The Precipice Episode 4

PLUS Staff: [00:00:00] Welcome to this PLUS podcast, The Precipice, Episode 4.

Before we get started, we would like to remind everyone that the information and opinions expressed by our speakers today are their own, and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice. With the housekeeping announcements out of the way, I'm pleased to turn it over to our host, Peter Biging.

Peter Biging: Hello again, everyone, and welcome to The Precipice, the podcast devoted to identifying and discussing what's coming next in management and professional liability. In recent episodes, we've taken looks at where things appear to be heading with respect to lawyers' professional liability and cyber risks.

In upcoming episodes, we're going to look at the latest risks presented to insurance agents and brokers, accountants, and financial services professionals. We also will be devoting time on future episodes to discussion of how AI can be expected to both mitigate [00:01:00] and generate management and professional liability risks, as well as the growing threat of nuclear verdicts, and what can be done to avoid them starting before a loss or injury has even occurred. Today, I want to take a look into alternative dispute resolution and specifically what makes mediation succeed or fail.

The fact is that management and professional liability claims are particularly suited to at least holding the opportunity for resolution through the mediation process, but success is never guaranteed. I subscribe to the belief that who you choose as a mediator and how the mediation is run is absolutely critical to the process.

As I've done some research into the mediation process, I've learned that it truly is a marriage of art and science. The best mediators have gamed out not only every phase of the mediation, but how, and why, and in what manner they [00:02:00] will approach a variety of scenarios. Today I am lucky to have with me as my guests a trio of some of the absolute best in the field of mediation today, Mark Bunim, Jennifer Lupo, and Theo Cheng.

I've told them that I want to have a discussion that really gets under the hood and provides an insider's view into how they each approach each step in the mediation process, how they deal with common and not so common issues that can arise, and where they feel they truly critical to the process. So let me introduce each of our guests before we get started.

Mark Bunim is an advanced trained mediator and arbitrator, and an attorney licensed to practice in the courts of New York and the United States courts since 1976. Mr. Bunim has conducted over 400 mediations and dozens of arbitrations concerning insurance policy related coverage issues, complex business disputes, and partnership disputes. [00:03:00]

With Mark joining me is Jennifer Lupo, who is a Distinguished Neutral with more than 30 years' experience. Jennifer's areas of [00:04:00] expertise lie in resolving business to business, complex, commercial, employment, and insurance disputes.

Lastly Theo Cheng is an independent [00:05:00] full time arbitrator and mediator focusing on commercial, intellectual property, technology, entertainment, and employment disputes, including breach of contract and negligence actions, trade secret theft, employment Discrimination Claims, Wage and Hour Disputes, and IP Infringement Contentions.

All mediators have their own personal styles and [00:07:00] there are probably an infinite number of ways to tee up a mediation for success. But I'd like to start our conversation by asking if there are specific things you try to do in advance of mediation to try to position the mediation for success. Let me start with Theo.

Theo Cheng: Sure. Look, I'm a big proponent of doing what I call pre mediation reconnaissance. In the very beginning, I'll definitely hold a joint call, usually with counsel, in order to just talk about housekeeping and logistics, including when those pre mediation submissions are going to be submitted and, of course, when the mediation session will actually be scheduled.

But more importantly, after the mediation submissions have been provided to me, after I've had a chance to review them, I'm going to schedule an ex parte call, again, usually with counsel, because that call is so instructive in helping to clarify the things that they're saying in those submissions, helping me to understand the negotiation dynamics between the parties, and also the relationship between the parties that might be important for me to know before I [00:08:00] walk into that mediation room, as well as the relationship between counsel, because I want to figure out whether or not there are issues that I need to be sensitive to, relationships between parties and or counsel that may come up during the mediation session. I'll stop there, but a lot of this work that's happening before the mediation session itself I think is critical for me to be effective in that room.

Peter Biging: Let me turn that to Jen now. Same question.

Jennifer Lupo: I have a very similar process to Theo. One of the things that I would add to that process is, from the first phone call, the mediation is happening. The whole premise of pre mediation and mediation is one whole process, the session being part of that. One of the things that I try to glean in the early stages of mediation is relationships, not only between the parties, but also between counsel and their client so that I am prepared in the event [00:09:00] that there is a need for me to be more of the heavy for, or the harbinger of bad news, which is something that we all tend to be in the rooms.

But sometimes, I need to be a little bit more, and that's part of my process, is to try to glean that information.

Peter Biging: Mark, what are you looking at? At least I refer to it as pre mediation, but I guess before the actual mediation session. The start of the mediation that starts, really at the very beginning.

What are you looking at? Are you are you looking for information regarding personalities, hidden agendas, stressors? What are the things you are trying to assess at that very initial phase of the mediation?

Mark Bunim: First of all, Peter, thank you very much for having us. And the first thing, I agree with Theo that the first thing I do, and I agree with Jen, is a scheduling conference call.

I agree with all the things that Theo and Jen have said about that scheduling conference call. I want to talk about [00:10:00] two things that are important in the scheduling conference call to add to what they said. One is an issue that has come up in the last four years, which is whether to have the mediation on Zoom or in person.

That's a big topic of conversation in the scheduling conference call. I personally prefer in person. I think it's better. I think it works better. I think the people being compelled to come and sit in an office until the case is settled moves them towards settlement. It enables the attorneys and the parties to see each other face to face.

It enables the mediator to read body language. But on the other hand, I understand that travel is a big issue. So, at the very least, if I can't get a hundred percent in person, what I try to do is get the attorneys to come in person. And maybe the clients will come in over Zoom or one or two of them will come in over Zoom and that way it's called a hybrid [00:11:00] mediation.

And that works also. A total Zoom mediation, others have different feelings about it. There have been studies done that say there's really no difference between Zoom and in person, but I think there is a difference. Especially in cases where you're dealing with professional liability it's important, I think, for the professionals to come in, the principals to come in, those who are litigating against the professionals to be there. The insurance company representative should be there, some representative so that they can gauge the veracity of the claimant and look at them and see their body language, facial expressions.

So, I think that's all important. Another thing that I want to talk about that we discuss in scheduling conference is confidentiality. In a professional liability case, the professionals are very concerned about confidentiality, an attorney being sued, an accountant being sued, et cetera.

They want it to [00:12:00] be confidential. Some rules provide automatic confidentiality if you're doing the mediation with an institution. Some, if you're doing the mediation ad hoc, and personally, most of my mediations are ad hoc. They're not through an institution, although I'm on the AAA panel, there's no automatic confidentiality except by statute.

I practice in New York and there are cases in New York talking about the CPLR confidentiality provision and it's iffy. There is confidentiality of the settlement result about offers back and forth.

But there are courts that have held that every statement made during the course of mediation may not be confidential.

That's not unanimous in all the courts, but some courts say that. And so, what I do to overcome that is send the parties a mediation agreement. It's like a contract, and I require all of them to [00:13:00] sign it, and say that they agree that this mediation and everything said therein will be confidential. And they do sign it and if they don't sign it, when I walk in the door on the day of the meditation, I have a copy of it with me, and I say, here it is, sign it.

That way the courts have held that it's a contractual agreement to confidentiality, and they've upheld that. So, I think that's an important point to come out. In terms of what I'm looking for, where I'm trying to go, I agree with Theo and Jen. I'm trying to gauge what the parties are like, what the relationship is between the party and counsel, if there's an insurance company involved, what the issues are with the insurance company frequently in a coverage case, for example, there'll be a lot of emotion, there'll be hostility, a professional will feel, "Gee, I paid all this money in premium for all these years, I've been sued and now I'm not getting coverage." So, that's always an issue.

