

THINGS THAT LAWYERS DO BEST (AND WORST) IN MEDIATION

Editor's Note: The following discussion took place during a symposium at the February 1997 midyear meeting of the American Bar Association Section of Dispute Resolution in San Antonio, Texas. The symposium was moderated by Texas lawyer-mediator Eric Galton. The participants' more extensive remarks have been condensed for publication.

ERIC GALTON: *What do lawyers do badly in mediations?*

COURTNEY BASS: Not showing up with the right people tops my list. There is no way to have an effective mediation if you don't have the people in the room who have the authority to make the deal.

STEVANN WILSON: One big problem I see is when lawyers come into the mediation without a plan or even a good idea of the value of their case. This causes them to leave a lot of money on the table unnecessarily, and to lose credibility with the mediator.

SID STAHL: I see a related problem, the failure to take advantage of the incredible opportunity in the opening session to speak to the opposing counsel's client. Too many lawyers don't know how to be conciliatory, to express concern, show compassion. So, instead of taking the opportunity to diffuse the situation, they pour fuel on the fire and make things worse.

ROSS STODDARD: I'd go a step further and say you should never underestimate the power of an apology, even though it's something that may be difficult for some trial lawyers to do. But you have to be sincere, or it's

not worth doing at all.

JOHN VAN WINKLE: One thing I see every day is the failure of lawyers to pay close attention in the mediation. We as lawyers have cases every day, but our clients do not. This is often the only case our client has, and when you're there shuffling papers, they get the message.

JACK TIDWELL: In preparing, you have got to spend time with your client.

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I don't care how fancy you are, if you don't have that client where he believes in you, then you are in serious trouble when the horse-trading of a mediation begins.

ERIC GALTON: *What is the most effective thing you have seen a lawyer do in a mediation?*

COURTNEY BASS: I remember a medical malpractice case, when the defense lawyer looked across the table at the plaintiff, acknowledged her pain, and then said: "Mrs. Jones, I never expect to convince you that this Dr. Smith didn't do anything wrong. But I want to explain to you why I think we can convince a jury that Dr. Smith didn't do anything wrong."

And at the end of that presentation, I

followed the plaintiff into the private caucus and the plaintiff turned to her lawyer and said, "You know, I don't believe what he said, but I can see why a jury might believe him." I knew at that moment the case was going to settle, and it did.

ALLEN CHURCH: One thing that I think can be very effective is to admit when you've made a mistake -- quickly, frankly, openly and professionally.

DAN NARANJO: One of the most effective things I've seen occurred in a discrimination case filed by some Hispanic federal officers against the U.S. Department of Justice. One of the Department of Justice lawyers was a black lawyer who showed great sensitivity to the cultural issues. The give and take, the dialogue, the sensitivity to those cultural issues is what I think really settled that case.

JACK TIDWELL: I know it's important to show empathy for the other side. But I'd like to note that it can be just as important to get a little sympathy for your side.

I saw this done very effectively in a mediation a case last year that involved the death of a wife and mother. We had a surviving husband and four little boys. It was pretty obvious that there wasn't any liability. But when we started the mediation, the plaintiff's lawyer said, "I want everybody to meet all of my clients." He then had the grandmother bring in the four cutest little boys you've ever seen. He showed them off, excused them and then went ahead without saying one word about those kids. He didn't have

to. The value of the lawsuit had quadrupled.

ERIC GALTON: *Let me shift from lawyers as advocates in mediations to lawyers as mediators. What do we as neutrals do wrong?*

CHARLES SMITH: I have a list of things on this one. I'd say the first thing is to be on time. Also, never divulge confidential information, or even give the perception that you have done this. In this regard, you should also make sure the lawyers are there when you talk with the clients, and never position yourself between the lawyer and the client.

Finally, I think you have to be careful when talking about fees. Don't request your fee in advance, and don't suggest to the parties in front of their lawyer that the lawyer ought to reduce his or her fee to settle the case.

