Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2014 Issue

Howard Shernoff

Interview: Mediation methodology

An interview with mediator Mariam Zadeh on the mediation process

Interview by Howard S. Shernoff

Terminology

HSS (Howard Shernoff): Mariam, mediation seems to have evolved to the point that these days we distinguish between mediation and a mediation session. Mediation is the process that starts with setting a session but may not end until the case is ultimately resolved, even if that happens ten months later by jury verdict. A session is just one step of the process. I shouldn't say "just" because it is generally the most meaningful part.

But is it fair for me to expect that you are going to be ready, willing and able to stay with my case all the way through to resolution? If so, should litigators take more advantage of that?

MZ (Miriam Zadeh): You're right, mediation has evolved. And I would agree that the mediation session, itself, is only one part of the process. A good mediator will stick with your case and follow up with both sides until the end, continually looking for resolution opportunities, whether you expect her to or not. Many attorneys seem surprised that I continue to follow up with them even through trial. You never know when a settlement opportunity may present itself. So, yes, it is fair for you to expect your mediator to stay with the case. And yes, litigators should continue to seek the mediator's assistance well after the mediation session. A good neutral is a valuable resource who should be committed to you for the long haul.

Zadeh

Modern litigation

HSS: One increasingly hears the sentiment that our civil justice system is much less adversarial than it used to be, that most cases nowadays resolve through the two sides working together in negotiation and not necessarily against one another in an all-or-nothing derby.

Do you find that effective negotiation requires skills and techniques not necessarily consistent with traditional trial advocacy skills? If so, what can trial lawyers do to have a more rounded skill-set to better serve their clients?

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MZ: Successful negotiators are proactive rather than reactive. They possess not only strong analytical skills but the ability to view and appreciate the landscape of the case from various angles: their own, their adversary's, and that of a third-party audience, whether it's the jury, judge, arbitrator or mediator. They are also adept at improvising and adapting without harboring attachment to the positions they hold. These skills allow for fluidity. And fluidity is a necessary component of a successful negotiation since the process must be given the freedom to evolve organically. Fluidity requires the ability to actively listen, problem-solve and quickly assimilate data and recalibrate. And also to eloquently articulate one's position, have it challenged and be able to respond without becoming emotional or letting issues get personal. These traits can allow a trial attorney to remain fully committed to his client's cause while simultaneously staying somewhat detached from the outcome. This may not be helpful in trial, but it's necessary in mediation.

Trial track record

HSS: I've always been curious about how much emphasis the defense puts on the trial record of the plaintiff's attorney. At my firm, we're all trial lawyers, and we're all willing to take a case to trial. Some of us have better, or longer, records than others. Myself, I just try to convey two things: that I won't hesitate to go to trial, and also that I'm not afraid to lose at trial. I think this last sentiment helps because it tells the defense that whatever points of bad law or fact come my way, they're not going to deter me. I want them to know that I'm a careful trial lawyer but also a little irrational.

Is this the right message to send?

MZ: When I worked as a young defense attorney in New York, part of my research entailed investigating the plaintiff attorney's experience, expertise, trials, verdicts, etc. But I've since learned that I was merely scratching the surface with that kind of analysis. If I were to travel back in time, I wouldn't limit my analysis to the attorney's past experiences. I'd take a more holistic view and think about whether this particular attorney has the drive, desire and passion to make an impact. Is this individual someone I would call a "true believer" – an attorney who permits his or her decision-making to be affected on an emotional and visceral level? If so, the accompanying passion for the case, and its resulting unpredictability, can make the defense nervous – which may accentuate your leverage.

Pre-mediation

HSS: My practice is to never pre-mediate a mediation with opposing counsel. Defense counsel often want to get into conversations about the merits or try to figure out if we're "in the same ballpark." And they always want a demand beforehand. I tend to eschew these overtures. I feel that there is too much risk of derailing the process before it starts.

Would you endorse this approach, or do you feel that pre-mediation communications among the parties can foster a more productive mediation?

