FLEXIBLE MEDIATION: TOOLS FOR SETTLING CASES

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Disputing parties and their lawyers go to mediation to settle cases. I propose that mediators are most useful when we have a wide array of settlement tools at our disposal. This article is written for litigators thinking about using mediation to settle cases and for mediators thinking about the range of acceptable mediator activity.[i] Disputes have many similarities, but also many differences. Mediators must be prepared for and flexible in dealing with a variety of challenges including: high emotion, different negotiating styles, distrust, legal issues, and at times relationship building.

Most mediation trainings emphasize the facilitative approach because it minimizes the reliance on mediator opinions to resolve disputes. It's a very useful approach and perfect for Community Dispute Resolution Centers (where specific mediators are not chosen by the parties) and it is often very effective in private mediations. All lawyers can benefit from facilitative training in listening, restating, focusing and cooperative problem-solving. Particularly when relationship building is an aspect of the dispute, the tools of facilitative mediation are especially valuable.

However, despite the benefits of facilitative mediation, evaluative mediation is often preferred precisely because the mediators offer opinions. The question is not which is the better method. The evaluative approach can be just as appropriate, efficient and successful for the parties as the facilitative approach. Experienced private mediators are aware and comfortable with the tools of both approaches to resolving disputes and at times use them all.

"*Thus if we are locked into just one approach, we retard our own emotional intelligence and limit the kind of dispute we can help resolve."* Marvin Johnson, Stuart Levine and Lawrence R. Richard "Emotionally Intelligent Mediation," Bringing Peace Into The Room, Bowling and Hoffman, p162

"*Successful mediators and peacemakers are not one trick ponies who utilize a single process to resolve all disputes. Everything is situationa*l…" Eric R Galton Ripples From Peace Lake, p 41

LITIGATOR PRE-MEDIATION CONSIDERATIONS:

1) When a litigator selects a mediator, his/her question should not be "Are you a facilitative or evaluative mediator?", but "Are you rigid or flexible in your approach to mediation?" The litigator should be asking: "Can this mediator meet my needs and my client's needs? Can this mediator adjust to changing circumstances during the mediation? Can this mediator 'read' people?"[ii]

2) Lawyers should hire someone they trust. Trust in a mediator settles cases. Private mediators have reputations that will increase the chances of a settlement. Look for a person of proven integrity and a person who can calmly and respectfully guide you, your client and the other party toward resolution. When tough situations occur there will be nothing as important as the mediator's ethics and honesty.

3) Litigators should discuss with the mediator pre-mediation issues such as: exchange of summaries, adversarial or more constructive tone of summaries, initial meeting with the parties together or separate, active or supportive role for lawyers, and any specific problems to be addressed. The mediator who is prepared and on top of the details earns trust.[iii] Litigators partner with the mediator by providing information to increase the expectation of a successful mediation.

MEDIATOR TOOLS and CONSIDERATIONS:

Mediators must ask themselves: What is the situation? What are the needs of the parties? Why is there an IMPASSE? How can a mediator help to get this case settled? The following is a list of mediation tools that are sometimes appropriate and at other times a waste of time. Some fit the facilitative approach and some definitely do not. What we see among experienced mediators is often an extensive and flexible bag of approaches. All mediation theories can be helpful in the right circumstances. One- trick ponies need not apply.

Mediators rarely use every approach to settle a single case. Approaches range from **soft encouragement** to **moderate pressure** to providing a **mediator opinion**. Depending on the situation, the parties and the lawyers, any approach can be useful or destructive. Among the following tools within these approaches, which tool one starts with and finishes with will be different in every mediation.

Initial Soft Encouragement

1) Buy- in. Whether meeting in caucus or all together, mediators must sell the value of mediation. The key points are: "nothing to lose," "can walk away," "empowered to decide instead of a stranger deciding," "ability to structure a resolution," "minimizing economic and emotional costs" and "a mutual need to put this problem behind us."

2) Likeable Mediator. Deals are made with the mediator as often as they are made with the other party. The mediator must listen, understand and flush out areas of agreement. These are the highlighted skills in basic mediation training, which in my

opinion are the foundation for most successful mediations. Few cases settle until after people have been heard and feel understood. Often it is the mediator who does this listening and understanding.

3) Early Caucus. When emotions are strong and self- images are challenged there is a need to express these feelings and this may be more important than immediately getting to business or numbers. Sometimes, however, this is a waste of time and invasive without purpose. Every situation is different, yet all disputes to some degree involve: 1) different perspectives, 2) emotions and 3) challenges to self-image. The mediator should be listening at all three levels in the early caucus.

4) Using Down Time. When one party to the dispute is in caucus with the mediator, the lawyer and party outside of the caucus must have something productive to focus on. The best assignment is to ask the non- caucusing party and their attorney to begin thinking of options that could be acceptable to the other side. A reminder from the mediator that the parties must agree in-order to achieve a resolution points to the path of settlement.

