

# Mediation Techniques and Why Honesty is Always the Best Policy

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“My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.”

First paragraph of the Code of Professionalism, adopted by the Louisiana Supreme Court January 10, 1992.

## **I. THE “TRIAL” VERSUS “SETTLEMENT” PERSPECTIVE**

Human conflict brings with it an infinite number of intangibles. Parties in dispute are often so mired in these entanglements that they are unable to emerge without professional help.

People in conflict naturally turn to litigators for assistance.

Litigators ply their trade in the courtroom. Their entire perspective is with any eye toward trial. They draft pleadings setting out claims and defenses; they engage in discovery and motion practice conceived to maximize their chances at trial; they seek to admit, or exclude, critical evidence at trial so that the trier of fact gets the evidence advantageous to their clients’ claims. They focus on the legal elements that the law requires them to prove if they are to win their case. They voir dire potential jurors, deliver opening statements, examine and cross examine witnesses, and give closing arguments. And after the jury’s verdict is read, and the appeals are taken, the judgment becomes final and the case is closed. The lawyers shake hands with their clients and move on to the next dispute.

But clients do not. Long after the verdict is read, clients continue to deal with the aftermath of their dispute. The litigation often goes a long way toward healing, but sometimes it makes matters worse. Sometimes, the financial and emotional toll that litigation extracts is, itself, life altering. And, even after a victorious outcome, litigants often relate the feeling of a hollow victory.

There are countless intangibles that comprise any given dispute. Most of these are rarely discussed in the context of the attorney-client relationship. But, they are always present in the parties' minds. They are present before suit is filed, during the litigation, and long after trial.

An example is helpful:

The parents of a wonderful 23 year old woman waive goodbye as she leaves town for a long weekend with her boyfriend. She is an only child and the centerpiece of her parents' lives. Daughter does not know it, but the boyfriend has asked for permission to marry their daughter and will propose the next day. The parents are thrilled as they have come to know the young man well and find him to be a perfectly respectable young man. They are elated for their daughter and privately long for the day she will bring grandchildren into their lives. She was recently graduated from college and at the threshold of a successful career. Just before daughter left town, she and her mother argued about something trivial. Their last words were an angry exchange. As her parents waive goodbye, mother wishes that they had not fought. She resolves to apologize as soon as they speak again. But, within a couple of hours, the young couple are involved in a tragic accident. Her young boyfriend took his eyes off the road and ran into the rear of an eighteen wheeler. Both die instantly.

The "trial" issues in this situation are few: fault, causation and damages. These facts make it obvious that there will be no real contest about any issue other than damages, and even that is only a question of degree. For the litigator, there is little doubt about the result of a trial.

But, what of settlement? How are mourning parents to accept the idea that resolving their claims amicably is not akin to blood money? How do they overcome the idea that no amount of money is sufficient compensation for the loss of their daughter? If they fail to settle, are they emotionally prepared for the rigors of trial? How do they reconcile the notion that their future son in law, whom they also dearly loved, is responsible for the death of their only child? How does the litigator approach the question of settlement? How do the parties tackle these and other

thorny problems associated with the delicate dialogue necessary if earnest settlement discussions are to be had?

None of these questions are necessarily germane at trial. Most of these questions go beyond the job of the litigator. But, in discussing settlement, these types of questions often dominate the dialogue.

The mediator has an entirely different perspective than the litigator. If he is to do his job, the mediator needs to understand the big picture. He needs to assess not only the “trial” elements of the dispute, but also the many influences affecting the parties in their settlement calculus. He also engages the litigants from a unique viewpoint. While the mediator is likely a lawyer, he will not participate in the trial and of course has no interest in the outcome of the case. The measure of the mediator’s ability is largely related to whether the case settles. So, while the legal elements of the claim might be of larger importance to the litigator, they are often less important to the mediator. And, while the litigator might take the position that it is irrelevant and emotional blackmail for the mediator to discuss the rigors of trial with his clients, that issue might well be the key to resolving the case. It is therefore critical in the eyes of the mediator.

