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MEDIATOR

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Legal proceedings can give rise to powerful emotions of anxiety, anger, sadness and despair in the parties to the dispute. It is important to do what can be done to ease such feelings, because emotional pressure can make it difficult for a party to understand the information and advice presented at mediation, with the result that he or she may not be able to participate fully in the learning, discussion and negotiation that take place there. This can yield a compromised result, or cause the mediation to fail completely. The mediation opportunity may be wasted. A truly successful mediation requires that the parties have the advantage of detailed legal advice and that they be emotionally ready to participate in the process.

This article explains the parties' rights in mediation, describes their role at the mediation session, and discusses ways in which they can prepare themselves to participate there, by relieving emotional responses to the dispute and learning how to think about the dispute in ways that will help them to participate usefully at the mediation.

Taking care of yourself prior to the session:

These first four Items may seem surprising, but they are choices that can help you to concentrate and have lots of energy at the session:

- eat properly for at least a week before the mediation;
- get proper sleep for at least a week before the mediation;
- on the day of the mediation, allow plenty of time to get to the session without rushing; and
- go easy on caffeine on the day of the mediation and the day before.

Preparation with your lawyer:

Arrange to meet with your lawyer to review the mediation process, to prepare for the mediation, and to discuss the case in detail.

Ask questions and *listen to the answers*. If you don't understand any part of your lawyer's advice, say so and ask for clarification.

The objective is to talk to your lawyer candidly about the strengths and weaknesses of your case, *and the strengths and weaknesses of the case on the other side, as well*.

Thinking about the case before and during the session:

There is more than one side to be considered in a mediation, just as there is at a trial. Parties should make a point of learning as much as they can about the entire case, not just their part of it. Remember: if there is no settlement and the case goes to trial, the *trial judge will listen to what all the parties have to say. You should do that, too: it is the best way to protect and advance your own interests.*

There are some common errors that arise in the way parties think about their case. Such errors are explored below, together with some techniques you can use to make your thinking serve you better.

"Black and white thinking":

Black and white thinking is the belief that the problem is simple, and that one party is entirely right and the other entirely wrong, or that one must win and the other lose. It is very human to indulge in this sort of thinking, but it is a mistake: if you want to make good decisions, you must start from a realistic understanding of the situation – not just the situation as you would have it, but the whole situation. Black and white thinking should be resisted because --

Black and white thinking is simplistic.

It does not reflect reality. Because human interactions and disputes are much more complex than black and white analysis can reflect, an understanding of the true reality of a situation cannot be reached through such thinking.

The clear answer yielded by black and white thinking is illusory.

Black and white thinking may be attractive because it seems to yield a clear answer, but that impression is misleading: the answer appears to be clear only because all the subtle realities of the situation have been omitted from the analysis. Law is not simple, it is highly complex. If the case goes to trial, law will be used to decide it, and legal thinking is not black and white. Remember that nothing is certain in a legal dispute – and there is no single right answer. Our courts have recognized that this is true: there are court decisions in which it has been observed that a series of *competent judges, faced with exactly the same facts and evidence, can arrive at different conclusions – and the fact that their decisions differ does not mean that any of the decisions is wrong*.

Possible legal results are best considered on a gray scale.

Mediation does not aim to yield a result which accords with law, so legal results may not be a large part of the mediation process. However, if legal analyses are considered at mediation, it is most useful to think of them as a *range* of different possible results, positioning them on a nuanced gray scale rather than using the overly-simplistic and polarized results of a black and white analysis.

Black and white thinking works against mediation.

Mediation is not concerned with deciding which of the parties is "the winner", and does not try to duplicate a legal result by deciding such issues as liability (fault). Winning and fault are issues in litigation. In mediation, such issues become part of the problem, because polarized thinking drives the parties apart. Mediation is a problem-solving process, in which the parties collaborate to settle the dispute between them. The parties cannot collaborate optimally in a process that emphasizes the differences between them. Mediation looks to the issue that the parties share – the problem they have in common (the dispute) and their need to cooperate in order to address it – and works from there.

Black and white thinking is often rooted in emotion.

