TEN PILLARS FOR LAWYERS AND MEDIATORS PREPARING TO MEDIATE THE LITIGATED CASE

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Irving Younger was a law professor and former New York state trial court judge who took the trial lawyer world on a terrific ride through the land of cross-examination with a short list – Ten Commandments he called them – of dos and don'ts that he delivered with style, humor, and impact. "Be Brief!" and "Ask only questions to which you already know the answer (unless you don't care what the answer is, but be very sure you don't care)!" were two rules every cross-examiner should follow. He didn't pretend that following his ten commandments would turn every lawyer into a great cross-examiner, but following his rules would at least project competence and demonstrate occasional genius. YouTube it, laugh, and learn. There really weren't ten rules (some were variations of others), but the number ten had a certain rhythm.

Similarly, contrary to the title of this essay, there really aren't ten pillars for preparing to mediate the litigated case. But like Professor Younger's approach to cross-examination, following a few simple rules for mediation preparation will make the sessions more effective, impress your clients with your awareness of the nuances of the process, and occasionally produce remarkable results. Most are not going to surprise you. Most you already follow them, to one degree or another. But some are not obvious, and special attention even to the ones that are self-evident is worthy of reinforcement. Mediators do well to alert lawyers to these principles because mediators know that prepared lawyers (and clients) make mediations more effective.

These rules arise from a fewer number of fundamental truths about mediation: it's not just a negotiation in which the mediator carries messages back and forth and it's not about convincing the mediator how great your case is. Rather, mediation utilizes a tool – the mediator – whose proper use is essential to mastering the mediation process and exceeding your clients' expectations. So let's go through the pillars, with some explanation.

1. Learn the Basics Of The Process, Including Any Mediator-Specific Procedures.

Most lawyers have an intuitive sense of the structure of the mediation process or learn the basics through experience in some or many mediations. It's not inherently complicated: mediations are assisted negotiations in which, among other things, demands, offers, and counter-offers go back and forth through, and hopefully with the advice of, the mediator. Because the structure is simple, many lawyers expect they can bring their client, tell the client to keep quiet,

and then just approach the mediation like any other settlement discussion (treating the mediator as a messenger and sounding board).

It could be said that only mediocre lawyers treat mediations like this, but the truth is there are lots of good lawyers who see mediation this way. The best explanation is that the skillset that makes attorneys good trial or litigation lawyers is different from (and in some regards inconsistent with) the skillset of lawyers who are able to exploit the mediation process.

So the first pillar is to discover how the process will unfold and what special rules or expectations the mediator has imposed. For example, will there be a joint session with all parties and counsel in the same room? If so, will it be anything more than a meet and greet session? The answer to these questions depends on all kinds of considerations and preferences, but you need to know the answers because they dictate how you prepare yourself and your client. If you want to bring your opening statement, a detailed summary of the evidence, and your closing argument (all with PowerPoint slides) because you want to convince the client on the other side of your awesome case, be sure that the mediator and the other side will agree. If you arrive expecting to dominate the initial session, you are likely to be disappointed (especially where the other lawyer doesn't have the time or inclination to present his case the same way).

Once you have a good sense of how the session will play out, now you can move on to preparing for it.

2. Know Your Case – Especially Its Risks, Weaknesses, And the Likely Cost If You Can't Settle It.

It goes without saying that the lawyer has to be encyclopedic on the facts and law, on the witnesses and documents, on the claims and defenses, and on her and the other side's arguments. It's because this is obvious – and hard enough to do without discovering that there's more – that many lawyer think that they can treat the mediation like the argument of a motion for summary judgment. This sort of preparation to advocate is necessary, but not nearly sufficient.

The essential shortcoming of this level of case analysis is that it usually leaves out a thorough, honest, and forthright exploration of what can go wrong. This is an area where good lawyering skills and good mediation skills may diverge. Lawyers are zealous advocates who are most effective when they believe unconditionally in the correctness of their positions. Because they are ethically bound to present only those arguments they believe are justified, they tend to convince themselves of the correctness of their positions.

