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FROM DUELS
TO HANDSHAKES

Mediator. Arbitrator. Trial Lawyer.
When trial is not the answer,
our authors tell you how to
best resolve the dispute

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Use mindfulness to do better at mediation

Set aside thinking about the case and focus on what is before you

Being effective at mediation involves more than asserting your position. The value of a case is ultimately a decision made by the person paying. You can get better results using mindfulness to affect that decision by noticing and then addressing the factors that drive value for the person paying.

Mindfulness

What it is. The essence of mindfulness is observing, with single pointed focus, what is immediately before you in the present moment, while actively setting aside all other thoughts, including preconceptions and judgment. The goal is to broaden your awareness of the details of what is before you and how those details connect.

It does not mean you forego judgment or other evaluative thoughts about the subject; you simply set that thinking aside for the moment. It is like studying a painting to see how it was made, regardless of whether or not you like the painting: seeing the overall image, then drilling down on the details such as the gradation of colors, the thickness of the paint, the type of brush strokes used, the use of shadow and perspective.

Lawyers are typically very good at paying attention. However, their tendency is to pay attention, with preconceptions and an agenda in mind. Litigators tend to pay attention by looking for specific information to support their view of a case and their case goals, e.g., “Hurt my case?” “Help my case?” “Can I use this later?”

Litigators are predisposed to quickly react to any ideas that are contrary to their goals and how they see the case, and they do so while paying attention to what others are communicating. This is multitasking, in that you are simultaneously observing, evaluating and formulating how you will respond to what is being communicated.

This multi-pointed attention necessarily means you are not giving your full attention to simply observing just what is before you. The unintended consequence is that you are subject to missing information that is available and valuable. Paying mindful attention precisely involves letting go of those multitasking tendencies. Paying mindful attention takes practice and discipline.

Why mindfulness works. The more you simply observe just what is immediately before you, the more opportunities you will have to gain information and insight you might have missed being distracted by other thoughts. It allows you to act rather than react. It deters you from saying or doing things that you later regret or that are otherwise not beneficial to you and your client.

Practicing mindfulness does not necessarily include being a vegetarian or a pacifist. Major companies, sports franchises and military organizations incorporate mindfulness into their training programs, e.g., Google, Seattle Sea Hawks and the United States Marine Corps.

How to be mindful.

Let go. Simply breathe, be present and pay attention, with the intention of being open to all that you perceive. Use awareness of your breath to stay calm and stay present. This means consciously taking full, normal breaths and avoiding shallow breathing which often accompanies stressful situations. We’ve all been told when things get tough, “take a deep breath.” Your thoughts will, by habit, veer to judging and otherwise evaluating what you are experiencing. Let go of these thoughts as they arise. Here is a step-by-step process:

- Take a few conscious breaths (two to five).
- Continue to consciously breathe and as you do, notice your body sensations, feelings and thoughts. Just notice and acknowledge them, don’t get caught up in them.

- Continue to consciously breathe and as you do, relax your body, particularly your shoulders, face and hands and move towards letting go of feelings or thoughts about what is before you. Smile a bit.
- Bring your full attention back to what is before you.

You can refresh this process by bringing your attention back to your breath and just letting go. (You can say to yourself as you exhale: “Just let go.”) You will naturally cycle back and forth between observing and having thoughts and feelings about and physical reactions to what you are observing. Don’t fight it; just persist in returning to simply breathing and observing. It’s a practice. The more you practice, the better you will get at it.

You will have plenty of time to digest and evaluate what you have experienced later. You will do better at digesting and evaluating when you pay full attention to those things separately from observing.

Be curious. Ask yourself: I wonder what that is? I wonder why that is? I wonder how that is? I wonder why they think that’s important?

Be kind. Lawyers often develop some degree of personal animosity towards their opposing counsel and parties. This is often a reaction to improper conduct. As emotionally justified as it may be, animosity is counterproductive to the mediation process. It clouds your ability to see the reality of what is going on and limits your ability to devise and evaluate alternatives for moving forward.

You can let go of animosity by practicing kindness. Kindness naturally arises by seeing the underlying humanity of the people on the other side. Consider that they are just doing their job; that they have their biases and preconceptions; that they have other things going on in their lives that affect how they feel and act in the present.

