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Myths and Misconceptions in Mediation

BY RANDALL P. CHOY

Being a partner in boutique litigation firm while also mediating cases for JAMS, it has given me the unique opportunity to meld the two approaches to resolving disputes. I often enjoy telling opposing counsel, and sometimes with co-counsel, "Let me put on a different hat," which allows me to present a case either as a mediator or as a litigator. With this versatility, I can advance ideas without igniting anyone's emotions.

Alternative dispute resolution (ADR), especially mediations, has become the primary tool for resolving cases before trial. Roll the clock back 40 years when ADR was in its infancy, and arbitration was used to avoid the costs and risks of a full-blown trial. Judicial arbitrations were initially somewhat useful. These were conducted by practicing attorneys, and awards were often accepted. Even if the attorneys strategically "kept their powder dry" in abbreviated proceedings, the parties got their day in court. If one party filed a trial de novo, an indication of a third party's evaluation was helpful. Because of the current tendency to file for trial de novo, only binding arbitrations are truly useful in most cases.

In this article, I will extol the "wonders" of mediation and dispel a few myths.

Joint Sessions Polarize the Parties

True and false. As a litigator, I was pretty resistant to the idea of joint sessions. Having the parties appear in the same room can be incendiary, and unpredictable without a lot of preparation. It doesn't have to be that way. The first step is to have a pre-mediation conference call, so that the mediator can get a sense of the relationship between the parties. The idea of a joint session can be floated out there, harmlessly, and the ground rules can be established. Without a conference call, the idea can be broached in caucus at the beginning of the mediation. The timing can be crucial, and the joint session doesn't have to be at the beginning. There are two rules that I follow: I will not coerce a joint session; it has to be voluntary. And there will be no discussion of the case. The purpose of a joint session, if it occurs, is to bring people together.

Ex Parte Communications Are Prohibited

False, except in certain court-supervised proceedings; e.g., for family law cases. Mediations

are by nature ex parte communications, and pre-mediation sessions are generally covered under confidential and privileged communications. However, similar to the actual mediation, it is prudent to let the mediator know when sensitive information is being imparted, and whether that information can be shared with the opposing party. Likewise, sensitive documents should be clearly marked "confidential." Each mediator is different, but my practice is to confirm confidentiality of information imparted to me during caucus, or a telephone conversation, prior to ending the communication. Parties should emphasize to the mediator when particularly sensitive information has been imparted. After all, we are human and may forget!

Talking About Anything Unrelated to the Case Is a Waste of Time

False. Yes, it might appear so, and in rare cases, it might even be true. However, it is important to establish some credibility with the parties, which is difficult to do in a pressure-filled situation, and in a limited amount of time. I liken it to picking a jury, where every action and every word are critical. The mediator needs to be a little nosy, give a little of himself or herself, and yet maintain neutrality, and establish credibility as a lawyer, and mediator. As a fourth-generation San Franciscan, I find this an excellent ice-breaker. Bringing up sports or asking about participants' family and backgrounds can lead to discussions that reveal who the parties are and maybe even what their goals are. If the parties are amenable to a joint session, this is what we talk about.

Sometimes a party will want to get right into the case, and I will try to delay that in order to learn a little more about that party, but if the party is adamant, I'll go with the flow. Being flexible and able to read the room are more important than adhering to dogma, which goes to the next myth.

You Should Pick a Mediator Based on His or Her Style

True and false. Of course, it is comfortable to pick a mediator that embodies your preferred style. Maybe you want a mediator who shuttles back and forth merely as a messenger; or maybe you want one who is tough, and will browbeat the other side; or maybe want one who is quiet, contemplative and evaluative. I happen to think that a good mediator should be all of those things, someone who can remain flexible, agile and adaptable. I try not to enter a mediation session with any preconceived ideas about how it should go. It is most important to be receptive to clues that the mediation approach must change.

It's All About the Money

True and false. Sometimes, it is indeed just about the money. A typical personal injury case might just be solely evaluative in terms of liability, the injury, medical treatment and collectability. But then it could go back to the sandbox, especially in family disputes, which often come up in probate matters. Johnny isn't mad at Mary because Mary threw sand at him; Johnny is mad at Mary because Mom didn't punish Mary. Getting to those issues sometimes unearths the non-monetary issues preventing resolution.

Culture Doesn't Matter

Mostly false. Using the examples of Chinese and American cultures (which are the only two I can speak confidently about), culture may not matter at all; that is, there are so many permutations—i.e., the human experience, the individual—that culture may in fact make no difference at all. Without making it a pejorative, I have met people with ethnic backgrounds who identify only as Americans. But, the vast majority of Chinese people I have worked with, do appreciate a familiar visage, especially older people, who feel a little less comfortable with American culture. In particular, speaking their language, or attempting to say a few words in it, is a terrific ice-breaker and a good way to establish a connection. I know a non-Chinese mediator, who does a lot of mediations with Chinese speakers. He does not speak Cantonese very well, but he is a terrific mediator who generally establishes a good rapport with the parties upon trying to speak their language. I had a case where the various parties spoke Cantonese, Mandarin, Hakkanese, and English—a virtual merry-go-round of languages and translations—yet it somehow worked because the mediator was able to converse in at least three of those languages, and thereby establish the necessary rapport.

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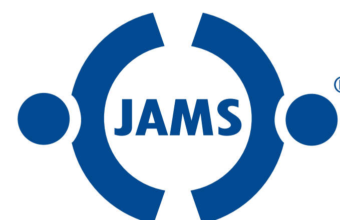

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