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Forum

Ability to Earn Parties' Trust Is Key to a Mediator's Success

By Alexander S. Polsky

Great care must be taken in selecting a mediator. In highly emotional matters, the mediator must possess sensitivity to the parties and be a good listener who is patient and attentive.

Many mediators have only one style. Others are skilled at shifting styles to meet the needs of the case or the individuals involved. Mediation morphs, meaning the mood of the mediation shifts during the session itself. This calls for a mediator who can shift styles and address the needs of the individuals.

The mediator is counsel's partner in designing the process. The expectations of the attorneys and the mediator as to the structure of the mediation should be the identical. A pre-mediation call is useful to align those expectations.

The purpose of the call is to discuss the length and format of the mediation. The more emotional, the more time is needed. Once momentum has begun, there are few things more destructive to the process than ending prematurely.

Submit briefs to the mediator and opposing counsel not later than the Friday prior to the session. This permits the mediator to review them in advance.

Briefs should be informative, and not too adversarial. Each side should acknowledge their weaknesses, as this builds credibility. Set forth the nature of the claim, its impact on the client and some ideas regarding the relief sought. The respondent should identify its view of the issues; discuss challenges each side will have, the impact of the claim on the respondent and suggestions for resolution.

Little is gained by withholding briefs from the other side. The earlier submitted the better — as this permits the other side to analyze and consider the information. Information that the parties do not want to share should be sent along with the brief going to the mediator only.

The key to success is the mediator's ability to earn the trust of the parties. Often the mediator will begin in a very friendly and detached manner, to assure a relaxing and hospitable session. Problem-solving should govern the demeanor of the mediator.

It is an often-overlooked requirement for the mediator to introduce the process before the parties exchange views. The mediator defines the goals and sets the tone.

Risk-focusing examines the risks and costs attendant to proceeding forward. This is the essence of risk-based mediation. It is very effective, particularly in cases where the risks for both sides are extreme. However, before this can occur, the mediator must obtain the trust of the parties. The mediator cannot talk about the risks unless the recipient feels that the mediator understands their perspective.

The purpose of a joint session is open constructive communication in the presence of the decision-makers. This is a plenary session where the mediator asks each side to present its views on the situation, in an open forum. Critical is the rule of uninterrupted presentation with the acknowledgment that each side will hear things they disagree with.

Some mediators encourage facilitated dialogue by asking questions of the parties themselves (as opposed to their legal representatives) in the plenary session. This should not be a surprise and should be agreed to in advance.

The purpose of private caucus is to identify each party's interests, and make an effort to determine how far apart the parties really are.

The mediator must learn the nature of the dispute, and identify any below the line issues. These are issues that transcend traditional remedies. They may be as simple as a handshake or apology, or as complex as a structured retirement plan. Typical ranges of issues include: issues of fact; substantive legal issues; relationships issues; monetary thoughts; and non-monetary issues such as anger, conciliation (an apology may be worth thousands of dollars), acknowledgment, need to vent (to the mediator) and perhaps local verdict ranges.

Traditional private caucus provides the parties an opportunity to vent and tell their story. The trained mediator will listen attentively and ask few questions. Questions will be open-ended "How did it feel?" type of questions. Later, after trust is earned, the mediator will explore risks and downsides.

As the process proceeds, the mediator moves from needs and expectations to the solution creation process. In complex cases, there are multiple issues to be resolved en route to global resolution. The mediator will focus the process on the smaller issues, and use them as the building blocks for global resolution.

In facilitated negotiation, the mediator avoids traditional negations. The solutions may be presented as neutral proposals. Discussions are concept-oriented. Once both sides agree to the concept, the mediator closes the settlement. In this way there is no negotiation winner.

This differs from distributive negotiation, the tedious and emotional process of demand/counter offer/counter demand, etc. The more emotional the dispute, the less appropriate is distributive negotiation.

When the mediator is with one party, the mediator should provide them with homework.

A good initial approach is to ask parties to write every reason to settle and every reason to continue the dispute. The mediator will discuss the results of the exercise upon return.

Another exercise is to ask the parties to answer four questions: What is the likely outcome if the other side's version is accepted 100 percent by a jury? What is the likely outcome if the fact finder accepts some, but not all of the case? What is the total dollar cost of proceeding from this point through trial? What are the non-dollar costs of not settling? Balancing these possible outcomes, what is the present settlement range?

This risk-managed approach focuses the parties on business considerations, rather than on the emotional issues, and compels thoughts about the interests of all sides. Think about issues and creative solutions in advance. There are many ways to address specific issues and interests that arise in virtually any mediation.

Bring a settlement agreement and a laptop computer to finalize the settlement on the spot. Otherwise use a stipulation for settlement (See Code of Civil Procedure 664.4). Let's face it, it is not uncommon for buyer's remorse to set in. A signature is a powerful thing. Get one.

So, why mediate? Transfer of power and control of risk is the answer. In arbitration, 100 percent of the power is given the arbitrator. In trial, it is given to the jury. In mediation, the risk is managed and the outcome controlled. The key to success is your preparation, and the selection of the appropriate manager (mediator).

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