

## Leveraging Mediation to Increase Revenue and Broaden your Client Base

by Gary Birnberg, Esq.

The GC of a corporate client calls regarding a complaint that was served on his company. Litigation will be long and complex. Your chances of prevailing are modest, and the damages awarded could be considerable.

Your team and you have the potential for investing considerable billing hours into the dispute: it could be a very lucrative case for your firm. Moreover, you believe that you may be in a position to argue successfully for some measure of lower damages.

Although your client wants to defend his claim, he is preoccupied with the many costs of litigation. Particularly, the extent to which discovery,

preparation for trial, and trial itself will create internal stress and occupy senior management's bandwidth.

Litigators know this situation well; there is nothing atypical about it. What is confounding is the fact that we in the legal profession, grounded in an hourly billing formula, are failing to recognize a primary client concern: the value that he places on a rapid resolution. This value typically is considerable.

The principle methodology proposed herein for accelerating dispute resolution is mediation. In the hands of a capable mediator, the success rates of mediation are astronomical: reportedly upwards of 70 percent globally. Moreover, mediation is very quick, extremely



price effective, can be conducted in parallel with other proceedings, and can be repeated, should it fail to produce resolution on any given round.

On its face, recourse to mediation clearly is in the client's best interests in the great majority of commercial cases. But, what about your practice,

grounded in the traditional hourly-billing model: could enthusiastically embracing mediation, with its implicit compressed timeline, undermine the profitability of your firm's litigation activities?

Not necessarily so. Consider restructuring your compensation model based on a flat fee. Many corporate clients already are demanding the same. Then, working off a reasonable flat fee baseline, build into your retainer ***a bonus for rapid resolution.***<sup>[1]</sup>

Awarding a bonus for rapid resolution may seem counterintuitive: you will be compensated more for working less. But, the economic analysis required here is based not on valuation of expended resources. That is irrelevant to the client: it is a red herring to him or her.

What is really important to the client is utility (of resource deployment): what does the client get for his/her investment. All other things being equal, the client's core economic concern is the marginal value of early resolution in relation to "normal" resolution. Typically, this

is of considerable value: value for which a rational business person will be willing to pay.

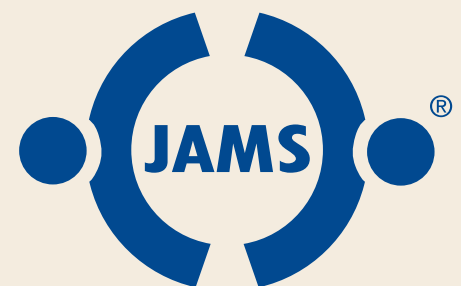
In this case, what is an economic red herring for the client is a golden egg-laying goose for outside counsel. Man-hour productivity goes through the roof when decreasing the hours dedicated to a case simultaneously with increasing the revenue (in the form of a bonus) generated by it. Moreover, introduction of a heavy dose of mediation into your litigation portfolio inevitably will shorten the average case duration of that portfolio and, thus, will allow the firm to handle more cases. This has not just obvious financial benefits but also the strategic benefit of creating an opportunity to fill the scheduling void with new clients, thereby broadening your client base, leading to greater stability of your strategic model.

Moreover, leadership in the area is strategically significant. The firms that get first to market with this concept will be identified as the market leaders in it: augmenting the firm's reputa-

tion for furthering client needs.

The proposed billing model, with its tacit endorsement of the efficiencies offered by mediation, can have a significant impact on income and productivity, as it allows you to serve a broader portfolio of clients. In the classic jargon of mediators, this model presents a win-win opportunity, both for clients and their counsel.

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<sup>[1]</sup> *A priori, the bonus could be considerable for resolution within a number of weeks, then taper off as resolution stretches into months or years.*