

The Value of Mediation When Your Case DOESN'T Settle

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It's late in the afternoon (or evening). The parties, counsel, and the mediator have labored mightily all day to achieve resolution of the case. A deal seems probable, even likely. But it doesn't happen. Frustrations rise; expectations, reasonable or otherwise, are dashed and everyone is left asking "What happened? Why did we come here, spend all this money, and not achieve the desired result?"

The fact remains that while many cases do get resolved at mediation, many do not. When they don't, is there still value in the process? Can certain goals be achieved short of resolution which give the parties and counsel a feeling of progress and that the time and money were well spent? The short answer is "yes."

Opening Lines Of Communication:

Many times, the mediation hearing is the first time counsel and the parties have had the opportunity to discuss their dispute opening and candidly since the inception of litigation. Either face to face in joint session or in private caucus with the mediator, the importance of opening lines of communication is essential. For those of us old enough to remember, there was a legendary superior court judge in Santa Monica, the late, beloved Mario Clinco who many consider the "Godfather" of modern mediation practice. Although they were called "settlement conferences" then, the principles remain the same. Judge Clinco's classic Mercedes Benz convertible had a license plate which read "Set'l It." And "settle it " he did. But not every time. He used to tell the assembled multitudes of counsel that the value of communicating with your opponent could not be overestimated. "Talk to each other every chance you get," he told us and

we did. Rapport was established, issues were discussed, and the possibility of settlement greatly enhanced.

Mediation also provides an opportunity to learn about your opponent, his or her style and the mediator's experience with the particular attorney.

Exchanging Information:

The mediation hearing also presents an excellent opportunity for the exchange of information in a confidential setting. Each side can learn much about the other's case assuming the participants are willing. Many times, the information is new to one side or the other which may make resolution on that particular day less likely, but more so in the future after the information has been digested.

The mediation hearing may also be the first opportunity for insurance representatives to actually see and meet the injured party. I recently settled a case with follow-up where the injuries were not fully appreciated until the hearing. The hearing was adjourned, the representative obtained the necessary authority and resolution was achieved several days following the mediation. The matter went from Armageddon to resolution obviating the time, risk, effort and expense (TREE) yet to be incurred.

Defusing Unrealistic Expectations Of The Parties (And Counsel):

Having the advantage of being the only person in both rooms, I am often struck by the stark differences in the expectations of the parties (and, sometimes, counsel) about the merits or value of their respective cases. Many times, it seems like we are talking about two entirely different matters. Being of the school that a mediator's role is more than just carrying numbers back and forth, I will attempt to gently or not so gently, as the situation demands, defuse

unrealistic expectations. When this happens, it may take a little time for one or all sides to reflect on my sentiments. A "cooling off" period may be required and then the case resolved with follow-up.

There may also be attorney-client issues and conflicts which the mediator can help resolve leading to future resolution.

Setting The Stage For A Second Session:

In some instances, it becomes clear that the parties, for a multitude of reasons are ready to talk, but not ready to deal. This is especially true when the mediation is court ordered.

When this situation arises, suggesting a second session may be appropriate with the extension of a credit for time not used. The hearing is "adjourned," not ended, with the realistic and positive expectation that the matter will be resolved at a second session. Sometimes, cases need to "marinate" and with time, will be tender enough for a mediator's fork.

Best Alternative To A Negotiated Agreement:

The best alternative to a negotiated agreement or "BATNA" can oft times give the parties and counsel satisfaction with the process. Are there some issues which can be resolved short of global resolution? What's "on the table" and what isn't? Probing beneath the surface of the dispute can lead to discussion of issues which are agreeable among the parties short of a complete resolution.

A related topic concerns partial or separate settlements. Are they realistic when one or more of the parties won't participate? That feeling of being "left behind" may lead to additional negotiations resulting in total resolution of the case.

Additionally, are there alternative means of resolving the dispute short of full-blown litigation? Recently, I have had some success in persuading parties and counsel to agree to binding arbitration, sometimes with a "high-low" component. This achieves several desired results. It removes the matter from the very crowded court docket and gives some certainty to the parties, counsel and insurance carriers if involved.

Mediator's Proposal:

Many mediators employ a technique known as a "mediator's proposal" to bring closure either at the conclusion of the hearing or with follow-up.

The mediator recommends a settlement figure to both (or all) sides after agreement of the parties and counsel that he or she may do so. There must be an indication that the recommended figure will work to resolve the matter either at the conclusion of the hearing or shortly thereafter with follow-up. From my own experience, I have found that many times one or more parties need a little time after the hearing to reflect on the proposal. If the recommended figure is realistic, it will very likely be accepted by the parties and the matter concluded. Sometimes, I send them out jointly asking each party to respond separately and confidentially. This creates a "double blind" effect and prevents any floors or ceilings from being created if the proposal is not accepted.

Follow-Up:

Like communication, follow-up cannot be underestimated or overvalued. It has been suggested that fully 20% to 30% of all cases resolve AFTER the hearing with follow-up by the mediator. Laying the groundwork at the hearing, making sure all sides understand what the case

CAN settle for before they leave, and then following up can result in resolution of most matters brought to mediation.

Follow-up is appreciated by the parties and counsel and part of the mediation process. When the parties and counsel leave the hearing, believing the case will resolve at some time in the near future, it most likely will.

Conclusion:

Ideally, all cases should resolve at the mediation hearing. Realistically, they do not. Creating value for the parties and counsel at mediation when the case does not settle will lead to positive affirmation of the process, goodwill and increased resolution down the road.

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