MEDIATORS GET MORE AND BETTER SETTLEMENTS WHEN THEY DON'T TAKE NOTES

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When I became a mediator in 1996, I took notes from the start to the finish of every case. Around 1998, I stopped. I have neither held a pen nor touched a keyboard to take notes since then. I believe this discipline results in more and better settlements. This article explains why.

WHY DID MEDIATORS TAKE NOTES IN THE FIRST PLACE?

In the mid-1990s, standard mediation technique included a device I recall being called "re-creation". In joint sessions, after each person spoke, the mediator would "re-create," or rephrase, what that person had said. It would often include greater clarity, advocacy and vigour than the original speaker had mustered. Because this re-created advocacy was coming from the neutral, it was intended not to be subject to the same reactive devaluation it generated when spoken by its true sponsor. And, it was intended to build the original speaker's confidence in, and comfort with, the mediator by letting the original speaker know that the mediator really "got it". These joint session presentations could go on for extended periods of time. So, to re-create them accurately, the mediator had to take copious notes. That was how I practised.

Later in the 1990s, litigators began to change their attitudes toward joint sessions. They were no longer willing to participate, absent some exceptional circumstance. The objections are well known: joint sessions take too long and lawyers want to get down to bargaining; lawyers say they already know what the other side's positions are, so a joint session is a waste of time; and, worse, the joint sessions can get unduly antagonistic, spark negative emotions, and set the whole mediation process off track.

With fewer joint sessions taking place, there was less need to take notes on joint session presentations and then re-create them. So I gave up taking notes. The number and quality of the settlements, and user satisfaction, went up.

HOW CAN MEDIATORS DELIVER SUPERIOR PERFORMANCE WHILE TAKING ZERO NOTES?

The goals of re-creation are still sound: mediators still need to show that they "get it". Once a mediator "gets" something, it no longer has to be discussed or repeated with the mediator. But until the mediator gets it (whatever "it" is), the need for discussion remains. So for conversations with mediators to progress, mediators still need to show that they get it. Mediators also still need to help the sides hear each other without reactive devaluation. That's the only way people can evaluate where they really stand and make the smart, calm decisions which lead to settlements. The mediator who takes zero notes does a better job of helping people reach these important goals. Here's how.

LET LAWYERS KNOW YOU "GET IT" BEFORE THE MEDIATION DAY, ON THE PHONE

The emerging best practice among mediators is that proper preparation includes talking to lawyers on the phone after the lawyers have submitted their mediation statements or briefs, and before the day of the mediation. In these conversations, mediators can show lawyers that they get it, with zero notes.

Generally speaking, these conversations proceed best when the mediator asks the lawyer open-ended questions, such as:

- What more do I need to know to be most helpful to you?
- What are the challenges we face?
- What are your expectations of me?
- Are there any mediation process issues we should discuss?
- Tell me about the personalities of the people involved?

In discussing the lawyer's answers to these questions, there's plenty of opportunity for a mediator to show that they get it. There's no need to take notes. The legal and factual issues in the mediation statement or brief are already in writing. The mediator is just refining and amplifying on those issues. Most importantly, the mediator exercises judgment to figure out what's missing, what it is each side doesn't get about the other's views, and how each side can help the other fill those gaps. This leads to a potential agenda for a joint session which the mediator designs to be brief, informative, and calm – in which lawyers are therefore more likely to participate – and which can form the foundation for the parties negotiating their way more efficiently to a more satisfying deal.

LET PARTIES KNOW YOU "GET IT" WHEN THE MEDIATION DAY BEGINS, IN PRIVATE

The emerging best practice among mediators also includes talking privately to each side when they first ride the elevator, before any sort of joint session is even attempted. When a mediator takes the time to establish rapport and chemistry, and thereby credibility, with each party at the beginning of the day – to show each party that the mediator gets it – the mediator can play a far more valuable role later in the day, helping the lawyer serve the client's interests by persuading the client to pay a little more or take a little less, to get all of the benefits of finality that settlement provides.

To gain that credibility, basic questions usually get the conversation going. To the lawyer, there's the familiar, "What else do I need to know to be most helpful to

you today?" To the party represented by that lawyer, it generally takes no more than, "Is there anything you would like to add?" Most often, the party will begin with "No," or silence. Then, the mediator must count to 10, when the party is likely to continue, "Wellllllllll…" Once the party starts explaining, the mediator's opportunity to listen carefully, show respect, learn and thereby gain credibility, is in full swing.

Here, the practice of taking zero notes starts to prove its true superiority. The stuff the mediator needs to "get", to oversimplify just a bit, is either emotional content or logical content. With lawyers, it is largely logical content, the facts and the law. With parties, though, it is largely emotional content. They are angry. Sad. Vengeful. Nervous. Excited. Agitated. Alienated. Exhausted. Disgusted. The list goes on. And, critically, this emotional content is completely separate from the logical content of the words. Mediators absorb and respond to this emotional content very poorly by staring down at a yellow pad or a keyboard, transcribing, and reading back to parties what they said.

USE THE JOINT SESSION AS THE PRELUDE TO PRODUCTIVE CAUCUSING

With the agenda focused and emotions acknowledged, the mediation can often proceed to a joint session. Not the old-fashioned kind to which lawyers object. Rather, one which the mediator can promise will be brief, informative and calm. If the mediator manages this well, better caucuses, bargaining, and settlements will result, as explained below.

