MEDIATION TALK

Tricks of the trade

I. Basic Principles

A. Neutrality: the mediator is not disinterested, but is not on one side or the other.

B. Self-Determination: the parties make the decision. The mediator does not coerce, and tries to engage the parties themselves in the process of reaching a resolution. This cannot happen in litigation, where the lawyer does almost all the talking.

C. Confidentiality: there are two kinds—

1. What happens in the mediation stays among the participants to the mediation. The Illinois Uniform Mediation Act provides only that nothing goes to the court, with certain exceptions. The parties can agree to more than that, and the statute contemplates such agreements, but they have to be in writing.

2. What one side says to the mediator in confidence is not communicated to the other side without permission. Some mediators presume everything, others require you to specify. The latter approach is more open, it allows the mediator to explain the temperature of your room, specific personal reactions, etc. Assessments like "They were really upset about your last offer, to the point that the client was talking seriously about walking out." have more credibility. The other approach means that the other side's position is a black box and that the other side is dictating to the mediator what to say about their position.

Be aware of the limits of confidentiality contained in the Uniform Mediation Act. The statute itself only provides that mediation communications are not to become part of the case, whether in evidence or discovery or disclosures to the judge. It leaves it to the parties to agree to what confidentiality beyond that will apply.

If the mediator is an attorney and learns that a lawyer (party or attorney) has committed a violation required to be reported under *Himmel*, the Circuit Court's position is that in a mediation under the Circuit Court program, the mediator must report that violation to the ARDC without regard to mediation confidentiality.

Rule 8.3(a) of the Illinois Rules of Professional Conduct for Attorneys (on which *Himmel* is based) provides that: "A lawyer possessing knowledge *not otherwise protected as a confidence* by these Rules or *by law* that another lawyer has committed a violation of Rule 8.4(a)(3) [criminal act reflecting on honesty, trustworthiness or fitness as a lawyer] or 8.4(a)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Since the Illinois Uniform Mediation Act authorizes parties to enter into agreements providing for mediation confidentiality beyond what the statute provides, absent this Circuit Court position it appears that *Himmel* would not extend to attorney-mediators because of the confidential setting in which the communication is received.

Also be aware that under the limited Illinois Uniform Mediation Act protection, without more, could lead to waiver of attorney-client privilege or work produce protection when privileged information is disclosed to a mediator in confidence. A provision stating a contrary effect could prevent this result.

D. Standard Model of a Mediation

1. Joint Session:

(a) Mediator makes introductory comments setting the stage and ground rules for the mediation.

(b) Presentations by both sides, dealing with merits of controversy, negotiating history, other information pertinent to settlement issues.

(c) Follow up on specific points, if desired and appropriate.

(d) Agenda of items for discussion developed and discussion, where desired and appropriate.

(e) Separation of Parties into separate "caucuses"

2. Caucus

(a) Mediator gathers additional information, viewpoints and concerns; seeks to identify interests, discusses options, demands, offers and negotiation strategy with each side.

(b) Mediator meets separately with each side and conveys offers and counter-offers.

(c) Where desired and appropriate, mediator may provide feedback or evaluation of matters in controversy.

(d) Where desired and appropriate, mediator may hold separate meetings with attorney or attorneys only, or with client or clients only—if attorneys approve, or resumption of joint session.

3. Settlement

(a) Parties resume joint session to ensure that each side has agreed to the same points and that all points for agreement have been articulated.

(b) Written memorandum developed by parties memorializing the agreement, usually intended to be enforceable agreement to settle, often with more detailed document to be drafted and substituted thereafter.

4. This is not the only model—some mediations, for example, remain in joint session throughout the entire mediation or for most of it—generally when there is a relationship between the parties that will continue after settlement.

II. Common Settlement Obstacles

A. Failure to Communicate—The first thing the litigator tells the client about communicating with the other side when a lawsuit starts is not to do it under any circumstances. This guarantees that the only communication will be through the hostile moves of litigation.

B. Distrust & Suspicion—Litigation is corrosive to relationships. There are no friendly lawsuits. The operative assumption is that the other side is out to trick you, and that anything they want must be bad for your side. The last three arbitrations I have done, I have proposed bypassing the AAA administration and selecting an arbitrator by agreement, and was turned down each time, and not because paying the AAA fee was an obstacle to proceeding—just because I was the one suggesting it.

C. Demonizing the Adversary—This is innate to conflict. The only way you can be 100% right is for the other side to be 100% wrong. Typical description of a conflict: "I was walking down the street yesterday, minding my own business, when Ron came up out of nowhere and he hit me." We all know that story is leaving something out.

