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Hon. Jacqueline A. Connor (Ret.)

Eight rules for winning at mediation

Simple yet often overlooked rules to maximize your success at mediation

Some lessons seem so obvious that they don't bear repeating, but when the basics are trampled repeatedly to the detriment of everyone involved, it is never too late to revisit and build better approaches. I will start with an admission to hard-learned bias: I believe that very little good comes out of court and what good that does survive is generated at an enormous price in treasure, time, lost opportunities and emotional cost.

Judges and arbitrators are limited to working within tight, artificial structures created by archaic statutory causes of actions and appellate opinions developed from hundreds and thousands of wildly varying factual scenarios. A cause of action cannot, by definition, fit an individual case on all fours. If the case at hand appears to so fit, there is rarely agreement from the other side and no one can be surprised when the ultimate fact finder does not see the obvious parallel. The ability to fashion a real solution that addresses the future, the relationships of the parties and the variables at play including human factors, insurance issues, and equities, doesn't exist in the courtroom. The ability to actually fix *the problem* can rarely be found anywhere in our formal legal confines. The potential for a real fix can, in contrast, be found in mediation, where the ability to design a solution is limited solely by imagination.

The psychic price of justice is particularly steep for clients, who can usually only see their own view of "justice" (which should come quickly and with as few dollars in counsel's pocket as possible.) There are always competing views from the opposition, with more from the judge and 12 jurors. Clients also universally anticipate a "day in court," expecting to be able to tell their story and voila, the fact finder will "get it." Even with vigorous massaging from skilled advocates, this rarely happens.

The predictability of a result based on the evidence has become even more elusive in this culture of instant access to every piece of information published on the face of the earth with a single click of the keyboard. This is particularly so for our community of millenials who do not exist more than inches from their smart gadgets.

A favorite insight comes from the genius of Mark Twain who wrote: "I have been ruined but twice in my life, once when I lost a lawsuit and once when I won."

There is much to be said about considering mediation and there is much that can be accomplished in the informal setting provided, protected by confidentiality and freed from the stranglehold of limited legal remedies.

Assuming mediation is under consideration as an alternative to the MMA cage, there are simple tips that can enhance the resolution for a client. The benefits of these maxims presume that the opposition is relatively experienced, reasonable and rational. If that is not your reality, ignore all of this and thank your higher power for this gift, as the offending party will inevitably annoy the judge or jury very quickly, to your benefit. This also assumes that you have sidestepped an ulcer/heart attack and have resisted spitting on this gift by rising to the bait.

What are the rules to maximize the quality and results of your mediation? These are basics, and the basics presume the existence of legitimate and reasonable exceptions.

One: The brief

Concise, disciplined, professional, straightforward, an absence of hyperbole, name-calling, or bold and/or capitalized sections (highlighting sounds like screaming to the reader.)

In that vein, I'd like to give a shout out to one of my favorite unsolicited but welcome daily emails from *Writing Tips from WORDRAKE*, expert wordsmiths committed to the clarity of the written language in our legal warzone. It is worth a look.

A brief thrown together at the last minute, or a cut-and-paste restatement of the complaint, cross complaint, answer or a motion with its legalese, repetition and verbiage, tells the mediator much about a lack of commitment to the case. The message may, correctly or incorrectly, telegraph that there is little money or time invested or worse, intended to be invested, the attorney is unprepared, uncommitted and/or inexperienced, and the client and case is not their priority. There are many messages being sent. None are good.

A brief that is too long is almost as bad as one that is too short. In contrast, it telegraphs a lack of discipline, preparation, understanding of the core issues and focus.

To the extent there are issues that should remain confidential, these can be communicated in a separate addendum or letter. Typically the most helpful confidential additions provide tips on dealing with the client, the past history with the opposition or facts related to the relationship between the parties or between the client and counsel that will keep the mediator from walking into a buzz saw or fatally starting off on the wrong foot.

I will never forget an example of the value of a very well-written opening salvo. In a significant PI case, an exceptional plaintiff's attorney delivered a solid, focused brief four weeks before the mediation. This mediation was prelitigation and costs were still minimal. He provided additional copies for the adjusters and other stakeholders, and included exhibits of expert reports, a clear spreadsheet of expenses including Howell numbers, and a timeline of relevant developments in the case. The brief laid out his strengths and addressed the weaknesses professionally, without exaggeration, and to great effect.

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The opposition was therefore prepared. Opposing counsel had the necessary information to present to the adjuster and mediation was quickly concluded with a number very close to the reasonable but very substantial seven-figure demand that started the discussion. Both sides saved a fortune in costs and avoided the risk of unknown twists. The result was a textbook picture of the power of a brief. It also enhanced the reputation of the plaintiff's counsel as being prepared, invested, and committed. Reputations do make a difference.

Also, if the mediation is staged pre-litigation and prediscovery and there is not enough information available, an informal exchange or agreement prior to the mediation session for limited discovery can completely change the dynamics and expectations. Such cooperation can, should and does happen between experienced and motivated advocates.

