

Showing respect for mediation — and the mediator

Respect for the process and the participants includes being as prepared as you would for the courtroom

By Hon. Joe Hilberman, Ret.

Having completed two and a half years in the private sector after leaving the bench, I have a perspective on attorneys' attitudes toward "neutrals." The following observations should be considered by practitioners to achieve the best results in arbitration or mediation and with your discovery referee.

R-E-S-P-E-C-T, find out what it means to me

I recently had an "in your face" moment in an arbitration. The young and very promising plaintiff attorney in a medical-malpractice case did not appreciate the fact that an arbitration should be approached as you would a court trial, albeit with relaxed procedural constraints and in a more relaxed environment.

His first faux pas was to present for the first session with his sunglasses neatly balanced on the back of his neck. He looked cool, but not professional. When I saw him in the hall during the morning break, I told him that while I did not particularly care, the ultra-casual approach would not go over well with many retired judges, and did not appear professional. He thanked me; actually, he said, "Thanks, Mr. Hilberman!"

With that I said, once again, that while I did not particularly care, being addressed as "Mister" would not go over well with many retired judges…. We really should be called "Judge" unless invited otherwise.

Later, when I indicated to the assembled multitude that they could remove their coats to be more comfortable, he was the only one among the eight of us who did. It was then that his party arbitrator admonished him, again in the hallway, "If you are the only one to take your coat off, put it back on!"

The coup de gras came when he delivered his impassioned closing argument…spitting tobacco juice into a paper cup!

So many lessons, so little time

The most significant rule here is to treat arbitration like a trial. I do not believe any attorney would have appeared before me for a court trial and behaved in that fashion.

Be fully prepared — serve a brief and any motions in limine at least five days before the hearing; coordinate with opposing counsel on joint exhibit and witness lists; have your exhibits pre-marked and your witnesses ready to go. If you can, meet and confer with opposing counsel to agree on the foundation of documents to be presented at the hearing.

Take it to the limit and treat mediation like an MSC

You should serve a brief on the opposing side before the mediation to let them know your expectations and, more importantly, why you hold those expectations. I remember a plaintiff's bar presentation, years ago, when prominent Los Angeles attorney Gary Dordick was asked by a colleague in a panel discussion, "How do you get such great awards from a jury?"

His answer was simple: "I ask them for it."

We all know the issue is not really that simple, but it is true that the opponent will be better prepared to engage in meaningful negotiation if you tell him in advance what you are going to ask for, and explain why it is reasonable to consider the demand. The same is true, of course, of the defense — they should serve you with a brief and tell you why they evaluate the case as they do.

I am always surprised and disappointed by how few attorneys serve a brief on the other side. If there is something confidential you want the mediator to know, serve a separate, confidential brief.

Reflecting on the differences in private practice from service on the bench, I ask counsel to be sure to serve a brief on me no less than five days before the mediation, yet I often receive the brief by e-mail at 10 p.m. the night before, or not at all. No attorney would disregard such a request from a sitting judge, and you should not disregard the request of your mediator. The reason for the request is simple — to be as well prepared as possible to assist in the settlement of the case.

Discovery Referees: Why can't we be friends?

Here's a surprise: Judges do not like discovery disputes. The court is

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overworked and understaffed. If you have a case with lots of production, interrogatory, motion and deposition issues; the probability is you will be sent to a discovery referee.

When serving in that capacity, the thing most different from the bench is the "bickering" quotient: Lots of bickering, little substance. I suggest counsel avail themselves of telephone conferences with me, as it is less time-consuming and disruptive of the day, and far less costly. When using Court Call, most attorneys understand that they need to actually wait for the other party to stop talking before responding, yet for some reason, when on a conference call, they need to interrupt, cut each other (and me!) off, and bicker. Not constructive!

When using a discovery referee, consider the wisdom of former Judge Allen Buckner, whose bench had a sign on it that said, "Be Brief, Be Direct, Be Gone." Time is money to you and your clients. Be sure to engage in a meaningful meet and confer session, in person if possible, and really reduce the issues to those most significant.

One positive difference from the bench is the luxury of time. I try to make the initial discovery meeting an opportunity to get a sense of the case and discuss with the attorneys a comprehensive discovery plan that will allow for meaningful discovery without unnecessary delay and conflict. In the private sector, especially where the referee is not the ultimate trier of fact, or "decider," the parties can be candid and not posture for the final result.

In the long run...

Treating your private neutral as you would a sitting judge will increase the value of the time spent in mediation and arbitration as well as discovery disputes, and improve the quality of outcome for you and your clients.


Hilberman

Judge Joe Hilberman served on the Los Angeles Superior Court from 2002 through 2009 following a 27 year career in civil litigation. He is currently a full time mediator, arbitrator and discovery referee with ADR Services, Inc. *Judge Hilberman was recognized by the Los Angeles Chapter of ABOTA as "Jurist of the Year" in 2008 and selected by the* Daily Journal as one of the "50 Best Neutrals" in California in *2009 and 2010.*

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