D. Victim Mentality—This goes with the demonizing. No one ever ended their conflict story with "…Ron came up out of nowhere and he hit me, and I could have stopped him, but I didn't." The only way to be completely free of responsibility for the conflict is to be powerless. For instance:

1. The employee is at the mercy of an evil employer. Evidently this employee was born in this job and so does not know how to find another job or has no possible value to any other employer. In real life, the employee just does not have the initiative to find another job, or will not accept the lower pay somewhere else. Who's fault is that? And how is it that every other employee in the place seems to be able to deal with the offending supervisor or manager?

2. The employer is at the mercy of a hostile legal system. Fee-shifting is just legal extortion. No matter what you do, some employee has the right to sue you for it. Excuse me, who hired this employee in the first place? Who made up the rules, who created the comparable situations and who did (or allowed to happen) whatever it is that the employee is complaining about?

E. Emotional Attachment to Positions—People start to attach a symbolic emotional significance to things that are arbitrary, like specific "bottom line" settlement amounts. For example—

1. The employee has a disputed claim for sexual harassment and constructive discharge. She has just $10,000 in lost income, but claims both emotional distress and punitive damages. She says she just wants to get as much money as possible. From a negotiating figure of $150,000 to $125,000 to $100,000, but although she could probably settle the case for $85,000 to $90,000, she refuses to move below $100,000. Unless there is some specific financial imperative, the explanation is generally "I just think that is what the case is worth." What she really means is that she believes that *she* is worth $100,000, and it would be demeaning to accept anything less.

2. The employer in the same case knows that there is exposure—the case is very likely to go to the jury. There is certainly a potential for a verdict of $100,000. The cost of defense will likely exceed that amount, and if there is a verdict, paying both lawyers and the verdict could be in the $300,000 to $500,000 range. The employer digs in its heels at $75,000 and refuses to pay anything more. In the absence of a financial imperative (disclosure of settlement to a higher level of management to obtain authority, budget issues) or a power play (I'm betting that this is enough money that she will accept it if it is a "take it or leave it" final offer), the chances are that the employer is doing the same thing. Management has placed a value on the case in relation to some other situation having nothing to do with valuation of the present case.

F. Tunnel Vision—in the litigation/negotiation/settlement conference format, the bargaining is positional and the positions are based on a zero-sum exchange of dollars for release. Especially in cases brought by current employees, there are a host of other options that no one is thinking about because they are concentrated on the fight. In some cases I have settled, the employer wanted to settle but only for a substantially reduced amount, and the case settled because the employer gave the plaintiff something worth money—a job.

G. Anger—This is a secondary emotion. Whenever someone is angry, there is something underneath driving it, usually fear, sometimes hurt.

1. When someone cuts you off in traffic, you probably get most angry if you had a moment when you were afraid an accident was about to happen. If someone has just cut in front of you when they should have waited, it might also be that you resent not having your turn in line—because you are getting a message, "you aren't as important as me."

2. When your teenage daughter comes home late, you are angry because—you were afraid for her safety and your authority was being challenged. You were afraid for her safety because you love her; you were concerned about your authority because you believe children should obey their parents. Employment cases are relationship disputes, too.

3. In the same way, there are three levels in employment disputes: Positions (concerns resources, money); needs and interests (what those resources mean to the parties); and values (the fundamental beliefs or core values on which the needs and interests are founded).

H. Intention vs. Action—We judge others by their actions, we judge ourselves by our intentions. Only when vulnerability meets vulnerability is there true resolution. Apologies, done correctly, can bring about this moment.

III. Mediation Activities

A. Storytelling & Active Listening. People usually need a day in court experience in order to be ready to end a conflict. Until we have been heard, we are not emotionally prepared to let go of a conflict. After the story is told, we may be able to hear a different story—maybe not. If we *can* hear, the demonizing ends. If not, we have it "off our chest" and can approach the practical problem of resolving the dispute.

B. Venting & Reflecting Back. People store up their emotions and let them out in different ways, and at different paces. Catharsis can come when they are fully expressed, and received as valued.

C. Identifying Interests. This is about getting at the second and perhaps glimpsing the third level. Mediation cannot change the third level, but when interests are out in the open, new options to obtain what is desired will appear. If the employee in my sexual harassment case is not going to get $100,000, she might be satisfied with $75,000 if she can also get some validation from the employer—or even from the mediator—of her personal value.

D. Developing an Agenda. This is a step that allows the parties to start shifting focus from the past (the litigation issues) to the future (the settlement issues). I try to work on two lists, one for the dispute issues that help us find a financial valuation, and a second on for addressing the settlement agreement issues. Not all are on the table—when people start talking about details, that is a signal about where they see the negotiation going.

E. Translating

1. Between different viewpoints—the mediator must become an empty vessel, make no judgments, absorb both viewpoints and explain each to the other—usually in the face of skepticism.

