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Mediation: How Litigators Can Maximize a Unique Opportunity

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It is often said that litigators are hired to make other people's problems their own, which is why litigators often view the world and every disagreement as a fight. While we consider ourselves litigators as well, this article is being presented from a mediator's perspective. We believe that having substantial litigation experience is extremely useful, if not necessary, to being a successful mediator. This article is focused on how litigators might benefit from reconsideration of the mediator's role as an asset rather than a potential obstacle in their case.

Recognizing that every meeting with their opponent feels to a skilled hired gun like an impending fight, we want to offer a more valuable approach to mediation. When litigators view mediation through the lens of the process's value, rather than seeing it as just another deadline or added expense, litigators gain the advantage of using mediation to the maximum benefit of their client and their case. By learning to maximize the value of both the mediator and the process, litigators can learn to use mediation to the greatest effect, and they stand to gain the most from the entire mediation process.

It is a fact that mediation is not only potentially the most effective and efficient tool to resolve litigation, but consider that it is also an extremely and uniquely effective mechanism to bring a case into sharp focus. Every litigator assembles their case from the start by considering every possible theory to advance their client's cause. As the case gains momentum, however, it is often hard to pare down the theories that may no longer be effective in favor of a leaner and tighter approach.

Bogged down by all of the minutiae of litigation, the most effective arguments might not always be obvious to the subjective perspective of the lawyer and their client. In a sea of evidence and shifting legal implications, all litigators confront moments of painful recognition that parsing out the *most* relevant facts in favor of those that support the best legal arguments can be a daunting task. Experienced litigators know that ultimately, many of the initial theories of their case must be abandoned in favor of focusing on the strongest theories. However, the best choices might not always be clear to lawyers or their clients, who have been living with the case for months and possibly years. Even if you can begin to see the weakness of one approach and the strength of another, your client might have become invested in each and every possible argument.

In the first instance, the mediation process and the mediator (if you have properly selected one[1]) will help you bring your case into a clearer focus and evaluate some of the arguments from a more objective perspective. Moreover, allowing the mediator to help you better inform a client about the validity of a position is a tremendously valuable tool in moving toward settlement, or at least toward refining the best path to a successful resolution. In order to avail yourself of this process, you must be clear and focused in the facts and law that you bring to the mediator, be *honest* in your private discussions of the strengths and weaknesses, and be candid about your and your client's expectations. Moreover, you need to be engaged and objective in your communications with the mediator to understand and appreciate the mediator's independent, nonbiased perspective. Do not take questions about your case as criticism. Remember, the mediator is there to challenge every assumption of both sides. Everything said in private caucus remains confidential.

You must put your sword down for this part of the process, understanding that, if necessary, you can readily grab it again before the end of the day or process. Every litigator's natural inclination is to approach each encounter with their adversary as an opportunity to advance their position by force of will. At their core, even very eloquent and deeply experienced litigators often have difficulty putting aside aggressive advocacy, even when they come to the table with the stated intent of negotiation.

Taking advantage of the confidential and collaborative nature of mediation, even in joint sessions, will help to channel that desire to win by aggression into recognition of an opportunity to gain an advantage by being open and listening. Rather than using a joint session at mediation to attempt to impress your client by "convincing" the mediator, and your opponent, of the strength of your case, consider using that time to allow the mediator to focus the parties on issues over which there might be no dispute and to narrow the focus on the remaining legal and factual disputes. This is where the advocate can learn to make the best use of a mediator and the mediation process.

1 Leslie A. Berkoff, "The Importance of the Right Mediator," XXXVI *ABI Journal* 4, 38, 102-03, April 2017, *available at* abi.org/abi-journal.

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Always bear in mind that in mediation, unlike every other venue in a litigation forum, the mediator does not need to be persuaded or convinced of anything. The mediator should not be treated like a party or a judge. Rather, the mediator is there to gather information; understand and help identify issues, risks and potential outcomes; evaluate the cost of litigation against the potential exposure or recovery; and bridge the gap between the parties. Consequently, the focus of your advocacy needs to shift toward providing as much information and clarity on positions and known risks, and toward gaining a greater understanding of the opponents' positions. Because the mediator has no interest in the ultimate outcome, the risk analysis is an effort to settle all or even part of the dispute. While the advocate's role remains the same, it is just tuned to the potential for learning and what the best or right resolution might look like, in or outside of mediation.

Remember that during a private caucus, rather than fighting the mediator, you can and should use the mediator to do what you as the litigator might not be able to do: speak the truth to your client. That is not to say that successful mediation comes from litigators conceding their weaknesses, but rather that successful litigators recognize the potential gaps in their case and use the mediator to communicate those concerns to their client and assist in risk analysis. Sometimes litigators do not want to appear "weak" by acknowledging their case is not a slam-dunk or they do not hold the winning hand. In order to maintain the client's confidence in the litigator's ability to aggressively advocate for them, it is at times useful for the litigator to have the mediator drill down on the missing pieces and the risks in the case. By having the mediator lay out the downsides for the parties to discuss (privately), it takes pressure off of the litigator and allows them to retain their role as an advocate of their client's cause. Sometimes the litigator just needs someone else to bring the dose of reality to their client, or even to themselves.

For alpha litigators, one of the hardest asks is that they listen more than argue. Being open-minded and exerting self-control in this context will invariably yield the best results. Certainly, learning about the case through mediation is not a one-way street, and you must challenge adverse assertions. However, strategically discussing the issues that have been a barrier to settlement prior to mediation can yield answers that you might not have expected, or that you might have mistakenly assumed that you understood. After all, if you had all of the answers *before* mediation, you would most likely have found the path to resolution before then as well.

