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Making the Case for Directive Mediation

By Thomas D. Jensen

Alternative dispute resolution literature refers to mediation styles in jargon. The approaches to mediation have been labeled "transformative," "collaborative," "facilitative," "evaluative" and "directive." While the different approaches all have their place, this article encourages the use of a directive or advocatory approach by a mediator to achieve case settlements. Why? Because as attorneys, we are advocates. We should use our ability and experience to challenge mediating parties' positions assertively to achieve settlements. We should confront them with case weaknesses, omissions and risks. This approach best sets the stage for position softening and, ultimately, settlement. Directive mediation can be controversial; it has been subject to debate within the profession. Although you won't put others out of business, it will serve parties well.

When representing clients, many of us have experienced mediation sessions that have kept parties separate, without introduction, in which a mediator shuttles between conference rooms, doing little more than serving as a courier of incremental demand or offer iterations. The small talk is fine, and people vent, but not much happens. We begin to wonder, "what good is this?" A few caucus sessions later, the thought comes to mind, "I could do better talking to the opponent's lawyer directly." Granted, mediators often achieve settlements in this passive way. But the tenor that this author recommends is that as a mediator in your mediation practiced you assertively advocate for settlement by engaging counsel and the parties with adverse facts and appropriate case law.

Risks and Ethical Considerations

In essence, in a directive mediation approach a mediator assertively "directs" the parties to their case weaknesses and, ultimately, settlement. The approach involves risks for everyone, including the mediator. First, parties may not view a mediator as impartial when he or she challenges their positions intensely in the caucus room. Second, counsel for the parties may not have considered or counseled a client about points raised by a mediator using the directive method, thus diminishing client confidence. Third, this approach emphasizes the enormous costs of continuing litigation – contrary to counsel's self interest. Fourth, it targets and makes plain the non-financial anxieties, fears, doubts and risks posed by continuing litigation. Fifth, assertive mediators use mediation sessions to speak directly to an involved party, rather than through counsel to that party, about case problems, obliterating the information filter between counsel and client that generally exists. Sixth, parties may object to a mediator's advocacy because it can collaterally result in educating their opponents about beneficial litigation strategies. A mediator can counter, however, by mentioning that in reality, a jury will include advocates, and they will advocate during deliberations. You simply are accelerating the process.

Does this directive mediation approach trigger mediator ethical dilemmas? The universal ethics requirement is that a mediator must be impartial. Directive mediation

may raise party concerns about a mediator's impartiality. At all times, a mediator must focus on challenging each side equally, telling them in caucus that he o9r she is challenged both sides equally, without revealing arguments advanced to the opponent. Be open about it. To ensure that you comply with the impartiality requirement, plan ahead for the parties' arguments, creating a list of position challenges to present to each party over the course of caucus sessions. When you exhaust a list, regardless of the party, repeat the points.

Another important mediation principle that a mediator must honor is to respect the concept of self-determination. This means that the parties must come to the settlement from within; it should not be forced on the parties by a coercive protagonist. Assertive, directive mediation does not violate this principle. Challenging positions intensely to lead parties to recognize the desirability of settling voluntarily is distinct from imposing settlements by undue influence.

Mediation ethics rules allow mediators to proceed in this manner. California ethics law provides that a mediator "may provide information or opinions that he or she is qualified by training or experience to provide." Ca. Rules of Court, Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, Rule 3.857(d). In Florida, a mediator "may point out possible outcomes of the case and discuss the merits of the claim or defense." Fla. Rules for Certified and Court-Appointed Mediators, Rule 10.370©. In Indiana, a mediator "may express an evaluation of the proceeding." Ind. Code §4-21.5-3.5-19. Virginia summarizes the approach well: "the mediator may suggest options for the parties to consider," as long as "the suggestions…do not affect the mediator's impartiality." Judicial Council of Va., Standards of Ethics and Professional Responsibility for Certified Mediators, Standard J. The Arkansas rules modify these sentiments in that they provide that a mediator cannot offer opinions about the probability of case results. Ark. Alternative Dispute Resolution Commission Requirements for the Conduct of Mediation and Mediators, Standard 8(D). In Arkansas, apparently a mediator can challenge parties' positions to set the stage for settlement as long as he or she does not appraise potential case outcomes.

