appropriate mediating range or "field of play" that allows them to get back to mediating.

No. 2: Adjourn and come back another day: This often happens. Perhaps there is more discussion that needs to take place between lawyer and client, or the parties need more discovery. However, if there is real interest in a settlement among all parties, a second session after some time passes and some additional work is done, often can lead to resolution.

No. 3: Separate sessions with the parties: If there are disagreements among several defendants, but overall they have a sense of what collectively might result in a settlement, perhaps a separate settlement session with the defendants will allow them to discuss their respective shares.

No. 4: The mediator works the phones: Here the mediator takes the responsibility of continuing negotiations by calling the parties separately and discussing resolution. This can work in the situation where the parties are close but closure does not occur. Maybe the defendant or defendants need to request additional authority, and cannot accomplish this during the mediation day. Or perhaps the mediator wants some time to talk to the parties separately without the time pressures of a work day. The disadvantage is that the mediator loses the face-to-face encounter, and also has the inconvenience of trying to reach counsel, who are often occupied during the business day. This becomes more of a problem when there are time differences. But continuing the mediation process is better than abandoning it. Perhaps the mediator can even bring the parties back to a face-to-face process if he runs out of nickels for the phone call!! (I remember when.)

No. 5: A mediator's proposal: This is the last resort for a mediator to settle a case where the parties are reasonably close but are unable to make the final move to closure. Here the mediator proposes a number and the terms of a settlement. Both sides are advised of such and given the opportunity to accept or not. If the parties accept the mediator's proposal, then the deal is done. If not, there is no settlement. In my experience, mediators are reluctant to do a mediator's proposal unless there is a real chance the parties will accept it. These are normally very reasonable proposals which are irresistible in most cases. I cannot remember a case in which a mediator's proposal was not accepted by the parties, but then this approach is not one that occurs with great frequency. Used properly by a mediator it can be an effective tool for resolution.

There are other approaches as a mediation is subject to the creativity of the mediator and the parties. But as long as the parties "keep talking" there is hope for a settlement. After all, as noted in previous columns, history and statistics demonstrate that the parties are likely to do better by settlement than concluding the matter by arbitration or trial. .

CHAPTER 28

"SETTLEMENT" AIN'T A BAD WORD!

My experience with clients today is that they want (and perhaps even expect) their case to settle. They want to avoid the stress and delay of a trial, and also the risk of an unacceptable result (to them). So the first question after "What is my case worth?" is: "Can you settle my case."

So educating the client about process and prospects of a resolution short of trial should and usually begins at the first client meeting. And its discussion early on is important to successfully settling clients' cases because obviously they hold the authority to settle. So it is important to have a dialogue with clients about the negotiating process and begin educating clients about how this all works and what their expectations should be for a settlement instead of a trial.

Here are some thoughts on how to educate and prepare clients on settling their cases:

- Prepare for the Process: You need to prepare clients for the negotiating process by first educating your client to have the right attitude towards settlement. This means explaining the various alternatives that are available, and when they might be an advisable part of the effort to settle the case. To help accomplish this, I explain the difference between direct negotiations, a court supervised settlement conference or mediation, and a mediation through a private dispute resource.

- The Timing: I also inform the client about the level of preparation needed to posture the case to get the other side interested in negotiating. And explain that

this might be accomplished through a "demand letter" or a simple conversation with opposing counsel at the "right" time. Or it might be addressed at a Case Management Conference. No matter how it happens, the client needs to know it does not happen overnight and a good bit of work needs to be done before negotiations can begin.

- "Settlement" Ain't a Bad Word: Hence the title of this commentary. Showing interest in settling is not a manifestation that you don't believe in your client's case. Instead it can show confidence in the facts and the applicable law, and illustrate your experience and wisdom in handling the matter. Also, by reaching out to the opposition, you can begin the process of educating the client.

- Understand Confidentiality and What that Means: *I also make sure the client understands that what takes place during negotiations is confidential*. I stress that anything said during negotiations, whether direct or through mediation, cannot be brought up in court during trial if settlement efforts are not successful. Clients often are surprised at this. They need to know that they will not be prejudiced by the process.

- Get Down to Business: Settlement is where clients learns the business side in resolving disputes. It is important to talk about numbers at a stage where they become important – usually when costs begin to significantly increase and start to reduce the "net" to the client and counsel. So it is important to recognize when the cost going forward significantly increases and advise clients accordingly.

