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HOW TO WIN AT MEDIATION (HINT: IT'S NOT LIKE A TRIAL)¹

Introduction

Starting in law school, lawyers are trained to be litigators and trial lawyers. Beginning with civil procedure classes, evidence classes, trial teams, moot court teams, clinics, and internships in state prosecutor and public defender offices, and other law school activities, lawyers are well-trained in the art of adversarial advocacy. Even post-law school, many CLE seminars focus on trial skills. Trials are considered the place where real lawyers are made, where the rubber meets the road.

However, fewer and fewer cases are going to trial than ever before. A quick internet search will reveal studies showing that around 90% of all civil cases settle before trial. The reasons are many, and include the availability of vehicles for settlement such as offers of judgment and the encouragement of settling through such methods as mediation.

But mediation is fundamentally different than litigation. The rules are different, and different skills are required. Therefore, good lawyers must learn the art of mediating to get the best results for their clients.

I. Mediation is different from litigation in two fundamental ways

Great litigators and trial lawyers are instinctively combative. They have a deep-rooted desire to win at almost any cost (within the bounds of professional ethics, of course). That is why their clients love them. They're fighters for their cause. Indeed, the adversary system is expressly designed to foster this mindset.

Much of a litigator's time is spent beating down the opposing party's positions and arguments. This combative and adversarial mode works perfectly well in written motions, hearings, depositions, and trials.

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But this naturally combative mode of conduct breaks down in a mediation setting and can be counter-productive. The reason is that a mediation is different from the adversarial trial setting in two fundamental ways:

A. A mediator is not a judge

First, unlike a judge, the mediator cannot rule on any aspect of the case.

The role of a mediator is to reduce obstacles to communications, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate decision-making authority, however, rests solely with the parties.

Fla. R. Cert. & Ct.-Apptd. Mediators 10.220. Therefore, convincing the mediator of the lack of merit of the opponent's case will not necessarily do anything to cause a good outcome in a mediation. The mediator cannot rule in your favor. The mediator cannot force the opposing counsel to accept your view of the case. Putting all of your resources toward convincing the mediator will largely be a wasted effort.

B. Mediation is voluntary and consensual

The second fundamental way mediations differ from court proceedings is that, unlike a court hearing in which attendance is *mandatory*, no one is forced to stay in a mediation. A mediation is a *voluntary and consensual* process. Decision making rests with the parties, not the mediator. Fla. Stat. §44.1011(2). Any party can end it at any time, for any reason or for no reason, without suffering any consequences whatsoever. Fla. Stat. §44.404.

In a courtroom setting, the parties must participate in the trial. Even if they do not like what they hear in the courtroom, they cannot simply stage a walk-out and end the process when the opposing counsel is presenting adverse or uncomfortable evidence. But a party in a mediation that is made to feel uncomfortable by over-the-top and bombastic arguments about how bad their case is can stage an indignant walk-out rather than continue to endure being made to feel uncomfortable. Even if they stay, they can become entrenched in the positions and refuse to budge an inch.²

These two fundamental principles should guide a trial lawyer's entire approach to mediation.

II. Choosing the right mediator

A. The bulldog mediator

Preparing for a mediation begins with choosing the right mediator. This must be done keeping in mind the two fundamental principles of mediation discussed above.

Somewhere along the way, all good advocates become enamored with their own case. Some become so enamored with their own case that they are no longer able to see the case objectively. They cannot understand how anyone else could rationally see the case in any other way than the way they see it.

² Even if no one walks out in a huff, it can end in an impasse at the end of the day. Fla.R.Civ.P. 1.730(a).

To these lawyers, the only possible explanation as to why the adverse side has not already capitulated is that no one has explained the facts to them forcefully enough. Thus, they believe in the myth of the so-called bulldog mediator, a forceful individual that can, by “telling it like it is,” cause the adverse party to finally see the light and capitulate. They believe a so-called bulldog mediator can “explain the facts” to opposing counsel and to their stubborn and recalcitrant client, and force them to settle.

Notably, advocates of the bulldog mediator theory will not be able to recite any instance in which they, *themselves*, were ever successfully “bullied” by a mediator into accepting a settlement they did not already want. Instead, in their apocryphal tales, it is always the *other* side who was bullied into submission.³

Meanwhile, back in the real world, no one likes to be bullied. Society has recognized bullying as a national scourge. There is even a National Bullying Prevention Month. <http://www.apa.org/pi/e-card/2013-bullying.aspx>

No one wants to be bullied, no one responds well to bullying, and it is a myth that this ever works. Turning back to the two fundamental principles of mediation, the mediator cannot rule on any aspect of the case, thus convincing a bulldog mediator will yield no results. And, the parties can walk out whenever they are made to feel uncomfortable, for example, by being bullied. So, bullying by a mediator will yield no good results.

