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Dipping Into the Secret Sauce: Developing Mediation Strategies That Hit the Right Notes

Introduction and overview of the study:

Most civil litigation matters find their way into mediation at some point. Over the last 20 years, most courts require the parties to participate in some form of mediation or settlement conference. Mediation has changed quite a bit over the last 20 years. All mediators are not the same; some are highly skilled, others are not. Despite advances that have been made in mediation, claims professionals, lawyers, and clients face substantial challenges that impede their goals in mediation – whether the goals are full resolution of the dispute, repair of relationships, improve communication or send signals to opponents concerning mediation.

Personal interviews were conducted of forty-three civil litigators in the Baltimore-Washington D.C. metropolitan area, nineteen mediators (seventeen of whom are members of the International of Academy of Mediators), and ten insurance claims professionals and other representatives who manage litigation risk for large institutions. Most interviewees are known to this author. Interviews were conducted in person or by telephone, July through November, 2019. Responses are anonymized.

I. Challenges lawyers and claims professionals encounter in mediation.

The key challenges that lawyers and claims professionals encounter in mediation include (a) mistrust of the other side; and (b) posturing and overconfidence. These challenges can be overcome but the participants must first be aware of them and also be prepared to face these challenges with the help of a skilled mediator.

A. Mistrust of opponents.

i. A pervasive problem.

Lawyers in this study report mistrust of their opponents as a pervasive frustration and challenge. For lawyers who invest significant time and resources in managing case-specific challenges, mistrust of opponents is a significant, additional burden. Personalities determine the tenor of mediation and its outcome. Although good reasons may justify some level of skepticism or mistrust between opposing lawyers, a mistrusting bargaining dynamic can negatively impact counsel’s ability to assess risk and

negotiate effectively, placing "attorneys in 'untenable' negotiation positions."[1] When attorneys trust each other, however, they generate better outcomes for themselves and their clients. Respondents report experiences with trusted opposing counsel as less frustrating and more rewarding.[2] As stated by one personal injury attorney, "If we know and trust counsel on the other side, they get better numbers from us."

ii. Dysfunctional yet rational behaviors that flow from mistrust.

The lack of trust between opposing counsel creates a number of dysfunctional problems in mediation. Defensive or offensive tactics emerge, such as, "pressing arguments known to be specious, concealing significant information, obscuring weakness, diverting attention from the main evidentiary risk, misleading others about the existence or persuasive power of evidence not yet presented (experts, fact witnesses), resisting well-made, client-responsive suggestions, injecting hostility, remaining attached to positions not sincerely held, delaying access to information sought by other parties, and protracting the proceedings to wear down the other side."[3] One dysfunctional behavior reported by lawyers with some regularity was withholding and hiding information, including what their clients would accept to settle the case. Lawyers claim they want to negotiate openly with problem-solving opponents, although they admit to withholding some information in the event trial is necessary.[4]

In the context of bargaining over limited resources, such as insurance policy proceeds, perhaps parties should not be completely honest with each other in some cases.[5] Some mediators have witnessed overly-competitive responses to "reasonable" demands. As they report it, "no good deed goes unpunished." One party's "reasonable" opening position may be exploited by her opponent.[6] Important ethical issues are raised in distributive bargaining contexts where one party's gain is another's loss.[7] Full and candid disclosure may feel altruistic, but it surrenders valuable information the other side wants to know and will exploit.[8] Perhaps an "opponent has no right to know" why or why not the other party might prefer or fear trial.[9] Many attorneys maintain the view that "needs ought not . . . determine the price I get."[10]

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[1] RANDALL KISER, HOW LEADING LAWYERS THINK, 166 (2010).

[2] *See also* Wayne D. Brazil, *Reciprocal Coaching to Reduce the Risk of False Failure in Mediation and Support from Social Science for Coaching Ideas*, 29 OHIO ST. J. ON DISP. RESOL. 167, 203-04 (2014).

[3] Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 706, n.50 (2001). (quoting Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts,* 2000 J. DISP. RESOL. 11, 29 (2000), and Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation,* 28 FORDHAM URB. L.J. 935, 945 (2001).