- It's the Client's Decision: I stress that it is the client's decision whether to settle, and I make sure the client has all necessary information to make an informed decision about whether or not to settle.

- A Chance for an Objective View of the Case: I explain that an advantage of mediation is that it provides a chance for us to get an objective view of the case. A mediator will often comment on the issues and give his or her views on each side's pros and cons in settling versus further litigation. This provides an objective, third-party's view of the matter, which is valuable.

- Using the Proper Words: The proper words should be used in getting the client ready for mediation (or for settlement for that matter). Words like "victory," "doing battle," "defeating the other side," or war and combat slogans have no place in getting a client ready for negotiations and setting the right tone for the negotiation process. This is not war; this is negotiation and compromise, so words appropriate to that process should be used. I prefer words like, "educating the other side about our case," "working with the mediator [and the other side] to resolve the dispute," "resolution," "settlement," and "compromise." I also stress that we are not giving in, and these words don't mean that. I remind the client that it takes all parties having the same attitude to get a settlement that works for all.

- Settlement is Voluntary; There is No Decision Unless All Agree: Some clients think a mediation is an arbitration and the neutral will decide the case. I stress

that no one is forcing the parties to settle. A deal will be done only if all agree to the terms and conditions. No one is going to shove a settlement down a party's throat; they should not even try, although sometimes a little persuasive effort is encouraged to illustrate what a settlement means for the client's case, and how the client can benefit from this process.

- Does the Client Need a "Number?" I try to avoid giving the client a predicted range, although sometimes it is necessary to get a client to think in terms of a realistic figure for settlement. There are three ways to approach this:
    - Don't give the client a number at all, but tell the client that a "demand" should be made first (if you are the plaintiff), and you and the client need to see how the defense responds and what the mediator says before you think numbers;
    - Give the client a reasonable but fairly wide range for settlement, suggesting that the ultimate number will be affected by how the defense postures during the mediation and how effective the mediator is at moving to a higher number;
    - Just set a rock bottom "walk away" number and work from there.

One of the major tasks in preparing for mediation, and any settlement negotiations for that matter, is to inquire about a client's expectations of how a settlement will benefit them. This involves advising the client of the pros and cons of a settlement:

- The costs of further proceeding;
- The certainty of a settlement versus the uncertainty of a trial or arbitration;
- The emotional drain on the client and family or business partners;
- Adverse publicity that might result;
- Public "airing" of personal life and issues, particularly sensitive medical or psychological problems;
- The present value of money in hand versus the chance of a greater gain at trial [which after affixing value to the two, can vary greatly, and in fact, lower a client's unrealistic expectations];
- The positive impact of having money now for life planning rather than the long wait through trial and appeal.

I try to explain the major points in favor of a settlement, and that at its core settlement is a business approach to resolving disputes. The clients should be ready to engage in this process and understand that this can be a productive, positive way for resolution, and that the client has control over the outcome! Obviously that is not true if the case is left to a jury's discretion.

CHAPTER 29

EMOTIONS AND THE NEGOTIATION PROCESS – GAINING CONTROL OVER A CLIENT'S EMOTIONAL RESPONSES DURING SETTLEMENT EFFORTS

Any negotiation of a disputed matter is going to bring to the surface the emotions of its participants, some welcome and some not. As I have often said (and written), I prepare my client for resolution from the day we first meet to discuss his/her case. I also try to assess the emotional state of the client at that time, and get a read on his/her "emotional profile". Does the client wear a heart on his/her sleeve?[1] Is my client likely to repress emotions? How is my client expected to deal with those emotions in the intense setting of a mediation? Is my client likely to repress emotions and keep them under control, or will they drive the client into an unwanted emotional state which is likely to interfere with the negotiation process? Is my client likely to maintain control? Does my client exhibit understanding, or defensiveness or hostility? Is my client likely to get angry (anger is the most powerful emotion)? What is the emotional package I am taking on as my client's counselor and adviser in the negotiation/mediation process?

