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A judge's view of mediation

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Abraham Lincoln once said, "Discourage litigation. Persuade your neighbors to compromise whenever you can." This comment rings true today, as more and more parties are avoiding court by turning to compromise through alternative dispute resolution. In fact, between 80 and 95 percent of cases are settled out of court, through processes like mediation and in the civil lit world, mediation is often no longer an "alternative" to litigation. Indeed, in many courtrooms today, especially in California, mediation is a mandatory first-step to resolving cases. Whether the increase in the use of mediation is due to limited court resources or the difficulty getting a case to trial it has almost become an unwritten rule of civil procedure that cases must mediate before trial.

Speaking from my experience on the bench, I can attest to the fact that most judges laud mediation as an opportunity to potentially resolve and remove cases from a crowded docket. Mediation is also favored because it saves everyone time and money. Courtroom judges may serve as mediators for their own or other courtrooms' cases. Or, a judge might order parties to mediate with retired judges, seasoned attorneys, or mediators provided by the courthouse. For myself, I mediated many personal injury and medical malpractice cases for other judges in our courthouse as those cases were part of my expertise before taking the bench.

My thoughts on mediation, as a former member of the bench...

Mediation requires legal information, not advice or rulings. As a judge, I focused on reading briefs and applying the law. A judge serving as a mediator, however, must employ a more nuanced approach. A mediator may read the parties' mediation briefs, but they will not focus on application of the law to the legal problem at hand. Instead, the mediator may give an evaluation or analysis of the case, with attention to each party's strengths and weaknesses, if the case were to go to trial. This is largely to encourage the parties to continue with the mediation by understanding the risks of going to trial. This evaluation can include information about what certain cases say on this area of law, any gray areas, and the range of verdicts for cases that go to trial. Once both parties and the mediator have discussed the merits of the case, the mediator's role is to direct the parties to discuss offers and counteroffers. Unlike judges, mediators do not tell the parties what to do but instead encourage the parties to make moves on their own.

Mediation requires a true neutral. I have witnessed, both as a trial lawyer and while serving on the bench, that judges sometimes make comments that indicate bias. For instance, a judge may have difficulty hiding his disdain for certain parties or their attorneys. While many parties accept this display of favoritism as part of litigation, these types comments can threaten to prematurely end a mediation. Successful mediations are usually led by a mediator with strong ethics and an awareness around perceptions of unfairness. Counsel and parties can be sensitive to small behaviors that suggest the potential for prejudice to one party, such as where

opposing counsel and a mediator share a private joke. If a client perceives they are not receiving fair treatment, they may be more likely to end the mediation.

Mediation requires empathy. Empathy is a buzzword these days, but it represents a type of emotional intelligence that is here to stay, even in staid legal circles. While courtrooms are often the last place one would find empathy, more and more bench officers are learning to cultivate this ability to understand the parties' thoughts, feelings, and condition from their respective points of view. This skill is vital when mediating as well. Mediators must act with empathy, listening to and reflecting back the values and feelings underlying each party's concerns. Some mediators subscribe to the idea that mediation benefits from "EAR" statements, which combine Empathy with Attention (truly listening, for an uninterrupted period of time) as well as Respect (communicating respect for that person's efforts and accomplishments). Mediators are trained to empathize with the person, not with the complaint. The benefit to being "heard" is that parties trust the mediation process, have an opportunity to air grievances, and are more likely to reach a resolution.

Mediation requires creative solutions. In court, the scope of relief a judge may issue is often constrained by precedent or statute. However, the mediator's job is to think outside the box to reach a solution. The mediator is not interested in issuing a judgment about who is right and wrong. Unlike a court ruling, a settlement in mediation might include things like an apology from the defendant or a clause in which the parties agree not to talk about their experiences prior to or during the mediation. Mediation allows the parties and the mediator to create individualized resolutions that address the parties' feelings and values. The parties may ask the mediator to propose a solution, which allows the mediator flexibility to resolve a case with a settlement made in payments, or by taking into account each party's unique financial position. Further, many describe mediation as an "assisted negotiation," so mediation will almost always take longer than a court hearing.

Mediation requires engagement. Some bench officers are not as attentive as the parties before they may hope. While on the bench, a judge might be distracted (or bored!). They are often staring at their computers instead of the action going on in the courtroom. During mediation, however, a mediator is more likely to be present as they move from room to room, exchanging information. The mediator is trying to balance feelings and values expressed by each party and by counsel and anticipate reactions to offers and counteroffers. This typically means the mediator is engaged in a way they might not be during a hearing.

Most judges welcome an offer by a qualified neutral third party to mediate a case. Some courts have such mediation services built in, while in other courts parties elect private mediation. Private mediation is an excellent option so long as the parties agree on the cost and format of such mediation. And some judges jump at the chance to serve as mediators, even though the skills and goals of courtroom litigation are vastly different from mediation.

In the end, all parties should give mediation a try in every case, even the most highly emotional cases where it at first glance a settlement might seem impossible. Over the years I have been involved in over 1,000 mediations and I have seen incredibly creative settlements because the mediator was an expert at listening to the parties.