ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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Mediating the Litigated Case

Hailed as *sine qua non* of dispute resolution, mediation has generated books, articles and guides identifying the process of successfully bringing adverse parties together and achieving closure to their dispute. Formulae are proposed, skills identified and the art of dispute resolution studied and analyzed. But we know from experience that the ability to resolve disputes is directly related to the context of the disagreement. Outside the contours of a legal system, *i.e.*, extra-judicial mediation, a mediator must resolve disputes unaccompanied by critical factors present in mediating a litigated case. The role of pleading, discovery, motions, evidence, jury instructions, and a pending trial combine to dramatically change the mediation landscape. Mediation, in the context of litigation, does not necessarily mirror techniques invoked to resolve extra-judicial disputes. In a [two] word[s], mediation of the litigated case is *sui generis*.

Hon. Lawrence Waddington

Paradoxically, litigation facilitates mediation. Trials, verdicts and enforceable judgments compel "closure" of the dispute. Parties in extra-judicial conflict who do not confront "closure" lack the incentive of litigation to settle their differences, and, in the absence of an enforceable provision for resolution, continue their dispute unabated. Accordingly, adverse parties can exchange diatribes, hurl insults, and engage in violent conduct with impunity, fearing no consequence-unless the "consequence" is force. In the United States, the judicial system exists to provide a neutral, albeit compulsory, forum for resolution of disputes.

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Mastering the Art of Cross-Examination

Every trial lawyer in America fantasizes about emulating Perry Mason and "breaking down" an opposing party on the witness stand during withering cross-examination resulting in a crucial admission of wrongdoing in front of the empaneled jury. Does this really happen? Is there a formula for effective cross-examination? Is there a way to become adept at cross-examination without going through the agonizing experience of trial and error? The answer to all of these questions is "Yes."

Allan Browne

Nonetheless, cross-examination is a risky business. A lawyer who recklessly cross-examines every unfriendly witness is more likely to strike out rather than hit a home run.

Fortunately, cross-examination is not a mystical art incapable of definition. A few simple questions can help you decide whether it is wise to cross-examine a particular witness. Then, if you go ahead, there are guidelines you can follow to become a more effective cross-examiner.

There are a number of "do's" and "don'ts" that can be mastered and implemented in a short period of time. Following these rules during cross-examination can provide big dividends once these techniques are put into play.

Deciding Whether To Cross Examine

Many lawyers believe that every witness should be cross-examined. This is definitely not advisable. Most cases are rarely won during cross-examination, and if you cannot hammer home your case through your own witnesses' direct testimony, it's doubtful that cross-examination of an adverse witness can bring home a victory. Far from helping your case, an ill considered cross-examination can actually drive the proverbial nail into your client's coffin. Ask yourself the following questions before you decide to undertake a cross-examination:

• *Has the witness hurt my case?* If the witness has testified only on peripheral matters or in a manner adverse to your client on an immaterial point, you should consider saying "no questions, your Honor," when it is your turn to cross-examine.

• *Can I use a friendly witness to rebut?* If the witness has testified adversely to your case in a material way, but you have a friendly witness who can refute the testimony, consider using only the friendly witness to rebut the adversary's point. The ulti-

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examination is often better than too much. If you have any doubts about asking a certain question or following a line of questions, you probably should not. If testimony on direct examination has been ambiguous or equivocal, leave it alone during cross-examination. You can then point out in your closing argument that such inconclusive testimony does not hold up in light of your own witness's clear and crisp contradictory testimony.

These tips on whether and how to cross-examine are meant only to guide your thinking. They should not be slavishly followed. The greatest trial lawyers, after all, are those who possess the intuition and judgment to know when the rules for examining a witness should not be followed. Mark Twain wisely said "no generalization is worth a damn, including this one!"

— Allan Browne

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Despite public criticism of frivolous lawsuits and a proclivity of American people to involve courts in tenuous claims, litigation compels all parties to resolve their dispute voluntarily or a jury/judge will impose resolution. The prospect of "closure" in a trial forces the parties to confront the reality of proving the merits of their respective claims to a group of strangers (jurors) as distinct from convincing friends or partisans who have already rendered their personal verdict.

For counsel, the key to successful mediation of the litigated case is selection of the optimum time to discuss potential for resolution of a dispute. Litigation does not stand still, its contours ebb and flow. Pleadings are amended, new parties served, bankruptcies occur, case law or legislation changes, one or more parties settle, motions denied or granted. Other factors are often beyond control of the parties but compel counsel to constantly reappraise a case. For counsel, whether the reasons are external to the case or internal to it, factoring in factual or legal risk is an art practiced during the maturity of litigation. If mediation is arbitrarily compelled, the timing ignores the delicate balance that triggers the decision to attempt resolution.

