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JUDICATE WEST

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The mechanic

THE ANATOMY OF A MEDIATION

When I chose to become a full-time neutral, I was privileged to have learned from many of the best in the business and hoped that I could merge some of their styles and approaches with what I had learned as a client of mediation over my 35 or so years of practice doing both plaintiff and defense work. However, what became natural to me was analyzing every case as if it were somehow broken and needed fixing.

Fixing what is broken

As a child I loved to take things apart and see what made them work. To the amazement of my parents and siblings, I could always put whatever it was back together and later this led me to fixing many broken things. Could a case presented to me just be broken and need some fixing?

By the time I was 16 I had repaired countless lawnmowers, and minibikes before I could drive. A neighbor was getting rid of an old motorcycle he had been told would cost too much to fix. I was riding it later that day. Cars were next and my first job at 16 was at the local sports car dealer, first as a lot boy but then, having gotten old Jaguars and Triumphs to run and make it out onto the used car lot, I was promoted to used car mechanic.

I have always loved approaching a broken car, lifting up the hood, and trying to see what was wrong. Occasionally I would take a hammer to a stuck fuel pump, or a starter motor that wouldn't turn just to free it up. This approach has helped me consistently as a mediator although I seldom use a real hammer. My profile in the Daily Journal famously referred to me as "The Tinkerer" and I am very happy to be going at mediations in a similar way.

Many cases settle prior to mediation because the pieces of the case are obvious and functioning well together. Often the counsel know each other and understand the posture of the other side as merely the positioning of their case in the light most favorable to the client.

Sometimes what is wrong with a case is revealed in the briefs: Unrealistic demands, low ball offers, or positions on legal issues that will never hold up. Whatever it is, just like a broken car, the parts can be made to work together again and get the case moving toward resolution.

Systematic assessment

When a car won't start, there is a systematic approach that any good mechanic uses to find out why. If parts are just pulled off of a car and replaced like the mistakes a backyard car hobbyist might make, he or she will never know what the problem was even if it results (and it seldom does) in a fix.

A car needs power, so the first step is the battery. If there is juice, will the engine turn over but not fire up? Then the next step is to see if there is fuel and to see if there is air to mix with the fuel for a combustible mixture. If all that checks out, then there must be sparking to fire the engine. Attacking all these elements at once will generally fail. It is one or the other, rarely both.

I love to open the door to a mediation and get started on the analysis of what is broken. If a case has sat around

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too long, parts are definitely stuck and need loosening up. If a case is very new or perhaps even in early or pre-litigation mediation, there may need to be more learned about the position of each side to get things running smoothly. Expensive parts, like depositions or expert opinions or even a medical exam, do not need to be purchased if the parties are capable of unravelling some of those mysteries through the mediation process.

Just like opening the hood of a car, you have to start someplace, and you hope for the obvious fault to jump out at you. A badly corroded battery cable, a crack in a distributor cap, or some unplugged wiring may jump out at you and the fix can be quick.

Opening the briefs and then the door to the first room (usually the plaintiff's) is always exciting; it's the first chance to see if there is that spark to resolve the case.

Road testing

All too frequently, a case will arrive not only broken but actually sabotaged by one of the parties: The last offer by a defendant is suddenly withdrawn, or the demand from the plaintiff, upon which mediation was agreed to, has shot up. These are serious breakdowns that must be repaired before the analysis of what else is wrong can be undertaken. Oftentimes there is a wrecked car that is rebuilt by the body shop but once looking nice and running again, it is found to have what the insurance companies call "after items" or add-ons. The transmission was damaged in the crash, or the frame needs straightening or, hopefully, just a good four-wheel alignment can be done. But things have to be running and drivable before that road test can occur.

Good mediators are always road testing the case toward potential settlements. Numbers are fine tuned in the age-old process of diagnostic testing known as offers. We also have tools in our toolbox like brackets, a sometimes-despised concept, but when used correctly, it can close gaps and reveal true targets (which is rarely the midpoint of any bracket proposed).

So, the diagnostic phase is undertaken at the beginning of the mediation process which is, in fact, a very facilitative process. The mechanic cannot tell the car it has to run, and a mediator cannot order the parties to settle the claim. Like the mechanic looking for combustion mixtures and spark to fire it, the neutral is finding the real reasons that the case is in mediation. Is there a trial date coming or perhaps a designation of experts when real money has to be spent?

It is also important to remember that the mediator is looking for every nuance to help understand why the parties are here to mediate. Some attorneys do a much better job at hiding some of these foundational facts, but they still leak out. Statements by plaintiffs like, "I need this to be over," or "I hate the idea of trial….. I hated my deposition," whatever it might be. The defense does it, too. How often have we neutrals heard statements like "my carrier needs to be told what this case is worth," or a house lawyer may say, "I have five trials coming up…"

Getting past the posturing

These bits of intelligence are the obvious ones, but we neutrals look for every little factoid to help us understand how the case got here, and it helps us to get past the posturing and get both sides to genuinely engage in the mediation process.

