MEDIATION ADVOCACY:
NEGOTIATION TIPS AND PERSPECTIVES TO HELP YOU UP YOUR GAME AT MEDIATION

by REBECCA CALLAHAN

People think that adjudicatory processes are predictable, but they aren't and the public is figuring that out and moving away from formalistic procedures to mediation.
~ Hon. Wayne D. Brazil (Ret.)

Referring to the results of a 2011 survey of Fortune 1000 corporate counsel, Retired Magistrate Judge Brazil made the above observation during the 2015 advanced training seminar provided by the U.S. District Court/Central District to its panel mediators. The 2011 survey shows that less than one percent of the responding companies espouse an "always litigate" posture, as compared to roughly ten times that percentage in a similar survey conducted in 1997. The 2011 survey also revealed a dramatic drop in the percentage of companies that purport to "litigate first" before moving to ADR. *See* Thomas J. Stipanowich and J. Ryan Lamare, Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations, 19 Harv. Negot. L. Rev. 1 (2014), *available at* www.mediate.com/articles/LivingWithADR.cfm. These survey results indicate that those who have had repeat experience with adjudicatory dispute resolution processes (litigation and arbitration) prefer a negotiated, versus litigated, outcome. This is consistent with statistics maintained by the Judicial Council that show that approximately 80% of all civil filings are resolved by means other than a trial on the merits (*e.g.*, settlement, dispositive motion, abandonment). *See* 2014 Court Statistics Report at 43, www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf.

Litigating civil disputes in the current environment requires a lot of strategic thinking and planning. It is no longer enough to map out legal theories and the discovery plan to develop evidence to support those theories. It is the rare case filed today where thought is not given to when—not whether—to go to mediation. Partly due to the broad confidentiality protections afforded by Evidence Code section 1119, mediation has become the preferred method of ADR. Mediation is a facilitated negotiation, and has developed into an ADR process that is uniquely distinct from the settlement conference. The center point of mediation is party self-determination, giving the disputants control over defining both the process and the outcome. The purpose of this article is to examine a few strategies that might help you and/or your clients utilize the mediation process to its best and fullest potential.

Risk is in the eye of the beholder.

People do not perceive or assess risk the same way, and much depends on whether we are facing a gain (selling) or a loss (buying). Generally speaking, in the context of a litigated dispute, plaintiff is selling a claim and defendant is buying plaintiff's claim. Studies show that the person selling places a higher value on that which is being sold than the person buying. Additionally, some people are more risk averse than others, meaning they will pay more or take less in order to avoid the risk of loss/liability. Others are risk-seekers in the sense that what looks like an unwise gamble to most would look like a gamble worth taking. Risk attitudes of both the parties and their counsel are a subliminal factor in any negotiation, and exert strong cognitive influence on how settlement is viewed as compared to the high stakes and uncertainty associated with litigation.

Researchers have found that a party's position in the negotiation as plaintiff (seller) or defendant (buyer) influences how risk is assessed. Plaintiffs face a sure gain in settlement versus the possibility of a larger gain at trial, coupled with the potential for complete loss at trial. In the absence of counterclaims, defendants face a sure loss by settling versus the possibility of a defense judgment after trial, coupled with the potential of a significantly larger loss at trial. In one study, the majority of subjects facing gains (seller position) preferred a certain $250 over a 25% chance of $1,000 (worth on average $250). On the other hand, when the same group was put in the position of facing a loss (buyer position), the majority preferred a 75% chance of losing $1,000 (worth $750) to a sure loss of $250. So, the position as plaintiff or defendant is likely to influence each side's valuation of the case. There is not much anyone can do to avoid completely the influence of risk tolerance in a negotiation, but when an extreme position is taken and held, then you need to spend time working through why one side's perception of the downside risk is so minimal. The following are some areas where you might test assumptions:

Reactive devaluation is a cognitive barrier in which we automatically reject without consideration that which is said or offered by the other side—even when it is favorable—simply because the source of the message is our adversary or someone we hold in low esteem.

