

The Resolution Advocate: Tips on Getting to the Goal Line in Civil Litigation

SOME BASICS OF NEGOTIATING AT A MEDIATION*

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When I started law practice in the mid 1960's, the word mediation was not commonly used. I am not sure I heard the word more than a couple of times while in law school at Hastings College of the Law, University of California. If I did, it meant something different than it means today – some type of evaluative process that was not necessarily related to bargaining to get a settlement.

As a young trial lawyer, the common practice was that settlement was not really discussed until a mandatory settlement conference right before trial. Before that, if a case settled it was because the attorneys did so, or the insurance adjuster jumped in and negotiated the file directly with the plaintiff's lawyer.

The words alternate dispute resolution or ADR were not in our vocabularies. Private dispute resolution services did not exist. Judges were elected and appointed to the bench and stayed to retirement. There were no jobs as private mediators to lure them away or provide

*This is the second of a column to be published in the monthly publication of the Litigation Counsel of America Trial Lawyer Honorary.

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employment after retiring. Frankly, as I look back on this, we were wasting a valuable resource in good settlement judges leaving the bench and essentially retiring from the profession altogether.

Now, the situation is much different. Private dispute resolution services and full-time mediators abound. There are excellent training courses for mediators and new rules for governing that practice. Certification will soon be available and standards will be set. While it seems that there are more mediators than lawyers, the litigation process seems to demand this resource for dispute resolution as an alternative to plodding through the litigation machinery at the courthouse.

The mediation process is an opportunity – a time for you, as the legal representative of your client, to avoid putting your client through the litigation “mill” (aka: process) and get results.² I see mediation as a definite positive process, but only if you, as the lawyer, have the right approach. I enjoy trials and arbitrations, court hearings, and appeals. But, after all these years, I get great satisfaction when I am able to get a good settlement early in the case before we incur large litigation expenses. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation, which more often than not would only add to the emotional injury already caused by a serious accident, injury or illness which led to the litigation in the first place.

To put this in perspective, we are talking about how to get your case resolved early in the more formalized process of mediation - the voluntary process in which the parties agree to conduct negotiations of a dispute using a neutral intermediary in a non-binding process. The mediator has no power to decide anything. The job of the mediator is to try to get the parties to agree on the terms of resolving this

² There are excellent papers on settlements, e.g. S. McGBundy, *The Policy in Favor of Settlements in the Adversary Systems*, 44 *Hastings L. Rev.* 1 (1992). One of the biggest advantages of settlement is that the result is more likely to be perceived as “just.” Leaving the result to a third party, such as a judge, arbitrator or jury, may lead either or both of the parties to believe that the result was “unjust” or “unfair.”

conflict and disputed matter. While you are an advocate in this process, the advocacy skills that are involved are much different than those that would be used in the courtroom.

Also, lawyers - and courts - are doing a better job of managing litigation, at least in the more complex cases, so that resolution and settlement are part of the planning and case management mechanism. That is good because it forces the parties to think about where they are going, what the results might be, and how much it will cost. That is, a cost/benefit analysis is part of the initial planning process and evaluation of the case.

In order to get good results in mediation, there are basic principles that I have found should be followed. Here I lay them out. In future columns I will take them one at a time and discuss their importance and what you can do to ensure they are followed.

Here they are:

The Ten Principles for a Successful Mediation

Principle 1: Understand What a Mediation Is All About

Principle 2: Prepare Your Client for the Mediation Process

Principle 3: Put the Pressure on the Defendant to Come to the Mediation Table

Principle 4: Get the Information You Need to Mediate

Principle 5: Get to Mediation Early, Not Late

Principle 6: Use Your Experts

Principle 7: Select the Mediator Best Suited for Your Case

Principle 8: Prepare the Mediator

Principle 9: Be the Diplomatic Advocate at the Mediation: Make “Love” Not War

Principle 10: Know the Numbers and When the Best Deal Is on the Table

Effective resolution of disputes should be our goal. Perhaps that is trial, but more often it will be a negotiated result. And, in most of those cases, from what I can see, there is an intermediary - a mediator - who will assist the parties to that end.

I encourage all to make sure that all cases are tested in the negotiations arena. More on the Ten Principles in future columns.