MEDIATION: THE DANCE AND THE DEAL

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Torts and Contracts. Although mediation takes place in many types of cases, tort and contract disputes are the foundation of a mediation practice. Cases arising from breach of duty and breach of agreement are primarily claims for money damages. The resolution of these cases is achieved through an interesting and complex process. A mediator guides the parties through the process toward resolution, i.e. "The Deal".

The components of the process are: Presentation, Negotiation, Evaluation and Motivation.

1. PRESENTATION - - "The Pitch".

Presentation is the justification for a position using argument, legal precedent, statutes, pictures, numbers, graphs, charts, reports, records, etc. It is the first step in negotiation, and it may continue throughout the process. It likely masks an underlying evaluation and is often more style than substance, particularly when the presentation is basically an illustration of a best or worst case scenario.

The words used in presentation are familiar to a mediator - - costly, significant, substantial, severe, devastating, catastrophic, permanent, premium, punitive; and these - - discount, minimal, nuisance, unreasonable, undocumented, inconsistent, spurious, counterclaim, summary judgment, affirmative defenses, appeal. It is the language of The Dance. To a mediator, the words are code - - the claim is worth more than the offer; the claim is worth less than the demand.

2. NEGOTIATION - - "The Dance".

Negotiation is an exchange of ideas about price and terms. Generally, the seller wants as much as possible, and the buyer wants to pay as little as possible, thereby creating an inherent tension in the discussion. With presentation and negotiation, the parties blend style and substance as they attempt to achieve their objectives and make decisions about resolution. Parties tend to negotiate in one or more of the following manners:

Positional Bargaining, or "high-low" bargaining, is starting at the shallow end of the pool. Parties are cautious and guarded as they exchange offers and demands, sometimes referred to as RED numbers. The exercise is characterized by presentation rehash, accelerated hyperbole, frustration, retaliation, name-calling, and countless use of the terms: "good faith", "bad faith", and "unreasonable". It is stylistic and tactical more than substantive or evaluative. Nonetheless, positional bargaining is entrenched in the culture. Gradually, the parties will "dance" their way out of positional bargaining.

Evaluative Dialogue, in sports terms, is playing in the second half. The tone and words are different as the "shift" takes place from positional bargaining to a discussion of evaluation. There is less hyperbole, less posturing, and more emphasis on risk and benefit.

The mediator is often instrumental in facilitating the shift. Claimants are encouraged to "dangle the meat low enough to make the dogs jump", as so eloquently put by a colleague. Defendants are encouraged to propose a rational evaluation to arguably put claimants at risk. Counterclaims turn into set-offs, then are perhaps eventually abandoned. The shift may be direct and overt, or subtle and gradual, but eventually the shift will occur.

Ultimatum may be used when one or more parties desire an end to bargaining or negotiation. The dialogue is abrupt and seemingly final. Sometimes ultimatum is tactical, especially if it comes from the consummate dancer or negotiator. In such a case, the "ultimatum" is as credible as a 5-martini promise.

In any case, the mediator should deflect and discourage ultimatum. A mandate to "take it or leave it" is problematic on two fronts. First, it is perceived that one party is forced to do something. The tone is not of compromise and conciliation, which are valuable tools used by a mediator. Secondly, it imposes the additional problem of "face-saving", making it even more difficult to unwind the ultimatum.

The mediator may choose to soften ultimatum by delivering an evaluative message on behalf of a party. While the point may be the same, the message may lay better ground work for resolution.

Hypotheticals are used as an alternative to positional bargaining, evaluative dialogue, and ultimatum. The parties may privately engage the mediator in a discussion of ranges or possibilities for resolution, sometimes known as BLUE numbers. Such discussions put the mediator in a better position to assess the probability for resolution. To be sure, negotiation remains, but the gaps and issues between the parties are narrowed and identifiable substantively. Contrary to custom, agreements involving substantial sums and complicated terms may be achieved with a minimal exchange of red numbers.

The mediator may propose to the parties a hypothetical resolution, known as a mediator number or "silver bullet." After much discussion, and often as the last task, the mediator may propose a resolution that neither party has openly demanded or offered, and which has the ingredients of compromise, conciliation, face-saving, and ascertainable value from the mediation process. Done correctly, it is a thing of beauty.

3. EVALUATION - - "The Meat of the Coconut."

Evaluation is the foundation for decision-making during the dance and in the deal. It lies hidden beneath presentation and negotiation tactics. The mediator seeks to determine each participant's evaluation and the basis for it. An understanding of respective evaluations allows the mediator to focus on the deal, rather than the dance, and to assess the probability for resolution.

