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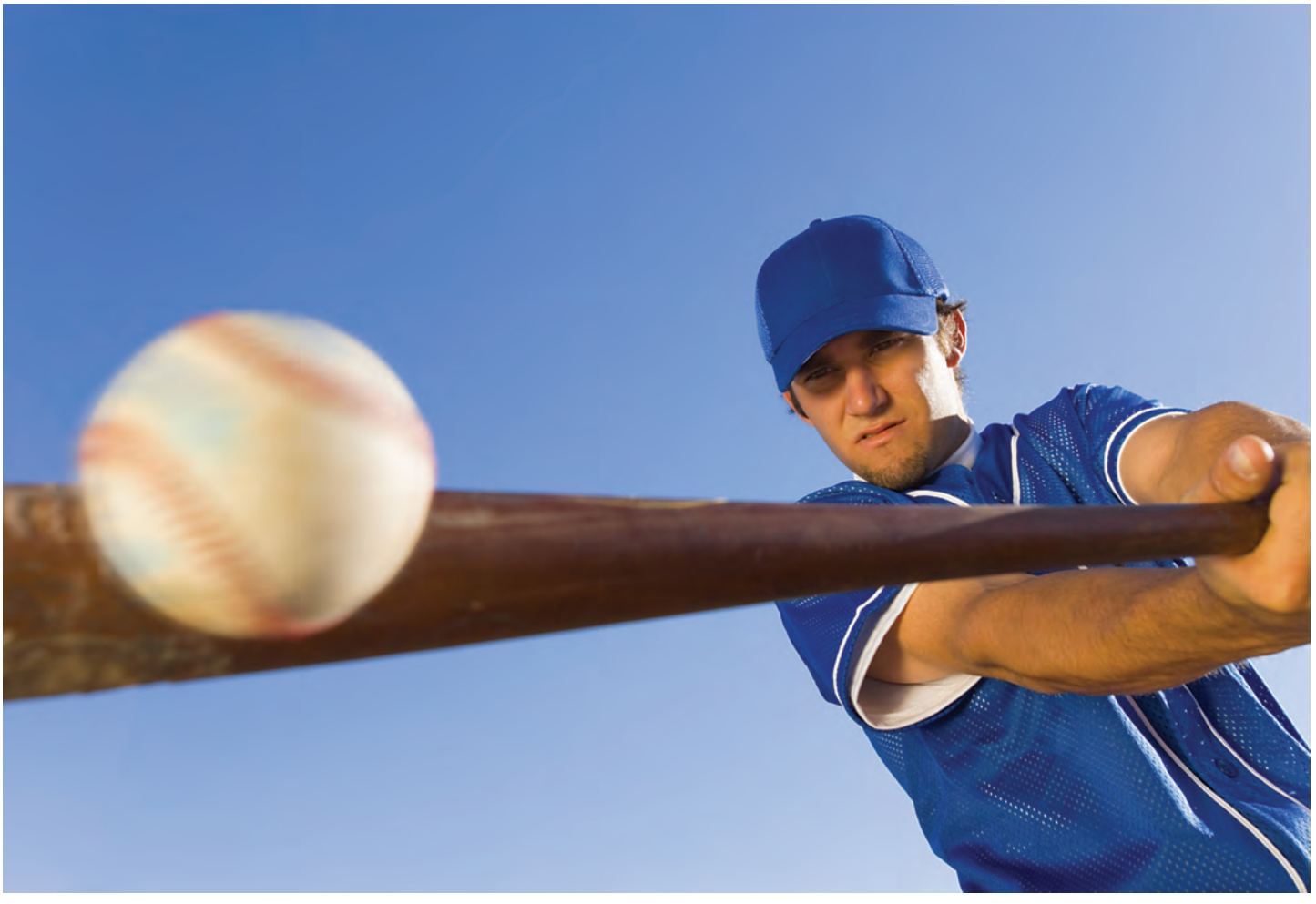

Getting the most out of your "at BATTs"

Mediation is your "Best Alternative to Trial" whether your need is confidentiality, a quick resolution or meeting a client's desire to be heard

"People will come, Ray. They will arrive at your door, as innocent as children, longing for the past. They will pass over their money without even thinking about it: for it is money they have and peace they lack. And they will watch the game and it will be as if they dipped themselves in magic waters. People will most definitely come."
(*Field of Dreams*, Universal Studios, 1989.)

Like an Iowa farmer who hopes to build a baseball field on a corn farm, we are increasingly leading our clients to mediation, a settlement of their claims, even though they have retained us to "seek justice" and "penalize the wrong-doer" by taking their precious cases to trial.

