

HELPING ATTORNEYS SEE BEYOND THE CASE : RETURN TO OBJECTIVITY

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Introduction

“Why do I need a mediator to help me settle my cases”? This was a question that mediators used to hear a lot. As mediation has become a standard part of litigation, this question is less frequently articulated. However, it still remains, even if it is not expressed. Although there are many ways to answer this question, from the trial lawyer’s perspective, the most process-oriented response is that mediation allows counsel to make the shift between “litigation advocate” to “settlement advocate,” while still preserving the relationship with their client.

A client hires a lawyer with the expectation that the lawyer will win the case. Typically, in the life of a lawsuit, the time comes when it is appropriate to make some compromise to settle the dispute. To settle the dispute the lawyer must shift from representing the client as a zealous advocate to representing the client as a diplomatic problem-solver. It may be difficult, however, for the client to appreciate the necessity for this shift in focus.

By using a mediator, the litigator remains the advocate for the client and the client’s case, and the mediator can be the advocate for settlement.

When a client brings a new case (either plaintiff or defense) to his lawyer, typically, the first thing the lawyer does before accepting representation is conduct a detailed analysis of the strengths and weaknesses of the case. The evaluation usually includes an analysis of the law and facts, the availability and reliability of witnesses, costs and time likely to be expended on the case, and the impact of litigation on both the lawyer’s practice and on the client’s life and business.

After the case is signed up, lawyers often forget their initial evaluation and jump headfirst into the battle, going from fire to fire, litigating the case as zealous advocates of their client’s position. By mediation day, both sides are firmly ensconced in their respective positions and, oftentimes, although they may wish to settle, don’t know how to remove themselves from the case they have so painstakingly constructed. In order for a dispute to settle, a negotiated settlement must meet the legitimate interests of the client. That is not enough. In order for the client to settle, her lawyer, who has taken up her banner in the

battles of litigation, must now become an advocate for settlement. Part of the job of the mediator is to help the lawyers and the parties see beyond the case they have built so that they can more readily reach an agreement that resolves their disputes.

Three Stages of Litigation

Initial Stage – Preliminary Case Evaluation

Today is your lucky day. You are interviewing a prospective new client that feels he has been wronged or that someone has unjustly accused him of doing something wrong. In either event, he is ready and anxious to get justice. You, as an experienced and competent trial lawyer, view the situation with objective skepticism. Your analysis includes many issues, including the following:

Determination of whether the client will be a positive or negative for the case. How will the client hold up to the stress of litigation? Will your client appeal to the jury? What will the judge think of your client? Where is your client from? How is your client employed? Is your client married? Does your client have children? Is your client credible—is his story believable?

Review of the facts of the dispute. What is your client's story? What is the other side's version of the story? Who, what, where, when, and why?

Identification of the witnesses. What is their relationship with the claimant? Are the witnesses objective, believable, and available?

Gathering of other evidence. Is the evidence persuasive? Is it admissible?

Calculation of the economic costs of litigation? How much time and expense will be incurred in preparing and presenting the case? What written discovery will be involved? How many depositions will be taken and defended? What motions are anticipated? What experts will be necessary? Will the experts survive challenge? What travel costs will be incurred? How much opposition is likely? How many lawyers and staff members will be required? Will the fee be hourly, flat fee, or contingent?

Calculation of the time required. How long will the case take to prepare and present? What will the time and costs be if your client or the opposition appeals?

Review of the legal issues. How strong is the case legally? Will the case be decided on the law?

At the meeting with the prospective client, you, of course, comply with your ethical duty of exploring the alternatives to litigation and possibly raise the subject of seeking a settlement of the controversy. You have learned over the years that this subject has to be handled carefully because the potential client has sought your assistance in advocating his interest and position and wants justice. He believes that he needs a fighter and not someone who wants to settle. You do not want to give the potential client the impression that you are not willing and anxious to redress the wrong that has been visited upon your client or address the wrong that is at the center of the accusation. Assuming that you accept the case, you move forward and prepare the case.

Second Stage — In the Trenches - Battle

You file the necessary pleadings and the process begins. You prepare your written discovery and respond to the other side's written discovery. Next, motions to compel, motions for more time, and hearings are set and reset. You schedule and reschedule and continue, but finally have hearings on the motions. Depositions are set and reset. Some depositions are completed and others are postponed. Motions for summary judgment are filed and probably denied. The case drags on, the client begins to ask questions about the time involved, and grows weary and impatient. You have a trial date and begin final preparation for trial.

Third Stage — Fight or Flight

You have come to realize that the facts are a little different than you originally thought, and that your client's story has a few holes. The fees and expenses are growing and are more than you originally estimated. Your client presses you for the percentage of success and has forgotten that you have advised him that litigation is risky. In fact, your client is "shocked" and "surprised" that he could lose. You revert to your initial objective skepticism. Your client's weaknesses are apparent to you, as well as your opposition's strengths. Trial is closing. You would like to discuss settlement with the opposition but you (and your client) do not want to show any weakness or indication that you are worried about the case. Mediation is the process that will bring all of these issues together. Your client will have the opportunity to evaluate the case first hand. The mediator will help your client focus on the realities of his case, and the risks and uncertainties of a trial. You will have the time to objectively review the whole case and prepare for trial if the case does not settle.