MZ: I'm a proponent of "checking in" with your opposing counsel before the mediation session, whether it's during the convening stage or after the case is already on calendar. There's nothing worse than having parties come to the mediation with no idea about how the other side perceives the case. I'm not talking about concrete numbers or even settlement ranges, but rather taking the pulse of the case. You would want to know if the defense views your case as having only nuisance-value when you see six-to-seven-figure potential. Learning this for the first time at the session is counter-productive and frustrating for both sides. Likewise, it's important that each side has at least a basic understanding of the other side's theory of the case so that half the day isn't spent educating one another. This can easily be accomplished by exchanging briefs, which I always encourage.

Early mediation

HSS: Many courts nowadays are pushing parties into mediation right from the first case management conference. The result is mediations that are early in the litigation, often before much discovery has been exchanged or testimony taken. I used to abhor these early mediations because the success rate is low, as is the value of the case. It was frustrating and disappointing for me and my clients. But I've now changed that dynamic by altering expectations. I tell my client that there is a very small chance of resolving at early mediation but that the process will be beneficial in the long run because we may learn about the defenses we face, and we will get a good case evaluation by an experienced third party. Approaching it this way has made the process much more palatable. And in fact there have been many surprises, where the case settled at far higher than I thought possible at that stage.

What is your opinion of early mediations? Are there times when they are best avoided?

MZ: I have mixed feelings about early mediations. There are times when they are beneficial and other times when, as you point out, they leave parties feeling frustrated. That can make future negotiations more difficult. In situations that turn on a question of fact, it can make sense to agree to a limited, informal discovery exchange, perhaps including deposing two key witnesses. This approach avoids any discovery wars, while ensuring that sufficient information is available at the mediation to reasonably evaluate the case. Cases that rely more on the law lend themselves better to early mediation. Each side takes a position on why the law favors their case, and after spending a couple hours hashing that out, both sides end up having to agree to disagree. From there, we can dive into the negotiation. If we can't reach a resolution after having debated the legal arguments, then the likelihood is that it will probably require a few rulings from the court before negotiations can

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become productive. So I endorse early mediations not as a general rule but when they make sense.

Mediation briefing

HSS: I consider mediation briefing a really important topic. I'd like to explore three aspects: (1) timing, (2) exchanging and (3) quality of writing. In terms of timing, my mantra is the earlier, the better. Insurance companies these days make decisions by committee, so I want to give them all the time they need to consider my position, evaluate my case and designate the proper resources to settlement. So I aim to get my brief to them two weeks before the mediation. Regarding the exchange, if you are a plaintiff aspiring to a monetary settlement, you must give your brief to the other side. That's the whole point. Often the defense won't give its brief to me because they think they might show their hand, or perhaps they are a little embarrassed by their own aggressive tone. When this happens, I enlist the help of the mediator to get me the brief – or even a redacted version of it. As to quality of writing, I'm a big proponent of excellency in written expression. Mediators have a ton of briefing to read, so I believe you can help your cause by providing a brief that is flawlessly written, easy to read and above all else, not too long.

I feel that I have these three aspects figured out, but as always, I'm sure you're going to show me the error of my ways…?

MZ: If your rationale were flawed, I would point it out. But here it's not. In terms of timing, two weeks in advance is certainly ideal. I typically see briefs come in about a week in advance, which is sufficient for me but not for the defense. There isn't much to add about exchanging briefs. I'm always in favor of sharing, and I applaud you for showing yours even if they don't show you theirs. Unfortunately, many of your plaintiff-bar brethren don't follow your lead – they won't give their brief unless there's an exchange. And then at the session they wonder why the defense isn't prepared to pay on the case. As to caliber of writing, I would rather not receive a brief at all than receive one that is incoherent or overlong. If I don't know what your case is about by page 15, something's wrong. While I certainly enjoy receiving a brief that demonstrates "excellency in written expression," that doesn't happen very often. I'm thrilled if the brief is simple, concise, easy to read and comes in on time.

Deception and credibility

HSS: Even a less cynical person than I would observe that everybody is playing everybody else at a mediation session. The clients are playing the lawyers. The lawyers are playing the mediator. The mediator is playing the clients and the lawyers. I guess that is the nature of the beast. Yet I believe that here, as in all aspects of litigation, one value rises above the others: credibility. A lawyer needs credibility with his clients, his peers, opposing counsel, judges and mediators.