Setting the Stage

To succeed with directive mediation it is vital to obtain case information well in advance of a session. Rather than the usual "night before," insist on early submissions. A mediator needs to request key pleadings, summary-judgment briefs, expert-opinion reports and deposition transcripts of key witnesses. Reviewing this material will arm a mediator-as-advocate with the raw material necessary to challenge the parties and set the stage for settlement. Reviewing the material may well reveal errors in the liability claim and defense analyses, omissions in expert opinions, party impeachment material, insufficiently prepared damages claims or defenses or avenues for achieving separate settlements, if you cannot achieve an overall resolution. It is imperative that you master the facts of a case and applicable law so that the parties will view you as an informed mediator who will not be sidetracked with impertinent, caucus-room pushback. Every file has problems. Exploit them as a mediator.

Before the parties arrive, place in each caucus room the following six documents. First, equip each room with an extensive **CV** detailing your mediation experience. The CV will help to establish your credibility with the parties so that they will think that they ought to listen to you.

Second, put a copy of the **Mediation Agreement** in each room. It will outline the requirements of mediation,

including, of course, the mediator's fee agreement, mediator confidentiality protections and other provisions.

Third, either prepare your own or place in the caucus rooms a copy of "**Prepared for Trial? Considerations and Questions**." (*See page 7 Prepared for Trial? box*) The purpose of this document is to confront the parties with trial risk realities that they probably have not considered. Their lawyers have unlikely made them aware of these risks. Some considerations raised by the questions may not apply; counsel may readily dispel others if a client inquires about them. But the reality is that since they will have nothing else to do in the caucus room, parties will read these papers. Reading the materials will have a conscious or subconscious effect on the settlement-attitude evolution.

Fourth, consider placing "**Perils of Overconfidence**" document in each caucus room. (*See page 8 Perils of Overconfidence box.*) Some readers may view these points as silly, impertinent or trifling. But the fact is that when mediation begins parties and their lawyers generally have overconfident views of the merits of their cases. Lawyers arrive for mediations with a more inflated sense of the strength of their cases than they have the night before a trial begins. Counsel will generally believe that their case is strong on this or that point, but on final trial preparation, they discover that their minds may have filled in some blanks that the file does not support. The "Perils of Overconfidence," again, is designed to encourage the parties to question their confidence in their cases while they sit in the caucus room waiting for the mediator's next appearance. Nobody wants to find him or herself on this list of blunders. He or she won't express it, but he or she will think about it. Put the dead space to use. Plus, the points will generate discussion, and they will set you apart in your practice.

Fifth, use the accompanying "**Costs of Trial and Appeal**" document, tailored to your own state's practice, to make plain the reality of the costs, and cost risks, that proceeding to trial entails. (*See Costs of Trial and Appeal box*.) A mediator using an assertive, directive approach is not shy about emphasizing the enormous cost of litigation. It is, well, "too 1990s" simply to drag out the old, "well, your fees and costs through trial will be $X, so pay that in settlement" approach. Confront the parties with their potential costs.

Finally, include "**Quotes of the Day**" in the caucus rooms. (*See page 9 Quotes of the Day box*.) These quotes focus on trial truths that, again, will inform the parties that good cases can be lost, juries may have limited capabilities and trials never go perfectly. Believe it or not, these papers will fuel subconsciously the attitude evolution crucial to ultimate resolution of a dispute. They also will silently challenge the frequent counsel mindset that opposes settlement, that participates in a mediation session merely because of a court order and that intends to sandbag the process and leave soon.

Joint Conference

The "always separate" versus "initial joint conference" dichotomy is well known to mediators and counsel. Here, personal preference looms large, and in the author's experience, a decided bias exists in favor of an always-separate caucus approach. Certainly some cases may require that the parties never meet – for example, those involving party hatred. But generally, an assertive mediator should require an initial joint conference.