## **II. GUMBO AND MEDIATION: DO THE BEST YOU CAN WITH WHAT YOU’VE GOT**

Like any good chef, the mediator takes the ingredients on hand and tries to make the best of them. Sometimes, the recipe might call for simple and straightforward logic. Sometimes, the recipe might call for an impassioned plea to bring closure to a difficult case. Sometimes, the mediator needs only to get out of the way and let the parties settle on their own.

Thus, mediation techniques, like mediators themselves, vary from case to case and mediator to mediator. A mediator's task – to assist the parties in settlement – is always affected by the various influences the parties bring to the table. Those dynamics are the result of a myriad of variables. The facts of the case, the personalities involved, and the likely outcomes at trial are only some of the most obvious such factors.

As any experienced litigator well-knows, litigants are often influenced by factors that have little or nothing to do with the case at hand. For instance, a defendant in litigation might have an “axe to grind” with the plaintiff and refuse to participate in a genuine effort to settle. Or, a plaintiff might “need” money to pay off a debt unrelated to the litigation. In these situations, the trial lawyer is placed in a trick-bag. The only outcome he can help his client to control – the settlement – is jeopardized because his client is being influenced by factors beyond the scope of what the law considers relevant.

The mediation process is one that, if allowed to function properly, identifies and deals with the influences standing in the way of settlement. The mediator sizes up the situation and embarks on a course of action to isolate and address the issues that influence whether the case will settle.

### **III. THE BUILDING BLOCKS OF THE MEDIATION**

There are two basic assumptions that the parties make going into any mediation: (a) that the case is one that *can* settle; and (b) that the parties are participating in the mediation to engage in an earnest effort to resolve the dispute.

- a. Every Case Can Settle: the Important Question is at What Cost?

Matters in litigation end in one of two ways: in judgment or in settlement. Every case can be settled. The plaintiff has it within his power to voluntarily dismiss the case. The defendant has it within his power to acquiesce in judgment. These are examples, albeit ridiculous, of compromise. But, the point is clear: every case can be compromised.

The question, then, is one of degree. If the plaintiff, for instance, refuses to dismiss the case *except for some guarantee of compensation*, then he has hedged his bet that the case might have been dismissed entirely without any award. If the defendant refuses to pay the full judgment value of the case but agrees to pay the plaintiff something close to that amount, he has entered into an agreement that ends the litigation, saves expenses, and brings finality to the matter.

The reason that compromise is difficult – more difficult than trial – is because litigants are asked to give up a right to prevail at trial. In practical terms, this means plaintiffs accept less than what they might win at trial and defendants pay more than they believe they would otherwise pay after trial.

What they often fail to understand is that their “right” to trial is fraught with obstacles like delays, expensive legal fees, and uncertainty. Once they perceive and understand these obstacles, they often hold less firmly to the “right” to trial and begin to see the wisdom of resolving their case swiftly and definitively.

b. Are the Parties Willing to Engage in Earnest Dialogue?

The typical reason that mediations fail is because the parties are unwilling, or otherwise unable, to engage in meaningful settlement discussions. This comes in many forms. Sometimes, attorneys instruct their clients not to speak to the mediator and to allow them to handle all

substantive discussions. Other times, parties are willing only to listen during the mediation process and not to engage the mediator in a substantive dialogue about settlement. Sometimes, the parties have decided in advance of the mediation that they will not agree to settle with one or more defendants. All these examples are fundamentally inconsistent with the mediation process. Where the parties make an effort to intercept the mediator so that any effort at dialogue is cut off, they run a real risk that the mediation will be a failure.

#### **IV. SETTING THE TABLE FOR THE MEDIATION**

Most mediations begin with a joint meeting of the litigants. Here, the mediator often takes the opportunity to “set the table” of discussion by discussing the framework of the mediation. This session often includes observations about the risks inherent in litigation, the nature of a compromise agreement, and the benefits of bringing certainty to an otherwise unpredictable litigation. On occasion, opening sessions are an unproductive waste of time. Often, the parties are unmoved by the mediator waxing philosophical about the benefits of compromise. Most times, however, the joint session serves as a good jumping off point to set the parameters for the discussions to come. If the parties take anything from the opening session that the mediator can later recall for them during private caucuses, it has served its purpose.