But I always ask [00:14:00] counsel after I get the materials and read the materials, I have individual phone calls with each of the attorneys and I say, tell me about your client. Tell me about how you and your client get along. Tell me about what you think I need to do vis a vis your client.

Sometimes people come to mediation, believe it or not, the attorney will say, I've told this client to settle, I think they should settle, they won't listen to me, maybe they'll listen to you because you're an independent neutral. So, I want to know that before I walk into the room. So those are my pre mediation highlights.

Theo Cheng: There's a difference between Zoom and in person mediations, for sure. Certainly, for example, as Mark said, reading body language, judging, assessing credibility, for sure.

I will say, the place I disagree with Mark is that I don't have a preference for either, but in most of my mediations, I don't spend a heck of a lot of time talking during that joint call with the lawyers about the format because they've already decided that. They've already [00:15:00] agreed that they're going to do it via Zoom or in person amongst themselves by the time they've reached out to me.

A lot of my cases, for example, are employment cases. They almost exclusively want to do it through Zoom because a lot of times, most of the issues that we're going to be discussing are largely distributive in nature. They're money matters. And so, they don't want to spend the time to actually travel somewhere to do it, even when they're all in the city.

They just rather just sit in their homes or sit in their offices and just do it via Zoom. So that's the only place where I really differ, right? I think it just depends on the practice area that you're in. And whether or not the parties have already talked about that before they've even reached out to me for rates and availability.

Peter Biging: Let me actually, Theo, you touched on something here. I want to follow this path a little bit. Anecdotally, I had heard that during the pandemic mediations via Zoom were, that was the only game in town. And they were surprisingly successful. People didn't expect them to be particularly successful.

And they were surprisingly [00:16:00] successful. Anecdotally, I've talked to insurance claims executives who have indicated, at least some, have indicated that they feel that the success rate has dropped since we've gotten further along post pandemic, and some are actually pretty adamant that they feel they they're not going to want to do it remotely.

If they can, they really want to try and do them in person. And I know that from personal experience, there's a sense that, if you're all in a room together for hours and hours you start to feel something of a joint venture, right? We're all in this to try and come through with a resolution so that when we walk out of this room, we've accomplished something together.

And I know that when I've done remote mediations there's the concern that the client on the other side or your client as well, it's just too comfortable. They're sitting in their office in between they're taking calls; they're doing work, they're snacking whatever, they may even be [00:17:00] walking away for a while and coming back.

And so, I tend to think that my preference would be to do it in person, and my thought process would be that there is some merit, again, anecdotally speaking, to the argument that doing them remotely could lead to lack of success or lesser success. It was funny, when I was researching this, I saw some data that said there's a growing body of research indicating that trust formation is more challenging to achieve in the teleconferencing environment.

And the inability to read body gestures, while watching the other side can create a "cognitive dissonance that undermines trust formation." And that again also goes to the issues of the success or failure of mediation. So, I just said a lot, Theo. So, what's your response?

Let me give you a chance to respond and then we haven't heard Jen's [00:18:00] position on this. Maybe she'll be the tiebreaker.

Theo Cheng: Sure. Sure. No, listen, all valid concerns. And I have heard some of those anecdotal observations about the fact that, not only are people preferring more to be in person, but that perhaps the settlement rates have gone down.

I know empirically, that's not true, just because the National Academy of Distinguished Neutrals has run surveys for the last three years. And that's always shown that Settlement rates are equal to or better on Zoom. But I think, it's really a question of what, whether the parties are really in a position, really in a mind frame to settle, and whether they're going to use, the fact that they're in a remote setting to actually be an inhibitor, as opposed to a way in which it facilitates a settlement.

There's no question that developing trust and rapport over a Brady Bunch box is going to be very different than developing trust and rapport in person, right? Hard to look someone in the

eye, hard to gauge body language in the same way. But if you are an attorney, and you are talking to your client about prepping the client properly for a [00:19:00] Zoom or Teams mediation, you are going to prep your client appropriately about how to do that.

There's just a different technique that's done over this video teleconference platform than you would actually in person sitting around a conference table looking at each other. And I think with respect to credibility issues, sometimes that's a big issue. Obviously, it feeds into the trust and rapport but that's one of the reasons why arbitrations in particular have actually moved more away from the remote platform. Now remote platforms have always been available in the arbitration space, primarily in the international arena because of, for example, time difference, right? And the enormous amounts of money that will be spent in travel and resources.

So that was nothing new to arbitration, but I think people do recognize that it is difficult. Not impossible, but difficult to judge credibility. And if you're sitting as an arbitrator, like the three of us do, you sometimes have to make very difficult credibility calls. Would I prefer to do [00:20:00] them in person?

Absolutely. I'm more trained and used to making those kinds of calls in person than over the video teleconference platform. But I've had many Zoom hearings. And so, I've trained myself to look for certain things and to be able to look at facial features a lot better. For example, I can actually blow up someone's box much bigger and see them much clearer than I would then sitting 50 feet away from them in a big, huge conference room.

So there are pluses and minuses, but I think, bringing it back to the mediation space, I think there are just differences in which ways they're done at the mediation in terms of developing trust and rapport, and I think you just have to be able to train and be prepping yourself, both yourself as a mediator, as well as the client for how that's going to be done.

Jennifer Lupo: I think that from an anecdotal standpoint, we all conform to Zoom because that was our work. Like everyone else, right? So, if you worked in a call center, you went home and you, they [00:21:00] gave you equipment and you were able to answer the calls for your employer's 800 number. We're mediators and arbitrators and we learn to adapt. Parties learned how to adapt counsel learned how to adapt.

We don't need to adapt anymore. We could choose to be on Zoom. But we don't need to be on Zoom any longer. And I think that has a lot of bearing on how people approach whether or not they want to have their mediation on a video conferencing platform. My preference is to do it in person, but I will say that I found ways to adapt, to build rapport, to try to suss out what parties are like, and the continuum of mediation through Zoom or other platforms like Teams, et cetera.

But I think that's really [00:22:00] what happens in, in my view, is that we can go back in the room now, so why not go back in the room?

Peter Biging: So, one of my favorite lines in a brief I read in my history as a litigator was somebody was complaining that the other side was lingering too long on an issue and wrote the line, I think he said, "Counsel continues [to] insist on beating the fetid remains of a long dead

horse." At the risk of beating this horse to death, I just, let me just go with one more thing I want to talk about with the idea of handshaking. There's a concept of handshaking that I, again, doing a little research on mediations.

It says that making personal contact with your adversary at the outset of negotiations tends to improve the likelihood of successful negotiations as it reinforces the perceptions of the other side's good faith. Last poke at this dead horse [00:23:00] on the issue of Zoom versus in person.

Theo, how do you address that concept of handshaking in the remote environment?

Theo Cheng: No question that there can be no handshakes real true handshakes in the normal sense in the remote environment. But I think there are other ways that we can develop positive reinforcing relationships, like one of the things I always do in the beginning, of course, is in that joint session in the beginning, whether you use that merely as for welcoming remarks by the mediator or actually have a substantive discussion, I go around, make sure everybody knows each other.

