Judge Daniel Weinstein's Selective Insights on Mediation

By Norman Feit

For many decades, top plaintiffs and defense law firms have looked to Hon. Daniel H. Weinstein to mediate complex and high-stakes disputes. The author first encountered Judge Weinstein as a party representative in the context of a massive securities class action involving virtually every IPO issuer and underwriter during the dotcom era. The mediation sessions required four banquet-sized conference rooms to accommodate hundreds of lawyers representing plaintiff firms, defense firms and insurance carriers. Judge Weinstein deftly maneuvered among the legal armies, worked relentlessly over time as the legal rulings and dynamics shaped the dispute, and ultimately forged a settlement.

Those firms have turned to Judge Weinstein often because he embodies the critical qualities of many successful mediators: a track record of settlement success, the intellect and acumen to grapple with thorny legal issues, the ability to listen, patience, empathy, creativity to forge settlements, boldness, persistence, confidentiality and integrity, and a keen sense of humor that can defuse tense situations.[1] Indeed, Judge Weinstein has contributed heavily to the growth of mediation itself by helping to found leading ADR platform JAMS and training generations of international mediators including through the Weinstein Fellows program. He has frequently lectured and written on the subject. His mediations have touched virtually every facet of the law and transcended U.S. borders and foreign states.

Meanwhile, when not making peace among litigants, he has devoted his time and resources generously to youth organizations and foundations (still near to his heart after heading the Juvenile Court in San Francisco), and environmental causes (including the Environmental Law Institute and the Baja Coastal Institute). He shares the distinction with several former U.S. presidents of receiving the *Cardozo Journal of Conflict Resolution*'s International Advocate for Peace Award, and with Archbishop Tutu of being honored with Pepperdine Caruso School of Law's Peacemaker Award.

So it seemed fitting to sit down with Judge Weinstein to enable us all to benefit from his perspective and observations on a number of issues faced by countless accomplished and aspiring mediators. What follows is a recent interview with him on some of these important and evolving topics.[2]

Q. In selecting a mediator, attention is often given to the mediator's philosophy and approach—facilitative, evaluative or transformative. Are those mutually exclusive buckets, or can an effective mediator draw from all disciplines?

A. Beware of placing too much weight on academic theories of mediation or nomenclatures that define precise and mutually exclusive mediation methods. The reality is that a good mediator is all of those things and knows when to call on which modality or combinations to address different situations. At the more facilitative end of the spectrum, I sometimes function as a high-priced courier, keeping negotiations open and the parties interested while transmitting their bids and offers back and forth. In other situations, the parties want and need a trusted neutral to weigh in with judgment and evaluation. There are also times when some sort of transformation is needed to foster a more constructive dynamic. All good mediators are good listeners, can switch modalities to accommodate the dispute, the parties, the context, and other factors which may evolve over the course of the mediation. A generally facilitative mediator may introduce evaluation through gentle observations on the parties' positions or questions about weaknesses a party may not have considered. Conversely, an evaluative mediator knows when to let the views resonate and step back into a more facilitative role. Good mediators tailor the dynamics and process to the parties in the situation at hand, subject to ensuring that the process is safe and confidential, and that the parties ultimately control their own destiny.

Q. Parties and their lawyers often come to a mediation with one-sided views of their case and extreme settlement ranges. How do you make them more realistic and find common ground?

A. Mediators spend far too much time and effort grappling with disruptive and unproductive high- or low-ball negotiating tactics. A stratospheric demand inevitably invites a miniscule offer, and vice-versa. Unfortunately, there is no secret formula to obviate that type of game playing.

