EFFECTIVE NEGOTIATION AND MEDIATION TECHNIQUES AND STRATEGIES

VIEWS FROM BOTH THE ATTORNEY-NEGOTIATOR AND THE MEDIATOR

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Preparation and Setting Realistic Expectations

Negotiator's View

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Forecast What the Other Side Will Do

- Where will they start?
- What arguments/evidence will they use to support their position?
- Project subsequent moves

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Plan Your Response

- Map out your concessions
- Practice your most optimistic position
- Attack head-on the other side's strongest points

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Preparation and Setting Realistic Expectations

- Mediator's View

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Providing Context and Setting Expectations

- Set your intention as the mediator
- Discuss with parties the purpose of mediation
  - What can and cannot be accomplished
- Ensure parties have the information needed to make best decision
  - Requires hearing and understanding the other party's position
  - Discuss strengths/weaknesses and potential impact of specific evidence on the jury
  - Requires understanding of risks and expense of going forward
- Decision making power and risk of handing that over to a jury
- "Truth" versus what a jury decides is true

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Providing Context and Setting Expectations

- What parties need to prove – Verdict Forms
- Possible outcomes
  - Components of damage awards
  - All or nothing, apportionment of fault
- Explain negotiating process at mediation
- Ask about questions/concerns
- Expectations
- Defining successful mediation/knowing when to stop

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Handling Opening Demands and Offers

- The "Stratospheric" Demand
- The "Insulting" Offer
  - Perspective of the Negotiator
  - Perspective of the Mediator

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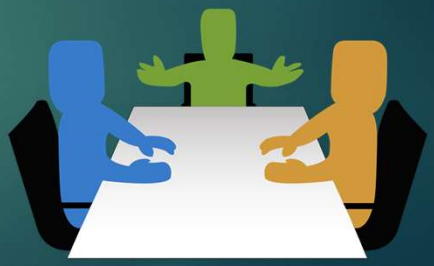
Managing Negotiations – Mediator's View

- Discuss opening demands/offers before made
  - What message does the party want to send
  - What does the demand/offer signal to the other side
  - Mediator messaging
  - Testing the other side



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Managing Negotiations – Negotiator's View

- Tapering and Concession Patterns

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Effective Bracketing

- Goal of bracketing
- Set ground rules
  - Mean the midpoint
  - Don't do best bracket first
- Moving back to numbers – last/best/final Mediator's proposal

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Oh, Just One More Thing…. Add-Ons and Saving the Deal

- State what your client will need in addition to the amount well in advance
- Mediator should determine what additional terms will be needed
  - Confidentiality
  - Good faith determination

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President's Message

April 2017 **Philip M. Andersen**

An Insurance Defense Attorney's Perspective on Effective ADR

I would like to share my perspective on how to make the most of the ADR process. In my 33 years as an insurance defense attorney I have participated in hundreds of mediations. I have also served as a volunteer mediator for the courts in over 100 cases. In my view ADR is the most rewarding and productive part of litigation. It is a time where parties can amicably resolve their disputes rather than relying on the arbitrary decision of a judge or a jury. Here are six ideas on how to make your ADR experience more effective.[1]

1. Be courteous

It has been said: "Speak when you are angry and you will make the best speech you will ever regret."[2] Be kind and respectful. Shake hands and smile. Compliment the other side. Be self-deprecating. If appropriate tell them you are sorry. Whether you settle or not, leave with a kind word.

2. Use the joint session to your advantage

The joint session is a time to listen and to share. Do both. Do not allow the mediator to control the flow of information by breaking you out into caucuses too soon. Invite the other side to open up and tell how the injury has impacted their lives. Something good happens when people feel heard. Once they have had their "day in court" they may feel emotionally ready to let go and settle the matter. Actively listen and do not argue or correct.

3. Watch your body language

There is nothing worse than watching your client non-verbally accept a bad offer. It can be in the form of a smile, a nod of the head or the relaxing of a previously tense body stance. Work together as a team and practice how your body will react to new information.

4. Anticipate concession patterns

Before you start your mediation try to guess the other side's opening demand. Map out your responding number. Take it a step further and try to foresee the next demand and your response to it. Keep pushing the limits of your imagination until you reach the final settlement number. Readjust your figures if the ending point is not to your satisfaction. Remember that "tapering" (each concession systematically less than the one before) sends a strong message to the other side of where you want to end up.

5. Guard your bottom line

"Tapering" can send a strong message of where you want to end up, but you still want to guard your actual bottom line. Mediators are masters at figuring out your bottom line. Don't fall for t trick of guessing what the other side is willing to take or guessing what the next offer will be.