Two: Sharing the brief

IMHO, briefs should be shared, regardless of the position of the other side. If there is anything confidential, it can be presented, as noted above, in a separate letter or document. No one should be able to articulate a position for your client as well as you can, nor is anyone else as familiar with the legal framework of the case. The mediator will have lived with the case for a few hours or days. Counsel will have lived with the client and facts for months or years. This dynamic makes it less likely that the mediator can persuade the other side simply from the strength of the expected spin. Counsel will know things that can make or break a position and know the factual and legal strengths and weaknesses. Sharing a well thought out brief in advance comes from a position of strength. There won't be surprises and the other side will know that you are not only realistic about your case, but are prepared for their counter arguments.

Ultimately it is rarely the law that drives a settlement. No one, no mediator, judge, justice, lawyer or client, can guarantee a result, either legally or factually. The trial judge or arbitrator can get the law wrong; the appellate court can get it wrong; the trier of fact may decide in spite of the law that a different result is more palatable….there are no guarantees. Getting mired in the assumption you shall and will win a legal motion can cripple your bargaining position and stop the conversation.

Typically, discussions start with the law, evolve to estimated percentages about how the law will promote or detract, move to estimated discounts based on strengths and weaknesses, and then ultimately to numbers the market will bear. The latter is usually divorced from the legal positions that started the conversation. Get the law out there in the shared brief, then dig deeper for the real variables that are more likely to drive the result.

The underlying message in a well-written brief provided in advance is that you believe in your case and you are ready to go. This is priceless.

Three: No last-minute submissions

I was told that attorneys could and would send in a brief a few nighttime hours before a mediation. It unfortunately happens too often. While better than no brief, it does speak volumes about the commitment of counsel to their case and to their client.

Last-minute submissions, both in terms of briefs and information, make it difficult for the other side to consider or reconsider the stakes. New information about injuries, additional surgeries or new witnesses, for example, are impossible for most adjusters to fold into their calculations, as the numbers and authority have likely been round tabled with hard instructions to the attorney or adjuster days, if not weeks, earlier. It also puts the defendant's attorney in an untenable situation with the adjuster, and too often results in no settlement, hardened positions, and a new or renewed sense of distrust and hostility.

Four: Know and prepare your clients

Experienced trial lawyers know that jurors will bend over backwards to find in favor of a party (and trial lawyer) they like and with whom they sympathize. Jurors look for the villain in the story and are on guard against anyone they perceive to be trying to "get away with something." This view from the jurybox typically trumps the law. ("What stinking rules? There are no stinking rules.") It is critical to know whether your client might end up on the wrong side of this dichotomy. If your client is going to offend the jury, that factor must be strategized, and counsel *and the client* needs to know it. If the adjuster or opposing counsel is unaware of this variable (because, for example, someone else did the deposition, or there has been no deposition yet,) it helps to keep this factor off the table and be proactive about preventing contact with the other side. If the opposite is true, and the sympathies are in your corner, it makes sense to be ready to put your client up as Exhibit Number One. Friendly, controlled and short meet-and-greets can be game changing.

Of course, knowing your client means some work, including checking out their internet presence and background. Many settlements have been torpedoed by damaging facts known to the other side but undisclosed and undiscovered by counsel.

Unprepared clients can hurt the process and, of course, the opposite is also true. A prepared client must know that the mediator is not advocating for either side, but has to find the maximum possible win-win for all parties. Hopefully the client has been told of the parameters of confidentiality, as well as been educated on the raison d'etre of mediation that the best-case scenario will not carry the day for either side if the goal is a settlement. The four-letter f-word ("fair") sits in second position to a realistic business decision that takes into account the true cost and risk of a trial or arbitration. A good mediator should be able to spend time hearing both the demands and underlying interests of each side, and to weave them into something mutually palatable. The client should be ready and untethered from unrealistic expectations.

Use the mediator

If the client has unrealistic expectations, use the mediator as the bearer of bad news.

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If the client needs to be "heard," let this be the setting where the client can get it all out without legal objections and interruptions. The mediation is indeed the last place where the client does have full control….the decision to accept or refuse is available and the tenor of the experience can be shaped to accommodate their needs. Once in the courtroom, someone else will be pulling every string, including when to show up, where to sit, when to speak, how to speak, and when to stop talking, followed by twelve disinterested, suspicious and cynical strangers making the final call.

If the client needs to face his or her nemesis, work with the mediator's intuition about having a controlled safe joint session to allow the catharsis.

The reality is that the courtroom will not offer these opportunities without enormous cost, even when the client is convinced that the jurors', judge's or arbitrator's decisions won't matter as long as they can speak their piece. This is always false. It does and will matter. And never be surprised when you are the one who bears the brunt of your client's disappointment.

Clients also should be prepared, when relevant, for the risks of fee shifting, the damage from 998 offers and the impact of burning insurance policies.

