Why Most Mediations Succeed and Some Don't: A Practical Guide for the Plaintiff's Lawyer

If you've ever spent all day in mediation and, when it's over, felt like you just wasted a whole day and a bunch of money, I have some thoughts that might help you use the mediation process more effectively and maybe settle your case instead of just having a discussion.

Rules for Mediation

The first rule of mediation is there are no rules. Of course that's a slight exaggeration since the process is defined by Evidence Code Sections 1115 through 1121. Of course you can't literally do anything you want. The law places evidentiary constraints and defines the process pretty clearly. But this article is not meant to be a discussion of academic theory. Rather, the purpose of this article is to share some thoughts I have after thirty years of trying cases and five years of mediating them professionally.

To begin with, one should remember that mediation is not science. Even though most cases I see are in litigation and being managed by a court, it's important to understand that mediation is essentially a human process, not a science. There is no single method that works every time. Depending on the type of case and the relationship of the parties, there are often different forces at work that call for different approaches. In other words, a mediator with a "cookie cutter" approach is usually ineffective, and worse, can even come across as patronizing or arrogant. For me as a mediator, the key is to recognize that each case is unique and that the forces at work are not always the same. An employment case carries a different charge than say, an auto accident, a police shooting or a medical malpractice case. The mediator, to be effective, must recognize those forces as early as possible, in time to deal with them.

The Mediation Statements

One way for the mediator to get a handle on a case is by reading the statements. The statements are often the first way the mediator gets to know the case, and more importantly, the parties and their beliefs. But that is just the start. In my opinion the mediator and the parties all need to deal with what I call the "real" case, not the case they wish they had. This requires going beneath the surface of the statements themselves. While the statements usually begin the process, I find that most statements have one thing in common. They invariably use a variety of techniques and legal language to assert one overriding theme: "I'm right and the other side is wrong." This is sometimes followed by a veiled threat to walk out if the other side won't meet their demands.

The statements are very helpful, however, in getting command of the facts the parties think are important. I recognize that usually the parties have been living with the case for months or years and know it far better than I can by simply reading their briefs. But even so, by the time I've finished reading all the briefs, I am frequently troubled by unanswered questions, questions that just won't go away. In my view, in order to deal with the "real" case, one must face these questions. I believe that if a question occurs to me - someone looking at the case for the first time - the same question will likely occur to a judge or jury. The reason these kinds of question don't go away is that they are not the complicated or sophisticated nuances in the case, but instead are usually the simple, basic and inescapable questions arising from some fact or facts in your case. Even though they are fundamental, they are often treated lightly, with such expressions as "we'll deal with that with expert testimony." The truth is that because they are so fundamental, they will be difficult or impossible to ignore no matter how much additional discovery is done or how many experts are hired. If you're honest, you'll know what those issues are in your case. They're the facts you wish weren't there.

Get off to a Good Start

The first fifteen minutes of the first session (almost always a joint session) is often revealing. The parties have stated their positions in their statements. I may have talked to the parties on the phone beforehand. Nevertheless, I always take that time to explain the process to the parties, attorneys and representatives present. I feel it's important that everyone in the room hears the same thing. I find that sometimes the one

time litigant (usually the plaintiff) may not understand what's happening despite the attorney's best efforts to explain things beforehand. During this fifteen minutes I like to watch everyone's eyes and body language to be sure we are all engaged. Sometimes the parties arrive with skepticism and even hostility, perhaps born out of some discovery dispute or lack of cooperation. These resentments and issues cannot be overlooked or just skipped over. In my experience, before any real dialog can occur, these feelings must be dealt with on some level. It's hard not to sound platitudinous, but I feel it's important to get each side to commit to trying to resolve the case if possible and not to waste valuable mediation time posturing or threatening the other side. I tell people that if you want to do that, go ahead but please wait till tomorrow. After all, if you don't resolve your case today, you can always go right back to court and pick up where you left off. But for today, I encourage everyone to treat this as a "time out" from the litigation. Usually that gets everyone engaged.