#### **V. THE SETTLEMENT DEPENDS ON HONEST DIALOGUE**

The real work of the mediation begins when the parties meet in caucus. There, the mediator assesses the motivations of the litigants to understand what obstacles stand in the way of settlement. This can be a time-consuming process. It can also be tedious and emotional work.

But, the success of the mediation hinges on whether the mediator, counsel and the litigants are able to identify and work through the obstacles that otherwise prevent settlement.

Some influences are obvious:

- Facts of the case
- Applicable law
- The judge and/or the jurisdiction
- Precedent
- The expenses involved in bringing the case to trial
- Predictability (or unpredictability) of outcomes at trial

Often, the influences are far more subtle and more difficult to identify:

- The personalities of the litigants and the attorneys
- Emotions
- Financial needs and limitations of the parties
- Expectations
- Risk tolerance
- Time horizons
- Need for closure
- Rationality
- Bravado
- Obstinance
- Fear of the courthouse

Identifying these influences is only the first part of the equation. Once they are identified, they must be dealt with. This is often the most difficult part of the mediation – because it requires that the parties examine their motivations and decide for themselves whether they should be rethought or abandoned entirely.

Take the above example involving the wrongful death of the 23 year old daughter. No doubt, the grieving parents come to the mediation with a confounding set of motivations. They are angry. They are confused. They want to stop hurting. At the same time that they negotiate with the defense for an appropriate settlement, they grapple with the larger issues that will confront them for the rest of their lives. The mother has to deal with the fact that her last conversation with her daughter was a trivial but heated argument. Both will never have grandchildren. The joy of their lives has been wrenched from them and, even as they grieve, they are asked to make very difficult decisions about resolving a lawsuit that, even when they win, will never bring them what they really want: their deceased daughter.

If the mediation is to be a success, the mediator must understand the litigants' motivations so that they can be addressed. And the mediator can only come to understand these motivations if honest dialogue is allowed to occur.

## **VI. THE APPEAL**

The mediator has a single tool at his disposal: the appeal. It can be an appeal to reason, logic, or emotion or perhaps some other virtue. But at its basic level, the mediator can only lodge an appeal and hope that the litigants recognize the wisdom of settling the case.

If the dialogue with the mediator has been less than candid, then the mediator's appeal will likely be ineffective. Think of it like a doctor visit. If you tell the doctor that your throat

hurts, he looks inside your throat tries to find the problem. He might prescribe medication thinking you have a throat infection, even if he sees no sign of illness. Based on his training and experience, he makes a calculated guess that the medicine will treat the infection he believes is there. Chances are, he'd probably be correct. But what if for some reason it was your right toe that was hurting, but you decided to tell the doctor it was the throat that was ailing you? Do you get miffed when the doctor's treatment plan does nothing to heal your toe? Ridiculous, you say?

This very dynamic occurs in mediations all the time. Mediators are told things like "My clients are not afraid of going to trial..." or "I'll never get that kind of authority..." If true, then there is no harm. It is when these statements are false that the real harm occurs. Suppose, for instance, that the parents in the above example have told their attorney that they are unwilling to be put through the rigors of a trial. If the settlement discussions fail, then they might well find themselves in the very trial they hoped to avoid. Or, suppose the insurance adjuster is holding back on his authority to settle the case so that he looks good to his supervisor. If his gamble does not pay off, his insured might well find himself facing an excess judgment that could easily have been avoided had he been candid during the mediation.

## **VII. CONCLUSION**

The Code of Professionalism contains various platitudes, none of which are more integral to the mediation process than the pledge of candor. Honesty during the mediation process is not only part of being professional, but also has practical implications. Honest dialogue helps to settle cases and avoid potential adverse outcomes at trial. It is a key ingredient to a successful mediation – one that assists the parties, their counsel and the mediator to deal effectively with the obstacles that otherwise stand in the way of a compromise.