CAUCUS WITHOUT REACTIVE DEVALUATION BY ASKING LAWYERS QUESTIONS

Many mediators will tell you that the first caucus after the joint session is the day's most intimate communication moment. The lessons of the joint session are sinking in, and parties are taking more seriously the reality of almost all cases that get to mediation, that there are two sides to the story. The person in whom each party has the most confidence, and who is best able to persuade each party, is that party's own lawyer. So, for the caucus conversation to have the greatest persuasive impact on a party, and to trigger the least reactive devaluation, the mediator's general goal is to get the lawyer talking more in the presence of the party they represent, and themself talking less. It rarely takes more than one question directing a lawyer's attention to opposing counsel's best point: "Leondra, what did you think of Goodwin's point that three cases support his argument that the benefit of the bargain, rather than the out of pocket, measure of damages applies?" A mediator can easily and naturally do this with no notes because the mediator has limited the agenda and worked with it all along. And, the acknowledgment of potential merit to opposing counsel's points comes from the party's own lawyer, not from the mediator. Accordingly, it has a greater persuasive impact on the intended audience, than lawyer's own client.

When these persuasive comments have run their course, it is generally time for a plaintiff to formulate an opening demand. Nobody needs notes to remember a number.

BARGAIN MORE EFFECTIVELY BY PROMOTING DIRECT COMMUNICATION

Now comes a critical challenge: who communicates this demand to the defence? And, when the defence is ready to respond with an offer, who communicates that back to the plaintiff? The default seems to have become that the mediator shuttles up and down the corridor, and the sides never see each other again. When advocates abandon so much of the negotiation to the mediator, though, they lose a lot.

- Conviction. A neutral mediator generally cannot convey a negotiating position with the same persuasive passion, commitment and conviction as an advocate with a duty of undivided loyalty.
- Questions. When a negotiating position is communicated to the other side, they may have questions. The advocate who has been living with the case is generally best equipped to answer.
- Confidentiality. The mediator's caucus with you is generally considered confidential. In truth, the conversation is almost always a mix of confidential and non-confidential material. A numerical offer or demand is almost always delivered with some context, narration, and detail. The advocate is in the best position to control the communication so that only non-confidential material is disclosed.

Plus, there's the general concern about accuracy. Particularly when the negotiation involves points beyond the price of a release, advocates have a heightened concern that the points are conveyed accurately. Accuracy is best ensured when the advocates convey these points themselves, rather than delegating that responsibility to the mediator, whether the mediator is taking notes or not.

For advocates to gain these benefits, the default has to be reversed. Advocates must communicate their positions to the other side directly. Many times, though, they are in mediation precisely because they have not been able to have those communications. The answer is in a third way: the "attorney summit meeting." The attorneys meet, outside of the presence of clients to minimise the temptation to grandstand, chaperoned by the mediator. These communicate with conviction, they answer questions as they see fit, they control what information is disclosed. Then they report back to their clients, with or without the help of the mediator as appropriate.

When mediators are not taking notes, it is easier to persuade lawyers to reverse the default and reclaim these responsibilities. Mediators simply lack the ability to do all the heavy lifting themselves, and it's obvious. It is also consistent with the basic distinction of good mediation: the good mediator creates the environment in which the participants can negotiate at their best. The good mediator does not negotiate for them. The good mediator honours, and does not encroach upon, the boundary between their role and the role of the lawyer. When mediators enforce that boundary and lawyers negotiate for themselves in the environment which the mediator creates, clients rightly give their lawyers – not the mediator – the credit for the beneficial settlements which result. When the mediator takes no notes, it is easier for all involved to honor the boundaries and for lawyers to earn the benefits they deserve.

The use of attorney summits also largely eliminates one common justification for mediators taking notes: Mediators may need those notes to defend against possible future malpractice actions. The feared malpractice claim, though, generally consists of an allegation that the mediator misstated or omitted stating something to the other side. Here, the mediator states much less.

Another common justification for mediators taking notes is that it allows mediators to set others' misstatements straight. Notes are either unnecessary or ineffective for this purpose. It's unnecessary because mediators are smart and focused, and if something is important, the mediator is likely to remember it even without notes. It's ineffective because, in a conflict between a mediator's notes and a lawyer's memory (or memory plus notes), the mediator's notes are overwhelmingly likely to come in second.

With all this said, there are still some times when mediators need to go by themselves to shuttle messages back and forth between the sides. Occasionally, it's so tense and combative that the lawyers cannot even talk. Those situations, though, are few. Part of the mediator's skill is to establish and maintain an environment of calmness and decorum so that even lawyers who have been at each other's throats can behave like brothers and sisters before the bar for a few hours.

Finally, the payoff. The way we get cases settled. The way we maximise party satisfaction not only with the result but also with the process and with the performance of their lawyer along the way. The conversation up to which we have been building all day. The negotiation stalls and the other side will go no farther. The party looks into their lawyer's eyes and asks, "Is this the best we can do?" If the lawyer responds with a convincing "Yes," the case likely settles. The process is designed to put the lawyer in the best position possible to answer that question convincingly. The lawyer has worked hard to get the negotiation to that point. The lawyer has vetted the key issues, and the party has seen the lawyer's good work. The lawyer has negotiated hard, and the party has seen the process unfold. Nobody has to take the hearsay word of the mediator as to whether the other side is bluffing. The party understands fully that to make the best deal available, they have to pay a little more or take a little less. To get the benefits of finality, clients generally do it. The trade-offs are worth it and leave the client better off than they would be without the deal. The party gives their lawyer credit for the work they have done to bring things to this point. The mediation is a success.

When the mediator doesn't take notes, these are the benefits lawyers and parties get. That's why it's how I do it.