Why? In insurance cases, a joint session allows a claims adjuster to evaluate a plaintiff in person. Introductions and initial observations can inform an adjuster about a plaintiff's potential reception by a jury. Certainly defense counsel's deposition report has

commented on a plaintiff's presence and demeanor. But firsthand impressions of an adjuster are valuable in evaluating claims. This dynamic also can apply in non-insurance cases in which the parties are unacquainted. The major point is that removing the information filter between a lawyer's perception of a case and his or her client's understanding of the case is always valuable. A client or insurer's understanding generally is based on information reported by counsel. Through no fault of anyone, sometimes reports are not fully comprehensive. Thus, during an initial, joint conference a mediator should require brief opening statements by the lawyers on their key claims and defenses. You should obviously make the lawyers aware of this requirement in advance. Hearing the opposing party's arguments firsthand, and observing the body language of the participants firsthand, often reveals valuable information to everyone that can importantly achieve settlements.

During the initial, joint session, a mediator should also explain the mediation procedure and the assertive role he or she intents to play. A mediator must refer to the requirements of impartiality and self-determination in the context of forceful issue advocacy. In addition, you should reiterate the basics, such as the mediation's confidentiality scope. You should mention that a mediator has no obligation to protect the parties' interests and that you have immunity from being called as a witness at trial. The Mediation Agreement must also set forth these points.

Finally, an initial joint conference can establish the counsel-interaction paradigm for mediation sessions. Many lawyers are very familiar with each other from area law practice over time. Pre-established methods of dealing with each other in a different context may not set an appropriate stage for the mediation sessions. A mediator should avoid excessive small talk, banter, war story frivolity and the like. A serious, confident and intense demeanor should characterize a mediator. This may seem unnatural, but lawyers are familiar with the "game face" approach that advocacy sometimes requires. It is critical that a mediator establish an aura of trust and talent with the parties, which too much familiarity can undermine. The lawyers should know that "business as usual" in terms of personal interactions will not occur. Additionally, never presume that a party or lawyer's views on the issues of the day are consonant with your own.

First Separate Conference

During the first caucus with each party it is vital to establish rapport to build confidence in yourself as the mediator. You need to establish neutrality, given that the parties have been advised that you will advocate for settlement during the day. Employ empathy and draw the parties out to discover their core beliefs about the dispute and its effect on them. Let them talk and vent. Although lawyers naturally speak to each other, break this habit during mediation because the vital communication will happen between a mediator and a party. A party must believe that a mediator is honorable, trustworthy and knowledgeable about case realities and has jury verdict experience. The mediator's job is to take people where they do not wish to go. The leader must be believed. So before advocacy can begin, you must build a mediator-party relationship, which is the crucial purpose of the first, separate conference. Conclude this "get acquainted" session by obtaining initial demands and offers.

Caucus Room Advocacy

Thereafter, it's all advocacy. A mediator should raise one new law or fact argument against a party's case with each separate appearance in a caucus room. The argument may frustrate a party's claim or support the other party's position. The argument may challenge or support a cause of action

element, a damages element, or a contractual language interpretation. It may also demonstrate the opposing party's jury appeal.

Describe jury verdict behavior derived from review of jury verdict publications. Separate co-defendants to break down their solidarity and demonstrate their divergent interests. Offer simple explanations of joint and several liability rules. Advocate reasons for separate settlements involving less than all parties.

Discuss impeachment risks. Few parties will understand the meaning of impeachment, and without question, it is an essential element of jury trial success. In Minnesota, for example, a jury may rely on impeachment of a party to decide the issues of a case. Should the defendant win or should the plaintiff win without regard to the facts or law? Make sure that the mediating parties understand the significance of impeachment. Hold up the deposition transcript, asking "can any answer in this deposition be contradicted or twisted?" If the answer is yes, point out that the party can lose the case regardless of tens of thousands of dollars spent preparing for and during trial. Argue that a party's risk includes an attorney fees award if state law allows prevailing-party fee awards – the bane of any litigant's life.

Exploit uncertainty to establish a foundation for directive-mediation success.

During all of this, a mediator must sustain an optimistic, "can do" attitude. Buy lunch and have it delivered. Don't let discovery omissions impede negotiation progress. If parties don't have necessary information and it is retarding progress, urge them to allow you to call a party employee for the information. Propose non-monetary settlement considerations. Devise and propose fresh, "third-way" approaches to settlement, if necessary. Be keenly aware of time spent with each side so that you do not spend more time with one side than the other. Argue the reality of Rule 68 or other cost-shifting rules or statutes in your jurisdiction. Explore structured-settlement opportunities. To aid resolution, suggest adding non-disparagement or confidentiality terms to a proposed settlement as nonmonetary consideration.

