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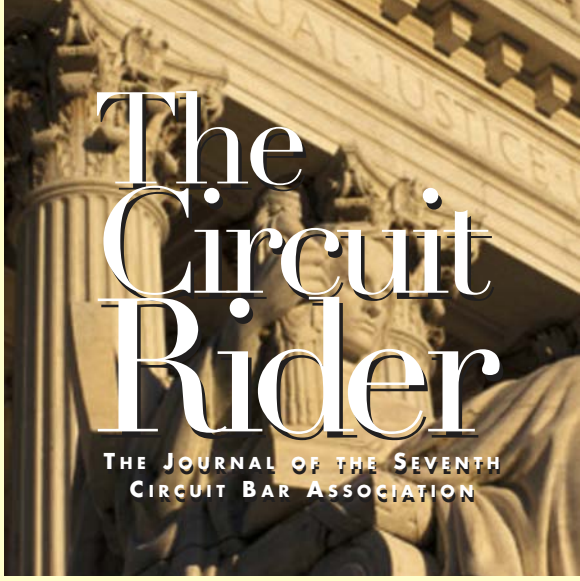

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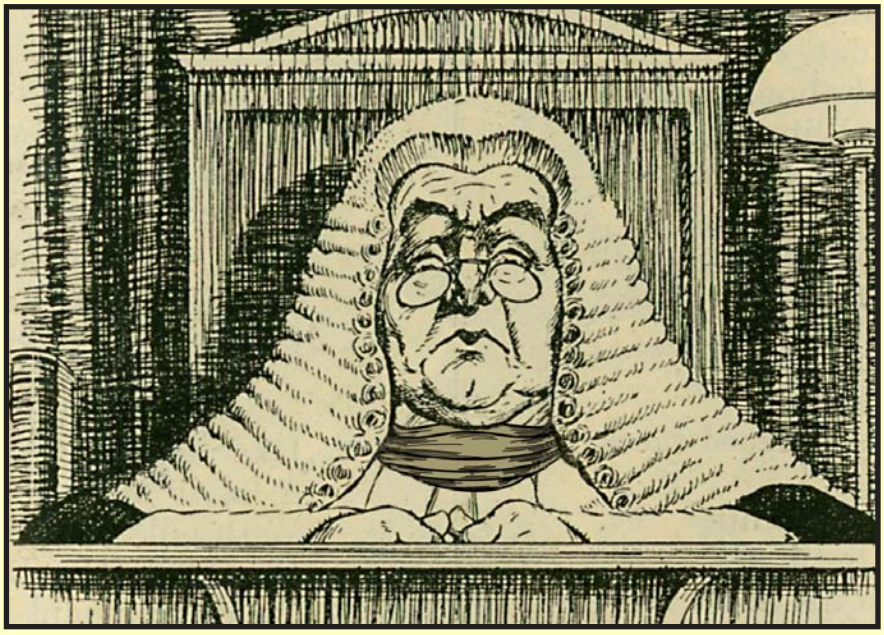

Preparing *to* Prepare *to* Mediate

By Thomas J. Wiegand[*]

An associate in my office was tasked with drafting an opening statement for a mediation in one of her cases. I overheard her discussing it with another attorney in the office and stuck my nose in – "You have to prepare in order to prepare." Litigators understand the legal and factual issues of their cases, and how those are marshalled to force an outcome onto the opponent. Mediation, as one form of settlement process, cannot force an outcome, and some of our honed skills are counter-productive if used reflexively. Before deciding whether to start a mediation with an opening statement, much less what you want to convey or how best to do that, you need to understand the broader negotiation landscape. Here is your guide, based on the comprehensive set of seven basic elements of any negotiation made famous by Professor Roger Fisher in *Getting to YES:*

BATNA. The first rule of any agreement that you reach, whether by mediation or negotiation, is that it must be better than what your client can achieve on its own -- Roger called this the "Best Alternative to a Negotiated Agreement," or BATNA. These are self-help options. Can your client build a product with a different technology, avoiding the need for a license going forward? Can it seek out new customers, and what will that cost? Might it help to issue a press release or garner other media attention?

The pending (or threatened) lawsuit is one piece of the self-help initiatives – and you want to know what it is worth to your client in order to know whether to give it up in a settlement. If you could run the trial 100 times, what would be the average outcome? Decision tree analysis is a good structure for estimating this expected value. Build a model of the lawsuit, through final appeal. To start, there is a damage claim and a probability. If you represent a plaintiff with a $10 million damage claim and a 50% chance of

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winning, the gross "expected value" of the lawsuit is $5 million. If the defense offers a competing damage theory, then there are three foreseeable outcomes -- $0, the defense number, and $10 million, each with a percentage chance of occurring. You can then add other issues. If there is a chance of a significant motion ending or limiting the lawsuit, that is a chance event that precedes the trial on the flow diagram. At each juncture factor in legal fees and costs, including expert fees. There are many articles and books discussing decision tree analysis. When you are finished, do you feel it fairly predicts how the lawsuit might proceed? If not, tweak it further, but recognize that precision is impossible and close is all you need.

