ADVOCATE
October 2007 Issue

By Laurel Kaufer

The *value* in mediation

Getting value out of mediation is up to you and your clients as much as your mediator, but helping your clients understand what that *value* is, can make all the difference in their satisfaction with the process and your representation, regardless of the outcome.

The right mediation style for your client

There are as many different styles of mediation as there are mediators. In choosing a mediator, you can also choose the style that you know your client needs. The most significant styles are known as *evaluative*, *facilitative* and *transformative*.

- ***Evaluative style***

Using an *evaluative* style, a mediator will give his/her opinion on the value of the case, the merits of the differing positions expressed regarding the issues in dispute and the relative likelihoods of certain outcomes, among other things. In those situations where an *evaluative* style is expected, it is also commonly thought that it is of significant importance that a mediator possess substantive expertise on the topics of issues in dispute. With the exception of those cases in which there is expected to be a dispositive motion such as a Motion for Summary Judgment, this may be a mistake.

In those litigated disputes that are likely to go to a jury if not resolved pretrial, it is far more valuable that a mediator mirror a juror than a judge. In a jury trial, it is your jury that will make the determinations with regard to the credibility of the parties and witnesses, ferret out the relevant facts, make their most educated evaluation of what really happened, and who will be asked to apply those determinations in light of the law as they are instructed, in order to give your clients an answer to their prayers (literally and figuratively).

Though mediators vary on this position, it is typical in litigated disputes that counsel expects a mediator to be evaluative. Any mediator with an understanding of the litigation process can help you and your clients to evaluate the relative costs of settlement versus trial and the costs of winning versus losing. Rather than needing substantive knowledge, you should seek out a mediator who can be educated on the facts and issues and is not afraid to share opinions with you when asked.

Because of this belief, it is my practice to ask the participants, parties and counsel alike, to consider me their "first juror." Whether or not I possess substantive knowledge on the issues, it is rare that I do not form an opinion as to the credibility of the parties and witnesses, their evidence and the application of the credible facts to the outcome of the dispute. If you want evaluation from your mediator, this is what you should be asking for.

- ***Facilitative style***

In the use of a *facilitative* style, mediators will help the parties and counsel to communicate with each other, expressing their needs/positions/interests and then act as a conduit for negotiation. In its purest form, *facilitative* mediation does not involve evaluation by the mediator, but merely aids the parties in moving forward to a resolution they can live with.

- ***Transformative style***

In the *transformative* style, which is not common in litigated cases, but regularly used in highly emotional community disputes, including victim/offender, neighbor/neighbor and interpersonal/interfamilial disputes, the mediator uses far more emotional and personal techniques to get to the deepest levels of conflict in hopes of bringing about resolutions that are not only settlements, but sometimes life-altering transformations in the face of conflict.

Rather than any pure style, in my view, a mediator must be sufficiently well-versed in each of these styles and prepared at all times to be flexible, engaging whichever style is called for in the moment.

Establishing trust

As the mediation process begins, in front of all parties – the mediator and counsel in the room together – involved with the conflict, the mediator sets the stage for establishing the trust that will be critical at the end of the day in reaching resolution. This trust, among all participants in both the conflict and in the decision-making process, must exist in order for any evaluation by a mediator to be valuable. We go about this in many different ways, but we can often forget that it begins with the very first contact with each party. You have an opportunity to determine from your initial contact with your mediator, whether your client will have the confidence in and be able to trust the mediator you have chosen. If your mediator does not contact you prior to the mediation session, pick up the phone.

You need to know the style, process and procedures your mediator will use, and the mediator needs information about your client, how he/she is behaving in the litigation process, what you think he/she expects out of it, any difficulties you may be having or have had in the past in your attorney/client relationship and anything else that may have an impact on how we approach the situation.

Whenever possible, you and your mediator should be in agreement on procedures that are comfortable and set the expectation for these procedures for all parties and their counsel.

One room or two: Your client's opportunity to be heard...

How should the mediation space be set up? Should the mediation be done in one room or more? Believe it or not, as simple as it may seem, these are questions that are asked at almost every mediation workshop I have attended over the years.

Obviously, there should be enough rooms/spaces available to give a mediator

See Kaufer, Next Page

ADVOCATE
October 2007 Issue

the ability to meet privately with each party to a dispute, but the penthouse office with several conference suites is not necessary for most mediations. Despite the fact that many counsel and mediators still prefer the use of shuttle diplomacy in resolving cases, *mediation* is not a settlement conference and should not be treated as such.

Of far greater importance, because of the commonly-known statistics regarding the percentage of cases that actually continue all the way through trial, we must all recognize that *mediation is very possibly the only opportunity your client will have to "be heard."* While this opportunity may not be critical to settlement of the case, it may be absolutely critical to your client's ability to feel resolved in the acceptance of a settlement. Not only does your client need to be heard by the mediator, but also and often more importantly, by the opposing party to the conflict, even if it is an insurance adjuster who is standing in the shoes of the accused wrongdoer. I, therefore, believe very strongly in the use of joint session for as long as possible.

During joint session, the mediator will lay out the ground rules of the process, the issues in dispute will be addressed, you will have an opportunity to present your client's position and your client's story will be told. While I have never encountered an attorney who is uncomfortable or objects in any way to most of these objectives, it is a relatively common experience that there will be an objection when it comes to a client telling his own story. Many attorneys are uncomfortable with this thought, as we have been trained to advocate on behalf of our clients. Lawyers have been taught that the legal process is cerebral and professional and that it is the job of counsel and representative to substitute cogent legal arguments for the emotion of their clients. Letting go of this responsibility is difficult, if not impossible at times, but imperative in the process of serving our clients' underlying needs in most situations. When counsel agree to the use of joint session as a place for storytelling by the client, something extraordinary can occur.

Moving your client through emotion

It has long been taught in mediation courses, as well as in other disciplines, that surfacing the emotion must happen before there can be any possibility for resolution. The telling of one's own story, when permitted to be done in an authentic manner with the freedom to be emotional, is the first step in being able to move to a place where one has the ability to think rationally and analytically about a problem. A new study released by UCLA on June 21, 2007, by Dr. Matthew D. Leiberman, *Putting Feelings Into Words Produces Therapeutic Effects in the Brain*, confirms through physiological study that putting feelings into words activates the prefrontal region of the brain, which reduces the response in another area of the brain, the Amygdala, "which serves as an alarm to activate a cascade of biological systems to protect the body in times of danger." Dr. Lieberman likens this effect to hitting the brake when driving if you see a yellow light. It effectively puts the brakes on emotional responses.

If we approach the surfacing of emotion in mediation with this in mind, it makes it all the more important to encourage parties to "tell their stories" and to have them do it in as narrative a form as possible so that they truly can switch gears. In this way, the telling of the story is not the working through it to any rational or reasonable end, but an end in itself, allowing people to move beyond the emotion.

Conclusion

Use the opportunity for mediation through the thoughtful design of style, process and procedure to help the client take the brave step of surfacing and moving beyond emotions. This will give the client the ability to make rational decisions, making the lawyer's job easier and allowing the real negotiations to begin.

A mediator and arbitrator since 1995, Laurel Kaufer specializes in consumer, construction, real estate and commercial disputes. In addition to her active Southern California practice, following Hurricane Katrina Kaufer founded and serves as president of the non-profit Mississippi Mediation Project, the only community-based conflict resolution program in Mississippi. For more info, go to www.mississippimediationproject.org.