"Attorneys' Pet Peeves about Mediation" seminar. L to R: Mike St. Denis, Hon. Joe Hilberman, (Ret.), Daniel Ben-Zvi, Lisa Maki, and Randy Dean.

Mediation Tips Based on Attorneys' Pet Peeves

By The Hon. Joe Hilberman

I recently had the pleasure of participating in a panel discussion at the Strauss Institute at Pepperdine Law School sponsored by the Southern California Mediation Association. My co-panelists included Randy Dean, Lisa Maki, Daniel Ben-Zvi and Michael St. Denis, discussing the topic "Pet Peeves of Attorneys About Mediation."

It came as no surprise that there were many! I would like to highlight a few and make some suggestions about how attorneys can assist the mediator in ensuring a meaningful and successful mediation. The following "peeves," and my comments regarding them, are addressed in no particular order.

"A mediator who does not strongly encourage sharing briefs."

Always serve a brief, even if the other side does not serve one, and even if an additional confidential brief is served only on the mediator. If you are asking for something, tell the other side why you are legally entitled to it. If you are denying something, tell the other side why. And if you have a thought about how to resolve the matter, express your thoughts.

The purpose of the exchange of briefs is to let the other side know where you are coming from before the mediation so the decision-makers can have an opportunity to prepare for a meaningful discussion, allowing you to get to the substance of the discussion as quickly as possible.

If there are issues you do not want the other side to know, such as potential impeachment evidence, serve that information on the mediator as a separate, confidential document, or explain that information to the mediator in person, although he/she would appreciate having the information in advance of the hearing. As to the briefs that are exchanged, remember that they, too, are protected by the mediation privilege regarding use outside of the mediation. (See Evid. Code, §§1115-1128.)

"A mediator who won't talk with an attorney before the mediation."

The panel was uniformly in agreement that it is the responsibility of the mediator to be available to counsel in advance of the mediation to discuss the case. In my experience, the mediator can be far more effective when the attorneys provide a "heads up" on the issues in dispute, and perhaps more importantly, insight into the personalities of the parties involved.

This is particularly significant when "what the dispute is about" is really not what is alleged. Often there are significant

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personality, familial, ethnic or societal issues involved that are not evident from the briefs; when the mediator is advised of these issues it creates the opportunity for greater understanding and better defines the manner in which a successful mediation can be conducted.

The bottom line here is that counsel should not view contact with the mediator as prohibited "ex parte" communication.

"A mediator who insists on / refuses to convene a joint session."

As a mediator, I am not generally a believer in convening a joint session. My experience has shown that parties engaged in litigation seldom want to sit down across from each other and listen to the other side explain why the case is a slam-dunk winner/loser, or why they are completely right/wrong, or, well, you have been there and understand.

In high conflict cases it may be especially important to be able to assure one's client that he or she will not be in the same room with the opposing party, as there is often concern about an unwanted confrontation.

This is an excellent example of when a call to the mediator in advance is appropriate, as you may want to have the parties together, or not, and you should let the mediator know in advance. Again, you know your case far better than the mediator and should share with the mediator your thoughts on how the mediation will be most successful.

I do utilize the "joint session" in cases where the matter has been resolved and it is necessary to have the parties "buy-in" to the agreement in person and together, such as a homeowners association case or neighbor dispute. This is, of course, always with the consent and agreement of all counsel and the parties.

"A mediator who does not meet with the attorney outside of the presence of his or her client."

At the outset of the mediation I always tell the clients that I will be meeting privately with the attorneys – not to hide information but to speed the process. When we speak privately I have the opportunity to be more candid than in front of the client, as the mediator should never get between the client and his or her attorney. Additionally, a private meeting provides the opportunity for the attorney to give the mediator insight into how he or she *really* feels about the case and how resolution can be attainted.

Often the complexion of the case has changed from the time of the attorney's retention and the initial analysis of the risks and benefits of proceeding to trial are different as the trial date nears. The attorney may need the assistance of the mediator to "deliver the message" to a client that the attorney knows he or she needs to hear, but the attorney is having difficulty getting across to the client.

"A mediator who goes too fast."

One of the benefits of private mediation, as distinct from a court settlement conference, is the luxury of time. I have written before of my observation that when sitting as a Los Angeles Superior Court judge I was fortunate to get an hour or two to hold a settlement conference. With private mediation the parties control how much time will be available for the proceedings, and cases in mediation have gone as quickly as an hour or two and as long as three days.

It is not the role of the mediator to dictate to the parties the length of the negotiations. Counsel may sometimes have to be patient, however, if a mediator suggests continuing with discussions that have appeared to stall. Part of a successful mediation process is allowing the parties an opportunity to fully explain his or her position, and affirming the fact that the mediator has "heard" that position. Often this process itself is the most significant factor in progressing to resolution. Going "too fast" reduces the probability of success, and may lead to an impasse when

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more time would allow for progress in the negotiation.

All mediators and counsel have had the experience of thinking that the negotiations had come to an end, only to find that by allowing a bit more discussion a pathway to resolution appears.