Because black and white thinking fails to take into account the whole picture, it can be tempting for a party to take refuge there. The simple, clear answer seemingly reached through black and white thinking makes it easy for the party to build up blame and anger towards the other side, while avoiding recognition and acknowledgment of the ways in which his or her own behavior may have contributed to the problem.

Thinking about your role in the problem -- one way to go about it:

This is a tough one: ask your lawyer directly if he or she is of the opinion that a court might find you at fault in any aspect of the case. If the answer is "yes", try not to be defensive. Ask questions so that you fully understand what is being said. And ask what kind of impact this could have on the case as a whole.

You may think this is a difficult thing to do – and it probably is -- but look at it this way: no matter what the answer is, you will have the advantage of a realistic assessment. You can think about it and get used to it, and then decide how to deal with it. If the answer is that you appear to have been relatively blameless, you can take some comfort from it; if the answer is that you are likely to be found responsible in part, you can prepare yourself, emotionally and substantively, for an argument that any settlement should be discounted to reflect your part in the problem; and if the answer is that a court is likely to find you are substantially at fault for the problem, you will have the opportunity to work with your lawyer to devise an exit strategy, with or without mediation, relatively early in the litigation. Tough, maybe – but isn't it better to know?

Resist the urge to rehearse:

You may experience an urge to recite your case over and over to yourself. If you do, try to resist the urge. This behavior is driven by anxiety and, possibly, anger and resentment and a need to be "right". You may believe that it will help you to be powerful at the mediation, but it won't. It is not useful to the mediation process – it is not legitimate preparation -- and repetition of your grievances will tend to cause negative emotions to build, which will make it difficult for you to participate constructively in mediation. Rehearsing is actually a trap: if you let it become a habit, you may get stuck.

Learn to bear both sides of the problem in mind:

In my experience, it is counter-productive for a party to steep in his or her own case without reference to the case of the other party: to do so creates an unbalanced understanding. The following is a practice that is designed to help you develop the ability to think about both sides of the case.

Mediation practice requires that a document called the "Statement of Issues" be prepared and filed prior to the mediation session. It is a written summary of the party's version of the facts of the case, and law, and a statement of the result sought at mediation.

Your counsel will provide you with a copy of the Statement of Issues prepared on your behalf. My suggestion is that you ask for a copy of the Statement of Issues filed by the other party, as well, and discipline yourself not to read your own Statement without reading the Statement of the other party, too. You can go through the same sort of exercise by reading the parties' pleadings in this way – that is, the Statement of Claim, the Statement of Defence, and any further sets of pleadings such as counterclaims or subsidiary actions.

To make this process useful with respect to your behavior and your thinking, monitor yourself as you read these materials. Try to suspend judgment and defensiveness, and concentrate instead on understanding what is being said (even if you disagree with it).

A tougher challenge:

To develop this skill even further, you may want to try this more advanced exercise. An exercise like this was the biggest assignment given to my first year class in law school. We were divided into teams and assigned a complex problem, with instructions to research it and prepare a written submission for one side or the other. We worked on the project for weeks, knowing that we would later be required to prepare and deliver an oral argument on the case. Human nature being what it is, we were all pretty much persuaded of the virtue of our own side of the problem by the time we handed in our written submissions. But when the assignment for oral argument was given, we were each assigned to argue the position *opposite* to the one we had prepared for. It was quite a shock. Again, we worked for weeks, and what we learned is that the human mind is an amazingly plastic thing: by the time we were called to present oral argument, most of us had decided that we were wrong in our earlier assessment, and that the position we were about to argue was the correct one.

I am not suggesting that you should research and write in the sort of detail that those law students did, but if you are willing to devote some time and effort and to make a sincere attempt to do it, you will learn a lot by preparing as though you are to argue the other side's case.

Developing understanding of the case through BATNA:

This section will describe a method of analysis known as "BATNA", which is an acronym for "Best Alternative To a Negotiated Agreement". BATNA is used to help parties reach a realistic understanding of the advantages and disadvantages of the options open to them, in order to ensure that their decision-making in settlement negotiations is grounded in an appropriate understanding of the case, both "up-side" and "down-side".