5) Teacher. The mediator should bring these perspectives: (1) the parties need each other to get the matter resolved, (2) over-focusing on the past will get us stuck, (3) resolution is about the future, and (4) it is valuable to end fights and at times to restore relationships. Even the best of people may need these reminders when in conflict.

6) Reality. Although parties in conflict often assume inflexible positions, most people want finality and certainty. Settlement numbers must in the end make sense to more than just the self-interested party. In some situations the mediator is a host and everything resolves itself. Still, very often it is the mediator who has to break the ice and, using whatever skills he/she possesses, gently or less gently move the parties toward each other and resolution. Timing and taking care to maintain the dignity of all involved are critical. Unfortunately, timing is a constant challenge, as we all have different levels of patience and often a different sense of when something should occur.

7) Why. The mediator should explore the positions of both sides. Whether probing for underlying needs and interests or for real settlement possibilities, mediators assist in dissecting positions. A posture of curiosity and probing with “whys” is a critical tool.

This is not cross examination by the mediator, but a real exploration with empathy and with no wrong answers.

8) Honest Doubts. Most parties need to be encouraged to question themselves. They have taken positions that have been repeated to friends, reinforced by these friends, and are now a matter of principle-- or worse, have begun to define their lives. The mediator has a different perspective and can gently probe by asking: How did you contribute to the problem? What are the weaknesses of your position? What are the strengths of the other side's position? What do you wish you had done differently? Is continuing this dispute working for you?

9) And. Mediation is not about absolutes, it is about finding accommodations among different perspectives. Brainstorming with parties separately or together, the mediator tries to get all involved in suggesting resolutions that the "other," i.e., your bargaining partner, can accept. Parties are encouraged to think "AND" and not "either/or."

10) Mediator Time Outs. Sometimes a mediator may need a break to reflect on what is happening. Is this impasse about money, respect, apology, personalities? Are we missing something or somebody? What's the hang-up? How do we tackle it?

Adding Moderate Pressure

11) Adding Heat. Real friends challenge you. Good coaches push you. Great teachers may encourage you. These actions may make you uneasy, while at the same time inspiring deeper thoughts and self-questioning. The mediator challenges by asking tough questions: How would you react to that offer, gesture, comment you just made if it had been made to you? How could you get a better response? If you had suffered the other parties loss (money lost, business hurt, emotional hurt) how would you react? How could this all look to an outsider (jury, judge)? What if the outsider viewed your contribution or attitude differently than you view it? Finally, you might state: to be candid with you, the situation could be viewed your adversary's way as well as your way. When the mediator is trusted and acts with integrity, the heat is generally appreciated.

12) Optimism. There may be low points when all seems like a waste of time. Patience is running low, a lawyer may feel insulted, and the party's original negative expectations are being reinforced. The mediator must be comfortable with conflict and its low points

and remain the optimist in the room. Pessimism is natural; parties may begin with over-inflated views of their case, and then feel deflated and angry when all is not fitting their predetermined positions. This is the space within which settlements occur. The mediator knows that 98 percent of cases settle—with more work, why not today? The mediator also knows that mediation provides the best opportunity for a better settlement to the benefit of all parties.

13) Joint Sessions. Whenever people can work together there are huge advantages. The key is getting people to that point where they can work together, or to honestly recognize when togetherness will not help to settle the dispute.

14) Resetting the Table. Sometimes it is wise to meet with just the lawyers, just the experts, perhaps the decision makers with or without the mediator, or any other combination that has potential for unfreezing the situation.

15) Bad Thinking and/or Too Much Gaming. All of us at times are subject to fuzzy and irrational thinking. A mediator can help peel away these thinking traps. One problem can be an ungrounded and exaggerated idea of value held by a party that has turned into a faulty anchor. Movement off this anchor is only meaningful to the party attached to the anchor. The other party is unimpressed with movement from what he/she considers an unrealistic anchor. At other times a party takes this anchor position simply to set the perimeters or to make the rules so as to win the game. The mediator recognizes the faulty thinking or game playing, then defines and challenges it. Another example of fuzzy thinking is the "endowment effect," i.e., "it's my stuff so it's valuable." This faulty position can be present whenever valuation is a factor. The mediator redirects by asking: If you didn't have "the stuff" what would you be willing to pay for it? When not as emotionally attached, what is this case worth? For example, what would an investor pay to own the potential benefits of this lawsuit? What risks should worry this investor? Simply put, what would you pay for the right to this lawsuit if it was someone else's? There are many of these kinds of thinking traps and the mediator must recognize and challenge them. The mediator must also recognize pure game playing and be prepared to politely challenge unproductive strategies.