But you are doomed to fail at finding a sensible resolution of the case if you do not have a genuine appreciation of how and where it can all go wrong (not to mention an understanding that if it goes wrong, it will probably happen in a way or on an issue or witness you never expected to present a problem). So study your warts; which include the fact that the process is distracting, painful, and expensive. Are you going to be asked to estimate the costs of the trial or arbitration process if the case isn't settled? In 99% of your cases, the answer is "of course you are." In the 1% of you cases where you aren't asked, 99% of the time it's because the client is afraid to ask. And if he isn't on notice of what it will cost to prepare and present your case at trial, you are going to have a problem. So you better have a genuine cost estimate based on what's left to do to get the case ready and what it will cost to present it. Even then, consider a multiplier of 2 or 3.

3. Prepare Your Client for the Process, Being Especially Forthright and Forthcoming in Disclosing Risks and Costs.

Lawyers obviously need to tell their clients what to expect. But advising the client what a mediation is and how it will generally work is woefully insufficient. Everything that happens in the mediation that your client did not expect and was not prepared for will undermine the lawyer's authority and her client's level of respect. So the client must be prepared to have the lawyer's and the client's evaluations of the case challenged and any naive expectations about how long it will take and how expensive it will be demolished.

But this "prepare the client for the bad news" rule runs against the lawyer's need to appear to his client to be the committed believer who can and will achieve extraordinary result at a remarkably reasonable cost. Lawyers get cases because they win cases. Clients hire them because they radiate strength and power. But the path to hell is paved with overstated conviction and undisclosed danger, so do your best. (If it seems that there are messages that need to be sent that the lawyer may have trouble delivering, let the mediator know so the mediator can deliver the bad tidings.)

So the lawyer must forthrightly explore the weaknesses of the case and costs and risks of pursuing it with the client. In doing so the lawyer makes it possible to obey the next pillar.

4. Before You Arrive at the Mediation, Decide on a *Tentative* Set of Settlement Terms That Are Tolerable. But Draw No Lines in The Sand.

So, once you have fully and forthrightly evaluated the case and its likely costs, and shared the full evaluation with your client, you must recommend, defend, and have your client

agree on a range of outcomes that tolerably protect your *interests (not positions)*. Recognize that the "value" of the case for settlement purposes is not the expected verdict if you win (or lose) times the chances that you'll win (or lose). You must also acknowledge what the client (or the lawyer in a contingency case) will have to pay (and what additional burdens your side will bear) to get to the end of the line.

Some call this establishing a bottom line for the negotiation. It's better called a flexible or movable line of defense. "Moveable" because the mediation process will invariably cause the parties to focus on risks not previously considered significant and make it clear that each side needs to rethink their perspectives as new information is received. More importantly, it is likely that you will discover that you can't settle the case for what you though it was "worth" before the mediation. Instead, you will have to decide whether it makes sense to continue the case rather than take "what you can get" or "pay what's required to get it settled".

So leave room for flexibility by setting a tentative settlement and adjustable target. Remember that if you set an unqualified bottom line, whether carefully thought out or not, this benchmark will take on a power and influence of its own. Even tentative positions can become anchors that make alternatives more difficult to adopt than would have been the case if the first position had never been taken.

5. Trust the Mediator. Consider His or Her Questions and Comments, and Allow Her To Deliver Bad News and Reality Therapy.

One of the most challenging and enlightening aspects of the mediation process is the opportunity for an intelligent and disinterested neutral to examine your positions and ask pointed questions that reveal dangers, weaknesses, and risks that you may have discounted or ignored. Some counsel believe mediators see it as their job to attack each side's case wherever possible in order to convince them that they won't prevail, and should therefore settle. This assumption about the mediator's role is dangerously misguided.

