Mediation – The Need for Strategic Preparation
Part 1

Mediation is an evolving process and has grown in many regards over the past 20 – 30 years. It started off as something that looked an awful lot like a Mandatory Settlement Conference where the primary technique used by the judge was good, old fashioned arm twisting, keeping in mind that he or she wore a black robe and sat in the chambers of a courtroom with a flag and a bailiff with a gun.

Settlements facilitated through mediation are much more than that now. Most would agree that mediation has become a component part of the modern civil litigation; that it is the rare case that is filed without some thought being given to when – not whether – to go to mediation. Part of that development is certainly due to the courts' embrace of mediation. When judges say it's OK for them, the legal profession generally follows suit.

Negotiating in a mediation setting has become quite sophisticated as compared to 20 years ago because everyone - counsel, judges, insurers, mediators and frequently the parties -– have had LOTS of experience. Lawyers being lawyers, we're always thinking, plotting, planning. As a result, negotiating in a mediation setting has become more strategic and thus requires more planning and preparation all round the table – by attorneys, parties and even mediators!

The following are some thoughts on what parties and counsel might want to consider relative to preparing for their next mediation.

Who Should Attend the Mediation?

The reason why disputing parties sit down at mediation is to achieve a negotiated resolution of all or part of a dispute. To achieve that end, there needs to be persuasive conversation in the first instance. That can only occur when there are people at the table who have *first-hand knowledge* about the transactions and events that are in dispute, especially if there are differing views. You need people at the table who can speak knowledgeably and engage in a discourse about any factual issues in dispute, *and* who can make "in-game" adjustments based upon new information received during the course of the mediation. In terms of attendance, that generally boils downs to: trial counsel, meaning the person who is "lead" and who will answer to the client if the client does not prevail, and one or more party representatives who have first-hand knowledge about the matters in dispute.

People who have first-hand knowledge about the problem that led to the dispute are not always the people with decision making authority for a business. As mentioned above, it is not unusual for "new" information to be exchanged during the course of a mediation that affects (or should affect) the perceived value of the case and thus the settlement range or objective defined in advance of the mediation. If the purpose of the mediation is to achieve a negotiated resolution, there needs to be someone at the table with the ability and authority to make "in game" adjustments and who has the ultimate decision making authority to walk away without a deal. "No deal" / walking out / not trying to find another way is a huge responsibility because it means that the litigation alternative is going to be the one that defines the outcome. One of the top reasons why parties who have otherwise made considerable progress in mediation get stuck and reach impasse is that one or both is missing the ultimate decision maker. The party representative at the mediation table only has a limited / pre-defined range of authority and cannot go beyond that set limit even if the circumstances presented at the

mediation warrant. Yes, a phone call can be made, but nine times out of ten that person is 1. unavailable, or 2. does not have time to be brought up to speed before with regard to the mediation developments that have prompted the phone call.

***SUGGESTION*:** Who is going to attend the mediation should be a pre-convening agenda item discussed between / among counsel. It's part and parcel of planning for success. Who do you want the other side to bring to the mediation. Who does the other side think you should bring to the mediation? Is there one person who can make the settlement decision alone? If not, what is the settlement approval protocol and how might it be accommodated / planned for in connection with the mediation.

It might also be appropriate to talk about non-party attendees – e.g., accountants, appraisers, other experts – who might be able to help the parties talk through technical and/or financial issues. When numbers need to be crunched, accountants can be of great help setting up spreadsheet scenarios for everyone to work with.

Timing – When is the right time to sit down at mediation?

Why are – or should – both sides be ready to talk settlement? There can be a number of reasons why – some of the more popular / recurring:

- The expense of the litigation will be greater than what is recoverable.

- Plaintiff might hit a homerun, but defendant has no or insufficient assets or insurance to satisfy.

- The case is not a slam dunk – there are some bad facts and/or bad case law – and the downside risk is substantial in some way.

- Plaintiff has a great case, but either cannot afford the fight or cannot afford to wait for a trial outcome. E.g., M&A opportunity.

- Defendant has a great defense, but cannot afford the fight or the publicity or the impact of having this dispute unresolved. E.g., M&A or financing opportunity.