If the mediator senses that the case is evaluated similarly by the parties, then the parties will likely dance their way to resolution, only temporarily stalled by redundant presentation and positional bargaining. In such a case, the mediation process is best served by allowing the parties reasonable latitude to dance because the end game is in sight. In the end, the parties will be satisfied that they controlled their destiny, and together they reached an agreement. The result is a good day for the parties, an easier day for the mediator.

However, more often than not, the mediation reveals fundamental differences in evaluation, which left unchanged may result in an impasse. Bargaining, red numbers, blue numbers, brackets, hypotheticals, and silver bullets will only highlight the problem, not fix it.

If resolution is stalled by lack of information, lack of experience, or lack of authority to resolve beyond one's evaluation, such matters can often be cured, if not at the mediation, then shortly thereafter. After all, mediation is a process, not an event. Resolution may come after the mediation conference, often through the continued efforts of the mediator. The process is sometimes referred to as "working downstream." The groundwork having been laid, additional information, higher authority, and more research may lead to the deal downstream. However, during the mediation conference, if there is a difference in evaluation between or among informed, educated, and experienced participants with authority to settle, then the mediator will examine more closely evaluation and motivation.

During the mediation, the mediator is asked to deliver messages, or, in effect, repeat portions of the presentation. At the same time, the mediator is attempting to ascertain the basis for evaluations and to separate style from substance. True evaluations are often masked. As a result, a mediator will make decisions about his/her role in discussing with the parties, usually in private sessions, the basis for the message. These decisions at the heart of a long-running fundamental debate about exactly what a mediator should say, or to what extent should the mediator challenge the presentation, the message, the demand, or the offer. The debate has been traditionally characterized as "evaluative vs. facilitative", and frequently is a major part of mediation ethics and rules discussions.

Herein, it is assumed that the mediator will be "pro-active" within ethical and statutory guidelines. The mediator should avoid opinion and advice, yet use language and skill to question and challenge evaluations. Throughout presentation, negotiation, and evaluation, the mediator seeks to create an environment wherein compromise and evaluation reassessment are possible. In one form or another, and in either general or specific terms, the mediator engages the parties in private session as follows: "Please help me understand exactly what it is you wish me to tell the other side, other than merely presenting a number." Such an inquiry will elicit from a participant the basis for a position and reveal an evaluation. It also opens the door for a substantive discussion, challenges to positions, and a more meaningful mediation.

The art of challenging positions begins with numbers. Generally, math has certainty. A discussion of gray areas such as pain and suffering, premium, or discount, usually follows a mediator's efforts to establish some consensus with the numbers.

For example, a personal injury action has three elements of past and future damages: medical bills, wages/lost earning capacity, pain and suffering.

Past medical bills are recoverable to the extent the amounts are owed to either providers or insurers. If, although incurred, the bills are not owed, they are not recoverable. Thus, generally, there is a real number as to past bills.

Future bills are recoverable to the extent they will continue or probably be incurred. Scheduled surgeries or reasonable treatment make a better case than arguing for mere possibilities for surgery or worst case scenarios.

Past wages are those actually lost. Future wages/lost earning capacity that are probable are recoverable; speculative future wage claims are not. Work history, tax returns, current status, disability payments can reveal a more accurate wage picture than the one portrayed during presentation.

Past and future pain and suffering are general damages and are a little harder to pin down. Those experienced in such cases will be familiar with ranges, past verdicts, and the current climate for jury decisions. Normally, general damages will bear some relation to the special damages, but not always. For example, medical expenses incurred for a lost limb may be minimal, but the pain and suffering and/or a wage component may be substantial.

Lastly, there may be attempts to claim items not recoverable under the law. Such claims create another area to be analyzed and scrutinized by the mediator challenging the evaluation.

In contract disputes, commercial cases and construction matters, the amounts are generally liquidated. Often the math is not in dispute; rather, the controverted issues are liability or a genuine counterclaim or set-off.

In both tort and contract disputes, there is often an issue of insurance coverage. The existence and/or the amount of insurance can affect the collectability of judgments. An experienced mediator will take on insurance issues and deal with them as a part of the process.

After the mediator has worked through the numbers, there still may be fundamental differences between the parties as to the settlement value. Often the problem exists because there are different views of the probability of recovery or recovery of a certain amount.