The mediator's job as "evaluator" is actually seriously different. This role not to advocate your opponent's positions or attack yours; it is to encourage you to confront the risk that the other side's arguments or evidence will be strong enough to allow the decision maker to decide against you for whatever reasons ultimately motivate the judge, jury, or arbitrator. As it turns out, the mediator is often the only credible voice to articulate these risks. Your opponent isn't credible. The lawyer needs to be seen as the steadfast believer and advocate.

So it may only be the mediator who can set out the risks most credibly. As a consequence, good lawyers encourage mediators to do this precisely because it helps the lawyer

assure that the client is fully informed while maintaining the lawyer's stature as undiluted and fearless advocate. So hear the mediator out, and test their credibility. By all means discount his or her views if they seem insincere, but don't assume that's the case. And, where appropriate, ask the mediator to deliver reality therapy to the other side or to your client where it is better conveyed by someone other than an advocate.

6. Let the Client Speak and Participate.

Most lawyers accept it as a given that clients hire them to advocate their clients' positions, that the lawyer can do it better than their clients, and that clients are likely to hurt their cases if they are allowed to speak. For this reason, lawyers are generally reticent to let their clients participate in mediation discussions (especially where the lawyer for the other side is present to take notes, conduct discovery, and prepare cross-examination). Lawyers are only slightly more likely to let the client interact with the mediator in a conference where the opposing side is excluded.

This is very often a huge mistake in mediation because clients are their most effective advocates precisely because their views are not filtered, spun, abridged, or delivered by the lawyer. They are credible to the other side because an adversary's lawyer gets no respect for truthfulness and honesty.

In the context of a confidential session with the mediator that excludes the other side, the client is likely to be extremely persuasive when it comes to demonstrating conviction and confidence in her position. This gives the mediator an important tool for confronting the other side with its risks. The client's direct presentation to the other side's client can be even more powerful and effective. Few things are more persuasive than one individual's direct appeal to another principal, both because it is unfiltered and because the emotions are right there to be absorbed.

So discuss such a direct presentation, prepare it, and allow your client the opportunity to be heard by your opponent whenever possible. And remember that clients don't just appreciate the opportunity to get their feelings off their chest. They may insist that for all the money and effort they have put into the matter, they should at least get the chance to be their own advocate (if only briefly) and to be heard. And the decision to allow a client to make a presentation demonstrates the lawyer's trust and confidence in the client, which is obviously good for the lawyer's relationship with the client.

7. UsetThe Mediator As An Ally, Coach, and Strategic Asset, Not A Messenger.

There are many compelling differences between a mediation and an unassisted negotiation. Among them is the opportunity that each side has to have confidential conversations with someone who has also had confidential conversations with the other side. While that person – the mediator – is sworn to keep the contents of her separate conversations with the parties confidential, the fact that she has had the conversations, and knows important secrets about each side's interests and expectations, allows her to make suggestions about how to conduct the negotiations that allow progress where none would otherwise be possible.

The simplest example is when the parties open the negotiations hundreds of thousands of dollars apart, and are so offended by each side's initial offer that further negotiation seems useless. But the mediator will have learned things about each side's views that will suggest ways to bring the parties closer together without either side having to disclose information they want concealed and without appearing weak or indecisive. The mediator has tools, and the power of suggestion, that can be used effectively to move the parties forward when they would otherwise have to refuse to proceed.

The mediator's awareness of confidential information about each side's most important interests (information that parties do not want to share because of fear that it will be misused or exploited) also allows the mediator to be an important resource, sounding board, strategist, and coach as each side presents their offers, counter offers, and positions. The essential point is that lawyers should look for ways to use the mediator as a tool for discovering ways to present their positions more effectively, using words and images with which the other side is likely to be more comfortable and by avoiding language and attitudes that interfere with the communication.

