



“...to support and promote professional and qualified attorney-mediators who are committed to the proposition that the existing dispute resolution system can fulfill its intended purpose through the use of mediation.”

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We probably think of things when considering various activities such as why we belong to AAM and how can we interact with other mediators in order to make the most of this valuable membership organization. I think that it is healthy to ponder these things from time to time. It may cause proper improvement to the matter. Now that AAM provides us a private social networking forum area, it would be interesting to have several of you contribute your thoughts. Who knows, we might learn something from one another. You can access AAM’s forum at www.aam-forums.airset.com.

In the last several months, Mike Schless and Dean Kilgore have worked very diligently with the Texas Legislators in providing constructive assistance to contents of various bills that affected mediation and arbitration. Some of these were HB1083 and HB299 and HB2696. Look for a summary of the legislative happenings in this newsletter. Another somewhat later bill, HB2256 is still causing a stir in the mediation world at this writing.

Brenda has worked with Michael Leech, longtime AAM Illinois member, to help bring about the existence of a Chicago Chapter to AAM. The mediators who have pushed this along are Michael Leech, Katheryn Dutenhaver and Bob Berliner, all of Chicago. Seek them out at the San Antonio meeting and let them know how much you appreciate their efforts.

We sure appreciated those who traveled West to Fort Worth for our last meeting. The folk seemed to have really enjoyed it. They were very positive to the effort and time put into the interactive session. But since I had a personal interest in the matter — Fort Worth and all — you might ask others about it if you did not make it. I am confident you will wish you had made it. Make every effort to come the San Antonio on September 11, 2009 — it is sure to be another outstanding training.

Brenda tells me that we have a really positive response to the opportunities offered in San Antonio. Mike Schless is putting together “a really good show”; and something quite unique. Our panel line-up includes Ross Stoddard, Susan Perin, Jeff Kilgore, Dan Naranjo, Dean Kilgore and Don Philbin. We will also be entertained and taught communication insights by *Physiognomist*, Kathy Thompson during our luncheon.

Financially things are “in balance.” Brenda reports that even in these economically uncertain times, we are holding our own and filling the house at our CLE events. AAM strives to keep the dues and CLE trainings as low-cost as possible to break even — we are a non-profit organization and our goal is to work within our budget.

PRESIDENT'S LETTER continued from page 1

Membership is steady and has grown this year, due in part to the arrival of the troops from Chicago. Let's keep that pace going. We should make positive efforts to invite qualified candidates to consider membership in AAM, because it does provide value to all.

It is a pleasure to serve you. Brenda's faithful, efficient, and effective day-to-day operation of the organization is greatly appreciated by all. As the President, I have seen her tireless commitment to AAM. Be sure you give her the "atta girls" she has earned.

We will see you in San Antonio on September 11.

Sincerely,

John W. Hughes

ASSOCIATION OF ATTORNEY- MEDIATOR

Presents Its

ADVANCED MEDIATOR TRAINING

Avoiding the Line in the Sand



Friday, September 11, 2009
Crowne Plaza San Antonio Riverwalk
[111 Pecan Street East](#)
San Antonio, Texas

Our Advanced Attorney-Mediator Training on September 11, 2009 in San Antonio will feature an all star panel led by perennial favorite, Ross Stoddard. The panel will guide us along the always challenging and sometimes treacherous path from the opening session through the initial caucuses, from early stage negotiations through late stage negotiations, all the way to the drafting of the mediated settlement agreement. Each panel member will focus on one of those five stages, and all will lend their expertise to what we expect to be a highly informative and interactive discussion of the ethical and practical challenges we may face along the way.

We hope you will join us! www.attorney-mediators.org for registration form and agenda.

AAM National Office — 1-800-280-1368 or aam@attorney-mediators.org

2009 TEXAS LEGISLATIVE UPDATE

— *Michael Schless, Austin*

Four bills of particular interest to AA-M members were considered in the regular session of the 81st Texas Legislature.

HB 299 by Rep. Harold Dutton (Harris County) would require both parties to agree before a court could order mediation under either Chapter 6 (property issues) or Chapter 153 (parent-child issues) of the Texas Family Code. This bill did not pass either house of the legislature.

HB 1083 by Rep. Gary Elkins (Harris County) passed both houses of the legislature, was signed by the Governor, and became effective immediately upon signing, June 19, 2009. It prevents a court from ordering the parties to mediation if the case involves a contract that contains an arbitration provision controlled by the FAA. There has been a split of judicial authority in Texas, with some courts holding that under Chapter 154 of the Civil Practices and Remedies Code, and under a court's inherent powers, the court may order the parties to mediation before compelling arbitration. Other courts cite the FAA provision that prevents a court from impeding a party's contractual right to arbitrate. HB 1083 simply codifies that second line of cases.

