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Effective Mediation Calls for Advocacy Skills, Even if They're Not the Kind Litigators Use in Court

BY MARK HANSEN

Alternative dispute resolution has been part of the legal landscape for more than a quarter-century. But for attorneys familiar with the adversarial arena of the courtroom, ADR proceedings still take some getting used to.

And with good reason.

Alternative dispute resolution is not the same thing as going to trial, nor was it ever intended to be. Instead, ADR was designed to encourage faster resolution of cases through out-of-court proceedings that are generally shorter than trials, less formal and less encumbered by complex rules of procedure, especially regarding admissibility of evidence.

But alternative dispute resolution proceedings should not feel totally alien to litigators.

Arbitration, for instance, is reminiscent of trial in the way it allows each side to make its case to a neutral third party who then renders a binding decision that, in effect, results in a winner and a loser.

And mediation is a process for the parties to settle a case with the help of a neutral third party. In many jurisdictions, mediation has essentially replaced the pretrial settlement conference.

In both types of ADR proceedings, as at trial, effective advocacy is crucial to achieving the desired outcome. But advocacy in mediation proceedings is different from the adversarial winner-take-all approach that litigators are so used to when they go to trial.

"The gladiator type of advocacy you see in the courtroom is totally inappropriate in a mediation," says Jeff Kichaven, a former litigator in Los Angeles who now works full time as a mediator.

The emphasis in mediation on different types of advocacy skills stems from the purpose and format of mediation proceedings, say experts in the field.

Mediation starts from the premise that the parties want to reach some settlement of their dispute.

"Litigation is the place to make a point," says Kichaven. "Mediation is the place to make a deal."

In litigation, the parties and their attorneys often don't get down to serious settlement discussions until they've already fought through extensive pretrial proceedings, and in some cases the trial itself is under way before the two sides talk settlement.

Mediation is intended to get the parties talking sooner than that. Courts concerned about becoming clogged with pretrial proceedings, he says, are seeking to get parties into mediation as early as possible, and attorneys are increasingly taking disputes to mediation, even before filing lawsuits.

"Mediation has become progressively front-loaded," says Dwight Golann, a professor at Suffolk University Law School who also serves as a mediator and trains others to mediate.

ADVOCATES GETTING ALONG

Mediation encourages parties and their attorneys to work directly with each other to reach a settlement. That process fosters a type of cooperative advocacy between the two sides that generally does not exist at trial.

In litigation, says Los Angeles mediator Lee Jay Berman, opposing counsel is typically viewed as the enemy, the parties have an incentive to play "hide the ball" with evidence and an adversarial posture pervades the entire process, from the first telephone contact to the actual trial.

But in mediation, the most effective advocates are deferential to the other side, says Berman, who chairs the Training Committee in the ABA's Section of Dispute Resolution. They lay out the facts as they see them, but also demonstrate a willingness to listen to what the other side has to say.

Berman says he reminds the parties at the start of every mediation that everybody at the table is looking for something, and that somebody else at the table has it. "In mediation, the goal is to get what you want directly from the other side," he says. "In litigation, you have to appeal to a third party, who has the power to give you what the other side has."

Bruce E. Meyerson, a mediator and arbitrator in Phoenix who chairs the ABA Section of Dispute Resolution, agrees that the chest-thumping tactics so often encountered in litigation aren't going to work in mediation.

"All it's going to do is make the people on the other side angry," he says. "And if they get angry, you're not going to get a settlement."

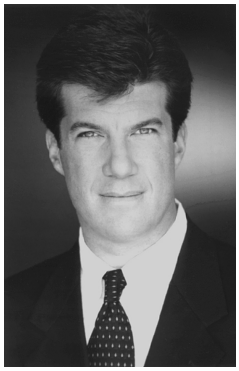
But it takes more than just being nice to the other side, says Meyerson. A party will settle, he notes, when the settlement terms are preferable to slogging through trial. So the advocate's task is to persuade those on the other side that a settlement favorable to your client also is in their best interest.

Philip J. Kaplan, a Los Angeles attorney who represents plaintiffs in civil cases, emphasizes the flexibility that mediation gives the opposing sides to craft settlements that give them both what they're looking for.

In civil cases, at least, "Litigation is about money," says Kaplan. "The only issues are liability and damages. Mediation is about resolution. And resolution isn't always just about money."