Unless sophisticated in the litigation process, the vast majority of parties themselves are indifferent to procedural or substantive law, trial strategy or the legal process in general. But lawyers cannot ignore the risks posed by applicable statutory and decisional law. During mediation, identifying relevant law can convert irresolution into resolution. Increased use of mediation requires lawyers not only to master the negotiation process *per se*, but to incorporate their legal acumen and transfer that skill to their clients by explaining legal vulnerability. Coming to the mediation table to parrot previous demands and resist any negotiation wastes client and counsel time. Explanation does not require capitulation.

The Rhetorical Clash

Mediation and litigation are worlds apart conceptually. The adversarial nature of litigation is accentuated by its rhetoric, procedural framework and substantive rules. The caption of a case which inserts "v." as a grammatical surrogate for "versus" confirms and intensifies the clash of interests between parties. And despite liberalized pleading to discourage extensive allegations of misconduct, Complaints are frequently couched in accusatory language, Answers deny responsibility and invoke "defenses," or a Cross-Complaint levels accusations of wrongdoing committed by the complaining party. Discovery proceeds in deposition by questioning parties or witnesses, frequently duplicating "cross examination," a process freighted with implications of confrontation. Interrogatories demand answers, documents are compelled for examination, and requests for admissions seek concessions. Trials are conducted in formal public courts before a jury who must render a "decision" and presided over by a judge who serves, in part, as a "referee." Verdicts are translated by the media into "wins" and "losses" and characterized by the litigating parties respectively as "victory" or "injustice" depending on the outcome.

In contrast, mediation dispenses with the adversarial model, modifies the structure of litigation, and invites parties to participate in a "resolution" mode achieved by a process of negotiation. Informality of the proceedings, a conversational tone, a narrative uninterrupted history of the dispute by the parties and an opportunity for counsel and client to re-evaluate the facts (or law) are the hallmarks of mediation. Mediators attempt to minimize the combative language of litigation and its contentious tone in order to reshape the process of resolving a dispute. Privacy, confidentiality and the absence of public exposure in mediation contribute to facilitating communication and defusing hostility.

Counsel and clients who elect mediation in litigated cases engage in participation of a process markedly different from the language of pleading or the compulsion of pre-trial discovery. Although mediation employs fluidity sharply contrasting with rules of pleading, discovery and trial, the mediator and counsel cannot ignore relevant procedural, substantive and evidential strictures of litigation impacting the negotiating process. Counsel remain in the adversarial role of litigation but engage in the conciliatory dimension of mediation.

Mediating the Litigated Case

For lawyers in litigation, or poised on the advent of litigation, the entire spectrum of procedural and substantive law, evidence and remedies cabin the boundaries of the dispute and affect its potential resolution within limitations imposed by statutory and case law guidelines.

Whether these limitations are appropriate is beyond the scope of this article, but the mere presence of these restrictions impacts the mediation process in the context of litigation. As a result, resolution of disputes in mediating litigated cases does not always allow creative, imaginative or unbounded solutions available in other contexts. The artificial constructs of decisional and statutory law affect resolution even though the specific law is perceived as inequitable.

A client, immersed in the rhetoric of litigation which emphasizes the adversarial, and who equates "winning" to vindication and "losing" to injustice, must emotionally adjust to the prospect of "compromise." From the point of view of plaintiffs, "compromise" may connote a concession, or surrendering fair entitlement to recompense for an injury or loss; for the defendant, the word represents extraction of an unwarranted financial contribution. Mediation inherently requires reevaluation of litigation as the appropriate forum for resolution of a dispute, but confronted with the alternative of win-lose in jury trials, parties often consider the flexibility of a settlement.

The perspective of litigator and mediator in the process of mediating a litigated case obviously differs as a consequence of their respective roles. Advocates present arguments attempting to cast their case in the best light, whereas mediators evaluate relative strengths and weaknesses of both sides in a quest for vulnerability likely to surface at an eventual trial. Many commentators on mediation recommend certain techniques they have successfully employed to achieve settlement. Mastering these skills is unquestionably important, but a mediator invariably transcends individual styles by attempting to overcome the subjective perceptions of attorney and client in order to objectively identify key elements of litigation played out against the backdrop of trial. In that context, the mediator can identify the reality of: evidence inadmissable on grounds of hearsay, privilege, or other statutory or case law restrictions; weak corroboration of testimony; insuffi-

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cient evidence of loss, harm or breach; impeachment of a witness by prior inconsistent statements; and other significant evidentiary issues affecting liability or damages.

