by Hon. James Steele (Ret.)

Practice Tips

Judges Think Differently

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An all-time favorite movie is *Young Frankenstein*, a film of Mary Shelley's *Frankenstein; or, the Modern Prometheus* in which Dr. Victor Frankenstein creates a living creature from non-living tissue. At one point, Gene Wilder (Dr. Frederick Frankenstein, a descendent of Dr. Victor Frankenstein) is almost killed by the monster he created whom he had expected to be perfectly normal. Wilder asks his assistant, Marty Feldman (Igor), whether he obtained the brain of "the late Hans Delbruck—scientist and saint" for implantation as instructed. Feldman admits he inadvertently dropped the brain while attempting to steal it but indicates that he found an even better one ("no wrinkles"!). Wilder asks whose brain he implanted into the "7 foot tall 4 foot wide" monster he created. Feldman replies "Abby." "Abby who?" asks Wilder, and Feldman responds, "Abby…someone." Feldman admits the jar containing the brain was marked "Abby Normal."

Do lawyers think that the transformation from practicing lawyer to judge somehow also involves the transformation of an otherwise "normal" brain into an "Abby Normal" one? Why do judges and practicing lawyers not think alike, and how does this impact mediation?

During the mediation process parties and counsel often comment how much they appreciate a "judge's perspective." Having successfully assisted in resolving thousands of cases during eight years as a neutral, sharing the unique perspective of a former judge has been instrumental in many of those settlements.

While there are many excellent, highly effective and accomplished attorney mediators who are extraordinarily well-suited to assist parties in arriving at what I like to refer to as the "point of mutual unhappiness," there are a number of particulars about determining why and when practitioners may find the services of a retired judge to be of special advantage regarding the settlement process. Intrinsic to that analysis is consideration of the reasons why judges and lawyers don't think alike when assessing cases, whether in mediation or trial or in formulating settlement strategies.

During nearly three decades practicing law before appointment to the bench, I regularly employed the services of mediators. I used retired judicial officer mediators in some cases and in others sought the assistance of experienced attorney practitioners. Client preference was always

RICHARD EWING

important when selecting the type of mediator. Some expressed a preference for an attorney mediator with significant specialized education, credentials, and work experience. This was especially true in cases involving technical areas such as construction, civil, or structural engineering. The clients believed those industry-specific mediators would better understand certain aspects of the case and would speak the language of the clients and their technical experts. In other instances—for example, when representing corporations through in-house counsel or in cases involving highly sophisticated clients with extensive litigation experience—there was often a preference for a judge mediator's assessment of the case for settlement or other purposes.

Selecting one type of mediator over another has always been, and always will be, an exercise in obtaining the right balance of expertise, experience, and personality. Some mediators are simply better suited than others in helping clients and their lawyers make the difficult decisions associated with settling their cases. Regardless of who is selected, gaining some insight and appreciation into how current and former bench officers think, and how that may differ from the lawyers litigating the case or from lawyers acting as mediators can be of tremendous value. This is true irrespective of whether or not the case settles in mediation.

At some point during my transition from practicing attorney to judge I experienced sort of an epiphany—the way I viewed cases, indeed, how I viewed the entire litigation process, changed rather dramatically. This was due to various factors.

Judges Have No Clients

Years ago in conversation with a law firm colleague about practicing law, he seemed dissatisfied in general with the practice. When asked why, he said something like "Well, if it weren't for judges and opposing counsel, I would probably enjoy the practice a lot more." He then added, "And clients…they go to the very top of that list."

Judges have no clients. Indeed, most tenured judges have not had clients for many years. The profound effect this has on a judge's perspective, especially those coming from the private sector, cannot be overstated. Not needing to account to a client dramatically affects the way in which judges view the entire litigation process. A lawyer is ethically obligated to pursue a client's cause or endeavor with commitment and dedication and must advocate on the client's behalf with zeal.[1] A lawyer also owes a duty of loyalty to the client's interests.[2] Judges have no obligation to individual clients, nor should they. Unlike counsel, a judge is obligated to view every litigant and every case that comes before the court fairly and objectively.[3]

While good lawyers strive for objectivity, it is a goal easier stated than achieved. For example, lawyers on opposing sides of a case may cite the identical portion of a statute or excerpt from a case in support of diametrically opposed, even mutually exclusive, positions. When a lawyer looks at a statute or case, or hears a witness testify, the lawyer seizes upon that portion of the statute, case, or testimony that potentially benefits the position of that lawyer's client. Aside from the professional obligations to further the client's case, lawyers also may have developed a close professional relationship, even a personal bond, with the client and the client's case. Under such circumstances, it is natural to want to see a client's case succeed.

