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My mediation TOP 10 list

PERSPECTIVES FROM AN ADVOCATE OF 38 YEARS, RECENTLY TURNED NEUTRAL

After 38 years as a consumer attorney, I offer the following declaration to the parties and counsel as I introduce myself as their mediator:

"I know that you know my professional background. My goal as your mediator: By the end of our time together, if you had not Googled me, you would not know on what side of the "v" sat the names of my former clients."

With the foregoing credo in mind, this "new mediator" offers a Top Ten List of those actions and traits on the part of both mediator, counsel and the parties that improve the chances for a successful mediation. "Success" is not just a complete settlement of a pending civil case, but instead, can be a process and an experience that has or may soon advance the interests of the parties.

Number 10: Be present

Ideally, all decision makers should be present and be active participants. In mediating the litigated case, rarely can there be success in the absence of the plaintiff and defense representative with true resolution authority. This principle applies even in the seemingly routine injury case where plaintiff's counsel assures the mediator she has settlement authority.

It may be acceptable for the insured defendant driver in an admitted liability automobile accident case to be absent, but there are few other similar examples. Perhaps the more accurate statement of principle is that the mediation will likely fail to find success where the mediator does not enjoy the personal presence of everyone required to close the deal. And, by the way, the parties and counsel appreciate when the mediator arrives early and is ready to go at the appointed hour.

All of these "be present" principles involve physical presence. But it is equally important that all participants "be present" in the sense of their focus. Whether in private mediations where presumably the parties and counsel have had weeks if not months to prepare for their day with the mediator or at settlement conferences where the settlement officer is assigned a case going to trial in a week, too often these "presence" rules are not honored in the breach.

Most litigators and mediators have felt the frustration of a late arrival due to traffic. We believe we have done all we can (short of making arrangements to camp out at the door to the office building the night before, much as we Bruins did in the 1970's before basketball games) and yet still we remain on the 405 in suspended animation. But what is not as understandable is a failure to pull over and use the cell phone to check in. Many lawyers do not include in their mediation preparation an easily accessible note as to the phone numbers of the mediation office, mediator and opposing counsel.

It is also surprising to see how many lawyers on both sides are unable to leave their other case obligations at the office. Instead, during mediation, they allow the many worries and complications of a busy life and practice to enter the conference room, thus distracting them from both their focus on the mediator and on their client. The mediation session is

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important to everyone. The best way to communicate that one believes in that importance is to do everything one can to be focused and engaged with everyone encountered at the resolution session.

Number 9: Failure to prepare is preparing to fail (Coach Wooden)

This starts with the mediator. For yours truly, the gray hair and irregular skin below the eyes is proof that preparation is the secret to success in just about anything, from opposing an MSJ, to solid pre-game infield practice, to careful reading of all mediation briefs. Similarly, when counsel presents a cogent brief, he demonstrates preparation. When she brings a three-ring binder containing photographs, a *Howell* analysis (*Howell v. Hamilton Meats* (2011) 52 Cal.4th 541, and the cases that follow so that the mediation will not bog down in unproductive debates over the amount of the special damages likely to carry the day (should the case be tried) and the relevant jury instructions, the mediator feels she has died and gone to heaven.

But preparation goes well beyond the immediate written materials presented to the mediator. One of the ongoing debates in the legal community is when is the right time to engage in a mediation session, assuming of course that both sides believe the case should be resolved short of trial. The status of your preparation to date is key to this analysis. The issues and questions about settlement versus trial are beyond the scope of this article. During an opening joint caucus, when held, the mediator's goal is to be clear as to process; what to expect over the next four, six, eight or more hours. One approach is for the mediator to say what he believes; that there are cases in the civil arena that must be tried. But the vast majority not only do settle, but should settle. What is usually not said out loud, but is true nonetheless, is that many if not most cases that resolve pursuant to terms that all would agree are fair and just reach that conclusion by virtue of a well-thought-out plan of investigation, discovery and client involvement.

