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Advocacy in Mediation: One Mediator's View

by Michael Lewis

Mediation is being used more and more as part of the litigation process in both state and federal court cases. Many attorneys, however, fail to recognize that mediation can differ considerably from the typical lawyer-to-lawyer negotiations that often take place as a trial approaches. The failure to understand these differences can hinder reaching an agreement or result in an agreement that is less than optimal.

There are at least four reasons why mediation might be the process of choice in virtually any dispute:

cost—mediation, if it results in agreement, is virtually guaranteed to be less costly than litigation of the same issue;

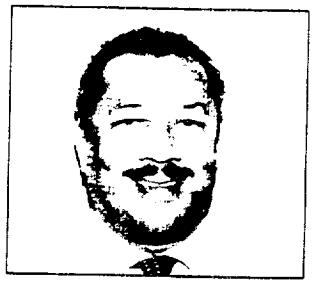
control—as will be described in greater detail below, principals typically have a larger role in the actual negotiation of an agreement in mediation than is true in most lawyer-assisted negotiations arising out of disputes;

customized agreements—partially because clients can be heavily involved in the creation of agreements in mediation, those agreements can be tailored precisely to the parties' needs;

confidentiality—mediation generally affords the parties the opportunity to construct a settlement that can be as private as they desire, although there are sometimes restrictions such as sunshine laws or mandatory reporting laws that limit confidentiality.

For disputes in which the parties might have a continuing relationship, one could also add the increased likelihood of *cooperation in the future.*[1]

Preparation for mediation requires a discussion of the client's needs and some discussion of what the needs of the other party to the dispute might be. Though the second phase of this discussion will be based on imperfect knowledge, it is important for lawyer and client to engage in the discussion, since if they focus on the other side's interest and likely goals, they may well be able to think through possible solutions to meet the other side's needs and their own as well.



Advocates representing institutions must discuss with their clients who among the possible institutional representatives should participate in the mediation. Much is made of the question of authority at the mediation table—that is, can the representative at the table commit the institution to an agreement. But authority is just one of the important attributes an institutional client should bring to a mediation. Others include enough knowledge to craft an optimal agreement and the ability to communicate with—and understand—the other side.

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At the mediation session, the mediator quickly will try to elicit the information necessary to help the parties move toward an agreement. It is at this stage of the mediation that counsel plays a second pivotal role. Trial lawyers are accustomed to negotiating directly with lawyers on the other side of cases. They are less accustomed to having an opportunity to make a pitch to the principals on the other side. A critical early question for lawyer and client should be how to make the best possible presentation to those principals.

The tone of the opening presentation should strike a balance between an interest in settlement and a willingness to litigate. The presentation should set out a cohesive story or theme as economically and clearly as possible. Demonstrative evidence can often be used to great effect. Linda Singer, a well-known mediator, recently described how an advocate used a series of videotaped excerpts from depositions of the other side's managers. To the supervisor who had not been party to the deposition, and who had been assured that they had gone well, the videotape was very persuasive.

As pointed out above, one important difference between most lawyer-to-lawyer negotiations and mediation is that clients are expected to take an active role in fashioning solutions in mediations. If clients are present during mediation sessions, most mediators will expect them to speak—to offer their perspectives on the dispute and what their interests are. Most mediators do not take well to efforts by an attorney to prevent the mediator from asking questions of the client, especially during sessions when the other side isn't present. The mediator needs to hear from the client what is most important to the client. Only then can the mediator help to fashion an optimal agreement.

Most mediators meet with parties in a combination of joint and separate meetings. It is important for lawyers to understand the differences between these sessions. The initial joint meeting provides the lawyer and client an opportunity to speak directly to the other principal(s) involved in the mediation. While few mediators would suggest that the lawyer and client put on a presentation that is so polished that it seems canned, failure to plan adequately for this session can result in missing a major opportunity to make a persuasive presentation to the principal(s) on the other side.

If the mediator intends to spend time with the parties in separate sessions, it is important for advocates to make sure they understand the extent of the confidentiality to be offered by the

mediator in those sessions. A good place to start here is by looking at the jurisdiction's statute (if there is one) on mediator confidentiality. There are currently many such statues. If the mediation is taking place under the auspices of a court program, the advocate should review the rules governing the program, as many of them have rules on confidentiality. Most mediators in private practice have developed agreements to mediate explicitly establishing the mediator's offer of confidentiality to the parties. Some court programs, however, forbid mediators from using such agreements, so it is important for advocates to establish the scope of confidentiality protections applicable in their particular mediation.

