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News & Tips

Crushing It At Mediation!

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There is little doubt that mediation will continue to be a frequent, if not mandatory, feature of dispute resolution in circuit and district court. The title for this article reflects the notion that mediation does not get the same attention nor command the sort of reverence that trial evokes. Nobody comes back from a hard day of mediation and says "I crushed it today!" Recognizing only 2-3 percent of filed civil cases go to trial, and that the remaining overwhelming majority of cases go to mediation, one should learn how to "crush it" at mediation as that is where the case is likely to end. Great mediation advocacy is harder to learn because there are little or no feedback mechanisms. Trial is a public spectacle and there is a written record. Mediation occurs in the quiet sequester of a black box where almost all words and actions are hidden from view by privilege and confidentiality. So it stands to reason the bench, bar and public reveres trial advocacy. Mediation results are ho-hum. Trials are value affirming or a source of outrage. Mediators are like undertakers, providing a valuable service few ever see and claiming few Facebook followers.

If mediation were traded on the equity market, it would be a growth stock. Within the skill-set of litigators, mediation preparation and advocacy are oftentimes areas for improvement. This is in part because the mediation process does not have a feedback loop and does not depend upon the application of fact to the law, rules of procedure or precedent – none of the bread and butter material comprising a typical law school education. Mediation does not depend on trial skills or the art of lawyering in the ordinary sense. Because there are no hard and fast rules (other than confidentiality) and because mediation training is limited, many litigators are not usually well-prepared to be great mediation advocates. Regardless of whether you are preparing for your first or your thousandth mediation, there is more to learn. Preparing yourself and the client is only half of the battle. Creating a fruitful mediation process is the larger goal. All these activities are justifiably billable as they help increase the chances of successfully resolving the case at mediation.

1. Make sure you have the best voice and final decision-maker in attendance for corporate parties and that all parties have key decision-makers. Telephone opposing counsel and tell him or her you intend to bring a key decision-maker and that you expect them to do the same: no placeholders. Mediations that lack key decision-makers are more likely to result in an impasse. It is not enough to make sure you have the right representative. The astute advocate endeavors to make sure all parties bring the right people. The owner or in-house legal counsel may not be the true or best voice for the company. If your client is governed by a board, you should identify potential nay-sayers and deal-killers in advance.

2. For the client's benefit, create a comprehensive report 45-60 days before mediation that includes a future budget to designated milestones: e.g., summary judgment, mediation and trial. Include the good, bad, ugly and what other options exist (if any) for resolving the case in the absence of a negotiated

solution at mediation. Most clients do not understand that most of cases are resolved by decisions of the parties – and not by Court or jury verdicts.

3. Solicit a pre-mediation demand and statement from other parties. If they do not comply, this insulates you in large measure from criticism – as your client may have expected clairvoyance. If new and material information was not shared in their pre-mediation statement, how can you be faulted for not knowing this in advance if a premediation position paper was solicited? Soliciting a position statement from all parties and generating your own is an often overlooked step in mediation preparation.

4. Find a mediator the other side respects. It is not important that the selected mediator is your favorite mediator. What is important is that the other side respects that mediator's message in private session. If the mediator walks in with your last number at the end of the day, a mediator trusted by the other side can help sell it.

5. Make sure the non-economic terms of the deal do not become a distraction. Usually, but not always, you have to focus on the money first. If there are other parts of the deal leave those until the end. (A good mediator will steer you this way). Sometimes the non-economic terms are important to one side. Don't ignore or put off these issues merely because they are "not part of the lawsuit." You are mediating a dispute not a lawsuit. Do not get hamstrung or limit your thinking to the facts in the complaint.

6. Understand that everyone needs an exit strategy that works, economically, intellectually and emotionally. If you insist on capitulation by the other side you are doomed to impasse. Litigators don't always get this. Saying the end game for the other side is "not your problem" misses the point. It is precisely your problem. You need to find a way for the other side to leave the battlefield with some dignity. (Non-economic concessions can be that bridge).

7. Ask the parties to disclose any non-party who may be in attendance as expert, advisor or consultant at the mediation. Resolve any true legal objection to participation if challenged. (Mediation rules differ in jurisdictions regarding participation by non-parties). As long as the participant is subject to confidentiality, non-parties should be permitted to appear.

8. In multi-defendant civil cases, the defense lawyers should meet and confer with the clients (and insurers) to consider litigation funding arrangements and pro rata contributions that may be required to resolve the case prior to the formal mediation session. Agreements are not likely to be reached prior to mediation but the discussions will be advanced by holding a "pre-mediation" defense caucus. Very few defendants and their counsel do this; instead waiting until the day of mediation to "spring" their position on the co-defendants. This is hugely problematic because positions take time to evolve and so asking for major tectonic shifts in proportional shares among the defendants during the actual mediation is very hard. You need to flush out positions in advance.

9. Advise the client in writing of any recent material developments that may influence the time of trial, cost or case value. Oftentimes, the client has fixed on early understandings and "beliefs" wedded to a set of facts and analysis of the case that is untenable as discovery in the case has evolved. This is particularly true with contingency fee clients. Many times, the parties do not really understand their own case. Educate clients in advance to manage client expectations.

10. Schedule the mediation with sufficient time following impasse to conduct discovery after the mediation session ends. In the absence of settlement, many times (dare we say always?) you will learn new information that leads to additional discovery or investigation needed.

Concluding thoughts: Settlements at mediation do not happen by accident. Poorly planned mediations and unprepared lawyers cause clients to question their choice of counsel. Thoughtful and timely preparation is the key but scheduling pressures and litigation demands may override that fundamental concept. Cases that might take years to resolve by litigation can be resolved by a mediated settlement in a single day. Litigators who embrace mediation as a tool for dispute resolution and who are capable and adept at performing well in that arena will engender client confidence and afford the client the best possible opportunity to reach a resolution that satisfies their personal, economic and business objectives. You can CRUSH IT! at mediation and your clients will be supremely happy that you did.