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Mediation: Duels to handshakes

A primer on mediation for both attorneys and their clients

Pistols at dawn! The challenge is issued. To turn it down would leave you marked a coward for life. So, you meet at the chosen spot.

In 1804, Aaron Burr, the Vice President under Jefferson, and Alexander Hamilton, the leading Federalist and former Secretary of the Treasury, had an "affair of honor" as duels were then known. The political enemies met at the dueling grounds – where Hamilton's son died defending his father's honor in 1801. In their duel, Burr killed Hamilton.

We've come a long way in dispute resolution. When parties seek dispute resolution now, they proceed to litigation, mediation and/or arbitration – not duels. Today we have more choices. But, a type of rigid, narrow mindset that led disputants to a duel continues to some extent to permeate the world of dispute resolution, including the chief consensual format, mediation, which is simply a form of negotiation using a third-party neutral.

The modern use of mediation was born in 1976 at the Pound Conference – formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Since then, use of mediation has grown dramatically and has become a key part of the litigation process.

Unlike court and arbitration with set and formal processes (albeit unpredictable outcomes) mediation offers a broad array of unique opportunities for parties to resolve disputes in a confidential process. An effective mediator provides doses of insight and creativity fitting the particular dispute and participants.

Throughout a mediation session, the mediator and participants typically evaluate the case, analyzing strengths and weaknesses of evidence, legal claims and defenses. This analysis is a driving force in the negotiation.

But, another less obvious driving force on the path to settlement is at work here, too. It is the wide range of imaginative methods available for use to increase the odds of crossing the finishing line. Einstein appreciated the value of this arsenal declaring, "Imagination is more important than knowledge." The best mediators and mediation advocates evoke imagination to create a world of possibilities.

We explore in this article just some of the many physical, emotional, mental (and even spiritual) methodologies the authors have fashioned or experienced, some with planned forethought, others instinctual, to meet the parties at the intersection of their own negotiation dynamic, conflict or stuck point.

Setting the stage

A pre-hearing conference call with the mediator, either separately or joint with opposing counsel, can be a powerful tool that helps identify issues needing further legal or factual preparation and development, the parties and support persons necessary to attend in person or by phone or video conference, and additional pre-hearing steps needed to maximize the opportunity for success. It gets counsel and parties thinking of different ways to present their case, evaluate their case, think about dynamics that drive the dispute or allow for its resolution, and gets creative juices flowing. This isn't just another arguing session before a judge or arbitrator. For example, an attorney might suggest that the mediation take place at the property that is subject to dispute, or the home of a party who is disabled. Talking with the mediator in advance paves the way for candid valuations and settlement strategies.

At the mediation, successful strategies to create open-mindedness include greeting the other side, thanking everyone for attending, expressing a desire to find a mutually satisfactory resolution, turning negatives into positives, looking for common ground rather than fighting over everything, and making forward-going and productive negotiation moves with messages (rather than a move leaving the other side to guess its meaning and where you might be headed). The mediator speaking with plaintiff or defense counsel separately can provide insights into legal strengths and weaknesses the attorney may not feel as free to discuss informally in front of their respective clients.

Consider whether to use any type of joint session, or only separate caucuses and shuttle diplomacy. Early models of community mediation relied heavily on the use of joint sessions with all parties and counsel; it is still the format of choice in many parts of the country. This model heavily focuses on the idea that participants have the power to shape outcomes that work for them and desire to express their feelings as well as identify their needs, interests and wants in front of everyone.

In Los Angeles, the "commercial" mediation process, with attorney representatives, has evolved to where usage of a joint session in most cases has been replaced by a process where the mediator caucuses with parties who remain in separate rooms. But remember that anything goes, and the adept attorney and mediator will consider a variety of ways to mix and match participants with pieces of the mediation process, such as mediator meeting only with attorneys, only key decision makers, or with defense counsel and insurance adjuster meeting plaintiff to better evaluate the claim.

