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Michael Starr Mediation Services

ARTICLE

How Mediation Differs from a Judicial Settlement Conference

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Most lawyers would say, if asked, that the difference between mediation and a judicial settlement conference is about 5 hours: judges tend to schedule settlement conferences to 2-hour sessions and mediations tend to take all day. This is true. But the reason it is true is that mediation is a fundamentally different process from a judge-directed settlement, and that different process takes time to unfold.

One way to illuminate the difference between settlement conferences and mediation is to articulate the different roles mediators play: Neutral Evaluator, Agent of Reality, Active Listener, Disputant's Confidante, Negotiating Coach, Creative Problem Solver, and Trusted Advisor. Settlement judges do some of these things, too, but their institutional role as judges constrains them from doing others. Even if judges gave more time to conducting a settlement conference, it would not be like a mediation.

Neutral Evaluation

One role both judges and mediators play is Neutral Evaluator: an objective, disinterested person who assesses the merits of each parties' claims and defenses, and their likelihood of success. Judges are most comfortable with this settlement technique. They do this unabashedly and – like voting in Chicago – early and often. Their recognized expertise – the law being, after all, what judges say it is – makes their evaluations compelling.

Some mediators also see themselves as Neutral Evaluators, but more commonly mediators see their role as facilitating the parties' negotiating their own agreement. Facilitative mediators sometimes engage in neutral evaluation but only unobtrusively, when invited to do so, and late in the day.

Judges readily engage in neutral evaluation because they see the goal of settlement conferences to be, well, settlements. They don't much mind how that is achieved, as long as it is done honestly and impartially. They have no problem pressuring a

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party – perhaps with just raised eyebrows and an incredulous look – to consent to a compromise that is, in the judge's eyes, reasonable.

That is not the mediator's way. The ethical guidelines applicable to mediators set as a fundamental value each party's self-determination: its voluntary and uncoerced decision to agree. *See* Amer. Bar Ass'n, et al., Model Standards of Conduct for Mediators, Aug. 9, 2005 (Model Standards), Std. 1. (Self-Determination). The difference between consent to a settlement some third party presses on you and an agreement voluntarily accepted as one's own is obvious to anyone who has been on the "receiving end" of either of these two processes.

Agent of Reality

Another role played by both mediators and settlement judges is Agent of Reality: the neutral does not advocate for or against any participant's position but, rather, speaks to the reality of their situation, looked at objectively rather than through the parties' respective rose-colored glasses or, what cognitive psychologists call, "confirmation bias" (that is, seeing all new information as confirming what you already believe).

The reality focused on is not the legal merits but the pragmatic realities of continuing to litigate. As Agent of Reality, the neutral might ask: Have you accurately calculated the true costs of continued litigation, not only as to legal fees but also opportunity costs (that is, the opportunities for profit that are being lost by the time and effort spent sparring with your adversary)? How fully have you considered all the collateral consequences of further litigation with respect to, for example, business reputation or the effect of uncertainty on each side's ability to "get on with its life."

At bottom, the Agent of Reality asks repeatedly the same, basic question: "You don't really believe that, do you?" That question seeks the objective rationale behind some belief asserted by a participant. Mediators ask that question gently and indirectly so as to foster each parties' self-reflection, rather than as to cajole. Settlement judges are not always so reticent.

Active Listening

A third role played by neutrals is Active Listener. This is the heart of what good mediators do and what starts to clearly differentiate settlement conferences from mediation as distinct ADR processes.

The first part of active listening is to look beneath the words expressed to the underlying values, concerns and interests. It next involves validation and empathy – not that the party's position is correct, but rather affirmation by the mediator that her concerns and interests are understandable and also understood. The mediator's ability through empathy and validation to communicate to a participant that she is being heard lays the foundation for the trust that will later in the day bring the parties to a mutually acceptable resolution of their dispute, one that they own as their own. *See* Goldberg & Shaw, The Secrets of Successful (and Unsuccessful) Mediation, Negotiation J. 393, 414 (October 2007) (Secrets of Successful Mediation).

The last part of active listening is reformulating what has been said, saying it back to the speaker in a way that, while supportive, promotes collaboration, rather than defensiveness or belligerence from the other side. So, for example, when a mediation participant says, "I was cheated out of my commission," the mediator might respond, "I hear that you want fair compensation for the work you did."

Settlement judges tend not to do much active listening. While judges could certainly develop this skill, it does require practice; nor is active listening easy to accomplish if there are short time-limits for how long the session will last. More fundamentally, there are institutional constraints on what judges can and are comfortable doing. Judges see themselves not only as disinterested but also detached. It is hard to be empathetic and detached at the same time.