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This diminishes the mental clutter caused by feelings of hostility. This helps you to be non-judgmental about what you are experiencing in the moment, which allows you to see more of what is going on.

Mindfully prepare for mediation

Being Curious. Imagine how the person paying views the case and prepare to address that at the mediation session. Start with a neutral review of how opposing counsel has thus far described and positioned the case at hearings, in correspondence, pleadings and discovery. Map it out, at least in an outline.

Consider having an informal chat with opposing counsel, after the mediation has been scheduled and prior to the hearing, in which you: preface the conversation by pointing out that the conversation is covered by mediation confidentiality, which begins at the scheduling of the mediation; say that you plan to address their view of the case at the mediation hearing; summarize what you understand to be their view of the case; ask them if you've got it right or whether you are leaving anything out. Whether or not you gain any new information, this will have the salient effect of communicating to the other side that you are paying attention, that you "get it."

We often see claims professionals and defense counsel shaking their heads in mediation sessions at the evident lack of consideration by plaintiff's counsel of core defense positions, on the pretext that "It doesn't matter," "We will get around that," "A jury won't care." While that might end up being true at trial, it is counterproductive to getting the most value at mediation. Claims professionals need solid reasons for increasing their offers and for getting more settlement authority.

Kindness, empathy and patience. Prepare your client (and yourself) in advance of the mediation hearing: to avoid demonizing the other side or at least let go of focusing on that for the mediation; to be able to listen to and address the defense viewpoints without blowing up; to be patient with the mediation process; to be emotionally prepared

to accept a valuation that is substantially less than your best result at trial; to be emotionally prepared to not settle at mediation.

Prepare to let go of trying to bully or otherwise push the other side into a settlement. Focus instead on being persuasive. The more substantive reasons for your positions that you can articulate, the more persuasive you will be.

Pre-Mediation settlement demand. Make a credible demand, with backup, well in advance of the mediation, so that the person paying has adequate settlement authority and time to plan accordingly.

We see this all too often: an insurance claims professional who shows up with limited settlement authority because a pre-mediation settlement demand has not been made – or the demand made is clearly posturing, e.g., \$1M demand with medical specials of \$5,000. While the claims professional typically has a supervisor available to get more authority, that person is not engaged in the mediation process and is not just waiting by the phone. He or she is doing other things and gets interrupted by a call from the claims professional for more authority. This forces the supervisor to make a quick decision on the spot, likely with a dose of animosity for having been made to do so, and respond with a correspondingly lower amount than would have been offered had you made a timely and reasonable pre-mediation demand.

Prepare to negotiate, not litigate. Mediation of a litigated case is inherently a deal-making process. However much lawyers and mediators engage in evaluation of the legal merits, it ultimately comes down to making a deal in which Plaintiff is selling the lawsuit and Defendant is buying it. If the mediation is voluntary, that usually means the core issue is how much the defense is going to pay. Prepare to negotiate that number. Prepare to articulate how you value the case.

Draft a settlement agreement. Prepare a draft settlement agreement that covers the concerns of both sides. This has two immediate benefits. It focuses you on what the other side is going to

need to settle the case. It avoids the inherently risky options of having to draft a long form at the end of a long day or relying on a short form and hoping that the settlement doesn't blow up in post-hearing efforts to agree on a long form.

Consider addressing this prior to the mediation with defense counsel. Defense counsel will likely think it's a good idea and offer to do the drafting. Let them. Their client (the person paying) will be more comfortable with working from a draft prepared by defense counsel. This is also an opportunity to engender cooperation that is beneficial to making a deal at this mediation session.

Mindfully conduct the mediation

Be curious. Ask yourself: Why do they say or think that? Listen and look deeper to answer that question. The prevalent process model is for mediation sessions to be conducted with each side in a separate room with the exchange of information conducted by the mediator. Lawyers typically react on a point-by-point basis to what the mediator conveys. Let go of that. Pay mindful attention. Ask "why" a lot and otherwise actively seek additional information. See the bigger picture. Look for ways to use the mediator to gather information you can use to your advantage.

Consider having a strategic joint session with lawyers only and the mediator. While it is generally best to have your client involved in all discussions, having a face-to-face with defense counsel can be productive, for example, when there are fine points of the law or evidence in issue; more ground can be efficiently covered using lawyer-speak and removing the need to posture in front of the clients. It also has the salient benefit of building rapport. The mediator can help you determine if a lawyers-only joint session is useful and set it up in a way that does not reveal any weakness on your part.

