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Essential Tools for Successful Mediation They Don't Teach You at Your Average ADR CLE

What are the questions that mediators should be asking when either or both of the parties are advancing positions that appear to drive the parties further apart and leave them frustrated?

By William Sanders

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Mediation is one of the hottest topics for CLE and publications. Ever since "Getting to Yes" was first published in 1981, more and more of the folks who pay our fees, that is, clients and insurers, are pushing us to get their cases into mediation. More and more business disputes are in fact resolved through direct negotiation even before litigation. For those that do not settle and where litigation goes forward, the trial courts in most jurisdictions have mediation programs of some type. Heck, even the appellate courts have them. Major firms now bid to employ the best-known retired judges to lead their "alternate dispute resolution" practice groups.

There are good reasons for this push/putsch directed to the adversary process. The foundational laws that set up our courts have given us a system based, ostensibly, on zero-sum, Euclidean/Machiavellian/"you or me" principles. That structure is disjunctive and is premised on one side winning while the other side loses. Yet, we all know from experience only a small percentage of civil cases get resolved in court on the merits. Most statistical measures put the rate of out-of-court resolution at 90% or greater. So, the ultimate results of the disjunctive, adversary system, are overwhelmingly conjunctive, where the parties come together to affect a consensual resolution. Stripped of that persiflage, we are settling almost all of our cases.

What, then, is the organic truth about successful mediation? Both sides must be committed to reaching a settlement. Time and again, I have found myself in mediations where one party simply stakes out a position that, had they given full and realistic commitment to the scope of issues in play, they would never have taken because even a "blind" person could recognize that it would be rejected. Worse yet, it is exceedingly difficult for even the "best" mediators to be as familiar with all the issues and the parties' competing interests in a way that would allow them to detect the difference between mediation cant and realistic expressions of result-oriented interest.

What, then, are the hidden barriers that prevent mediation from succeeding? What are the questions that mediators should be asking when either or both of the parties are advancing positions that appear

to drive the parties further apart and leave them frustrated?

1. Counsel cannot "let go" of their adversarial posturing. After all, this is what "we" would have been doing for the months/years that a dispute had been maturing into litigation before the parties agreed to mediate. We have been pleading, moving, answering, counterclaiming, discovering, interrogating, objecting, producing, not producing, deposing and posturing in court for so long that we are tied to the "story" we have built representing our clients/insurers, and to justify the fees we are charging. As a result, many of us cannot liberate our own persona as professionals from that process. Some of us still regard the notion of compromise, whether through informal settlement negotiations or formal mediations, at least before the eve of trial, as a sign of weakness. We approach the framing of demands/offers with the mantra that our client should not "bid against itself" by voluntarily engaging in the process. The way "out" of that black hole is a paradigm shift where we think of formulating strong, realistic settlement positions as demonstrations of confidence rather than weakness in the traditional sense. Better still, make a plan with your client to orchestrate the pleadings and discovery to highlight those issues that will foster settlement.

2. Cost-benefit analysis has not penetrated one or both parties' thinking. While this may be the "most obvious" way to analyze settlement, it is often overlooked. The hot topic introduced in "Getting to Yes," among others, was "interest bargaining." Clearly, one way to approach that is for each side to assess the potential rewards of the case, discount or multiply those by the perceived likelihood of succeeding at trial and measuring that against the expected costs of going forward. In most of our cases, the latter would comprise counsel fees, expert's fees, if any, and other litigation expenses. Can we conceive any substantial litigation these days, lasting for say two years from filing until substantial discovery has been done, costing less than $200,000 at "regular" hourly rates? One of the reasons that most clients have latched onto mediation is that they realize so many of their disputes, absent other considerations, do not have that much at stake. Alternatively, they realize that the risks of the case are such that it may not be "worth the risk" to incur fees of that dimension. But if that analysis is not being performed, then whomever is failing to do so may be guaranteeing that they cannot approach mediation realistically.

3. Some cases and parties just will not settle. There are some cases where the issues are so deeply felt by one or both sides, the settlement may just not be possible. It is better of course to be able to recognize that *before* the parties get involved in mediation. But often in litigation there are parties whose tactics suggest that all they care about is conducting a war of attrition until the other side "caves" for fear of having to continue to pay their attorneys. If that is one of your cases being referred to mediation, you should smoke out that strategy early in the process and bring it to the attention of whomever is making the decision to mediate. Save your client/carrier's money and continue litigating because your adversary will not be approaching the process realistically.