HB 2696 by Rep. Dan Gattis (Williamson, Milam Counties) did not pass either house and was left pending in the House Judiciary and Civil Jurisprudence Committee. In its original form, this bill would have had a substantial impact on arbitration in Texas. Representatives of AA-M, the ADR Section of the State Bar of Texas, and several other interest groups worked with Rep. Gattis and his office to make

substantial improvements in the bill, but time ran out before all of the various interest groups could complete their work. The bill is likely to be the subject of interim study this fall and it is likely that some form of the bill will reappear in the next session. A related bill, SB 222, was introduced in the Senate by Sen. Royce West. It was referred to the Senate Jurisprudence Committee, but never received a hearing.

HB 2256 authored by Rep. Kelly Hancock (Tarrant County) passed both houses of the legislature, was signed by the Governor, and became effective immediately upon signing, June 19, 2009. This bill allows an enrollee in an out-of-network health benefit plan to request a mandatory mediation with a facility-based physician under limited and specified circumstances. These mediations would be conducted by mediators appointed by the Chief Administrative Law Judge from a list maintained by the State Office of Administrative Hearings. Of particular significance to Texas mediators is the fact that the Act defines "bad faith mediation" as (1) failing to participate in the mediation; (2) failing to provide to the mediator information the mediator believes is necessary to facilitate an agreement; or (3) failing to designate a representative participating in the mediation with full authority to enter into any mediated agreement. It also places the burden on the mediator to report to the Texas Department of Insurance "commissioner or the Texas Medical Board, as appropriate" any acts of bad faith as defined. The Act requires that as "soon as practicable after the effective date...the commissioner of insurance, Texas Medical Board, and chief administrative law judge of the State Office of Administrative Hearing shall adopt rules as necessary to implement and enforce this Act." That rulemaking process is likely to be the subject of the active attention and participation of many Texas mediators.

Fort Worth Was Worth It!

Ninety-four attendees and twenty-seven spouses had a really good time at the Renaissance Worthington Hotel in Fort Worth. It was a great time together learning new mediation techniques and refreshing some friendships from past years. Everyone met up for the social hour on the terrace, enjoying the view of downtown Fort Worth at sunset, proving that the "best really do meet where the West begins". Then off to Sundance Square for time with friends, food and strolling through the area listening to music spilling into the streets. The gunslinger show at the

luncheon was fun, even if it was a little louder and rowdier than expected. The delicious barbeque luncheon with hot cobbler and ice cream was a real treat! Plan to join the fun next year in the spring at AAM's Annual Meeting.

**A special thank you to the speakers for this event:
Hesha Abrams, John Allen Chalk, Susan Jensen, John Rothman, Sidney Stahl, and Ross W. Stoddard, III**

Thank you for your willingness to give of your time and energy to make AAM's trainings the best!

AVOIDING AND DEALING WITH PESSIMISM

— John Trimble

AAM Member, Indianapolis, Indiana

Introduction

All of us who serve as mediators on a regular basis soon come to realize that pessimism is one aspect of mediation that occurs in *every* mediation session. We learn early in our careers as mediators that if we let pessimism cause us to quit, we would never settle anything. However, pessimism on the part of the parties and their counsel (coupled with impatience) can prevent a very settleable case from being settled.

Parties frequently come to mediation with a pessimistic view of the potential for success. Even optimistic or neutral parties can become pessimistic after the first demand and offer or as the negotiation proceeds toward apparent impasse.

The purpose of this brief article is to offer a few suggested techniques for addressing pessimism and getting past it.

Laying the Groundwork During the Opening Statement

Once I realized that pessimism occurs in every case, I began addressing it at the beginning of every mediation session. I tell the parties that although a statistically high percentage of cases settle in mediation, *100%* of the cases encounter pessimism. I tell the parties to *expect* it; I tell them that it may occur at the beginning, after the first exchange of offers, or that it may occur later...but it *will* occur. I forewarn them that we will be talking about pessimism when it occurs and that *I* will not be pessimistic because I know that most cases settle despite pessimism.

I also explain to the parties what causes pessimism, namely, a disagreement over the facts, the law, the case value, some other significant risk factor, or a combination of some or all factors. I ask the parties to be ready to dissect the pessimism with me when it occurs.

As a result of this groundwork, I appear prophetic when the pessimism occurs. It is not unusual for a party to say, "Wow, John, you were right, I am feeling pessimistic." My experience has been that when parties expect pessimism, they are much more receptive to an honest and objective assessment of the stumbling issues, and we can narrow the issues down to what is actually causing impasse.