A BATNA analysis may be done at any time: before the mediation session, as preparation, or during the mediation session, or both. In all likelihood, BATNA analyses will be done many times, as new information comes forward.

Many of the factors that go into a BATNA analysis are legal in nature, so it is best to work with the assistance of litigation counsel. As you will see from the list, below, each individual factor in BATNA analysis could be the subject of its own detailed discussion.

BATNA is not a "calculation-to-the-penny" sort of analysis. All of the factors that go into it are estimates, assumptions are made, and there is rounding up and down, and so on. The trick is to be careful that the values are reasonable, not wild guesses and not driven by wishful thinking. While the resulting pictures of the case may not be precise, they will be surprisingly helpful if the exercise is undertaken thoughtfully. As can be seen from the list of factors, below, a complete BATNA analysis requires that the same exercise be done for the case of both parties.

Some of the factors that should be included in BATNA analysis are the following:

- strength of the parties' respective cases in law;
- hypothetical best-case value of your case if successful at a trial;
- hypothetical worst-case value of your case if unsuccessful at a trial;
- estimated total legal fees to be incurred by you to the end of trial;
- legal costs recoverable by you against other side under court tariff if so ordered;
- your hypothetical maximum liability to pay costs of the other side if so ordered;
- for other side, hypothetical best-case value if successful at a trial;
- for other side, hypothetical worst-case value if unsuccessful at a trial;
- for other side, estimated total legal fees to be incurred to the end of trial;
- for other side, legal costs recoverable against you under court tariff if so ordered;
- hypothetical maximum liability of other side to pay your costs if so ordered;

Variable factors include the following, to be considered from both sides:

- even if you win, will the award be recoverable?

- how much of the case is based on credibility? Credibility issues cannot be decided at mediation, but values are discounted to reflect the uncertainty they cause: have you made reasonable discounts from your best case for the possibility that your case will not succeed on some or all of the credibility issues?
- if the dispute is about property, how will the case impact its value? Will it still exist by the time trial is reached? Will it be obsolete?
- even if you win, how much of your personal time and effort will have been expended in order to conduct the case to the end of trial, and how does the value of that time and effort compare to the best-case value? Will it have been a good investment?
- even if you win, will you have done serious or permanent damage to your business or personal reputation?
- will you lose a valued relationship because of this dispute?

There are many other factors, depending on the circumstances of each case.

Note that reference is made in these factors to success or failure "at a trial": BATNA refers to trial because the parties are headed for trial if settlement fails. Results at the trial is the "alternative to a negotiated agreement" referred to in the BATNA acronym, and the best point of reference for use in BATNA analysis.

The role of the parties at the mediation session:

Meet.

There are many opportunities to interact with the other participants at a mediation. Generally, some part of the session, at least, is spent in a general meeting in which all parties and their counsel meet together with the mediator. At other times, the mediator will rotate through a series of meetings, first with one party and his or her counsel, alone, and then with the other. This type of meeting between the mediator and one party, in the absence of the other, is called a "caucus". More information about caucuses is set out below.

An issue often arises as to whether the participants in the mediation will spend some time working together in joint session, or settle immediately into their separate rooms. The argument against joint session is usually that it will be too upsetting for the parties to work together, that tempers will flare, etc. That may be so, but if you have done some of the thinking exercises I suggest in this article, you may find that you have developed the capacity to participate in joint session without being upset. And if you think about it, you may decide that some upset isn't that big a deal anyway.

The reason I ask you to consider this issue is that a tremendous amount of information can be gleaned in joint session, which also affords an opportunity to

see the other participants in action. Attendance in a joint session is worthwhile on the basis of those benefits alone. But if you are able to participate in a constructive fashion, you may motivate another participant to do likewise – and it is much easier to demonstrate reasonableness and persuade someone of your goodwill when you are sitting at the same table than it is when you are closeted down the hall alone with your lawyer.

Listen.

Again, there is a lot of information moving around at a mediation -- Information about the case, certainly, but also information about the insight and intentions of every other participant, including counsel and the mediator. Try to put aside any anxiety or defensiveness you may be feeling, and suspend any judgments you might be inclined to make, in order to watch what is happening and to hear as much as possible of what is said by every other participant. It all goes into the mix when working on settlement. Asking questions is generally permitted, as long as they are polite, and, again, if you can keep your cool, your example may help another person to participate in a question and answer session without losing theirs.