Of course, a mediator should say nothing in caucus sessions that could encourage a party to decrease its offer or discourage settlement. A mediator should not criticize a position held by a party's opponent. At all times, a mediator must treat all positions as honorable and all parties with great respect. To avoid embarrassing counsel in the presence of a client, when appropriate, hold a private meeting with an individual counsel to point out errors so that counsel can address them with the client while you meet with another party. Obviously, as a mediator, you must never reveal confidentially disclosed information.

Approaching Impasse

What if parties can't breach an impasse? How can a mediator bridge the final gap in a settlement amount? Each mediator has his or her own approach. One approach you can take involves declaring to the parties a settlement number that you wish to achieve that is within the gap, distinctly in contrast to giving your opinion of a case value or an expected jury value – both "no-no's." After disclosing the figure, you can ask the parties to note on a confidential sheet of paper whether they will pay or accept that figure. If all responses are "yes," the case will settle. If a party answers "no," announce that the case has not settled.

Some mediators may employ a "guilt" tactic to advance the final push. A mediator may announce that he or she will waive the mediator's fee if the parties agree to settle for an announced figure within the gap. Rarely will parties agree to such a waiver after witnessing a mediator's hard work to help them achieve a settlement. But the gesture itself may cause the

parties to yield their previous positions.

Settlement Wrap-Up

If a mediator achieves a settlement, it is imperative to ask the parties to sign a binding, interim, mediated-settlement agreement, in short form, before they leave. Because a detailed, final release and other closing documents ordinarily cannot be drafted at the conclusion of a mediation session, generally these documents will follow. An interim agreement signed by the parties, however, should include a provision requiring binding arbitration by the mediator if a dispute arises between the parties over the terms of the final releases and other closing documents. Including a binding arbitration provision may prevent a party with "buyer's remorse" from using a purported dispute about the closing documents to thwart a previously agreed-to settlement. Binding arbitration will occur quickly and will avoid court-motion costs and uncertainty. A mediator should also correspond with the court, announcing the settlement, for obvious reasons. Implicitly, corresponding with the court can lead that court to suggest the mediator for future assignments, based on a record of settlement success.

If a session ends in impasse, it does not mean that the process was unsuccessful. More often than not, mediation will lead to a settlement following the session as parties continue to evaluate their cases in light of the mediator's efforts. Before the parties leave, you should determine whether the final settlement offer will remain on the table for a certain period of time post-session. Stay involved and use post-session telephone calls as "after care" to encourage the parties to settle.

Conclusion

One mediation size does not fit all. Mediation styles that involve restrained shuttle diplomacy and self-motivated settlement interest by the parties can be effective. But as attorneys, we needn't check our advocacy skills at the door when we mediate. And, as experienced trial lawyers, we owe it to other parties involved in litigation to help them to resolve their cases.

Prepared for Trial? Considerations and Questions

Considerations

? Your lawyer's effort to hide unfavorable evidence may be unsuccessful (*in limine motion*).

? The judge – while fair – may prefer your opponent's case.

? If mediation is unsuccessful, the trial judge may push hard for settlement, after significant additional fees are incurred.

? Witnesses expected to perform well at trial may underperform.

? Witnesses expected to perform poorly at trial may outperform.

? Many times expert witnesses perform better in your lawyer's conference room preparing for trial than they do on the witness stand at trial.

? Treating doctors – who often dislike lawsuits – may not cooperate in their testimony with your injury claim at trial.

? Your opponent may not permit your tightly scheduled expert to be called as witness out of order.

? Your key witness may suddenly be unavailable for trial.

? What will happen to your case if your opponent's questioning of your witnesses is effective? The judge may select jury instructions that are unfavorable to your case.

? The judge may select a special verdict form that is unfavorable to your case.

? If you lose your trial, remember that appeals courts try to affirm or support the trial court's result.

? Even if you win the trial, appeals courts may throw out the trial court's decision.

? If you lose your trial for improper reasons, appeals courts can affirm trial court decisions even if they disagree with the trial court's reasoning.

