"YOUR JEDI MIND TRICKS ARE USELESS ON ME"- RESISTING FOUR COMMON TOOLS OF MANIPULATION USED BY MEDIATORS

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I have been in private practice, handling mostly civil trial work, for over a decade. Like everyone else who is likely to read this article, I spend more of my professional time in the 21st Century in mediation rather than trial. However, I cannot recall the last time I settled a case in mediation. Indeed, the last one of my cases which settled at mediation was handled by one of my partners when I was called to trial in another lawsuit. Apologists for the mediation industry may well point to that fact and conclude that the "problem" (if there is one) is me. However, I suggest an alternative viewpoint. That is, there is no problem at all with not settling at mediation. Indeed, most of my cases that did not settle at mediation settled eventually. All of them settled on the same or better terms as the day of mediation.

Over the years, we have all encountered mediators who believe that mediation is more than a process, but, rather an end in itself. One clue to such a mindset is the recitation of the stale old bromide, "If, at the end of the day, both sides leave here with a settlement agreement they are both a little unhappy with, then I will have done my job." While I am licensed only in two states, and have done no legal research of the other 48, I can state with certainty that no state's ADR statute lists making both sides unhappy as the task of the mediator. Nevertheless, this mindset often seems inculcated into young mediators in the same way Yoda mentored Luke Skywalker that "The Force" would always be with him. Like the Jedi in George Lucas' *Star Wars* series, mediators have been trained to use weapons at their disposal, as well as mind tricks, to forge settlements which one or both sides might otherwise be able to avoid or even to improve. This essay will take a look at four of the ways I have seen mediators use their "Jedi mind tricks", and ways to avoid them.

SECLUSION

I first began practicing civil litigation, after half a decade as a prosecutor, in the age before wireless internet and blackberry devices. Mediators would park you and your client representative in a room, and often leave you there. This had the psychological effect of making you feel isolated and cut off from the outside world, except for paying long distance on the mediator's land line or reading a crumpled newspaper. The subliminal effect of this was to make the mediator's tales of potential doom at the courthouse echo, and cause the parties to obsess over details raised in the opening session. Too often, legitimate positions might be abandoned by the client representative, for reasons other than the merits, but for the hope of escaping the gilded cage of the mediator's office, with its cookies and free candy.

Mediators might question whether this was or is a tactic, rather than the necessary result of late nineties technology and the need for the mediator to spend time with the other side. My response to this is to ask the reader to recall the times that he or she has found the mediator in his own office after a long period with no contact with him or her. In my experience, some mediators like to "let them stew".

"Some mediators depict the courthouse as a virtual house of horror."

Technology is the easiest solution to this tactic. Mediation is now a place where you can be as connected as you want to be (or as connected as your client will consent to you being) with your office. Indeed, clients appreciate the ability to stay connected, as it makes the overall litigation and mediation process less disruptive. Believe it or not, some mediators in smaller cities do not have free wireless access. My strong recommendation is to confirm the availability of wireless access prior to agreeing to a mediator. The harsh reality is that there are too many mediators who want your business and will provide modern amenities for counsel to agree to go back to the communication dungeons of mediation rooms of decades past. Having contact with the outside world is not a distraction, in my experience. Rather, it is a way to help counsel and the client maintain perspective when the mediator attempts the usual "scare tactics" couched in terms of a reality check.

DOOMSDAY SCENARIOS

If counsel have done their job prior to mediation, all possibilities have been discussed with the client in advance, including the bad ones.

Continued on page 12

faint praise is a transparent ploy. Its obviousness usually gets people focused on how clever you are and causes them to stop listening while they evaluate you.

10) **Body Language: Don't Let Yours Betray You**

Don't react nonverbally to the opening statement of opposing counsel. Grimaces, head shaking, sighs and the like have no place in the court room. If the body language you use to comment on opposing counsel's comments is orchestrated, you are either walking the edge between being a phony or revealing your lack of faith in your own case.

JEDI...

Continued from page 6

Of course, clients sometimes need someone new to confirm what their counsel has told them, and mediators can often send a useful message. However, some mediators go overboard with "doomsday scenarios", such as opining that a jury trial is the last thing the client needs. Indeed, some mediators depict the courthouse as a virtual house of horror, a place to be avoided if one is seeking sanity and tolerable outcome. Admittedly, the courthouse can be unpredictable, but some mediators give opinions about worst case scenarios that have no relation to likelihoods or actual risk. If you allow your client to buy into the mediator's rhetoric and not your own, then you invite them to settle on a basis that might be less favorable than if the mediator had been ignored.