Now create a chart as you believe the other side sees it – not just altering the estimates on the chart you created for your side, but submerse yourself and create an entirely new chart that illustrates how you, enrolled as your opponent, see the case moving forward. The more honest you are in this exercise the more you can be surprised by better understanding where your opponent is coming from – which is invaluable knowledge.

With these final models in hand, toy with the effects of changing the percentages and amounts for each branch – some changes have much larger effects on the outcome. This exercise exposes either a flaw in your structure or estimates, or it reveals what are and are not the critical events for the lawsuit. Throughout this exercise you will be surprised by facts, legal issues, or areas of expert analysis that are either more or less important than you had previously assumed, or that you had been ignoring altogether.

Interests. In a complex commercial case the main controversy involves money. Parties nevertheless also have other interests -- money now versus money later; being protected from how an award is taxed; or avoiding a public judgment that encourages others to file claims. What else is your client interested in? And again, perform the same exercise for your opponent – what motivates it? This is a creative exercise, think expansively. Some of your opponent's interests you know, but you will also generate a list of *possible* interests with question marks after each one. Continue looking for surprises.

Options. For each interest, think of different ways to satisfy it. Settlement offers the chance to accomplish acts that courts cannot achieve – warning labels, charitable donations, or funding an education initiative. How does each side see the post-lawsuit future and how might that be improved? Could a company's product line be limited or expanded? Could a trusted neutral, respected by both sides, decide a sticking issue that has been a road block? Is adverse publicity a risk, but a joint press release a potential benefit? Don't ignore the list of possible interests with question marks – for each, if this is one of their interests, what are different ways you might appeal to it? Don't be quick to evaluate ideas as they arise, list them all and evaluate later, remembering that many good ideas start as bad ones that need nurturing. Think in terms of structures at first, they can grow specificity later.

Legitimacy. Using a decision tree to value a lawsuit not only helps to clarify the case strategy on your side of the case – it also helps sharpen the legitimacy of your perspective. Gather substantive support for your views – from key documents, from the most relevant caselaw, from decisions to date in your lawsuit, from previous actions against your opponent. And understand where the support is weak or does not exist. Pounding the table and insisting your view is right does not go far in the world of sophisticated litigators and their clients. At least it shouldn't. But provide a reasoned analysis and gravity gathers around it. If the $10 million claim is seeking a royalty for past infringement of a patent, can

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you show it is calculated using the average royalty in similar recent cases? A response to the demand can of course be $0, but now your opponent will feel compelled to give a reason because it is difficult to stick to a position without reason. Is the offer $0 because of a defense? Good, get it on the table and discuss it – your opponent might be relying too heavily on it, this is a chance to educate. But $0 without a reason – simply because one strongly believes in his case -- has no ability to influence anyone. Be creative and find other legitimate bases – creative use of experts, admissions of your opponent in other cases – you are looking for things that are hard to ignore.

Often the parties will arrive at equally legitimate positions – reasoned approaches that are roughly equally supported, but are on the high or low side depending on which party is advancing it. If there is no further data or analysis that can narrow the range, then maybe you have two positions that can serve as bookends for a discussion. At some point splitting the difference is fine, but you get there by encouraging reason rather than difficult behavior.

Communication. The above five points are largely substantive, these last two are focused on process, but are equally important to consider before developing strategy for the mediation. Assess how the parties (and their attorneys) have communicated to date, and consider what you might change. In litigation your goal is to be heard by the judge or jury, and to have *them* communicate with your opponent through an adverse judgment. But in mediation your goal is to be heard by your opponent – so the first thing you do is listen. Not for a moral or philosophical reason, but pragmatism – someone who thinks they haven't been heard speaks louder and more insistently, and is even less likely to hear you. Is there a point your opponent doesn't think you understand? This often happens with lawyers in the adversarial process. So listen to them, and let them know you listened by mirroring it back to them and checking that you have stated it correctly. You clear away the block without giving up anything, and now they are more able to hear you – "The reason that does little to influence us is because …" This increases the chance of moving the conversation beyond an opponent's positional mantra.

Another reason to listen is because you have developed that list of possible interests with the question marks – you are zeroing in on what matters in this discussion, which increases your ability to imagine possible solutions. Being truly curious about those question marks makes it easier to listen. Listen for what is new to your analysis, even if only a different emphasis or priority. Don't be surprised if your opponent has not thought about its interests in as much detail as you have. You will think this through thoroughly, and sometimes find that pieces of their positions ignore their interests.

Relationship. You want to create a good *working relationship* with your opponent. Regardless of how your opponent behaves, you will be better able to achieve a settlement that meets your interests if you can be trusted, are respected, and are heard. Plan to do that by being trustworthy, by being credible and legitimate, and by listening. A bad relationship is characterized by being sloppy on the problem and hard on the people. When your opponent offers a legitimate point, recognize it – you might not agree because of facts or law that they are ignoring, but engage in a reasoned discussion. When your opponent does respond with a legitimate criterion – respond to it, you are ready because you prepared.

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Now you are ready to start scripting how a mediated settlement discussion might proceed. What options might be possible, and how do you get there jointly? You are still an adversary, but you need a strategy that maximizes the chance of enticing your opponent to agree to a result that beats your BATNA. If you decide to offer an opening statement, it will be for the purpose of moving toward a goal, not because it mimics an opening statement at trial.