1. **Control**. Where we believe we have control, we have a lower perception of risk. Travelling by car is a good example. We may feel less comfortable as a passenger than as the driver. For a seasoned litigator with a history of success through trial, the bias may be to try a case rather than resolve it through mediation. Similarly, where the plaintiff controls the decision to settle or litigate, the bias may be to "go to trial" rather than make a counter-offer so as to keep the negotiation moving forward because plaintiff's initial control over the litigation process may cause plaintiff to underestimate or underappreciate the risk of loss. The influence of the "control" bias is countered by taking the time to critically assess and talk through the various attributes of the trial process that are uncertain and outside the control of the parties and their counsel.

2. **Novelty**. New risks are seen as higher than ones we have grown used to seeing. For example, genetically modified food is viewed as more risky than pesticides. Continued exposure to the same risk also results in it being seen as less risky. An attorney may be more confident in his/her assessment of the trial outcome in a court or before a judge where the attorney routinely appears versus the situation where the attorney is litigating a case in an unfamiliar court. The same case/same client looks more risky in the "foreign" court. Similarly, a party or insurance adjuster may be more confident in an assessment of the trial outcome where that party has been involved in numerous similar cases versus the situation where being involved in litigating a case of any kind is unfamiliar territory. The novelty bias is countered by delving into the particulars of the case at hand, as well as the representativeness and reliability of the "sampling" from the prior court experience.

3. **Risk-benefit trade-off.** Behavioral studies show that risk is discounted when there is a perceived benefit as well as a threat. Smoking cigarettes and drunk driving are examples of risk discounting. This factor affects the analysis required for a successful negotiation where the risk of trial is severely discounted because either the defendant focuses on the "benefit" of winning big and paying nothing, or the plaintiff sees only the upside success of the trial and discounts all related risk. This bias is countered by focusing in on the specifics of the perceived benefit, and directly contrasting those benefits with the downside risks.

4. **Trust**. Where protection from a risk is offered from a trusted party, the risk is perceived as lower, but lack of trust makes the risk seem higher. Public trust in the government, intelligence agencies, and law enforcement can influence the perceived level of threat from terrorism. The client's confidence in his/her attorney may distort the risk analysis for a given dispute. This is also known as the "halo effect," and as recent cases have shown, clients have been known to settle (or not settle) with their adversary and then sue their attorney when:

(1) they settle for something significantly less than what they were asking for in litigation and have seller's remorse, or (2) they pass up an opportunity to settle and then obtain an outcome in litigation that is far worse. *See, e.g.*, *Filbin v. Fitzgerald*, 211 Cal. App. 4th 154 (2012); *Moua v. Pittullo, Howington, Barker, Abernathy, LLP*, 228 Cal. App. 4th 107 (2014); *Syers Properties III, Inc. v. Rankin*, 2014 WL 1761923 (1st Dist. Ct., May 5, 2014); *Amis v. Greenberg Traurig LLP*, 2015 WL 1245902 (2d Dist. Ct., Mar. 18, 2015). The simplest strategy for countering the "trust" factor is to coordinate with the mediator in advance to lead the "worst case" discussion and to make sure that the ultimate choice to accept or reject a settlement is left in the client's hands.

QUICK LOOK

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Spectacular achievement is almost always preceded by unspectacular preparation.

Before starting the mediation, time should be devoted to preparing for the negotiation, exploring tactical moves, and setting overall strategic objectives. Fact gathering, developing positions, and devising supporting arguments and materials are essential. Another critical task is to identify the personal and business interests of one's client *and* the opposing party. Where do they overlap? Where do they conflict? How many things can you identify and prepare for in advance that your client or the other side might want or need to talk about on the way to reaching a deal? Are some interests more important than others? Are there any "deal-breaker" points and, if so, should they be put on the table at the beginning or end of the negotiation?

Advance preparation pays other dividends. If you (and your client) do this type of work in advance of the mediation, you will not have to work quite so hard at the mediation. Why is that important? Because one of the top reasons why disputes do not settle at mediation is mental fatigue, or too many decisions to be made in a short amount of time on important matters.

The Popeye phenomenon.