Five: Have your decision makers present

There are often individuals behind the scenes who are the real shot callers. Counsel should be aware of who they are and have them either present or available during the mediation. If it is another adjuster, information about their phone access and time limits needs to be built into the timing of the mediation. If it is relative/friend/family member, or sometimes a ghost attorney, it is important to know that and have a strategy, including alerting the mediator to this dynamic. The reverse is also true. There may be parties who will sabotage an agreement and their presence can be destructive. Their presence needs to be carefully evaluated.

Six: The numbers

Trial, not mediation, is the time to practice the art of blowing the lid off the case. The most successful mediations start with both sides in the same universe, or willing to get onto the same page in the first few moves. Intransigence locked into an unrealistic hope on either side of the table will doom reasonable movements. This often calls for early communication between the attorneys. A phone call to introduce oneself, if the other side is unknown, can reap significant benefits. Certainly opening demands and offers can be aggressive without being unrealistic. Credibility is essential, and these numbers should be exchanged before the mediation. If new information changes the calculation, this should also be communicated as soon as possible.

Bringing in squibs of other verdicts, awards or results to a mediation is not usually helpful. These should, on the other hand, be included in the written (shared) brief. Adjusters have their own statistics, and the variables that distinguish cases overshadow raw numbers. However, the value of other verdicts and awards does help with a discussion on potential exposure. Providing this in advance is generally more effective than bringing such comparative numbers to the mediation.

Communicating that the failure to reach a settlement in mediation will result in a more aggressive approach in trial is both appropriate and expected. This gives legitimate cover to the reasonable numbers being used to frame the discussion, establishing that the "true" numbers will only come out in the trial arena.

Know the history of the negotiations. Regardless of the "official" numbers, any numbers communicated along the way will shape and harden the expectations of the players. If prior counsel has made offers or demands that are different than the view of current counsel, that needs to be acknowledged and ideally addressed before the start of the mediation. If a prior demand or offer is absolutely off the table, that should be communicated to the other side in advance of the mediation. Ignoring the history of exchanges or reversing the direction or prior communications can be fatal to a good settlement.

Know your own numbers. Know what your bottom line is. It is always a mystery when participants walk in without a clear and realistic view of their walk-away numbers. It is also critical to know the status of liens, whether Medicare, MediCal, ERISA, or prior counsel, and to know the range of negotiability for such liens.

Counsel from both sides are well advised to come armed with non-economic chips that can be traded or that might mean more to the opposition. This is where thinking outside the box can seal a settlement and produce a true "fix" to a dispute. As an example, in a recent mediation, it became clear that the plaintiff and defendant had uniquely similar backgrounds, each coming from nothing and building their empires on sheer grit and high tolerances to risk. The defendant had already made it, and the plaintiff was trying to get there. With a settlement that was (barely) agreeable to both, one of the chips added was a private meeting between the two, as mentor and mentee. Apologies, the creation of legacies or scholarships, donations to favored charities, a divvying up of customer lists…the possibilities are limitless and powerful.

Seven: Bring language necessary in a settlement document

Some parties require a long form while others do not. It is helpful to know this in advance and to ideally bring that long form to the table at mediation. Specific language that if absent will operate as a "deal breaker" should be prepared in advance. Many a settlement has disappeared in the glut of legalese in our world that doesn't see much English. The use of a short form, with crossed out words and handwritten additions, is viable in a 664.6 enforcement hearing. It will clearly and loudly carry weight as a *working* document. Long forms with additional verbiage that changes the

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scope of what could and should have been a straightforward deal, have scuttled many an agreement. The irony is that the loss of the settlement in favor of the war in the courtroom rarely results in a win that encompasses all the extras that show up in boilerplate legalese.

It has happened all too many times that a deal was reached in the late afternoon, but the crafting of the settlement documents kept going till late. Last night, for me, was 2:00 a.m. Zzzzzzzzzzzzz.

Eight: Finish with signatures

Leaving a settlement without signatures is folly. Nine times out of ten, something will come up, a promise will not be kept or something unanticipated, perhaps even anticipated, will cause the deal to implode. If a final form is not available, there is value in getting the parties to sign a working short form, as noted above.

If all else fails and the sides cannot work out the specifics, counsel can still think outside the box. If specific information is missing, the parties can agree to exchange that information. If the other side requires something, perhaps a second deposition or an IME, set it up. If a dispute on a specific legal point is blocking a settlement, consider asking the judge for an early ruling on that core issue, making sure to inform the judge that the decision will open the door to a meaningful settlement discussion.

Don't underestimate the potential and limitless benefits of mediation and don't waste that potential. It can be the gift that keeps on giving.

A double Trojan and prosecutor before her 1986 appointment to the bench, Judge Jacqueline Connor (Ret.) tried hundreds of jury trials as a trial lawyer, presided over thousands more, and was recognized as a national expert on jury reform. Currently committed to her work as a mediator/arbitrator for ADR Services, *she uses her experience and expat upbringing to craft creative solutions and assist in realistic assessments of risks and rewards. Named Judge of the Year from multiple organizations and designated as a top Mediator, she intimately knows the costs of litigation and the risks particularly unique to our digitally connected world.*