The myth of the bulldog mediator should be put to rest once and for all and this phrase should be retired.

B. The experienced mediator

It makes perfect sense to want an experienced mediator. But the type of experience the mediator has can make all the difference.

For example, some former judges make great mediators. But prior judicial experience does not, by itself, automatically translate into good mediation skills. Not all former judges make good mediators. Experience ruling on cases and telling others what to do is not necessarily applicable in a mediation setting, where the mediator cannot rule and the parties can walk out any time they want.

Similarly, a mediator that has done practically nothing but mediate cases their entire career may make a great mediator. But lots of experience mediating, while forgetting what it was like being a lawyer and an advocate who must answer to actual clients and to a judge, does not necessarily translate into good mediation skills.

Likewise, a mediator who in private practice handled only one type of case, perhaps even the type of case that the mediation is about, may make a great mediator. But most cases require knowledge of various areas of the law, a willingness and capacity to learn about the unique aspects of each case, and a basic understanding of psychology and human nature. Tunnel vision in a particular practice area may not necessarily lead to good outcomes in a mediation.

³ Indeed, a mediator is expressly supposed to avoid “coercion.” See, Fla. R. Cert. & Ct.-Apptd. Mediators 10.300.

C. The best mediator

Each mediator is unique, and each mediator should be evaluated on his/her own unique terms, without resorting to stereotypical generalizations. In most cases, the best mediator will be one that is generally knowledgeable about the law, is open minded, is able to comprehend the law in various scenarios and when it is explained to them by the lawyers, has the patience and willingness to listen to the lawyers and to the clients, has a basic understanding of human psychology, and treats everyone with equal dignity and respect. These qualities in a mediator will allow the lawyers and parties to focus their energies on obtaining the best possible outcome for themselves.

III. The mediation statement

Many lawyers believe that the Confidential Mediation Statement (CMS) is a waste of time and money. They dread having to write a long explanation of the case when they feel that opposing counsel already knows what the case is about, and in any event, they can just explain it orally at the mediation. They therefore give it little thought, copy and paste from prior motions, or perhaps skip it altogether. But they are missing out on an important opportunity by skipping the CMS or giving it short thrift.

The purpose of the CMS is very different from the purpose of the opening statement, the two should not be confused, and the CMS should not be skipped. The opening statement is the lawyer's opportunity to do a lot of things, such as speaking directly to the adverse lawyer's client. Therefore, the opening statement can (and often should) include some posturing and bombast by the lawyer.

However, the CMS is the lawyer's private, privileged, and confidential communication to the mediator about the case. It should avoid being bombastic and argumentative. As discussed, the mediator cannot rule on any aspect of the case, and therefore an overly argumentative CMS can simply be wasteful and serve as a distraction.

Instead, the CMS should educate the mediator as to the basics of the case so the mediator can formulate a plan for helping the parties reach a settlement. It should state, in plain and concise terms, the name of the case, the forum, the parties, the basic nature of the dispute (breach of contract, etc.), whether it is set for trial, the status of discovery, and the status of settlement discussions.

Beyond these basic points, the CMS should also privately and confidentially tell the mediator things that cannot be said openly to the opposing counsel or opposing client, such as the weaknesses in the lawyer's own case and in the adverse party's case, unique pressure points in the case, wholly inadmissible matters that can nevertheless affect the case, and what the client "really" wants out of the case. In sum, the CMS should be a short, concise, candid, non-bombastic, and frank statement of the case, and it should educate the mediator on how the case can best be settled favorably to the lawyer's client.

IV. The opening statement

The main focus of litigation is on ultimately convincing the judge or jury to rule in one's favor. Litigators are comfortable with this mind-set. That explains why they often prepare for mediation as if preparing for a contested hearing. They often prepare to argue the merits of the case as they would prepare to argue a contested motion in court.

