Mediation – A View From The Bench

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When I came to the bench six years ago, I had very little experience in mediation. I served sixteen years as a federal prosecutor. Mediation is a foreign concept in criminal cases, and federal judges are strictly prohibited from any involvement in plea negotiations. For that matter, the Department of Justice's plea negotiation policies left little discretion to the prosecutor. In the six years I served as a civil trial attorney with the Department of Justice, I attended one settlement conference, which lasted about five minutes after I explained to the magistrate judge why DOJ would not, and could not, settle that case for any amount of money. I attended one other settlement conference as DOJ's party representative – that case did settle, I am happy to report. Two thoughts emerge from my limited experience: first, I recognize that some cases should be tried; second, I came to the bench knowing almost nothing about mediation. The latter of which caused significant anxiety on my part.

I must acknowledge my deep appreciation for the mentoring I received from Magistrate Judge Ellen Carmody, who is nothing short of a mediation guru. I now have several hundred settlement conferences under my belt. I don't pretend to be an expert. I do have some thoughts, however, which I am happy to share with you (have you ever known a judicial officer who wasn't happy to share his or her opinions?).

Alternative Dispute Resolution (ADR) – both facilitative and evaluative – has become an integral part of the litigation process for good reasons. The courts simply could not keep up with the demands of a civil docket without it. More importantly, however, ADR provides a mechanism that allows parties to resolve their disputes timely, less expensively, and with fewer deleterious effects. Let's face it, no one who has gone through the litigation process expresses interest in going through it again. If anyone did express such an interest, we would certainly have cause to question that person's sanity.

Our judicial process is based on an adversarial system, which by its nature tends to bring out the worst in all parties. Accordingly, the litigation itself can take a heavy toll on the litigants. Rarely, if ever, does a litigant – including the prevailing party – leave the trial feeling truly like a winner. The French philosopher Voltaire once said: "I was but twice ruined in my life. Once when I lost a lawsuit, and once when I won one." Abraham Lincoln commented: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser in fees, expenses, and waste of time."

The actual costs of litigation are quite significant: attorney's fees, filing fees, court reporters, document production, etc. A significant, but often overlooked, cost of

litigation is the lost-opportunity costs. Every minute a party spends on litigation is a minute that cannot be spent doing something else, whether it be relating to business, family, or other aspects of one's personal life. This is what I refer to as the "hidden" costs of litigation. As noted above, no rational person would choose litigation over these other activities.

All of this is by way of saying that, in most cases, it is in the parties' best interests to find a way to settle their disputes short of trial, if for no other reason than to avoid the negative consequences of litigation. Beyond that, there are at least two significant positive benefits of compromise in most cases. First, we are all human; we are not perfect. I have yet to see a case in which one side was completely right and the other was completely wrong. Accordingly, compromise, which reflects that reality, is often a fairer result. Second, human beings like to feel that they are in charge of their lives. Few people, in anyone, like to be told what to do. Settlement is the parties' only opportunity to control the outcome of the litigation. If the parties choose to go to trial – whether a jury or a bench trial – they are putting their fate in the hands of a factfinder, or group of factfinders, whose decision will be based on a limited amount of information and a certain set of legal principles. The parties likely will disagree, at least to some extent, with the evidentiary rulings and the legal instructions given by the presiding judge. But they will have to live with them.

A few "do's" to keep in mind with respect to mediation (I try to avoid the negative). First, be prepared. You need to know your case inside and out. I am surprised how often I am discussing the facts of a case with counsel who are unable to answer fairly basic questions. I have even encountered counsel who made factual assertions I knew were inaccurate. That is a quick way to lose the trust and confidence of the mediator.

Second, be realistic. You need to have an objective view of the potential weaknesses in your case. If you think your case has no weakness, think again. The practice of law is difficult and competitive. Lawyers often feel that they need to sell themselves to their clients, which sometimes results in overselling the likelihood of success. Other times, what appeared to be a very strong case in the beginning becomes much less so as discovery progresses. Use the mediator, if necessary, to help educate your client about the potential weaknesses. That way you can continue to be a strong advocate for your client. Let the mediator be the "bad guy." While any good mediator will be willing to assume this role, Magistrate judges can be particularly helpful in this regard, as there is something about wearing a black robe that confers instant trust and respect (something which judges should always strive to earn).

Keep in mind that the mediator cannot help you if you are not candid with her or him. If you don't trust the mediator, choose a different mediator (if possible). If you do trust the mediator, be candid both in your confidential letter and in person. A good mediator can be very helpful in finding ways of resolving a case, but the mediator

is unlikely to be successful if you are not candid. Acknowledge potential weaknesses in your case. Talk to the mediator about any concerns you may have about the case or your client. If there is anyone or anything that poses an obstacle to settlement, tell the mediator. Good mediators often find ways of overcoming obstacles. Ask to speak to the mediator privately if there is something you need to discuss that you don't want your client to hear.

Be creative. Some cases cannot be settled simply by the payment of some amount of money – or at least the parties will never agree to a sum that will settle the case. Consider other ways of resolving the case. For example, I had a settlement conference in a case involving a claim of breach of the manufacturer's warranty on a million-dollar boat. The parties were bitterly divided on the merits of the case, and worlds apart on a monetary value. The case was never going to settle if we pursued purely monetary terms. So, I asked the plaintiffs if they were still interested in having a boat, and whether they would consider buying another boat from the defendant (a well-known manufacturer of high-end boats). I was not surprised that the plaintiffs still wanted a boat; I was a bit surprised that they were open to buying another boat from the defendant. At that point, I became a boat broker and helped the parties settle the case by trading in the allegedly defective boat for a new one on favorable terms for both sides. The plaintiffs obtained a very good deal on a new boat, with a reasonable trade-in credit, and the defendant still made a profit, albeit a lesser one (the markup on high-end boats is astronomical).

Be open minded and engage in the process in good faith. In my experience, cases settle when the parties end up agreeing to something they didn't think possible when the mediation began. Rarely do parties come to the mediation with settlement positions that intersect. I have never encountered anyone who expressed regret for having settled a case. I have, however, had counsel acknowledge regret for having missed an opportunity to settle a case.

As a final note, mediators don't settle cases; the parties do. What a good mediator can do is help the parties reach compromise when, for whatever reason, the parties cannot find it on their own. But you need to help the mediator help you.