4. Particularly in commercial cases, the parties lose sight of future opportunities to work together. Commercial cases frequently involve parties who "know" each other because the case arises from an existing or previous commercial relationship. To be sure, there are those disputes that are in the "bet the company" category that may not bode well for resurrection or even expansion of the relationship. However, the parties' best interest may be served by determining that it is better to "switch" back to working together, than to "fight." Very often, the stakes in a particular commercial dispute would be overshadowed by the totality of the relationship or the potential profit from further business down the road.

5. Choose the right mediator. In most jurisdictions, there is a group of "go-to" mediators that everyone wants to use. The difficulty is that they are usually the most expensive and the busiest. If you are under pressure from a court or your client to schedule the mediation "sooner rather than later," you may have some work to do in convincing them that, absent real external time pressures, all parties would be better-off waiting a couple of extra months to get onto the "it" mediator's schedule. Very often, the "second rank" mediators simply cannot "grok" anything beyond the parties' stated positions and split-the-difference compromises. As noted, mediators have a major hurdle to overcome because they are of necessity "new" to the case. While they may know counsel and even one or more of the parties, they cannot know as much about the case as those participants

who have been "living with" it for months/years. The most in-demand mediators can look behind the parties' positions to determine their real mutual interests, if any, and pierce through the barriers to uncovering common ground that we are outlining here.

6. One of the parties has failed to appreciate all of the permutations of the dispute and/or consider solutions for all issues. It may be self-evident that all the parties to the mediation will be "prepared." For whatever reason, there are cases where one or more of the participants has not considered one or more of the key issues and other variables that should have been part of any realistic and complete assessment of the matter. One of the benefits of the adversary system is that we will learn things from our adversaries or outside observers such as mediators. Hearing new perspectives and alternatives has a great potential to benefit the parties and introduce potential avenues for resolving the dispute. But if one side or the other, or both, simply does not "know the case" or recognize the major issues, it is likely that they will not see the value of creative solutions that may be offered.

7. Someone's job is on the line. We have all experienced the situation where someone handling an issue on a day-to-day basis has failed to report to their supervisor(s) about negative aspects of the dispute or the full status of other critical issues. Those communications gaps are barriers to settlement for several reasons. But if a client representative or line adjuster who is participating in the process refuses to "sell" solutions to their supervisor(s), the mediation cannot progress. This communications gap can also arise when counsel sees issues developing in the mediation for which they had not prepared their client. Those counsel may become a barrier to successful completion of the mediation because they will not fully convey offers or the mediator's insights on issues they had not anticipated.

8. Expand the conflict. If you want to mediate a case that will not settle, one way to move the ball forward is to change the "audience" on the other side, by using what political scientists call "conflict expansion." It is not always easy to do but try to get the attention of the decision-makers of your adversary who have authority "above" those who are opposing counsel's direct reports. Sometimes, this can be done, if warranted, by amendments to the pleadings that change the stakes in the litigation. Other times, you may be able to formulate discovery requests that the other side would not want to answer, or which would force your adversary to involve decision-makers or non-parties with important relationships to the adverse client that it does not want disturbed by such involvement.

Somewhat accidentally, but serendipitously, I had an experience that is illustrative of conflict expansion while representing the plaintiff in a highly contentious Consumer Fraud Act case against a multibillion-dollar real estate firm. Trust me, we had a very strong case for a significant treble damages recovery, not to mention attorney fees. Defendants' counsel was an experienced litigator in the subject matter and appeared to mirror his client's determination to litigate. After three years of litigation, there was no hint of a possible settlement. Then, the plaintiff got a call one day directly from one of the highest executives of the defendant, and he was looking to engage in mediation. He told our client that once our adversary's fees exceeded a certain level, he had to take control of the case away from the line officials previously handling it. When he started asking them and counsel about the case, the answers, shall we say, drove him to "sue for peace" and seek mediation.

In conclusion, getting our cases into mediation and achieving a successful settlement requires each of us to be "at cause" for doing so. Get to know your client's side of the case as early as possible. Figure out the issues that will create "touchpoints" for your adversaries, client and counsel, so that they will see the virtue in mediating. Make a plan to achieve those goals and stick to it. Then, if you are able to get to mediation, let the mediator know that is how you have proceeded so you can empower the mediator to help you complete your plan. Best of luck.

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