"A mediator who does not determine what the dispute is really about."

This goes back to an earlier point about communication between the attorney and the mediator. By utilizing the opportunity for the mediator and counsel to speak before the mediation, or privately during the mediation, counsel can assist in the determination of what the dispute is really about. Sometimes it becomes clear to the mediator that one party or the other has not appreciated what the dispute is really about, and great effort should go into making that determination. Once the "real issues" are determined, efforts can turn to real solutions.

"A mediator who relies too heavily on 'cost of litigation' or 'risks of trial' as an argument for settlement in a certain range.

When I was a young lawyer, many, many years ago, it was not uncommon for the defense to offer the "cost of litigation" as a viable settlement amount in cases where they felt liability was unlikely. With the advent and expansion of house counsel and law firms whose attorneys are employees of the insurance companies, the carriers became less willing to engage in such offers, as the costs of the defense was part of the budgeted operating expenses of the company rather than an outside expense.

With this development, the financial motivation of avoiding the expense of the outside attorneys has diminished in many cases where insurers are involved, and pressing the defense to make such offers is less viable as a negotiating tool. There may also be an increase in willingness to try cases where the defense sees little merit, making plaintiffs "prove their case" to a jury.

On the other side of the "*v*," plaintiffs' counsel who bring a case felt to have merit have shown an increasing willingness to let a jury decide the case, recognizing that every trial has risk, an inherent factor of any plaintiff's case.

On our panel, defense counsel were adamant that they and their clients and principals were uniformly put off by the "cost of defense" argument. Similarly, the panel members who primarily represent plaintiffs universally appreciate the risk of litigation, and are not keen on advising their clients to "give up" on a case in which they have confidence.

While recognizing the validity of both of these positions, I often find myself quoting Judge Lawrence Waddington, before whom I had the pleasure of trying several cases in the '80's, who would always remind counsel before the start of jury selection that "Settlement buys certainty." Still true today, but I also say to both sides, "It's your case and your money, so you can do what you want."

"A mediator who makes a 'mediator's proposal' too early in the negotiations."

Mediation is a process, and the parties are there in good faith to try to shape a consensus as to what resolution should look like. Indeed, one of the great selling points of a mediated settlement is the recognition by the parties that it may be their last opportunity to have meaningful input into what the outcome will be.

It is only after the process has had an opportunity to run its course that the mediator should consider making a proposal for settlement. I require two things before I make a mediator's proposal. First, all parties need to express the desire to have a mediator's proposal. If you think the discussion has progressed to the point where a mediator's proposal is worthwhile, go ahead and privately ask the mediator about

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that option; broaching the subject will not be viewed as a "sign of weakness," and as counsel who has been living with the case for months or years, you may have insights into the negotiating dynamic that is helpful to the mediator to understand.

Second, I need to feel that whatever resolution I propose has a strong probability of being accepted by both sides. Without that, any proposal will probably fail and may be destructive to the settlement process by cementing one party or the other in their position because it is more aligned with the proposal.

Finally, making a proposal, even when asked by all sides, when it is unlikely to be accepted diminishes the opportunity to return to the negotiating table, as a party may conclude that by making the proposal the mediator has expressed his or her opinion on value or terms of resolution, so there is no need to continue the discussion.

"Failing to reduce the settlement terms to writing."

I have found that many times counsel will arrive at the mediation with the outline of a settlement agreement already in his or her computer. That is of great help when the case settles, as it may be used to format at least a memorandum of understanding if not the settlement document itself.

Most commonly, we use a "fill in the blank" generic form that expresses the boiler plate terms such as each side to bear its own costs, waiver of certain Civil Code Sections, the essential terms of the agreement (parties, amount, case number, etc.) and the fact that a more detailed agreement would be prepared. In the absence of such a further agreement the Court may enter judgment on the matter pursuant to CCP Section 664.6 consistent with the essential terms as set forth on the agreement, signed by the parties. Before going into a mediation, counsel may want to refresh their memories about what is required in a writing to be enforced under the terms of CCP Section 664.6.

While there was some feeling by certain members of the panel who were willing to let the parties go home from the mediation without a signed agreement to "think about it," I generally do not want the parties and counsel to leave the mediation after an agreement has been reached without signing the document! Parties go home, talk with family and friends outside of the good counsel of their attorneys, and change their minds. Not good. Attorneys should not be shy about asking the mediator to ask that the parties spend just a little more time at the end of the session if necessary to get a signed outline of the settlement in place.

If there is an agreement to a fair and equitable resolution, it should be memorialized and signed by the parties, bringing closure to the matter. That closure itself has value to all of the settling parties. Of course, the exception is where there is a mediator's proposal under consideration.

Conclusion

The "pet peeves" raised by counsel were appropriate and thought provoking. One clear lesson was the need for honest and open communication, under the clear privilege of the mediation, between counsel and the mediator, thereby creating a positive environment for meaningful discussion, negotiation and, ultimately, resolution.

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