Popeye is a cartoon character from the 1950s famous for saying, "I am what I am . . . and that's all that I am." The same could probably be said for each negotiator in terms of how he/she perceives the world, interacts with people, and makes decisions. In 1921, Carl Gustav Jung theorized that there are four principal psychological functions by which we experience the world: sensation, intuition, feeling, and thinking. Of these four functions, Jung proposed that one is dominant and influences how we act and think. Katharine Cook Briggs and her daughter Isabel Briggs Myers took Jung's theories one step further and put the theory of psychological types to practical use through the Myers-Briggs Type Indicator (first published in 1962). The underlying assumption of the MBTI is that we all have specific preferences in the way we construe our experiences, and these preferences underlie how we define and perceive our interests, needs, values, and motivations. Those preferences fall into four broad, general categories: (1) *Extrovert*—strong-willed, outgoing, social, demanding, determined; (2) *Introvert*—cautious, precise, deliberate, questioning, formal; (3) *Feeling*—caring, encouraging, sharing, patient, relaxed; and (4) *Thinking*—logical, organized, verbal, persuasive, demonstrative.

In addition to their personal "preference behavior," negotiators can choose from a well-defined range of negotiating behaviors and styles, ranging from competitive to collaborative, compromising, accommodating, and avoiding. Effective negotiators are aware of their natural orientation, take time to observe and identify the orientation of their counterpart, and work to understand the dynamic interplay of the negotiation styles that may be at the table. They are versatile and able to use different styles, depending on the circumstances of the negotiation at hand. For example, if one negotiator's natural orientation is to problem-solve and look for a collaborative solution, he or she will need to change the usual action plan if the negotiating style of the opponent is competitive. For another example, if one negotiator's natural orientation is to be competitive, he or she will need to work at being more patient, relaxed, and encouraging if the opponent is an avoider whose negotiating weapon is to not engage and to avoid discussing key issues by diverting the discussion elsewhere. To borrow words from Linus Pauling, "The best way to get a good idea is to get a lot of ideas."

Negotiation is a dance, but it is not a two-step.

Negotiation is akin to a dance competition where the dancers must be capable of performing more than one dance and switching from different tempos and beats. In the context of negotiating the settlement of a litigated dispute, it is unlikely that either side will be persuaded to adjust its assessment of risk or its evaluation of the merits to mesh with that of the other side on most issues. So, squaring off and arguing "the evidence" or "the law" will not yield a settlement—unless, of course, both are undisputed, but then you would not be in mediation. The party on the undisputed losing end would simply yield. In order to settle a litigated dispute, something more needs to happen and be discussed. And that takes time and patience all around the table. First of all, both/all sides need to have an opportunity to speak, respond, and find some level of common ground. One side may have thought the whole thing through and have a pretty good idea of where the negotiation should end, but the psychological reality is that most people need to engage in a back-and-forth negotiation—they need to dance a little (or a lot)—before they are comfortable saying "yes" to a deal.

A good negotiator understands this aspect of the process and plans out in advance how to engage in a constructive dialogue with the other side, which means identifying a framework within which everyone can agree to discuss settlement. A good negotiator also understands, and comes prepared for, two negotiations: the first being the negotiation that gets each side to its "best" number; the second being the negotiation that bridges the gap. It goes without saying that the higher the level of preparation and communication skills, the faster a negotiation will move. And the reverse is also true. So, wear comfortable shoes and be prepared to dance more than just the two-step.

True genius is the capacity to evaluate and make decisions in the face of uncertain, conflicting, and missing information.

In any negotiation, but especially in the context of the litigated dispute, a negotiator will not have all of the information he/she would like to have. Even in negotiations that occur after discovery has been completed and everyone has a pretty good idea of "the facts" and who they are dealing with on the other side, the negotiator still cannot predict *what*

the other party will do or how they might react or respond to an offer or counter-offer. Thus, in addition to making and responding to substantive moves, each party must make a deliberate choice throughout the course of the mediation as to whether to make a move that will be perceived and received as competitive versus cooperative. With a competitive move, the party runs the risk of alienating the other side so that it makes the ultimate competitive move of walking out the door. With a cooperative move, the party runs the risk of yielding too much and obtaining a less advantageous outcome than was otherwise available if it had been more competitive. This is the prisoner's dilemma, and explains why two rational parties might not engage in a cooperative, problem-solving type negotiation, even if, objectively, it is in their best interests to do so.

