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PERSPECTIVE

Office hours with the mediator

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In HBO's "The White Lotus," viewers can see that a dead body is washed ashore outside the swanky Koh Samui Resort in Thailand; and undoubtedly, one of the guests is to blame. Then we spend eight weeks trying to guess who is the murderer and who is the victim.

In Mediation, more than 90% of cases will end, eventually, in a negotiated agreement. The question, then, is when and how that agreement gets made.

Litigators and trained mediators know that one of the principles of mediation is that both participation and ultimately the terms of agreement must be voluntary. The voluntary nature extends beyond mere attendance and includes a legitimate engagement in the process. In other words, whether or not the parties genuinely want to settle the case is always optional.

It is, perhaps, for this reason that on occasion the parties are not there for the purpose of settling their dispute, but instead for a variety of different (and often legitimate) reasons. For some, it may be to appease the clients, who may hold little hope or limited resources to march cavalierly towards an uncertain trial process. The mediation may serve merely as an opportunity to find out what the parties hold as goals in the ultimate settlement or trial. For others still, it may be simply an effort to justify going forward with the delays and expenses of litigation if too little is offered or too much demanded. In some cases, the parties are hopeful that they can learn of the other side's evidence and contentions, so that they can better assess their chances at trial.

As an example, where a Corporate client is pushing to figure out whether the Plaintiff holds any evidence that they have not seen (including witnesses, declarations, written records), which may require them to reconsider their otherwise airtight defense, mediation may offer that opportunity. Once it becomes apparent that the Plaintiff does not have any new or meaningful evidence, the Corporation may shut down the negotiations and instead plan to make a statutory offer before formal discovery commences.

Alternatively, in another scenario, the Plaintiff may find out that the Corporate Defendant has a large insurance policy and a low self-insured retention, or that it has been sued by numerous other similarly situated people for the same or similar alleged misconduct. In that case, the Plaintiff may plan to raise their pre-mediation demand to meet the policy limits, thereby again, potentially shutting down negotiation through mediation.

Enter the Mediator's Proposal, which JAMS Mediator Martin Quinn, Esq. once referred to as: "God's Gift to Mediation: or a Betrayal?" At its core, the concept of the Mediator's Proposal flies in the face of the concept of party autonomy as first envisioned and articulated by the early scholars in the field, Frank Sanders and Leonard Riskin, among others.

As a general rule, the Mediator will make a proposal only when a few things have occurred: first, the parties have reached (or are about to reach) an inevitable impasse; and second, both parties have expressed consent to allow the Mediator to make a proposal.

In those cases, most mediators will make a proposal that may bear little resemblance to their own evaluation of the case: either in liability or in damages. Instead, she will rely upon the subtle hints she has gleaned throughout the day from the parties and their lawyers as to their tolerance or reluctant willingness to move to a particular set of numbers that may be adequate to satisfy them if both parties agree to the proposal. In other words, where the parties have clearly indicated they will never agree to the number offered by their adversary, the mediator may be the only path towards getting to an agreement. It generally follows a series of hypothetical proposals, in the nature of the "What if's?" followed by the "If they went to X would you go to Y?" Eventually, the mediator will have a pretty solid degree of confidence in the proposal and will set it forth to the parties simultaneously, but it will seldom be a shock or surprise to savvy counsel.

Before the Pandemic, many of the busiest mediators, especially those working at agencies such as ADR Services and JAMS, could confidentially discuss these proposals – both timing and process in the hallways. Now, although it appears that well over 50% of cases are resolved based upon a Mediator's Proposal, it can be tricky to discern the right time and the right terms.

And yet so many lawyers who regularly use mediation have come to expect that the Mediator will ultimately provide a Proposal that will effectively settle the dispute by the end of the day, that mediators and their clients should be prepared for the inevitability of a Proposal if they are unable to reach an agreement on their own.

Of course, this bears the potential consequence that on occasion the lawyers will attempt to spin the mediator to a favorable proposal for their client from the outset of the hearing. Unfortunately, that has also allowed for some perversion of the mediation process, as lawyers will sometimes play their case to the mediator, instead of letting him in on his true objectives.

For others, knowing that it is likely the mediator will do a proposal at the end of the day is an excuse not to engage in the tough stuff of negotiation, hoping or expecting that the mediator will accomplish that for them without the earnest efforts and strategic preparation that might have achieved that outcome in the absence of a proposal. While this is a potential minefield for the unsuspecting mediator, the mediator nonetheless can gain valuable insight into the true range of acceptable outcomes during this process. And timing, of course, is key.

The old sales adage coined from the 1992 film, "Glengarry Glen Ross" is apt here: the mediator must mind her "ABC's" (Always be Closing). If the party-lead negotiation fails to produce a complete settlement, she will need to mine for clues about each party's true objectives throughout the day.

Initially, as in any mediation or negotiation, the mediator needs to build her trust capital account by assuring the parties and their counsel that she is there to facilitate their negotiation, not her own. Listening carefully for the moment when the parties' negotiation is about to break down, the mediator can then raise the specter of the possibility of breaking a threatened impasse by making a reasonable proposal that she believes both sides may find acceptable.