Identifying and Exploiting the Parties Hidden Agendas

One of the reasons that I have personally been able over time to ignore pessimism is that I have learned that parties almost always have hidden agendas that will prompt them to settle. Once I learned this and embraced this concept, I became a better negotiator for my clients and a much better mediator.

To identify a party's hidden agenda, one must step back and study the age, education, occupation, sex, race, ethnicity, socio-economic or other characteristic of an individual that may motivate them to settle or not settle a case. The same type of analysis is necessary for corporations, governmental entities, and other institutional parties. With a little bit of study (and a modest amount of reasonable stereotyping) one can determine the wants, the needs, the fears, and the risk factors for many litigants. Once you understand the parties' hidden agendas, most cases can be settled.

There are many examples of hidden agendas that we mediators learn *after* a case has settled:

- The Plaintiff who needed enough money net of attorney fees and liens to buy a new boat for the bass season;
- The married couple who longed to have enough money to pay off the credit card balance they had been carrying and paying for 10 years;
- The newlyweds who had a house they wanted and needed a down payment;
- The middle aged couple with a child starting college in a year;
- The aging couple needing income for retirement;
- The business that needed to settle litigation so that it could obtain financing to break ground on a new headquarters building;
- The business that needs to settle in order to avoid harmful publicity;
- The woman who wanted to settle so her husband would relax and not have a heart attack caused by the stress of the lawsuit;

- The employee who simply wants an apology;
- A Plaintiff lawyer who needs to make payroll;
- A defendant who can't afford the litigation;
- And on, and on, and on.

Many times, settlement that appears hopeless can still occur if the mediator can get the parties talking about their own hidden agendas or can get the parties working on their opponent's hidden agenda.

Studying and Dissecting the Causes of Pessimism

I have found over time that I can work around pessimism if I can persuade the parties to work with me to study our pessimism. As I mentioned at the beginning, this is an easier exercise if the parties are expecting to have to dissect the pessimism.

At the most pessimistic stage of the mediation, I frequently ask the parties to put their emotion aside and to engage in a critical analysis of where we are. Usually, we can isolate the factors that are causing the parties to see the case so differently. Once I do that, I then try to shift the discussion to the *risk* that each party may be right or wrong in their respective views. We then chip away at each conflicting issue, and I have found that pessimism melts and people begin to more objectively assess their positions. This is also the stage where I frequently will ask one party or the other to make a breakthrough move that will put the other party at risk. If I cannot obtain a breakthrough move, then I will suggest that the parties make conditional bracketed moves to narrow the gap enough so that a range of settlement can be visualized.

Conclusion

In conclusion, because pessimism is such a likely occurrence in mediation, getting the subject on the table, exploring the basis for the pessimism, and dissecting it can make it melt away and cease to be a barrier to settlement. When parties are cautioned at the beginning to expect pessimism, they become significantly more patient and creative.

John Trimble is managing partner of the Indianapolis, Indiana, litigation firm of Lewis Wagner, LLP, where he defends catastrophic injury claims, complex litigation, class actions, and business litigation. He has been a mediator since 1988 and is frequently engaged to mediate some of the state's highest profile cases.

AAM Welcomes New Members

We are pleased to announce the following new AAM members since the last newsletter printing:

Anne Ashby, Dallas, Texas
Mary Benz, Chicago, Illinois
Robert Berliner, Chicago, Illinois
Clyde Bowles, Chicago, Illinois
June Brown, Chicago, Illinois
Charles Byrum, Chicago, Illinois
Thomas Deen, LaPorte, Texas
Stuart Duhl, Chicago, Illinois
Katheryn Dutenhaver, Chicago, Illinois
Timothy Eaton, Chicago, Illinois
Jeffrey Elkin, Houston, Texas
Michael Fleming, Houston, Texas
Philip Glick, Highland Park, Illinois
Alan Harris, Dallas, Texas
Nan Hundere, San Antonio, Texas
Robert Lehrer, Chicago, Illinois
Donald Levine, Chicago, Illinois
Paul Lurie, Chicago, Illinois
Kathleen Manchin, Austin, Texas
Greg McCarthy, Arlington, Texas
Ralph Morris, Chicago, Illinois
David Person, San Antonio, Texas
Stanley Sklar, Chicago, Illinois
John Skogland, San Antonio, Texas
Constance Slaughter-Harvey, Forest, Mississippi
John J. Specia, Jr., San Antonio, Texas
Charles Swayze, Greenwood, Mississippi
Robert Walner, Highland Park, Illinois
Dale Wills, Chicago, Illinois
Elizabeth Woodruff, Jackson, Mississippi
James Young, Dallas, Texas

We welcome you to the **Association of Attorney-Mediators** and look forward to your active participation within this organization! Please let an officer of a local chapter or an AAM national board member know what AAM can do for you and how you would like to become involved in AAM's activities.

