

MEDIATION & ADR News (July 2021)

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Lou Chang Mediation-Arbitration-Neutral Services

We can't solve big problems...unless we can see each other and listen to each other and learn to work together.

Barack Obama

Live or virtual? Is the Future Here to Stay?

Born of necessity. Driven by ease.



Over the past year, we have been forced to learn to use virtual technologies. Many have come to appreciate, even love, the ease, convenience, flexibility, time and cost savings associated with meetings, hearings, mediations, arbitrations and conferences conducted via video conferencing technologies such as Zoom, Teams and others. Indeed, the advantages are many, including:

1. Ease of scheduling and gaining participation of busy people in a far-flung locales
2. Cheaper
3. Efficient
4. Saves time, travel costs
5. No Commuting
6. Working in the comfort of own home or office
7. Safety in a pandemic, safety and reduced risk from personal aggression

8. Great tools, sharing screen, private conference rooms, whiteboards for drawing, group drafting of documents, muting and turning video cameras on and off.

There seems to be a growing expectation that our future interactions, negotiations, mediations and arbitrations will largely be conducted virtually. If that is so, what might we lose? In person interactions, discussions and negotiations can be described as a rich or full medium for human engagement. When we are physically present and together, we have the full range of communication, words, eye contact, body language and tone of voice. We have a full view of faces, gestures, reactions and responses. There is greater synchronicity in the human interaction with the opportunity to touch, interact, relate informally and to move around. We can share human experiences more easily, we can share food, treats, offer tea or coffee. In such a rich medium, it is easier to develop a sense of commonality or “We”ness.

In contrast, with virtual interactions, a leaner medium for human engagement, there are potential shortcomings. They include:

1. A sense of distance and detachment. Participants are viewed in separate visual boxes. People appear to be less engaged
2. Less party commitment, investment and focus can make it seem easier to withdraw from difficult discussions and negotiations
3. The virtual environment reinforces a sense of separation and allows more group think, demonizing of others and negative attribution biases
4. Sense of “Other”ness
5. Shorter and reduced range of communication, nods, gestures, facial expressions, eye communications, sounds
6. Head & shoulders body language of view allows less complete observation of communication cues
7. Sequential communications with some video lag
8. Multi-tasking & distractions

9. Less eye contact.

There are other challenges presented by the virtual environment. We are learning to watch out for “zoom fatigue”. With videoconferencing, being on camera can create tension. The sense that everyone is looking at you and the worry that you have to look good can be uncomfortable. There is also the risk of multi-sensory brain overload. There is much more to see, listen to, process, evaluate and assess. There are multiple video boxes to monitor. There is also a growing culture of people having short attention spans. With all that’s going on, multitasking and distractions, people can feel mental and physical exhaustion.

For negotiations and mediations, the use of virtual technologies and videoconferencing has proven to be an amazing, effective and productive tool. We may need to be sensitive to identifying the kinds of situations and disputes that can be productively and effectively conducted virtually and those that may be better handled in person. I, for one, hope that we don’t lose the human touch and succumb to the temptation of having all of our communications and interactions done on a videoconferencing platform. The pleasure and richness of in-person human interaction can be critically important in the development of trust, establishment of rapport and building of relationships. As a mediator, my sense is that where ongoing relationships are important, such as in business, partnership, family and divorce conflicts, the human touch and dynamic may be more effectively conducted, managed and handled directly and in person. For those of you who might be interested, there is an insightful discussion of the differences in consideration associated with negotiations and interactions conducted in person or by written text, email, telephone and videoconferencing. The author, Noah Ebner, wrote a chapter entitled “**The Human Touch in ODR: Trust, Empathy, and Social Intuition in Online Negotiation and Mediation**” for an upcoming book. If you can’t find it by googling the author and title, feel free to contact me for a copy.

There are things that we, as negotiators and mediators, can do to try to minimize the disadvantages associated with utilizing virtual

technologies. Before engaging in negotiations and before conducting mediated discussions, negotiators and mediators can contact, meet and connect with participants. Establishing a human connection and sharing of commonalities is fundamentally important for positive human interactions. If interactions are limited to videoconferencing, it is still possible to chat, talk story and to draw connections. We can do things to maintain a sense of authenticity and to humanize our interactions. Consider selecting a comfortable or thematic virtual screen for your videoconferencing. Pictures, music and stuff visible in your video background and a participants video background can be the source of discussion and an opportunity to share commonalities. You can even have a virtual handshake or a fist bump with starburst on screen. You can unmask yourself and be human, personable, present and real. Not everyone is comfortable utilizing video conference technologies. So one thing that can be done is to arrange for a “tech check” to make sure that people can connect and have a steady and adequate Wi-Fi connection. You can help participants, have good sound and video and look good, comfortable and competent in an online environment.

During video conference negotiations and mediations, it is also good practice to check in with each other frequently to make sure people are comfortable. People should consider asking more clarifying questions to confirm that communications are heard and understood. Taking frequent and regular breaks is also helpful. If possible, doing something physical or fun can be helpful. Having an opportunity to stretch, go outside, look at the clouds, rainbows and horizon entities in the breaths can be relaxing and helpful.

Seven Tips for a Winning Mediation Opening Statement

I witnessed it. Truly. I saw an attorney prevail in a mediation primarily on the strength, style and presentation of his opening statement. Here are some tips:

1. Do Not Waive Your Mediation Opening Statement

A trend is developing on the West Coast to waive mediation opening statements and go directly into caucus. In my opinion, this is a mistake.