☑ **PRACTICE TIP: It is important to be as realistic and objective as possible about the client's as well as the opposition's case. Counsel should be prepared to honestly explain to the mediator and the client the other side's evaluation of the case, as well as to specifically state what the other side believes to be the weaknesses of the case. Counsel should also be prepared to explain how to anticipate overcoming or mitigating those weaknesses at trial in addition to any obstacles that may be encountered in doing so.**

A judge has the luxury of undivided loyalty to a considered determination of the facts and their application to the law. This application of facts to the law pays no heed to the judge's personal feelings about the litigants or the applicable law. A judge is duty bound to abide by the law, even if in disagreement with it. At times a judge must reconcile finding in favor of parties who do not appear to be particularly worthy or sympathetic, or worse. Indeed, at times, the facts and the law led me to find against highly sympathetic parties who were represented by lawyers I greatly respected and held in high esteem.

Judges Decide Many More Cases

Regardless of how busy a practitioner might be, it would be virtually impossible for an attorney to participate in as many trials as a judge. Most litigators do not participate in as many trials over their entire career as a judge might preside over in just a year or two. My first year on the bench I presided over approximately 40 jury trials. I have also presided over more bench trials than I can count. With bench trials, a judge is not just engaged in pre- and post-trial proceedings and evidentiary rulings but also decides the final outcome. Being a party advocate, as compared with being the final decision-maker, requires vastly different skills. Even assisting in jury selection and a jury's fact-finding process through trial requires different skills from those of a litigator.

Approximately four million cases are filed annually in court in California, and there are limits to how many variations of those cases are possible.

Approximately four million cases are filed annually in court in California, and there are limits to how many variations of those cases are possible. So, judges often observe similar factual scenarios play out before them multiple times. Judges, therefore, have an opportunity to observe innumerable percipient and expert witnesses testify. Some might think judges are no better than anyone else at discerning who is or is not being truthful. However, seeing the testimony of some truly impressive liars fall apart during cross-examination does help develop skills in assessing credibility. Therefore, judges are likely to be better at assessing credibility than those who have not worked so long or hard at trying to do so.

It is helpful to a mediator during the settlement process to ask questions and to share with one or both sides

one's initial observations about whether or not a particular party might make a good testifying witness. Some parties simply cannot fathom the possibility that the testimony of an opposing party might actually be believed if the case were to go to trial. More than one case has settled primarily faced with that realization.

Another aspect of the trial process that parties, and even lawyers, often fail to fully appreciate is that the ultimate fact finder, whether a judge or a jury, most likely knows the least about the case. Typically, the parties know most about the facts, followed by at least some of the percipient witnesses and the parties' lawyers. The fact finder is limited to admissible documentary evidence and what is observed during trial testimony. It is the lawyer's job to sort through the mountain of available facts to determine what is or is not worthy of inclusion at trial. Being able to successfully balance how much detail and which facts to provide, in order for the fact finder to focus on the issues and make a considered decision, is the mark of an accomplished litigator. A former judge as mediator may therefore explore lines of inquiry or issues during the mediation process that would be of particular interest to a sitting judge or jury. Hearing what facts or circumstances a former judge might find useful can enhance the likelihood of settlement and, failing that, assist counsel in gaining some insight into the mind of a fact finder during trial.

☑ **PRACTICE TIP: A mediation brief should be concise, focusing on the relevant facts. A lengthy brief with marginally relevant information may impede the mediator's ability to achieve an overall understanding of the case.**

Parties (and even lawyers) sometimes wrongly assume they will be able to present all potentially relevant facts and information and that the court will sort through it all in order to arrive at the "correct" decision. The ability to articulate a coherent and consistent message at trial is far more essential to achieving the right result than many practitioners appreciate. In broad terms, a case should have elements of both ethos (credibility) and pathos (emotion). A properly presented case should be about more than just how much money moves from one side to the other. It is the role of the judge mediator during settlement discussions to view the case in these broad terms within the context of his or her judicial experience and to focus on the minutiae only as is essential to provide worthwhile commentary to the mediation participants.