Those are tools used by mediators to read you. Something unintended will escape you (verbally or non-verbally) when you bite at these lures. Your bottom line is something to keep to yourself —always—especially when the mediation is over.

6. Watch out for last-minute grabs

We tend to relax and get sloppy when we are close to a settlement. Keep your guard up. Slow it down. Too much unintended information is disclosed when we are tired or impatient. The skilled negotiator will capitalize on your weakness and seek one more baby splitting move; or one last ditch effort to recoup the cost of the mediation; or one unacceptable settlement term relating to liens or the timing of the payment. Stay in the zone until you leave the building and are safely in your car.

In conclusion, effective use of ADR is a learned skill. The more you do it the better you get at it. When used correctly it can be the most rewarding and fulfilling part of your practice.

Footnotes:

[1]The views expressed are my own and do not necessarily reflect those of my employer State Farm.

[2]This quote has been attributed to American editorialist, journalist, short story writer and satirist—Ambrose Bierce.

Philip M. Andersen

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Eating Crow: A 180 Degree Change in Attitude About Zoom Mediation

When the stay-in-place order was first issued in March 2020, and mediating by Zoom became what I thought was a "necessary evil," I wrote an article ranting about all that would be lost.[1] I argued that it would be difficult to connect with the parties, earn their trust, and convey empathy while also helping manage expectations, and keeping the parties engaged. Having mediated more than 50 cases since that time, I am now searching for crow recipes, happy to report that I was wrong, and have, in fact, discovered surprising benefits of Zoom mediation, a few of which are highlighted below.

The Benefit of the Zoom Screen: I was very concerned initially that eye contact would be very difficult, and I would not be able to gauge body language and facial expressions as well over Zoom. I now believe that the opposite is true. While eye contact is an issue (looking into the camera vs. the face of the person on the screen) being able to see everyone in the room at the same time is a tremendous benefit. When in person, we tend to focus primarily on the person speaking. However on Zoom, everyone can see not only the speaker, but the effect of the speaker's words on others in the room. I can gauge both the party and attorney's reactions to what is being said. I can also see immediately if a party is "shutting down," and not staying engaged, and can address that. If a party does not feel part of the process, they cannot make a decision with which they feel comfortable. Seeing both a party and their attorney while each is speaking also gives insight into that relationship.

Parties are More Relaxed: For those of us who mediate often, we forget how stressful and intimidating any legal proceeding can be, especially when a party does not know what to anticipate. Zoom allows the party to mediate from their home or office where they feel most comfortable, as opposed to having to go to an unfamiliar office. Having a party who feels safe and comfortable and more in control at the outset, is a tremendous plus; everyone if on their home turf. Explaining to a party that this is *their* mediation and that they are the decision makers rings far more true when they feel comfortable and supported in in their own environment. Many people are having to manage spouses working from home and Zoom schooling. While I initially felt that would result in a party feeling distracted, I have found that they are far less distracted knowing that they can check in if they need to. I have often suggested that a party take a quick break to check in with their kids or get a something to eat and they return more focused and able to get back to work.

The Power of Pets: I have had many mediations where parties, attorneys and claim representatives have pets with them, and I never underestimate the power of pets! I've had many instances in which a party is better able to listen to difficult, disappointing information because they have a pet in their lap. Pets also allow for an opportunity to connect in a way that would be impossible in person. Once a pet appears, everyone else in the "room" reaches for their pet, which allows for a lightening of the atmosphere and connection. When I have had that occur in a "meet and greet" joint session, the tone

[1] That article may be found in the CAOC Forum Magazine at: https://online.flippingbook.com/view/364849/40/

going forward was far more positive. I jokingly say that as soon as pets appear on Zoom, I know a case will settle regardless of how far apart the parties are, but in reality, I've never been wrong about that. Pets and children humanize all of us and allow us to connect over something that has nothing to do with the case. Once everyone is smiling and saying, "Who's a good dog?" there is a palpable shift in the room for the better.

The Zoom Background: Zoom backgrounds speak volumes and serve as conversation pieces. Most are the parties' homes, attorneys' offices, and some are artificial. There is often child's artwork or some interesting object in the background, and when asked, people want to talk about it. Often in my "meet and greet" initial sessions, I ask about or mention backgrounds, which allows for conversation unrelated to the case, so that participants can get some sense of one another. Or during the mediation, I can ease tension by pointing out to a claims representative, who is agitated and waiving her arms, that she, like Godzilla, is about to destroy the Golden Gate Bridge in her background. Sometimes backgrounds are never mentioned, but they nonetheless reveal information.