I ask if it's okay to act to indulge me to call everybody by first name, just so that we are breaking the ice a little bit. Sometimes, and I tell people like, "Look, this is game day, right? Everybody prepares for game day. But we don't have to turn this into some kind of scary adventure."

So, I think doing those kinds of things within the limitations that a video teleconference platform has can actually grease the wheel in the same way that the [00:24:00] sort of physical handshake would have done, right? And I always look out for people, making sure they're comfortable. If they're not seen very well on video cameras, I will point that out, right?

If people need to take breaks, I'm very conscious of that. And we haven't talked about Zoom fatigue, but that's a huge issue, in, in these teleconferencing platforms. So I'm always watching out and talking to counsel and the principals about, hey, if you need to take a break, or maybe this is a good time for a break, because I think it's really important that people make self-determined decisions about the outcome here and I don't want them-- and I've had this happen, where I've detected that people are just making poor decisions, right?

It came to a point in one mediation where they were like making math errors, right? Arithmetic errors and you're like, oh, you know clearly, we've been going a long time, and they need a break, And so you watch out for them and you develop that kind of relationship You could just do it in different ways because clearly you're not going to reach through the screen and have an actual handshake.

Peter Biging: So, let me shift over to setting [00:25:00] protocols.

Mark, I think we've talked in the past about how you try to just start with letting people know what you need in the mediation statements and if they're not going to, if they're going to exchange, whether they should exchange, if they're not going to exchange what you need in the mediation statements, if they're not going to exchange.

Can you talk a little bit get us started talking about setting protocols and the method that goes into your thinking in setting these protocols?

Mark Bunim: In the usual mediation statement, I ask for a mediation statement. I do ask the parties to tell me if they want to exchange or not exchange.

It's really up to them. I want them to in the mediation statement, outline the facts as they apply to their client, discuss the legal issues if there are legal issues, if there are legal issues and there are cases that they're relying on, I want copies of the cases, I want their analysis of the situation as it exists in terms of where the case is [00:26:00] and what, where they're going with the case, and see if there are any areas of agreement that they can put in the mediation statement. Let's say that's the exchanged mediation statement.

If they're going to exchange, I ask them for a statement in confidence. If they're not going to exchange, I take the statement in confidence and put it into the mediation brief which is, I ask both sides to tell me pathways to settlement, their ideas for settlement, anything that they would want to tell me in confidence about how they think a settlement can be achieved.

I also ask them to list the three strongest points in their case and list the three weakest points in their case. Getting counsel to articulate the weakest points in their own case is very helpful. And opens the door to our subsequent pre-mediation discussion on the telephone or on Zoom that we're going to have so we can [00:27:00] explore what they believe are the weaknesses in their case.

And it enables me to embellish that with my perception of what the weaknesses is in their case. I always try to tell counsel that if the case was black and white, we wouldn't be in mediation. Obviously, it's gray. And it's a close call, and it could go either way. And that's why they're here.

So those are the things I try to get out in the pre mediation statement. Now, sometimes they don't want to do a pre mediation statement. I was on a pre mediation call yesterday, and counsel said, "Look, we've both just made summary judgment motions and all the parties, there were a lot of parties, and everyone's moving for summary judgment, and why don't we just send you the motions, and that's all you need to know."

That's acceptable. Sometimes they don't need to submit what's called a pre mediation brief. So, it's a matter of getting material before the mediator so that they learn the facts and opens [00:28:00] the door to the subsequent ex parte phone calls that we're going to have.

Peter Biging: Theo, do you have any additional thoughts on protocols that you set in advance of the actual mediation session?

Theo Cheng: Yeah, sure. I do go over in that initial joint call with counsel, some of the contents, which I then later repeat for them in an email, but I include things like asking them just the same things that Mark asked, but like things like perspectives on interest and concerns, I'd like to know what your underlying concerns and interests are about the dispute.

I'd like to know, for example, the history of the settlement discussions, if you've had any. And any, if you have any reasonable proposals for settlement that you want to share with me. It's also helpful if I, sometimes I tell them, "Hey, if you have any obstacles to settlement, right here, whether it's a personality thing or some sort of business reason or something, maybe you want to clue me into that because these are confidential and ex parte."

Or if there are any must haves, like you have to have something in the settlement at the end of the day, maybe this is the time for you to clue me in on that. I don't [00:29:00] have them create two separate statements, one confidential to me and ex parte and one that's public, although I highly encourage them to share it if they can within the confines of the mediation, confidentiality, and privilege, because if the other side doesn't know where you're coming from, we will spend a lot of time at the mediation, me basically being carrier pigeon, trying to explain to them where they're coming from.

So, I encourage them to do that. And if that means that they have to prepare a redacted version. Yeah, that's fine, too. Just take out the parts that you don't want them to know. But other than that, I think that tool, and I've had a situation like Mark, where they just filed summary judgement motions and they said, we'll just send you the briefs.

And then, of course, I get briefs plus 150 exhibits, and plus the declaration of the statement of undisputed facts, all of which is interesting reading, but that's just legal argument, right? And to me, that's not enough, actually, I want to hear more than that. So, I typically will push back, obviously it's their process.

So, I will push back and say, [00:30:00] listen, I think that's great. I want to have your perspectives on liability and damages, but I also would like to know the other things I noted, because I think that's really what's going to get to a deal, because I'm not going to decide whether somebody's right or wrong on a summary judgment motion, right?

That can give me a lot of the evidence and a lot of the things that are in the record, but we're trying to get to a deal, a business deal at the end of the day, and those legal arguments alone aren't going to get us there.

Peter Biging: I like the idea, before I throw this question as well to Jennifer, I like the idea of the obstacles.

I remember I first encountered that with Mark when I had a mediation with Mark many years ago. He was the first mediator I had who had asked, " What do you see as obstacles to this?" And frankly, at the time, the obstacle I saw was that there was a multi- party case. And one of the parties clearly wanted to be, I guess a passenger, they let everybody else carry the water and then I'll just come in at the end to throw in some sweetener.

And I'm like, from my perspective, they couldn't be a passenger. This was [00:31:00] not going to work. If they were going to just be a passenger, they had to be a full participant in settling this. And so, I identified that as a major obstacle, and I really thought that was a useful tool to really

get past some of the stuff that really would have taken, I think, a lot longer to get to, or maybe wouldn't have gotten to at all if we didn't have that as a focus early on.

I'm interested, though, Mark, in the concept, too, of asking your weakest point. Do you feel you get honesty? It's funny when we'll ask you do interviews with prospective associates, and it's what do you think are your weaknesses? And it's I want to do work too hard.

I'm too ebullient. I'm too nice a guy. You don't really hear a weakness. You hear something couched as a weakness that's really trying to sell a strength. Do you feel like you get honesty from that, or do you have to read between the lines?

Mark Bunim: Sometimes, and most of the time, you don't get honesty in the written statement. You've opened the door in the written statement, so when you have the ex parte [00:32:00] phone call before the mediation and ask them again, "What are the weaknesses?" You can really explore that as a mediator and you can say, "Come on, I see this as a weakness, do you agree?"

And that'll open, that will get them going in terms of a conversation. By and large, yes, they will discuss the weaknesses in the case, and I think that's very helpful. It's more helpful for them than for me, because for them, they are articulating a weakness in their case, and the lawyer is being prodded to let his or her client know that "Hey, we've got weaknesses here.

Don't think this is a slam dunk. This mediation is a process, and at the end of the day, those weaknesses are going to go away because we're going to settle." So, it really opens the door to that.