In a recent case, Kaplan represented a man in a lawsuit against a Los Angeles suburb and two of its police officers, alleging false arrest and excessive use of force. Pursuant to state guidelines, the judge ordered the parties into mediation. Berman mediated the case.

At the start, he says, it looked like the case was headed for a contentious trial. But as the parties continued to talk, what each side really wanted became clearer, Berman says.



Of course, the plaintiff wanted his medical bills and legal fees paid. But the plaintiff, who operates a health and wellness center that uses meditative movements to promote physical, emotional and spiritual harmony, also wanted recognition from the police officers that, even for them, force is not always the best way to handle a situation. The city, for its part, wanted the case to go away as quietly and as cheaply as possible.

The two sides eventually hammered out a tentative settlement under which the city would pay the plaintiff's medical bills and attorney fees (as of early May, the city had not yet given its final approval). But the settlement also calls for the city to pay for

the officers to undergo stress and anger management training for six weeks—at the plaintiff's health and wellness center.

"No resolution like this could ever come out of any courtroom," says Berman. "Only in a mediation is a win-win outcome like this even possible."

Mediation differs from litigation in another key way that affects what kind of advocacy techniques will be effective. A distinctive characteristic of mediation is that it provides for a neutral third party to help the parties get what they want from each other. But a crucial difference between a mediator and a judge (or jury) at trial, or even an arbitrator, is that the mediator's job is not to render a decision, but to facilitate the efforts of the opposing sides to reach a settlement.

It is crucial to understand the unique role of a mediator, says Suffolk University's Golann. "Of course, mediators can't compel parties to settle, but they do influence the process of bargaining," he says. "They're like referees in a sports contest: They can't score points themselves, but they affect the rules, tempo and content of the game that litigators play, and their decisions can boost—or lower—a party's final score. Wise advocates understand how a mediator can help them. They treat us as valued partners, while turning us into invaluable agents."

The relationship between a mediator and the opposing sides is different than the role of a judge in trial, says Berman. In trial, each attorney tries to persuade the judge to eventually rule in favor of his or her case. But in a mediation, the advocate's goal is to persuade the mediator to help convince the other side that his or her position is fair enough to be accepted in settlement.

Knowing that, Berman says, a good advocate will take advantage of opportunities to engage in ex parte negotiations with the mediator, who can help each side figure out how to get what it wants from the mediation.

Two schools of thought have developed about what type of role mediators should play in helping the opposing sides reach settlements, according to Edward F. Sherman, a professor at Tulane University School of Law in New Orleans who is active in the ADR field. He says it is important for a lawyer embarking on a mediation to understand that the mediator's preferred approach will help determine what advocacy techniques work best.

A mediator who follows the more traditional "facilitative" or nondirective style of mediation tries not to interject his or her views, values or opinions into the negotiating process, Sherman says.

But as more lawyers and former judges have become mediators in recent years, an evaluative approach to mediation has gained support, says Sherman. Mediators using that approach are more willing to give their opinions on the merits of the parties' cases, and may even suggest solutions to impasses or actual settlement terms.

Golann sees benefits from the active participation of the mediator. "A good mediator can help make the negotiations go better and keep the talks from breaking down," he says.

At the same time, says Golann, attorneys should understand how they can gain by getting the mediator more actively involved in the negotiating process.

"It's a missed opportunity not to take advantage of what the mediator can do for you," says Golann. "The unsophisticated advocate will treat the mediator like an enhanced phone, which will get you better communications, but that's about it."

Golann says, for instance, that attorneys should be prepared to take advantage of a mediator's ability to play a variety of roles in the mediation process.

"Mediators don't need to worry about maintaining a judge's reserve or showing a litigator's resolve," says Golann. "As a result, they have much greater freedom to do what it takes to settle a case."

Golann describes a case that he mediated involving two siblings who were locked in a struggle over control of their deceased uncle's business. It became apparent that the brother was reluctant to make any key decisions without input from his wife, who was not at the mediation, and the attorney representing the sister finally suggested to Golann that he talk to the wife.

The next morning, Golann talked to the wife at her workplace and suggested that she come to that day's mediation session.

"In the ensuing hours, the wife proved to be much more decisive than her husband, and also better with numbers," says Golann. "The case settled, but absent an outside-the-box suggestion from counsel and a mediator's freedom to respond to it, the process would almost certainly have foundered."