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[1] This phrase may derive from the custom at middle ages jousting matches. Knights are said to have worn the colours of the lady they were supporting, in cloths or ribbons tied to their arms. The term doesn't date from that period though and is first recorded in Shakespeare's Othello, 1604. In the play, the treacherous Iago's plan was to feign openness and vulnerability in order to appear faithful:

> Iago:
> It is sure as you are Roderigo,
> Were I the Moor, I would not be Iago:
> In following him, I follow but myself;
> Heaven is my judge, not I for love and duty,
> But seeming so, for my peculiar end:
> For when my outward action doth demonstrate
> The native act and figure of my heart
> In compliment extern, 'tis not long after
> But I will wear my heart upon my sleeve
> For daws to peck at: I am not what I am.

http://www.phrases.org.uk/meanings/403000.html.

This is important of course, because I am taking on the problems of a human being who has an emotional profile which I must understand in order to communicate with my client and be an effective adviser. I also need to learn how my client's emotions will affect his/her ability to participate in the settlement process, which in most cases will be at mediation.

Negotiating a disputed matter understandably brings out emotional responses of clients. And the mediation process where the client confronts a wrongdoer or the insurance company of that wrongdoer is a forum and format which will be normally a strange one for a client. So it can be unpredictable how the client's emotions will respond and impact this process. The client – the victim – is going to respond emotionally to the process of meeting like this and entering into the focused dispute resolution effort.

From a simplistic, but practical standpoint, primary emotions that can be exhibited in this scenario are anger, sadness and fear. Each of these can combine to produce various reactions: hostility, indecision, lack of trust (in the other side and possibly in the mediator), passive aggressive behavior, and other responses that can interfere with the client's ability to be a willing and active participant in the decision making process. It is critical that I understand how this is going to play out so that I can be prepared to deal with my client, maintain control over our participation together, and also assist the mediator in gaining my client's confidence.

This requires me to be mindful of how my client is likely to respond and also to monitor his/her emotions as the day progresses. I may have decided that my client needs more emotional support than I can provide. If of, I may suggest that a family member or close friend attend with my client to provide that additional support. I may also suggest that an important person be on telephone standby to talk to my client as the day progresses. This could be a financial adviser; it

could be a counselor, or perhaps a confidant whom my client trusts. The client may need confidence builders, or a support network to get him/her through the day.

As time goes by and I deal with my client I get a better understanding of his/her emotional needs and what emotions might be exhibited in mediation. My client may be angered at offers that are viewed as "lowball" and the failure to respect the injuries and losses that my client has suffered as a victim of wrongdoing. The failure to see numbers that approximate my client's belief as to the value of the case is often an issue. This is likely to evoke an angry response by my client. I have to prepare my client for the likelihood that the initial offers may be much lower than desired and may result in my client's angry response and loss of confidence in the process. I have to explain that it often takes time to get the parties into the "field of play." Our adversary may be testing the waters to see if we are going to collapse in the negotiations or are over eager to settle.

This may result in the client being impatient with the process. Here I need to encourage my client to continue to work towards an acceptable resolution, which may take a full day, or even more than one session.

As we progress through the negotiation process it is critical to take a client's temperature and recognize that the circumstances are going to trigger human responses that are part of the emotional profile of a client. It is our job to gain an understanding of them, be prepared to deal with them, and help the client maintain control over these emotions so that an intelligent and thoughtful decision can be made about resolution.

CHAPTER 30

BEING A BETTER ADVOCATE IN MEDIATION: A CASE STUDY

We often talk about various aspects of mediation, but how often do we consider our own preparation as advocates at mediation? Of course, preparation is a key, and knowing not only what to prepare but how to prepare it. Is bigger, longer and heftier better for our mediation statement than a more succinct, less "bulky" presentation? Is our video better shorter rather than longer? How are we going to present ourselves at the mediation – are we going to be aggressive in our approach, or should we sit back and see how it plays out, contributing where we can to keep the negotiations on course?

Quite recently, I was involved in a mediation of a complex construction loss case involving insurance issues. The underlying case was "settled" by a stipulated judgment against a contractor defendant who built 16 homes which had defective windows that leaked and other construction defects. The defects were the fault of the subcontractor who performed the actual construction. The contractor assigned its claims against a primary and excess carrier to our clients, who then proceeded, and settled the case against the contractor's primary carrier for the limits of its coverage in one of several years of coverage, thus potentially triggering the excess carrier's coverage. The primary carrier's case was settled after it went to the state's Supreme Court and we obtained a very favorable opinion establishing coverage.