Peter Biging: Jennifer, what are your thoughts about setting protocols before the actual mediation session?

Jennifer Lupo: I think it's important because it's setting expectations as well. I walk through [00:33:00] the process because oddly enough, even the most sophisticated of attorneys, they've all experienced different types of mediation, right? Each mediator has a different process. So, I need to lay out for them how, the only thing that I own is the process, that's it.

So, I give them an idea of what the process looks like with me. And also explain to them that I am not steadfast. I'm flexible and athletic to the extent that what they need may change on that day and I'm ready to pivot to get them where they need to go. So that's one thing. The other thing is, like Mark, I ask people to really dig deep into where are the flaws.

And when I get back, that, the falls pride to the extent of what you're, how you're the associates make their statements, I utilize that also like Mark and Theo in the confidential first caucus, before we [00:34:00] have an in-person session. And I play Columbo and I'm aging myself at this point in time, but I use a kind of approach of the hapless detective trying to ferret out what the actual limitations are, and I utilize sometimes some humor.

And one of the things I say to folks is, " I've been a mediator for 20 years now. And in 20 years, every time I've done my opening statement, and other folks have been doing their opening statement, I haven't had a party stands up and go, you know what? He's right. And we're out. Okay, here's a check."

There's a little bit more to this, and they see the holes in your case, you see the holes in their case, but it's important for both sides to see the holes in their own cases, and I call it not falling in love with one's position. That's it.

Peter Biging: With regard to those individual caucuses that you just talked about, Jen, I think, Theo, you and I had talked at one point in preparing for this podcast about how far you feel like you can go to try [00:35:00] and start mediating. And I think you had said, you have to gauge when you've started to develop some trust and you got to figure out when that is and those initial calls, it's probably too soon. Can you expand upon that a little bit about the trust building process and how those early calls start that process and how you develop that along the way?

Theo Cheng: Oh, sure. Look, the parties may or may not know each other well, but they're certainly bringing in an outsider who, and I don't have any knowledge of these parties or the lawyers and the dispute in question. So, in order for them to, have trust and confidence in me, I've got to earn that trust, right?

I don't get that. I get a little bit of that because I'm known as the mediator. But, if they haven't worked with me before, if I'm a stranger to them and their dispute, then I need to earn that, and part of doing a lot of that pre-mediation reconnaissance, and if I didn't mention it before, I apologize, Peter, but [00:36:00] part of doing all that work is also to build up my confidence and trust in them, right?

So that they know that they're working with someone who's going to actually pay attention. Who's going to ask the right questions, who's analyzing this issue and really trying to understand what the dispute is about from each side's perspective, right? For example, in those ex parte calls, I'm not trying to mediate in those calls.

I'm not trying to make them feel bad about their case. I'm not trying to poke holes in their case or anything like that. All I'm trying to do is clarify my understanding of where are you coming from? What are your needs? What are your concerns? So that I'm better prepared then to see if I can help broker, and I really use that term meaningfully, but I'm an honest broker to try and see if I can find a solution for you, help you come up with a solution that's going to meet, as best as possible, the individual interests and concerns of all the parties involved.

But I can't do that unless you [00:37:00] have trust and confidence in me. And yes. All of that work, that pre mediation reconnaissance work, ultimately has to do with that, because by demonstrating to them that I'm listening, that I'm clarifying my understanding, that I'm there for you, I'm demonstrating also that I'm going to be impartial, that I'm really just trying to be everyone's best agent in the room to try and bring about a resolution.

So, I think it's critical what we do. And I think you do that at every stage of the process, not only in those pre mediation calls, but also when I do my opening remarks at the very beginning of a mediation. Reiterating again, when I do those individual caucuses for them and reminding them that, "Listen, Be open, tell me, what's on your mind and please be assured that what you tell me is told in confidence and I won't repeat it to the other side unless you give me permission to."

They're not going to believe that statement unless they actually have confidence and trust in me.

Mark Bunim: I agree with Theo a hundred percent. [00:38:00] But I do Try to conceptually start the mediation process, and I use that word very broadly, at the beginning.

By the process, concepts of mediation that apply to every case. They're coming to us as gurus to try to help them settle a case. They're putting their trust in us because they've heard good things about us, with people who've never used us before. They're sending us money in advance, so they're financially involved in a relationship with us, and I start the process to let them know that what they're about to do has an end goal.

It's a settlement. It's a resolution. It's putting a case to bed. So right away, I tell them, "If you're interested in pontificating and making a point and proving you're right, this is not for you. This is about making a deal. You're coming to mediation to make a deal." And I stress that [00:39:00] in the pre mediation conferences, I stress it in my opening statement. I show them slides, one of which is you go to court to make a point, you come to mediation to make a deal and throughout the day it's all about a deal and I have to, I want to drum it into the heads of the attorneys and the clients, that this is about making a deal, and that They're going to have to be flexible.

They have positions, but mediation is a process which demands flexibility.

Theo Cheng: I think there are some cases in which it's not always about getting to a deal. There are some mediations in which the parties are actually using mediation as a way to suss out whether or not there actually is a deal possible at all.

And in fact, reaching an impasse actually is the goal. And I've been in many of those mediations. I wouldn't say that the vast majority of my cases are like that. But there are some cases in which the parties are really coming to mediation, not just to check the box, but to see whether or not the time is [00:40:00] right now to reach a deal.

And so, reaching an impasse is actually an objective or goal that I try and suss out with the parties during those pre-mediation calls as well.

Mark Bunim: Let me ask you a question. What do you do where in the first call the parties or the party that retained you, you're going to say, "Tell me about this mediation, what your goals are."

And they say, " We're in litigation. We're before Judge So and So, and the judge said, ‘before we go to trial, we have to go to mediation. We're coming to you.’" Immediately, they're putting up a

barrier. They're saying, "Yeah, we're not that 100 percent into this. We're being required to do it. We have to check a box for the court.

We really want to go to trial. At least that's what I'm hearing. And we want to go through this process. We understand it's going to cost us money, but so what? And we, we want to overcome that hurdle. And so, we can go to court and say to the judge, okay, we did it, it didn't work, let's go." So how do you approach that and say "No, this isn't what it's about.

You're here and we've got to make [00:41:00] a 100 percent effort. You've got to really dig in and try to use this process to reach a resolution."

Theo Cheng: I actually tell them slightly differently. It's similar to what you just said, but slightly differently. I just say to them, "This is an opportunity for you to explore a possibility of a resolution, right?

It may not happen, but this process is a very different process than what you're doing in the litigation forum. And I'm an expert in this process. I'm the guardian of this process. I can help structure a process for you in which you can actually explore these things. You may be surprised at what you learn.

You may be surprised at what kinds of conversations can develop out of mediation." So, I try and encourage them to keep an open mind about it, even if they've come to me, Mark, already with this preconceived notion that all they want to do is simply check the box and go to the next step. Because a lot of strange things have happened in mediation that I've never, ever expected would happen because of the conversations we've had.

And I think that's because when you get a [00:42:00] third party involved to facilitate a discussion, it just changes the whole dynamics of the entire thing. And one of the things that, Mark, we offer is that agent of reality. That's someone who's has no stake whatsoever in this dispute coming to you and telling you, here's what I see.

So, you're not getting that reactive devaluation that you get because you heard it from the other side immediately. That's what I try to do.

