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What is mediation advocacy?

By John H. Sugiyama

Mediation advocacy and trial advocacy are not the same. In what ways, however, are they different? Should attorneys who are comfortable in courtrooms be assumed to be equally nimble in mediation settings? Should the attorneys designated to take the lead at trial also be projected as the ones to guide parties in mediation?

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Strategic Differences

At some moment during pretrial proceedings, the litigation road may diverge, with trails leading to two different destinations, trial and mediation. Too often this will occur on the eve of trial. Attorneys may be referred to mediation by the presiding trial judge. Or attorneys may propose mediation on their own initiative. Either way, their probable attitude will be that trial preparation subsumes readiness for mediation. *See* John H. Sugiyama, "The Art of War in the Kingdom of Probate: Part 1," JAMS (Sept. 30, 2020).

Such an orientation would be misguided.

Confronted with a divergence in roads, the poet perhaps may be constrained to choose only one, leaving the other untaken. *See* Robert Frost, "The Road Not Taken." Attorneys, in contrast, may seek to traverse both, perhaps concurrently. But regardless of the decision made, travel along each requires a different strategic vision.

For trial, success will depend upon the presentation of relevant, admissible evidence and the elucidation of supportive legal principles. For mediation, success may follow without regard for the seeming weight of evidence and in spite of potentially applicable legal precedent.

The processes of persuasion thus differ between trial and mediation. Trial may be viewed as a singular event, with orchestrated movement from jury selection to return of verdict. The evidence and arguments that may have a persuasive effect on a jury or judge will be offered only during that dynamic, focused proceeding. Mediation may also be viewed as a discrete event, but with amorphous, unfettered facets. Any evidence and arguments that could be persuasive often will not be presented directly to the parties during that less-structured proceeding.

In view of these differences, the process of persuasion leading to mediation is not necessarily linear. Most obviously, the process must be commenced before the mediation itself. But how then does the process occur?

Any mediated settlement will be based on a recognition of self-interest, that an agreement reached without resort to trial will be beneficial to the parties in some way. Parties may perceive that the achievement of all objectives through trial will not be possible or will be too costly. Or parties may perceive that certain objectives may take too much time to achieve or will be undermined through events not subject to control through trial.

These perceptions and realizations will follow from evidence that the parties possess or acquire from others during discovery. But that process also implicates an emotional element about the significance of that evidence. The truism holds that people view matters differently. The same evidence may be assessed in varying ways from person to person. On a continuum, the evidence may be disregarded entirely by some, yet accorded too much weight by others.

Thus, the mediation advocate must ensure that the opposing party is made aware of the evidence that the former perceives will be helpful during mediation. In so doing, the mediation advocate must give the opposing party cause to recognize that that evidence may undercut the latter's interests. Otherwise, the opposing party will have no incentive to reach a settlement.

This process of persuasion may begin with the initial complaint or petition, or answer or response. The averments of the opening pleading may be drawn together through a narrative summary that artfully explains why the authoring party ultimately should prevail. The process may continue through particularly focused discovery that may illuminate specific evidence that adversely affects the opposing party's interests. The process may then culminate in the submission of a mediation statement that effectively serves the same purpose as an appellate brief. (Some attorneys may take the position that any such

mediation statements should be shared only with the mediator and not with the opposing party. The perception may be that the statement contains assessments and offers that should remain confidential. Yet it is the opposing party, not the mediator, who must be persuaded for any agreement to be reached. An accommodation that may be helpful may be for the attorney to submit two statements, one to guide the mediator and the other to persuade the opposing party.)

Assuming that efforts at persuasion have been reasonably fruitful, the mediation advocate must account for yet another difference. The prayer of the complaint or petition defines the relief that may be obtained through trial. Relief through mediation, however, faces no such constraint. *See* John H. Sugiyama, "The Art of War in the Kingdom of Probate: Part 2," JAMS (Oct. 8, 2020).

Confidentiality, comprehensiveness and closure are all concepts not frequently associated with any verdict or judgment returned by a jury or judge. The opportunity for a creative disposition of a dispute also is foreign in the trial context. In contrast, regardless of the prayer for relief, the mediation advocate may creatively fashion a comprehensive settlement that can bring closure to a multifaceted dispute.

Tactical Differences

If trial and mediation thus require different strategic visions, should the same attorneys be assigned or retained to handle both? A similar kind of question engaged the legal profession only a few decades ago when larger firms began to establish appellate sections within litigation practice groups. The development toward litigation specialization drew impetus from the recognition that trial and appeal require different skills, and that attorneys are not necessarily adept by ability and by temperament to handle both equally well.

Any answer to the question, however, must account for the economic structure of many practice areas. Attorneys who specialize in estate and trust law or family law often work without associates. Even for partnerships, such attorneys frequently choose to limit the size of their firms. Nevertheless, even without a formal division of responsibilities, attorneys would benefit from the understanding that trial and mediation should not be approached and handled in the same way.

The mediation advocate must know the critical skill of how to work with the mediator. Unlike a jury or a judge, a mediator decides nothing, serving instead as a messenger, facilitator, and evaluator. The mediator may help guide the parties toward resolution of their dispute, but ultimately must work within the constraints imposed by the parties themselves. *See* John H. Sugiyama, "Why Are Cooks Called Chefs? In Search of a Title for Mediation Advocates and Specialists," Daily Journal (Feb. 4, 2021).

The mediation advocate consequently must discern how the mediator may likely convey demands, offers and accompanying information from party to party. The mediation advocate must illuminate for the mediator the points that may facilitate an emotional desire by the parties to reach resolution. Similarly, the mediation advocate must highlight for the mediator the points that may lead to an objective recognition by the parties of the benefits of settlement. In these ways, the mediation advocate must guide the mediator.

The mediation advocate moreover must be capable of anticipating how an offer or counter-offer will likely be interpreted by an opposing party. When to demand or accommodate, what to accept or concede, and how to present or modify are matters that the mediation advocate must constantly assess. *Id.* An ancient aphorism captures the essence of this attribute: "Know the enemy and your own. And victory is in sight." Sun Tzu, "The Art of War," translation by Michael Nylan. (New York: W. W. Norton & Company, 2020), p. 107.

The mediation advocate must also be capable of adapting to ever-changing circumstances during mediation. An offer may be withdrawn unexpectedly. Or recalcitrance on a preliminary point may be unforeseen. These may be manifestations of an opposing party simply staking out an extreme position at the outset, with the intent of thereafter giving up a little at a time until an end is reached. The mediation advocate must be sufficiently agile to respond effectively to "these so-called salami tactics...." Winston Lord, "Kissinger on Kissinger" (New York: All Points Books. 2018) p. 103. *See* "The Art of War in the Kingdom of Probate: Part 2," *supra*, p. 2.

Mediation thus requires skills and attributes not necessarily associated with trial. The same attorneys may not be equipped to handle both facets of litigation. Yet even if a division of litigation responsibilities may not be feasible, attorneys should be cognizant that mediation advocacy is significantly different from trial advocacy. ■

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