What's the best way for a lawyer to lose credibility with a mediator, and what is the ultimate damage?

MZ: Understating and exaggerating, which are both forms of deception, qualify as acceptable tactics that leave one's credibility intact. For example, an attorney might assert that he is not particularly concerned about losing on a motion for summary judgment, when in fact he has significant concern. That's an understatement. And it's not taken at face value by either opposing counsel or the mediator, because understatements and exaggerations are expected in this forum. Equivocations, such as indirect or ambiguous statements, and concealments are two other forms of deception often used in negotiations.

For instance, in a disability or employment case, the mediator might inquire as to the plaintiff's plans to return to work. The plaintiff might respond with, "I haven't given it much thought because I'm disabled and can't work," or "I have been looking for work but employers don't want to hire someone who has been fired." Now consider that plaintiff's counsel is aware that the client has been considering returning to work in some capacity if the disability case settles or that the client's job search has been less than adequate. Is this considered concealing information? The answer probably depends on which side you ask. Information is being omitted and equivocations are being made, but they are probably within the acceptable range of deception. When any form of deception is taken to the *extreme*, or if information is not disclosed where there is an *expectation* that it should be disclosed, then one's credibility is put at issue. An *extreme* exaggeration or understatement in the example above might be where the attorney knows his client has an open job offer yet remains silent while the plaintiff represents that he hadn't thought about working or couldn't get a job. This is a lie and is unacceptable. Concealing or avoiding disclosure of information that is *rightfully expected* is certain to destroy an attorney's credibility with both the mediator and opposing counsel.

Alternative uses of mediation

HSS: It amazes me that with such a developed system of civil justice, plaintiffs are afforded few opportunities to understand the defenses they face. A plaintiff in a bad-faith case, for example, might discover the insurer's theories of the case only two years after filing suit, at summary judgment. It seems wasteful. That is why I am almost always willing to mediate. I feel there is nothing to lose, and I don't see it as a sign of weakness. My opponents know me better than that. To me, the session can be a valuable milestone in the litigation, enabling each side to understand the other before expending further resources. If the case doesn't settle, the issues are honed, the litigation is streamlined and the chances for settlement down the road are improved.

Is this a healthy, good-faith view of mediation, or should a lawyer be committed only to resolving the case?

MZ: I would caution that if one side is approaching the mediation from that perspective while the other side has

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expectations to resolve the case, then one side is bound to be let down. The result of that letdown is going to be felt later on when negotiations are revisited. And there will be a price to pay. It could be modest or it could be steep. It could also cause the side that felt let down to reconsider mediations with their adversary in the future on other cases. This ties into credibility. There have been instances where I have been told emphatically at the beginning of a session that the case will not settle because plaintiff is there only to gather insight and information. Hearing that for the first time at the start is awkward because it doesn't allow the mediator to manage the other side's expectations. If information-gathering is the objective, the better approach is to let the other side know. The mediator could then facilitate an informal dialog at the session. If that dialog results in a settlement, all the better. If it doesn't, your credibility and rapport with the mediator and opposing counsel remain unblemished.

Case devaluation

HSS: Something I always keep an eye on is having my case lose value at mediation. I've seen this happen, when a plaintiff begins to negotiate and moves downward from her original demand only to have the case not settle. In the mind of the defendant, the last number on the table becomes the new value of the case. Admittedly this is not a "true" value, but I know that it's very hard to make an insurance company, for example, go north of that value ever again. As a result, unless I am confident that the negotiations will end in a settlement, I can be reluctant to engage and will advise my client not to negotiate at the session.

Is losing value like this a valid concern for a plaintiff? Isn't it true that you can never move the goalpost back?