2. Between different negotiating styles.

(a) Traditional labor lawyers are hard knuckle brinksmen. They take aggressive positions without showing willingness to bargain.

(b) Employment lawyers are strategy players and nickel & dimers. They rarely make "best and final offers" because they are too engaged in the negotiation dance and hopeful of getting the case resolved.

(c) Insurance adjusters have strict limits that are rigid. But they engage by making substantial initial offers and telegraph their limits by their small subsequent steps. They follow the adage, "If you want him to jump, you've got to hang the meat low enough for the dog to smell it."

IV. Mediation Styles

A. Facilitative—demeaned as "carrying water," this can be most effective if the mediator keeps the parties together. The strict neutrality of the facilitative mediator prevents the mediator from expressing any opinions, so the mediator cannot be perceived as being on the other side. But some do "reality testing," which is just using Socratic dialogue to point out the unrealistic nature of the offer being made.

B. Evaluative—You want someone to talk sense to the other side and to you and your client, if your position is off base. The evaluative mediator does this, but usually not right away.

C. Transformative—this model is focused on trying to teach people how to handle conflict on their own, to give them tools for resolving disputes so that after the mediation they will be better equipped to deal with recurrence or address similar conflicts in the future. This is highly aspirational. It is mediation as teaching session, and can be perceived as patronizing. But mediators have a great deal to teach people about resolving their dispute.

V. Persuasion Tools

A. Framing. This is a tool that challenges the parties to begin seeking mutually agreeable outcomes. It is done by identifying the interests the parties have and asking them how both interests can be satisfied in an agreement. For instance—

1. The employee has been terminated and two important concerns he has are being able to maintain medical insurance coverage and losing his substantial income. He has a claim of age discrimination, but no money available to fund a lawsuit.

2. The manager and HR manager want any payment to be small enough to avoid getting them hassled about the settlement by higher management and avoid litigation or even a charge of discrimination.

3. Framing question: "How can you (employee) keep your medical benefits and have financial protection without you (employer) having to deal with a discrimination claim and pay what that could cost, win or lose?"

4. Critical point: it is their job to come up with the answer, and there are a number of them.

(a) Enough cash.

(b) Employer contributes to COBRA and severance pay and/or pension benefits.

(c) Employer contributes to COBRA and hires employee on a contract basis for off-site projects that will take several months to complete, part-time.

(d) Employee is brought back to work for three months, working off-site, but actually attending outplacement.

(e) Employer contributes to COBRA but limits scope of non-compete to expand employee's potential for new employment.

(f) Termination is reversed and employee accepts demotion that employer assumed he would not accept.

(g) The only right answer is the one the parties themselves develop. If they do, they will be satisfied and committed to the solution.

B. Decision Trees. Experts will be within 20% of each other if they are looking at the same key facts, which is close enough that the transaction costs demand settlement. Demonstrate that.

C. Focus on Negotiation—When all else fails, people can be coaxed into a bargaining mindset that allows them to set aside the emotional blockade to resolution by putting them into a high-stakes poker game.

1. The mediator's job is to work with the parties in developing their offers and counteroffers, and the messages that accompany them, to ensure that communication is clear and that neither side takes a step that will provoke the other side to give up on the negotiation.

2. Keeping the mediator in the dark about your decision making is not a wise step unless you lack trust in the mediator. The mediator should not disapprove, for instance, if you decide not to offer your "bottom line" because you have concluded that the other side will accept something less or more. At most, the mediator should point out the risks inherent in that approach, and leave the choice to you.

VI. Impasse

A. Bracketing. Where the parties start out their bargaining far apart and each takes progressively smaller steps to communicate that it values the case substantially higher or lower than the other. The defendant makes a conditional offer, such as "We will offer $20,000, but only if your response to it will be no more than $200,000." There are four possible responses:

1. Yes.

2. No.

3. If you will offer $20,000, I will counter with $300,000.

4. I will counter with $200,000, but only if you will offer $40,000.

The parties essentially bargain over what their next demand—offer cycle looks like. This breaks down the offer-counteroffer cycle into still smaller steps and provides an opportunity to keep negotiation going

B. Mediator's Proposal

1. The parties are not close to settlement, or they are dug into positions that are sufficiently apart that settlement will not occur through negotiation.

2. The mediator selects a figure between the positions of the parties that the mediator believes is the figure most likely to be accepted by both sides, and communicates it with a deadline for response.

3. The proposal is a "take it or leave it" offer that neither side may accept with conditions or revisions. The answer of each party must be "Accept" or "Decline." In other words, there is no room to negotiate over it.

4. If both sides accept, there is an agreement.

5. If both sides do not accept, there is no agreement.

6. If one side accepts and the other declines, the side that declines does not learn whether its adversary accepted or declined. But the side that said yes has learned that the other side will not accept the figure proposed by the mediator.