Use the mediator to get specifics on what defense counsel and the person paying are concerned about regarding case value. Ask the mediator to help

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prioritize those things, so you can be more efficient with the amount of time spent addressing them.

Address what matters to the defense. Address with specificity what matters to the defense with analysis and backup.

Don't avoid the warts, i.e., the things that hurt your case. Address them head on to the extent you can. It ultimately does not matter if your position on each of those issues is not particularly strong, so long as it is credible. If you can credibly present it to a jury, it has settlement value. Failure to address it diminishes settlement value.

At the very least, arm the mediator to be able to say to the defense: "Plaintiff's counsel gets it."

Be empathetic and kind. Let go of pushing at every moment to get what you want. Take a couple of breaths and imagine being them; imagine being in their place. This allows you to "see what they see," so you can use that perspective to achieve your ends. This also prevents you and your client from being surprised by what they say and do.

Be patient. This allows you to more constructively engage in the process leading to resolution. It does not mean that you should not speak up when you think time is being wasted or the session is otherwise getting bogged down. Practice patience by seeing the bigger process picture and noticing where you are in the arc of the mediation.

Fully engage in each part of the substantive mediation session. The first part is viewpoint and information exchange. The second part is the numbers. The third part is concluding the mediation, ideally with a signed settlement agreement.

We often see plaintiff's counsel impatient with the first part, wanting to get to the numbers as quickly as possible. For all the reasons discussed above, that is simply counterproductive. The defense has to have reasons, as specific as possible, upon which to base their case valuation and what they are willing to pay to settle. Use the mediator to drill down on what will motivate them to acceptably settle.

Be persistent with mindful attention. As your attention wanders to other

thoughts, use the step-by-step letting go practice (described above) to keep bringing your attention back to single pointed focus on what is before you. Practice monotasking. When you are gathering information, just gather information. When you are assessing information, just assess the information. When you are preparing a response to a viewpoint, just prepare a response to that viewpoint.

Act rather than react. Once you are clear on a particular point that you observed and have calmly thought through your response, then communicate your response to the mediator. Calm confidence is far more impressive to a mediator than blustering outrage. Mediators typically "take the temperature" of a room and report it as appropriate to the other side. It is far more compelling for the other side to hear: "They understand, they disagree and they have well stated reasons" as compared to: "They are really pissed off and just want more money."

Avoid magical thinking. Avoid the temptation of relying on what you are sure will be the thing, such as emotional issue, fact or appearance, which will drive value for a jury. Silver bullets misfire. Don't overvalue the prior times you got lucky at trial. Stay focused on what drives value for the other side.

Mindfully conclude the mediation

Patience and persistence. Don't rush the result. Stay focused during the final rounds of numbers on moving towards what the other side is likely to pay. Be open to the mediator's efforts to narrow the gap with well-timed bracketing and mediator's proposals.

Be gracious. Accommodate what you can as to the other side's needs. Give to get. Don't push for settlement terms that are unfavorable to the other side and that you don't actually need.

Don't be attached to the outcome. If the other side is not coming close to your number after most of the day is up, look for ways to set the stage for further settlement discussions. Avoid making a drastic move downward unless the mediator can tell you with confidence it will bring the

defense substantially up. Once you take money off the table, you can't get it back on. The worst that happens is that you'll have to try the case, but you knew that. Accept it deeply. It will empower you and increase the likelihood of settling at a later time.

Conclusion

Mindfulness is a skill that develops with practice over time. It does not require you to diminish your passion or drive to obtain the best possible result for your client. To the contrary, it makes your passion and drive more effective. Mindfulness is deepened by learning and practicing meditation. It is best to learn and practice meditation, at least initially, in person with a teacher. And then practice on your own for a few minutes each day.

Regular practice of mindful attention establishes the ability to pay mindful attention as a skill. Try practicing mindful attention in your daily life, even for a few minutes at a time. When you are brushing your teeth, just brush your teeth, bringing your full attention to that. Same with driving, walking the dog, eating a meal, and so on. You will find that this sort of simple mono-tasking is calming, grounding and refreshing, and that it provides a wellspring of strength to carry on.

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