A Litigator's Guide to Mediation Advocacy:
Reflections on Effectively Achieving Client Goals at the Mediation Table

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I. Introduction

Litigators too often approach the mediation process with the same tool they employ in every other aspect of the litigation process. We call that tool traditional zealous advocacy. Zealous advocacy is expected of lawyers and does the job well in almost every aspect of our civil justice system. Because mediation offers a unique opportunity to take a step back from the conflict and search for mutually beneficial solutions, however, a very different tool is necessary if client goals and objectives are to be achieved. This paper will explore how mediation advocacy differs from traditional principles of zealous advocacy; and suggest an approach to mediation advocacy designed to maximize the opportunity for resolution afforded by mediation.

II. Mediation is an Assisted Negotiation

What is "mediation?" Plugging the word "mediation" into an internet search engine brings up over 155,000,000 results. When boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. As we know, a negotiation is completely voluntary. Negotiations result in resolution, therefore, if but only if both sides voluntarily decide to manage their risk, recognizing that the available terms of settlement are better than spending the money and risking a dispositive motion or trial. Unlike a trial, arbitration or dispositive motion, no judge, jury, or arbitrator decides the outcome. No one determines who is or is not telling the truth, who is right and who is wrong, and no one imposes a result on the parties. The parties are totally free to decide for themselves whether to settle and on what terms.[1]

Since parties to a dispute may readily negotiate on their own, what is the assistance offered by a mediator? In my view, mediators are most helpful when they manage the exchange of information and perspective, making certain each party has all the information available so as exercise good judgment about settlement.

Specifically, mediators explore, *inter alia*:

- What is the other side's story and is it plausible? If the other side's story is plausible, of course, there is risk the court, decision-maker, or jury will be persuaded and rule in their favor. When parties hear the story as spun by a zealous advocate, however, they are often antagonized. They perceive themselves under attack, they escalate, experience

[1] Indeed, Standard I of Michigan's Mediator Standards of Conduct is party "Self Determination." https://www.courts.michigan.gov/4aa077/siteassets/court-administration/standardsguidelines/dispute-resolution/med-soc.pdf

consternation. In other words, they respond emotionally, perhaps even lashing out or responding in kind. They do not process what they hear. Mediators help parties process important information and all the consideration due by reframing in neutral language.

- Where is the other side coming from; what is their perspective? Knowing how each side is viewing the conflict increases the likelihood proposed offers and counteroffers can be tailored to meet a party's underlying needs and interests. If a party's underlying needs and interests are met, the likelihood of a favorable response to a settlement proposal increases significantly.
- Are the parties assessing their strengths and weaknesses realistically? In my experience, parties (and their lawyers) fall in love with their claims and defenses. What happens when we are in love?[2] We focus only on our strengths and downplay or ignore the warts, challenges and risks, sweeping them under the rug where they are easy to minimize. Parties are often stubbornly convinced there is only one way to look at the salient facts. They strenuously resist seeing even the possibility of good faith alternative perspectives. A major role for mediators, therefore, is to sow the seeds of doubt by bringing out the risks presented and weighing the magnitude of such risks realistically.
- Are the parties aware of the economic costs of continuing the litigation? In my experience, parties rarely arrive at the mediation table fully informed with a detailed written litigation budget. If provided with any range of numbers, they have been given only a rough estimate, discussed mostly at the time the litigation began. In fact, a realistic and timely cost estimate is essential. Why? Business judgment is typically a choice between various available options. Good judgment requires a cost/benefit analysis to determine which option best serves a party's interest. Assume a party can settle for $25,000, for example, while the price tag on continuing the litigation is likely to be $50,000 or more with no guarantee of a positive result. Sound business judgment might dictate acceptance of a $25,000 settlement regardless of liability or risk. [3]
- Have the parties considered potential collateral consequences? Will the litigation disrupt management's focus on business operations and contributing to the bottom line? Alternatively, does continuing the litigation risk exposure of confidential, sensitive, private facts? Litigation today is intrusive and may result in disclosure of embarrassing allegations of sexual harassment, corporate mismanagement, flawed engineering, medical malpractice, incompetence and the like. Customers, suppliers, lenders and vendors important to the success of a business enterprise may potentially retreat from a continuing business relationship if they find themselves and their employees sucked into the vortex of someone else's litigation. Key employees of the enterprise may feel forced to take sides. Members of the leadership team may resign rather than become

[2] In "The Merchant of Venice," Shakespeare reminds us of an important truth: "love is blind."

[3] Coming from the world of litigating and mediating employment disputes where plaintiff is typically represented on a contingency fee basis, I welcome commercial disputes because both parties are paying their counsel by the hour. Somehow writing monthly checks for attorney fees helps parties better focus the mind at the mediation table.

embroiled in the litigation process. Sometimes collateral consequences can be more costly than direct economic ones.

- What do the parties expect to happen if the case doesn't settle? How likely is the court to grant a dispositive motion? What is the judge's track record in similar disputes? Are there other parties whose interests might be affected if a precedent is set?
- Has everyone examined their Best Alternative to a Negotiated Agreement (BATNA) or Worst Alternative to a Negotiated Agreement (WATNA)?[4]
- What evidence – documents, testimony, exemplars - are the litigators relying on to support their claims and defenses; and what are the risks a court will grant a motion to exclude? How does the value of a dispute change if key evidence is excluded? If the evidence comes in? How does an evidentiary ruling impact the chances of success if an appeal is taken?
- Do the parties know what to expect from the trial process? Many lay persons and individuals unaccustomed to litigation have a distorted view of trials – in part because we try so few cases today[5]. Sometimes painting the courtroom picture can remove impediments to resolution: What are the chances of getting a realistic trial date and keeping it? How many times might they need to prepare for a trial only to be adjourned long enough that preparation must be started over each time virtually from scratch? What does a real trial look like as contrasted with the dramas they see on TV or in the movies? A party cannot simply turn to the jury and tell their story. That is not allowed. The story can only be developed through plain, non-leading questions often painstakingly prepared and rehearsed. After direct examination, parties then face relentless, sometimes withering cross examination. If they thought they'd been "beaten up" and abused in their discovery deposition, their discomfort at trial is likely to be worse. What rational actor wants to go through that experience again?
- How likely is a losing party to seek an appeal? What are the chances of overturning an adverse decision on appeal? How much will it cost, and how long will an appeal take? What are the risks the decision of an appellate court will be made public establishing a precedent and perhaps, stirring up additional litigation?
- What are the party's goals and objectives for the mediation process? What do they hope to gain from engagement in an assisted negotiation? Are their goals and objectives realistic? Have the parties considered what might be required of them in the back-and-forth of a negotiation to achieve their goals? Parties must make reasonable proposals to settle in order to receive reasonable counterproposals in return. Parties are often surprised at the competitive/reciprocal nature of negotiations. Unreasonable demands are inevitably met with equally unreasonable replies; productive proposals often stimulate productive counterproposals in response.

As the answers to these kinds of concerns are heard, considered, weighed, and processed, the parties – with the advice and recommendations of counsel – are ready to make good, business-

[4] See "Getting to Yes," by Roger Fisher and William Ury.

[5] In both state and federal court, no more than 1% of cases result in a trial on the merits.

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