How might the advocate use the mediator as an ally? First, as suggested above, the advocate and client may want to share sensitive information about the details of the dispute.

If the advocate is assured about confidentiality, then he or she should consider how best to use the mediator in the early stages of the mediation. In these sessions, the mediator is likely to be interested in any sensitive information that the client and advocate might not want to share with the other side. This information may be of two kinds: sensitive information about what happened in the transaction or dispute, and information regarding the client's real needs or interests in the mediation. The advocate is likely to face a mediator who explores what the advocate and client have said in the joint session. From the mediator's point of view, the exploration is designed to equip him or her with information that might be useful in helping the parties fashion an agreement. An advocate who attempts to thwart this exploration by, for example, interposing himself or herself between the mediator and the client, runs the risk of missing an opportunity. The advocate who tries to use the mediator as an ally, on the other hand, will get the most out of the mediation.

Is it folly to speak of the mediator as ally? The late James Laue, a prominent mediator, especially in public policy disputes, used to say that the mediator is an "advocate for the process." Jim meant that the mediator could not afford to be perceived as an advocate for one of the parties over another, but that a mediator trusted by the parties would learn sensitive information that might provide the key to a resolution of the dispute. If the advocate can view the mediator as an ally to all of the parties to the dispute, the advocate may be willing to share the kind of information that helps the mediator work with all of the parties toward a settlement.

How might the advocate use the mediator as an ally? First, as suggested above, the advocate and client may want to share sensitive information about the details of the dispute and possible acceptable outcomes. Secondly, the advocate and client should think through how they want to explore settlement possibilities with the other side. Obviously, the dilemma the advocate faces here is protecting his or her client against overreaching by the other side. If Side A understands that Side B is willing to accept a settlement particularly favorable to Side A, there is little incentive to offer more. The mediator may be able to discuss settlement alternatives with Side A without necessarily conveying how acceptable Side B might find such alternatives.

Given that most mediations involve a series of meetings with the mediator, it is important for advocates to use "down time"—the time when the mediator is meeting with the other side—to consider any information the mediator may have conveyed that suggests new settlement possibilities. Thinking this through with the client may open the door for a settlement that better meets the interests of the client. If the information conveyed suggests that the other side is proceeding in a way likely to generate a series of unacceptable settlement possibilities, the sooner the mediator understands this the better.

Finally, given the fluid nature of many mediations, lawyer and client may be presented with settlement possibilities that they had not considered at the outset. The advocate should be careful not to reject these possibilities too quickly. It is not uncommon for clients to disclose new interests or change their priorities in the course of a mediation. A settlement that was once unthinkable to the client may, with time, becomes acceptable.

Toward the end of the mediation, the choice for the client may well be between a potential agreement meeting most of the client's interests or resolving the dispute through litigation. Only rarely will the client be offered what he or she wanted at the outset. If the advocate believes that one or more of the possible settlements meets all of the essential needs of the client, and that those needs are unlikely to be met at an acceptable cost through litigation, the mediator may be a useful ally in convincing the client to settle.

A good mediator will pick up signals from an advocate that he or she believes the client is not acting out of his or her own self-interests.

The advocate can use the mediator to help make the necessary points with the client without running the risk of having useful advice rejected out of stubbornness or an unrealistic sense of what is likely to happen at trial. A good mediator will pick up signals from an advocate that he or she believes the client is not acting out of his or her own self-interests. A good mediator will not permit a party simply to assert that he or she wants this or that. The mediator will return again and again to what the client and the advocate have identified as the core interests. The mediator can then explore whether the possible settlement meets those interests and what the likely litigation outcomes might be in a manner that provides the maximum amount of freedom for the client's decision, but assures as much as possible that whatever decision the client makes will be an informed one.

Fundamentally, mediators try to help the parties to a dispute realize as many of their goals as they can. The advocate should not fight with the mediator for the heart and mind of the client. Rather, the advocate should help the mediator understand that heart and mind so that the mediator can better assist the parties in achieving the best possible resolution to their dispute.

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[1] The author is indebted to Stephen E. Seekler and Oran E. Kaufman, from whose article, "Practical Tips for Representing Clients in Divorce Mediation," 23 Massachusetts Lawyers Weekly 865, January 1995, the list above was adapted.