16) Challenging Self-Defeating Behavior. Art Buchwald beat Paramount in a lawsuit for stealing his idea for a movie, but to do so he spent more than he won. The machinists union beat Eastern Airlines but then lost their jobs and everyone else's jobs as Eastern went out of business. Stubborn behavior often occurs when an individual's personal

identity is wrapped up in the conflict. Self-defeating behavior must be recognized and confronted.

17) Toughening the Reality Check. The mediator must emphasize the costs of litigation and the ensuing emotional toll to be paid. Different predictions made by attorneys on both sides must be put in perspective. When both attorneys claim an 80 percent expectation of success at trial something does not add up. Now is the time for the prepared mediator to be pointing out the factual and legal problems of the case. I have tried many cases and taught evidence so I will challenge statements such as, "don't worry I can get that evidence in." Other mediators with varying subject matter expertise will share their experiences. As much as we huff and puff in the midst of conflict, most people are basically risk-adverse. There is often wisdom in taking a sure thing.[iv] The credible mediator lets no risk go unnoticed.

Mediator Opinions and Other Finishing Touches

18) Smoke Signals. Before the current age of extensive mediation training, mediators shuttled back and forth testing the waters with "what ifs." If they do "x," are we close? Would you then offer "y"? This is sometimes dangerous since these are not offers and counter-offers unless clearly so labeled. Yet these probes can tell the mediator that this case will settle. There is nothing wrong with mixing old and new approaches to resolving disputes.

19) Early Safety Box. Think of the mediator as holding information in a safety box. When people are afraid of disclosing final numbers, for fear that if there is not a settlement the dollar amount will hurt them later on, this method can be used for breaking the logjam. It is a method of encouraging the parties to disclose their best offers. The key is that best numbers are kept and known initially only by the mediator. If the numbers are close the parties are told to keep negotiating

20) Final Safety Box and Mediator Proposal. When there is still separation, and **only with the clear permission of the parties**, the mediator will suggest a settlement proposal. Parties too often reject reasonable proposals made by the other side (reactive devaluation). When the mediator makes a proposal it is not automatically rejected. The parties are told to caucus and then to respond to the mediator, privately accepting or rejecting the mediators proposal. If both of the parties say yes, there is a settlement

and everyone is brought together. If only one party says yes and the other says no this is not disclosed (hence no bargaining position lost) and the parties are told there is no agreement (possibly rejected by both). The few times when I used this method and made a mediator proposal within the context of this safety box process, resolution has been achieved.[v]

21) Next Steps. It's not over if there is not an agreement. Perhaps further limited discovery or an agreed upon expert valuation is needed. Patience and optimism will lead to the appropriate next steps.

22) Final Process Agreement. Settlement through mediation generally has advantages for all involved, but not always. After all alternatives have been explored and rejected, it is then up to the parties to select trial or another alternative. Arbitration may be the most efficient and cost-effective approach. One possibility is using a high/low arbitration where the parties agree on a financial range that is not disclosed to the arbitrator. Also consider the alternatives of a one, two (both neutrals) or a three person arbitration. The key is to have a plan for resolution.

I have described the skills and attitudes a litigator should look for in a mediator and outlined practical mediator tools for breaking impasse and settling disputes. The key is for the mediator to be open to adjusting to the needs of the parties and not to be locked into one "right" approach. A practical and flexible mediator should be able to assist in getting most disputes resolved and in increasing client satisfaction.

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[i] Every idea in this article is borrowed and often from multiple sources. Favored books include Stone, Patton and Heen, "Difficult Conversations" (1999); Bowling and Hoffman, "Bringing Peace into The Room" (2003); Galton, "Ripples from Peace Lake" (2004); and Goldman, "The Science of Settlement" (2008). Finally, I have assisted or coached for most of the mediation trainers in Michigan and other mediators have lectured my advanced mediation class, so I owe special thanks to these friends with whom ideas and different perspectives have been shared, but I take full responsibility for differences in my thinking and fully credit them for any useful thoughts which have found their way into this article.

[ii] Gladwell, "Blink" (2005).

[iii] "Blink" supra at 264. Sharing early information may provide some comfort to the parties and to the mediator as it gives all a framework for the mediation, but is not to be confused with understanding, which necessitates 100 percent presence during the mediation.

[iv] One large study found that 61 percent of plaintiffs received less in litigation/arbitration than the last offer that they had rejected. At the same time 24 percent of defendants paid more after litigation/arbitration than for what they could have settled. While plaintiffs erred more frequently, the defendants who erred in their predictions erred more dramatically, with the cost of their errors greater by a factor of 10 compared to the plaintiff's errors. Hard lines often served neither the plaintiffs' nor defendants' interests (Note: error ratios varied depending on types of cases). See "Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations," Kiser, Ashen, McShane, *Journal of Empirical Legal Studies*, Volume 5, Issue 3, 551-591, September 2008

[v] There are refinements to this method beyond the scope of this review, "Should parties tell mediators their bottom line?" Contuzzi, *Dispute Resolution Magazine*, Spring 2000