In the early days of mediation, lawyers were concerned about appearing to be weak if they suggested mediation to their opposing counsel or their own clients. Times have changed; it is now the rule rather than the exception that most every case makes an attempt at mediation or informal settlement before the bright lights are activated and the score board begins counting balls, strikes and runs in the theatre of the court-house.

Attribution bias & reactive devaluation

Using a neutral third party to assist in these delicate negotiations can be invaluable for many reasons. First, when you set the value as your initial demand,

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there is an automatic psychological phenomenon known as "attribution bias" which will sometimes cause your opponent to assume, because it came from you, that the reasoning and values are misplaced. By engaging an intelligent, trustworthy neutral to articulate how you arrived at the particular opening demand, you are less likely to trigger attribution bias and more likely to get into the negotiating game in earnest.

Consider the construction accident where there are several defendants, with insurance carriers who are at odds with one another about the value of the underlying case as well as their relative contribution, the reservations of rights and the burden of who is taking the laboring oar in the costs of defense. In that case, a hypothetical initial demand of $1 million by the plaintiff, which extends beyond every available defendant's coverage, may be a non-starter. But with a diplomatic neutral, who recognizes and can manage the various participants' expectations, the case can resolve with a satisfied plaintiff and several defense attorneys who can save face with their respective carriers by putting together a reasonably managed package to present to each carrier on a hypothetical basis.

In addition, using a neutral to convey the initial, often "outrageous" demand can safeguard the initial demand from what is known as "reactive devaluation." Similar to attribution bias, this negotiation tactic is an almost automatic response designed to send a message of "outrage meets outrage." Just as in baseball, the way the first pitch is delivered may speak volumes as to how the game will proceed. Using a skilled and diplomatic professional may save you and your clients many innings of anxiety on the day of mediation.

Using a neutral

Practically speaking, it is worth spending that extra hour discussing how you arrived at your pre-mediation demand and enlisting the assistance of a savvy neutral to articulate the basis for the demand, however inflated it may be. When a neutral third party presents it, it is much less likely to be met with disdain and ridicule than if you presented it yourself, simply by virtue of the team to which each "side" has been assigned in the game of negotiation.

The other advantage in using a neutral to help evaluate the best strategy for negotiation is that your client hears from a respected third party about the potential pitfalls of his case and is better prepared to manage his own expectations if the "reality testing" comes at the beginning of the hearing, instead of disappointing results at the end.

There was an interesting study conducted by social psychologists in the Midwest who approached busy business people during their lunch hour and asked if they would help a foster-care agency by accompanying a youth in the foster-care system to a designated outing on one weekend per month. Not surprisingly, few agreed.

On the same day, another group of psychologists stopped men and women on another street corner nearby and asked if they would be willing to adopt a child. None agreed. Then they asked if they would be willing to chaperone a foster child one time per month, on the same terms and conditions as their counterparts had asked. Approximately twice as many agreed, because the psychologists had deliberately managed their

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expectations by intentionally inflating their initial request so that a more modest proposal, even moments later, would be met with more open-mindedness and even assent. Negotiation is contextual and whether a party is "getting a good deal" depends upon what it is compared to. When presented with two options: a full time, forever, commitment to adopt a child, and chaperoning on an occasional afternoon, it was clear that more were willing to accept the latter as a reasonable option.

Before the first offer is made, it is an invaluable management tool to have a neutral third party talk through the expected result of a particular starting offer. This dialogue should occur with you and your client as well as with opposing counsel and her client. The neutral can, if you invite them to do so, put the negotiation into context so that both parties are continually managing their expectations throughout the long negotiation process.

Customize the mediation process for maximum benefit

Ray Kinsella: "Don't we need a catcher?" Shoeless Joe Jackson: "Not if you get it near the plate, we don't."

Clients are generally less certain than their lawyers about the rules of mediation and trial. Trial lawyers know that trial is not science and there are no exact ways to predict the outcome. It is important to draw the distinction between the formality and rule-bound courtroom trial and the flexible, customizable process found in mediation. By customizing the mediation, you can gain control of the rules and set the negotiation up for success.

For example, in a recent case of wrongful termination based upon violation of public policy after the plaintiff reported a widespread failure to pay accurate earned commissions, the employer ended up going out of business and being acquired by a new company. There were multiple insurance policies available, but none that covered the disputed claim without a reservation of rights. Plaintiff's counsel (and her client) had grown weary of dealing with four different lawyers, each of whom were expressing that their own client had unique reasons why they were not at risk in this lawsuit.

By successfully getting one defense counsel's agreement to recommend mediation to all (some of whom appeared at the mediation hearing even though they had not appeared in the lawsuit yet), plaintiff's counsel was setting the case up for maximum success. You can demand, as a condition to mediation, that certain individuals and company representatives are physically present at the negotiating table. Carefully consider whom you will likely need, and whether they will need to be present or available by phone, Skype or e-mail. You have the control even where you would not have the right to compel these people to trial, because the mediation is a voluntary, consensual and non-rule-bound process.

