MEDIATION CENTRAL

The Prepared Warrior Uses Both Sword and Olive Branch

by Laurie Quigley Saldaña

Trial is often described in terms befitting war. The trial attorney "heads into battle" with a "take no prisoners" attitude. "Scorched earth" tactics lead to "victory." An unprepared witness is the "next victim." The briefcase holds the "heavy artillery." Trial "warriors" know their job and do it well.

Trial is always the end game, as it should be. Unless an attorney is emotionally and technically prepared to take a case to trial, the best litigated result cannot be obtained for the client. The most successful trial attorneys, however, wield the sword, while recognizing that an olive branch at the right time may yield the best result. The skill and wisdom to use both the sword and the olive branch is a prerequisite for a successful trial lawyer.

According to Hiliarie Bass in the fall 2010 issue of Litigation magazine, only 1% of civil cases filed nationwide resolve through trial. A few key reasons are cited by Bass: broader discovery rules yield fewer surprises; mandated pre-trial mediation in many jurisdictions; and the enormous expense of trial. This "new reality" is similar here at home: according to the ADR department at the Fresno County Superior Court, the average annual number of unlimited jurisdiction civil filings in Fresno County from 2005-2009 was 4,454, while the average annual number of civil trials during the same period was 37. Therefore, our local trial experience mirrors the national trend.

These statistics dictate that more time training law students and young lawyers in the strategy of successful negotiation and mediation should be encouraged (if not required). The veteran lawyer learned these skills over time. . . back in the day when cases were routinely tried and negotiated (or both). Today, however, the vast majority of civil cases are "won" through successful negotiation, not trial. Lawyers (and law students) must learn skills early in their training so they can effectively compete in this new system of justice which places a greater emphasis on negotiated results. Indeed, sophisticated clients more and more demand early resolution rather than accepting the risks of trial. A survey in the April 2011 issue of California Lawyer magazine indicates that only 26% of in-house corporate counsel prefer trial to ADR.

Too often, as a mediator, I see lawyers coming to mediation knowing the opening offer/demand, but little else. In my opinion, the most work for a mediation/negotiation occurs before the appointed day: preparing the client; persuasively briefing the case; identifying the client's needs/desires; objectively analyzing the merits of the case; considering the relationships involved in order to maximize results; evaluating the cost and risk of proceeding to trial; selecting a mediator with a style optimal for the personalities and facts at issue; identifying a strategy for the negotiation; anticipating the opponent's strategy; brainstorming terms of an anticipated settlement agreement (confidentiality? liquidated damages? indemnity provision?), etc. More than knowing the facts and law is required.

Once mediation/negotiation starts, the variables to consider are dizzying to the unprepared. What information do I emphasize for the mediator? What should be kept confidential from the other side? Should I authorize disclosure during the negotiation? When? What role should my client play in the

process? What are my (evolving) goals? What are my client's goals? Are there goals in addition to resolution? If it looks like the case will not resolve, how can the mediator still be helpful to the process? Are there non-monetary issues of import to my client? What is the right opening demand/offer? How "softly" or "firmly" should it be communicated? Will the offer/demand be insulting? Credible? Reasonable? Do I care? What size should the moves be? What is being communicated by the size and timing of my opponent's moves? Do I see any opportunity for mutual gain? How can I use the mediator to educate my client and my opponent? Should I speak with the mediator outside the presence of my client? The list goes on and on . . . .

Law school introduces us to the trial battlefield. We learn proper trial objections and the exceptions to the hearsay rule. Moot court and verbal advocacy classes train us to think on our feet. Once in practice, "trial skills" courses abound, as the young lawyer yearns for his or her first trial. Deponents are analyzed for how they will play to the jury. Countless hours are spent learning the art of voir dire and effective cross-examination. Entry into elite organizations like ABOTA depends upon a minimum threshold of trial experience. But with less than 1% of civil cases resolving through trial, we should spend at least as much time and effort perfecting the art of negotiation.

Fortunately, law schools now offer many more courses on negotiation and mediation than were available a decade ago. Further, resources like the Strauss Institute at Pepperdine University provide excellent training opportunities. Shadowing a more experienced attorney during negotiation and mediation is indispensable. Law firms can train lawyers in-house or invite guest speakers. I encourage a re-visiting of the gold standard Getting to Yes by Fisher and Ury. For an entertaining read on negotiation (or maybe I am just a mediation geek...) have a look at Improvisational Negotiation by Jeff Krivis.

In the real world, getting the necessary training on mediation and negotiation skills may seem daunting, both in time and expense. The right mediator, however, can help guide the parties through the minefield of mediation. A skillful mediator identifies the parties' interests, assists in communication, and helps formulate ideas for mutual gain. A mediator should help the parties extend the olive branch without weakening trial positions. Together, the mediator and the trial attorney work together toward a common goal: moving from conflict to resolution.

Just as technological advances yield new weapons for our armed forces, we, too, must adapt to changes in our profession. Lawyers must be "armed" with the skills needed to achieve the best results for the client, regardless of whether the "battlefield" is the courtroom or the conference room.

Laurie Quigley Saldaña is a Certified Professional in Human Resources and was a civil trial attorney representing both plaintiffs and defendants for 18 years prior to founding Mediation Central...Resolving Disputes from the Central Valley to the Central Coast. More information regarding mediation services is available at www.mediationcentral.net or by contacting Laurie at 559.730.1812.