Hovering in the background of cases in litigation is the prospect of a jury trial (or court trial or arbitration) and, unlike extra-judicial mediation, this element is injected into the resolution process. Pending trial, a myriad of factors not necessarily related to the merits of the case swirl through the minds of parties. In some instances, the plaintiff is in desperate financial straits, cannot endure the delay in securing a court for trial and accepts settlement of litigation in exchange for immediate payment; or, may accept settlement at a sum less than the potential value of the case rather than risk the uncertainty of a jury verdict. Conversely, a defendant may seek to avoid negative publicity of a trial and elect the privacy of mediation; or an insurance carrier prefers to close a file of questionable merit to forestall potential bad faith litigation. These factors, and innumerable others, are often concealed from the other party (although frequently inferred) but trigger motivation to settle, not litigate, based on issues collateral to the evidence.

A California Supreme Court decision lends a sense of urgency to one of the advantages of mediating the litigated case and avoiding trial: statutorily mandated confidentiality. In *NBC Subsidiary (KNBC-TV) Inc. v. Sup. Ct.*, 20 Cal. 4th 1178 (1999), the Justices drastically limited the power of civil trial judges to impose restrictions on media access to the courtroom. Practitioners may arguably express concern that this decision opens the door to disclosure of the discovery process and its attendant public revelation of deposition transcripts, answers to interrogatories and other discovery requests not necessarily included in court files unless contested. In contrast, the California Legislature has provided protection to all parties against disclosure of conversations and revelation of documents occurring during the mediation process. Evidence Code Section 1115 recites statutory confirmation of confidentiality during mediation. A recent California Rule of Court severely limits non-disclosure of court approved settlements. No such requirement exists in voluntary mediation.

Chemistry of Mediation

The American judicial system divides along legal lines paralleling our social culture. Aside from Constitutional law impacting litigation, state and federal law familiar to all lawyers enforces mutual promises executed between parties in contract, compensates victims of intentional and negligent conduct in tort, and prohibits or limits impermissible intrusions or use of personal and real property. Contract, tort and property all emanate from the democratic tradition protecting individual rights and, more recently, non-union employment has emerged as an increasingly important protected right. Each of these categories involves a different mix of relationships between the parties, a distinct social environment and, for the mediator, a unique "chemistry."

Contract

Except for consumer contracts, breach of a negotiated commercial contract occurs between parties who know each other, or through agents who agreed to a business relationship. Breach of a contractual promise, couched in litigation language, imports more than mundane causes of action alleging nonperformance of terms. The purely "business" dimension of the relationship between parties is damaged, in some cases beyond repair or severely compromised, and breach may also impose hardship on third parties who depend upon performance of the breaching party. But the essence of breach is the moral issue in failing to keep a promise, a loss of faith or trust.

The law attempts to ignore moral rationales under the guise of more neutral words, and not without some justification. A broken promise is labeled a "breach," and "damages" characterized as the secular equivalent of punishment. And by dividing damages into categories, *i.e.*, consequential, benefit of the bargain, or loss of good will, the law compels the jury to identify specific losses rather than applying a variety of moral convictions among jurors. The moral issue is not eliminated, merely replaced objectively.

Parties will undoubtedly avoid or ignore any reference to morality, although not necessarily oblivious to this dimension, focusing instead on the pragmatic effect of the breach. Perhaps parties are outwardly indifferent to the moral issue even if alerted to its existence, yet it underlies every breach of contract. Recharacterizing the breach as a loss of "trust," a close rhetorical ally of "morality," might be more suitable. A mediator who ignores the moral (trust) issue, at least to some extent, may forfeit the opportunity for settlement in those cases where its appearance is more easily recognized.

The world of business, whether consisting of global conglomerates or local entrepreneurs, regularly attempts to solicit customers, venturers, and vendors in whom a contracting party has confidence. An entity embroiled in litigation may not qualify as a reliable source of "trust" regardless of the merits of the underlying case. Resolution of a contractual dispute in mediation may not entirely eliminate damage to business reputation but surely avoids front page press exposure or a column in the business section reporting litigation.

On a parallel level, business disputes causing a financial loss to plaintiffs equates to fraud in their mind rather than nonperformance of a contract. Anger at financial loss caused by another party approximates harm incurred in personal injury. To an entrepreneur, the importance of "business" and its damage or loss is not as apparent as physical injury, but can represent damage to economic survival equivalent to disfigurement. For many people, "work" is their life and business loss is disabling. The desire for punishment in addition to compensation for loss is strong. In this context, emotion transcends the mediation similar to tort, employment and family law.