Do you have a topic you would like to present at an upcoming training? Email Brenda at the AAM National office.

OBTAINING BETTER MEDIATED SETTLEMENTS

— Joe Ramsey, AAM Member, Sacramento, California
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Introduction

In recent years, I have encountered increasing resistance to the mediation format I was trained to follow that has always worked well for me. The primary recurring suggestion from participating counsel is that starting with a joint session is unnecessary or even counterproductive. Usually, I convince counsel that the open meeting is vitally important to success of the mediation. Sometimes I cannot get agreement and dispense with the open meeting only to convene one later when it becomes obvious, usually for purposes of time and cost efficiency, that a joint session is helpful.

This resistance to the open meeting prompted me to consider the characteristics of lawyers in cases I mediate who consistently obtain better settlements. What I have observed is that adherence to fundamental, common-sense considerations at each traditional step of the mediation process consistently yields better settlements.

Ethical Commitment to Early Resolution

I submit without discussion that trial counsel have an ethical duty to shape their representation toward a time- and cost-efficient resolution of disputes. Counsel must therefore make every reasonable effort to know enough about each dispute to give sound and reliable settlement and trial advice. They should do so efficiently and earlier rather than later. This article assumes that trial counsel and clients have decided to make a good faith effort to settle the dispute through early mediation.

Preparing for Successful Mediation

There are three critical early steps to be taken: convince your client to approach the process positively; find out what you need to know to provide sound advice about trial and settlement; and approach the mediation intending to make your best case.

1. Convince your client to approach mediation positively

The success rate for mediation is markedly higher when parties voluntarily agree to the process than when there is some element of coercion requiring mediation. If your client is committed to making the process work, the chances of success are much greater than if the client is just tolerating the process

reluctantly or even unwillingly. So the first step to maximize success is to convince your client to proceed with an open, positive attitude.

This is often easier said than done. All of us as trial counsel have had clients who litigate as a “matter of principle.” Other clients want revenge — a pound of flesh, and preferably the red pulsating pound of flesh in the opponent’s chest cavity! Trial counsel need to move clients past emotionally distracting attitudes that divert energy from the goal of obtaining the best legally possible result.

What worked for me as trial counsel and now as a mediator is to keep the parties focused on the **basic reasons to compromise**: A thoughtful and detailed analysis of the **risks of loss** at trial; the **cost** of getting ready and then trying the case; the **inability to predict** with accuracy what the other side may do or how the civil justice system will administer the case; uncontrollable **delay**, which is the insidious country cousin of cost; and the **stress** of litigation. Once the parties fully appreciate at least these basic hazards of trying the case, they are usually more willing to approach mediation with a positive attitude and a willingness to consider reasonable compromise.

2. Find out what you need to know

The standard of care for trial work has evolved in the past 15 or 20 years to require more formal discovery. Many cases will require extensive and expensive formal discovery absent settlement. However, experienced trial counsel can often inform themselves sufficiently to provide informed advice on trial and settlement without extensive formal discovery. This is especially true in document intensive litigation when the documents themselves often reliably commit the parties to predictable positions. So how do you get what you need?

The first and obvious source of information is your client. Counsel should spend whatever time it takes to question not only “the boss” but also each person employed or retained by the client who has relevant information. Too often, counsel do not probe deeply enough to get all available information. This initial investment in time is crucial and should be done as soon as reasonably possible. Years ago I learned that the long time administrative assistant to a busy President/CEO is often a gold mine of direct information and can locate paper or electronically stored documents and the key personnel who are likely knowledgeable. Contact with key people should be made personally by lead trial counsel.

Counsel who convince their clients to spend the money **at the outset to retain an outside consultant on key issues** consistently get a more reality-based assessment than those who wait and rely instead on in-house personnel. The problem is the human nature of denial. The client and key people involved in the activity that led to litigation almost always believe they acted appropriately. They are not objective and will, at least subconsciously, deny the possibility that they were involved in a bad situation. Clients resist early retention of outside consultants as an unnecessary expense. Counsel's job is to convince them that it is penny-wise and pound-foolish to delay getting an independent and objective assessment.

