On Mediating after Mediation

Maureen P. Taylor

"It ain't over 'till it's over."

Whether you associate this saying with Yogi Berra or Lenny Kravitz, a baseball game or a love affair, it's a safe bet that when you hear it, one thing you *don't* think of is mediation.

But if you've participated recently in this form of Alternative Dispute Resolution, you may realize how applicable the saying is to this process. The parties have a disagreement and may be headed to a trial or an arbitration, but first they choose—or a contract or a court may require them—to try mediation.

So they meet with a trained mediator for a half day or a day to try to resolve their differences before a court or an arbitrator dictates the resolution to them. Perhaps they make some progress, coming to understand each other's positions somewhat better, and—if the dispute involves money, as most do—narrowing the gap a bit between what one party is willing to pay and what the other party absolutely must have. But at the end of the allotted time, there is still no agreement. Is that the end of it?

No. At least, not necessarily. Recently, more mediators have shown dogged determination in following up with the disputants and their attorneys, pursuing—by phone, e-mail and sometimes even a second day of in-person mediation—that seemingly elusive "yes, okay," followed by a signed settlement agreement.

How does this post-mediation procedure work, and is it successful? To discover the answer (or several answers), I talked to six experienced mediators who all use it occasionally and who shared their insights, answered questions and provided some advice for future mediations. Here is some of what they said.

What Kind of Case is a Good Candidate for this Approach?

According to several mediators, they use post-mediation efforts most often in multi-party cases. John W. Hays, of Jackson Kelly PLLC in Lexington, Kentucky, says he continues to work toward resolution in about 15 to 20 percent of his cases, the really complex ones. This often means there are more parties, and the failure to resolve the dispute in one session may be just a function of time. How often can you confer with each party in a day's time when you have 10 or more parties?

Why not just schedule the multi-party case for a two-day session to begin with? Hays has tried this, but he finds it inefficient. Often the first day may be wasted when everyone knows there will be a second.

Stephen Calardo agreed. In his work with Calardo Mediation Service in Cincinnati, Ohio, he has found that really complicated cases—like construction disputes (also Hays' specialty)—are most likely to settle post-mediation. Calardo estimates that 70 percent of his cases settle at mediation, and half of the rest settle afterward.

Sam Wampler, of SansCourt in central Ohio, also mediates a number of construction disputes, and he uses post-mediation techniques in about 10 percent of his cases. These work particularly well, he notes, in cases requiring payments or a division of money. (And what mediation doesn't, you say?) One day of mediation may be enough for the parties to get to know each other and identify the impediments to settling, but just not enough to resolve those impediments.

Known for his "never-say-die" approach, John Van Winkle, of Van Winkle • Baten Dispute Resolution in Indianapolis, Indiana, will make post-mediation efforts in almost any case that doesn't settle initially. Still, he cautions against going into a mediation with the assumption that one session won't resolve the dispute. In a large percentage of cases, it will.

Often, a dispute doesn't settle initially because something needs to happen first:

- A witness—expert or fact—may need to be deposed, according to Hon. Ann Shake, of Retired Judges Mediation and Arbitration Services in Louisville, Kentucky.
- Or one or both sides need to assess case value. Plaintiffs come with sky-high expectations, or defendants don't come to the mediation with enough money or authority, Shake also finds.
- Authority can also be a problem in FINRA (Financial Industry Regulatory Authority) cases, according to Calardo, who mediates a number of them. These disputes may take longer to resolve because there are levels of authority that need to be worked through—something difficult to accomplish in one day.
- In one case mentioned by Tom Williams, of Stoll Keenon Ogden PLLC in Louisville, Kentucky, the parties weren't ready to settle while a motion for summary judgment was pending. Once that was denied, they were ready to try a second mediation session.
- Shake and Wampler both stressed that some parties just aren't ready for the initial mediation. They aren't adequately informed, or they tend to over-value or under-value their case. They may need extra time to adjust to reality, to inform themselves, to achieve "buy-in."

What Techniques are Most Effective?

Mediation is "more art than science," according to Wampler, and almost everyone agreed. Shake mentioned following her instincts to decide which unsettled dispute might respond to a gentle nudge. Calardo, too, felt that after a day of mediation he could figure out if a follow-up attempt with the parties might succeed. But he doesn't really view that follow-up as a continuation of the mediation; it is more of a "re-kindling," as he sees it.

Williams, who handles a number of labor-related disputes, also stresses the emotions involved. He likes to use a restorative justice model, particularly if the mediation involves current employees, and the relationship needs to continue. A meeting of the parties seeks to repair the harm by discussing three questions: What happened? Who has been impacted? What can we do to make it better? Williams views his job as "keeping the emotional temperature in the room good." When this continues after the initial meeting, he works to keep the lines of communication open, checking back with both sides and "translating messages" so that the other side can hear them.

