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Reflections on the Quest for the Elusive Trial in the Dispute Resolution Pantheon

By Hon. John H. Sugiyama (Ret.)

Litigation attorneys spend years preparing themselves for trial. Few opportunities for trial occur, however. The pursuit of the elusive trial nevertheless persists.

Surveys about trials in the contemporary civil and probate context are illuminating. At one time, between 2% and 4% of cases were resolved through a verdict. A later assessment lowered the figure to 1%. Now, one review suggests a figure closer to 0.6%.

Trials thus are no longer the principal means of resolving legal disputes. Alternative processes are the norm and trials are the alternative.

Yet litigators direct most of their attention to an improbable outcome. They prepare for trial as if it were a set-piece battle that will end their war, or at least compel an armistice. They follow rules of engagement loosely formulated by predecessors who championed the cause of large retainers and unlimited billable hours. They perceive that adherence to these practices will enable them to maneuver through trial in an orderly manner from beginning to end.

Litigators recognize that trial preparation—a critical facet of this work—is costly. Unrelenting discovery and motion practice come at a cost. Thus, by engaging in this process, litigators are ascribing to certain assumptions:

- A trial is inherently valuable regard less of result.
- A decision by a judge or jury is preferable to a resolution achieved through negotiation by attorneys and parties.
- The outcome of trial will be favorable or tolerable to the attorneys and parties.
- A termination, or least an abeyance, of the dispute between the parties will follow in the wake of trial.

These assumptions, however, wither under scrutiny. The first is entirely subjective. The second signifies an unnecessary willingness to transfer control of any result from attorneys and parties to a judge or jury. The third is closer to a wish than an assurance. The fourth reflects a desire, perhaps unrequited, for a cessation of hostilities. Trials are not founts of eternal truths about the good and the bad.

Despite these limitations, litigators often profess to prefer trial to negotiation. Civil judges may refer and probate judges can order them to mediation. They nonetheless can decide for themselves whether to accept mediated terms or offer none, thereby complying with the form but not the intent of the judicial referral or order. They can decline to change anything about their approach to litigation. They can accept mediation as an afterthought before depletion of the retainer.

Questions follow about the consequences of continued adherence to a trial-centric approach to litigation. After all, is not mediation merely an extension of trial preparation? Are not trial practice and mediation advocacy essentially the same?

Trial as the Extension of Mediation

Trial in certain instances may be necessary. The threat of trial is like the display of a magical sword. If unsheathed sparingly, the sword will command respect instantly. If used frequently, the sword may be shown to have no powers at all. Similarly, litigators must occasionally demonstrate a willingness to risk all at trial to maintain a façade of confidence during a heated negotiation. But litigators also must not invoke the specter of trial casually, lest they lose the opportunity for negotiation.

Trial may also be perceived as a predicate for negotiation when cases are pending with similar, recurrent legal and evidentiary issues. Trials then may be helpful to ascertain the prevailing attitude of jurors toward questions about liability and damages. But once these issues have been decided through sufficient relevant permutations, the conflicts tend to shift from trial to negotiation.

Beyond these limited situations, Carl von Clausewitz's *On War* offers intriguing guidance for litigators. In it, von Clausewitz writes that the result of war is never final, that it "is not merely an act of policy but a true political instrument, a continuation of political intercourse, carried on with other means."

These maxims may be adapted to trial. Trial should be wielded as an instrument of negotiation. The latter holds the greater opportunity for the achievement of a lasting peace between parties in conflict.

Of course, litigators may choose to reject this view. They may presume that the aftermath of trial is beyond the scope of their engagement. They may rationalize that in any event a judge or a jury will be compelled by applicable law, relevant evidence or both to reach a decision favorable to them. They may conclude that enduring the trial process will have tangible benefits for them.

These views, rooted in some sense of probability, however, can seldom if ever be certain. The trial calculus has too many variables. The damages that may be awarded and the array of issues that will be decided will be unpredictable and indeterminate.

Mediation instead can yield benefits unavailable through trial. Even if litigators can play three-dimensional chess, the fourth dimension of time will be beyond their grasp at trial. But through mediation, they can influence time, deciding when to negotiate, when to settle and when to have any agreement take effect.

