SPECIAL FOCUS

MEDIATION

A Client's

Mediation has become one of the most popular and most utilized systems of dispute resolution in the United States. From an infancy that began only a quarter century or so ago, mediation—sometimes called settlement conferences—is now an institutionalized and highly popular way of resolving disputes.

Though there are many seminars, papers and books regularly written for mediators or would-be mediators, there is precious little to guide the poor souls who suddenly find themselves in the midst of one. It's bad enough to find yourself in a lawsuit; if you are a normal human being the prospect of negotiating the settlement of the case can be a daunting one. Even for those who regularly participate in mediations, the opportunity for confusion and misunderstanding—the opportunity to fail miserably in the task of settling the case—always exists.

Thus, I have here attempted to craft a quick and easy guide for the participant–client in a mediation. It is far

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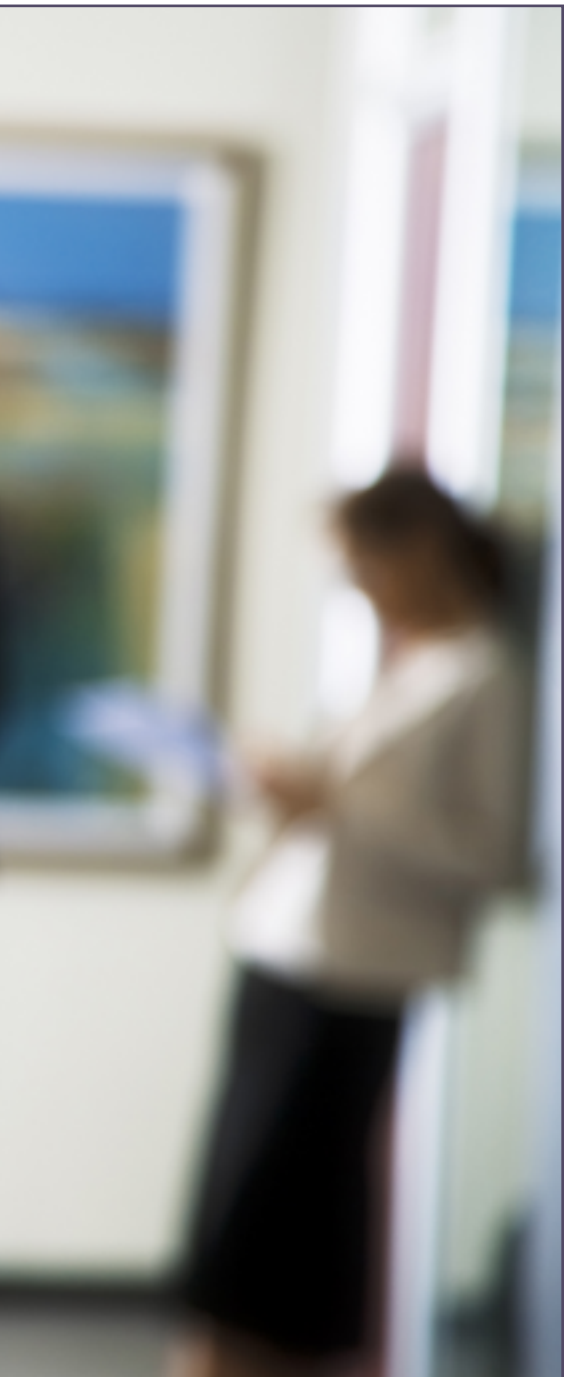
from a scientific inquiry, and one that is likewise very subjective. I have been settling civil lawsuits for more than 20 years, and during that time I have often chided myself for not making sure that the most important party to the process—the client—understands what the hell is going on. Indeed, the most typical reason for a failed mediation is that the client did not appreciate the process, got confused and frustrated, and walked out. And trust me, there is nothing worse than a bad mediation to not only ruin your day, but likewise your lawsuit. When the stakes are very high, your happiness with life itself can be on the line.



Lawyers too might benefit from such a primer. At the very least, this may be something you can hand your client as you enter the great adventure.

Therefore, in this article I speak to the client and the lawyer, each joined together in a unique endeavor. And why not? For conversing with this diverse audience is what mediators do every day.

So here we go: The Poor Richard's Guide to Attending a Mediation and Not Only Surviving, but Prospering.

The Process

First of all, mediation is a process, not an end unto itself.

It is designed to be an inexpensive and efficient way of getting to the bottom of a lawsuit and negotiating a resolution. It provides the client with a real opportunity of having his or her case, and that of their opponent, analyzed and examined with the assistance of a mediator who has the knowledge and experience to assist in understanding the good, bad and ugly of the lawsuit.