We once heard a very experienced mediator, a retired judge, suggest that at mediation, the lawyers' duties shift from their clients' goals to "settlement." While we think that is a step too far and do not adhere to the concept that a lawyer's duty in mediation shifts, we do believe that using the confidential process to explore how a settlement can be achieved, or what different versions of a resolution might look like, is always appropriate. Lawyers bring their duty to advance their client's interests with them to any proceeding, including mediation. That is not to say that lawyers cannot use the mediator to help them advance their clients' interests by presenting a realistic view of their case and the cost of litigation to both sides. Exploring paths to a resolution with a mediator requires consideration of the best and worst aspects of your client's case. Not only is this an opportunity to bring reality to your client and the opposition through a neutral disinterested party, but it is also an opportunity to test your theories within the safe confines of a confidential process.

Of course, part of the effective use of mediation and the mediator is understanding why the process is necessary, the value of the process, and what a good mediator can bring to the table. While mediation is an additional cost in the litigation roadway, there is almost always significantly greater value to be gained through *effective* use of the process. Adjusting your expectation of and your approach to mediation will reveal the most valuable outcome, with or without an immediate settlement.

In almost every mediation in which we have been involved, which combined reaches into the thousands, not one of them went forward because the parties were otherwise able (or willing) to reach a resolution before mediation. More often than not, mediation was required or "suggested" by the court. It was a bump in the litigation road that, if we are being honest, was often forced upon one or both parties — who may resent the intrusion on their progression toward trial. Incorporating a set of mediation requirements or deadlines into a pretrial schedule or by rule, the parties and their counsel are given a brief break to step back and, with the help of neutral party, evaluate their case at that stage of litigation.

Mediation is much more than focusing the parties on settlement; it is about considering the case in light of all alternatives in any given moment of litigation. Effective litigators are highly motivated individuals who do not readily or easily relinquish control over the direction in which they will proceed. However, in the process of considering settlement options, litigators can step back and use mediation to provide clarity about their case and their opponent's case while never relinquishing that control.

In light of the value we have described so far, it is important to be careful about whether it is productive to signal or even consider the view that the mediation process or the cost of the mediator is unnecessary or unwanted. Sometimes resentment that the opposition would not come to a resolution before mediation creates frustration and angst. But when lawyers raise the cost of the mediation as an added financial burden to the overall litigation costs as part of the mediation, they create an initial hurdle that an experienced mediator knows they must overcome. The intended first goal of all mediators is to gain the trust *and* confidence of the parties and their counsel. Part of that sometimes means explaining the value of the mediation.

A practical litigator can save some time and dialogue at mediation by coming prepared with an informed client ready to use the mediation process to its fullest potential. Whether it is helping to arrive at an expedited resolution or to crystallize issues for trial, preparing your case and your

client for mediation with these values in mind always yields the best results. Using mediation to derive the benefits we have described by themselves is invaluable. When properly exploited by prepared participants, the value of mediation significantly exceeds the expense and time of participation. Consider avoiding having the mediator justify the cost of mediation by not using the mediation cost as a weapon against your opponent.

When advocates and parties add the "cost of the mediation" to their settlement demand, they create a stumbling block not only to resolution, but to realizing all of the benefits that the unique opportunity of mediation affords. Experienced lawyers will recall that not long ago, the opportunity for a confidential discussion and a neutral assessment of the merits and weaknesses of their and their opponent's case was nonexistent. The only other option before the rise in the popularity of mediation was to spend tens of thousands on trial consultants, who benefited from prolonging the case rather than streamlining the path to resolution. Alternatively, their case might be stayed for months or years while a busy court tries to catch up on its demanding docket. This was the state of litigation less than 20 years ago. Truly the cost of mediation is typically a drop in the bucket compared to the overall cost of litigation, which can include needless hours of discovery, motion practice and court delays, and the lack of any alternatives other than years of waiting, not to mention the adverse impact on the ongoing business itself.

Consider an additional benefit that the distinctive mediation "forum" provides in light of human nature. In any litigation, and certainly in bankruptcy litigation, parties frequently express their overwhelming need to stand on just and noble principles (often to the significant frustration of their counsel). They recognize that they have been wronged by the "illogical process," and they will not concede anything at the expense of their principles. But most of the time, they just need the chance to have a third party hear their story. "Principles in civil litigation" should be the subject of many additional articles. For now, however, the mediator can explain what the litigator often cannot — that while values and principles are important beyond measure, advancing them is in the hands of the legislative branch, not the judicial. Principles are expensive and often not practical from a business-judgment perspective (*e.g.*, who is minding the store while you are advancing the litigation?). Avoiding years of protracted litigation or unrequited appeals is a critical foundation of commercial mediation. A good mediator often refocuses parties in a different manner than their advocate would have but might not have been able to at the risk of losing the confidence of their client. All of this also gives the parties the chance to vent their frustrations to a neutral third party (rather than in a courtroom).

Conclusion

If by now you have recognized that mediation provides significant value at some stage in every litigation, then we have successfully gotten our point across. A great mediation result is very often an agreement by both sides to come to a resolution and put the battle behind them. An equally successful mediation often has the parties and lawyers leaving with a much better understanding of the strengths and impediments in their case; they may have clarified factual and legal issues and even discarded some arguments altogether.

Just about every mediation has the potential to save the parties far more than they have expended in time and fees. Litigators who refocus their definitions of "success" will approach mediation as the point in their case at which they can now either efficiently resolve their client's dispute or, at worst, put their case through a rigorous examination and come away with a much better idea of what a good resolution looks like. At a minimum, they gain clarity on effectively presenting their case to a trier of fact and law. Hopefully we have allowed you to put your perception of mediation to the test and come away with a more useful expectation of the process. abi