Active listening, it seems, is inherently at tension with neutral evaluation. *See* Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 Florida St. L. Rev. 937, 940 (1997). Settlement judges who do mostly the latter are not inclined or well-situated to do much of the former. Mediators who spend much time on active listening, seeing it as a pathway to the trust needed to facilitate the parties' voluntary resolution of their dispute, tend to go very light on neutral evaluation, and do so only late in the process after trust has developed.

Disputant's Confidante

It is an easy transition from Active Listener to Disputant's Confidante. At various times during the process, a mediator will ask the parties to share with him in strictest confidence their true thinking. A version of the question, "What do you really want?" is asked throughout the process. A mediator might ask, "If the other side would move from this to that, how much are you prepared to move from where you are now?" or "You have just told me you are willing to make a significant change in your position; what are you looking for from the other side as a commensurate response?" This technique is really asking parties to confide in the mediator as to what they are willing to do later, not just where they are now.

There is nothing about a judge's skill-set or institutional role to prevent eliciting confidential information from the parties as to what they are "really" thinking. The problem comes from the other side. Judges are clothed with authority over important parts of people's lives, and no one is comfortable being completely forthright in that circumstance. You tend to shade what you say to accord with what you think the authority wants to hear or will not rebuke. The intimidating aura of authority exists even when the settlement conference is conducted by judges who are assigned that task alone and are not otherwise involved with the litigation.

It is difficult baring your truest self to someone who sits above you in a black robe, even when they are for the moment sitting robeless at a conference table. After all, that robe is, sometimes literally, always hanging on a coat

hook in the corner of the room.

Power, even implicit power, is inimical to candor. Mediators often emphasize that nothing will happen in the mediation, even if it is court-mandated, without all parties' agreement – neither the terms of a final settlement nor any of the processes that lead to it. *See* Model Standards, Std. 1. This willingness to let go of control allows the parties to take risks that can promote resolution. Ironically, mediators are most powerful when they give up all power. Settlement judges, in contrast, never totally surrender their aura of authority; it is just how they are perceived, do what they may.

Negotiating Coach

Since mediation is facilitated negotiation, one of the mediator's roles is to coach the parties on effective negotiation techniques and, in a sense, to orchestrate the process to keep it moving toward resolution.

This takes many forms. Sometimes a mediator will request permission not to present a party's offer for fear that it is too small a change and could, for that reason, engender a perception of bad faith. When to continue discussing concerns, realities and future expectations, and when to exchange offers is part of the orchestrating mediators do.

Sometimes a mediator will urge a party to move more than it is proposing: "I know you think their demand is still too high and that you are not willing to pay more than 50, but I think going only from 20 to 25 will not motivate the movement you want to see; would you let me offer 30 and we'll see what that prompts from the other side?"

Settlement judges tend not do much in the way of orchestrating the negotiation because, one suspects, it is inconsistent in their eyes with being both disinterested and detached. Judges who see themselves as umpires calling balls and strikes are not about to propose changes in a team's lineup.

Mediators, in contrast, see their primary role as facilitating the parties' own negotiated resolution to their dispute. Helping each or either side be a better negotiator for its own interests is part of what the parties have invited mediators to do, as long as it is done in a way that preserves neutrality.

Creative Problem Solving

After trustworthiness and perseverance, what lawyers value most in a mediator is creative problem-solving. *See* Secrets of Successful Mediation, at 414. This is possible in mediation because what brings disputants to the bargaining table is not necessarily what they most deeply care about.

Consider the plaintiff who brings a lawsuit for goods delivered but unpaid, and a defendant whose defense is nonconforming goods. What the plaintiff cares more about, however, is maintaining a continuing relationship with what had been a good customer. And, what defendant most cares about is getting some payment flexibility due to the volatility of its cash flow and some discounted price for useable but substandard goods.

Uncovering the interests that underlie the stated dispute requires active listening: sometimes because the parties are so enmeshed in the right and wrongs of the dispute that they are obtuse to their own underlying interests, or sometimes because, being distrustful, they are not yet ready to state out loud what they really want. Mediators have the ability to ferret out the interests and concerns that underlie the parties' positions to suggest creative ways for mutual accommodation.

Settlement judges, in contrast, tend to take the dispute as it is framed in the pleadings. The settlement judge will challenge whether substandard goods is a complete defense to nonpayment, whether the goods were sufficiently nonconforming to trigger such a defense, and what defendant would owe plaintiff, in any event, for acceptance and use of the assertedly substandard goods. At the end of the day – or rather at the end of the time allotted for settlement – the parties are likely to compromise and accept a settlement: the defendant's paying something for the substandard goods, but not full price. That outcome will take the case off the court's docket, but the opportunity for a more positive outcome would have been lost. Compromise-and-settlement is not the same thing as voluntary agreement resolving a dispute through mutual accommodation. Even when the outcome of each process looks much the same, the experience of the participants is not.

