How to Achieve a Successful Mediation

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Mediation is analogized to Japanese kabuki theater because of the ritualized steps that are taken to bring the parties together towards a settlement of litigation. However, unlike the traditional dance where the outcome is carefully scripted, mediation is extremely unpredictable and can head off in unanticipated directions with an unknown outcome. Nevertheless, mediation is a valuable tool that can significantly reduce litigation expense and achieve fair outcomes. The purpose of this article is to provide the reader with a general overview of the mediation process and suggestions on how a successful mediation can be achieved.

Most of my work as a mediator in the bankruptcy field involves attempts to resolve lawsuits seeking to claw back (1) payments made within 90 days of the bankruptcy filing known as preferences and (2) fraudulent conveyances. However, the lessons I have learned can be applied universally to all mediations. The specific techniques and methods that are employed by each mediator will vary, but there are some general principles that can maximize the likelihood of a successful mediation.

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I. First Steps

First, at the outset of the mediation the mediator should try to develop a connection with both the lawyers and their clients in a private session without the other side present. This can be done in a somewhat obvious way, by asking questions about their business or any subject that might cover some common ground which will help to establish trust. Second, the mediator should show some understanding and empathy for the predicament that each side is in and allow them to briefly vent their complaints about the perceived unfairness of the litigation. This may allow their anger to dissipate somewhat, and then the parties can focus on the case. However, it is important not to linger endlessly in recriminations and quickly turn to the business of having the parties exchange initial settlement offers.

II. Settlement Offers and Bottom Lines

When the first offer is made by a party, the mediator needs to assess if it is so high or low that it may kill the prospects for a successful mediation right at the beginning. If necessary, the mediator should firmly encourage a better offer and let the party know in no uncertain terms his view that the mediation will be doomed to failure if there is not a better first proposal. However, the mediator should also not be discouraged if the initial proposals are far apart – indeed, that is to be expected. The mediator needs to remain optimistic, keep the parties exchanging offers and have a realistic understanding of the time available in which to achieve a settlement. While some say that the biggest moves come at the end of the day when one or both of the parties need to leave (which in my view is not the case), the groundwork for a successful mediation needs to be established at the very outset.

Before conveying settlement offers, the mediator should listen closely to the supporting reasons for them provided by the parties. At the outset of the mediation, there should be a

rationale accompanying each proposal which is conveyed to the other side. However, as the mediation moves on, there can be less emphasis on the explanations for proposals; it may be sufficient that an increased or lowered offer is showing significant movement. After digesting the explanations provided by each side, the mediator should decide what is best to incorporate into his presentation to their opposition.

Further, while it may be tempting for the mediator to ask either of the parties for their bottom line, it is generally not a good idea. If they try to volunteer it, the mediator should not follow up. That is because in most cases, the mediator will ultimately need to ask both sides to go either above or below their purported bottom line. Accordingly, if the bottom line is not set in stone at the outset, neither party will lose face as they progress towards the final settlement. As a caveat, when the mediation is nearing an end and they are in the final stages of the negotiations, it is sometimes helpful to know a party's bottom line so that the mediator can go to the other side and try to obtain a settlement.

III. Preparation

The mediator should be fully versed in the case law pertaining to the litigation. He should be prepared to express his views to the parties as to the likelihood of an outcome on each major issue, and challenge their arguments and raise questions. If the case is complex, he should consider putting forward an analysis that applies a percentage likelihood of the outcome so the parties know the risks if they continue on a litigation path, and provide support for that analysis. This approach is often effective with the most sophisticated parties. While they may not need as much hand-holding as others, they usually react well a thoughtful and fair evaluation of the strengths and weaknesses of the parties' positions.

IV. Factual Disputes

It is also important to clear away mistrust due to factual disputes if that can be achieved. Often, parties will disagree about items that can be clearly established to the satisfaction of both sides, such as account histories or the back-up documentation supporting expert reports. In order to get past this problem, the parties should be brought together in joint session where these issues can be addressed transparently in a manner that both sides can have confidence that the mediation is being conducted fairly and key facts are established with clarity. To encourage this type of exchange, both parties should be told at the outset of the mediation that all materials exchanged are provided for settlement purposes only and are not admissible at trial. Occasionally, one party will protest that the mediation should not substitute for discovery. While they are technically correct, my experience is that usually that party has the weaker side of the argument if they are resisting disclosure.

