Mediation Advocacy - How to Win the Heart and Mind of Your Mediator

(Preferring a Slow Yes to a Quick No)

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Status Report – You're Doing Better

Attorneys who regularly use mediation are becoming more sophisticated all the time. To a large extent, the questions and concerns of ten years ago have been answered satisfactorily.

- Yes - Lawyers are essential to the process and mediation will not take away business.
- No - Mediation is not just an unnecessary expense.
- Yes - There are some instances when lawyers cannot settle the matter without the help of a third party.
- No - Letting opposing counsel host the mediation will not give him a "home court advantage."
- Yes - Even though the first number is insulting, the final number may be acceptable, possibly even desirable.

In spite of how far we have come, we have further to go. There remain some myths that continue to require some debunking.

Debunking Mediation Myths

1. High Noon - One myth is the detested yet popular pronouncement "I will know by lunch whether or not this is going to settle!" This supposed "truism" is just false. The only way to know whether or not the case will settle by noon is to be content with a "No".

It is always possible by lunch for the mediator to end the mediation without a settlement. Maybe the best way to finesse this sort of an attitude would be to start the mediation at 5:00 a.m. Perhaps we should schedule lunch at 4:00 p.m. or wait until the papers are being drafted to order in sandwiches.

Give a skilled mediator a case and your chances are overwhelming that the case will settle. Over ninety per cent of mediated cases (with skilled mediators) settle. Why then would anyone be willing to give up because his or her stomach says lunchtime? Why not allow each case the time it requires? Why not prefer *a slow yes to a quick no*?

2. Early Neutral Evaluation vs. Mediation- Okay, so why do some mediations take so long when others do not? Some cases just are not that difficult to settle, and parties can know by lunchtime that they are headed towards agreement. Many of these could have been settled without a mediator. Although the parties actually could have settled the case without the help of a third party for whatever reason, they choose not to try. In some cases parties or lawyers may be less entrenched. The risk analysis required may be straightforward and quick. Maybe there is no need for risk analysis, just some facilitation of the negotiation.

Sometimes an early neutral evaluation is just the thing and can lead to a quick result. With this style of dispute resolution, the neutral listens to each side's carefully prepared presentation of the case and then makes a determination as to who is likely to prevail and for how much. Without question, early neutral evaluation is a quicker process. It requires the neutral to listen and then evaluate. For certain cases, it is an efficient and effective choice.

This neutral forcefully tells each side what he has concluded and why. The parties adopt his approach within a certain margin and the case is settled. With this style the time required is fairly predictable. This approach works best with an easy case and with a malleable client or attorney. Or perhaps, the attorney or client is so impressed by the credentials of the chosen mediator, often a presiding judge or a retired one, that they accept *whatever* that mediator suggests. These cases also will settle quickly. These are not the tough cases.

Early Neutral Evaluation is less likely to be effective with a difficult client. Some clients just cannot be told directly. All clients have regard for their lawyer's ability. Presumably, if they did not believe you knew what you were doing, they would have hired someone else. Some clients refuse to defer to your expertise and experience as their lawyer even though they chose you for your expertise and experience. Some clients refuse to take your advice. They wont listen to you and when they do listen, they do not believe you. Sometimes your clients do listen to the advice you give today. Then they call you back tomorrow and ask the same questions all over again. Or perhaps when the advice is not what your clients want to hear, they argue with you. Sometimes your clients do their own legal research and question your interpretation of the law. With some clients, regardless of how often you repeat yourself, your client simply hears what he or she wants want to hear. With these clients, Early Neutral Evaluation although quick, is less effective. These sorts of clients do not respond well to being told what to do. The good news is that with an Early Neutral Evaluator you can know by lunch that your case will not settle.

Inexperienced lawyers present similar challenges with Early Neutral Evaluation. Their lack of personal experience and knowledge often makes them insecure and mistrustful. They often suspect that the Early Neutral Evaluator is biased when the evaluation favors their adversary. A strong Early Neutral Evaluator may produce a contrary and equally strong reaction. These lawyers often dig in even more firmly to their positions. They often become mistrustful of the Early Neutral Evaluator. When the case presents these challenging dynamics, the unskilled neutral who is lacking in tools other than the direct forceful approach will realize pretty quickly that he or she is out of tools.

To the delight of those to whom speed is paramount, once confidence in the superior knowledge of the Early Neutral Evaluator is questioned, the mediation is effectively over.

One can determine fairly early on when a party or attorney refuses to accept the mediator's view of reality. It is possible to figure out by lunch that the recalcitrant party or attorney will stubbornly refuse to defer to the credentials and experience of the mediator. There is no need to spend too much time arguing with someone who refuses to accept the conclusions of this mediator. That is how it is possible to get a quick "no" by lunch. I have heard some mediators - who have failed with this approach - complain that an attorney or client was just too stubborn or difficult to see reason.