If parties are thrown into a negotiation or do not prepare in advance and/or do not know or trust the other side, they are going to be more inclined to make competitive moves. When one or both parties have information and know something about each other and both sides of the case, there is less uncertainty and more options, and thus a potential willingness to make cooperative moves; the cooperative player can always return to competitive mode if a cooperative move is not reciprocated. The following are several steps to follow when engaged in a competitive negotiation heading for a stand-off (*i.e.*, impasse):

(1) Begin in a cooperative way, but do not risk very much; meaning, do not reveal your bottom line. The point is to get the negotiation going.

(2) If the other side comes back competitively, you should "retaliate" and make a competitive move. You need to show that you are capable of being a competitive negotiator, even if that is not your natural style or orientation.

(3) If the other side becomes cooperative, you need to be forgiving and play along, even if that is not your natural style or orientation. However, your cooperative moves should be measured (*i.e.*, tit-for-tat), and you should bear in mind that a negotiator who is by nature competitive will only change his or her behavior if it is going to hurt to not do so.

(4) You need to be clear on the process (as distinguished from the substance) and on how you prefer to negotiate. You may need to be prepared to negotiate the process with your counterpart, and you may need to adopt a negotiating style that is not your norm.

(5) In the event of a stand-off, be prepared to discuss a proposed bracket (*e.g.*, your client will come up or go down to "X" if the other side will go down or come up to "Y"). This is one way to deal with the prisoner's dilemma because each side knows in advance of its move what the other side's pre-agreed response will be.

(6) Look for opportunities to be creative and find agreement on side issues. Remember, "a pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty." (Winston Churchill)

I like the idea, but I don't like you.

In the context of the litigated dispute, it is sometimes difficult to formulate a proposal that both parties, given their different interests and views and their conflicting strategic goals, will embrace. Even when such a "mutually-acceptable-in-principle" proposal can be formulated, there may be an additional barrier to overcome: namely, reactive devaluation.

Reactive devaluation is a cognitive barrier in which we automatically reject without consideration that which is said or offered by the other side—even when it is favorable—simply because the source of the message is our adversary or someone we hold in low esteem. This barrier also influences us to reject or devalue whatever is freely available and to strive for whatever is denied (the grass is always greener on the other side). The reasoning that leads to this reactive decision-making is entirely inferential and assumes a perfect opposition of interests or, in other words, a true zero-sum game. That is rarely the case in real world negotiations where parties' needs, goals, opportunities, risk assessments, or risk tolerances are complex and varied.

Reactive devaluation helps explain the popularity of caucus mediation and use of the mediator to carry proposals between the parties. For some reason, when the proposal is delivered by the mediator—even though it has been sent from the "other side"—it is heard and received differently than if the "other side" delivered it directly. This should encourage you to think strategically about when and how to open settlement discussions. Will the process be easier and will it move more quickly to your client's desired end point if you conduct settlement negotiations at a mediation versus doing so directly or privately? Abraham Lincoln advised:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough.

While sometimes it is necessary to make a little war before there can be peace, parties involved in civil litigation should be provided with the opportunity, encouraged, and empowered to seek a negotiated resolution from the outset of the dispute. As discussed in this article, there is a certain ying and yang to making a deal. Every negotiation is a mixed motive exchange, but no matter how big the pie is, at some point it has to be divided. In negotiation, we have the challenge of managing what are competing voices. On the one hand, we want to compete and claim all the value that we can. On the other hand, we know that if we do not cooperate on some level, we will not reach a deal. These two voices are very different and frequently in conflict. A versatile negotiator is one who is well-schooled in an array of bargaining methods, and capable of translating the two basic negotiating paradigms into a negotiating strategy. As J. Paul Getty once said, "You must never try to make all the money that's in a deal. Let the other fellow make some money too because, if you have a reputation for always making all the money, you won't have many deals."

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