[4] *See also* Michael Dickstein, Strategy or Bad Habit: Avoiding Lawyers' Most Common Mediation Pitfalls, International Academy of Mediators Blog, (Oct. 26, 2018), https://iamed.org/blog/strategy-or-bad-habit avoiding-lawyers-most-common-mediation-pitfalls/ (last visited November 11, 2019) (explaining how "surprises" at mediation "leave the other side feeling suspicious, betrayed, concerned about other information being withheld, and unwilling to make a decision at the mediation.").

[5] *See also* Burns, *supra* note 3, at 9692-93 (explaining how each side benefits by misleading each other).

[6] *Id.*

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*.

iii. Query: How transparent should the parties be when negotiating over fixed assets such as insurance policy proceeds?

There are mixed views about the effectiveness of transparency in the mediation process. As the panel will discuss, it may ultimately depend on the various factors in the case including the personalities, the mediator, and the type of case.

B. Posturing and overconfidence.

i. When bargaining, each side makes only small moves when "everyone knows the real value"

Respondents are particularly frustrated by the ways in which their opponents negotiate and bargain. Unreasonable demands and offers and small, incremental moves when "everyone knows the true settlement value," frustrate respondents in this study and in others.[11] Extreme bargaining positions can be a sign of overconfidence.

ii. Blustery overconfident lawyers gets worse offers; stingy offers get small reductions in demands (reciprocal bargaining).

Lawyers believe that it is important to maintain a high level of confidence in one's case.[12] Of course, there is no way to know when one's confidence is overblown, impeding one's ability to assess risk. In any event, lawyers often pretend not to be concerned about weaknesses in their cases - a tactic that challenges all participants, including their clients.

iii. Query: How would a plaintiff's lawyer maintain confidence in her case without losing credibility with you? How do any of us monitor and manage our overconfidence?

Effective mediation advocates know where and when to press on key issues in a case and they develop a plan for the negotiation that maintains credibility and confidence. This may be easier said than done and it may be difficult to determine when your counterpart is justifiably confident without losing credibility.

II. What mediators do to assist parties, attorneys, and claims professionals.

The key to mediation is having an experienced and effective mediator to assist the parties, attorneys, and claims professionals. A skilled mediator can do several things to ensure that the mediation has the best chance of reaching a resolution of the dispute.

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[11] *See also* KISER, *supra* note 1 at 185 (reporting comments from attorneys who believe the most significant obstacle to resolving cases is "excessive plaintiff demands and lowball defendant offers").

[12] TRIAL LAWYERS FOR JUSTICE, Nicholas Rowley Profiled on Cover of Lawyer Monthly Magazine (Feb. 12, 2018) https://www.tl4j.com/nicholas-rowley-profiled-on-cover-of-lawyer-monthly-magazine/ (last visited Nov. 11, 2019). *See also* KISER, *supra* note 1, at 173 (quoting an attorney, "Never take a judge's evaluation of your case if you believe in your case.").

A. Establish rapport and trust

i. Why it's important; why it's challenging

Mediators interviewed for this article emphasize the importance of relating to people in ways that engender trust. As one mediator puts it, "Trust-building is the greatest secret ingredient and least analyzed in mediation." Another successful mediator comments, "Trust is crucial to get parties to move." Not only do mediators build trust between themselves and participants, they also broker trust between opposing lawyers and parties.[13] This can be tricky, however, since mediators are not in a good position to assess the trustworthiness or reliability of any of the participants.[14] It is difficult to discern "truth" from information that is not.[15] As brokers of information, mediators have to be trusted by the parties and counsel to perform dual roles that communicate and filter information with credibility.[16]

ii. Query: Should mediators vouch for anyone? Do you expect them to vouch for you?

The panelists will discuss their views about trust (what it is and is not), how effective mediators build it or not, and how they interpret messages the mediator conveys from the other side.

B. Mediator coaching

Many responding lawyers like mediators who coach or assist them in the mediation process and, as revealed in the literature, many mediators fulfill that role.[17] Assistance and coaching occur in various ways.[18] Some mediators help parties and counsel see themselves and their actions in a larger context by instructing parties to "go to the balcony" and observe the entire situation.[19] Many, if not most, commercial mediators evaluate the legal aspects of the dispute, since adjusters and lawyers expect the mediator to explain why they should move off of their positions. As one adjuster said, "Don't expect us to move just because it's mediation. Give us a reason to move."

