Making an Appearance: Being Present and Engaged at the Mediation Session

by Theodore K. Cheng

The mediation process involves a neutral, disinterested third-party who facilitates discussion amongst the parties to assist them in arriving at a mutually consensual resolution. One key objective is, with the mediator's assistance, to improve communications between the parties so that they can better explore possible alternatives for a resolution. But that can only work if each party is committed to participating in the process in good faith, and, in particular, attending the mediation session in person.[1]

For example, in *Binion v. O'Neal*,[2] the plaintiff allegedly suffered from a rare condition called ectodermal dysplasia, a group of inherited disorders that involve defects in the hair, nails, sweat glands, and teeth. He commenced an action against professional basketball player Shaquille O'Neal for apparently mocking and ridiculing him by publishing photos of the plaintiff on Instagram and Twitter, along with photos of himself (O'Neal) attempting to make a face similar to the plaintiff. Two months into the lawsuit, the court ordered the parties to mediate, directing that, "Pursuant to Local Rule 16.2E, the appearance of counsel and each party or a representative of each party with full authority to enter into a full and complete compromise and settlement is mandatory."[3] However, apparently upon the advice of his attorneys, O'Neal chose not to appear at the mediation session personally and physically. Instead, he merely spoke with the mediator on two occasions via Skype and sent a representative to participate at the mediation session on his behalf.[4] Not surprisingly, the case did not settle, and the court later imposed monetary sanctions against O'Neal's attorneys for contravening both the mediation referral order and the local rule, further ordering the parties to mediate the case again.[5] Five days later, this time with O'Neal's personal participation, the case settled.[6] Although O'Neal avoided being personally sanctioned, the court treated him the same as any other party-litigant, irrespective of his fame and status in the professional sports arena.

Critical to the success of any mediation process is whether the necessary decision makers are in attendance at the mediation. First and foremost, the integrity of the process requires that there be proper authority represented at the mediation in order for the parties to enter into authentic representations of their bargaining positions and interests, as well as ultimately enter into a binding resolution. But aside from the issue of actual party authority, the entire dynamics of the mediation session can easily become skewed when either the wrong party (or party representative) attends or when no party (or party representative) attends. For example, sometimes, companies will send a lower level in-house attorney to attend the session. This individual may have an arbitrarily low level of settlement authority, a limited understanding of the background facts, or a lack of appreciation of the company's true flexibilities when entering into acceptable resolutions. Such a situation is likely to result in the discussions and negotiations prematurely reaching an impasse at some point, with both the other party and the mediator recognizing that the company has sent the wrong individual to the mediation session.[7]

A different kind of dynamic problem arises when principals of the same or similar perceived level do not attend. This can often be the case when the parties are of different sizes or resources, such as when the plaintiff is an individual or small business and the defendant is a large, multi-national corporation. That imbalance (real or perceived) can lead to offending one side or the other. Similarly, the failure to even appear at all, as in O'Neal's case, can communicate the entirely wrong (and, presumably, inadvertent) message to the other side about how seriously the absent party is taking the mediation. So much of a mediation session entails listening, hearing, and recognizing the verbal and non-verbal cues (the tone of voice, the words spoken, the body language, etc.) between and amongst the parties, as well as with the mediator. Hence, someone who is not physically present is not able to build the kind of trust, credibility, and rapport – let alone assess the temperature in the room and engage in dialogue – that is essential to maintaining productive negotiations and generating creative solutions. The absent party who has not participated actively in the mediation process simply does not have the frame of reference or context for understanding the various offers and demands made at the session, thereby potentially undermining the hard work and progress made by those actually in the room.