Property

In property disputes, the parties may have either maintained a relationship with each other, contractual or personal, or are strangers as in some species of tort. Landlord-tenant disputes, initially based on contract (lease), may also involve the right to continuing tenancy. This "chemistry" differs substantially from arguments between adjoining landowners disputing property lines, "view" lines, easements or encroachments. Neighbors often attempt to validate their right *in futuro* as superior to that of another and initiate litigation to impose a perpetual reminder of vindication if they are successful. Frequently the dominant theme in these disputes is the demand for a judicial determination to validate not only a legal right but to confirm personal power. In contrast, tenants in disputes with landlords fear eviction and loss of housing, an economic issue unrelated to ego.

One common property dispute is an allegation by a disappointed buyer of residential real estate who contends the seller has concealed a defect in the house. Buyers either legitimately identify a defect in the property, are guilty of "buyers' remorse," or attempt to extract leverage. Legislation requires the seller to prepare a detailed statement in escrow disclosing known defects or conditions and most residential real estate contracts now require mediation of any dispute between buyer and seller. A mutually executed arbitration clause in the contract mandates arbitration if mediation is unsuccessful. Resolution of the dispute in arbitration replaces litigation and enforces "closure."

Aside from the merits of the dispute, broker(s) are not ordinarily a party to the mediation/arbitration agreement, although the parties may assert their culpability. If mediation between buyer

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and seller is unsuccessful, the broker continues to remain outside the process and subject only to litigation. Frequently, a buyer and seller who achieve successful accord in mediation will abandon efforts to compel agent responsibility and forego litigation.

A sales transaction between buyer and seller of residential real property is founded on contract, but the parties, having retained agents, may have never met each other. Crafting a solution to resolve a single failed transaction between residential buyer and seller of a residence unacquainted with each other, differs sharply from mediating a dispute between a long standing and often acrimonious personal relationship among neighbors whose proximity to each other will continue. Purchase and sale of residential real property is a combination of contract and property law, but a mediator cannot ignore the personal dimension of the transaction. Transformation of the word "house" to "home" connotes an emotional sea change for parties. Failure of a buyer to acquire a "new home," or inability of a seller to expend proceeds languishing in escrow, engenders strong feelings of resentment between parties unknown to each other, *i.e.*, "constructive acquaintances." In this context, "property" sheds its legal character and adds a broad panoply of emotions.

Employment

Employment litigation, previously dormant, has escalated in courtroom dockets. Fueled by federal and state legislation conferring legal rights on non-union employees in the workplace, the parties stoke the combustible embers of race, gender, age and disability with allegations of economic loss. Writings or correspondence introduced in contract litigation to establish breach or in tort (evidence of X-rays, MRIs and doctor bills submitted to establish injury) or in property disputes (providing documents or photographs to vindicate rights) is often absent in employment disputes. In some categories, expert witnesses are nonexistent, corroborating witnesses emotionally aligned with respective parties, and credibility is difficult to assess. It's family law without the family. A mediator must frequently construct settlement from mutually contradictory oral statements exchanged between incensed and uncompromising parties or witnesses.

Unless one party to an employment dispute insists on litigation and its concomitant publicity, participants can select mediation with the specific intent of seeking privacy and confidentiality afforded by statute. Publicly exposing intimate or embarrassing details to a jury in sexual harassment cases is not an attractive option to most parties. In employment litigation, the opportunity in mediation to "ventilate" offers a significant alternative to litigating in a public forum. Despite these factors, counsel for plaintiffs in gender, race, age or disability litigation regard jurors as more sympathetic to an individual if an employer is the defendant. Employers, understandably concerned about this factor, will often recommend mediation. Because the parties may remain in a working relationship with each other pre-trial, the option of suggesting alternative remedies in mediation finesses the "win or lose" alternative of litigation and provides an accelerated resolution.

Emotional damage alleged in employment litigation, dissimilar to objective physical injury, is amorphous, subjective and varied. Mental anguish ranges from humiliation, embarrassment and outrage to terror. In some cases, the conduct of a defendant is indefensible; in others, fault is ascribed to a vindictive or avaricious plaintiff. Fashioning causes of action, establishing substantive rules and procedural standards in this context is challenging. What kind of evidence constitutes legally cognizable "hostility" in a working environment? What conduct qualifies as "harassing?"

