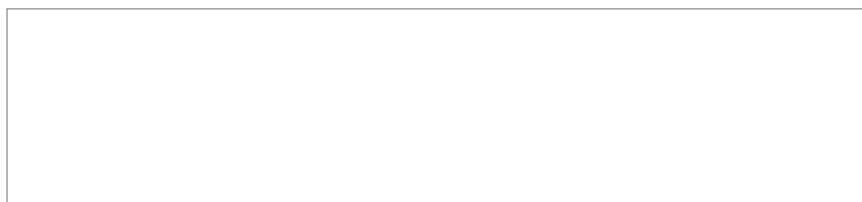
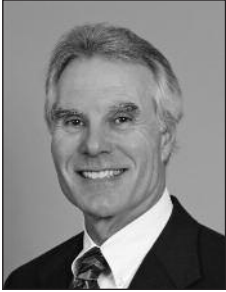


TRIAL TALK

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Concern for the Environment: Successful Mediation Techniques for Court or Private Mediation

By Hon. Joe Hilberman (Ret.)

When I retired from the Superior Court in January of 2009, I anticipated there would be differences in conducting mediations in the private sector as contrasted with the settlement conferences I had conducted in court. My experiences over the past year have identified many of those differences, but have also confirmed that similar preparation and techniques can be applied to each in order to maximize the probability of successful resolution. This article presents an overview of those observations and techniques, providing the litigator with the tools necessary to successfully mediate and resolve your cases.

Differences abound.

The biggest difference in private mediation from the court setting is the luxury of time. When on the bench, if I was able to get two hours for a settlement conference I felt fortunate. Now most mediations last between four and eight hours, with many continuing for several days. Sitting judges, especially in light of the current budget and staffing concerns, simply do not have the time necessary to explore fully the possibilities of settlement, nor to get to know the litigants in order really to connect with them when it is time to exert the nuanced pressure sometimes necessary to “close the deal.”

I will address additional time-related issues later in the article, but without question, the lack of time is the most critical shortcoming of the court-centered settlement discussions. As will be seen, that lack of time permeates the process, from not having enough time to really evaluate briefs, to the mediation or settlement conference itself, to the often-essential follow-up after an unsuccessful session.

Another difference is the lack of formality of private mediation. While the courtroom or chambers setting brings the solemnity and power of the court to bear, the less formal setting of private mediation can be an environment more conducive to discussion. Conversely, however, the private mediator does not have the power to compel attendance of, for example, a hesitant claims adjuster.

Before getting into the suggestions for successful mediation, it is worth observing that many cases go to a court settlement conference because they are ordered to do so. Conversely, participants in private mediation are there because they want to be (albeit some more enthusiastically than others!). That willingness to engage in the process really sets the stage for success, increased by embracing the following suggestions.

Failing to prepare is to prepare to fail.

The great UCLA basketball coach John Wooden said, “Failing to prepare is to prepare to fail.” That observation applies to mediation as well. I suggest that in every case a brief be timely submitted to the mediator. Let me stress a couple of points- first, *timely* does not mean on the morning of the mediation, nor does it mean the night before by e-mail with an apologetic note. All mediators want to help you resolve your case, and to do so you have to give them the information necessary to accomplish that, and your brief is the vehicle. Additionally, I suggest you serve the brief on your opposition. If you are going to ask them for something, typically more money than they want to give you, you need to tell them why, and early enough in the process to evaluate your claim and communicate to those

who hold the purse strings why it makes good sense to settle.

Most often, I receive briefs that are marked “confidential” and not served on the opposition. This defeats the purpose of preparing the other side to consider your legal and factual arguments seriously. I fully appreciate there may be tactical reasons for not sharing some information, such as really good impeachment, documents or witnesses about which your opponent does not know, or sensitive issues personal to your client or his/her business or interests. In those cases, serve a separate confidential brief of the mediator in addition to the one served on the other side so the mediator understands as fully as possible your position in the litigation.

In preparing your client for the mediation, meet and prepare him/her for his or her role in the mediation process itself. Explain that the mediator does not have the authority to order resolution, but will attempt to build consensus for a mutually acceptable settlement. You should review the qualifications and biography of the mediator and explain why he or she was chosen for this case, building your client’s confidence in the process.

Remind your client that no one “wins” a mediation; there must be compromise by each side. Work with your client in advance to determine what an acceptable and reasonable outcome will be, recognizing that it will not be either the potential highs or disappointing lows of a trial verdict or judgment.