The third often productive source of early and relatively inexpensive information is the other parties to the litigation. I recommend what I have come to view as the **Trial Lawyer's Golden Rule**: Do unto opposing trial counsel as you would have them do unto you. Lead off by offering information you know the other parties are entitled to obtain. Accept the possibility of a one-way street if the gesture does not immediately result in a reciprocal offer to exchange information in a civil, professional, non-combative, and much less expensive fashion. In my experience trying cases and as a mediator, trial counsel confident enough to start with a cooperative attitude more often than not evoke similar cooperation. The potential saving in time and money can be immense.

There will be cases in which the other side does not reciprocate. In such cases, trial counsel may well have to initiate **some minimal discovery** to get missing information needed to give sound mediation advice. The temptation is often to engage in preliminary "paper discovery," and, if the discovering party gets a legitimate professional response, such discovery should be relatively time and cost-efficient. However, what should be routine and innocuous "paper discovery" too often escalates into World War III with the wrong opposition and/or a law and motion judge unwilling to enforce discovery rights. In these cases, a short key deposition or two may be more productive and less expensive than "paper discovery."

3. Decide to disclose and show your best case

This final pre-mediation consideration is less a preparatory step and more a tactical decision about your approach. The goal of mediation is to convince adverse parties that your case is strong and that they would be well-advised to compromise sufficiently to resolve the dispute. Within the mediation process, you are protected by confidentiality, and nothing can be used against you if mediation fails to achieve settlement. Therefore, you should put your best case on the table. The other side already knows much of what you know and certainly

will be entitled to discover what you know. If your best case does not convince the other side to compromise, perhaps you need to re-evaluate your own position. The up side is that your presentation will sufficiently impress the opposing decision makers to settle. Having mediated over 3,000 civil disputes, I am sure that there must have been isolated instances when holding back was the wise approach. However, I cannot now recall even a single such instance.

Assuming you have opted for detailed disclosure, the traditional approach to mediation affords two major opportunities to convince the other side and to educate the mediator sufficiently to help you get the settlement you want: One major opportunity is the mediation brief; the other is the open or joint session with all decision makers in the same room.

The Mediation Brief

Almost without exception, when I am privileged to work with highly capable trial lawyers committed to a *bona fide* "good faith" effort to settle at mediation, I get a well-organized mediation brief comparable to some of the better trial briefs I have seen. There is usually a detailed factual presentation with page and line references to depositions and other documents. Multiple exhibits are relatively common. Unless the law is basic, better briefs include sophisticated legal analyses with citations to appropriate authorities.

In confirming time and place for the mediation, I urge counsel to provide me with their briefs and to exchange them at least two or three working days before the date set for formal mediation to begin. In a complex multi-party case, I suggest an even earlier exchange. This is simply another application of the **Trial Lawyer's Golden Rule**. You certainly want all information you can get about the other party's position, and you want it in time to assess it and consider what recommendations you can make to your client based on the other side's presentation. Surely the other side feels the same way.

Thus, I strongly suggest that a full disclosure be made as soon as reasonably possible. Even if you suspect that your opponent is at least generally aware of your position, assume that she is not. You should also assume that she will consider your position and that she will need time to inform and advise her client. Competent counsel will not act on new information without assessing it carefully. New information presented at the eleventh hour almost always causes delay and defers reasonable decision making.

For the mediator, it *does* matter whether you provide your brief reasonably in advance as opposed to the last minute. Your

job is to persuade the other side to compromise, and a major tool at your disposal is the mediator. So you need to be sure the mediator understands your position and is fully informed. The more ammunition you give the mediator, the stronger the arguments the mediator can make on your behalf.

Initial Joint Session

The second early opportunity for trial counsel to make the best case in a mediation is the initial joint session attended by all counsel, all clients, the clients' decision makers, and the mediator.

1. Reasons for conducting an initial joint session

At an American Arbitration Association mediation training in the mid-1980s, I was taught that mediation should begin with a joint meeting among all parties' decision makers, counsel, and the mediator. In that meeting, counsel for each party is expected to set forth the strongest position on all issues. Ideally, the presentation should be in the nature of an opening statement, non-argumentative, and addressed to the mediator so that counsel for one party does not end up directly addressing another party or lawyer.

One important reason for an initial joint meeting is that the parties can hear first hand how their opponents view the dispute. Counsel should have advised their clients of the strengths and weaknesses of the case. However, honest perceptions of zealous advocates often differ drastically even when looking at the same evidence. Moreover, even if all clients are fully advised, it is important for the parties to hear the opposing views presented professionally and by capable, well-prepared counsel. A new appreciation of the reality of litigation inevitably results.