Lack of Technology Has Not Been a Barrier to Settlement: My initial fear was that parties without Zoom capability would feel disadvantaged which would create a power imbalance. However, I have not found that to be true. Many of us struggle with technology and talking about that puts people ease. If a plaintiff can appear only by phone, I assure them that although I would rather all be in person, they will still be able to fully participate. I explain that often attorneys or claims representatives cannot access Zoom or their Zoom cameras because their kids need the WiFi for school, and they too have to be present only by phone. The concept of us all struggling through this together humanizes the process and puts people at ease. With only one exception, access has not prevented resolution.

Claims Representatives Are Present: So often, claims representatives "participate" in mediation by being on phone standby. However, I have not had a single Zoom mediation in which a claims representative was not present. There is truly no substitute for having the person with the money present for the entire mediation as it vastly improves the likelihood of settlement.

We were all forced into virtual mediation by Covid-19. While I do miss being in-person, because of the surprising advantages of Zoom mediation, I intend to continue to use it whenever requested. I believe we will also starting seeing hybrid mediations with some participants in person and others via Zoom which would ensure that all stakeholders participate.

By the way, crow? It's not too bad – it tastes like chicken.

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FROM THE MEDIATOR'S LENS: THREE MEDIATORS OFFER WISDOM

BY LAUREN TATE, MIKE NEY AND TOM CROSBY

LAUREN TATE

There are a number of circumstances that either make resolution more difficult or prolong mediation. While there are logistical hurdles to achieving resolution, there are also other important factors that determine not only the outcome, but how the parties will feel about the settlement. With that in mind, here is my not entirely conventional Top 10 list of how to ensure a successful mediation. Get ready to strike the pose and succeed!

10. Work with the Mediator Before Mediation

Even if you haven't yet written your mediation statement, there is tremendous value in speaking to the mediator well in advance of the mediation. The discussion may help solidify your approach and guide you in preparing your statement and addressing the factual and legal issues more effectively. You may also realize that either you or the defense need additional information, and the mediator may be able to facilitate that. Use the pre-mediation conference to decide whether and how a joint session will be most effective and to discuss barriers to settlement, and trust the mediator to construct the process she believes will be most efficient and successful.

9. Be Open to a Joint Session

Increasingly in California, both sides are resistant to a joint

session, which I believe is a missed opportunity. While having attorneys speak in a joint session often serves only to make everyone angry, don't shy away from a joint session for that reason. Unless there is a reason that the parties simply cannot be in the same room, there is immense value in even a short joint "meet and greet" gathering during which the mediator explains the process. If the defense attorney or defendant has not met your client, don't pass up the opportunity to have the defense meet and hear from the plaintiff as it will make it more difficult to vilify her. Likewise, don't pass up the chance to have the plaintiff meet the defense as it may make her more open to hearing the defense position. If nothing else, the parties will have looked one another in the eye and acknowledged one another as human beings. Physically coming together initially also signals an emotional willingness to come together in resolution.

8. Use the Joint Session to Overcome Hurdles

If there are issues that you know will be barriers to settlement and you can do something about them at the outset, do it at the joint session. For example, if the plaintiff is angry about the incident, the way the claim was handled pre-litigation, or how long the process took, have the mediator determine if the defense can address that upfront in a genuine way. A joint session can help diffuse intense emotions early on. Again, work with the mediator in advance so all parties have a clear sense of how a joint session might either help diffuse issues or potentially make things worse. (Beware the fake apology!) Trust the mediator to craft the joint session to promote a sense of hope and vision about resolution.

7. Don't Waste Mediation Time

Doing the work prior to mediation will prevent you from wasting costly mediation time. Keep in mind that defense attorneys and adjustors need to document their files and justify the authority requested. Make their job easy. Get final lien information if possible and at least start lien negotiations before mediation and get agreement regarding Howell numbers. Make sure the defense has the documentation of other damages such as wage loss so that the defendant/carrier comes to mediation with authority that can settle the case. Use the mediator to assist with damage issues ahead of time during the pre-mediation call, as she can find out from defense what it will take to move the needle. On the other hand, when issues do arise at mediation that could not have been avoided and preclude resolution that day, the mediation can still be successful. The mediator can determine what information is needed and the effect it is likely to have, and get agreement on a timetable for providing it to the other side and reopening negotiation either with another in-person session or by telephone.