Contact opposing counsel and informally explore the possibility of resolution before the mediation. Get a sense of what the issues of major contention are going to be. For example, if it is an automobile or other

personal injury case, is liability going to be contested, or will the real discussion focus on the damages? Is a contract breach in dispute, and what affirmative defenses are meaningfully raised? Dealing with these and similar issues before the mediation allows focus in both your preparation and presentation at the mediation itself. Also, if that discussion takes place early enough you can advise the mediator of what the critical issues are that will be addressed.

In the same vein, I am always surprised when counsel come to a mediation having never exchanged thoughts of an initial demand or offer. From the plaintiff’s perspective, it is far easier to get someone to give you money in settlement if you have prepared him or her for the request in advance. All plaintiff and defense counsel have been frustrated by negotiations that are far different from the anticipation of the parties, causing delay and frustration while additional telephone calls are made for settlement authority during the mediation.

Similarly, defense counsel should let plaintiff counsel know his or her thoughts on liability and damages in advance, and advise counsel know what more he or she needs in order to fully evaluate the claim in advance of the mediation. When on the bench I was often surprised to find the first time counsel really spoke with each other was at a court appearance; take time to communicate with opposing counsel early to initiate a relationship that can lead to a mutually acceptable resolution.

As obvious as this seems, defense counsel, and plaintiff counsel as well, must be very certain, and confirm with their client, what settlement authority has been extended. Imagine the conclusion the negotiations of a “multiple 6-figures case” after almost

three months of actual negotiation. In the penultimate communication to all counsel, individually, the amount of settlement authority to be extended by each defendant, and with the plaintiff the authority to settle if each of the defendants contributed the represented share, is confirmed. Counsel for each party responded to his/her individual e-mail with confirmation.

Days later an e-mail from one of the defendants to plaintiff and co-defense counsel apologizing for having made a mistake, but the settlement authority extended by the insurance company was actually 2% less than represented.

What now? This dilemma can be avoided by confirming with certainty what the settlement authority is before committing to a final settlement.

One really significant difference between court and private mediation is the wonderful availability of ex parte communication. There is no prohibition on contacting the mediator in advance of the mediation, or following, to discuss the case. It is a real help to the mediator if you give him or her a call a few days after you sent your brief, and a day or two before the mediation, to discuss the case. This is especially true when there are particular issues of dispute or sensitivity in the case. For example, often there are issues of culture involving one or more of the parties that are not as apparent from the briefs of which the mediator should be aware to increase his or her effectiveness. Similarly, if there are issues of personality between either the parties or counsel, a “heads-up” to the mediator is very helpful.

Remember that you have lived with your case for months or even years when you get to mediation; you have the best thoughts of how to approach resolution and the mediator needs to hear that from you. Before the

mediation consider what the most likely avenues of resolution are, and share your thoughts with the mediator.

Meaningful participation at the mediation is the key.

The process at either a mediation or settlement conference, when “in session,” is similar, and defined a great deal by the personality and style of the mediator. As mentioned, your input in advance of the mediation, either by phone, e-mail (not to the court!) or brief will assist in setting the proper tone for the proceedings. It is here where the difference in time available for the mediation or settlement conference becomes more acute. It is not uncommon for a mediation scheduled to conclude at 5 PM to continue into the late hours of the night or even early hours of the next morning. While many of my former colleagues on the bench may be willing to give that time to a settlement conference, the unavailability of security and crush of court business simply will not allow for it.

Additionally, mediators are able to set aside full days, or even multiple days, in which to hear the mediation, time not available to judges.

I always encourage candor at mediation, as the sessions are most often separate. Candidly discuss the strengths and weaknesses of both your case and your opponent’s case with the mediator. Here is where I have private discussions with counsel, outside the presence of his or her client. Having been a litigator for 27 years before going on the bench, I have an appreciation of the role as well as the personalities of litigators, and I love them! However, the relationship with their clients sometimes makes it difficult for them to tell the client the shortcomings or downside of their case. That is where I like to have a

private chat with the attorney (and I tell the client in advance that I will be doing so) and discuss the weakness or difficulties he or she recognizes in the case but is having a difficult time explaining to the client. That then becomes my job.

