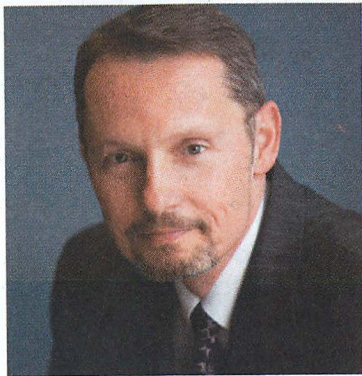


Judge Acosta Discusses Mediation

by Jeff Merrick



As the bar mediates more cases than we try, it is important for us to understand mediation more deeply. The Honorable John V. Acosta of the U.S. District Court kindly discussed the traits of mediators and attorneys that lead to good outcomes with me.

What makes a good mediator?

The primary skill of a good mediator is listening, said Acosta. "Most people listen to respond. When you mediate you have to listen to understand. If you come in with a preconceived notion of where the case should end up and you start driving the process, that's wrong. You are not paying attention to what their interests are; you are just trying to maneuver around positions. I don't think that is the way mediation should be conducted. So I think that listening is first."

A mediator cannot listen unless the parties speak openly. Judge Acosta is terrific at asking the right questions and projecting empathy, which encourages the parties to talk. To plaintiffs, I've heard him open with, "When you think of your case, what do you think of?" It is a brilliant question because it permits the individual to voice interests and concerns in addition to the legal merits, costs, and predictable emotions.

"Skillful mediators," said Judge Acosta, "honestly challenge each side's firmly-held beliefs about their cases." Here's where settlement judges differ widely in approach. "I think the process is extremely important to creating ownership of the result," said Judge Acosta. If the parties think "they have been given an ultimatum or the number has been dictated to them," then [1] they are "not going to own the process, [2] they are not going to feel good about it, and [3] they are less likely to say 'yes.'" Consequently, Judge Acosta identifies risks, "in a non-judgmental way that does not put them on the defensive." Judge Acosta builds trust by affirming each party's strengths. Later, he tries "to make each side think about their case in ways they

hadn't previously thought about it. They can't own the process if I am telling them what their case is and isn't. So I try to guide them to their own conclusions, which, in turn drives their decision-making."

Judge Acosta uses his position as a neutral person with fresh eyes, rather than as judge declaring the likely outcome. "I put it in the context of what a jury is likely to pick up on and wonder about and ask questions about and respond or react to. I tell the parties, 'if I am having these questions, there is a pretty good chance that one or more of the jurors is going to be picking up on the same things.'"

Traits of effective attorneys

Understand that the law is less important in mediation

"Your role should be to represent your client's best interest. To try to get the outcome your client wants, and that doesn't always mean you have to be the zealous advocate that you would be in a trial or a deposition," said Judge Acosta.

Judge Acosta continued, "In mediation, attorneys tend to place too much emphasis on the law. Attorneys often try to impress me with how great this or that legal issue is for a party, and my response is always, 'Well, if you've got a great legal position, you ought to just go file your summary judgment motion or try the case. Why are you here?' Well, they are here because they know there is always a risk

in any case moving forward to a jury. I want to get to the more pragmatic issue of 'how can we resolve this?'"

Good attorneys let their clients talk

Judge Acosta continued, "I like to talk directly to the parties. Doesn't matter what room I am in, it absolutely doesn't. If I am in the defendants' room, I take the same approach. I talk with the representative. It is their case, not the lawyer's case. It is not the lawyer's decision."

"The best lawyers let their clients talk and don't interrupt. When they do interject, it is usually very helpful context or affirmation of what I am saying or linking it to something that the two of them have talked about as a factor in that party's decision making. That is very useful."

Counsel your client on the realities

Judge Acosta advises attorneys to "be realistic about the case before you ever show up for the settlement conference. Candidly identify the weakness of the client's case. Manage the client's expectations by honestly conveying to them jury verdicts or settlements in similar cases."

"Quite often plaintiffs start very high in a range that they know the defendant is not going to pay. They are trying to create some room so that when they get to the real bargaining, they will end up where they would like. And defendants always start too low, for the same reason."

"Very effective lawyers," said Judge Acosta, "have already had a heart-to-heart talk with their client about starting at a realistic range. It doesn't matter if it is the defendant or plaintiff who comes in realistically. That really helps me because I can say, 'Look, these folks are already starting at a range that is within the range of reason. You are not even on the map here. You need to get close because if you don't, I am not going to be able to do much with the other side until you do.'"

Effective attorneys dovetail their counseling with the work of the settlement judge. Judge Acosta observed, "Some lawyers do this ahead of time. Other lawyers do it in the settlement conference itself, [perhaps] because they are waiting for the judge to talk to their client before they can say 'see now, remember what we talked about before we came here today. You heard what the judge said. That's a lot of what we talked about. Let's look at our number now.' The good lawyers I have seen in settlement conferences do that very effectively."

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