6. Prepare Your Client

I both want and expect to talk to the parties about the law, risks and expenses of trial, and 998 Offers at mediation. This is what I refer to as "The Ghost of Litigation Future" visited upon the parties at mediation so that they "wake up," fling open the figurative window, ask "What day is this?" and realize that it's not too late to resolve the case before the future nightmare comes to pass. However, clients are often hearing about the burden of proof hurdles, costs, and risks for the first time. Unless there is a reason you want the client to hear this first from the mediator, realize that it takes a lot of time to educate and revise unreasonable expectations. If a client comes to the mediation with a good sense of the issues involved, what she needs to prove, and defendant's anticipated position, she will feel more in control and have more realistic expectations, and the resolution will take less time.

5. Give Up Control – Well at Least a Bit

Nothing makes attorneys crazier than not being in total control all the time! You have chosen a mediator you trust. A good mediator will quickly establish that trust with your client as well, and once that occurs, be mindful and trust the process. Be flexible enough to allow the mediation to take a course you might not have expected, and focus on issues that you might not have realized were important – often those are the real impediments to settlement. The parties may need to work through conflict and emotions. Trust the mediator to keep control of the mediation and protect the parties, even if conflict makes you uncomfortable. Allow the mediation to take the course it needs to take. Mediators and attorneys both need to know "when to get out of the way" and allow the case to resolve.

4. Don't Forget That Defendants Are People Too

If your client is going to be hearing things that are difficult to hear, don't lose the opportunity to have the defense describe the process by which they evaluated the case, explain what information was considered (plaintiff's deposition, medical records, review of other cases involving similar injuries, etc.) and communicate to the plaintiff that a lot of thought and, hopefully, respect went into the decision. The defense can make important concessions, for example, that the plaintiff's credibility is not an issue or that the injury was significant, and shift the focus on the issues that are really in dispute, such as liability. A plaintiff who believes that her case has been thoughtfully and respectfully evaluated will be far more open to hearing numbers with which she disagrees, and will be less likely to have a negative emotional reaction to hearing defendant's position.

3. Take Time to Envision a Good Resolution and State Your Intention

Before you even write your brief or speak to the mediator, seriously think about what a good resolution means for your client. Is it only money? If so, what does paying or receiving the money represent to your client? Is it repairing a relationship, your client being able to continue to work with the other party in the future, repairing reputations, repairing trust? Examine what needs to be accomplished and why, what your client's needs and interests are, and what is actually necessary, not just desirable, to resolve the case. State your intention out loud to yourself. Keep your intention firmly in mind when making your initial demand and consider whether it is consistent with both your intention and your vision of the mediation. If you cannot state your intention clearly, then you probably need to clarify with your client. You will be amazed at the power of forming and stating your intention ahead of time. Then carry your intention throughout the mediation, and ask if what you are doing is moving your client toward that result.

2. Strike the Superman/Superwoman Pose

Don't lose sight of the fact that for most clients, this process is intimidating and scary, or at least stressful. Before heading into the mediation, remind your client that the purpose of the mediation is for her to understand the issues, risks, and benefits of settling so she can make the best decision. The client should be proud that she chose to come together with the other side to make every effort to resolve the case. Remind your client that it took courage for her to go to mediation and that she is in control. Have her strike a power pose, maybe with arms outstretched like Superwoman, at least figuratively. Your client should feel empowered and hopeful before she goes into the media-tion. Okay, attorneys, you try it too. Strike that pose and see what happens.

And the No. 1 tip for successful mediation....

1. Don't Check Your Humanity at the Door

Regardless of whether the other party is a personal injury plaintiff or a CEO, she is, first and foremost, a human being with vulnerabilities, fears, and hopes all informed by experience. I am often amazed by the strength of a person with seemingly no power or the vulnerability of an apparently powerful, sophisticated business person. I have mediated with a senior vice president who, when I dug down, was at his core embarrassed and fearful about the dispute, and framing the resolution to address those issues was critical. It is also remarkable to me the large number of people who have suffered some type of major trauma in their lives, whether physical, emotional, or financial, and I learned quickly not to make assumptions about a person's experiences or what is motivating her actions. Regardless of how you feel about the other party or her position, try to acknowledge her humanity. Understand that you cannot, in fact, walk in someone else's shoes. The same holds true for opposing counsel. Always be respectful and kind. Don't be afraid to be friendly and even funny, when appropriate. Listen and respond respectfully and the case will settle itself. Ultimately, we are put on the earth to take care of one another, and we need to make that happen.

Lauren Tate Ms. Tate has served as a mediator in all types of civil cases since 2012. She is particularly skilled at maintaining control of negotiations and reaching settlements in emotionally charged cases

Here is the link to Phil Andersen’s article.

[An Insurance Defense Attorney's Perspective on Effective ADR - Contra Costa County Bar Association (cccba.org)]