The Three Stages of Mediation

Either the parties or the Court has decided that the time is right for mediation. The mediation has been scheduled and the parties, armed with their months or perhaps years of battle weary “second stage” posturing, arrive for the mediation. It is time to resolve the lawsuit, but there are obstacles.

In order to settle the dispute, the parties must return to the “First Stage” of litigation and re-engage in an objective analysis of the case, this time armed with everything that has been learned from the battlefields of litigation. This is not so easy! A lot of time has gone by. The lawyers have fought hard for their clients and their clients expect them to continue to be zealous advocates of their position. Clients expect their lawyer to be able to go to trial and to win! So, even if the lawyers wants to settle the case, the lawyers, for fear of appearing weak, may not be able to say to their clients, “let’s settle.”

In addition, the lawyers may be so firmly entrenched in the case they have constructed that they are simply unable to re-engage in an analysis that would objectively dictate that the case be resolved. It is the job of the mediator to create an environment and opportunity for the lawyers to see beyond the case they have built so that they can heroically help their clients make a business decision to resolve their disputes.

Each stage of the mediation loosely corresponds, in reverse order, to the stages of litigation discussed above, and each stage provides a unique opportunity for the mediator to help the lawyers and clients work together to develop a good business resolution to the conflict.

Opening Session – Bringing the neutral on board!

In the opening session, the mediator establishes himself as the advocate for resolution, sets the expectations of the day, and changes the tone from “battle” to mutual problem solving. The opening session provides the mediator with the opportunity to create a safe environment for open communication so that both sides can hear the other side’s position directly without any sugar-coating or faltering. It also allows the mediator to let the parties know that the discussions during the day will explore the risks and costs of continued litigation. This puts the parties on the path of re-engaging in objective analysis.

By establishing himself as the advocate for resolution, the mediator allows counsel to maintain themselves in front of their client as the ready trial advocate. This allows counsel to continue the role that they were hired to play and retain the confidence their client has in their ability to win at the courthouse. Because of the conciliatory mood that the mediator

has set, however, counsel is now able to begin the transition from trial advocate to advocate for strategic resolution.

Initial Private Caucuses: The Day in Court

The lawsuit has been evolving towards a trial. Though not a trial, mediation must provide an outlet for the respective sides to have their “trial” experience. Your client has a story to tell. He has been looking forward to proving to a jury that he is right and the other side is wrong. He has been anticipating how persuasive your arguments will be to the jury. He is convinced that when the jury hears his testimony and your presentation of the case, he will win. The case cannot be resolved until he has had his say and has heard your presentation. The initial caucuses provide that opportunity.

Mediation does not provide the opportunity for any given side to “win.” So, it is important to provide the opportunity for your client to talk about his case. He needs to know that he has been heard and understood. By creating an opening for your client to freely discuss his view of the case and the impact it has had on his life, the mediator enables your client to have his day on the witness stand.

It is also important for your client to see that his lawyer is prepared and ready to win at the courthouse. By focusing on the strengths of your case during this first caucus, you are able to show your client that you are ready to try his case and your client is able to feel that he is bargaining from a position of strength.

The mediator can, at that point, introduce the possibility of risk by letting your client know that when he returns from visiting from the other side, he will discuss the other side’s strengths, which will be your client’s weaknesses.

Middle Caucuses (Objective Skepticism)

The middle caucuses provide the opportunity for the mediator to fully explore the risks of going to trial with the parties. In so doing, these caucuses also allow the mediator to facilitate the lawyer’s transformation from “trial advocate” to “resolution advocate.”

During these caucuses, the mediator will be discussing the factual and legal risks that both sides have. Because it is an objective third party raising the problems, the lawyer can realistically discuss with his client the issues that the mediator raises and adopt the role of problem solver. The client, therefore, sees his lawyer strategically working to resolve the problem in the best interest of his client. In addition, the client gets to work dynamically with his attorney to resolve the problem together.

Final Sessions (Third Stage – Fight or Flight – Don’t Make It Any Worse)

You have made your presentation and your client has seen that you are prepared to go to trial. Your client has been able to talk about his case. He has had his “day in court.” The risks have been explored and you and your client have brainstormed together on ways to best resolve the dispute. It is time to make a business decision.

At the beginning of the day, it would not have been possible to do this. Even if you had already concluded that it would be in your client’s best interest to resolve the dispute, your client wasn’t ready to settle. The mediation process has enabled your client to see the benefits of settling the lawsuit and has enabled him to work with you to resolve it in his best interests.

Conclusion

As mediators, our job includes assisting lawyers to serve their clients. We do this by providing a safe environment and by leading the lawyer and the client through the mediation process, enabling them to focus objectively on their case. Because of the nature of litigation, lawyers tend to lose objectivity as the case progresses. Most trial lawyers have confidence in their cases. In order to do so (i.e., to win), a lawyer must believe that he can win. This confidence is real and is ingrained in the lawyer and is conveyed to the client by the lawyer’s words and actions. When a lawyer and a client come to mediation, they almost always have a biased opinion of their case and the likely outcome. The art of mediation is to help the lawyers and their clients see beyond the position they have created and objectively weigh the risks of their case. This enables the lawyers to help their clients to seize upon the unique opportunity that mediation provides. . .to powerfully resolve their dispute themselves.