Mediation Advocacy: The State of the Art

by Jeff Kichaven

Every year, there's a new flu vaccine. That's because every year, the virus develops immunity to the vaccine that worked last year. And this year, the flu will evolve again. And next year, the scientists will invent a vaccine that's even more effective. And this will continue, year after year.

So it is in mediation. Although we might disagree as to which side of the aisle represents "virus" and which "vaccine," we know that every year plaintiff and defense counsel design new ways to use mediation to their clients' advantage and to neutralize each other's latest strategies. Mediators adapt too.

To help promote the positive direction of this evolution, this article takes a brief look at what's different about effective mediation advocacy today as compared to, say, 5 years ago, and suggests some ways for litigators to use mediation as an even more powerful tool.

First Principles

The progressive evolution of mediation is not a series of random moves. It can take place only if fully cognizant of, and respectful for, the role of the lawyer. Lawyers are fiduciaries for their clients and owe their clients a duty of undivided loyalty; this is their "First Principles." They are duty-bound to give clients zealous advocacy within the bounds of the law. As long as lawyers represent clients, these obligations exist—in the mediation room every bit as much as in the courtroom.

Isn't mediation supposed to be different, though? Isn't it supposed to be more collaborative and less adversarial, unlike litigation? If mediation is supposed to be different, though, how can lawyers be effective in that forum when they must still adhere to the First Principles?

Fortunately, mediation has evolved in such a way that honors both imperatives. The trick is to recognize that the First Principles are vindicated differently, though no less completely, in mediation. Understanding this will help all parties to use the mediation tool even more effectively to promote their interests.

The Problem That Mediation Is Uniquely Designed To Solve

Why don't cases settle? There are a million reasons. But in the nearly 200 cases I mediate each year, one stands heads and shoulders above the rest: The good advice that lawyers may be giving their clients is not getting through. Mediation is uniquely designed to solve that problem. Here's how.

Think of all the times people develop unrealistic expectations about their cases. It happens all the time. Now let's make it even more painful. Think of all the times a

person's unrealistic expectations have been fostered, at least in part, by their attorneys. That happens all the time, too.

Again, there are a million reasons why that happens. Some of those reasons are legitimate and some, frankly, are not. For now, though, "why" doesn't matter. We need only acknowledge that it's a common problem, and that cases can't settle until those unrealistic expectations are unwound.

This is where mediation enters. The commonality and severity of the "unrealistic expectations" problem, and the fact of the lawyer's frequent role in contributing to those expectations, shows that this is an area where lawyers could use some help. And there is no other forum better designed for lawyers to get that help than mediation. The mediator is the person touching the legal system with whom lawyers can feel most comfortable in confiding their client-relations problems, knowing they will get the help they need in getting their good advice through to their own clients—all in the clients' best interests. Good mediators have evolved to understanding that this is, in fact, the essence of the job.

The negotiation between the plaintiff and defense sides is important. But let's face it: both plaintiff and defense counsel are professional evaluators of claims and defenses, and in most cases, both realize who's playing with the stronger hand. As mediation evolves, lawyers are coming to acknowledge, to each other and the mediator, the likely range of possible settlements earlier and earlier in the day. Then the hard work begins—getting these realities across to the clients.

These realities of todays Mediation have important implications for how to approach mediation consistent with the First Principles. Three are worth particular mention:

* How to select a mediator
* How to prepare for the mediation
* What to do when you first show up in the mediator's office

How To Select a Mediator

There seems to be an emerging consensus to "let the other side pick the mediator." This is not as dangerous a practice as it used to be because as the market for mediation services has evolved, many cities have developed relatively small groups of top-tier professional, full-time mediators whose names appear over and over on most lawyers' short lists. So the names proposed by both sides are likely to be the same.

Nevertheless, mediators proposed by the other side need to be screened. Call those mediators if you don't know them. Make sure there's some chemistry, some rapport, so that both lawyers and their clients feel comfortable confiding in that mediator

and will be open to what he or she has to say.

The best mediators have evolved to understand that perhaps their most significant skill is the ability to understand and facilitate better communication between attorneys and their own clients. This is something attorneys need not be shy about taking advantage of.

How To Prepare for Mediation

Each party to a mediation should send the mediator a brief a few days before the mediation is to take place. You have only one chance to make a good first impression, and first impressions matter. Especially if you have let the other side pick the mediator, the brief is your first real opportunity to show the mediator that you are well prepared. You want the mediator to trust that the attorneys representing both sides are providing good advice, so that the mediator can do the job that needs to be done—supporting this advice with comfort and integrity. A good brief is a great way to inspire that trust.

Next, the respective attorneys should call the mediator. No matter how many times the word "confidential" appears on your brief, there are still some things about every conflict that will never be put in writing. Most particularly, lawyers will almost never be candid in writing about challenges they face in their relationships with their own clients. But mediators need to know about these challenges to be most helpful in meeting them. So, all parties should talk to the mediator on the phone before the mediation day.

Again, the best mediators have evolved to make these preliminary telephone conversations part of their standard practice. Joint conference calls with both sides serve many valuable purposes, but these private calls with each lawyer are indispensable for making sure that the mediator is fully prepared to help solve the problem that mediation is uniquely designed to solve.

If for some reason your mediator does not call you before the mediation day, it is perfectly acceptable for you to call the mediator. Ask for your mediator's cell phone numbers and home numbers. Indeed, do whatever it takes, but make sure that you make the connection.

In my experience, the two acid-test questions for mediators to raise during these conversations are:

(1) What are the challenges we face in the mediation, and

(2) What are your expectations of the mediator? Since every case is different, the answers should be different for every mediation. Mediators are much more likely to help you meet your challenges and fulfill your expectations if they know in advance

what they are. The overworked phrase is still true: Help us help you.

What To Do When You First Show Up The standard-issue mediation begins with the mediator walking into the reception area to find all assembled, inviting everyone into a conference room, giving an introductory spiel, and then inviting everyone in the room to speak their piece in front of everyone else. This can be a dangerous approach. Too many lawyers believe that their clients expect them to give fire-and-brimstone arguments in those opening sessions. When lawyers indulge that belief, they generally accomplish little more than reinflaming their clients' passions about the events that gave rise to the litigation in the first place. This makes mediations take longer than they have to and reduces the chances of ever getting to a deal at all.

Better practices have evolved. Upon arrival, the mediator should meet with each attorney and their client privately. While the attorney may already know the mediator, the client probably does not and may have questions for the mediator. It is important for all parties to the litigation to get a chance to develop some rapport with the mediator. If that rapport develops, the parties will almost certainly want to let off a little steam privately to the mediator, and that's a good idea. Separated from the other side, this private venting provides no opportunity to reignite the other side's passions.

Next, counsel and the mediator should meet privately without their clients being present. Here, the attorneys can discuss the possibility of reaching an amicable settlement without having to prove a point. It also sets expectations—what each party expects from the other—and confirms what advice has been given to both parties by their respective counsel. This diminishes any incentive to give an inflammatory opening statement. The first joint session that follows will tend to be calmer, more conversational, and more productive. The rest of the mediation is likely to follow suit.

Conclusion

Mediation can be a powerful tool for litigants, lawyers, and mediators to put their heads together to accept the realities and limitations of litigation, and to allow cases to settle where they should.