Mediation is also a negotiation. Unfortunately, even in the most tragic of cases, mediation ultimately boils down to the buying and selling of the lawsuit. It can sometimes feel like the buying and selling of a used car, and if you are in a mediation and beginning to feel that way, you are not alone. I am always concerned that clients, particularly those who are dealing with a catastrophic loss, become disenchanted with the process because they truly are negotiating the value of that loss or that loved one.

The only answer to this is to understand that mediation, and indeed the courtroom, is society's answer to the vital process of resolving disputes. We cannot make the tragedy go away; we can only put a dollar value on that tragedy and attempt to resolve it.

This is not to say, however, that mediation cannot be a cleansing experience. There are no real rules in mediation; no one is going to stand up in the middle and shout "Objection–hearsay." This means that clients have an opportunity to vent, to cry, to scream or shout, and to do so in a pretty safe place—which can be a real benefit not only in settling the case, but in helping clients deal with the underlying tragedy and anguish.

Different mediators handle the process in different ways. Some believe in joint sessions, in which the parties and the lawyers sit down in front of the mediator and debate the merits of the case. I am personally against such a process. The few times I have used it I have found that it drives people even farther apart.

I prefer to do what most mediators do, which is to have individual, private sessions with each party. I will normally start the process by explaining to the party the gener-

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al nature of the process. Sometimes I will start with the plaintiff, sometimes with the defendant, depending on the particulars of the case.

There are no requirements as to how many times the mediator meets with you or the other side. Nor are there any time limits. I personally feel that the faster we go, the better everyone feels about the process and the easier it is to resolve the case. However, any experienced mediator will tell you that we usually spend hours discussing terms that will not resolve the case and minutes discussing those that do. This is merely a reflection of the fact that the mediation itself is an opportunity to examine and challenge the perspective of the parties.

Once there is general understanding of the ups and downs of the case, and both parties have pretty much accepted the analysis, it isn't long before resolution is achieved.

The Mediator's Role

Typically, there are three parties to a mediation: the clients, their lawyers, and the mediator.

Good mediators care about two things: (1) controlling the process and (2) settling the case. Really good mediators also care about that elusive but easy-to-smell thing called Justice, which sometimes ain't bad even if it is administered with a small rather than a capital "J."

Mediators want to control the process because they are, or should be, the experts in the resolution of cases. Moreover, they are by definition the only objective party in the room, and objectivity is a vital tool of any successful mediator. After all, if you think the mediator is in the pocket of the other side (or, what's worse, in yours), you aren't going to heed much of what he or she has to say.

Objectivity, however, can hurt. Most mediators are adept at delivering bad news about your position or your case in easy-to-swallow doses, but the biggest reason for headaches in mediation is that the client may not like the opinion being delivered.

Frankness about a position, however, is one of the most important reasons for success in mediations. A mediator is not the enemy; after all, the reason you hired the bastard in the first place is because you wanted someone with experience and objectivity to measure the strength of your case.

Sometimes the mediator is not offering his or her own view of a case, but merely expressing how the other side views the issues. There is an understandable tendency in such cases to want to kill the messenger. I have found that it is sometimes very important for me to explain to the client that the views being expressed are not necessarily mine, but those of the other side. Hopefully, this allows a person to avoid the tendency to get personal about something and listen to what is being said.

Mediators want to settle cases because that is the reason they got into mediation in the first place. Even today, after settling many thousands of lawsuits, I am nagged if I can't resolve a case, and assuring myself that it failed to come together because the case was too difficult, or the parties unreasonable, really doesn't help.

This desire to settle often can be perceived by clients to be a desire to settle at all costs, even if it isn't fair. I appreciate it if clients express to me such feelings. It not only gives me an opportunity to discuss the issue, but it also requires me to sit back and ask myself whether the client just may be right.

This is where a mediator's penchant for fairness may be challenged. I would be lying if I didn't say that over the years the opportunity has arisen for me to settle cases under terms I didn't necessarily think were fair to one of the parties. However, I have also learned that I am not omniscient and that I may not always know the real reasons why someone will settle for what I think is less (or more) than fair. There is no requirement for a mediator to know all or even any of the reasons why you may want to settle your case. If the mediator has been effective in assisting you in settling the mess, that may very well be enough.

Almost by definition, a case doesn't settle if it isn't acceptable to all parties. This is where justice with perhaps a small "j" rather than a large comes into play.