Another reason for a full exchange of views in a joint session is time and cost efficiency. I was taught and still follow the practice of elaborating in some detail on four major motivators for compromise that are always involved to some extent: risk of loss, litigation costs, delay, and stress. Sharing this insight with all parties at a joint meeting saves the time of repeating it in private caucuses as many times as there are parties. It also underscores that all parties are affected by these factors and all face similar decisions. They should realize that they all share a common goal of dealing with the same hazards — even though the same hazards may affect each party differently.

Setting forth your client's position directly in a joint session enables you to say it the way you want to say it. Although all experienced mediators are careful listeners, there is always risk that something will be lost when counsel advises the mediator in private session and counts on the mediator to

convey the desired message to the other side. Counsel who say it themselves in joint session reduce to zero the chance that something important will be lost in transmission. In addition, by spelling out your position in detail, you enable the mediator to reinforce your arguments when meeting privately with the opposition.

Finally, the combination of all of these reasons for the joint meeting is that the parties become engaged in the process from the outset. The chemistry is different when the clients hear the issues together. The stage is set for follow-up on all issues in the private sessions.

2. There is rarely a sound reason for *not* conducting an initial joint meeting

The reason I hear most often to forego an open meeting is that there are strong emotions and setting forth the positions of the parties will likely inflame and even be counter-productive. A related concern is that opposing counsel will offend one's clients and cause them to retrench rather than approach mediation willing to consider reasonable compromise. In my experience, there is little merit to these objections for several reasons: First, if the mediator takes control and requires a civil and non-inflammatory process, no one should be seriously offended. Second, volatility is part of litigation, and venting is not necessarily bad. Third, the mediator will be able to reinforce the point that no event in the litigation is as benign as mediation; a party that cannot endure mediation needs to compromise and settle.

I believe that the only sound reason for a client not to attend an initial joint session is that doing so might impair her health. I have been convinced on occasion with elderly and/or otherwise infirm clients that even the relatively mild stress of a joint meeting might be harmful.

Whenever I confer with other mediators or attend mediation training, there is unanimous and strong agreement that the initial joint session is critically important and should not be eliminated except in extreme and rare circumstances. I continue to start with such a meeting even if there has been an earlier session or a failed Mandatory Settlement Conference. At a minimum, it is easier to share perceptions of the parties in a single open session concerning whatever has transpired since the previous session.

3. At a minimum, counsel should give a detailed and thoughtful opening statement

One of the most successful lawyers in the Sacramento region presents imaginative power point presentations in virtually every case I have mediated with him, and I am sure that

he does the same thing with other mediators. He outlines the entire case logically. He supports factual assertions with excerpts from deposition testimony, excerpts of other documentary evidence, photographs and graphic artistry. In doing so, he provides detail needed for thorough analyses by decision makers. Perhaps more importantly, he sends the message that he is ready to try the case. Whether one goes to this extreme, counsel should be prepared to lay out the case in an opening statement.

4. Whether to involve clients directly in the joint session is another question

I try to encourage counsel privately before the joint session to invite their clients to speak up in the joint session. Counsel sometimes object, usually because they fear the client will not make a good impression, and sometimes because they fear the stress will be too great. The more successful lawyers prepare their clients and invite them to speak on one or more issues. In addition to giving the opposition a glimpse of the client's personality, the client is more invested in the process.

Common Negotiating Problems/Solutions in Mediation

As a mediator, I regularly encounter certain recurring problems during negotiations toward settlement. I will identify and discuss five such problems and how I try to solve them, in the following order: (1) The most vexing problem is negotiations that start with a clearly unreasonable position, especially if money is the only or clearly the most important matter in dispute. (2) Extreme distrust by one or more parties can paralyze the process. (3) Diametrically opposed perceptions of the same evidence is not uncommon. (4) A marked change in negotiating direction well into the process can derail progress and set the process back. (5) Finally, until a settlement is reached and reduced to writing, vacillation and doubt too often block progress and may predict buyer's remorse even after agreement is reached. Obviously two or more of these problems may be happening at the same time.

1. Unreasonable starting positions

Especially when money is the only matter in dispute, a major recurring deterrent to good faith compromise arises when the parties assert **unreasonable positions at the outset**. Since plaintiffs seeking money damages usually begin the negotiations with an opening offer or "demand," plaintiffs often set the tone for at least the initial exchanges of offers. Unless the opening offer by the plaintiff is moderated somewhat, it frequently invites a "like kind" response: "That's absurd. I'll show them what's unreasonable. Offer them \$1.98!" Almost always, this bad start takes valuable time to

get the parties back into a range where both sides begin to experience some anxiety. I characterize this initial challenge getting from the "ozone" to the "twilight zone" in which both sides begin to realize that they will be better off reaching settlement.