MZ: Agreeing to mediate assumes the willingness to negotiate. What I hear you saying is that you want to know if the defense is willing to pay something close to your price, and you want to know that early in the session. I would encourage you to soften that stance because that approach may not allow for the process to unfold. That's not to say that you should continue negotiating if it becomes clear after two or three rounds that the parties are light-years apart. In that case, I would agree that it probably makes sense to adjourn so that the defense is not offering money that won't ultimately settle the case, and the plaintiff isn't losing value. As to moving the proverbial goalpost back, once a plaintiff – or a defendant, by the way – has put a number out there, it becomes extremely difficult to back away from that. Expectations get set, strategies are formed and plans are put into motion. Moving the goalpost throws a monkey wrench into the mix and causes the other side to go into a frenzy, wondering what's changed. If you don't have a compelling answer to that question, be prepared for a failed negotiation.

The money dance

HSS: Let's talk about "the dance" – the back-and-forth money negotiation, which hopefully occurs after the parties have articulated their respective views and realize that no one is going to change his mind. I used to shoot from the hip somewhat. I'd enlist the mediator's help in formulating offers and counter-offers and generally keep my eye on the end result that I desired. I'll add that I'm terrible at anything involving numbers. But then, after observing some very smart negotiators in action, I realized that I should take a more clinical approach and carefully consider my offers and always formulate and monitor the midpoint as counter-offers come in. I feel like my results improved.

Am I fooling myself? Does the other side simply have the money they have, and in seeking to alter the x or y axis am I actually practicing a pseudo-science?

MZ: There is a science and an art to negotiating, so it's a good thing that you're no longer just shooting from the hip. You're not fooling yourself. Your results have improved for a reason, and that is because you've taken a more clinical approach. And it might help to understand that you can find yourself in two different kinds of negotiations: cooperative and parallel. A cooperative negotiation follows the pattern you describe and involves attention to the mid-point of the numbers and keeping track of the degree, proportion and sequence of moves. The parties are engaging and responding to one another. Now let's contrast that with parallel negotiation. There are times when parties are so far apart that the only conceivable way to move forward is in parallel. An example of this would be where the plaintiff demands $950,000, and the defense offers $2,000. A cooperative approach, where you're keeping your eye on the mid-point and responding in kind, would never work here. If, however, both sides are willing to move forward in parallel, then the possibility of resolution remains viable. In this scenario, plaintiff may have demanded $950,000 hoping to end at $350,000, and the defense may have responded with $2,000 because they value the case at $150,000. If each side works its way in parallel toward its respective goal, the session may end up with a spread that can be bridged with a mediator's proposal – in this example, say at $250,000. This form of negotiating can be more frustrating for the parties and really requires the assistance of a seasoned mediator to keep the parties focused on the endgame rather than on each round of the negotiation.

Mediator's proposal

HSS: Ah yes, the ever-popular mediator's proposal. It seems like this nifty tool in the mediator's toolbox is reached for more and more these days. And I've seen it close some pretty large gaps. One mediator I know has told me that he won't make a mediator's proposal unless he's 99 percent sure it will be accepted by the parties. Otherwise, he loses credibility, and the proposal as a tool starts to lose its effectiveness.

Is this 99 percent rule your standard as well? Should trial lawyers wearing their negotiator's hat be doing anything to better position their case for a mediator's proposal?

MZ: I do have colleagues who follow the 99 percent rule, or something close to

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it. But what happens when you're not 99 percent sure? What if one side wants the neutral to make a proposal and the other side is harder to read? Things get complicated when you adhere to stringent guidelines. I won't make a proposal unless I feel relatively confident that each side will give my proposal serious consideration. I know – what makes me "relatively confident," and how do I determine whether "serious consideration" will be given? I gain that information through discussions with each side before making a proposal. I like to be as open as I can without turning the proposal into a negotiation between counsel and me, which can happen if you're trying to ensure 99 percent success. My proposals meet with success about 95 percent of the time, but not because I require it to be that way. It's merely the statistical outcome of the approach I take. In terms of positioning a case for a successful proposal, the key for attorneys is to have established a certain level of transparency and trust with the mediator. Everybody "playing" each other, which you mentioned earlier, has to come to a close because if I'm tasked with bringing everyone together with one final move, I need to know what I'm working with. I might tell the parties something like, "It's time to open the kimonos." If the rapport is where it should be by that stage of the session, then the resulting goodwill will go a long way toward getting the case done.

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