We then went against the excess carrier who raised many defenses and put up a bitter fight. I took video depositions of key witnesses and caught them in fabrications that were astonishingly portrayed on the videos. In addition, other witnesses contradicted the excess carrier's claims personnel. We also established before the cameras that the claims

representatives did not follow the excess claims guidelines of the company in investigating – or better said, not investigating – the loss.

Mediation was held before a magistrate judge. He ordered the case portrayed in no more than 5 double spaced pages (contrary to our usual 20-35 page presentation). He requested exhibits be kept to a minimum. He said nothing about videos. We submitted our "brief" and also prepared a 22-minute video of excerpts from the video depositions for what I call a "res ipsa" presentation, i.e. "the thing speaks for itself."

The judge was skeptical about the video, but entered the room and said we could play it. We provided a written timeline to all present, oriented my colleagues, our opposition and the judge to what was on the video, and then we played it. The judge took notes. Defense counsel and his client representative fixed on what was playing. Their only out was to beat us on the legal, i.e. coverage issues. They had already filed one motion for summary judgment, which was pending and threatened another. We considered the legal arguments to be threatening.

However, the "brief", a few exhibits and the videos carried the day, and we settled after about 5 hours of negotiations. The judge used our materials effectively. The short written presentation worked fine supplemented by the video.

My colleague in Indiana, David F. McNamar for McNamar and Associates, was a great advocate for his clients and is the one responsible for the favorable Indiana Supreme Court opinion. My colleague, Kaitlyn Johnson, did a great job on the brief with Mr. McNamar's guidance and also they edited the video down to the short presentation.

So, less is better in this case. Using the combination of an efficient "brief" and a video, and simply letting the witnesses tell the story of what happened was an effective opening in the

case. The judge took it from there to get a deal done. We got value in the case; thus, it was a good result for our clients.

CHAPTER 31

SMART DISPUTE RESOLUTION

Is there such a thing as "smart" dispute resolution? You betcha there is! And here is why.

What is the goal in representing a client in a dispute: resolution of course, but the path towards the agreed upon end result is the issue. How do we – or did we – get there, and when we did was the end result acceptable? Was value received in the sense that the cost of proceeding down the path and the ultimate result done efficiently and effectively?

The key to "smart" dispute resolution, in my view, is proper litigation management. I define it as: **The effective planning, organization, delegation and supervision of litigated matters so as to gain the advantage crucial to achieving an acceptable and timely resolution of the dispute.**

That is, make a plan. As a sometimes expert witness in various aspects of civil litigation and insurance claims handling, I see cases run amuck with no real planning or oversight. It is reaction not action that takes place. There is no goal setting, no timeline, not thought given to how to obtain the critical information about the facts in the case. And often the law is not carefully researched to apply to the facts at hand.

So what constitutes "smart" dispute resolution? Good question, so now let's address the answer.

First, make that plan. Go over the case and get the facts down and analyze what you know based on the legal rules. Force yourself to put everything available together in an outline and get a sense of what the case is about, what problems or issues present themselves, and what the client's needs are in representation in the dispute resolution process. Then communicate this

to the client so the client is aware of the merits of the case and what needs to be done to get resolution.

Second, evaluate what needs to be done in the discovery process to get you to a point of being able to sense the end result if the case is tried. Here, my colleague, Michael Carborne, a San Francisco Mediator, comes to my rescue. He calls this "good discovery" or "that which is used for the intended purpose and that leads to a fair settlement." "Bad discovery is that which is used with the ulterior motive of wearing the other side down, hopefully forcing them to spend huge amounts of money or to capitulate to the settlement that the bad discoverer wants." ("Resolving It, Vol. 3, Issue No. 10, October 2012.)

I have described the process of well-timed discovery as progressing to a "plateau" at which point enough has been done to be able to a) evaluate the case, b) see what needs to be done, c) look at the costs of further proceeding, and d) evaluate the possible outcomes, so that a cost/benefit and risk/reward analysis can be done.

CHAPTER 32

MY FANTASY MEDIATION!