Without buy-in from all stakeholders, the mediator's proposal will fail. However, if the Mediator and the litigants are all aware of this possibility as a way to eliminate those dreadful back and forth moves (we call them tit for tat) and instead to move to a range that both parties can negotiate within, the parties can look at this concept as a win.

Once both sides agree that they are open to a mediator's proposal, the hard work begins. Most experienced mediators will not simply adjourn and set forth a specific number, but instead will engage the parties in a kind of "what if" or hypothetical dialogue. For example, in an employment case in which the Plaintiff claims her "bottom line" is $1 million, the mediator might begin asking whether she would consider anything "in the high six figures. In the other room, assuming the Defendant has $100,000 in authority, the conversation might be along the lines of: "If I could get Plaintiff into the mid-six figures, could you get more authority?"

This may take several hours or even days, but the wise Mediator will wait until she has some assurance that at least one side, and hopefully both, will seriously consider a proposal in that range.

Curiously, when the "net to client" number becomes apparent, your friend, Chat GPT can be enormously helpful in calculating the numbers. And it has the advantage of the human mediator adjusting the input. For example, she may say: "Plaintiff wants to net $100,000, and her lawyer is taking 45%. But Plaintiff is not very believable and I fear she has not more than a 60% chance of success." Chat GPT will spit out a number as a suggestion, which the Mediator can use just as she might from a trusted colleague in the hallway back in the day when Mediations were all face-to-face.

A mediator's proposal does not have a set format and Mediators seem to do them differently. It is always a good idea to include all of the terms that the Mediator knows are important to the parties. These may include the time for payment, issues like confidentiality and even liquidated damages for breach, etc. However, there are a few terms that should prudently be avoided in a proposal unless they have been agreed upon in advance by the parties: such as payments over a long period of time and tax treatment. Those issues will ordinarily need to be fully negotiated by the clients (through their lawyers) before a final agreement can be achieved.

There is a great mystery as to what to do during the pendency of a Mediator's Proposal, or when the parties contact the Mediator to object to some, but not all of the terms. In those cases, many Mediators will simply refuse to engage with the lawyers, while others may request that their agreement should be stated with those conditions that they find objectionable set forth as "conditions." One hard choice comes when one party needs more time and the other has already responded. Best practice says a little deceit here is acceptable. A simple email to both parties advising that one of the parties has asked for additional time to respond and requesting consent to agree to that is probably all that is needed to preserve the confidentiality of the one party's timely response.

And what about the dreaded failed proposal? Many mediators will simply advise the parties that they have not reached an agreement and wish them luck in going forward. Others will inquire how far off the proposal landed. Others still will encourage and oversee further negotiation until the case is ultimately settled.

Since mediator's proposals have become ubiquitous as a useful step in the litigation process, there is another option that has become increasingly effective. I call it "Mediator Focused Negotiation." It is used when both sides find they are unable to negotiate with their opposing party and the only way they can move forward is through a Mediator's proposal, after the Mediation itself has resulted in an impasse.

An example of how this works is in a case where the Defendant is a large institution, with multiple decision-makers who have escalating levels of authority. The Plaintiff may have spent many months or even years wending through the administrative processes, such that all efforts at settlement have failed in the past and all parties are deeply entrenched in their positions. The mediation itself may get to an impasse fairly early, although it may take many hours to fully confirm all of the evidence and positions taken in such a long-standing dispute. After an initial set of insults and outrage, followed by predictable wrangling and posturing, even the best trial lawyers may conclude that this is a case that simply cries out for a jury trial, and potentially a test on appeal by the party who gets the adverse verdict.

After a long and contentious day, all parties may be well suited to simply adjourn. But days or weeks later, if the Mediator has the keen sense of timing and commitment to achieving settlement, she may contact each side to inquire whether they or their clients are interested in engaging in some "Mediator Focused Negotiation" – which would all be confidential, and all directed toward the mediator, not the opposing party.

In my hypothetical raised previously, this conversation may go something like this. "Madame Defense Lawyer: I know you have a trial date next summer. Do you think your client's authority will change as you get closer to trial? By how much?" To the Plaintiff's Lawyer: "I sensed your client was so disappointed that we didn't get to a settlement last month. I'd like to engage Defense Counsel in a conversation to see how much more authority they can get. Once I've satisfied myself that we've gotten to their absolute maximum, would you and your client entertain a Mediator's proposal even if it's significantly below your stated bottom line?"

It is gratifying to find out that most legal advocates are, indeed, satisfying their oath of zealous advocacy in an effort to get the best result possible for their clients. Many times, with creativity, patience and an open mind, that can be achieved through a Mediator's Proposal even after the Mediation Process itself has been exhausted.

While this process may appear to take away from the old principles of mediation, holding that party autonomy is always paramount, it is an effective and creative way to reach settlement. Yes, it should be a tool used as a last resort, but it is a resort worth visiting, especially if, like "The White Lotus," all parties know how the matter ultimately ends at the beginning of the process, just without the critical details.

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