I try to expedite the voyage to the "twilight zone" in several related ways. First, I encourage the parties and their counsel to share an objective evaluation with me in confidence. In this process, we are able to expose and discuss weaknesses in the parties' positions. Often a plaintiff will end up agreeing with me in private caucus that, on her "best day," she is not likely to get more than \$X from a jury. Similarly, a defendant will often end up agreeing in private caucus that, on her "best day," a jury will likely find her liable for something in the range of \$Y. Usually, this approach does facilitate getting to resolution more quickly.

I often suggest a variation of this approach, especially if one side decides that the other is "not dealing in good faith" and refuses to respond to the last "non-offer." I assure both sides that I will persist with the process as long as there is any hope but that I have an ethical obligation to find out sooner rather than later if there is no hope. Most of the time, with that in mind, both sides will re-evaluate their positions and tell me in confidence what they see as the least plaintiff will accept and the most defendant will pay. Even though the parties are probably still negotiating with me, most of time I can get a pretty clear idea what will settle the case, and settlement follows relatively quickly.

2. Extreme distrust

Sometimes the parties distrust one another to such an extent that distrust precludes reason and shuts down communication altogether. Disabling distrust occurs most often when one or more parties perceives the opposing position as a betrayal or a personal attack. Examples include family business disputes, estate disputes, long time business relationship break-ups, and many employment cases. I have seen extreme examples when the parties refuse even to be in the same room with one another. In such cases, there is an almost automatic rejection of whatever the opponent suggests on the reasoning that what the opponent suggests must be rotten and toxic. The initial challenge for counsel and the mediator is to find a way just to communicate negotiations.

This refusal to consider anything the other side suggests can be overcome in one or more of several related approaches. One solution is to have all sides submit what they consider to be a reasonable overall solution to the mediator who then makes a proposal based on the combined suggestions. In an especially malignant property dispute between neighbors, this approach

proved dramatically effective. Each side had predicted darkly in private that the opposition would make specific demands that were absurd and unreasonable. I was delighted to find that neither side suggested anything remotely close to what the opposition had expected. So we started on a much more positive basis than either side had expected — with a proposal made by the mediator rather than communicated by the other side through the mediator. Since the source was not the opposition, each side listened and reacted rationally.

Counsel and the mediator can also work together to have an independent source suggest a solution. The mediator is a logical independent source, and fresh solutions often evolve from an exchange of ideas among counsel, the parties, and the mediator. Occasionally, I have carried this approach a step further by suggesting and getting authority from counsel to act as an intermediary to find independent expertise. A simple example is getting an independent real estate appraisal in a dispute in which both sides are convinced the other side has found and paid for a partisan appraiser.

If all else fails, patience and understanding usually work. In one memorable case in which the parties literally refused even to be in the same room, counsel and I simply out-last-ed the parties and patiently and assiduously communicated until compromise began to emerge. In another, we recessed the traditional mediation, and I was allowed to meet separately at each attorney's office for lengthy meetings that finally revealed the causes for the disabling distrust and led to a solution.

3. Diametrically opposed perceptions

It is surprising how often well-prepared and intelligent opponents looking at essentially the same evidence perceive key issues in opposite extremes. I call this the “black/white” problem: One person points to a cat and exclaims: “Look at that beautiful black cat!” The other side looks up in amazement and exclaims: “What on earth is wrong with you? That cat is snow white!”

Zealous advocates do perceive the same evidence differently. In modern litigation, often involving voluminous documents, it is understandable that perceptions will differ. But the black white problem also arises when zealous advocates draw opposite inferences from the same undisputable evidence.

Counsel and the mediator can usually overcome this problem by meticulously identifying what each side is relying upon and then analyzing it together. This exercise rarely fails: Either one side has to concede or both sides realize that the evidence is not as clear as perceived. Confronted with reality, denial usually dissipates and then evaporates, and we move on to the next issue.

4. Marked changes in negotiation direction

In most mediations, a certain rhythm develops, with the parties consistently making positive compromises narrowing the distance between the sides. Sometimes, one party will disrupt this rhythm by making a marked change in direction. When this occurs, the result is almost always negative. At a minimum, negotiation slows or stops while the opponent absorbs the new information and formulates a response. At the extreme, the change can be perceived as sufficiently drastic that the opponent wants to go home. This problem usually arises in one of two contexts.