For all of these reasons and more, for example, all New York federal district courts and the Second Circuit Court of Appeals require the parties to personally participate in court-annexed mediations.[8] The Southern District of New York's mediation program procedures succinctly state that "[e]ach party must attend mediation." In explaining this personal attendance requirement, the Eastern District of New York offers this rationale: "This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions."[9]

At the same time, mediation participants should be mindful that there may be legitimate exceptions to personal and physical attendance at the mediation. Such exceptions could include situations where the higher level executives simply

do not have the time or are so remotely connected to the events comprising the dispute that they cannot add any value at the mediation. Another instance might be when scheduling, travel, or financial constraints make in-person mediation impracticable or where the true decision maker is a third-party (like an insurance carrier) whose physical attendance at the mediation is not absolutely critical, although being available at least by telephone should be required. Sometimes, the legal merits of the dispute are so one-sided that participation by one party (or even both parties) through teleconferencing or videoconferencing may still get the job done. Today's advances in technology may also yield other acceptable substitutes.

All that said, more often than not, the actual personal and physical attendance by the parties (or their appropriate representatives) at the mediation session will be a critical factor in whether a resolution can be achieved. The focus of the pre-mediation preparation then should be on ascertaining whether the right individual (or individuals) will be present at the mediation, or at least assist in the pre-mediation work. These are the people who possess the requisite interest, knowledge, background, skills, temperament, and authority to enable the party-litigant to meaningfully participate in the mediation process. For example, in entertainment-related disputes, individuals who understand the business and industry customs and practices are often vital to exploring possibilities for a resolution, including licensing and other artist arrangements, that may be "outside the box." Additionally, and oftentimes, individuals specifically adept in the finance side of the business can provide the foundation necessary to arrive at a solution that will meet the economic needs and constraints of all the parties. On the legal front, both outside trial counsel and in-house specialized counsel, such as intellectual property or entertainment law counsel, can be particularly helpful. The former can reinforce the legal positions taken by the party, while also tacitly convey a willingness and ability to try the case if a resolution is not achieved; the latter can reiterate the concerns of the internal business unit, as well as help execute the company's overall approach to settling disputes. Moreover, the pre-mediation conference calls that most mediators hold are the perfect time to raise any of the foregoing issues and concerns – jointly or in individual caucus with the mediator – thereby enlisting the mediator's assistance in ensuring that the right individuals are both assisting in the pre-mediation preparation and attending the mediation session itself, and that everyone understands and appreciates the reasons.

In the end, it is always a better course of action to have the parties personally and physically attend and participate in the mediation process. As O'Neal and his attorneys learned the hard way, there really is no substitute for being present and engaged at the session if the prospect of a resolution is something that is a real objective. Anything less than that ideal may mean that the process is being unnecessarily put at risk of failure.

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Endnotes

[1]*See generally* David C. Singer and Cecile Howard, "Outside Counsel: The Duty of Good Faith in Mediation Proceedings," *N.Y.L.J.* (Aug. 25, 2010) ("Good faith is integral to the process of mediation – it would be difficult if not impossible for mediation to succeed without it.").

[2]*Binion v. O'Neal*, No. 15-cv-60869-JIC (S.D. Fla.).

[3]*Id.*, 2016 U.S. Dist. LEXIS 18387, at *2 (S.D. Fla. Feb. 16, 2016) (quoting June 30, 2015 order referring case to mediation) (emphasis omitted).

[4]*Id.*, Report of Mediator (S.D. Fla., Feb. 3, 2015).

[5]*Id.*, 2016 U.S. Dist. LEXIS 18387, at *6.

[6]*Id.*, Report of Mediator (S.D. Fla. Feb. 23, 2016). Other courts have also levied sanctions against parties for failing to appear in person at mediation sessions. *See, e.g.*, *Negron v. Woodhull Hosp.*, 173 Fed. Appx. 77, 79 (2d Cir. 2006) (upholding sanctions where the party representative failed to attend a mediation as ordered because such conduct "impaired the usefulness of the mediation conference"); *Seidel v. Bradberry*, No. 3:94-CV-0147-G, 1998 U.S. Dist. LEXIS 10310, at *9 (N.D. Tex. July 8, 1998) (sanctioning defendant for, among other things, failing to attend the mediation because his conduct was "evidence that [he was] intentionally thwarting the authority of the court and hampering the judicial process"); *cf. Kerestan v. Merck & Co. Long Term Disability Plan*, No. 05 Civ. 3469 (BSJ), 2008 U.S. Dist. LEXIS 50166 (S.D.N.Y. July 2, 2008) (sanctioning plaintiff for failing to appear in person at the settlement conference as ordered).