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But I try to spend time at beginning to preempt unrealistic negotiating tactics by reassuring the parties that being reasonable won't be held against them. Often, I conduct private sessions with the parties to ferret out their true appetites and establish a mutually reasonable good faith range. Ultimately, the key is to avoid the tyranny of talismanic midpoints and find a workable range. That doesn't mean the ground within the brackets is easy, but the process becomes smoother and a resolution is more achievable by avoiding the early wasted time in which so much damage is done.

diators dispose of submissions altogether. But a thoughtful submission that is civilized in tone, explores the party's strengths and weaknesses, and offers creative settlement structures and ranges can educate the mediator on fertile ground and set a positive tone for progress. That is especially true if the submission is candid and realistic—possibly in a separate submission for the mediator's eyes only to avoid showing a party's hand to the adversary. Most important, the submission should have the client's buy-in to ensure that lawyer and client are on the same page.

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Q. Are opening statements useful to kick off a mediation, and how do you manage statements that inflame the other side or are really directed at a lawyer's own client?

A. Opening statements can be an enormous asset when used properly. They are an art form in mediation as much as at trial. Yet, many lawyers who would spend days preparing an opening statement for a courtroom don't spend 30 minutes preparing one for mediation. To be effective, they require a much different language than in a litigation venue. To be sure, a good opening does not surrender or give in, but at the same time it extends an invitation for constructive, thoughtful, and creative negotiations, opens up avenues, eliminates flotsam and jetsam, and calms down emotionally evocative issues. Done the right way—with the right tone, body language, and eye contact, and addressed to right people (perhaps the head of the business or injured person)—a good opening sets the tone for effective negotiations.

Conversely, an ill-prepared or inflammatory opening can torpedo or truncate the mediation altogether. So often, litigators declare victory, castigate the opponent, and signal that anything other than nuisance value is a futile hope. Those approaches invite the adversary to abort the mediation or become entrenched, not to engage meaningfully in exploring common ground.

Q. The same basic question as to mediation submissions. Is there a set formula and are mediation submissions even useful?

A. Your recent article on mediation submissions[3] provides a great overview. Mediation submissions that simply declare victory and replicate litigation positions are not very helpful. That happens so frequently that some me-

Q. Mediations can get quite heated, whether because of the embedded emotions in the dispute, a clash of personalities, or a reaction to the other side's positions and aggressive tactics. How do you keep the participants cool and manage through the emotions?

A. Some people are more gifted at managing emotions than others: how do you calm people down and reset the tone? The great overlooked techniques are pause, break, and silence. If counsel is the source of the heat, maybe pull them aside together (to avoid singling out either of them) and explain the destructive impact of what they are doing. If a client is the issue, taking a break can help, either to spend some cool-down time with the lawyer or even with the mediator one-on-one letting off stream. Finding the safe space to calm waters is an art form every mediator has to learn.

Q. Have mediations been more challenging in a virtual environment since the pandemic's onset, do you see virtual mediations continuing, and do you have any tips for effective virtual mediations?

A. Because successful mediations depend on a lot on human interactions and body language, many of us were worried that the remote environment would render the process ineffective. To my surprise, virtual mediation has been a lot better than expected. That doesn't mean that in some mediations I haven't hungered to be there, to look someone in the eye and take a walk down the hallway. We all need to be wary of "Zoom fatigue" and the potential for becoming too impersonal. But with modernization and virtual technology, people can look at each other when they talk, and it is possible to reach people in far-off places to get participation never before available—whether the busy executive, insurance agent, or family member call-

ing all the shots from home. In recent mediations, virtual technology has enabled participation by village leaders in an underdeveloped country, police commissioners, and school board members. And mediations that might not have happened at all due to logistics or expense are now feasible. The visual technology also facilitates more personalized follow-up than sterile phone calls. To make up for the loss of in-person interaction, I rely a lot on relaxing and acclimating people at the onset through a series of ex parte introductory sessions to get to know each party before mediation, so we don't walk into the mediation gallery as strangers. In a way, with the right investment, the process can be far more intimate than everyone entering a big conference room.[4]

Q. Many mediations at some point hit an impasse. How do you get past that sticking point and keep things moving?

A. The measure of many mediators—whether they are good versus very good—is how effective they are at employing modalities and techniques to break impasse. I am still waiting for the case in which both parties waltz to a number without impasse. The mediator's arsenal includes adding new components, brackets and counter-brackets, orchestrating moves contingent on moves by the other side, time out (even overnight or weekend), and of course the mediator's proposal. When and how to use those and other tactics comes through experience and timing, but the most important thing is not to give up. When none of the normal techniques work, review with the parties all that has been accomplished and how far they have come to the goal line. Maybe they need to retreat for a while to consider the alternative risks and costs of continued litigation. Sometimes, the pause may occasion a change in dynamics due to legal rulings or business and market developments.