V. Emotions

In addition to listening with care, the mediator should also be watching the parties and their counsel closely throughout the mediation for non-verbal clues. Their body language will often be very revealing. For example, in a recent case I mediated, the business representative of the defendant spent the entire day with her arms tightly folded. Another party in a large case remained in a controlled rage for the full length of the mediation. In my experience, the best way to work productively with people in this emotional state is to analyze the case calmly but firmly. The mediator should show respect for their points, but should not back down in letting them know the weaknesses of their case and the risks and costs of proceeding forward with the litigation.

Of course, each case is different, so there can be no hard and fast rules for the mediator. What would work in one case will fail in another. Accordingly, the mediator needs to trust his instincts as he will need to make split-second decisions on how best to proceed, put forward an argument, or even stop a party from walking out, which is a common threat (one party even stationed himself at the office door for a half-hour; another kept getting up for his suitcase). Since the mediator will need to react quickly in these situations, he will have to do his or her best based on experience, instinct and fairness. Depending on the parties whom the mediator is working with, frequently it is a good idea to give reasons for those decisions. Mediation is a collaborative process, so it is also often best for the mediator to solicit the parties' views on how to proceed on procedural issues to gain their confidence. However, if there is a disagreement, the mediator must act decisively.

VI. Group Dynamics

Some mediations will be relatively small, involving just one lawyer and their client for each side, and others involve larger groups. Recently, I handled a mediation in which a party brought five outside lawyers and their business representative was the general counsel. Accordingly, when I met with that side privately, which consisted of those six people plus an expert and two representatives from insurance companies staring at me blankly, I decided that it was best to break the mediation into a smaller group consisting of one lawyer and the business representative. Because they were more able to acknowledge the complexity of the case and its uncertain outcome in a small group, the discussion was much more interactive and constructive.

VII. Patience

To quote President Obama on the Mideast negotiations, peace is hard work. Accordingly, gimmicks such as mediator's proposals should be used sparingly. If the mediator is

impatient, he may try to shortcut the process by throwing out a settlement amount that he thinks is fair to both sides to see if they will accept it, and therefore the problem will magically disappear. However, this approach rarely works. Both sides have to go through the time-consuming process of negotiating and actually focusing on the possibility that they could lose the case due to the weaknesses of their various positions. Insight may only come to the parties after the mediator has methodically broken down their arguments and questioned them throughout the course of the mediation. However, if the parties are getting close and the endpoint is difficult, the mediator may consider seeking advance notice from one or both sides if he has established a good rapport and go to the other and say "if you come back with $X, I'm confident the other side will accept it."

It is also important for the mediator to remember that savvy parties know that the consequences of an unsuccessful mediation could be harmful to their side. Accordingly, the mediator should not get discouraged when the outcome appears bleak. In fact, it can be helpful to let the parties know, as I have often done, that not every case has to settle. Often, that will focus them on the fact that a settlement is in their interest, because otherwise they will be tied up in expensive litigation for years and may be facing an unsatisfactory outcome.

VIII. Breaking Impasse

"Breaking impasse" is a term that is frequently used in mediation, but there are no magic ways (i.e., parallel offers, range bargaining, hypothetical offers, etc.) to achieve that goal when negotiations break down. In my experience, the best approach is to remain persistent, raising different arguments and coming at a problem from different angles in the hope that will generate some movement. On numerous occasions, a party has refused to budge from an existing offer despite multiple requests I have made and then for no apparent reason they finally change their

position. Persistence doesn't always pay off, but it sometimes does. I have found the key is often to keep nudging the parties closer together toward a settlement. Once they have a sense that a resolution is actually within reach, their settlement postures can change. As a corollary, one or both parties may claim they have a settlement number they can either not go above or below for political purposes, either within their company or for presentation to a board or some oversight body. Sometimes these artificial barriers are real and sometimes they are put forward for negotiating purposes, but one of the two sides will need to surmount them in order to finalize a deal.

Finally, the mediator should appreciate the significance of the outcome to the parties, particularly in our currently distressed economy in which few companies are secure. The importance of the amount at issue is relative and frequently depends on the size of the defendant and the tenacity of the plaintiff. I have had cases where parties shifted their positions regarding millions of dollars in the course of a day and others where we have argued over $1,000 for several hours. In all instances, the mediator would be well served to remember how intensely personal mediation can be for some participants and respect their emotions, while at the same time calmly and professionally guiding them towards settlement.