In typical cases with two or so parties, attorneys and certain mediators approach mediation and the mediation format as a rigid process, not as evolving

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and flexible. While certain types of complex, multi-party multi-jurisdictional cases call upon creativity in process design and format, it is surprising that rigidity prevails as much as it does when so much can happen with an open-minded approach. It is as if we still are faced with a duel as the only way to save face, and we had no alternative process.

Consider allowing your client or witness to freely speak to the mediator or, where appropriate, to the other side, either to fully present your case and create a favorable impression of this witness, or to allow a party to vent and fully participate in the process. One experienced insurance adjuster stated that she will not agree to pay top dollar unless she gets to meet and hear, at least briefly, from the plaintiff.

Telling "war stories" relevant to the situation, a tasteful joke or other ice-breaker can set people at ease and shape the environment into a comfortable setting. Food and drink, plants, windows, homey room appointments can all help set the mood or tone. In one case, a priest who was representing one of the parties asked to say a prayer before all participants, which highlighted a connection between the priest's order and the deceased, whose estate distribution was in dispute. This connection led to a conversation that allowed everyone to see the situation differently, moved the parties from rigid positions into a framework of possibilities, and resulted in creative resolution.

Fashioning creative remedies

A myriad of creative opportunities are present in mediations. These include apologies, non-apology statements of regret, acknowledgement of pain and suffering, and joint statements made to the public that evidence a resolution fashioned to benefit all parties. Certain charitable contributions to the other side's favorite cause are a way of making restitution and restoring honor in a less risky method than Andrew Hamilton endured.

Conversations that explore needs and interests can be facilitated, including brainstorming and testing potential resolutions, as in the community mediation format. Attorneys can allow clients to interact where appropriate, such as a brother and sister who came together to speak for the first time in years since a parent died and disputes about estate management arose. Years of fear, resentment, anger and frustration melted over a subtly suggested and well-orchestrated hug.

Dealing effectively with emotions and allowing parties to vent is in the powerful arsenal of the skilled mediator. Accepting and acknowledging parties where they are allows them to shift eventually from emotional to rational.

Attorneys sometimes default to a rigid mindset, coaching clients to buckle up, speak from a rehearsed script, and refrain from expressing emotions or speaking freely. Others will, at the opportune time, embrace the opportunity for their client to participate in fashioning the outcome. In the mediation example mentioned above, the party initially responded to the mediator's inquiry as to how he wanted his relationship to be with his sibling – "I don't ever want to speak with her again." The mediator calmly nodded, acknowledging the party's feelings and making no further comment. This paved the way for the party to discuss options for resolving the primary dispute over jointly owned property. There was no question that an estranged relationship would be the norm (at least for the time being) and the party, who felt understood after expressing anger, could now commence to discuss facts, risks and possible resolutions rationally.

Let's look at a different type of acknowledgment and support by the mediator. It's 4:30 p.m. after a full day of mediation and the plaintiff is now crouched on the floor of a conference room, sobbing. The mediator – who has joined her on the floor – switches between listening, consoling and analyzing the merits of the case. At 8:00 p.m. the shuttle diplomacy continues as the mediator takes defense counsel for a walk around the block. They get coffee. By 10:30 p.m., a settlement agreement has been signed and a relieved plaintiff profusely thanks the mediator. The defense likewise expresses appreciation. You won't see this in court or arbitration.

Mediators have witnessed genuine fear of facing a relative or former colleague, suicide threats, and all manner of angry outbursts and ultimatums. The Kleenex in the conference room isn't in case someone is nursing a cold. Mediators encourage party expression based on the axiom that what does not get expressed is repressed. As Freud said, "Unexpressed emotions will never die. They are buried alive and will come forth later in uglier ways." Often, it allows a party to move to problem solving. Attorneys can assist this process by preparing their clients to be forthcoming.

Mediating in separate conference rooms at opposite ends of an office and staggering bathroom breaks is not uncommon in employer/employee, sexual battery and trust and estate matters. Coming to mediation can be a very emotional process for parties, whether admitted or not, because the outcome is unknown. In these cases, clients are sometimes shielded from direct participation with the mediator, and the attorney does all the talking. In either situation, the creative tools are available for the attorney with an open mind and a trusted, seasoned mediator.