This type of presentation is unlikely to result in best outcomes in a mediation. In preparing for a mediation, the lawyer must go back to the two fundamentals of mediation. First, mediations are not hearings and a mediator is not a judge. A mediator cannot rule on any aspect of the case. Fla. R. Cert. & Ct.-Apptd. Mediators 10.220. Convincing the mediator of the legal merits of the case will not result in a mediation win, because the mediator cannot issue a ruling or force a settlement.

In addition, the adverse party is unlikely to be swayed by this type of argument because the parties are probably already very familiar with each other's legal theories. However, the case has, by definition, not yet settled at the time of mediation. So, there is little reason to believe that simply repeating those same arguments yet again in the mediation will yield a different result.

Secondly, mediations are voluntary and consensual. A party can walk out any time that the proceedings are making them uncomfortable.

The primary audiences for the opening statement are the lawyer's own client and the opposing client, not the mediator. The opening statement should not be wasted educating the mediator. A good lawyer will have provided a confidential mediation statement to the mediator well in advance of the mediation, so the mediator will already have a good understanding of the case by the time of the opening statements.

So, the lawyer must first prepare his/her own client for what opposing counsel will say in the opening statement. The client must be prepared to hear all of the negative arguments and bombastic language which will likely be coming from the opposing counsel during the opening statements, and not be affected.

The client must be educated that this is all part of the process, and not to get discouraged or inflamed when hearing uncomfortable things being said by opposing counsel. After all, it is better to hear those things now, in a mediation setting, rather than later in open court before the judge and jury that will decide the client's fate if the case is not settled. Walking out indignantly upon hearing opposing counsel's opening statement is a loss in a mediation and shows bad preparation by the lawyer.

In preparing the client for the mediation, the lawyer and the client should also have a full and frank discussion about the merits of the case, the risks of litigation and trial, and the realistic, desired, and possible outcomes. The client should not hear the weaknesses of the case for the first time during opposing counsel's opening statement.

The lawyer should also keep in mind that the opening statement is often the first time the client has heard their own lawyer speak for them in a public forum. The lawyer cannot disappoint his/her own client. Therefore, the lawyer should forcefully argue the client's case, which will inevitably include some posturing. The client is expecting it, and should hear it. This is normal, appropriate, and necessary, and everyone in the room should expect it.

The lawyer is also speaking directly to the opposing client, perhaps for the first and only time. Therefore, the opening statement (while properly argumentative) should not be so over-the-top argumentative and bombastic so as to totally alienate the opposing party and cause an indignant walkout or entrenchment of position. An indignant walk-out by any party is a failure for every party, and it shows bad preparation by the lawyers. Good lawyers don't cause walk-outs by the adverse party, and they prepare their own clients so their own clients won't walk-out.

V. Conduct at mediation

As discussed, the lawyers should give a carefully calibrated opening statement. This part of the mediation should not be skipped. Even if the lawyers think they totally understand each other's case and that the mediator understands it from reading the confidential mediation statement, the opening statement has other purposes, such as allowing the lawyer's own client to experience the necessary venting and catharsis of hearing his/her lawyer advocating their case in an open forum, perhaps for the first time, and speaking for the first time directly to the opposing party (not to the opposing lawyer). These are essential elements required for getting the parties in a mental state of being able to rationally consider settling the case. Thus, the opening statement and should not be skipped.

At all times, the parties and the lawyers must act with dignity and respect toward the mediator and the opposing counsel and party. This is obviously required by common decency and by the Florida Bar Rules of Professional Conduct. But is it also good advocacy.

Nothing good can come from name-calling and angry words. Angry words never convinced anyone to capitulate or give in. This is especially so in a mediation. As discussed, a mediation is a voluntary and consensual process. Anyone can walk out any time. A mediation that ends in an indignant walk-out by either party is not a positive outcome for either party.

Unlike winning at trial, where a judge or jury imposes the terms on the parties, winning at a mediation requires convincing the opposing party to voluntarily and willingly agree to your terms. Angry and offended people rarely do that. People are more likely to give ground when they feel respected and when they feel that they have been validated.

A good lawyer will find a way to make the opposing party feel respected and validated in order to broker the best deal for their own client. So, basic good manners, keeping in mind that the goal is to cause the adverse party to voluntarily and willingly agree to your terms, are essential.

VI. Conclusion

As discussed, mediations are different from litigation in at least two fundamental ways. Being a good advocate in a mediation requires a lawyer to understand these fundamental differences, and to use a different set of skills than those required for the rest of the litigation and the trial. Lawyers who recognize the differences between these two types of forums will be able to obtain the best results for their clients.