DICKY GRIGG: I think the worst thing a mediator can do is put a figure in the client's brain. The only thing he or she remembers is the top of the range, and if you mention the figure too early and the client doesn't get it, it doesn't really matter what the case settles for. The client leaves displeased.

BOB GIBBINS: One of the worst things I see is when the mediator lets either side control him during the mediation. On the other hand, a mediator shouldn't become argumentative with one side or the other, either.

ERIC GALTON: *How much evaluation do you want out of your mediators?*

DICKY GRIGG: I think that it's fine when the mediation gets near the end, because I know that the mediator wants to settle the case and is not going to be in there saying, "your offer is too low, you ought to be demanding more."

CHARLES SMITH: I disagree. I don't think mediators should give their evaluations of the case. In fact, I have seen cases in which the mediator's evaluation created the impasse. Mediators ought to be mediators and avoid imposing their ideas of value on the parties. Clients resent it.

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— Dicky Grigg

BOB GIBBINS: Under certain circumstances, I think it can be good for both sides to have some type of evaluation. Take, for instance, a decent case in which the plaintiff's attorney is at \$250,000 and the defense counsel starts at \$15,000 or \$20,000, but has secretly revealed to the mediator that his bottom line is \$150,000. In that kind of case, I think it is really important that the mediator let both sides know what is fair -- and if that's an evaluation, then so be it.

ERIC GALTON: *How does it make you feel when mediators try to discuss the case directly with your client in front of the other side, without apparent regard to your preferences as a lawyer?*

CHARLES SMITH: I don't mind it in the separate caucus, but I don't think it's proper for the mediator to try to get one of the parties to talk during the joint session.

ERIC GALTON: *Why not?*

CHARLES SMITH: Because some people are real good at talking and some people are not. If I have a real articulate client, I want that client to talk. But sometimes the client is not so good, and I don't want that client to say a word. In any event, I think the decision should be up to the lawyer, and that the mediator should not try to

impose it upon the lawyer.

ERIC GALTON: *What things give you confidence in a mediator, make you feel like you are getting what you want, and what your client wants?*

DICKY GRIGG: From the plaintiff's perspective, I think that the most important thing a mediator can do is to really listen to the plaintiff at the first session. Let the plaintiff vent. Let the plaintiff get out whatever he needs to get out so that when he leaves, the plaintiff will say that the mediator may be a squirrely son of a gun, but he's all right.

CHARLES SMITH: I like the mediator who never gives up -- even when it might seem to the parties that the case isn't going to settle. Sometimes the mediator can see something that the parties don't see, and a good mediator is one who at that point can say, "Look, we have been here all day, we cannot go any further. Rather than just give up here, why don't we recess this for two weeks or so?" In the interim, he or she can contact the parties after they have had an opportunity to reassess their situations. When they return, it's a whole new mediation.

ENDNOTE

¹ The symposium participants included in this article are, in alphabetical order: Courtney Bass, a lawyer-mediator in Dallas; Allen Church, a lawyer-mediator in San Antonio; Eric Galton, an attorney-mediator with Wright & Greenhill in Austin, Texas; Bob Gibbins, a trial lawyer with Gibbins, Winckler & Harvey in Austin, Texas; Dicky Grigg, a trial lawyer with Spivey, Grigg, Kelly & Knisely in Austin, Texas; Dan Naranjo, a lawyer-mediator in San Antonio; Charles L. Smith, a trial lawyer with Jenkins & Gilchrist, Groce, Locke & Hebdon in San Antonio; Sid Stahl, a lawyer-mediator in Dallas; Robert Stoddard, a lawyer-mediator in Dallas; Jack Tidwell, a lawyer-mediator with the law firm of McMahon, Tidwell, Hansen, Atkins & Peacock in Odessa, Texas; John Van Winkle, a lawyer-mediator in Indianapolis; and Stevann Wilson, a lawyer-mediator in Austin, Texas.