

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 29 NO. 2 FEBRUARY 2011

Commentary

Mediation in Gray, Mediation in Green

BY JEFF KICHAVERN

Excuse me, counsel. This letter was on the ground near my office. Is it yours?

Dear (Name Illegible):

Thank you for your outstanding representation of our company in our recent lawsuit. You were thoroughly prepared, put our interests first, and kept us well-informed. While it was expensive, we always knew what we were getting into.

You always explained the range of available decisions and the likely consequences of each choice. Although the settlement didn't get us everything we wanted, it got us enough, and we agreed with you that it was the best choice available.

We hope it's a long time before we are in litigation again. If that happens, though, we will hire you again. We appreciate you, the quality of your work, and the sincerity of your concern for our company.

Sincerely,

Carlos Client

Not yours? I see. Receive one like this recently? No? Ok, well . . . would you like the chance to get one? Yes? Care to know how? Read on. . . .

You'd likely give quite a bit to get a letter like this. Because, let's face it, acknowledgements like this are scarce, and when something is scarce, people give a lot to get it.

Remember Adam Smith's "Diamond-Water Paradox"? We pay a lot more for an ounce

of diamonds than for an ounce of water. It's not because diamonds are more valuable. It's because they are scarcer.

The mediation community has missed this point. Most mediators do not offer anything scarce. What most mediators offer is already abundant. Rather than offering the chance to get the gratitude, respect and affection of clients shown in Carlos's letter, most mediators offer only the chance to get a settlement.

Of course settlements are valuable. But they also are abundant. Before mediation existed, cases settled by the millions. Even complex, multiparty, high-stakes, emotional, vicious cases. If mediation were to disappear tomorrow, cases by the millions would settle still. If all you seek is settlement, you don't need mediation.

Indeed, when mediation doesn't bring settlement, don't you often hear or make comments like these?

We had a mediation, but we didn't settle. The mediator wasn't that helpful. Just shuttled numbers, and then made an unprincipled compromise proposal. We threw him out and settled the case on our own.

Since these people were able to settle on their own, why did they spend time and money on a mediator in the first place?

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they do not wish to discuss settlement with you again.

There are times, however, when agreement is just impossible at the time of the conference and just carrying it a day or so, or even for weeks or months seems fruitless. Even then, urge the parties to maintain the progress they have made by agreeing to a

“high-low” stipulation. This will protect both sides from a “low-ball” or “ringing-the-bell” verdict, and may be sold by the mediator on the basis of reducing trial costs and affording mutual protection.

Also, in a multi-issue case, the mediator can go back over the issues discussed and see if some can be considered settled, or even traded,

so that only a few remaining matters are left for trial.

Always end by reminding the parties of your continued availability so that if after further reflection, they want to continue or resume discussions, they will have a forum ready for doing so. ■

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Commentary

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Sadly, commercial mediations are increasingly this way. Let's call it “Mediation in Gray,” because gray is the color of death, and this is a death-like process. Lawyers pack up their cases, send them to mediators, show up and passively wait in a little conference room for the mediator to shuttle numbers.

Eventually, this expert stranger, based on limited knowledge, judges that settlement should be at some arbitrary number. Then you either take that number or you don't.

These mediations rarely involve opening joint sessions or other direct communication between the sides. Client representatives hardly need attend. For that matter, neither do the lawyers.

Yes, Gray Mediation turns you into a Gray Lawyer. Your passivity makes you death-like, too, as you cede more and more responsibility to the mediator, not only for the process but also for the result.

At its worst, this excessive delegation may carry ethical implications, for while you have a fiduciary duty of undivided loyalty to your client, the mediator does not. Even if it falls short of full client abandonment, you lose the practical opportunity to earn your client's gratitude, respect, and affection by showing him or her a job well done.

Sure, you'll get a lot of settlements. But you would have gotten those anyway. Big deal.

THE BETTER WAY

There is a better way: “Mediation in Green,” not in “Gray.”

“Green,” not in the sense of being environmentally friendly—though it may be that, too—but rather in the sense of vitality and spirit, mediation that is alive.

Green Mediation similarly will get you plenty of settlements. Critically, though, Green Mediation gives you the chance to get much more—the scarce gratitude, respect and affection of your clients, who so often take you for granted or even resent you.

There's a catch, though. Gratitude, respect and affection don't come out of thin air. You

ADR, Engaged

The thesis: Mediation advocacy often is carried out by rote. Or worse.

The cure: Active lawyering, which the author calls ‘Green Mediation.’

The result: The better outcome you are supposed to get from ADR.

have to earn them. Green Mediation gives you that chance, because in Green Mediation, you are no longer a Gray Lawyer. In Green Mediation, you demonstrate your own vitality and spirit, you come to life, and your client gets to see it. It's a big challenge, with an equally big payoff.

In Green Mediation, lawyers embrace their client duties and appropriately keep responsibility for outcomes. The Green Lawyer distinguishes between a mediator who facilitates his or her negotiation, and one who negotiates for the client. The mediator's facilitative responsibility is to give all sides a process in which they can do their best work. Then you have to get your job done.