Consider the following case recently resolved at mediation. It was a bicycle accident case wherein the plaintiff was riding her bicycle on the sidewalk near her home in Los Angeles County. As she passed a three-story office building and its driveway coming from a covered parking lot, an exiting vehicle did not stop prior to arrival at the sidewalk, resulting in an impact, ejection of the bicyclist from her seat and various moderate-to-severe injuries.

Counsel for both parties focused on damages, the medical specials, future lost earnings and medical care needs. Defense counsel made a passing reference in his brief to comparative negligence, asserting that of course plaintiff was partly at fault as she was riding on the sidewalk. But defense counsel did not say more about the subject of sidewalk bicycle riding. More importantly, plaintiff's counsel had not spent the time to further analyze and, if possible, refute the claim of comparative negligence.

As the mediator read the briefs, he recalled a basic fact about bicycle riding in California. Vehicle Code sections 21206 and 21650(g) leave the determination of the legality of riding a non-motorized bicycle on a public sidewalk to the locality, by ordinance. One is generally permitted to ride a bicycle on the sidewalk in the City of Los Angeles, but not in the City of Beverly Hills. The parties to the case both assumed that the accident had taken place in the City of Beverly Hills. The mediator was not so sure. He logged into Google Earth and concluded that the plaintiff had been riding just within City of Los Angeles limits. The mediator did not believe his job included educating either side, but he did believe he should drop hints here and there that might prompt one or both sides to do what the mediator had done. Thankfully they did so. With this key fact now known to both sides, the bicycle lane to resolution was open. That case was another reminder that planning and preparation are as important to those seeking dispute resolution as to those preparing for trial.

Number 8: Black and white? Or should gray be the color of choice?

No one wants to be told they are wrong, even if they are. The mediator needs to see gray areas as much as possible; it can be done. The successful mediator will usually manage to get counsel and even the parties to see gray areas they had not considered. By the same token, the best advocates arrive at the mediation session prepared to acknowledge the gray even as they advocate for what they believe is right and wrong.

Most of us have an uneasy feeling that we are living in challenging and troubling times when it comes to the nature of facts, events, certainty, and values. How often have many of us attended an all-day mediation session where the first four to six hours are spent with one side sending the mediator into the other room to instruct opposing counsel and her client as to the facts of the case and the applicable law, even where comprehensive briefs were served on the other side? The experience of a party or party representative who simply will not acknowledge that his interpretation of events may not be the only interpretation can be maddening. The accomplished mediator should remain optimistic that even the most hardened position can be softened with ongoing dialogue and the ability and willingness to think outside the proverbial box.

Number 7: Trust and credibility are earned, not assumed, or inherited

From the mediator's perspective, earning trust and credibility starts with the first contact she has with the lawyers who retained her, continues with her introduction and joint caucus, and is never fully assumed. The lawyers and their clients will know the difference between a mediator who balances confidence and humility, imperiousness and egalitarianism and one who believes he has all the answers and cannot wait for you to adopt them as gospel.

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The same principles hold true for the advocates; the truly gifted ones rarely if ever rest on their laurels; each new encounter is an opportunity to earn the mediator's trust and thus establish credibility. Shortcuts are usually apparent. This is usually an issue with mediation briefs.

It is generally important to cite cases that are still good law. The dollar amounts need to add up. It is important whenever possible to have an up-to-date and verified statement as to a Medi-Cal or Rawlings lien. About liens, it can be very important to identify if a lien is asserted by a Self-Funded ERISA plan. This means that when you say you will not be able to achieve much of a lien reduction, you can support your belief with the challenges imposed by ERISA. As one can see, the rule about preparation is closely associated with the establishment of trust and credibility in the eyes of both the mediator and the opposing parties and counsel.