The Lawyer's Role

By the time you reach a mediation, lawyer and clients have hopefully had plenty of time for a frank and complete airing of the issues. The rule is, and this doesn't only apply in mediations, that if a client does not understand something about the case, it is not only appropriate but it is their right to question the situation. One of the most important things to understand is that, if your lawyer suggests that you should mediate your case, this is NOT a sign that the lawyer is trying to sell you down the river. To the contrary, mediation today has been adopted by the court system as a primary means of resolving cases. Chances are the judge will order a mediation if your lawyer hasn't already asked for one.

Depending on the personality and wishes of the client and the lawyer, counsel may take very different roles in a mediation. Some lawyers tell their clients that they, and not the client, are the only ones allowed to speak while the mediator is present.

Generally, I think that is a lousy idea. This is your case, and mediators are very interested in hearing what you have to say. Indeed, often the other side can be affected if a mediator, having had the opportunity to converse with a client, can report that the client makes a good impression and will be liked by a jury.

Of course, if your lawyer tells you that you shouldn't speak up, you may want to ask your lawyer if he or she is concerned about your ability to add to your case. If your lawyer admits that there is a concern, that does not necessarily mean that you should fire your lawyer. To the contrary, a lawyer who is honest with the client about the client's abilities to succeed in litigation is a lawyer worth keeping. Trouble occurs when your lawyer, while believing that you will not do well in mediation or in front of a jury, nevertheless tells you only that which you want to hear, and not that which you should.

Having said that, however, your lawyer may not want you to discuss certain issues. This raises a question of the confidentiality of the mediation.

Almost every state, Arizona included, has rules or statutes that mandate that statements made during mediation are confidential and cannot be used in any legal proceeding. There are some small exceptions to this rule, but the reason for confidentiality in mediation is because the process profits from honesty and frankness, and therefore confidentiality will apply.

Many people, however, don't understand what can or cannot be said in the mediation itself. The general rule is that anything you tell the mediator during a mediation is not confidential and can be repeated to the other side, unless you inform the mediator that what you are say-

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ing should not be communicated.

I always begin my mediations with an explanation to first-timers about this rule. Actually, most experienced mediators instinctively know what can or cannot be repeated, but it is a good idea for your lawyer to preface certain remarks with the request that what is about to be said should not be repeated.

If you are uncertain about whether something should be kept confidential, I encourage you to still discuss it. There is no "gotcha" rule in mediation, which means that if you say something that in hindsight you and/or your lawyer believes should not be communicated to the other side, it is perfectly fine to ask that the item be kept confidential. It is better to err on the side of communicating with the mediator, but you also must understand that if you don't make it clear that you want to keep certain things confidential, the mediator will presume that it is not confidential and will act accordingly.

Many times the mediator will ask the lawyer to leave the room and "take a walk" with him or her. Don't get nervous when this happens. There is usually a fairly remarkable level of trust between lawyer and mediator, and a private one-on-one is useful for the lawyer to educate the mediator about how you really feel about the case, or concerns the lawyer may have about the situation that don't necessarily need to be said in front of you.

Again, this is not a lawyer selling you down the river. Rather, it is an opportunity for your lawyer to provide the mediator with a roadmap to a successful mediation. Often, those private conversations represent the most important thing a lawyer can do for you during the mediation. I have sometimes had lawyers warn me that certain topics may be off-limits for a client, and should not even be broached. This is very useful because the last thing a mediator wants to do is upset you about something that ultimately will not assist in the settlement of the case.

Almost every mediation includes a discussion of complicated issues of law between lawyer and mediator. I think it is a very good thing for a client to listen in, and, if they want, contribute to that discussion. Even if you don't understand everything that is being said, it helps you to appreciate the legal setting and arguments that affect your case. When that discussion is a frank one between lawyer and mediator, the client has an opportunity to understand that it may not be them, but the legal underpinnings of their position, that could have a deleterious impact on any litigated result.

One thing that a mediator is limited in discussing, however, is the legal fee that your lawyer is charging for the case. In Arizona, the law prohibits a mediator from negotiating the legal fee between lawyer and client. The reason for this rule is because the process is designed to result in a resolution between two disparate clients, and a mediator's interjection into a discussion of the legal fee can ruin the mediator's objectivity. If you want to discuss your fee with your lawyer, the best thing to do is simply ask the mediator to leave the room.

An important role for your lawyer, of course, is to educate the mediator about your case. Usually, this is done before the mediation, in the form of a mediation statement that the lawyer has provided to the mediator. Lawyers will often exchange mediation statements with the other side, a process I encourage because it ensures that the initial facts and positions have been exchanged and accurately communicated. Sometimes your lawyer will also send a confidential statement to the mediator only, which will contain information that the lawyer wants the mediator, and not the other side, to know.