When we get to this point, it is the same as getting the car running. Once the engine is sputtering along, then real investigation can begin into why it broke down and how to make it run smoothly to our destination. We can be lucky sometimes and find that one broken wire or blown fuse and the car lights up and runs perfectly. Rarely, a similar event occurs at mediation, but it does happen. For example, a moderate accident leads to a plaintiff who gets some positive findings in the shoulder and gets an arthroscopic surgery, but no actual tear is found, just normal degenerative conditions. She gets better, and the attorney thinks he has an objective injury case but comes to learn it really isn't causally connected. He knows his demand of $300K is too strong, and defense has only offered $30K. (The meds are $80K.)

We start the mediation in the shoulder case and explore why the demand is so strong. Right away plaintiff counsel says he knows he has problems and is willing to come way down. There's our broken wire. Repair that demand and knock it down to the mid one-hundreds and this car will run like a sewing machine all the way to settlement. Into the defense room we go and explore their willingness to maybe get to the low hundreds or very close. They reveal that they "came to settle" and have "area of the meds" in mind. Suddenly we have the solder for our broken wire. This case is not 30K to 300K its just become 80K to 130K and after a couple quick moves, settles for 90K.

What happened was the facilitative process allowed a merging over to the evaluative role that the mediator must also step into. In this case, it became the party's idea to go evaluative by being very open to the process and transparent about their goals for the case. Again, this is rare and often the neutral must drag a plaintiff kicking and screaming, down the path of understanding that the medical treatments were unrelated, unnecessary, or ridiculously overbilled.

Likewise, there are certainly just as many (or more) times where the defense must recognize that a party was entitled to significant diagnostics, perhaps a surgical procedure, and of course the resulting rehabilitative therapy. Yes, epidurals are not $18,000 each, but they often do have restorative impacts and diagnostic value. We go through cycles of what treatments and modalities carriers are "buying" and what has been abused. What a plaintiff can and will put up at trial is a big motivator for your neutral to start getting realistic numbers from the defense. Just as Sears Auto Centers and the old Mark C. Bloome stores sold a lot of front end bushings and shock absorbers no one needed, there are plenty of chiropractors and doctors selling treatment, in an attempt to magnify a case's value, that simply is not needed.

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On the other side, the defense doctor will undervalue and slash every procedure as unrelated or excessive except the barest minimum. However, defenses know that juries will value the opinion of a treating physician and a believable plaintiff as to pain and suffering, especially over an IME doctor who spent ten minutes looking at the plaintiff. The problem is that we see the same players and many doctors on lien are both overtreating and jacking up bills from the surgery center (which they often have an ownership interest in). Plaintiff's counsel need to be cautious about these huge bills. We want a mechanic that can fix what is wrong with the car, and not keep replacing expensive parts until he hits on the one needed. You don't want to pay for that learning experience on your car, and carriers won't pay for it on your plaintiff.

When we see good communication between lawyer and client, and not mysterious approaches to unrealistic goals from either side, we can almost always achieve the goal of settlement no matter how complex the case, or entrenched the parties are.

Parts needed

One final admonition to users of my mechanical approach to mediation is that we need all the parts that will make the car run. It is an obvious problem when we pop the hood on the car and see that the battery has been stolen, or the fuel tank is simply empty. Likewise, at mediation, when a plaintiff's counsel shows up without the plaintiff, it puts a real chilling effect on settlement even if the counsel has full authority. All you are getting is a broken car with missing parts. Another issue is the infuriating and increasingly frequent practice of a claims representative who is appearing by telephone.

The message sent by either of these absences is that the parties really don't care enough about the case to resolve it. Sure, we settle a lot of cases with these pieces missing because we can reach people by phone and as a neutral I insist I be allowed to do so. But if all my diagnostics say I can make my repair if I just could try this missing part, it is frustrating not to have it in hand.

Many truly difficult cases are really a series of sub-mediations and negotiations, and the mechanical approach still works in stages and steps. To all plaintiffs' counsel who want success at mediation, I urge you to take the time to do a good short brief. Briefs are the workshop manual to the repair. We need your guidance. We also need you and the plaintiffs to refrain from hiding any important information from the defense. Insurance carriers need a paper trail to justify what they pay. You aren't going to pay the shop hundreds of dollars for some item you can't see, or do not get a receipt for. Lay your groundwork well.

You should all be able to tow a lot of dead cases into the neutral's workshop and drive out with a settlement, or a good proposal for settlement that may take a while to sink in and get done. Either way, if the goal of mediation was to settle and close a file, remember that we aren't looking for what the case is worth; we are looking for what the case will resolve for. We don't care why the car broke down if we can fix it and drive on. In the process we may learn some preventative maintenance for our cases and keep them from falling apart. Happy motoring!

Rob Bennett practiced as a trial lawyer for 34 years before becoming a full-time neutral in 2012. Rob is admitted in California, New York, and New England and handles mediations in all of those states, exclusively through Judicate West. *Rob is also a member of the Beijing Arbitration and Mediation Association. Rob practiced almost equally in the Plaintiff and Defense arenas, and handles insurance bad faith and coverage, personal injury, real estate, employment, complex business and contract litigation, banking, and professional liability. Rob speaks Mandarin Chinese and restores classic automobiles as his primary hobby amongst many.*