After the first fifteen minutes, every mediation assumes a life of its own. Depending on the parties' level of commitment, the settlement authority of the defense, and good faith of all, the process can vary greatly. There are so many variations in technique among mediators that it's impossible to discuss them all here. But one technique I feel strongly about is the "opening statement." For me, in order for the mediation to really be a "time out" from the litigation process, the entire experience should have as little resemblance to a trial as possible. To that end I discourage "opening statements." As we all know, that's what happens in court. I feel it's more important that the parties know that their positions have been heard and understood rather than restate their position again out loud. For that reason I offer to summarize for the parties what I believe they have said in their papers and assuring each side that I will be effective in communicating their position to the other side with the right amount of emphasis and intensity.

After thirty years of trying cases and participating in mediations and now, with the benefit of five years of mediating them professionally, I would make the following observations and offer some practical advice to the plaintiff.

1. Get in touch with your real case, not the case you wish you had. It's not necessary that you emphasize the negatives in your case, only recognize that they're there. There are no perfect cases.
2. Don't make threats. Not only do they not work, they produce a defensive and hostile reaction. It's rarely productive to threaten someone and then ask them for money. Imagine how you yourself respond to an ultimatum like "pay me the money or I'm going to kill you in court." If you're going to kill them in court, just go and do it instead

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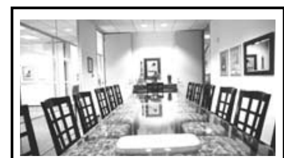

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of using mediation to make threats. In general, the defense knows when they're in trouble and threats don't add anything.

3. Recognize one obvious but fundamental truth of mediation. What your case is worth TODAY is exactly what the other side can be persuaded to pay voluntarily at the end of the day. They will pay what you, hopefully with the help of the mediator, persuade them to pay. But there is no gun to their head. The "true" value of your case exists only in your mind and can only be known by going to trial. Most likely, even assisted by an effective mediator, what you will face at the end of the day is a hard choice. But that's true of the other side as well. Even when pressed to the wall, the defense will pay what they see as in their best interest to pay. Your job is to educate them as to what that figure should be.
4. Mediation is often your best shot at settlement. It's often hard to reconvene all the decision-makers for another meeting once you're back in litigation mode. Recognize that there is a real incentive for the defense to close the book on a case early. After a day of mediation, a certain momentum develops toward settlement which is hard to recapture when everyone goes home. Once that opportunity is lost, it's often lost forever.
5. Prepare to be "insulted" by the opening offer from the defense. Remember, negotiating styles are different and sometimes people play it close to the vest, fearing that if they start too high, they'll send the wrong message about where they want to end up. Be patient. Wait for a few rounds of bidding to see where things go before giving up and walking out. Don't just give up because the first offer is an "insult". Remain flexible regardless of your strategy. Remember no one can make you do what you don't want to do and a good mediator won't try. I have settled many cases where the first offer was extremely low. But I had encouraged everyone to commit to the process at the beginning to see where it ends up. After all, isn't where you end up way more important than where you start?
6. Similarly, the defense can be put off by an unrealistic demand. I frequently hear how "disappointed" the defense is in the plaintiff's opening demand. An unrealistic demand can cause a setback in the negotiations which can be difficult to recover from. What you gain in credibility by giving the other side a realistic figure at the outset can translate into real money in the end.
7. Recognize some of difficulties the defense often has. Such things as the setting of reserves, settlement authority by committee, and the East coast home office can often make it difficult for a defendant to change directions. This can lead to frustration. That's why it's a good idea to furnish everything possible by way of documentation, especially of damages, well in advance of the mediation. Even if it sounds redundant or unnecessary to you, it's often helpful to do it anyway. Remember, the defense operates in a different world than you do, a world of documentation and committees. Don't lose sight of the fact that you are asking for money, money they don't have to pay you (at least not yet). Why not make it as easy as possible for them to do what you want them to do?
8. Lastly, and most importantly. Remember why you're there. You're there to settle your case. Don't lose sight of that fact no matter how heated or contentious the negotiations may become.
9. If none of these techniques work, go try your case with a clear conscience.

After 30 years as a trial lawyer, Eric Ivary is currently a full time mediator and arbitrator with ADR Services, Inc. A past president of the Alameda Contra Costa Trial Lawyers Association and founding partner of Oakland's Gwilliam Ivary Chiosso Cavalli & Brewer, Mr. Ivary is particularly experienced with matters involving medical malpractice, employment, product liability and insurance bad faith.

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