One of the most important things lawyers do in mediation, of course, is choose the mediator. There are a wide variety of fac-

tors that go into the selection of a mediator, but lawyers typically look for people who are experienced in the practice of law, who have had a great deal of time in front of juries (which often makes judges very attractive as mediators), and with whom they have had success in the past.

One thing that is often not necessary is that the mediator be familiar with the underlying subject matter of the litigation. Usually, it is more important that the mediator be experienced in the process of mediation and negotiation, and less important that they know the intricacies of any given subject. I have settled many cases in which I know practically nothing about the subject matter of the lawsuit, a fact that can be heartily supported by scores of lawyers throughout our fair state and places beyond.

The Client's Role

I've saved the best for last. The client's role.

The client is by far the most important person in any mediation. Too often, this fact is forgotten by both mediator and counsel. This is the client's case. It is not the lawyer's case, or the mediator's case. A bewildered client is an unhappy one. It is vital that the client understand what is going on. If you, the client, do not, then feel free to question all and sundry.

Mediators are by and large a sturdy lot. There is not much we have not heard. If you don't like what's going on, say so. If you don't understand what's happening, question it. Even at the risk of riling the mediator and your lawyer, you have a sacred right to speak up.

But by the same token, please remember that mediation is ultimately a compromise. Neither side will ever settle for the worst case they could ever expect, and therefore you will not get the best case in settlement.

Mediation is about changing expectations. Sometimes, you have been told by your family and friends that yours is the best case since sliced bread, and you suddenly find yourself in a situation where you are being asked to settle contrary to all you thought possible. That is when the rubber meets the road. If your lawyer and mediator have been open and frank with you during the process, that uncomfortable feeling in the back of your head and the chambers of your heart is probably you changing your mind. This is a good thing, because it means that the mediation has worked, and you are confronting the realities of your situation.

Some of this requires frank discussion between lawyer and client before the mediation. If you start a mediation with a settlement demand scores above or below the true value of the case, one can only hope that you understand that this is merely a negotiation technique and not a true reflection of what you might fetch at the end of the day. If you really believe the amounts being flung about, the mediation will be an excellent opportunity for you to examine truthfully your position and ascertain if it is really a sensible thing to head into a trial.

This means that one of the client's most important jobs in a mediation is to listen. This is a wonderful opportunity to educate yourself about the ups and downs of not only your case, but the realities of a jury trial as well.

I often wish that a client could be a fly on the wall in the room of the other side while the mediator worked his magic. Even though it may feel like you are the only one being asked to compromise, the fact is that no good mediation, nor any good mediator, is successful if there is not a bilateral beating about the head and changing of minds. Some clients even take offense if they feel the mediator is spending too much time with the other side. In fact, that is usually an indication that the mediator believes yours is the better position and needs more time to convince your opponent of that fact.

There is usually an inordinate amount of downtime in a mediation. You may actually want to bring a good book along. I suggest you dress appropriately for what is, let's face it, probably the most important day of your lawsuit. Most cases settle at mediation or shortly thereafter, and very few actually go to trial. Even if you are not acquainted with appropriate business attire, showing up in shorts and sandals probably sends the wrong message to everyone, including the mediator.

Finally, don't be too disappointed if your case doesn't settle at mediation. Sometimes it is necessary for the parties to return to mediation after important legal motions or discovery has been conducted, and often people simply need to get away for a time to think about what they have heard. I often settle cases in the days or weeks after a mediation by telephone, and never actually return to the mediation proper.

The Joy of Resolution

Settling a lawsuit remains, for me, one of the most satisfying things there is. I have spoken to people moments after the settlement of their case, and years after. Generally, I have found that people are delighted by the fact that litigation—vexatious at best and poisonous at worst—is finally over. Even when you feel that you may have compromised more than you wanted, the mere fact that you have settled is a good thing. As time goes by, people usually come to terms with their feelings about their case and feel that getting it over was the best thing they could have done.

When a case settles at mediation there is usually a short document that is prepared by the mediator, which lists the main points of the settlement. The lawyers then prepare a much lengthier document after the mediation, a process that can sometimes take much longer than expected. Patience is a virtue at this stage of the game, although I usually start pushing pretty hard if more than 30-45 days have elapsed without the completion of final paperwork.

Whether it takes this long to complete the process or not, mediation is a truly wonderful thing. For an overburdened judicial system, another case has been eliminated. For the client, an even more wondrous event has occurred. This lawsuit, which may have burdened and bothered you for years, is finally over. You have been a participant in the process, not merely a helpless spectator. You have freed yourself from the tribulations of litigation and have been able to get on with your life. And as we all know, life is simply too short for anything less.