In the first context, money is the only issue. In money negotiations, the plaintiff starts at a higher amount than she is willing to accept after an exchange of reasonable compromising positions. As negotiations proceed, the plaintiff continues to demand less while the defendant continues to offer more. I call this the “North/South” rule: plaintiffs must continue south, and defendants must continue north. There is a major disruption when this rule is violated. If plaintiff reverses direction and demands more, the defendant is not likely to respond with a higher offer. Similarly, if defendant offers less, the plaintiff is not likely to respond favorably. Derailment is imminent, and mediation will fail unless counsel and/or the mediator can get the negotiations back on track.

The other context in which a late change of direction can threaten the progress and rhythm established in the mediation arises from the injection of a new and usually non-monetary issue. As an example, in a case of alleged professional negligence when defendants always want confidentiality, a plaintiff may first agree to confidentiality but then renege later in the process. As a related example, the parties identify the issue early and agree that any settlement will be confidential, but, late in the negotiations, the defense demands substantial liquidated damages if there is a violation of the confidentiality provisions.

In either context, a late directional change is usually the result of poor preparation or a failure to anticipate that the problem might arise. In the North/South context, neither party should be so ill-prepared as to realize in mid-negotiation that the case has more or less value. Similarly, in professional negligence cases, counsel and the mediator should have anticipated these confidentiality problems and put them on the table much earlier. In both types of late directional change, counsel for the side asked to respond to the change should be able to rely on the mediator to get matters back on track.

5. Vacillation and doubt

Vacillation and doubt can jeopardize settlement at two different times. First, even though the parties are proceeding toward resolution, either or both parties can begin to second-guess the concessions they have already made. Second, “buyer’s remorse” can threaten the enforceability of a negotiated settlement even if it has resulted in a written agreement. Both problems will be considered briefly here.

Second-guessing during the negotiating process is not an unusual human response from parties who started the process with a high confidence level but have kept open minds and feel that they have compromised enough — maybe too much. Counsel for such a party will likely inform the mediator that the client is experiencing some doubts and may even backslide. The mediator will likely react accordingly and seek closure from both sides or risk losing the settlement. Experienced counsel has presumably advised the client throughout the negotiations and should therefore work with the mediator to keep the process on course.

“Buyer’s remorse” after a negotiated settlement has been reached will still jeopardize the settlement if one party has second thoughts and tries to back out. Experienced counsel and mediators will insist that the parties enter into a signed agreement to memorialize the settlement. If the settlement is reached after litigation has commenced, a provision in the settlement agreement that the parties acknowledge

performance may be enforced by motion pursuant to CCP section 664.6 should make the settlement iron-clad. Even if litigation has not been commenced, counsel and the mediator should include a provision that any party may require performance by filing an action to enforce performance and then moving to enforce pursuant to CCP section 664.6. To my knowledge, this kind of provision has not been tested, but it seems likely most courts would view such an attempt to preserve a settlement favorably.

Parties can include in the written settlement agreement reached in mediation provisions requiring the parties to submit to binding arbitration before a properly selected arbitrator if any disagreement arises in the more formal documentation of the settlement after mediation or in the performance thereof. I have used such a provision in hundreds of settlements. To my knowledge there has never been a problem with enforcement. In a handful of cases, some arbitration was required, and it resulted in preserving and enforcing the settlement.

Conclusion

I hope sharing these observations will help trial counsel consistently obtain better mediated settlements. As in virtually all legal matters all of us undertake, if the matter starts right, it usually stays on course. One important key to successful mediation is a carefully planned and executed mediation brief and participation in an initial joint session.

www.aam-forums.airset.com

After repeated member requests for an easy way to communicate with other AAM members, privately, AirSet is giving us just such an opportunity. This forum will allow us to communicate with each other on any topic we choose, privately. For now, AAM will use the Forum portion and from time to time the AirSet calendar will send you a reminder about an AAM function. We would appreciate your feedback and comments. If you are unable to sign in at the web address above, it may be that your “invitation” was lost in the “mail”. Please let Brenda know and she can send a new invitation to get you started. Let’s give this a try and see if it will work for us!

Go ahead — give it a try — www.aam-forums.airset.com.

St. Louis Chapter News

The St. Louis Chapter continues to hold monthly meetings to discuss current mediation developments and issues and to consider specific problems and questions the members have encountered. In addition, at each meeting, one of the members leads a discussion on a specific mediation topic (that qualifies for MCLE credit). Topics have included or will include:

- Philosophies of Settlement
- Advocates’ Views About Mediation
- Mediator Malpractice

For information about the St. Louis Chapter, please contact Richard Sher at 314-721-1516.

AAM CHAPTER NEWS

AAM currently has chapters in several locations. Some of these meet on a regular basis, offering members CLE credits. Several meet in conjunction with their local bar ADR section. Contact your local Chapter President for more information and to get involved.

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