Peter Biging: I agree. Jennifer, Jen, I saw you nodding vigorously when Theo started talking about sometimes you get, he sees people not coming with the sense that they want to get a deal.

They're trying to figure out even if a deal is even possible. Have you encountered that, and how do you try to deal with that?

Jennifer Lupo: Sure. I've encountered that and I've also encountered the straight, "Judge so and so told us to go to mediation. We're coming to you." Which is not even a trying to suss out if the case is ripe for settlement, it's a check the box.

Part [00:43:00] of my first call is I asked them why mediation? I do. I ask people, "So, you've called me to mediate and tell me what you intend to get out of this process?" And so, I can gauge where their mind is in terms of what mediation is, what the process is, how much work I'm going to have to do to educate. Sometimes how much work I'm going to have to do to repair.

And how to manage this person's or these people in terms of their conceptions or misconceptions about their own case, about their opposing party's case and about the process itself. In regard of folks that come in and they're looking to utilize the process to test whether or not their case is ready, that's their process, right?

If they've come, if they want to spend what they're spending on my fee to come to a process, to suss out [00:44:00] whether or not the case is ready to settle, and it doesn't settle, I don't take any offense. I don't feel like I've been used. I feel like I have provided them with the service that they engaged me to provide.

So, I take a little bit of a different approach than Mark does. I do speak to settlement. But that looks different to each person, right? What a settlement looks like. Yes, it is oftentimes financial and insurance and commercial and business to business. Though I have seen odd things come out in mediation rooms and into settlement agreements that I would like.

Okay. Not, not something that I would ask for, but okay. So that's my long, short answer.

Peter Biging: So, let's get, actually get to the actual mediation session. I'm a big fan of motivational phrases. I love some of John Wooden's phrases, "Failing to prepare is preparing to fail." Things like that.

And I noted at Mark's sessions, he talked [00:45:00] earlier about, coming in with slides, and even like low tech, you'll have like handwritten slides, and I remember one of the phrases, I know that you used a number of them one of them was "movement breeds movement," and I adopted that as a phrase. I know that at mediations I've had there was a recent mediation where we were talking about how to grease the skids a little bit.

And that, that phrase came to mind. And I said to my clients, "Why don't we make a move? We can always start to put the brakes on it, but let's make a move and try to get the wheels moving." And so, we made a bigger move than I think they expected. And it got things moving.

And we coupled that with the phrase that "we're doing this to get the process going to get the wheels unstuck, but don't misunderstand what this is all about." And it was taken the right way, and it was understood and we were able to get the wheels moving without feeling like we lost control of the train.

Mark, can you talk a little bit about some of the things you do at the initial joint [00:46:00] session? Because it's funny, I know that some of them can be terrific. And when I've had those with you, I think some of them can be very perfunctory.

It's just like, all right, we're all going to break now. And, what is it that, that you tried to do at the initial joint session to really set the stage, and can you talk about some of the things that you mentioned like I said, "movement breeds movement," and I think you said was it, "we're not here to litigate, we're not here to argue a point, we're here to make a deal," things like that.

Mark Bunim: Yeah, so at the initial joint session, one, the most important thing is to develop, as Theo said before, and Jen said before, the confidence and trust of the parties. The attorneys hopefully from the pre mediation ex parte conference have trust in you, but their clients don't. The important thing is to somehow convey to the clients that you're there to help them, that you are truly neutral.

But as Theo said before, that you're an agent of reality. And I tell them [00:47:00] that. I am an agent of reality. I am going to say things to you when we break into caucus that will make you think that I believe the other side is right. That's not the case. I don't believe the other side is right. I don't believe either side is right.

But it is my obligation as a mediator to bring reality to the table. And hopefully they will appreciate that. I also go through various points with them. I tell them what my role is in this process. I talk about how the day is going to work. I tell them that I'm a mediator, not a magician.

Sometimes I tell them, depending on the situation, that the role of a mediator is a tour guide. You tell me what you want to see when you go on tour. You tell me the sites and I'm going to take you there and I'm going to show you the sites and explain the sites, but I'm just the tour guide or I'm the conductor of the orchestra.

You play the instruments. I just conduct the music. If it sounds good, it's because [00:48:00] you've done a good job playing the instruments. So, I'm trying to empower the parties that this is their process. They call the shots. I will lead it in the right direction. And then, I go through the slides as you said, Peter I do have a bunch of slides depending on if the parties are going to speak or not.

I talk about mediation is about tomorrow, not about yesterday. I try to get them to think that this whole process is to put the matter to bed. That tomorrow is going to come and they're going to wake up and look in the mirror and say, "Wow, I settled that case. I don't have to worry about this anymore.

I don't have to pay my lawyers anymore. It's over." So that's one of the themes I try to stress. I tell them this is the main course. Sometimes parties will hold back. They'll say, "I'm not going to say that because I'll use it at trial." No. This is the main course. Everything's coming out on the table today.

Flexibility, very important. Mediation is about needs, not about [00:49:00] wants. As you said, movement breeds movement. And then finally, you go to court to make a point, you come to mediation to make a deal. Most of my cases the parties are not in mediation to explore. They involve insurance companies.

I know that insurance companies, that's what I do, mostly insurance related mediations. The insurance companies want to close the book on this. They want to reach a resolution. Pay what needs to be paid, whatever else has to be done, close the book, write a report and say, I've settled this case.

And I understand that. And so that's the goal here. And when there's multiple insurers involved it's a little more complex. So that's the object of the opening session. Then we talk about whether the parties are going to speak or not. I encourage, in insurance cases, I encourage the claimant or the plaintiff to speak.

I think it's very important. Their job is to sell their case to the insurance company and to the insurance [00:50:00] company's lawyers. Or maybe sometimes the plaintiffs or the plaintiff's lawyer makes a speech. Frequently, I have the lawyers make a PowerPoint presentation. They choose to do it, but I encourage that.

Their job, they want money from the insurance company. That's why they're there. They want a check. And to get that check, they have to sell their case. The insurance company doesn't want to write a check but wants to write a small check. They have a job to do. Frequently the insurance companies or the defendants don't speak in the opening session.

Sometimes they'll say a few words but that's not required. What is required in those kinds of cases is for the plaintiff to make a presentation to sell their case.

Peter Biging: So, let me shift that the conversation over to opening statements. I know that when I was first starting out, opening statements were common.

And they were fraught with peril. I liked the idea of opening statements generally because it's the only time that I [00:51:00] will get a chance to speak directly to the adversary without my comments being filtered through the lens of the lawyer. So, it gives me an opportunity to bring out that we're there in good faith, we are trying to make a deal to show empathy, especially in employment cases.

I think it's very important. I think you've mentioned this too, people can get very emotional about just cases where it's just money and it's just business issues. But there are cases where people can get very emotionally caught up in it.

And I think it's important in making your adversarial case to show that you recognize, and you understand that there's emotion involved in that, and that they really deeply feel about this and that you understand that you want to honor that and respect that while respectfully disagreeing. That said, I know that I've had opening statements where I'll had said all that, and then my client just has to throw something else in that just sticks a pin in the [00:52:00] balloon that I just blew up.

And there's dangers in that. I've noticed that more recently, the tendency of mediators has been to just not even try to fight it. " I assume nobody wants opening statements, or I don't want opening statements, or whatever."

