**Mediation, Negotiation, and Settlement CLE, Faculty of Federal Advocates**

**June 20, 2019**

**Panel:**

**Magistrate Judge Michael Hagerty**

United States District Court for the District of Colorado

**Professor Carol “C.J.” Larkin**

University of Denver Sturm College of Law

**James M. Lyons**

Partner, Lewis Roca Rothgerber Christie LLP, Denver, Colorado

**Moderator:**

**Andrew Lillie**

Partner, Hogan Lovells US LLP, Denver, Colorado

***Some Issues for Consideration***

**A. Mediation Case Selection**

1. What kinds of lawsuits generally are the most suitable for mediation?
2. What types of conflicts lend themselves most easily to settlement? Which ones make settlement difficult?
3. Are there reasons to avoid settlement? Do mediators have any role in telling parties and their lawyers to continue litigating for those reasons?
4. Why are fewer and fewer cases going to trial?
5. What are the typical pros and cons of mediation all clients should know?

**B. Mediator Styles and Process Preferences**

1. What qualifications or certifications do mediators need to have? Are there specific skills, traits, or substantive practice areas that are necessary, or even simply beneficial?
2. Do you, the mediator, have an identified “style” of mediation? Evaluative, Facilitative, Transformative, etc.?
3. What are your personal guidelines, or a “map,” or checklist that you follow when you are the mediator?
4. Under what circumstances do you offer a “mediator’s proposal” or your opinion on the appropriate settlement amount?
5. How do you know when to advocate for a position, as opposed to simply suggesting lenses through which to view the facts and the law?
6. When do you suggest a common/joint session at the beginning of mediation, where both sides can express their positions to each other? When do you think that is a useful tool, and when is it not? What do you hope to accomplish? Are there times when you bring the parties together mid-mediation? What about just the lawyers? Or only the clients and you?
7. How do you assert your authority as a mediator without actually having formal authority over the parties (especially when what you say and do and suggest is not binding)?

**C. Psychology of Mediation**

1. What are the most powerful ways that human psychology plays into your work as a mediator?
2. When and how do attitudes affect mediation outcomes and your job?
3. Of the players in the mediation (lawyers, parties, experts, 3rd parties not present), whose mindsets typically matter most? Examples?

**D. Mediation Advocacy Skills and Preparation**

1. What characteristics make a lawyer a skilled or talented advocate during mediation and settlement negotiations?
2. Give us some tips about how we as attorneys can best prepare our clients for mediation.
3. There’s a popular book about negotiation techniques called “Getting to Yes.” When you’re mediating a case—what is your “Yes”?

**E. Ethical Issues for Mediators and Advocates**

1. What are some of the ethical responsibilities that meditators have?
2. What ethical issues do advocates experience in mediation (as negotiators, as legal minds versus business people, etc.)?
3. What, if any, ethical duties do the advocates have toward the mediator?
4. Can you give examples of times when something about an attorney’s representation of their client in mediation made you uncomfortable?

**F. Mediation Briefs**

1. What should the parties provide to you before the mediation? What helps you and what doesn’t?
2. Prior to the mediation, do you have the parties exchange written briefs with each other? Under what circumstances? Why do you/don’t you find this useful?
3. How much is mediation about the law at issue, as opposed to the facts, business motivators, psychology, etc.? And how do you tease out what is most important?

**G. Settlement Tools and Barriers**

1. What are some examples of the most important moments in a mediation—the ones that tend to be pivotal, tipping-point moments?
2. What truths can you share with us about what makes settlement discussions successful?
3. How do you deal with intractable positions, or stubborn participants?
4. Is there always a “right” settlement amount?
5. Is there any kind of “magic formula” or “secret sauce” that you use to push parties to arrive at the “right” settlement amount?
6. How should parties in mediation feel after they leave the mediator’s offices or the courthouse, settlement in hand?
7. What tactics and strategies do you employ to help the parties find common ground?
8. What are some of the most productive and satisfying mediations you’ve worked through?
9. What should lawyers do to ensure their clients are confident that the outcome of mediation will be enforceable, even though it isn’t actually binding?