Counsels Expectations at Private Mediation

I have a theory that every successful mediation requires certain ingredients. They are: preparation, participation, patience, and perseverance. These are the four "Ps" of mediation. Each and every one is important. It is my hope to explain and expand on these components, and demonstrate how they all fit together.

The activities that we perform in our professional capacities require careful and thorough *preparation*. We have heard it said many times that there is no substitute for preparation. Mediation is no exception. The mediators preparation begins when counsel deliver their mediation briefs. When the mediation session is confirmed by letter, I always request that the briefs be received at least seven days in advance. When briefs come in at the last minute, it is very difficult to review them thoroughly. The lawyers most important contribution to the mediators preparation, is to deliver the briefs in a timely manner so that the mediator can perform their task.

When I open a mediation brief, I look for the following: who are the lawyers, who are the litigants, what is the subject matter of the dispute, and does the dispute hold any conflicts of interest for me. That is where I begin.

Assuming the mediator knows the lawyers and their respective styles, the mediator will have a pretty good idea of how the discussions surrounding this dispute will unfold. Armed with this knowledge, the mediator will review the subject matter as well as the proof. A careful review, with a clear understanding of the issues, will reveal to the mediator whether or not there are any hot buttons. The brief will be reviewed in the context of whether or not each side has carefully and correctly presented the strengths and weaknesses of their case. Sometimes, when there are controversial issues or a failure to clearly cover important aspects of the case, I will call counsel and discuss these matters.

You would be amazed on how many occasions a lawyer has failed to deal with a weakness in the case. When that happens, the opponent will also see it as a weakness and it will make the case more difficult to settle. When this occurs, and there is enough time before we are gathered at the session, I will phone the lawyer and urge them to file an addendum dealing with this problem. Alternatively, when I arrive at the mediation venue I will take the lawyer aside and point out that because this is omitted in the memo, it will have to be stressed in their opening statement.

Sometimes, a pre-mediation phone call to one or both of the lawyers can smooth the way to resolution. If it is one of those rare cases where I am aware that the counsel do not get along with each other, I will always telephone and remind them that personal issues or vendettas have no place in a mediation.

The mediator must review the brief with the intent of gaining a thorough understanding of the subject matter of the dispute. It may be necessary to do some research and look up terms or definitions, especially in medical cases.

An important part of my preparation is arriving at the mediation venue a minimum of 30 minutes in advance of the agreed starting time. I do this in order to meet the litigants, chat with counsel

privately, ask the lawyers whether there have been any settlement discussions and their nature and extent, and to get a feel for how the individuals will approach the case. It is a good opportunity for me to make suggestions on negotiating strategy and how they might deal with certain evidentiary issues that could be controversial.

It is very important for the mediator to meet the litigants, or as I like to call them the civilians. The most important quality that a private mediator must possess is the ability to engage the litigants. As the day wears on, this can become a crucial necessity when unusual tactics must be employed to keep the mediation going. So I will meet the civilians, ask them questions about their backgrounds, occupations, where they grew up, what their hobbies are, and other things of that nature. It is important that the civilians have a good impression of the mediator and at the very least, have faith in the mediators approach. If the mediator engages successfully with the litigants they will have both confidence and trust in the mediator's judgment.

At this initial meeting with the litigants, the mediator will also have an opportunity to determine whether or not certain issues must come out in the opening session. For example, in a personal injury case the plaintiff may need to have a catharsis, or very simply an opportunity to be heard. Other issues may come out in this meeting, which will assist the mediator in making determinations about how the opening session should be conducted; or whether or not there needs to be an opening session at all.

I also use the preparation time before the mediation starts to meet everyone and ensure that all the right people are there. The decision-makers, the people with the authority to settle the case, must be present at the mediation. If one of these key individuals is missing, decisions must be made as to whether or not to proceed, or to decide if the decision-maker can be contacted by phone.

A fundamental rule of the mediation process is that the mediator is responsible for the process; the lawyers are responsible for the result. I do not allow counsel to hijack the process. For example, if a lawyer thinks we shouldn't have an opening session and I am not convinced of the logic or the persuasiveness of their reasons, I will insist that an opening session takes place. If the lawyer does not agree, I simply withdraw from the mediation.

While I am on the subject of opening sessions, I have a very strongly held view that they are important. Even though mediation is a non-adversarial process, persuasion plays a very important part in the evolution of the settlement agreement. The best kind of persuasion is logic, and that will be front and center in the opening session. I always urge lawyers to use a low key approach, it is about salesmanship. You are selling the opposing litigant your theory of the case.

