Andrew T. Berry’s Rules for Success in Mediation

In more than 40 years of law practice, the late Andrew Berry’s experience as an advocate in mediation ranged from the ordinary to mass-tort insurance coverage behemoths involving 50 or so different entities. In an interview years ago, I asked him: “If you were asked to give a speech on the 10 secrets to successful mediation, what would be secret number one?” He jokingly replied, “Get a piece of paper with numbers 1 to 10 so you [can] keep track.” Berry then proceeded to surprise himself (and me) by actually coming up with seven “rules” off the top of his head. Here they are, along with some of his explanations.

Rule #1: Understand that nobody, including the mediator, is going to be completely candid.

This rule has nothing to do with ethics; it arises from the simple fact that negotiations in mediation are what Berry called a suboptimal candor environment. “The parties trust the mediator as a general proposition, but understand that the mediator may take minor liberties with the truth. So you won’t—and the other side won’t—be completely candid with the mediator until you really get down to short strokes.”

An example of the mediator’s minor liberties: “A good mediator will not give you his candid opinion of how good your case is. A good mediator will tell you your case is worse than you think it is—and probably worse than he thinks it is. He will do the same thing to the other side.”

Similarly, “when the mediator says, ‘I think I can get the other side to X [dollars],’ it may mean that the other side is already at X, or that the other side has said there’s no way on earth they’re ever going to get to X. But if the mediator is candid in revealing either one of those positions, it will make it harder to settle the case.”

Meanwhile, you may take minor liberties when talking to the mediator. (This does not include playing fast and loose with the facts of the case; see Rule #3.) For example, if there are four items up for negotiation, you might “spend a lot of time
explaining why piece number four is critically important” to you, so that “when it comes time to trading and you trade piece four, you increase the chances you’ll get something for it. You’ll either get credit for it that’s usable in ‘buying up’ their pieces, or they will think that they have won something and psychologically be more agreeable.”

And of course, you know that the other side will be doing the same thing with you.

**Rule #2: While you want to negotiate to “yes,” it’s okay to say no.**

This rule is based on the premise that “sometimes even the best mediator can’t get the other party to a place which roughly approximates the litigation risk alternative dispute resolution analysis.” There is a danger that you (and your client) may nevertheless become so caught up in the process that you give away too much in order to get a resolution.

To be able to know when to say “no,” it is essential to do a good litigation risk analysis before walking into the mediation session. If you do, and you and your client have communicated well with each other in advance, “you know what your stopping point is.”

Of course, sometimes facts can emerge during the mediation that may raise a defendant’s estimation of the settlement value. And for either party, other considerations may justify a higher settlement than the strict value of the case. For instance, your client may be willing to pay somewhat more (or accept less) just to be done with it or to save the time of company executives. But this should be the result of a calculated decision—not getting swept away in the moment.

However, that doesn’t change the basic rule: “It’s okay to say no, even if you disappoint the [mediator], and even if it makes the other side crazy.”

**Rule #3: Appear to be entirely candid—and actually be quite candid.**

Although this rule may seem to contradict Rule #1, Berry called it a corollary, because he was talking about a different kind of
candor. It is one thing to obscure your views and intentions in the negotiation process; it is quite another to misrepresent facts or break promises.

“In mediation, getting caught up in a small exaggeration is an almost trivial event. Getting caught in a big, fat lie is bad for your client in that mediation, bad for you in that mediation, and bad for you in other mediations—at least if any of these mediators talks to another.”

An example of breaking Rule #3 during a private caucus with the mediator would be to somewhat misstate the content of certain e-mails in order to exaggerate how much they help your position in a contract dispute. A competent mediator will then bring up those e-mails in his caucus with the other side—and your credibility takes a nosedive. “Believability is very important in mediation, as in life.”

Rule #4: Keep careful track of the “bid” and “ask”—and the reasons asserted.

As figures start to be exchanged back and forth during the mediation session, don’t just rely on your memory. You will want a complete record of how the offers and counteroffers evolve. This will help you develop a clear picture of “what’s negotiating to the middle, how you signal what the middle is,” and “what’s a false middle.” It will also enable you to say things to the mediator like, “You know, that’s a movement of less than two percent. If that’s what they really mean, we’re not going anywhere.”

By “the reasons asserted,” Berry meant the rationale that an opponent (or you) may give for putting a certain number on the table. At a minimum, this will help you stay clear. In an ideal case, you might even be able to put your hands on facts or legal precedent that undermines your opponent’s rationale—and thus weakens his number.

Rule #5: Come in with a really good, readable mediation statement.

This rule refers to the memoranda or letters that parties often provide to the mediator in advance of a session. “Any time you tell your story in a lucid and persuasive way, you’re advantaged.
I mean at the margin, mediators are human! They prefer to be dealing with people who are relatively candid and relatively intelligent and relatively open about their needs and their willingness to make compromise.”

Even though the mediator has no power to force settlement decisions, his assessment of the strength of your case may help shape his idea of where the negotiated numbers should end up. Beyond this, “virtually all mediations at some point turn into evaluative mediations” to some degree, “even if they weren’t set up as such.”

**Rule #6: Either have good stamina or refuse to work late at night.**

“It’s amazing how many deals you get done when people are exhausted,” Berry said. “Sometimes that’s right and sometimes it’s not right.”

From Berry’s perspective, it’s right to the extent that fatigue helps foster a momentum in favor of getting the case settled and done. At the same time, “fatigue does affect one’s judgment.” If your opponent’s judgment is affected (to your advantage), then great—but if fatigue causes you or your client to lose sight of your proper stopping point (see Rule #2), it’s bad.

One of Berry’s favorite classic movies was *The Hustler*, starring Jackie Gleason as a legendary pool player and Paul Newman the young rival who ultimately wears him down. You want to be Fast Eddie—not Minnesota Fats.

**Rule #7: Start out by being more respectful to the [mediator] than he [or] she might expect.**

If you don’t know the mediator personally, you don’t know how much deference he wants to receive. For example, does the mediator who is a retired judge (which is common) prefer to be called Judge Jones or Charlie?

Better to start with Judge Jones. If the former judge then says, “Please, call me Charlie,” you can become less formal and

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2. For an anecdote illustrating this, see Sidebar 10-5: “The Fatigue Factor.”
everything will continue to go smoothly. But if you call him Charlie and he corrects you—“That’s ‘Judge Jones’”—you’ve started on the wrong foot.

“You can always get more casual and friendly as the mediation proceeds. It’s very hard to go in the opposite direction.”

Even if the mediator is someone you know well—perhaps someone you’ve mediated previous cases with—you should still start with an air of formality. This is especially true where your opponents do not have the same previous background with the mediator.

“If you go in and say, ‘Hi, Charlie,’ in the presence of the other side, that could be read as suggesting a level of familiarity with the mediator—and either an accurate or a false suggestion that your friendship with the mediator will be to your advantage and to their disadvantage. And because the mediator understands that it could be read that way, the mediator will be angry at you.”

SIDEBAR I-2

How to Doom a Mediation

By John J. Upchurch, Kimberly Sands, and Michael S. Orfinger

A panel of mediators from across the United States compiled a boldface list of mistakes that often cause failure. Mediators John Upchurch, Kimberly Sands, and Michael Orfinger (whose firm has offices in Florida and Alabama) added commentary to write an article (2011), from which this sidebar is adapted. It is worth noting that at least four of the featured paths to doom involve inadequate preparation for the mediation session.

1. Fail to prepare the client and/or decision maker for mediation.

Participants should be prepared for the process itself; i.e., be fully briefed as to the dynamics of the mediation process, the