Accordingly, the parties may agree on several points, but ultimately disagree on whether the case should be resolved at a premium or at a discount. In such a case, the mediator may challenge the evaluation using percentages. For example, if the parties basically agree that a case has a $100,000 value, then a 50/50 chance of winning or losing should result in a $50,000 resolution.

After the parties have danced, and the mediator has exhausted challenges to respective evaluations, and there is still no resolution, the end game is obvious - - one or both parties will need to change their mind. The mediator analyzes agenda and motivation to determine if a button may be pushed to change an evaluation.

4. MOTIVATION - - "What Makes One Tick".

Motivation triggers how an individual responds to decision-making, personally or professionally. In play are basic human emotions - - survival, fear, greed, pride, and revenge. The backdrop is one's experience. These emotions are represent in all participants - - the mediator, attorneys, parties, spouses, adult children, corporate representatives, insurance adjusters, insurance company supervisors, company presidents, third party lienholders, government agencies, medical providers, guardians, etc. The mediator analyses evaluations, emotions, agendas, and motivations as to all participants in the mediation. Analogous to the work of a physician, diagnosis precedes remedy.

Survival instincts are present in all of us. Survival can be physical, emotional, financial, or professional. A disabled personal injury plaintiff deals with life in a wheel chair; a survivor with loss of a spouse, child, or parent; an insurance company with rising claims, judgments, and fees; a company with a defective product; an owner with a project with construction defects and delays; attorneys with costs, fees, relationships with clients; many deal with a boss, or directors, or shareholders. Generally survival, in whatever form, is enhanced by certainty and the elimination of risk. As such, it is an ally in promoting compromise. The definition of survival is existence after a significant event. Resolution of a claim is often a great benefit to survival.

Fear can also be an ally to a mediator in promoting compromise and resolution. Fear of failure, fear of costs, fear of uncertainty with the legal system, fear of "all or nothing", all may serve the mediator in creating an environment for compromise.

Unlike survival and fear, greed, pride, and revenge are particular to only some individuals and certain situations. The mediator should be able to spot and identify these emotions as they surface during the mediation. Are they manifested as temporary venting or are they deep-seeded? Is it the lawyers or the parties? Both? To dismantle greed, the mediator will attempt reason; to achieve pride "swallowing", the mediator will provide face-saving rationale; to mitigate revenge the mediator will create an environment for "burying the hatchet".

In dealing with these emotions, the following are general suggestions or guidelines. First, the mediator's demeanor is critical. The mediator should counter the emotion. The louder the voices, the softer the mediator should speak. The more serious the moment, the mediator should deflect, sometimes with humor, or simply shifting the discussion to something occurring in the news or community or in the lives of the participants. Secondly, the mediator should be rational in analysis, and always preserve neutrality. Neutrality is great for a mediator. It allows detachment and distance from a problem. A frequent comment: "As a mediator you really have your hands full today with a big problem." Response: "I will work hard to assist the parties in assessing the benefits of a mutually acceptable resolution of <u>their</u> claim or lawsuit." Other clichés - - "I have no dog in the hunt"; "I am not dealing the cards, I am just reading the hands"; "Don't shoot the messenger."

The purpose of these exchanges is never give the impression that the mediator does not care about the parties, or is merely "punching the clock". Rather, it is about perspective. Since the mediator is not driven by the emotions arising from a particular case, by example the mediator's demeanor and rational analysis creates an environment to allow the parties to minimize the impact of emotions. In other words, the mediator is basically giving the parties the following message, "I have heard you, I understand you, I may sympathize with you on a personal level, but if we engage in objectivity and rational thinking, together we may find a way to resolution."

Regardless of the case, the key to perspective is understanding and appreciating what it is we are really dealing with - - a claim/lawsuit. An asset. The situation and circumstance may be emotionally charged, financially significant, life-affecting, and one that may impact business, jobs, and daily lives for many of the participants. Nonetheless, the claim/lawsuit is still just an asset. Everyone has assets in one form or another, some more than others. Assets are evaluated,

lives are not. An asset may have great, average, little, or no value. Or, indeed, an "asset", may be in fact a liability. When the mediator and participants focus on the evaluation of an asset in the context of a judicial system, the participants will likely set aside emotional drivers, and ultimately justify a decision for resolution. In summary, the mediator should do the following:

(1) create an atmosphere for objective, rational reasoning;

(2) discuss evaluations;

(3) ascertain agendas, emotions, motivations;

(4) provide rational justifications for changing opinions;

(5) promote consensus, compromise, and conciliation.

The result is a job well done, and the dance will likely become the deal.