Finally recognize that the mediator has training, perspective, and experience that will facilitate the negotiations and help bridge the differences of the parties. Expect the mediator to supply useful analysis and suggestions about the progression of offers and counter-offers, about ways to deal with emotional aspects of the dispute (including whether an apology by one or both sides would be helpful and, if so, how they might be delivered effectively), and other proposals and approaches to surmounting potential impasse. When this happens, be flexible and open minded in considering mediator proposals to facilitate the negotiation.

8. Bring With You The Flexibility You Need To Reevaluate The Case And Resolve It Without Delay As Your Views Evolve, Which They Will.

We are told that "in battle, no plan survives first contact with the enemy," so be prepared to improvise." This is true in successful mediations. On occasion, both sides have a similar sense

of the risks, costs, and opportunities of further litigation, and find a resolution within each side's zone of reasonable compromise. But if this happened often or easily, there would not be much need for mediation, and we know that's not the case.

In fact, your opponent will all but invariably see the case differently from you, making resolution possible only if you are prepared to concede more than you hoped when the mediation began. It is also likely that the mediator or the other side will be at least somewhat persuasive in convincing you that there are risks and costs that were not fully discounted in what you established as your tentative bottom line.

Since this is likely to occur, you must be prepared to react effectively as your view of the case evolves or your conclusion about what it will take to settle it changes. The best way to do that is to be sure you have persons with you with the necessary authority to reevaluate the case on the fly and have the necessary stature to make a tough decision (or at least the stature to get approval for a tough decision). (Most courts require that lawyers bring a person or persons with final and open-ended authority to settle the case, so don't be caught without sufficient authority or the necessary people to get a deal done.)

9. Forget About Winning or Losing. Focus of Interests, Not Positions.

It is inherent in the litigation process that outcomes are framed as "wins", "losses", or "ties". Everybody wants to win and hates to lose. But litigation is not a zero sum game. The litigation process continuously exacts a high price that only reduces the value, or increases the final cost, of the resolution. The longer the litigation goes on, the greater the chance that there can be no real winner, irrespective of the outcome. And the more quickly the case is resolved, the more likely that both sides get an outcome that can be considered a victory.

So put aside the idea that a settlement is not viable unless it vindicates your stated position. A position is just a strategy to claim what you want. An interest is what you need; what's important. Getting an outcome that gives you what you need, even if it doesn't affirm all your positions and claims, is a good outcome, even if it's less that you wanted, expected, or feel entitled to. And put aside the notion that an insufficient settlement or a seemingly excessive settlement is a loss. Because whatever you get or pay, it will be worth less or cost more to obtain if it comes after fruitless and expensive legal wrangling.

10. Eat A Healthy Meal, Take Your Medication, and Be Respectful.

Ok, these admonitions may not rise to the level of profound wisdom, but being physically ready and emotionally prepared for the mediation is more important than you may think. And

emotional reactions driven by blood sugar spikes can bring a fruitful discussion to a halt more quickly than a power failure. So prepare for the mediation experience like you'd prepare for any tense and demanding event. And the same goes for your client.

The mediation process is also an occasion for long bottled up feelings, old rivalries, and for reactions to perceived insults and disrespect to be voiced. This voicing is, of course, especially likely at the tensest moments. Most mediators have come to expect and appreciate the usefulness of this kind of catharsis (properly managed and timed) because clients want to feel that the process has allowed them to express themselves on the issues that are meaningful to them without the filter of their lawyer. Indeed, this sort of client participation may be critical to the success of the mediation.

But charged exchanges between parties can derail the discussions and close people's minds to the sort of flexible evaluation of options that is essential in difficult mediations. (This is why many mediators dispense entirely with joint sessions.) So test your client's need to be heard and discuss the subject with the mediator. Encourage them to express these feelings first to the mediator outside the presence of the other side. And counsel your clients to remain respectful when interacting with opposing parties (lawyers and clients).

CONCLUSION

Following these guidelines will not guarantee brilliant mediation outcomes, but attention to the principles will significantly increase the odds of success by improving your level of preparation and allowing you to take maximum advantage of the unique opportunities and advantages mediation affords.

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