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[13] Notes from the Cleveland IAM conference (on file with the author). *See* Brazil *supra* note 2, at 196 (explaining the importance of trust-development in negotiation).
[14] Brazil, *supra* note 2, at 203-04 (stating mediators cannot know whether representations are truthful or not).
[15] Notes from the Cleveland IAM conference, *supra* note 13.
[16] *Id*.
[17] *See* Dickstein, *supra* note 4; Brazil, *supra* note 2, at 176; *See* STEVEN N. TAURKE JOSEPH, GUIDE TO EFFECTIVE NEGOTIATION STRATEGIES EMPLOYED IN MEDIATION OF LARGE DOLLAR DISPUTES, 76 (ABA 2011); Russell B. Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO STATE JOURNAL ON DISP. RESOL. 281 (2006) (providing potential interventions for each cognitive bias discussed).
[18] *See* Thomas J. Stipanowich, *Insights on Mediator Practices and Perceptions*, DISPUTE RES. MAGAZINE 4 (Winter 2016); Brazil, *supra* note 2, at 168.
[19] Teresa F. Frisbie, *Raising Emotional Intelligence at the Mediation Table: A recipe to help parties tell their stories in self-distancing language*, DISP. RESOL. MAG. 21 (Winter 2018).

i. Expressing evaluative opinions on the merits of the case

Responding litigators prefer strong-willed,[20] evaluative mediators who are not afraid of expressing an opinion about the merits of a claim or defense: "We hired you for your insight into a case – give it to us." It is important to point out that in the midst of warring opinions about potential adjudicated outcomes, uncertainty abounds.[21] Evaluative mediators will advise parties that resolution is less about the law and more about "how a judge or jury responds to competing evidentiary presentations."[22] In mediation, participants may miss settlement opportunities if they focus on legal outcomes excessively,[23] although one plaintiffs' lawyer maintains a strong opposing view that the fear of trial drives settlement negotiations.

ii. Query: Should the bargaining focus be on creating options or leveraging fear of bad trial outcomes? Or are they related?

III. How mediators frustrate attorneys and claims professionals

A. Evaluative opinions as a source of frustration

Evaluative opinions of mediators can frustrate counsel who believe strongly in their case and know their strengths and weaknesses.[24] It is easy to counter-argue or simply reject the mediator's evaluation since there is wide discretion regarding the admission and weight of evidence and interpretation of law.[25] Most lawyers and claims professionals report that they do not like evaluative opinions that bully their side into concessions. "Don't tell me how doom and gloom my position is all the time." Counsel and claims professionals want mediators to make sure the "squeeze" is applied equally, "lean on the other side." Some claims professionals critically ask themselves throughout the mediation, "Is this discussion pro-plaintiff?"

B. Lack of fortitude and creativity

Responding lawyers are frustrated by mediators who are "weak," unable to generate movement, or are indifferent to closing the case. Respondents want mediators who are creative problem solvers who are in control – especially when it comes to badly-behaved participants and "bully" attorneys.[26] Other comments from respondents include the following: "Don't be a paper airplane who simply shuffles number back and forth." "Don't stick to the same process over and over again." "Don't phone it in."

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[20] *See also* KISER, *supra* note 1, at 216.
[21] Brazil, *supra* note 2, at 203-04
[22] *Id.*
[23] *Id*.
[24] KISER *supra* note 1, at 173-74.
[25] *Compare id*. (discussing attorneys who put greater weight on the evaluative opinions of judges in settlement conferences).
[26] *See also* KISER *supra* note 1, at 209; Joseph, *supra* note 17 at 113 (reporting similar results).

C. **Query: How creative and bold do you want your mediator to be (i.e., conduct joint sessions; emphasize the bad parts of your case in caucus; pressure certain moves)? How perseverant do you want the mediator to be - when is the right time to quit?**

Presenters and attendees will share their own opinions and recommendations on what is useful for a mediator to do in routine and difficult cases.