In approaching this part of my job as mediator, I often say that I am to deliver the message to the client that their attorney is having a difficult time delivering, for whatever reason. Sometimes the client is expected to be a bad witness, needing to be gently educated to the importance of how the jury perceives you rather than the substance of what is said. Sometimes the client needs some “reality therapy” about the real jury value of their case, told to them by a judge who has seen the crazy things juries do, especially in challenging economic times. There is nothing like a war story from a judge who has shaken his or her head at a verdict to focus the discussion on settlement.

It is essential to remain open and flexible at the mediation, so all parties and counsel can thoughtfully consider not only the position they are espousing, but the position of other parties and the insights, observations and suggestions of the mediator as well.

Counsel should bear in mind that the level of advocacy at the mediation is not the same as in trial; at mediation, the gladiator suit can be left at the office and the comfortable visage of reason and compromise donned in its place.

When the mediation is successful, be sure to have the agreement reduced to writing and signed by the parties so that it will be enforceable. If the mediation was private, be sure to advise the court of the settlement so an OSC re dismissal following notice of settlement may be set and other court dates vacated. If the settlement

conference was at court, have the terms of the settlement placed on the record and affirmed by the clients.

Another benefit of private mediation is the possibility of ongoing involvement by the mediator in supervising the terms of the agreement or clarifying issues of compliance as they arise.

Never give up.

Hon. Winston Churchill has been oft misquoted, but the essence of his famous speech was that one should never give up. Not all mediations are successful. At least not the first time. We all know that well over 95% of all cases filed in the Superior Court are resolved short of verdict. The important thing to remember when mediation is not initially successful is that it is a process, and perhaps you have just taken the first step. We have all had mediations that have required multiple sessions. Indeed, sometimes a successful first session is just clarifying the issues so counsel can do some specific and targeted discovery to clarify some issue of liability or damage, and then a second session is contemplated to explore resolution further with the newly discovered and considered evidence.

In one of my earliest mediations, the defendant was outraged by the position of the plaintiff and walked out after several hours of discussion. In the next session, the plaintiff became outraged at the position of the defendant and walked out after several hours. In the third session, no one became outraged, and we settled the case for a substantial sum. Never give up.

In addition to having multiple sessions, counsel should avail themselves of the ability to keep the mediator engaged in settlement discussion by e-mail or telephone. E-mail is a truly wonderful tool, as

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Endnotes

- ¹ www.tomdavenport.com/books.html.
- ² http://en.wikipedia.org/wiki/Health_Insurance_Portability_and_Accountability_Act.
- ³ ROBERT O'HARROW, *NO PLACE TO HIDE: BEHIND THE SCENES OF OUR EMERGING SURVEILLANCE SOCIETY* (2005).
- ⁴ http://en.wikipedia.org/wiki/Health_informatics.
- ⁵ www.MediConnect.net.
- ⁶ www.amia.org.

We congratulate our partners

Bradley A. Levin and Michael J. Rosenberg

who with MURRAY OGBORN and THOMAS NEVILLE of Ogborn Summerlin & Ogborn successfully appealed Nunn v. Mid-Century Insurance Company before the Colorado Supreme Court.

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you can compose and send when necessary, and the mediator can respond when able, not having to engage in a protracted game of telephone tag.

Be sure you have the e-mail and phone contact for the mediator, and that he or she has yours as well. Just as in the mediation itself, let the mediator know what is going on, what has changed, and what your position is currently on settlement, or whatever the issue may be. Also, be sure to be clear about what is privileged and what you are willing to share with the other side.

Admittedly, this technique is not going to work well in the court setting, as business hours and availability are limited, and e-mail is probably not a realistic option.

Final observations.

Mediation and settlement conferences are now a staple of litigation. Maximize your potential in obtaining resolution by choosing your forum, your dispute resolver (a term I just made up), the critical issues, and then preparing with diligence and purpose, communicating with your client, opposition and the dispute resolver before the mediation, and remaining open and flexible in obtaining resolution. ▲▲▲

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Judge Joe Hilberman served on the Los Angeles Superior Court from 2002 through 2009 following a 27-year career in civil litigation. Judge Hilberman was recognized by the Los Angeles Chapter of ABOTA as Jurist of the Year in 2008 and by the Los Angeles Daily Journal as one of the "10 Best" new mediators in California in 2009. Judge Hilberman is currently a full time mediator, arbitrator and discovery referee with ADR Services, Inc., in Los Angeles, Century City and Orange County, handling professional liability, tort, business, real estate, homeowners' association and related disputes.