In addition to instincts, emotions, and art ("reading the chemistry," as Wampler called it), several specific techniques were mentioned by at least one of the mediators:

- Sometimes dealing with only the lawyers after mediation works, according to Hays, as there is "less theater." It helps to eliminate posturing.
- But both Shake and Wampler stressed that sometimes the parties are involved in post-mediation discussions. "The dispute is a puzzle," according to Wampler, "and the parties have the knowledge to solve it." It may work to get the parties on the phone with their attorneys, he suggests, as there is no "filter."
- When the mediator initiates an after-mediation call, it is particularly useful, Calardo says, as it isn't a party signaling weakness or appearing over-eager to settle.
- Optimism often proves successful, according to Calardo, who wants to remain the most optimistic person throughout the process.
- According to Van Winkle, it helps to make an early decision on what rules will apply if negotiations are needed after the mediation. The same rules on confidentiality, immunity and sanctions that applied during the mediation should still apply, he believes, and he recommends following the Uniform Mediation Act (even though neither Indiana nor Kentucky has adopted it).
- When there are multiple parties involved, Wampler has found it useful to set up post-mediation communications with each attorney, with just one ground rule: Do not talk to each other. This worked well in a seven-party case, which finally settled after five months of post-mediation efforts.
- It may help to "plant a seed" when the mediation session begins. Wampler said he may start the mediation session by explaining how the process works, including that it can continue beyond the initial day-long meeting.
- Sometimes the parties need to know what the mediator thinks. Hays has found it useful to tell them, and he considers himself an "evaluative mediator."
- But Van Winkle cautions that a "mediator's proposal" should not be automatic. He has two requirements for presenting one to the parties: (1) all parties must approve of the technique, and (2) he must believe that there is a "reach" point that might work for everyone. Also, it should not be used too early in the process. When he

uses it as a post-mediation procedure, his report back to the parties is either "both sides accepted the proposal" or "we did not have both sides accept the proposal."

- Perhaps the best technique of all was summed up by Hays in one word: persistence.

How Often Do You Get a Post-Mediation Settlement?

The consensus seemed to be that at least half of the disputes that don't settle during mediation will settle afterward.

If the parties want to continue, Hays said, there will eventually be a settlement. Both Williams and Calardo estimated that only about 30 percent of their cases do not get resolved at the mediation, with about half of those settling afterward. Only about 15 percent never settle. The statistics were about the same for Wampler, who noted that 85 to 90 percent of the disputes he mediates do settle. Shake, too, estimated that as many as 90 percent settle at mediation, and most of the others may take days or months longer, but eventually they also settle.

She credited this success rate to the fact that lawyers are more familiar with the mediation process than they once were, and resolution is in the best interests of everyone—often including the lawyers.

Have Parties Ever Objected to Continuing the Efforts?

Objections appear to be almost non-existent. Williams credited this to the parties' giving up a bit of control to a mediator they trust. Neither Shake nor Wampler recalled any objections. She noted that even when the case is not resolved, the parties are at least willing to try. Wampler agreed but had one caveat: he suggests continued efforts only when he and the parties both see some hope of resolving the problem.

Hays did note that, on rare occasions, he would suggest continuing the efforts to settle and have a party say, "No, thank you." But that is rare. Calardo, too, recalled that once in a great while, someone would say, "We've spent all the mediation money we are going to spend."

How Do You Bill for Post-Mediation Efforts?

That leads to the question of billing. Again, objections are few. According to Hays, if people feel they got value, they won't object. It is "actually a bargain," and if his post-mediation time is nominal, he won't even bill for it. Calardo noted that he, too, often makes a follow-up call without even billing for it. So some post-mediation work turns out to be free. Shake agreed; she considers the follow-up calls she makes to be client development. Van Winkle bills after the mediation session *only* if there is an additional formal session.

Billing by the hour is most common. That is what Wampler does, but he emphasizes that he bills only when he is done. Williams waits to see the outcome, and if the dispute doesn't settle, he often discounts the bill.

Any Advice for Lawyers or Clients?

Given the opportunity to offer some final advice to lawyers or their clients, Williams recommended a book that has really influenced his thinking—*Beyond Reason: Using Emotions as You Negotiate*, by Roger Fisher and Daniel Shapiro. The book, which, like *Getting to Yes*, arose from the work of the Harvard Negotiation Project, provides a framework for dealing with emotions at all stages of the mediation process.

Both Shake and Hays proposed more involvement by the parties' lawyers. She suggested that lawyers assess whether their clients are willing to move off their final position and let the mediator know. Suggestions for reaching a final resolution are also welcome. Somewhat surprisingly, Hays thinks lawyers come to depend too much on mediators; they can do more negotiating on their own. But he sees mediation as popular because lawyers like to have third parties confirm what they have been telling their clients all along.

Wampler likes to point out to parties what happens if there is a trial and they lose: More than money is involved, as those who hear about the result may conclude that the losing party gave testimony that wasn't trustworthy. Reputations are at stake, and often the parties haven't considered this.

Wampler also disagrees somewhat with the old saying that it is a good resolution if everyone is a little bit unhappy with the result. He has seen people—both attorneys and their clients—relax and become jovial when the end is in sight. He attributes this to the certainty about to be realized by resolution of their dispute. For the first time in weeks, months or years, the parties can see light at the end of the tunnel, and that is not a reason for unhappiness.

Although he didn't put it this way, Calardo's advice could well be, "Listen to the mediator." He tells a story that many mediators could probably echo—a case where he prepared an "evaluative recommendation" to let the parties know how he thought a trial might resolve the dispute if there was no settlement. There was no settlement. The parties went to trial, and guess what? The jury came back with exactly the number he had predicted in his recommendation!

Calardo also noted that there were fewer "settlements on the courthouse steps" now than there used to be—a development he attributes to the growing use of the post-mediation process to ease the parties toward an earlier settlement. The growing realization that efforts to mediate the dispute need not end just because the "mediation" has ended—that "it ain't over 'till it's over"—may be leading to more permanent and satisfying resolutions for all.

Maureen P. Taylor is a member of Conliffe, Sandmann & Sullivan in Louisville, Kentucky. ■