☑ **PRACTICE TIP: Counsel should draft a simple, concise statement of the client's case that is accurate and persuasive. The theme of the case should be capable of easy and quick communication. Evoking "Pathos" is essential, but the use of "legalese" should be avoided. Moreover, the case should be more than the movement of money from one party to another.**

Although the testimony of "disinterested" third-party witnesses may be very helpful to the trier of fact, persons unfamiliar with the process often place too much emphasis on the testimony of a particular third-party witness. Depending on the witness's relationship to the case, such as an expert witness, certain testimony is expected and, to some degree, discounted. Clients and the lawyers who have selected the expert may presume that in the "battle of the experts" their experts will fare better than the other side's experts. That does not always hold true in the courtroom. For example, in a trial over which I presided, an architectural expert inadvertently included a link to his internal files when he provided his materials to the other side. However, the link included more than the architect's final report. It also contained a link to a heavily redacted and revised version, showing changes made by the lawyer and the lawyer's client. In fact, some of the expert's original conclusions had been changed so much that the final conclusions were dramatically different from the architect's original draft. During an effective cross-examination, the architect had boxed himself into the position that he alone was the exclusive drafter of his report, with no input from others. The expert's testimony on redirect did nothing to restore his credibility. It was a rare occurrence, but I struck the entirety of that expert witness's testimony.

☑ **PRACTICE TIP: It is wise to keep a list of essential witnesses and the essence of what their testimony will establish. Potential problems that may arise should be delineated along with their testimony (e.g., bias, reliability, background problems such as prior criminal convictions, adverse administrative actions, and the like). If brevity concerns preclude including that information in the mediation brief, counsel should inform the mediator that the information is available and be prepared to summarize it in case discussions during the early stages of mediation.**

Having "pretty much seen it all" at one time or another, a former judge's ability to speak to the parties from personal experience about what can happen during trial may prove highly valuable to the parties' assessment of potential risks if the matter fails to settle during the initial mediation session.

☑ **PRACTICE TIP: "Perry Mason" trial moments are rare. Through proper discovery and investigation, parties are, or should be, well prepared for what one side may believe will be a devastating blow to the adverse party's case. The client should be prepared for the possibility of sharing those facts with the mediator and, if necessary, to authorize the mediator to utilize those items during discussions with the opposing side.**

Anyone who has been a full-time courtroom spectator would be hard-pressed not to gain at least some insight into how a particular case might turn out. It should be no surprise that most courtroom staff are rather adept at predicting jury trial outcomes. Having been involved in so many cases, judges also tend to develop an innate sense of likely outcomes. A judge mediator may be expected to have some basis on which to evaluate likely outcomes based on the information provided. From discussing a great many cases informally with other judges and, more formally, in the judicial classroom setting, it is clear that judges tend to approach the analysis of cases in very similar ways.

Another aspect in determining whether to select a retired judge as mediator is a judge's greater familiarity with the Evidence Code. Surprisingly, this is frequently overlooked by attorneys during the mediation process or, worse, during trial preparation and even during trial. Given the number of trials over which they have presided, former judicial officers are typically more familiar with the rules of evidence and how a judge is likely to view certain kinds of evidence. While it is said that "a trial is the search for the truth," the fact is that sometimes the truth may be inadmissible.

Regarding the persuasive value of certain evidence, it is common for one or more of the parties to assert that if the case goes to trial, their clients will certainly prevail based on the strength of the anticipated testimony of witnesses. Those witnesses may have never

been deposed, or even interviewed, so the anticipated testimony is actually what the client believes the witnesses will say. Or a party may present something like a post-it note with words or numbers scrawled all over it, which allegedly "proves" one thing or another. In this context, a discussion during mediation regarding what may, or may not, see the light of day inside the courtroom, or what may, or may not, be accorded much weight even if admitted, may be of substantial value to the parties and their counsel in assessing the case. Similarly, the profound appreciation judges have regarding the importance of burdens of proof, including what may or may not be sufficient to meet those burdens, is of considerable value in the evaluative process.