An attorney also can use the perceived neutrality of the mediator as a way to make a settlement offer appear more inviting to the other side, Golann says.

"Humans instinctively suspect anything that is proposed by an opponent," says Golann. "Assume, for instance, that an accident victim has been waiting anxiously for an insurer to offer $100,000. The defendant now offers just that sum. Is the plaintiff happy? Probably not. 'They wouldn't make me a fair offer,' the plaintiff thinks, 'so my case must be better than I thought. Or there's some other catch.' "

But using the mediator to convey an offer can help neutralize what psychologists call "reactive devaluation," says Golann. He notes that the mediator might say to a plaintiff, "You know, I think that if we could ever get them up to $100,000 that would be worth serious consideration. What do you think?"

That kind of approach accomplishes two things, says Golann: "First, the mediator has presented the offer as hypothetical; it is not yet cursed by the fact that the defendant is actually willing to make it. Second, the mediator has tentatively endorsed its reasonableness. If the plaintiff buys into the potential offer, the mediator will have partially 'inoculated' it against being devalued when it materializes."

The participation of a mediator sometimes allows the opposing sides to take harsher bargaining positions than they otherwise might in direct negotiations, according to Golann.

"The reasons are simple," Golann says. "First, having taken the trouble to come to mediation, people are reluctant to walk out of the process. And more important, a mediator can 'scrape the other side off the ceiling' when they erupt at their opponent's unreasonableness. Counsel sometimes take advantage of this dynamic to play 'tough cop,' knowing that a good mediator will instinctively take on the 'good cop' role in order to keep the process alive."

THE IMPORTANCE OF SHARING

Because the course of negotiations in a mediation can be so fluid, it is crucial, say experienced practitioners, that an attorney come to a mediation thoroughly familiar with the case and with a well-planned but flexible negotiating strategy.

Preparation for a mediation must be even more thorough than for trial so that the attorney can adjust appropriately to shifting negotiations, maintains John W. Cooley of Evanston, Ill., who chairs the Mediation Committee in the ABA's Dispute Resolution Section. To do that effectively, says Cooley, the

attorney must be very familiar with all of the pertinent evidence, and well-versed on the relevant legal positions. The attorney also must be clear on what is actually negotiable.

It also is important to prepare the client for the mediation session, say Cooley and other experts, because the parties will be much more directly involved as participants than they typically would be in a trial or other proceedings in court.

“That doesn’t mean that the client should be expected to discuss legal theories,” says Meyerson. “But he or she should be prepared to discuss the facts at issue and the terms of settlement.”

Another key element of effective advocacy in mediation is deciding what evidence to share with the other side or the mediator in the course of the negotiations.

In litigation, disclosure and admissibility of evidence are strictly controlled by a complex web of rules. But the use of evidence in mediation is not controlled by any extensive rules, so decisions on whether to keep evidence secret or share it with the other side, the mediator, or both is subject primarily to each party’s goals and strategy for the mediation, as well as shifting tactics as the negotiations unfold.

“One of the paradoxes of mediation is how mediators are expected to treat information that they gather during private caucuses” with each side, notes Golann. “On the one hand, caucus discussions must be kept confidential,” he says. “At the same time, one of mediation’s key purposes is to foster better communication, and as long as the parties are separated in caucuses this can only happen if the mediator conveys information.”

In actual practice, says Golann, “most lawyers designate very few facts as confidential, and they appear to expect a mediator to reveal at least some of what they say in private caucuses.”

For instance, says Golann, “You might tell a mediator, ‘$500,000 is as low as we’ll go at this point. You can tell them that.’ The mediator might well interpret that to mean that he can tell the other side that you are reducing your demand to $500,000, and also that he sees you as being probably willing to go further if you received an appropriate response. A mediator, in other words, usually feels able not merely to report what a party is saying, but also to give an interpretation of its intentions.”

Clearly, mediation is here to stay. As a dispute resolution mechanism, it can be efficient, economical and flexible. “Mediation is an active process, capable of almost infinite variation,” observes Golann.

But perhaps even more important than the process of mediation is the results it produces. Settlements in mediation often leave parties to legal disputes more satisfied with the results than the outcomes they might have achieved in litigation, maintains Berman. “The parties may say they want their day in court,” he says, “but when all is said and done, what they really want is their day in mediation.”