The next step in the planning is to determine the "agenda" for the mediation. Should the mediator begin with attempting to determine an appropriate allocation as between the disputing defendants, or begin by pegging the value of the plaintiff's claim and then sorting out the rest? Should the defendants negotiate separately or together? Does the plaintiff's counsel want to risk being outnumbered by a united front or negotiate through a designated spokesperson for the entire defense "team"? All of these are options, which you may select to maximize the likely outcome at a mediation hearing.

The obvious benefit to using a professional to assist in negotiating a case with multiple defendants and numerous issues beyond the damages is that she can work with you to design a process that will be effective, efficient and flexible enough that "if you get the ball near the plate, you don't need a catcher."

Control the flow of information and emotions as needed

In a security case, in which a retail store is sued for false imprisonment, false arrest, and negligence after a very aggressive security guard wrongfully detains a suspected shoplifter and forcefully knocks him to the ground, only to find he has not stolen any merchandise, both parties may have a real interest in maintaining the confidentiality of the action. Videotapes, incident reports, criminal records and other personal information may be better left "off the field."

The typical confidentiality, which is a hallmark of mediation, allows the

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parties to control the flow and dissemination of information. By working with a responsible mediator, you will be able to successfully hold back the damaging information unless it is truly helpful to get your case resolved. You may even want to time the mediation hearing to occur before embarrassing or damaging depositions have been taken or complete discovery of documents has occurred. And even after the damaging documentation has been exchanged, you can certainly craft your own informal protective order, allowing only the eyes present at the mediation hearing, or the mediator, to view the damaging or embarrassing evidence.

In some instances, a savvy litigator will show the mediator informally videotaped interviews of witnesses or forensic evidence captured on their computers, but not yet provided to the other side. These confidential bits of evidence can be extremely compelling, yet effectively withheld from the other side's view, in case the matter does not settle and litigation continues.

One of the other benefits of mediation is that you can effectively "seal" all records and evidence and protect disclosure of anything that is revealed as a condition to the ultimate settlement if that is what you and your clients desire.

On the other hand, the confidentiality of the mediation process may, at times, be exactly what your client does *not* want. Often times, clients believe that the public nature of a trial will be cathartic for them and allow them to fully express their hurt and damage and gain some vindication beyond a general or even special verdict.

If that is the case, upon your very diplomatic request, a sensitive mediator will invite your client to fully express themselves, either to her or the other side or both. After all, many plaintiffs are genuinely victimized by the wrongdoing of the defendants they have sued. When they conclude their case, they may suffer what psychologists refer to as "loss reaction": that deep wound that they have been harboring for the past two to five years is suddenly gone, replaced by money, but nothing more. They may genuinely mourn the loss of the struggle that got them to that point. Honor that by permitting them to express their emotions in the mediation process. In that

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way, you will maximize their personal satisfaction beyond the monetary gain.

Let the magic happen

Litigation is hard work, as is negotiating to end a litigated dispute. It takes courage and humility to give up your vision for how your best day at trial may go for the sake of your client's best interest when a respectable offer comes through. Don't discount your own role in stepping aside from controlling the discovery, flow of information, timing and litigation strategy when, at the eleventh hour, an offer comes through which your client wants to accept.

As Terrence Mann, the acclaimed author and '60s activist said to Ray Kinsella in "Field of Dreams": "Then they killed Martin, Bobby and they elected Tricky Dick twice, and people like you must think I'm miserable because I'm not involved anymore. Well, I have got news for you. I spent all my misery years ago.

I have no more pain for anything. I gave at the office."

> *"There is enough magic out there in the moonlight to make dreams come true" (Dr. Archibald 'Moonlight' Graham to Ray Kinsella in "Field of Dreams").*

For trial attorneys, there is a little "loss reaction" too, when we give up a case to a settlement. All of those deadlines, anxieties and strategies get neatly boxed up and put into a filing cabinet. Take heart, they will inevitably be replaced by another file at your office.

By approaching mediation cleverly, preparing diligently and stepping away from control to allow the process itself to achieve the best result for you and your clients, you can achieve the best outcome possible.

Jan Frankel Schau, Esq. of ADR Services*, settles litigated cases arising out of employment, tort and business disputes. A dedicated neutral since 2003, Jan was recognized as a Top 50 Neutral by the* L.A. Daily Journal *in 2013 and a Super Lawyer for the past six years.*

A Distinguished Fellow of the International Academy of Mediators, she is also a popular trainer, author and lecturer on issues related to Alternative Dispute Resolution and the Author of a book, "View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction". Follow her musings at: www.schaumediation.com/blog.