[7]*See, e.g.*, *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590, 596 & n.4 (8th Cir. 2001) (affirming district court's order denying motion for reconsideration and imposing additional sanctions where appellant's corporate representative at the ADR conference had settlement authority limited to $500 and any settlement offer over $500 could only be considered by

another individual who was not present and only available by telephone, thereby hampering "the corporate representative's ability to meaningfully participate in the ADR conference and to reconsider the company's position on settlement at that conference").

[8]*See* 2d Cir. L.R. 33.1(d)(2) (last modified Apr. 2, 2015) ("A mediator may require a client to participate in a conference in person or by telephone."); E.D.N.Y. L.R. 83.8(c)(2) (rev. Sept. 28, 2015) ("[T]he Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party."); N.D.N.Y. L.R. 83.11-5(b) (eff. Jan. 1, 2016) ("The attorneys who are expected to try the case for the parties shall appear and shall be accompanied by an individual with authority to settle the lawsuit. Those latter individuals shall be the parties (if the parties are natural persons) or representatives of parties that are not natural persons. These latter individuals may not be counsel (except in-house counsel)."); S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) (Dec. 9, 2013) ("Each party must attend mediation."); W.D.N.Y. ADR Plan §§ 5.8(A), (E) (rev. June 24, 2011) ("All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 5.8(E) below," which requires a showing "that personal attendance would impose an extraordinary or otherwise unjustifiable hardship."). *See also* N.Y. Supr. Ct., N.Y. Co., Comm. Div. Rules and Procedures of the Alternative Dispute Resolution Program Rule 10(b) (eff. Feb. 10, 2016) ("Attendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter.").

[9]E.D.N.Y. L.R. 83.8(c)(2). *Accord* S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) ("This requirement is critical to the effectiveness of the mediation process as it enables parties to articulate their positions and interests, to hear firsthand the positions and interests of the other parties, and to participate in discussions with the mediator both in joint session and individually.").

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employees and the Department of Defense. James Downey explains *Ziober v. BLB Resources, Inc.*, a recent 9th Circuit Court of Appeals decision addressing ADR and the application of the Uniform Services Employment and Reemployment Act to claims of returning service men and women.

The controversy over the fairness and suitability of ADR in some situations remains with us. While there may still be debate over ADR in certain consumer cases and employment law situations, ADR continues to be a favored form of dispute resolution in a wide range of commercial contexts. David Allgeyer looks at the effect of the arbitration debate on commercial arbitration in general and its use in intellectual property disputes in particular.

Transactional and corporate counsel need to pay attention to the utility of ADR, and especially arbitration, in commercial transactions and relationships. Those drafting contracts are well-advised to treat ADR provisions with care. Angelika Hunnefeld and Ricardo Gonzalez offer practical guidance for drafting ADR contract provisions.

The private nature of the process has long been cited as an important characteristic of ADR. Two of our articles explore situations to which ADR is particularly well-suited—healthcare disputes and whistleblower cases. Flexibility and sensitivity to specific cases and participants, explain Marcia Adelson and Mary Austin, are two additional reasons to employ mediation as a first-line treatment for resolving healthcare related disputes. On the other hand, Jeffrey Grubman points out that ADR serves the purpose of keeping private sensitive information and serious allegations.

When theory meets practice ADR professionals must be mindful that to be effective they must be sensitive to the human side negotiations, whether in the context of mediation or arbitration. Good arguments by themselves do not guaranty success. In fact, Theodore Cheng, provides evidence that having the right people at a mediation at the right time is at least equally important. Every participant in a negotiation will experience emotional reactions to what is proposed and how proposals are made. Mallory Stevens and Alexander Zimmer identify the positive and negative emotions and techniques for using them to achieve positive outcomes.

We hope that our readers will find this issue of *The Resolver* useful and thought provoking. We welcome your comments and reactions, and we invite you to contribute your own thoughts, analyses and opinions to our next issue to be published in September 2017.

Thank you for your support.
Alexander Zimmer, Editor