Among other things, the Green Lawyer:

- Submits a solid brief sufficiently in advance for the mediator to digest it.

- Works with the mediator in advance to design a process likely to generate maximum progress, including the possibility of an opening joint session.
- Prepares the client for a process with both collaborative and competitive elements.
- Delivers an opening statement, if appropriate, designed to generate maximum progress, not just hostility.
- Does not expect a whole day of shuttle diplomacy. The Green Lawyer understands that people may need to communicate face-to-face, and is not afraid to do so.
- Discusses choices and outcomes frankly with his or her client, and honors the client's right to decide whether or not to settle.
- Documents the settlement in conjunction with the other lawyers (and with the mediator mediating), not expecting the mediator to have a cookie-cutter form that meets the client's needs.

The Green Mediator is hardly idle in all this. The neutral constantly monitors the process, as an anesthesiologist constantly monitors a patient during surgery. He or she makes appropriate adjustments, so that the lawyers, like surgeons, can continue their work. The Green Mediator is not shy about providing evaluative input, even coming down on somebody like a ton of bricks when necessary.

In a Green Mediation, you can actually earn your client's gratitude, respect and affection for a job well done. You can help your client solve his problem, and he can see you do so.

The Gray Mediation alternative? After you passively rely on the Gray Mediator to do your work for you, the mediator might put an arm around you, turn to your client and praise you for having done “a great job” to bring the case to this point. It's patronizing and phony, but in a Gray Mediation it's the best you can do.

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Commentary

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It's not enough to show what Green Mediation offers lawyers. We must also ask what is in it for the client. After all, it's the client's case and money, not yours.

In Green Mediation, the client watches and actively participates in the settlement "sausage-making" process. The client sees the attorneys perform, and understands why the available options develop as they do. Then the Green Lawyer, like the Green Mediator, must exercise restraint, step back and allow the client to decide.

We maximize the client's informed self-determination, and fulfill mediation's most fundamental purpose. The settlements that follow are the clients' settlements. The clients made them, the clients own them. The

clients' satisfaction with them will therefore be higher.

NOBLE HERITAGE

Green Mediation has a noble heritage. Consider the judgment of Solomon.

In the Biblical story, King Solomon considers two women, each of whom claims she is the mother of a baby. He is asked to help resolve their conflict, and states that the "fair" result is to "split the baby." Had Solomon been a Gray Mediator, he would have encouraged the women to accept that compromise and be done with it. A settlement is a settlement, after all, and everybody should leave equally unhappy, right?

Fortunately, Solomon was able to exercise a Green Mediator's restraint. He was "evaluative." He opined as to the "fair" result. But then he stood back and allowed events to unfold.

We all know how it turned out. The true mother shrieked, "Please, my king, give her the live child—do not kill him!" But the liar, in her bitter jealousy, exclaimed, "It shall be neither mine nor yours—divide it!" The true mother got the child.

* * *

None of us can pretend to have the wisdom of King Solomon. But we all can learn from his example. When mediators and lawyers exhibit restraint and all participants share appropriate burdens of effort, Gray Mediation can turn Green.

You can go beyond the abundant settlements which you can negotiate for yourselves. You can earn the admiration, respect and affection of your clients. All you have to do is be willing to put in the effort to earn those rewards. They're scarce, and they're worth it. 

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CPR News

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center.com, covering ADR topics and new techniques, systems design and cutting-edge practices. All are accredited by WestLegalEdcenter in jurisdictions nationwide. Now, 25 sessions are available as podcasts for CLE-on-the-go, where permitted.

CPR members automatically get a 25% discount as a member benefit when they register at the WestLegalEdcenter site.

The *Cassel* session joins a cutting-edge live Ethics CLE session from December with experts from the College of Commercial Arbitrators, "Is This the Arbitrator I Want? Using a Potential Arbitrator's Disclosures to Test Partiality and Competence." 

CPR LAUNCHES A NEW WEBSITE

It's the same URL. But the CPR Institute late last year launched an entirely different web experience at www.cpradr.org.

In addition to a new look, the website features powerful new navigation tools, making it easier to learn about and access the CPR Institute's range of services and capabilities. There also is more content linked on individual pages, across the site.

The highlights of the site are the CPR Panels of Distinguished Neutrals page, where easy access to neutrals by discipline and geography is provided along with selection assistance, and the clearinghouse of CPR's rules, procedures, and commitments. The site also is updated for breaking ADR news events. 

ALSO NEW ON THE WEB

The CPR Institute has rolled out its first model Economical Litigation Agreement pilot program.

You can learn how this "litigation pre-nup" can be aid in reducing civil litigation costs. The ELA and its supporting materials are accessible from the homepage at www.cpradr.org.

In addition, CPR's Early Case Assessment Guidelines have been redesigned for the new website.

The ECA guidelines set forth a process designed to help businesses decide early on how to manage disputes, including identifying key business concerns and assessing risks and costs. The guide is indispensable for processing cases, even mass claims, at companies.

You can download the 2010 Revision of the Early Case Assessment Toolkit under the Resources tab at www.cpradr.org. 