Creative problem solving can occur at all phases of the mediation and as to issues large and small. One party insists it cannot possibly schedule a mediation date because the other has not complied with its discovery demands, and the other party counters that those demands are burdensome and unwarranted. A mediator might ask the objecting party what it minimally needs to have a productive mediation, and then ask the other party if it is willing to produce that. This is done without prejudice to either parties' position as to the propriety of the formal discovery demands themselves.

Settlement judges tend to accept every disagreement as the parties themselves frame it because, it seems, their institutional role is to rule on what is presented to them for decision. When the lawyers are at loggerheads, judges might say something to the effect of: "Counsel, either you work this out by yourselves or, if you want, I will rule on your 46 discovery demands, but neither of you is likely to be fully satisfied." In this way, the judge uses her authority to induce the parties to back away from their most extreme positions.

The mediator, in contrast, views this as an opportunity to change the culture of negotiation from the natural tendency of lawyers to find a reason to say "no" toward a positive orientation that looks for what in the other side's position they are willing to say "yes" to.

It is sometimes said that in a good settlement, neither side is happy. How could it be otherwise? Each party has compromised and "given up" on something it wanted in order to achieve an armistice. But, a good result from mediation generally means that each side is satisfied (not ecstatic, but satisfied) because it has gotten the most important part of what it wanted,

given up only on what it valued less (or didn't really need), and come to accept that the whole package was better, all things considered, than the alternative of continuing to litigate.

Trusted Advisor

The capstone role of the neutral in mediation is that of Trusted Advisor. It could be said that no one wants to leave money on the table and no one wants to pay more than they have to. What brings the parties to agreement is the belief that the deal on the table is the best they can get from the other side under current circumstances. In negotiation, mediation and settlement conferences, parties and their counsel can sometimes scope this out for themselves. Often, though, they are looking for a neutral's guidance as to just how far the other side is willing to go.

It is often overlooked that trust requires not only perceived good will but also perceived ability. You trust the surgeon with your life not only because you believe she has only your best interests at heart, but also because you believe she has the competence to be successful. A ladder, which has neither good will nor bad, is not trustworthy if its rungs are rotted and likely to give way. Trust is as much about competence as it is about intent.

Mediators earn the trust of the parties largely through active listening, patience and persistence but also by offering creative ways around interim roadblocks, which shows an ability to generate flexibility from what had been intransigence. Parties come to trust the mediator: that she has no dog in the hunt or personal stake in which party is closer to right; that she has been as persistent and forceful in challenging one side's position as she has with the other; that she has communicated each side's perspective and legal assessments accurately and effectively to the other side and, so, has moved that party as much as it can be moved by argument, and that her assessment of what one party can realistically expect from the other side at that particular time is accurate and reliable.

Voluntary resolution is frequently reached only when the parties trust the mediator's assessment that not a penny is being left on the table nor anyone paying a nickel more than necessary.

There are institutional constraints on settlement judges' acting as trusted advisors, as doing so requires stepping outside the scope of a judge's expertise and making an assessment untethered to the law (i.e., neutral evaluation) or their experience with the practicalities of lawsuits (i.e., agent of reality). It is one thing to communicate to a party the other side's ask; it is quite another to assess the distance between the ask and what that party would ultimately be willing to accept.

The trust that brings settlement is not only between the parties and the mediator, but between the parties themselves: trust, that is, in the other side's good-faith participation in the process even as the belief persists that its position on the merits is wrongheaded. Sometimes, and ideally, mediation brings each side to see that there is some truth in the other side's position.

But voluntary agreement is possible even if a “kumbaya” moment never comes, provided each side comes to see the other as genuinely interested in resolving the matter without further litigation and also willing to forgo what is most objectionable to the other side provided its own core concerns are met.

It takes time for trust to develop. For small disputes, like those that come to small claims courts, this can be accomplished in an hour or two. For truly complex matters, like mass-tort litigation or large consumer class-actions, it can take two, three or more days before the process of mediation succeeds in facilitating the parties’ own negotiated agreement. But, for the typical case, the process of building all-around trust takes about a day (sometimes into the evening), and not just an hour or two. This is the reason – the true reason – for why the difference between judicial settlement conferences and mediation is about 5 hours.

Mediation is not merely a more time-consuming form of settlement. It is a different process that, on account of its differences, takes more time.