Using ice breakers

You have been mediating for hours and are now at a logjam. A party may need to consult with a trusted advisor or family member to talk over an offer before deciding what to do. Or, an attorney might take the mediator up on his suggestion that he take out the client alone to get ice cream. Mediator proposals and floats, bracketing and negotiating in ranges, and moving numbers with messages about possibilities get parties into proactive negotiations when they are stuck in reactive bargaining (you only moved $5,000 so I will only move $5,000).

We have seen mediations resolved by one party volunteering to help at the other party's favorite charity, jointly creating a community-based program, or

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even by one party taking the other out for dinner or drinks. A case has even been known to have settled by flipping a coin to determine whose last best and final settlement move will be the final settlement. Needless to say, the more participants express themselves and are open minded, the more opportunities to break impasse bubble up, seemingly out of nowhere.

Exploring diverse ways to break an impasse helps parties weigh options for resolution. One example involves use of a form of the Expedited Jury Trial (EJT) – a one-day, binding jury trial offered by California courts since 2011 in limited dollar value cases. In a mock, non-binding version of the EJT, all parties and their counsel observe the jury deliberations behind a one-way mirror or on a live video feed. The next day, the mediation takes place. The deliberations and verdict of the jurors are then fodder for the ensuing negotiation.

Sometimes the parties may select an arbitrator to decide some or all of the issues in the case, possibly including agreeing to a high/low figure that avoids the extreme impact of a defense verdict or runaway win. Also, appointing the mediator as the first person to contact when there is a breach of a confidentiality clause in an employment dispute can avoid haggling over concerns that such a clause will result in prolonged future litigation.

Where parties in a business relationship realize that ongoing disputes are likely, a Standing Neutral familiar with the contractual relationship can be retained to mediate on short notice disputes as they arise, such as in complex multi-faceted licensing agreements or joint ventures. Similarly, a Dispute Review Board (DRB) can be quite successful in resolving disputes as they come up on a major construction project. The concept of a Standing Neutral or a DRB can be expanded and creatively tailored for use in other fields.

What does the future hold?

On our shrinking planet, we have the ability to meet virtually anywhere around the world to seek resolution of ever-increasing multi-national disputes. Communications are instantaneous. Mediations can be created as a series of communications and conversations between parties and their representatives beyond the usual two- or three-party format where everyone comes together in one place. Many attorneys still react negatively when a decision maker is not physically at the location where everyone else is gathered. While it is clearly preferable to have that decision maker present, practicing the art of what's possible means employing the assets that appear in the same time and place. Planning in advance for communication with a party not present is one part of the equation, and the other is how to have them effectively involved and updated with developments relevant to assessment and valuation of the case.

A case can be tentatively resolved based upon counsel's recommendation to the decision maker. Offers can be left open or made irrevocable for a certain period of time to allow a party sleeping halfway around the world to address it with other decision makers during waking hours. Sessions via phone or video conference call can be used to make the human connections which can loosen up the rigid and the tense. In one case Skype was used to establish that a claimant in another country who could not attend the mediation was in fact the named plaintiff in a complaint. The possibilities are endless.

Conclusion

To make full use of the mediation opportunity, you should remain open minded to varied possibilities available in this unique, confidential forum. Skilled mediators, as doctors of negotiation, suggest effective and creative methods to reach settlement, given the case and participants at hand. But, attorneys also should be attuned to possibilities and be prepared to make suggestions to progress the negotiation. Even where prospects of settlement appear unlikely, resist the notion that you are in a futile exercise. There is always something productive that can occur when parties meet and put their minds together to explore what is possible.

If you can imagine something – big or small – that could advance the negotiation, brainstorm about it with the mediator. Consider a skilled mediator's process suggestions that are different than where the mediator shuttles between conference rooms. Be open to exploring the mediator's suggestions, whether it involves a broad or limited joint session, or creative terms of settlement. Thinking outside the box can be just what is needed to help seal the deal.

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