Questions

? Is there anything in your background that your opponent may seek to exploit regarding your credibility?

? How certain are you that your expert witnesses' background contains nothing that your opponent may seek to exploit?

? How certain are you that there is nothing in the background of your other witnesses that your opponent may seek to exploit?

? If your expert witness opinion disclosure was not comprehensive will an important but undisclosed opinion at trial be ruled out?

? Are the complex issues presented in your case suitable for evaluation by a jury?

? Were you or will you be given enough chances to remove unsuitable jury candidates if your jury pool was or is worrisome (*peremptory strikes*)?

? Can you be certain that a "rogue juror" was or will not be selected in your case – a juror with a hidden, key bias capable of swaying the outcome?

? How will you perform on the witness stand after an anxiety-filled, lousy sleep?

? If your deposition testimony is effectively twisted around by the other lawyer at trial, will the jury doubt your credibility (*impeachment*)?

? Will the jury pay much attention to the defense's case after the plaintiff presents evidence for several days?

? Can you be certain no juror will research your case or issues on the Internet and reach a decision unrelated to the trial evidence?

? Are diversity or cultural considerations part of the party-counsel-jury dynamic in the courtroom, and will they potentially affect the jury's evaluation of your case?

? Given the judge's almost unlimited power to exclude evidence from the jury, what happens to your case if key evidence is kept out?

? How confident are you that your estimates or others' fault are correct (*comparative fault*)?

? How confident are you that the law will not make you pay someone else's bill (*joint and several liability*)? Is bad publicity a possibility after the trial?

? Could the result of this case adversely affect other cases, if you have more than one?

? Will a successful money judgment be collectable from your opponent?

? Will liens adversely affect a successful damages award?

? Would a loss at trial and obligation to pay money affect your credit record and impede business or real estate transactions during appeal?

? What risks to your case are presented if another defendant settles during your trial and you are alone?

Perils of Overconfidence

- In 1995, O.J. Simpson's prosecutors were confident that they would win.
- On September 30, 1938, after visiting Germany, British Prime Minister Chamberlain was confident that he would win "peace in our time."
- On July 19, 1999, Jean Van de Velde was confident that he would win the British Open golf tournament, holding a three-shot lead at the 18th tee in the final round of regulation.
- On April 14, 1912, Captain Smith of the Titanic was confident that he would beat Mother Nature while steaming at full speed in an iceberg floe at night.
- On July 2, 1937, expert pilot Amelia Earhart was confident that she could fly her Lockheed Electra across the Pacific Ocean.
- On July 21, 1861, sightseers who flocked to the first Civil War land battle (Bull Run or Manassas) to picnic were confident that the Union Army would win.
- On November 2, 1948, the publisher of the Chicago daily *Tribune* was confident that Thomas Dewey would defeat Harry Truman for the presidency.
- On October 12, 2004, in the American League Championship game, New York was confident that it would win against Boston, when they led the series 3 – 0 and were up by a run in the bottom of the ninth inning of Game 4.
- In 2006, The CBS television network was confident that it would win ratings wars by hiring Katie Couric as anchor with a $15 million salary.
- On March 10, 2000, many stock purchasers remained confident that the NASDAQ market would continue to advance when it peaked at 5132.52.
- In 2006, many house purchasers were confident that the real estate market would continue to advance.
- On February 22, 1980, in Lake Placid, New York, the professional, Soviet hockey team team was confident that it would beat the amateur American team in the Olympic medal round.
- In 1867, Czar Alexander II was confident that he had beaten the Americans at negotiation when he sold Alaska for $7.2 million**.**
- Until March 2008, investment banking giant Bear Stearns was confident that it would do well in the securitized-mortgage loan market.
- On June 25, 1876, Lt. Colonel George Custer was confident that 210 cavalry soldiers could win against 900 to 1,800 Cheyenne and Sioux warriors in a southeastern Montana battle.
- In 1776, Britain's King George III was confident that his world-renowned armed forces would defeat the ill-trained and equipped American rebels.
- In the January 3, 1993, NFL playoff game, the Houston Oilers were confident that they would defeat the Buffalo Bills who were down 35 points in the second half.
- On October 21, 2006, the Northwestern University football team was confident that it would defeat Michigan State, when it led 38-3 in the third quarter.
- On December 7, 1941, Japan was confident that it had dealt the U.S. Navy a mortal blow at Pearl Harbor, Hawaii, even though the American aircraft carriers were not in port.
- On June 12, 1972, agents of the Committee to Re-elect the President were confident that they could break into the Democratic National Committee's offices at the Watergate complex without getting caught.
- In 1958, Ford Motor Company was confident that its new sedan named "Edsel" after a Ford family member, would sell well.
- In late 1999, lawyers were confident that the Y2K computer glitch would generate massive and profitable legal work.
- Before May 6, 1937, Germans were confident that they would win the overseas travel competition via hydrogen-filled dirigibles featuring the Hindenburg.
- On October 11, 2003, while leading by three touchdowns after three quarters, the Minnesota Gophers football team was confident that it would win against archrival Michigan.