Your reporting prior to mediation should include a review of verdicts in similar cases in your venue. You should also share your personal experience with such cases with the client. If the mediator is simply overstating the risk, challenge his evaluation with confidence. Ensure that the client listens to you, not the mediator, by pointing out the preparation that went into your evaluation. (Of course, if the mediator does in some way have more knowledge than you about the venue, the court and the jury pool, that information should be given due consideration.)

OVERSTATING LIKELY COSTS OF LITIGATION

It has been a frequent occurrence for mediators and even judges conducting settlement conferences to encourage movement in a suit by estimating the cost to the client of litigation going forward. In zero percent of those cases in which I have been counsel, has the mediator done anything but vastly overstate the costs. Many are too removed from the practice to be able to estimate this accurately (an observation even more true of judges), and none know what your fee arrangement is with the client. Clients sometimes do not grasp that the mediator's cost of litigation number is a complete (and uneducated) guess. This "mind trick" must be countered by immediately going back over legal budgeting with the client after the mediator leaves, pointing out that the actual number has been budgeted and is far less than the mediator's or settlement conference judge's prediction. Otherwise, dollars are allocated to a settlement value needlessly.

THREATENING TO TATTLE

Mediation is a confidential process. Most mediators respect this. I even witnessed a mediator resist a magistrate's attempts to inquire as to what the parties' negotiating tactics were at a mediation conducted at the U.S. Courthouse in Waco, Texas. However, there are mediators, primarily in smaller jurisdictions which are reputed to be unfriendly venues for business, who lose sight of the importance of confidentiality. If things are not going their way, they will say something about their obligation to inform the court as to who attended the mediation and whether they were attending in good faith. This can be couched in terms of, "I would hate to have to tell the judge that your claim handler did not have authority and have the judge order the supervisor to attend." This usually is followed by a subtle reference to the court's power to sanction parties who do not abide by a court order to mediate. The best defense to this is to be proactive. Mediate by agreement prior to receiving any court order. Make clear ahead of time who will attend and how they will attend. Be very clear about what your jurisdiction allows a mediator to report to the court and quote those rules back to the "tattletale". Finally, vote with your feet, by making sure you never use a mediator again who brings up such a threat.

"Make clear ahead of time who will attend and how they will attend."

In summary, I must point out most mediators are quite valuable in resolving cases. Even the worst mediations I have attended taught me more about my case. However, some mediators can attempt to use the foregoing tactics to get a "notch in their belt" at the expense of a fair result for your client. Recognizing these tactics ahead of time will

enable you to say, on behalf of your client, "Your Jedi mind tricks are useless on me."

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TRIAL LESSONS...

Continued from page 4

case had a different impact for me than my client – it does not determine my future, but it does for my client.

I learned to listen to my client's input. The client was helpful, at times offering opinions with a unique perspective. It is important to let the client know that you appreciate and encourage their ideas, but there are reasons why you choose not to use all their strategies. Clients may try monopolizing your time during the trial. While you should address their concerns, it is imperative that you have time to prepare and rest.

Always remember, that at the heart of it, it is your client's case. Clients are human and they worry about the verdict and how it will affect them. I learned that working with clients is very rewarding – friendships can develop through working together.

Lesson # 4-Expect the Unexpected

I learned that no matter how much you prepare, you can never anticipate everything. For example, in our trial, I prepared to cross examine two of the plaintiffs' witnesses. A novice lawyer at my first trial, I looked forward to watching the experienced partner I worked with examine plaintiffs' main witness *prior* to my cross-examination. However, on the first day of trial, plaintiffs called one of the witnesses I was cross examining first.

The pounding in my chest was so loud I barely heard the direct examination. Before I knew it, the judge was asking if we had any questions for the witness. I took a deep breath, and promised myself I would not trip on my way to the podium. I quietly arranged my papers while trying to ignore the eyes of the judge, jury, and the witness in front of me. I could not even let my mind begin to worry about the partner, client and opposing counsel behind me. Worst of all, the witness was a very experienced, well respected, *attorney*. Of all the luck! But I was prepared and after my first questions, I was on a roll. It was over surprisingly quickly; I simply could not wait for my next chance to examine a witness.

"I learned I was cut out for this."

The experience gave me the confidence to ask the partner for the responsibility of handling the direct examination for one of our witnesses. I learned I was cut out for this.

Lesson # 5 Losses are Challenging; Lady Liberty does not always Wear her Blindfold

After all our hard work, determination and belief, we lost. When the verdict came in, it was both shocking and heartbreaking. One of the hardest moments of my life was sitting with the client while the reality of what the verdict meant sank in. I will always remember that day and will never forget the pain etched upon his face.

An attorney I respect told me "you are not a real lawyer until you have lost." I told him that this was a bad beat and as I write this, I am still in disbelief of how justice was not served. But I keep fighting for my client and working hard on post-trial motions. Maybe my next article will be about what I learned in the appellate court.