- Plaintiff and defendant have an ongoing business relationship.

- Plaintiff and defendant share relationships with others, and those relationships are being impacted.

- A ruling has been made that is dispositive of some, but not all, of the issues, and that ruling alters what the parties are fighting about.

- The parties either have enough information to negotiate effectively and make an informed decision or they can (and are willing) to develop or exchange the missing information they need.

With regard to the last point, in any negotiation, but especially in the context of negotiating a litigated dispute, negotiators will rarely have all of the information they would like to have before sitting down to negotiate a deal. Negotiating in this context is very much like playing bridge. In bridge, the players see only one-quarter of the cards, and some of the information that might be gathered is false due to an uneven split of the cards. In a negotiation, the parties see only their information and that which the other party is willing to share, and that typically is less than all of the information that is available. Sometimes the time, expense and risk associated with the litigation alternative require that calculated decisions be made in the face of uncertain, conflicting or missing information.

***SUGGESTION*:** The two areas where a negotiation with missing information is destined to fail is where: 1. the amount, components and basis for damages being sought has not been explained by the requesting party, and 2. the value of property in dispute has not been appraised. When these types of items are going to be included in the issues to be discussed at mediation, discussion should be had between counsel in advance of the mediation to make sure that information is developed and exchanged concerning these matters, *and* that the exchange occurs sufficiently in advance of the mediation so that both sides can consider it as part of their pre-mediation preparation and briefing.

Quantify Risk

It's easy to talk about the perceived merits of a case or defense, but that won't move the needle in either room. Each room believes that its case – not the one in the other room(s) - is the one that has merit and will prevail at trial. Having a merits-based "discussion" will only take the negotiation so far, especially when the dollars at issue are large and the gap is wide. Something else needs to be put on the table for discussion. One such "something" is to quantify risk and place a value on avoiding the "downside" through settlement. This exercise seeks to place a value on a known variable that neither side controls, that is avoided through settlement. What if "X" happens (or does not happen), then would the settlement opportunity that is on the table look more attractive? The following are some "what ifs" that might be included in a party's planning and preparation, not just for its side, but to develop "what if" scenarios to present to the other side in an effort to move it off of a staked out position in the negotiations:

- Jury pool / Are community values pro or con?

- Judge factors / Does he/she have a known predisposition? What is his/her case management style and how might that affect the case?

- Witness factors / For key witnesses, what level of prior testifying experience do they have? How are they likely to appear to a judge or jury? How would you rate their communication skill level – Do they speak clearly? Will they be understood? Will they be believed?

- Attorney factors / How much prior trial experience has counsel had? What kind of an appearance does counsel make? How would you rate counsel's communication skill level - Do they speak clearly? Will they be understood? Will they be believed?

- Market fluctuations and influences / Is the value of the thing in dispute something that fluctuates? Is the market stable or volatile?

- Key evidence / What is it? What happens if it doesn't get in?

- Dispository motions / What happens if one is granted?

- Does the case involve novel issues or a case of first impression on which there is no binding or guiding authority?

- How might conflicts in the evidence be resolved – will it boil down to accepting one and rejecting the other? Believing one and not believing the other?

- Who has the burden of proof and what exactly does that mean? (i.e., ultimately, burdens of proof are very subjective and without precise measure or application)

- Are there any assumptions that may not pan out – e.g., third-party witness will appear / will testify to "X" / will be believed

- Time to trial / too soon? Too far off to give meaningful relief (e.g., elderly or ill party; business party with an opportunity that requires removal or elimination of contingency created by the dispute)

- Time allotted for trial / abridged? Unlimited? Truncated?

***SUGGESTION*:** Preparing in advance for a discussion about risk factors is an easy way to "expand the pie" because uncontrollable variables along the lines of the ones discussed above exist in every case and are generally shared around the table. This is more than a "you could lose at trial" discussion. It is really more of a "the outcome might not be as rich" or "the outcome could have negative repercussions that have not been considered," for purposes of more carefully evaluating a settlement opportunity that is on the table and responding (even if with another counter) versus walking away and proceeding with the litigation alternative.