Costs of Trial and Appeal

Written discovery is complete, depositions have been taken and summary judgment motions are under advisement or denied. Those costs are in the past. Here's what you have to look forward to.

- ? Cost of courtroom trial presentation graphics
- ? Cost of evidence video display equipment rental
- ? Cost of expert trial testimony preparation
- ? Cost of counsel's miscellaneous trial preparation
- ? Cost of counsel's deposition outline preparation
- ? Cost of counsel's legal research as new issues arise
- ? Cost of counsel's trial brief preparation
- ? Cost of counsel's adverse expert cross-exam preparation
- ? Cost of counsel's jury selection preparation
- ? Cost of exhibit photocopies
- ? Cost of motion filing fees
- ? Cost of time diversion from work and non-work activities
- ? Cost of post-trial opening brief
- ? Cost of post-trial legal research to support/oppose motion
- ? Cost of cost bond on appeal
- ? Cost of trial transcript
- ? Cost of court of appeal opening brief
- ? Cost of court of appeal oral argument preparation
- ? Cost of Supreme Court review application
- ? Cost of Supreme Court opening brief
- ? Cost of Supreme Court oral argument preparation
- ? Cost of opponent's costs (if unsuccessful)
- ? Cost of judgment collection efforts/defenses
- ? Cost of evidence presentation software databases
- ? Cost of records custodian depositions for exhibit proof
- ? Cost of trial expert fees and disbursements
- ? Cost of witness subpoenas and service fees
- ? Cost of counsel's special verdict form preparation
- ? Cost of counsel's jury instruction preparation
- ? Cost of counsel's in limine motion preparation
- ? Cost of counsel's opposition to the opponent's in limine motions
- ? Cost of adverse expert background investigation
- ? Cost of paralegal preparation time
- ? Cost of lunches/similar expenses during trial
- ? Cost of playback of video depositions
- ? Cost of jury consultant, if retained
- ? Cost of other required pre-trial filings
- ? Cost of post-trial reply brief
- ? Cost of supersedes bond on appeal
- ? Cost of court of appeals filing fee
- ? Cost of appeal legal research
- ? Cost of court of appeal reply brief
- ? Cost of court of appeals oral argument
- ? Cost of Supreme Court filing fee
- ? Cost of Supreme Court reply brief
- ? Cost of Supreme Court oral argument
- ? Cost of opponent's attorneys fees (if allowable)

Cost of new trial, if granted on appeal

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Quotes of the Day

"While a defendant is entitled to a fair trial, he is not entitled to a perfect trial, for there are no perfect trials." *United States v. Payne*, 944 F.2d 1458, 1477 (9th Cir. 1991)

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"An attorney who says that a case is a sure winner and cannot be lost should be steered clear of. While you can be sure that most attorneys will do all they can to try to win your case, an honest attorney, no matter how good they are, has to admit that there is always a chance of a lawsuit or a case being lost." *Tips on Hiring an Attorney*, **http://www.attorneys.co.za/tips.asp#obligations** (last visited June 3, 2009)

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"No lawsuit is a sure winner for either side… [e]ven great lawyers lose cases." Lawyers.com, **http://research.lawyers.com/When-You-Are-Unhappy-with-Your-Lawyer-FAQ.html#five** (last visited June 3, 2009)