Sometimes when emotions are running high, or perhaps the litigants have a strong dislike for each other, the opening session can in rare circumstances be dispensed with, or set up differently. These decisions can only be made after the mediator has met the litigants and spoken with counsel.

Having met the litigants in a pre-mediation session, I sometimes form an opinion of whether or not the litigant's *participation* will make them a good witness. I always ask counsel whether their client will say anything in the opening session. Participation by the client is important, simply because if the client feels a part of the session they will be an active participant in the solution. The more a litigant participates in the mediation session and/or the caucus, the higher their

confidence will be in both the process and the settlement. At the end of the day, the lawyer has a happy client and a settled case.

In the opening session, the mediator sets the stage for participation by first introducing everyone at the table and explaining their roles. It is necessary to explain the mediation process to the civilians in order to help them feel comfortable at the session. It is important to make clear that the process is informal, that they are encouraged to participate, and that everything that is said is protected by the principle of confidentiality. This should be gone over carefully. The rules of caucusing must be discussed and explained. It should be understood that the litigants are free to ask questions at any time, whether in open session or in caucus.

After the opening session is completed, I always begin a series of caucuses. It is during caucus that the mediator has an opportunity to test the strengths and weaknesses of each sides' case. I tend to do this by simply asking the lawyer how they will prove a particular component of their case, or how they will deal with the allegation that their opponent is making. Most lawyers do not want the mediator to express an opinion about the case, particularly in front of the client.

Often the mediator is a negotiating coach. The mediator will make this discovery during the first caucus. The negotiations that are conducted at mediation are really an exchange of messages. The best kind of negotiating is principled, because it can be defended and explained. Every settlement proposal that is made between the opposing parties sends a message to that litigant. A ridiculously high offer made by a plaintiff to a defendant, will result in a ridiculously low offer coming back. I try to convince lawyers not to do that. If it is an extreme proposal I will say to a lawyer; I value my credibility too much, if you want to make that offer I will go with you into the other room and you can present that proposal.

Sometimes during caucus, it will become obvious to me that counsel for the plaintiff is having problems managing their clients expectations. On some occasions, a lawyer may even indicate to me prior to the mediation that he needs my help with this issue. In the former situation where I suspect there is a problem, I will go down the road of assisting the lawyer to manage the client's expectations.

There is a lot of downtime at a mediation, making *patience* an important part of the process. The mediator must remain calm at all times and exercise a great deal of patience. It is important for the mediator to communicate this concept to the civilians. Downtime time can be used to engage the litigants, as the more information the mediator has the better equipped he or she is. Sometimes mediations can be quite long. They cannot be rushed. A mediation is like baking a cake, it must remain in the oven for the right amount of time. If you take it out too soon, it will fall flat. If you leave it in too long, it will burn. Every time I have tried to take a shortcut during a mediation, it has backfired.

For example, in a personal injury case where the plaintiff requires a catharsis, it can't be rushed. It may take 50% of the mediation time, but the case can't be settled without it occurring.

An important quality for a mediator is *perseverance* and the ability to deal with adversity. During the course of the mediation, the mediator will encounter obstacles to resolution. These are challenging. The mediator must be able to keep the parties talking; as long as they are there in the mediation room and still talking, a resolution is possible. This is when the work that the mediator has done establishing rapport with the litigants will pay off. The litigants have come to

the mediation session to settle the case. They want to settle the case because for them, a civil lawsuit is a pathological experience. The lawyers may be at their obstinate best and in the heat of battle, they sometimes forget that it is the client's case, not theirs. The mediator must remind counsel of that.

Sometimes it may be the litigant who is disappointed by the way the negotiations have been going. It may be that the litigant doesn't really understand the process of the negotiations, or it has not been properly explained. Out of frustration, they will seek to leave the session. That is when the mediator must hold them there by gentle persuasion. The litigant must be reminded that this moment, this day, is their best opportunity to settle this case. And if they leave without a settlement, it will be a long while before this file is dealt with.

When this kind of impasse occurs, earlier efforts by the mediator to build rapport can assist them in engaging in small talk with the litigants to persuade them to stay. Talking about every subject under the sun, except the lawsuit, can relax and encourage them to be patient and trust in the process.

Perseverance pays off at the end of the day when the parties have reached an agreement. I always encourage counsel to draft the agreement together and to ensure that the language is clear, concise and inclusive of all relevant matters. After the agreement is signed, I thank everyone for their hard work that day and I congratulate the civilians on achieving a fair and expeditious settlement to their dispute.

In addition to preparation, participation, patience, and perseverance, the mediator's best compass is ultimately his or her experience and instinct.