Q. Do you have any guideposts for when and how to formulate a mediator's proposal?

A. The mediator's proposal is also an art form in and of itself, and can be a very effective but dangerous tool. I spend days on mediator's proposals in my course at Pepperdine—including when to make one, what it should contain, and its timing. I also spend a long time thinking about the potential pitfalls of a mediator's proposals and how long parties have to consider it. Where appropriate, I may include a deal point memo tailored to each side explaining why they should give it careful consideration and laying out risks from a neutral's perspective. But my overarching protocol before making a proposal is to vet the range with each side and give them a question to ferret out whether the proposal will be dead on arrival: will you give a proposal in that range careful consideration? Generally, the mediator's proposal can be used only once, so if I don't have a commitment to consider it carefully from both sides, I save it for a more opportune juncture. Proposals are particularly effective close to the finish line when a party may not want to bid against itself and the proposal coming from the mediator instead provides safety and cover.

Q. What are the biggest mistakes made by mediation participants?

A. The mistakes made by mediation parties and advocates are too numerous to summarize in a paragraph and are grist for a separate article.[5] Most important, mediation advocates have to be trustworthy, and their handshake has to be golden. But beyond their integrity, advocates stumble most often where they fail to prepare. They should come to a mediation with the same amount of thought and energy as a trial. More lawyers are learning how to practice their advocacy skills in the context of mediation than a decade ago, but not enough.

Q. You and other successful mediators attract repeat assignments from the same litigants and law firms. How do you maintain your impartiality and credibility despite the relationships that develop?

A. Mediators attract repeat business precisely because they are effective at getting disputes settled at ranges all parties find reasonable. Rather than giving rise to some sort of conflict, the relationships that develop are assets by building credibility and trust in the mediator. At the same time, a mediator's ethical responsibilities are sacrosanct. If a relationship might interfere with neutrality, the mediator should decline the assignment. And relationships can never invite a breach of confidence or overstepping of authorization.

Q. What advice do you have for aspiring mediators at the start of their career?

A. The mediator's "fix" from early and creative resolutions is a high, and brings satisfaction not available in many other professions. To get there, however, mediators must often walk into the room, absorb all the stress and dissension as a lightning rod, prepare to be shot as the messenger, and spin things back with the poison and thorns taken out. To maintain poise and sanity, a mediator needs to find ways to expunge all of that angst and stress, whether through exercise, yoga or other techniques. The mediation process is intense, and the mediator will wear down absent training like an athlete.

Endnotes

1. For a discussion of these mediator qualities, *see* Norman Feit, *Critical Mediator Qualities Viewed from the Advocacy Trenches*, NY Dispute Resolution Lawyer, Vol. 12, No. 2 (Fall 2019).
2. Mr. Feit acknowledges and appreciates the helpful suggestions of Laura Kaster and Professor Jacqueline Nolan-Haley as to the topics for the interview.
3. Norman Feit, *Drafting Effective Mediation Submissions*, AAA Dispute Resolution Journal, Vol. 75, No. 3 (August 2021).
4. For a discussion of the benefits of pre-mediation triage, s*ee* Norman Feit, *To Triage or Not To Triage,* CPR Alternatives Vol. 39, No. 3 (March 2021).
5. *See* Daniel Weinstein, *Reflections of a Leading Neutral on Mediation Advocacy* in Robert Haig, Business and Commercial Litigation in Federal Courts, 5th ed (Thomson Reuters, 2021)..