A skilled mediator who possesses a fully stocked tool chest and some creativity can settle these cases. However, patience on the part of everyone is essential. Why does it take longer with a tough case than others? It only takes longer if the objective actually is to settle the case. The ability to close the tough ones is the true measure of a mediator's ability.

3. Give the Mediator a Chance - To get to yes in a difficult case, give your mediator a chance. This means let the mediator mediate. There is a reason attorneys choose to bring in a mediator rather than attempt to settle the case directly. Lawyers, regardless of whether or not they have taken a course in mediation, should not micromanage how the mediator mediates.

Each case is different. Each brings its own unique set of problems and dynamics. Just because you don't think the matter is complicated doesn't mean your adversary agrees. Even worse, both you and your adversary may agree that the solution to the case is easy and obvious. In that situation, it's likely that you both disagree as to what that solution should be.

A good mediator is like a good litigator. A litigator who wins and does so ethically is a good litigator; the style is irrelevant as long as it produces positive results. The low-key, reasonable and completely likable litigator would fail miserably if required to pound the table. It would be equally disastrous if the drama king or queen were told to keep the volume turned way down.

Similarly, there are as many styles of mediators as there are growth portfolios. Some mediators are aggressive and confrontational. Others engage in early neutral evaluation. Still others are subtler in their approach. As with litigators, the measure of a mediator's success is the results they consistently produce.

If the case in mediation presents some issues, allow your mediator to address those issues. If the Claimant is totally unfamiliar with the subject matter, your mediator will have to take additional time for education. If there are particularly intense emotions, your mediator will take extra time to address these emotions.

For example, during the recent spate of "tech bubble" cases, it was common for the underlying position of a Claimant to be "I trust my broker like I trust my doctor. They are the experts and I trust them to do what they are hired to do. I told my broker to make me money, not lose me money." This sentiment is at best marginally relevant to the actual claim and has little to do with how strong or weak the Claimant's case is. The temptation may be to tell this to the Claimant and proceed to the material issues in this case. That may work, but depending on who the Claimant is and the particular dynamic, this can end up torpedoing your mediation. Even though the mediator may dismiss Claimant's position summarily, the Claimant will continue to have this unresolved issue, which may drive the dispute. Even if the mediator and attorney are successful in preventing the Claimant from raising this issue, it will remain an unanswered question in the mind of the Claimant. Claimant may be bullied into accepting as true what they are told to accept as true, but thoughts of this nature tend to persist even when suppressed. It can be what prevents the Claimant from accepting an objectively good settlement, It can resurface as resistance to closing the deal as the lawyers are drafting the agreement, or in the angry phone call the next day from the Client in the form of seller's remorse. It is a major mistake to ignore the deeply held beliefs of the Claimant regardless of what they are even though addressing what matters only to the Claimant takes time.

Sometimes attorneys representing a party in mediation will take the position that risk analysis is unnecessary since they have already "beaten up" their clients. I will sometimes begin to analyze a case with a Claimant, and counsel eager to be have a deal done by noon will tell me risk analysis is unnecessary. Counsel will assure me that during his preparation with his client the day preceding the mediation he was quite direct as to

the problems with the case. Even in those instances, when I do a bit of testing it is not unusual to find that the client still does not really understand what the claim is let alone the problems with this claim. My way of communicating this to a layperson is a bit slower, but when I am done, the client understands. If the client does not understand, the client cannot make decisions regarding settlement. When the client really does not understand what the numbers actually relate to there is more likely to be a reluctance to participate in the process and a breakdown of the negotiation by lunchtime.

Without question, the most efficient way to communicate information is to state it directly, i.e. evaluate the facts and law and announce the likely outcome. Efficient does not equal effective. This style is problematic. An understanding of basic human nature tells us that with many people, if you confront them directly and challenge them you do not change their deeply held beliefs. Rather than change their mind, they become defensive and argumentative. Winning the argument rather than understanding takes over as the objective. A favorite analogy for this reaction to the direct approach is Chinese Puzzle Rings. These are the woven tubes given away as children's party favors. You place both index fingers in either end of the tube and pull. The harder you pull the tighter the woven tube grips your fingers. The only way to free your fingers is to relax the pressure and allow your fingers to slide out. In many cases, mediation is similarly counterintuitive. If you resist the urge to force, you can be much more successful. Allow the process to work. Relax, take the necessary time to listen and understand. Speak to what the Claimant needs to talk about. Choose effective over efficient.

4. Still wondering what takes so long? Well, as in everything in life, it depends. And as an old friend says "Sometimes you just have to let life work." This means that parties in mediation should resist the temptation to push. Let it happen. Often in the course of the mediation, people have to adjust their expectations. That should not come as a shock to anyone. Sometimes the best thing a mediator can say is nothing. Just letting the Claimant have the time necessary to think and reflect and absorb can be absolutely magical in reaching settlement.