After many years of participating in formal mediation sessions, and experienced "The Good, the Bad and the Ugly," – yes "ugly"[1], it occurs to me that for once I would like to participate in the (near) perfect mediation session. That desire is even more prominent on my "bucket list" after seeing abuses and reluctance of parties to participate in mediation in good faith. I am not usually a pessimist – I could not practice as a trial and appellate lawyer if I were. There has to be a "realistic" optimism about a client's case for us to be effective. But I have noticed these past few years – perhaps starting about the time the recession hit us in March 2009, if not before -- a change by which parties now approach suggestions to mediate and the participation in the process.

I am not alone. I talk to colleagues and mediators all the time. I have heard many comment on the fact that cases are harder to get to mediation than in past years, and, more important, the preparation is not there, or the "good faith" effort to try to resolve a case is not present. In a certain number of cases that are mediated, one or the other party lacks the ability to be part of the negotiation process or is simply going through the motions. I am not sure why. I hear complaints or see for myself this from both sides, plaintiffs and defendants.

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[1] "The Good, the Bad and the Ugly" is a 1966 "spaghetti western" made released in Italy. ["Il buono, il brutto, il cattivo." *(original title).*] A bounty hunting scam joins two men in an uneasy alliance against a third in a race to find a fortune in gold buried in a remote cemetery. It starred Clint Eastwood, Eli Wallach, Lee Van Cleef.

In this day of high cost of litigation, counsel and their clients need to fully appreciate the positives of mediation at early stages or even mid-stages after the parties have seen enough to be able to measure the potential exposure, do a risk assessment, and come to grips with what the resolution value of a case is at the time the mediation takes place. I see unrealistic settlement positions, a failure to understand and participate in bargaining, a lack of preparation, and in some cases simply a complete lack of appreciation of the opportunities presented by the mediation process.

In my (near) perfect world here is what we might see (these points stress how lawyers and their clients should approach mediation):

1. **There has to be a good faith interest in resolution**. If there is not, politely decline. If the court directs the parties to mediate, then be honest if a party just wants a trial. But if you attend you must have a real interest in settlement.

2. **The "check writer" and decision maker must be present**. I insist that this be the case or I will not attend. I ask the mediator to confirm this. I fail to appreciate how mediation can be effective and there be good communication if this is not the case. And, the last thing I want to hear is that the key person, who was standing by the phone (!) left work at 5 p.m. Eastern Time, when I am in a mediation on the West Coast where it is only 2 p.m..

3. **Lay out your case in full in a mediation brief that is exchanged**. How can mediation be effective if one side conceals its position from the other side? There can be no dialogue if this does not happen. Two page briefs from a party, or mediation statements I never see, allow me to just call off the mediation, and it is really galling to get them a day or two before the mediation.

4. **The mediation statements are complete and submitted well in advance of the mediation**. My rule is that I send the mediation briefs out to counsel and the mediator (email and/or hard copies) two weeks beforehand. Because I am usually representing a plaintiff, I need to be sure to get the mediation statement with my demand in time for the defendant(s) to evaluate my client's position. And it needs to be complete, a "mini" claims file with all supporting documentation. Last minute submissions of additional specials, and thousands of dollars of additional medical bills -- does not allow a defendant to review all the relevant information and seek authority so that settlement can be fully explored at the mediation. That won't happen if the statement is submitted 5 days before the mediation is to take place. Late and incomplete submissions understandably puts a defendant in a bind in its efforts to settle, and only delays the process. Also, if you email the mediation statement to opposing counsel, then it is easy to forward them on to a client or insurance carrier.

5. **Prepare you client to make decisions**. On the plaintiff's side, spend a few hours going over the details of the case, the cost of going forward, and the dollars and cents involved if it progresses further or is tried. What is the likely outcome and how much will it cost. Use the statistics of what happens if the parties walk away; what are the chances of a better result[2]. Look at the economics of going forward and consider the present or time value of money from the plaintiff's side. What is the value of having cash now versus the "hope" of more cash later?

6. **Be an active participant in the process**: Be professional, meet and greet the other side and make sure all attending have met you and your client and exchanged greetings.

[2] See my article, "Research Confirms Negotiated Results Superior to Going to Trial," San Francisco Attorney (San Francisco Bar Association, Spring 2009), which discusses the study by Dr. Randal Kaiser of Decision Set in Palo Alto, California, and which compares from both the plaintiff and defense side the statistical chances of doing better that what a settlement presents.

There is no reason to be angry, hostile, or defensive. Just be a good participant in the negotiation process and see if you can get the job done – closure for you and your client.