☑ **PRACTICE TIP: It is best to make a list of critical items of evidence in support of the case, noting which items currently exist or are just anticipated. Counsel should be prepared to discuss both the admissibility of such evidence and evidence that will be offered by the adverse party at trial, as well as how the harmful effect of such evidence will be mitigated.**

All of the above, combined with the vast number of mandatory settlement conferences judicial officers preside over and the process of approving a great many settlements add to a judicial officer's storehouse of relevant settlement knowledge. Years of assisting parties in resolving cases also gives retired judges a feel for what may or may not be possible in structuring a realistic and workable settlement. Parties need to realize that what may be agreed to in mediation may not be possible if the matter goes to judgment.

☑ **PRACTICE TIP: It is important to be realistic about the value of the case. The mediation brief should include a calculation of each side's best and worst outcomes at trial along with an assessment of the success of each position, as well as what should be the starting point and why.**

Greater Appreciation for Discovery

Law schools place little emphasis on the importance of effective discovery. This is confounding, given its impact on the litigation process. Therefore, some lawyers may see discovery primarily as a billing exercise for the least experienced associate in the firm. It is surprising how many times in pretrial motion practice a judge is called upon to intervene in litigants' hotly contested discovery disputes, only to observe later that there was no mention at trial of the discovery over which so much figurative blood had been spilled. Discovery should be well planned and targeted at the identification of relevant and essential documents, facts, and witnesses. Limited, well-focused discovery combined with independent investigation is more effective than broad fishing expeditions, which frequently lead to unwieldy, expensive, and unavailing discovery disputes.

☑ **PRACTICE TIP: If particularly helpful or hurtful discovery has been obtained, including deposition testimony, the significance of that discovery should be explained to the mediator.**

Experience with Attorneys and Clients

Running an efficient courtroom requires maintaining control over the proceedings. This includes learning how to thwart attempts by others to interfere with or unduly delay the process. Dealing with difficult counsel in the courtroom or in mediation can be a challenge, but one that every competent judicial officer must master. The considerable experience bench officers gain in effectively dealing with challenging personalities can be an invaluable asset in moving a case towards settlement. Even the most difficult lawyers and clients tend to give deference to retired judicial officers, thus allowing the parties to focus on the merits of the case rather than pointless and unproductive personality disputes.

☑ **PRACTICE TIP: Personality clashes with opposing counsel must be avoided. It is necessary to stay above the fray and be professional at all times. Opposing counsel may be extraordinarily difficult to work with, but he or she may be the only person standing in the way of a satisfactory settlement. "Settling well is the best revenge."**

At times a client's unreasonable expectations may be the impediment to achieving a reasonable settlement. Having an experienced judge mediator who has presided over many such cases during his or her career and who can discuss the case and the process of rendering a decision after trial has dampened the expectations of many an overly enthusiastic client. Generally, clients place greater value in a retired judge's opinion of the case than if the same opinion were to be rendered by someone who has never presided over a courtroom. This may also apply when the client received substantially the same advice from his or her own attorney. More than once I have sensed that a lawyer, while vigorously advocating the client's position during mediation, is hoping I will convince an unyielding or unreasonable client to settle the case to avoid a disappointing or even disastrous outcome.

Judges Often Think Alike

The takeaway from all of the above should be that judges and lawyers do not view cases the same way, even in the context of mediation. In crafting motion rulings or even during routine status conferences, judges may reveal their general sentiments regarding certain aspects of the case, including their views on how a particular statute might be applied. Since judge mediators have considerable experience in ruling on motions and in other courtroom proceedings, judge mediators may be better equipped to "read between the lines" when reviewing motion rulings or transcripts of court proceedings.

☑ **PRACTICE TIP: Any significant motion rulings and hearing transcripts should be provided to assist the mediator in gaining insight into how the trial judge may be viewing certain aspects of the case.**

Judges, lawyers, and certainly clients do not view cases from the same perspective. By virtue of the central role judges play in the legal process, judges develop a unique perspective with respect to what happens in the courtroom. In that context judges' brains may be considered "Abby Normal." A former judge may thus be able to provide the parties and their counsel with a deeper understanding and appreciation for the fact-finding process as it specifically relates to the case in which the judge is assisting as mediator. At the very least, this can significantly enhance the likelihood of the parties' achieving a mutually agreeable settlement at mediation. ■

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[1] *See, e.g.*, ABA Model Rules of Prof'l Conduct R. 1.3 cmt.

[2] *See, e.g.*, Cal. R. of Prof'l Conduct R. 1.7.

[3] Cal. Code of Judicial Ethics Canon 3B(2) (2020).