Or at least I've run into that with some mediations. And I respectfully disagree with that. So, I know that it can be good, and it can be bad. It can really set people off on the wrong foot right at the outset if it goes bad. I can understand why sometimes mediators are very concerned about going ahead with opening statements.

So, let me start the, this discussion this aspect of the discussion with Jen, what are your thoughts on opening statements, people speaking at the outset rather than just going straight into private caucuses?

Jennifer Lupo: I think it's imperative. It is the to your point, Peter, it is the one time that everyone is in one place.

It can hear from the actual either litigant or litigants counsel, [00:53:00] how they're framing the issues that brought this dispute to that room. And I think it is a lost opportunity when counsel or parties take the position that we're going to caucus only. This is not to say that every case needs to be in a joint session.

There is absolutely, there are plenty of cases that need to only be in caucus and folks don't need to ever see each other. We all know what those cases are, and they're not necessarily in one area of law. They just have to do with that perfect storm of either personalities or subject matter, etc. Those cases are caucus only. But to have the opportunity to be together, to hear how your opposing party is framing the issue, to hear how the mediator is framing the issues as well. To have an opportunity to make that statement, "We're here in good [00:54:00] faith." Those are important things to set up for a productive mediation. And it is disheartening to have attorneys state a call and say, "Yeah, we just want to do a caucus." I'm like, "For that, why don't you just have us if it's a case that's in litigation, we'll just go have a settlement conference with the law secretary, the magistrate judge, right?"

Because that's what you're really asking for. Or you're going to be over reliant upon me and my view in terms of what the other side's position is, the other side's evidence is, the other side's what have you, rather than utilizing that time to hear directly from the horse's mouth. Now, with that said, back to the things can go woefully awry and off the rails, that requires, it isn't necessarily a game day decision, but it is a decision to be made post mediation brief where, I'm having my [00:55:00] confidential conversations with counsel.

That's part of what I'm discussing with them and making the case for why it is important for all of the listeners to hear what you have to say. But you have to say it in a way that the listener can hear so telling somebody they're stupid or their position is stupid, or you know it's like basically telling someone that their baby is ugly.

They're going to turn off and they're not going to listen to you. So, you have to be mindful of your the your use of words. What words are you using? How do you phrase things? Things like that. I also utilize the term from the very beginning these two terms that I utilize when I speak to counsel.

One is I refer to counsel as counselors. You are counselors. You are not advocates, right? There is no advocacy in mediation, there's counseling. Because the advocacy is in arbitration or in litigation, right? You are advocating a position. Here, you might, you know, we [00:56:00] see what your position is. We understand what your position is. Now we're going to move on from that and we're going to figure out what are the interests that need to be met and how are we going to get those interests met?

That's it. That's what this process is. So, I'm constantly referring to them as counselors. And the second thing is I tell them from the very beginning that they need to really think about the effect of language on the listener. And that includes their own client. Be mindful of the way that you say things.

And then after a while, and I will stop someone in the middle of an opening statement that goes off and I tell them, "There's no judge. Do you see a jury here? I'm not wearing a robe. So, if you don't need to advocate and in your opening statement, you need to, this is, let's be a little bit more congenial and just have a conversation. We recognize we're not going to agree."

And I make that comment that I made earlier, which is in the history of mediation. " I've never had a party at the [00:57:00] conclusion of an opening of opening statements that, you know what, you're right. Let me get my checkbook out." So, we understand that we may not necessarily agree, but we will hear something that we may not know.

And that may be very valuable to us.

Peter Biging: Let me toss that to Theo as well. So, what are your thoughts on opening statements? And I guess weighing the pros and the cons, the dangers versus the benefits, and how you manage them when you go ahead with opening statements?

Theo Cheng: I don't have a whole lot to say more than what Jen said, I think that she encapsulated really the theory of what mediators operate under when they're trying to manage that part of the process.

I will say that I totally agree that language matters here, and so I have that conversation about the opening of the joint session during that joint call with the attorneys, the very first logistics housekeeping call, and I actually don't ever use the term opening statement at all. I actually use the term opening remarks because I eschew any kind of [00:58:00] language that harkens back to the litigation process.

Because if you do that, you're just getting these folks back into their normal routine. So, for example, just another example is like when we're talking about exchanging information before the mediation session, I don't call that discovery or even informal discovery. I call it informal exchange of information or documents.

Because I think if you start calling it discovery, then people start thinking about it in a different way. So, I'm trying to talk to them during that joint call about setting a collaborative tone, thinking about what impact the words that you use will have on the listener, right? And whether or not

this can be an opportunity, as Jen said, for you to address not just the attorney on the other side, because I presume the attorneys are talking to each other, but more importantly, the client on the other side who may or may not be getting, as you noted, Peter, an unfiltered version of what you're trying to [00:59:00] say, because obviously you're only saying it probably to the other side's attorney, at least up until now.

So, for all those reasons I think, opening remarks are terribly important. I think it is a lost opportunity when they don't want to do it. But I also recognize that I can push, I can conjole, but this is their process. So, if they have decided that they don't want to do them at the very least, I will make them sit through my, what I call, welcoming remarks.

So, I will take the time to explain what this process is. I will try and explain to them that this is meant to be a collaborative, not competitive process or adversarial process. And I want to assure the parties that there's confidentiality, so that they will feel free to speak, at least to me, not to each other.

And then also that they are empowered to make decisions on a self-determinative basis to control their outcome at the end of the day. So, if I can accomplish that in my welcoming remarks, then at least that's a plus. But if I can't get them to do opening remarks the way I want to [01:00:00] do it, then, maybe it's better off they don't do it at all. But like Jen, if things do go off the rails I'm not shy to try and step in or, if I don't step in because I don't like to interrupt people often when they're speaking, I may go to the party who was a little bit more aggressive in the opening and go up to them and say, "Look, you think that was effective?

What do you think that did to the other side? Think about that as we talk going forward, right?" Or I may have to do some damage control in the other room, they'll probably, the first thing they're going to say to me is, "Wow, that was really terrible, we really disliked what that person said in that room." And then I'm going to have to calm them down, and I'm going to spend a lot of time dealing with their emotional reaction to something that was said, but we as mediators are well trained on the emotional side, too.

We know that emotions exist in every kind of dispute regardless of whether it's just about money, there's always some level of emotion. And so, we need to be ready to deal with that, to de-escalate that, to get them [01:01:00] focused on trying to reach a deal if that is in fact the objective of the day.

Peter Biging: Let me ask you a couple of questions now with regard to, we've moved past the opening session where you've been caucusing are there points where you decide that, hey, momentum seems to be flagging? And what do you do? Are there tactics that you utilize to, to try to address when you see momentum flagging and or including the possibility of bringing people back together again and when do you decide to do things like that?

So let me start with Mark on that question.

Mark Bunim: Certainly not in the first or second caucus or round of caucuses, do I get to that point, but sometimes momentum does flag does dissipate and it's our job to get it moving again.

If it's a money case, obviously we have the brackets tool and we, I would ask the parties, do you want to try [01:02:00] brackets to get this moving and we could have a discussion about brackets and whether they work or not, but it does get the discussion moving.

If it's not a money case, it would depend upon the circumstances, but sometimes I may bring the attorneys together, at least to start, without the clients, and tell them that there seems to be an impasse, not in terms of resolution, but in terms of discussion, and ask them for ideas on what seems to be the problem, why it's holding it up, how can we get this going again. But most of the cases I deal with are money cases. In other words, they're going to get resolved by somebody paying somebody money. And brackets are a tool. There's also what I call the time cost analysis where I give them homework and I tell them to take out a piece of paper that's blank, make columns.