Litigators can also ensure that any agreement is comprehensive, certain and designed to bring closure to any dispute. These results are not always available through trial. Lit-

igators may reject offers that are inconsistent with their perceived interests, proposing resolution alternatively on terms more acceptable to them, including confidentiality. Compromise may be a requisite condition for resolution. But compromise is not compelled.

Since the beneficial facets of trial and mediation thus are different, questions then follow of whether preparedness for mediation flows from trial preparation and whether trial practice and mediation advocacy are the same.

Trial Practice and Mediation Advocacy as Different Forms of Art

Both trial and mediation require persuasion, but of a different kind for each.

In trial, the process of persuasion involves the presentation of relevant, admissible evidence and the articulation of pertinent legal principles. For mediation, the process may proceed without regard for the weight of evidence and despite applicable legal principles.

The time for persuasion also is different. Trial may be viewed as a self-contained event orchestrated from jury selection to return of verdict. Evidence and arguments are presented during that dynamic, singular event. Mediation may also be viewed as a discrete event, but with unfettered aspects. Evidence and arguments usually are not presented directly to the parties during the less-structured proceeding.

The process of persuasion consequently may be linear for trial, but not always so for meditation. Most obviously, for the latter, the process must be initiated before the mediation itself.

In this respect, any mediated settlement is based on perceptions of self-interest, that an agreement will be beneficial to the parties in some way. Parties may recognize that they will not achieve all desired objectives through trial at a reasonable cost. The realization of the objectives could take too long. Any objectives ultimately achieved could also be undermined by developments not subject to control by trial.

Attitudes about self-interest, however, are subjective, varying from party to party. Hence, beginning before the mediation, litigators must be capable of guiding their own clients as well as those of opposing counsel toward a shared understanding of what may be mutually beneficial. Part of that process will entail finding a way to introduce the element of doubt into assessments of evidence and law. Otherwise, if parties decline to acknowledge the possibility of weakness in their positions, they will have no incentive to compromise.

Litigators must also be capable of adjusting to a different decision-making matrix. Mediation draws upon elements of reflection and action different from those employed during trial. In trial, a judge or jury decides the outcome. In mediation, the parties must make their own decisions. This pivot from letting others decide the outcome to having the parties themselves resolve their own dispute requires a different kind of orientation by litigators.

If trial and mediation thus implicate different strategic visions, should the same attorneys handle both?

Experience may be the classical means for mastering the art of trial work. Skills, moreover, may be tempered through continuing legal education courses on virtually every facet of trial, including pre-trial motions, *in limine* motions, opening statements, direct and cross-examination, and closing arguments. Other courses may be available that have the designation of "advanced" to suggest some level of enhanced training.

But such skills may be lost in translation in the mediation setting, for which other attributes will be more significant. Perhaps foremost among those qualities is an understanding of the role of the mediator. In contrast to a judge or jury, a mediator decides nothing, serving instead as facilitator and occasional evaluator. The mediator may help promote movement toward settlement but may do so only within constraints imposed by attorneys and parties.

Litigators thus must be able to envision how the mediator may convey proposals from party to party. In doing so, litigators must guide the mediator to an appreciation of the matters that may lead to recognition by the parties of the benefits of settlement.

Furthermore, litigators must be able to anticipate how opposing parties will interpret any offer. When to demand or accommodate, what to accept or reject and how to present or modify are matters that litigators must continually assess. As Sun Tzu wrote in *The Art of War*: "Know the enemy and your own, and victory is in sight."

Litigators must also be agile in responding to ever-changing circumstances. A party may display intransigence on an issue or may make an unexpected proposal. Litigators must be able to discern whether parties are simply staking out an extreme position at the outset, with the intent when pressed of acting as though slicing salami, giving up a little at a time until an end is reached.

As reflected by this discussion, trials occasionally do serve a necessary purpose. But trials occur infrequently and involve an uncertain outcome. Mediation holds allure for the greater probability of closure for parties. Yet not all litigators are adept at mediation. The professional attributes associated with both endeavors are different. In seeking mastery of their art, litigators should heed the differences between trial and mediation in the dispute resolution pantheon.

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