Then why is it shocking that different people require a different amount of time to process information and to adjust expectations? They don't do what you want when

you want just because you want. In many cases the side that takes the longest time is the Claimant's side. The Respondents likely will have been through this before and will not be as emotional as the Claimant. The problem with this dynamic is the temptation to not spend enough time with Respondents because the Claimants take so much time. Again, this may have an impact on the dynamic. Even though Respondents are less emotional on the surface, they may be as invested emotionally. Not spending enough time with Respondents doing risk analysis may be misinterpreted as a signal that there is no risk. As the pressure to get a quick resolution increases on the Mediator, the need to save time wherever also increases. Again, the parties need to permit the process to work.

5. Sometimes the reason it takes so long...is you! - If you want your mediation to move more quickly there are things you can do. In many cases, I cannot tell you this during the mediation, since you are my client, but you may be to blame for the mediation taking so long. You will save yourself time and money with a few simple suggestions.

1) Get the requisite documents to your mediator in advance of the mediation. This can save an enormous amount of time. I hate it when in spite of my asking for the critical documents, attorneys wait until the mediation. I dread the phrase "but you haven't seen..." Then I am handed the twelve-page letter written by whomever. At this point what am I expected to do? Do you really want me to excuse myself for twenty minutes to read and think about this important document? This is an example of sloppy preparation. The mediator still has to settle the case, but this will add to the length of your mediation.

2) Get the necessary people to attend the mediation. If that is impossible, have them really and truly available by phone. This is not determined by a job title. It differs from case to case. In all cases it is the decision-maker.

3) Make sure "phantom parties" are present. People who ultimately will exert controlling influence over the decision-maker need to participate in the process. If the right person is not present, you will find yourself "re-mediating" with the critical party to bring them up to speed. This will make your day much longer.

4) Handle the pre-mediation phone call yourself regardless of how senior and important you are. Unless you have mediated with this mediator before, treat this mediation seriously. If your associate has to spend the same time repeating everything discussed with the mediator, you are not really saving time. And you can miss something that will make the process go more smoothly at the mediation itself.

5) Bring the right attitude. When parties begin the mediation with an adversarial tone, it adds to the length of the process. People complain that openings polarize everyone. That is only true when the people giving the opening do not understand how to give a mediation opening. During your opening, always deliver the bad news without putting everyone on the defensive. Why would anyone ever attack someone personally at a mediation? If you choose this foolish approach, it will lengthen your mediation. If you give an appropriate opening, it can be extremely effective. It can help the mediator and can facilitate the process.

6) Long private caucuses where the parties endlessly discuss negotiation moves add so much time. People are better than they think at anticipating what the other side will do. Spend some time mapping out not only your "bottom line," but also your strategy before you arrive at the mediation. Anticipate your need to speak to someone who cannot be present. Have this person readily available by phone. If you have to spend time tracking them down, this increases the time and cost for everyone. It is also inconsiderate and annoying.

7) To a large extent, you and your client control the pace of the negotiation. If you insist on ridiculous positions and bargaining strategies, you will lengthen your mediation. Yes, if the other side is being unreasonable, it may be necessary to respond in a similar manner, but the parties in a mediation can shorten the process tremendously by moving towards the real range of negotiation sooner rather than later.

8) Prepare your client for the fact that the mediator may be spending more time with the other side than with you. Both you and your client should prepare for this by bringing something to read or to do. While this will not make the mediation move more quickly, it will make it feel like it does.

Concluding Thoughts

Securities mediation has now been with us for approximately ten years. The questions and the answers have changed. No longer do we fight over whose conference room we will use. No longer do we debate about whether attorneys will be come obsolete if mediation catches on. No longer do we believe that suggesting mediation to your adversary is a sign of weakness. We do not worry that if our adversary picks the mediator, that mediator will side with that side.

But we still have a fair distance to go. The debate over facilitative vs. evaluative has evolved. No longer is the mantra "only a tough evaluative mediator can settle case." The current mantra seems to be "facilitative in the morning, evaluative in the afternoon." My own mantra is anything ethical as long as it is effective and appropriate under the circumstances. Mediation is an art not a science. A good mediator always tries to say only the right thing and only at the right time. This is every bit as difficult as it seems. When a skilled mediator communicates an opinion, she can be subtle and indirect, never actually opening the door to the defensive reaction. Very importantly, a good mediator knows when the right thing to say is absolutely nothing, resisting the temptation to push when pushing only produces opposite and equal force. The most successful mediators do not give up at noon because someone is being "difficult." If everyone were malleable, mediators would be unnecessary. Skilled, experienced mediators stay with the mediation until it is "mission accomplished." The best mediators always prefer a slow yes to a fast no.

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This article explores common myths regarding the time necessary to mediate a case. It provides insights from the mediator's point of view as to why parties may not be able to judge whether or not a particular mediation is likely to succeed based on the developments at midday. In addition, this article offers some practical advice as to how the practitioner can avoid being part of the problem.

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