Learn.

No matter how much preparation is done beforehand, everyone always learns something at a mediation session. It may be learning of the existence of a witness who was not previously disclosed, or the findings of an expert in an expert opinion, or a court decision that had not previously come to the attention of counsel, or a major change in the circumstances of one of the parties. If you listen carefully enough to a party, you may be able to learn what is truly driving him or her -- and if you are able to address it in a meaningful way, you may have found the seeds of a workable settlement. The opportunities for learning are endless. Try to shelve any negative feelings and learn from everything that happens at the mediation session.

Your feelings and assumptions about the case may be addressed.

The mediator may address errors of thinking such as “black-and-white” thinking, the posturing of a party as a victim, or the failure or refusal of a party to recognize ways in which he or she may have contributed to the problem. This, by itself, is a good reason to clean up your thinking, as suggested above. But understand that the mediator, in addressing such issues, is not judging or finding fault. Such issues are of concern to the mediator only because it impedes negotiations at the session. A party cannot bargain effectively if he or she does not have a realistic understanding of the problem.

Some parties approach mediation with the goal of pursuing what they think they deserve or need, or with the idea that the other side should be punished. A party acting from this sort of thinking is at a serious disadvantage in mediation because he or she is considering the problem from the wrong perspective: law is generally objective rather than subjective; it is based on the values of society, rather than what

a particular party may think he or she needs or deserves or the way he or she judges the opposing party. Again, a mediator may intervene with respect to such thinking, because such beliefs are an impediment to bargaining in the mediation.

Where a party is stuck in an emotional response to the case, the mediator may work to help the party see how emotions can hinder negotiations towards settlement, and to help the party put emotions aside and develop a more balanced view of the case.

Confer.

Unlike trial, mediation is a process in which the parties are welcome to speak.

You will have an opportunity to meet with the mediator to discuss the case. When meeting with the mediator, you should speak candidly about your understanding of the case and what outcome you would like to see. Give truthful, complete answers to any question the mediator may ask of you.

You may also have an opportunity to talk to opposing counsel. Again, give truthful, complete answers to any question counsel may ask of you, but monitor your emotional response carefully: if you are having trouble maintaining equanimity, you should consider withdrawing from this exchange. Your counsel will be watching closely to determine whether the discussion is appropriate and to see how well you are bearing up emotionally: if he or she indicates that you should withdraw from the discussion, you should be guided by his or her judgment in this regard and withdraw.

Throughout the mediation, there will be opportunities to work with your counsel to obtain legal advice, and to discuss settlement options and bargaining.

Caucus.

You will recall that a "caucus" is a meeting between the mediator and one party, in the absence of the other.

Caucus is an important part of the mediation process. While it would be wrong for a judge to meet with one party in the absence of the other, it is considered an acceptable practice for mediators to do so. These separate meetings make it possible for parties to discuss their interests and concerns directly with the mediator, in privacy. As the mediation progresses, if negotiations occur, the parties can work with the mediator in caucus to develop offers to settle and to formulate responses to any offers from the other party. At this point, the mediation may consist of the mediator shuttling back and forth between the parties in their separate caucuses, carrying information, offers and counter-offers between them.

Confidentiality in caucus.

Confidentiality is an area of special concern with respect to caucus. Because the mediator acts for all of the parties, and has equal obligations to all of them, the ordinary rule is that anything the mediator may learn is information all of the parties

at the mediation are entitled to have. This can block progress at the mediation, as parties may be hesitant to confide to the mediator out of concern that the he or she may repeat what is said to the other party.

A practice has developed to manage this:

> if a party in caucus wants to discuss something with the mediator in confidence, knowing the mediator will not repeat it outside the caucus, the speaker must identify the information and tell the mediator that it is to be held in confidence between them, without disclosure to the other side. Once the information is identified and the mediator has been told that it must be held in confidence, the mediator will confirm that it is in confidence and will hold it so, not just for the balance of the mediation, but for all time. From the perspective of the mediator, this may not be entirely satisfactory, because use of the information is limited, but he or she will probably be happier to have the information, even if it must be kept under wraps, than to proceed without it.