Number 6: Treat everyone with respect

One rarely sees a party or his lawyer disrespect the mediator. But the mediator can find himself having a "hard time" with a particularly disagreeable client across the table. Get over it. It is not hard to apply the Golden Rule to everyone in the room. It is what everyone wants, and it is never a mediator's job to withhold or deny respect, ever. Of course, we are all human and we all know there are people and personality types who can get under our skin. It is hard to imagine any mediator who has not occasionally come across as dismissive of a party whose behavior is either unprofessional or suggestive of a personality disorder that threatens to poison the process. It is therefore especially gratifying when, through a stubborn insistence on grace, patience and acknowledgment of each person's value and worth, the mediator can connect with a party whose lawyer is even beginning to wonder why he is in the room.

The Golden Rule principle may just be the secret to success in many more resolution settings than we might imagine. In a recent case alleging assault and battery, the male mediator was faced with a case brought by a young woman against her former boyfriend. The parties were public figures and the tabloids had been having a field day with the case. There are many aspects to such a case beyond the scope of this article, in terms of how the mediator prepared for what would undoubtedly be a high-energy, high-emotion setting. But perhaps the most critical moments of the resolution session were those minutes of connection between the plaintiff and the mediator. It is simply not realistic to say that gender does not matter when it comes to human connection.

In this case, the male mediator needed to be the best of himself regarding the experience that the young female plaintiff was alleging in the lawsuit and that, for the most part, the defendant denied. The plaintiff was at various stages, angry, sad, scared, cynical, vindictive, and dismissive, of her lawyer, the mediator and the court. What was apparent from the outset, however, was that the legal system had thus far only served to validate for her that no one was listening, no one really cared, it was all about money and power. Even in an era dominated by "Time's Up" and "Me Too," this young woman felt as if she had no chance.

The mediator in that case was scared too. Scared that he would say the wrong thing. Scared that he would be viewed as the "system" this young woman found so abhorrent from the moment she hired a lawyer and decided to sue. The matter resolved, in large measure because there was only one truth that mattered. The Plaintiff was heard, she was respected, she was honored. The mediator did not need to ignore the very real factual disputes in the case or the risks of litigation for both parties. The mediator did need to respect both parties equally and acknowledge the truth each carried with them.

Number 5: One can be neutral and find the time to persuade

There are many forms of persuasion. For the mediator, "because I say so" is usually not the best approach. The art of the deal (if you will pardon the expression) is the ability to persuade in both rooms. Generally, the best approach is to suggest the impact of a key fact or two; think about it, consider "this" and how "it" might play out in front of a jury. This is where the mediator must balance his desire to use a facilitative approach to mediation with the potential and even likely need during the session to slip into an evaluative mode.

Number 4: Find each side's interest

Identify, acknowledge, respect, and use the interests driving each side's stated position. The twain can meet. Self-interest is a beautiful thing and rarely disappoints.

Number 3: Believe

The successful mediator will have an unceasing belief that he can and will find the solutions that will bridge interests. She must believe that the case will settle, eventually, and that she will have played at least some role in helping achieve resolution.

Number 2: Get past the anger

It is inevitable that anger will surface during a mediation session. This can happen where the subject matter naturally invites an angry response and even requires anger management. But anger can also rear its ugly head in those cases that should not generally foster such anger. The job of the mediator, as much or more so than parties and counsel, is to never let that anger control the process.

Number 1: Patience, fexibility, persistence, stubbornness (see # 3)

These words, indeed, these ideas, come from a profound belief on the part of the mediator that he can succeed because the parties want him to succeed. The mediator will know when his job is complete. Here, the reference is only to the individual case and mediation session. The "job" of the mediator when it comes to the art and science of mediation is never complete.

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Age and experience do not impact everyone in the same way. Yet a successful mediation is founded on patience, flexibility, persistence and stubbornness – all traits that often come with age, experience, failure, and success. The parties and counsel who come to a mediation session motivated to succeed, met by a mediator likewise so motivated, is the match made in ADR heaven.

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