First column is every single thing that has to happen in the case from today [01:03:00] until a jury comes back. List them 1, 2, 3, 4, 5, every single item, every motion, every deposition. And the second column is how long it's going to take you to accomplish each of those tasks from today going forward and the third column would be approximately how much you think you're going to spend, including expert fees, attorney's fees, court reporter fees on that particular task.

And if people are diligent and do it properly. It really moves the ball along because once people see it in paper in their own handwriting, how long it's going to take and how much it's going to cost them and build in delays in the court system, et cetera.

It's going to move it along and they'll be more diligent in terms of discussing settlement.

Peter Biging: How do you make the determination as to when to bring parties together? It's funny. I had a case where it looked like we were very far apart, and the mediator was like it's going to work, it's going to work. And I was, [01:04:00] he had a lot of success with other people. And his magic was failing to work its spell on me. I couldn't understand why he kept saying we're going to get there; we're going to get there. And then it seemed like at just the right moment, he brought us together and we had a breakthrough.

How do you address things like flagging momentum or ways to juice things up, when to bring the parties together. I guess a lot of it is just art. What goes into your thinking about when I need to do something to try and shake things up and get the momentum started again and, or bring the parties together, Theo?

Theo Cheng: Yeah sure. Look, when you started this line of questions with momentum flagging, like Mark, I interpreted that as the parties be at or approaching impasse. And this is where mediators earn their keep, right? We are trained in various, numerous impasse breaking techniques.

And I do many of the things that Mark just talked about, but essentially what I'm trying to do is, take [01:05:00] stock, for example, in how the parties got to this point, be the cheerleader for the mediation process, and help them understand that, "Hey, we started off the day at, this much apart, now look how much progress we've made." Or I tell a story that's inspiring or encouraging

them, because most likely I've had a similar thing happen in another case, and I try and tell them, "Hey, we got past this too." Or I direct the conversation elsewhere.

Maybe people are just tired of talking about proposals, right? So, I direct the conversation elsewhere talking about different types of things that could be part of the proposal but no one's proposing it. It's the travel in strategy, right? We throw up something and say, "What do you think about that?" Right?

Or I get people to switch around seats and like maybe if there's a legal issue people are getting bogged down about, maybe we'll just leave the parties alone and have the counsel just talk to me about it, right? Maybe we can get past that somehow, but I try a number of different things.

It really depends a lot. It is an art form, Peter. It depends a lot on the dynamics. It depends on the personalities of the people in the room. I think, a lot of [01:06:00] it is just judgment call on the part of the mediator, right? It's a judgment call as to when to break up in caucus and when to bring them back together.

In a roundabout way, I'm just saying that it's too circumstantial for me to give you strict lines, but I think we try a number of different things to mix it up, essentially. The biggest thing I do, honestly, Peter, is take a break, because sometimes people just need to just take a break, whether it's just walking around the block, walking around the floor, sometimes it's overnight, right?

They just need to break away from this very intense environment. This is a very unusual, particularly for clients and client reps, very unusual environment for them. This is not the normal thing that they do. Litigators also, they're more used to being in the courtroom than they are being in a mediation conference room with me.

So maybe they just need a break to get some perspective and come back renewed, right? Or when you take that break, maybe we break bread together, right? Don't talk about the case. Don't talk about the disputes. Just have a meal together. Or have coffee together, where we talk about, I don't know, what's going on with the American [01:07:00] League Championship Series, or how the Mets doing, or, whatever.

Just something else to get them off their mind and then they can perhaps have some renewed energy to think about all the things that the mediator has been talking to them about throughout the day. Sometimes it just takes some time for that to sink in. Like a lot of stuff that Mark talked about, the time cost stuff, that exercise is excellent.

But hopefully you've done that too throughout the day and talked about some of that stuff. And maybe some of that stuff will actually sink in as a little bit more time elapses.

Peter Biging: Let me throw out another topic and anybody feel free to jump in a couple of quicker ones like unethical behavior-- have you encountered it?

And how do you deal with it? And then the other one that concerns me sometimes is brinkmanship, you know that the threats to walk out the door. So, either topic anyone can jump in and take that first.

Jennifer Lupo: I'll take the unethical behavior. And I'll use an anecdote. A few years ago, during the height of that thing that we don't want to talk [01:08:00] about, we were on Zoom, and I had it was a large class employment and it was a private mediation, which was unusual at the time that it was happening. This is in the summer of '20. And I had multiple interpreters of different languages, which I started. This is employment case, so I was thinking to myself, this might right here be an issue that the employer and the employees spoke 2 different languages.

It wasn't even 2 different dialects; it was 2 completely different languages. And councils there, it's 2 partners, 2 associates the multiple that's probably, the class representative and 4 others. And then the employer, it was 2 persons from the employer and the interpreters. And, in the opening, they had agreed to do opening statements, and during the opening statement, when the claimants counsel began, it started out, [01:09:00] everything was well, and then all of a sudden, information about other matters that the lawyers had together started to leach into the statement, and the lawyer became very dark, and very rude and nasty toward opposing counsel and I muted everyone and didn't quite know what was going on.

Now, I deem that to be unethical behavior because where it was going. I took the 2 attorneys into a private breakout room to caucus, and I asked, I'm like, "Okay, what gives? What was that? And what gives?" And the response was, "We've had in the last 2 years, 7 cases together and I was looking at the settlement statistics between myself and Mr. So and So." And I was like, "is it the whole firm, is it just Mr. So and So?" And it was, "oh no, just Mr. So and So, and I [01:10:00] noticed that he's always nickel and diming me. He's not going to nickel and dime me like he nickel and dimed me in those other cases that I mentioned". And I was like, "let's start with the premise that you should not be discussing confidential settlement negotiations on a matter that is not before me, and in front of these other participants who are not your client. That's one. Second, this is not the right form for that behavior, and I will not tolerate it. And your client seems to be extremely confused regarding what happened. So now we're going to have to go talk to your client."

So off we go. I caucused with each side. So, partner, associate, client, interpreter. And how that whole thing wrapped up once the clients were made aware, because I said, "You have to tell your clients what happened here." A made aware what the clients had decided [01:11:00] on both sides was that they were going to continue with the mediation, but they were going to continue with the associates.

And they'd asked the partners, both partners, to leave the mediation because they felt that the partners could not be effective. And ultimately, these two barely mid-level associates that were not really prepared to mediate this case, did a bang-up job mediating the case because when the opportunity knocked, they said yes.

So, it was great for them. It was great for a learning process also for them. It was very good for the clients to see someone, because I disclosed that I am an attorney mediator, right? I tell them that I am part of the profession to see somebody that is part of the profession not tolerate bad behavior from a colleague.

And also, it gave, what the party said at the end when we did achieve a settlement was, " You made us feel like you understood [01:12:00] that we weren't being properly taken care of and that you wouldn't allow that." And whether or not that was the case, I don't know if the lawyers were going to be able to properly attend to their client's needs.

I just knew that their own conflict was going to bear so heavily on that mediation that it could not be a part of it.