Participation of the party in bargaining.

In mediation, you may work with your counsel to receive and review offers to settle, and to decide on and make offers to settle of your own.

While a mediation settlement is reached through bargaining, it is not based on one party accepting the opinion of the other -- in fact, settlements are generally reached without the parties agreeing about the facts of the case or what would have happened at a trial.

Mediation focuses on solving the problem, by finding terms on which the parties are willing to settle the dispute: *if the parties are able to find a solution with which they can both be satisfied, there is no reason to pursue legal issues like "true story" and "fault", and mediation does not do so.*

The rights of the parties at mediation:

The right to consult with counsel:

Each party has an absolute right to consult with counsel in privacy at any point in the mediation.

The right to be represented by counsel in negotiations:

A practice has arisen in mediation in which settlement negotiations are often conducted by means of the mediator going back and forth between the parties, who are in separate rooms in caucus. This is called "shuttle negotiation".

Many counsel prefer shuttle negotiation because use of the mediator, who is a stranger to the dispute, can keep negotiations from becoming heated. It is a practice that has become common, and both counsel and mediators are generally comfortable with it.

Parties should understand that they are not bound by this practice, however comfortable it may be to counsel and the mediator: if a party wishes at any point to be represented in negotiations by his or her own counsel, that is his or her right.

The right to withdraw:

Where there is no consent to mediate, there can be no mediation. Where consent changes -- as, for example, where one party becomes discouraged during the mediation and wants to stop – it is the absolute right of that party to withdraw from mediation. *Each of the parties is entitled to withdraw from the mediation process at any time.*

But that decision should not be made lightly. There is no other day like mediation, no other opportunity like it, when everyone is prepared and gathered together with plenty of time and no other object but settling the case. And there is unlikely to be any more economic end to the case than that which can be accomplished at mediation: once mediation is terminated, serious trial preparation begins and legal costs begin to skyrocket. If you are lucky enough to secure a settlement later, it is unlikely to be as good on a net basis as whatever offer was available at mediation, because any gain in the settlement bargain may have been wiped out by the increase in legal costs you incurred to get to it.

A party who is thinking about withdrawal from mediation should reflect carefully – is he or she tired? Hungry? Discouraged? Frustrated? Confused? Angry? Is the party thinking something about the other party, like “they do not take my position seriously”, or “they have no interest in settling” – and, if so, *is that thought true?*

What would help the party to continue in the process? Does he or she need a walk in the fresh air? A drink of water or juice? Some quiet time alone with counsel? Caucus with the mediator? Does the party need more information or advice? – and, if so, is it available at the mediation, or should the mediation be adjourned in order to obtain it?

Any party considering withdrawal from mediation should discuss these issues with the mediator before leaving.

If it is decided that the mediation session must end, the best outcome is a commitment by the parties to return on another day to continue, having used the break to do whatever further preparation will assist them going forward; however, there is no obligation on any party to return to mediation on another day. All parties are entitled to simply walk away. Returning to mediation is a matter for negotiation and renewed consent -- but you can be sure that the mediator will be trying to get such an agreement so mediation can continue on another day.

Final advice: be patient!

Mediation is not magic. It can work, but it is a process and the process takes time.

There is no point pushing to go faster or to get to the end: there are other people involved – not just the other party(s), but counsel as well – and they are all working through the process in their own way.

Understand that the bargaining process can involve many offers and counter-offers going back and forth, sometimes for hours. Try not to be defensive or discouraged about the early exchanges, because they rarely reflect the positions parties will take later in the process. Each exchange is a new source of information if you are alert for it.

You must be prepared to wait at various stages of the mediation. While you are waiting, try not to fret. You may be able to use the time to review and plan with your lawyer, or you may simply rest and conserve energy until it is your turn to work. When it is your turn, work as productively as you can.

Future articles in this series will explain various aspects of mediation in more detail, including the role of the mediator, how the mediation session is conducted and what sorts of settlements are possible at mediation. You can access the series through the Index for "Understanding Mediation" at jdemaray.com.