Employment disputes engender a "chemistry" altogether different from conventional civil law. The volatility of the parties, their personal relationship and the nature of conduct alleged, replicate family law superimposed on labor law. But each of these other two legal categories, equally incendiary as employment law, offers some measure of closure. In labor law, aside from general disagreement on wages and benefits which affects all workers, individual grievances are severed from the collective bargaining agreement between management and labor and resolved separately. The grievance/arbitration procedure affords closure to an individual worker without jeopardizing the main contract between management and labor. Employment law in the non-union context lacks the formal grievance procedure in collective bargaining contracts, and parties may continue working in the same environment with no prospect of resolution absent an internal complaint process. Employers have responded by providing resolution options in the workplace similar to grievance procedures in labor arbitration, subsequently documenting any investigation for use at arbitration or trial.

Employment law is further complicated by objective "differences" between parties based on history or culture. The legacy of slavery manifests itself not only in skin color but perception of racial inferiority. Women, formerly assigned the role of homemaker and child bearer, suffer from a male rejection of their ability to perform comparable work. The elderly experience patronizing exclusion based solely on age, and the disabled rejected as incapable. Legislation attempting to level this playing field, severely criticized as unjustified favoritism, has created political backlash potentially surfacing among jurors during trial or in jury deliberations. In each of these categories, the best intentioned jurors cannot always escape a cultural, historical or personal opinion affecting their verdict. *Voir dire* is unlikely to expose concealed bias, particularly in the public forum of a courtroom. Despite these factors, plaintiffs have succeeded in obtaining significant verdicts, but in the atmosphere of an employment dispute, counsel and their clients engage in a difficult decision evaluating "risk" in public jury trials. And their choice is not always between mediation and litigation, but mediation and arbitration.

Employment law at the federal and state level continues to evolve, creating an aura of legal uncertainty for lawyers. Employers increasingly require waiver of jury as a condition of employment, and recent California Supreme Court decisional law has validated arbitration as an alternative to litigation conditioned upon a quasi procedural due process. The legal risk in a maturing employment dispute world is substantial but statutory and case law complexity in employment litigation is undoubtedly irrelevant to parties unable to view the dispute as other than infliction of emotional damage. The mediator can explain legal uncertainty to the parties, as distinct from factual disputes, introducing an additional reason for re-evaluating litigation.

Attorney fees

Underlying all litigation, and without reference to issues of liability, damages or the nature of the litigation, is the role of attorney fees. In tort, attorneys representing plaintiffs may accept a percentage of any judgment or settlement. Customarily, counsel will accept a reduced percentage if the case settles rather than litigates. The difference between the two figures is a relevant factor in addition to the "risk factor" of litigation. But fees are dominant in all categories of litigation, attributable to the cost of preparation for trial and the trial itself. Regardless of the prevailing party in litigation, fees and costs can reduce a judgment for the plaintiff or increase payment by the defendant. Clients are understandably concerned at escalating costs, whether in tort, contract, property or employment.

Summary

Parties invest varying degrees of emotion in all litigation, regardless of its nature. The emotional component, its degree, the relationship among multiple parties for plaintiff and defen-

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dant, and the role of non-parties in various categories of litigation create a shifting chemistry for a mediator. In some cases a loss is personally devastating: breach of contract which decimates a business; personal injury permanently impairing a life; loss or damage of irreplaceable property; mental injury and subsequent fear; allegations of professional incompetence. When a legally cognizable act by one person causes loss, damage or harm to the mental or physical health of another, or challenges personal perception of "wholeness," litigation is a judicial attempt at rectification. Money damages are universally acknowledged as inadequate recompense but the adversarial nature of litigation assures resentment if one party denies responsibility in a public forum, whether rightly or wrongly, or challenges the extent of the loss. Mediation requires compromise, also resulting occasionally in dismay and anger, and settlement money will not necessarily assuage emotion. But the risk of further emotional loss from an unsatisfactory verdict is reduced.

— Hon. Lawrence Waddington

Cases of Note

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PMA devices that are "substantially equivalent" to certain pre-existing devices, and thus "is focused on *equivalence*, not safety." PMA, in contrast, is "focused on safety" and imposes federal requirements regarding the design and labeling of medical devices.

The Court alerted Congress that, in future cases, it will interpret a reference to state-law "requirement[s]" in a federal preemption provision to include common-law duties, absent a contrary indication. In addition, to be preempted, a state common-law duty need not "apply *only* to the relevant device, or *only* to medical devices." Rather, general common-law duties are preempted whenever a jury's application of those duties would result in state-law design and labeling requirements that are different from applicable federal requirements.

In short, this decision recognizes that Congress has vested the experts of the FDA — not lay juries — with the responsibility for determining the safety and effectiveness of complex medical devices.

— Kahn A. Scolnick and Dhananjay Manthripragada

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