Peter Biging: The thing where it comes up with that I've encountered, is where somebody will say something like, "If this gets out, they may face some threats of criminal prosecution" or "God forbid that word of this gets to the appellate division or somebody, some grievance committee and this comes out." And that really chafes me because that's ethics 101. You're not supposed to be talking about threats of criminal prosecution or other types of things to try to leverage a settlement. Have you encountered things like that? And again, I throw this out to anybody, and how do you address that?

Jennifer Lupo: Can I add 1 other thing? For those of us who do employment [01:13:00] the issue of whether or not somebody's immigration status being utilized as leverage to extract a nominal settlement, to protect an employer's bad acts.

So that's another issue that you see in the mediation room when you do employment work. I'm going to leave it to my colleagues to start off since you just heard from me, but I would like to throw that out there as well.

Theo Cheng: I think when the issue arises, I'm just like, if I spot it. I'll immediately be the first to say, "Hey, there is an ethical rule on this for us attorneys."

And so, I would caution them about using that during the mediation. Because one thing if the other side recognizes it too like in, in particular, like in the employment case, like in a wage and hour situation, it may be that the employer is actually a little behind in their tax filings, for example. Or haven't been properly paying taxes, and so therefore, this is not a case that they really want publicly being litigated in the courts, and they need to reach a [01:14:00] settlement. It's not really for the claimant to raise that issue. It may be something for me to chat with the employer about.

Because that's the reason why they want to settle today, but it's definitely not something that you want the claimant or the plaintiff to be using as leverage in the settlement discussions, and I have cautioned counsel about doing that. If I get counsel who don't really understand the issue or who fight me, that has never happened up to now.

I'm also an attorney. So, the problem is that under 8.4, that's misconduct under the ethical rules, but under 8.3, I'm actually under an ethical obligation to report that. So, I don't want to be in the position of having to report the attorney to the disciplinary authorities because he didn't listen to me on the specific disciplinary rules that I just talked about. But I've never had to go there. The bigger question I think I face, and maybe Jen you've seen this too, is the dichotomy between the contingency lawyer, who's looking out for his or her fees, right? As opposed [01:15:00] to working out for the interests of his or her client and that can be a little bit dicey, right?

I get it, but I got to be stern about that and lecture the attorney a little bit and say, "Look, we're here for your client, right? You need to get paid too. I get that. But this is about your client and what your client's willing to accept as a settlement. This is not about what you're going to make out of the case." I can only do so much in that situation because I don't want to get really in the middle of the attorney and the client, right?

Mark Bunim: I had a case where a plaintiff came to me and said, "Can I meet with you separately from counsel?"

And I looked at the counsel and the counsel said, "Yeah, go ahead. I don't care." And then the plaintiff said to me, "Look, this attorneys on a contingency. The settlement that's on the table is something I would accept, but you've got to get the attorney to lower their percentage on the contingency."

And I said, "That's between you and your attorney. I just can't get involved in that at all." So, it [01:16:00] does come up. It's a problem from time, not regularly, not a lot. I've seen it less than a handful of times in 20 years of doing this, but it does come up.

Peter Biging: We've been going a very long time, and I appreciate your patience with me and all these questions. This has been a really terrific discussion. Let me just, I actually wanted to go into coverage issues, but that would take another half an hour on this. And I don't think if we have some listeners still sticking with us, hopefully they're not driving and they're not nodding off.

Let's leave that for hopefully maybe another discussion. Now, let me just ask you quickly on closing the deal, just making sure, what is that phrase, "Many a slip between the cup and the lip?" I've had situations where, not often, but where it seems like we've got a deal and then suddenly something comes up, not typically.

Theo, I think you and I have had discussions. What are you doing along the process? I think you said from your first question, which was what are must haves? What are you doing throughout the process to make sure that when we have a [01:17:00] deal, we really have a deal and there's no details that are going to trip things up?

How do you get yourself to the end where you've got a deal that can be put down on paper?

Theo Cheng: Absolutely. Look, I think at the end of the day, if the parties are going to try and reach a deal, you want a deal that's durable. I'm already asking at the early stages, priming the

pump a little bit for both parties and saying to them, "Look, we can talk about money if that's what you want to talk about now, but if there are other provisions that you need to have in that deal, you better start surfacing them soon.

It doesn't have to be on this round, but pretty soon so that we have them all out on the table." What you don't want is like you reach agreement on say three or four terms and all of a sudden five or six others show up out of nowhere, right? Or you think you reached a deal at the mediation and then they go off and start papering and then seven or eight other terms come up, right?

I'm already ferreting that out with the parties and making sure that they're surfacing earlier in the day so that people can take them into consideration. Now, some of them could be " boilerplate", which, it may [01:18:00] not really be boilerplate, but I think it's important to just surface them and make sure you get the other side's agreement to them or make sure the other side at least is considering them.

And then at the end of the day, of course, Peter, if you reach a deal, I'm totally finding ways to confirm it in a rock solid manner, whether it's through some sort of memorialization, audio, video, or writing, or some sort of as you noted before, handshake, if you're doing it in person, some way in which people are actually saying to themselves, this is the deal, right?

And then, yeah, there may be some nibbling, what we call nibbling on the sides, right? But there should be on pretty minor things, not on major material deal terms. Oftentimes parties will get into either an MOU or a term sheet that actually says that it's legally binding, even if they don't reach a long form settlement agreement.

Maybe you get that far, maybe you don't, but if you at least have it in writing people have some frame of reference that this is the deal you got to.

Mark Bunim: I push super hard and so many states require a writing to confirm a deal, whether it be, as [01:19:00] Theo said, an MOU, Memorandum of Understanding, a term sheet, or an actual settlement agreement.

Some insurance companies come with a set settlement agreement. I know Peter, the listeners this to this podcast, many of them are professionals because it's professional liability, and they always want confidentiality. Confidentiality is a nice broad term, but how it's defined and how it's specified in the agreement is sometimes a very negotiated issue, and fact and that has to be hammered out pretty carefully.

Jennifer Lupo: To your point, Mark, particularly when you're dealing with public companies, and SEC filings. So, one of the things that I do real quick is part of my, I'll give a little bit of my magic away, is I start, very early on discussing the form of a resolution.

And I'll use language such as when we resolve in my [01:20:00] early conversations with counsel, I said, so when we resolve, money is one issue, but what are the other things to what my other colleagues have said here? Is there a particular form? " One thing that'd be great is if

the two of you would get together and start at least working out the boilerplate for an MOU so that we have a document ready at the ready when we achieve a resolution."

Jennifer Lupo: That's one thing and that's really, to start getting folks to start thinking collaboratively about resolving the case. And if we start with the more simple terms, it should be easier, at least in my view, they should be more prepared to resolve the bigger issues.

Peter Biging: All right. This looks like a good place to wrap this up. I want to thank Mark, Jennifer, and Theo for terrific discussion and giving us all a chance to peek under the hood a little bit. To see what you do and how you do it. Giving some of the magic away, [01:21:00] as Jennifer stated, which was my goal.

I know that getting folks to the finish line and the mediation can often be a serious challenge and good fortune can often play a part. But the famous Dodgers general manager, Branch Rickey, once said, "Luck is the residue of design." And I think the tips you've shared here will all help us find some good fortune with our mediations going forward.

I hope like me, those of you who have listened to this podcast feel you've learned something about both why and how mediations either work or don't work on both the mechanics, the science, and the art that go into a successful mediation. Thank you again to my wonderful guests, Mark Bunim, Jennifer Lupo, and Theo Cheng.

Until the next time, this is Peter Biging taking you to The Precipice.

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