An opening statement gives you the rare opportunity to speak directly to the other party and present your position without the filter of the other attorney or the mediator.

Further, it gives you the chance to present your case in the best light possible, demonstrate that you are a worthy adversary who would likely have great sway before a judge and/or jury and sow doubts in the mind of the opposing party.

In most cases, these enormous benefits should significantly outweigh any fleeting thoughts of waiver

2. Be Conciliatory

If I kicked you in the shin and poked you in the eye, and then a minute later I asked for your help, would you give it to me? Probably not.

Always remember that you are in a mediation to try to settle your dispute. There is nothing wrong with presenting your position with vigor and emphasizing its strength, but be careful how you address an opponent's position. You can disagree with an opposing side, but you should be careful to do so without denigrating the party or their position.

It is generally effective to acknowledge the other side's "strengths" and then explain them away with law or evidence. No one likes to be told they are categorically wrong or that a judge or jury will never accept their position. Most attorneys who frequently try cases are aware they are only handicapping cases before they are adjudicated.

Lawyers, no matter how perceptive they may be, are not clairvoyant.

In my experience, lawyers lose credibility with the opposing side when they inject categorical statements about judges and juries. Doing so demonstrates a lack of trial experience and suggests hubris.

3. Direct Your Comments to the Opposing Party, Not the Lawyer

How frequently has an opposing attorney convinced you that your case is a loser and that your client should just throw in the proverbial towel? Probably not very often, if ever.

When making an opening statement during a mediation, your primary audience should be the party, not the party's lawyer. The odds of your convincing the other lawyer (who has likely been telling their client for over the past three years that their case is highly prosecutable/defensible) that your side will prevail and they will lose are probably slim to none. You may not convince the opposing lawyer, but you may cause their client to question their own case. It is common for clients to hear things from the opposing attorney on opening statement that they've never heard or even considered before.

During the opening statement, you should focus on trying to create rapport with the opposing client, thereby effectively bypassing their lawyer's filter. The mediation is the only opportunity to do this. Creating doubt in the other party regarding their case should enhance their flexibility.

4. Show Your Hand

In Miami-Dade County, roughly one in 400 civil cases ever empanels a jury. With those odds, it is highly unlikely that a jury will ever decide any singular case. You are more likely to be lumped in with the other 399 cases than be the one case that goes to trial.

During mediations, it is common for lawyers to refrain from presenting all of the harmful evidence against the opposing side. They usually want to retain a trump card or ace up their sleeve for later use.

Since almost all cases never make it to trial, a lawyer should strongly consider presenting all the evidence during the opening statement. After all, if it is so damning, one would expect the opposing side to capitulate at once. If so, why hold back? In my experience, the evidence is usually not as devastating as the holder of the information may think.

5. Prepare an Effective PowerPoint Presentation

Nothing captures the attention of a group more than a video presentation. Who doesn't like to sit in a darkened room and watch a movie? However, there are good presentations and not-so-good presentations.

An ineffective presentation is one with bullet points and words—and nothing more. Why even bother?

A good presentation seizes the attention of the opposing side and simultaneously serves as a preview of your case before a jury.

A presentation designed to achieve a beneficial settlement will likely contain elements that effectively condense the case and highlight the best evidence and strongest impeachment. This is how the attorney referenced at the beginning of this article won his case.

The attorney juxtaposed portions of a defendant corporate officer's videotaped deposition with those of corporate employees giving contradictory answers. The attorney also included subtitles on the bottom of the screen. Toward the end of the presentation, he put the conflicting statements next to one another.

PowerPoint presentations take time (and often money) to prepare, but they can make a big difference

6. Present Helpful Jury Instructions

If I hear an attorney cite the case of *Smith v. Jones* one more time during a mediation, I will lose my mind. *Smith v. Jones*, of course, is a generic case citation. Feel free to plug in any case name.

Case citations matter most when a court is deciding a pending motion for summary judgment. They don't mean quite as much as when a judge is preparing jury instructions. Let's start with the premise that 99 percent of the time, a judge will give standard instructions to a jury, rather than special instructions, as long as the standard instructions cover the cause of action/defense raised. Why? Trial judges are rarely reversed when standard instructions, approved by the Florida Supreme Court, are given. Special instructions create another issue on appeal (assuming an objection or fundamental error).

If you peruse the standard instructions before the mediation, be prepared to present them to the opposition (and possibly incorporate them into a PowerPoint presentation). Present your opening and use the instructions as a checklist to show why you have a prima facie claim or defense.

This can be effective, especially if one party is hanging onto *Smith v. Jones* as their savior case.

7. Be Mindful of Time

Today, everyone's attention span seems to be abbreviated. I recently read that between 1930 and 1960, most film scenes averaged two to four minutes. Today, they average about a minute.

Be mindful of your audience. If you are a strong presenter with a modulating voice who likes to walk around the room while changing PowerPoint slides, have at it. However, if you are not, hit your high points and move on.

Once people tire of you, you've lost their attention. They'll give you the courtesy of looking up at you every now and then, but they won't absorb your words. Once that happens, you might as well be in a room by yourself practicing your speech.

Always remember that the mediation opening statement is about convincing the opposing party that you have the better case. You can achieve that goal only if they listen to you. Use your time wisely and efficiently

(From BLOG of Scott J. Silverman)