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Mediation Success: It's Not Magic!

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Trial lawyers and their clients spend a tremendous amount of time and money preparing cases for trial, yet nearly all cases settle. Almost all cases are mediated, but preparing for mediation is different from preparing for trial. If more time, energy and thought went into preparing for mediation, the success rate of all cases even the most contentious matters, would significantly increase. Here is how to make that happen.

Timing of Mediation

Mediations are normally set where a key date in litigation is pending. For instance, an impending trial date, motion to dismiss, summary judgment or class certification motion present leverage opportunities and are helpful in focusing the parties on issues in the case and in assessing risk.

However, more difficult, but increasingly more common, is early mediation. Critical to the success of early mediation is the exchange of information among counsel. While litigation instinct urges limiting disclosure of key positions through "confidential" briefs, this belief is misplaced. Mediation, and in particular the brief, is an opportunity for counsel and client to provide a clear and concise position statement that will be communicated directly to the opposing party, without the filter of opposing counsel.

On this point, no mediator is going to advocate more effectively than trial or in-house counsel, who have lived with the dispute, sometimes for years. Don't waste this rare occasion to speak to the decision-makers on the other side of your dispute.

A note of caution regarding pre-litigation mediations: While it is important to have those involved in the dispute participate and provide factual support for positions, it is equally important to have an independent set of eyes to provide a reasonable and rational evaluation of the mediation and its impact on the businesses and/or individuals involved.

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Once litigation has commenced, setting a mediation can radically alter the course of litigation. In particular, the parties' focus on litigation minutia must shift to a global perspective, where positions, costs and potential results must be evaluated and understood.

Timelines for reporting, reserving (in the case of insurance), briefs and coordination of key individuals become a priority. At the time of the mediation, key decisions have to be made on the willingness to settle versus the impact of failure to settle. In many instances, the decision not to settle can have a monumental effect on the businesses and individuals involved.

Selecting the Mediator

Choosing an experienced mediator is very important. The mediator should have some years of experience in mediating cases and have a style that reflects the challenges of your matter. An experienced mediator has many tools that may be employed to assist in reaching a resolution. These tools are learned over the course of many mediations in terms of what works in any given situation and at different times in the mediation process. For instance, an experienced mediator utilizes timing to facilitate discussions,

evaluate positions and employ settlement strategies, such as ranges, brackets, anchoring and brokering, to name a few.

Your mediator should also have subject matter expertise. If you are engaged in a dispute in a general area of law, such as M&A, construction or insurance, a mediator with subject matter expertise in that area understands the issues, knows the law, speaks the lexicon of the field and provides reliable input in terms of evaluating the case. However, when a narrow and specific issue is involved, finding a mediator with that particular expertise is like finding the proverbial needle in a haystack, so you should look for a mediator with experience and a style that reflects the needs of your case. If you have to choose between subject matter expertise and experience, the pendulum swings to experience.

Effectiveness and success at mediation is another metric that should be evaluated in selecting a mediator. A mediator who routinely gets cases settled should not be overlooked in the selection process. You must seek information on the mediator's track record from counsel who have used the mediator's services. Questions to ask include: Does the mediator engage in pre-mediation discussion of the case? How is the mediation organized? Does the mediator routinely follow up with the parties in the event of an unsuccessful mediation session?

Creativity and tenacity are also very important elements of a successful mediator's attributes. Does the mediator have a reputation for offering creative solutions when the parties are stuck? Does the mediator counsel the parties on the offers and counteroffers made during the mediation or recommend the amount that a party should consider demanding or offering?

Finally, is the mediator capable of providing you with a neutral evaluation and valuation of the case that is rational and trustworthy? If you can find all of these attributes in your mediator, then you are on your way to a successful mediation.

The Mediation

Critical to the success of a mediation is an objective neutral analysis of the strengths and weaknesses of liability and damages. Trial counsel must provide their clients, and clients must demand, such an analysis of the case. Factual disputes must be analyzed, legal disputes must be critically examined, and causation and damages must be discussed. Once understood, then the mediation brief should of course present your best case. If there are issues that you wish to address in confidence, then these should be discussed with the mediator in a pre-mediation telephone call or meeting or provided in a side letter with your brief.

Posturing is expected, but a word of caution: If you posture too hard and too convincingly at the mediation, you may convince the mediator that you are serious about the position that you are taking, which may run counter to your client's desire to settle the case. Transparency and willingness to engage in a rational discussion of the strengths and weaknesses of your case are essential. In fact, you will often gain credibility with your mediator when you acknowledge weaknesses and convey an understanding of the impact of those weaknesses.

In fact, by trusting and working with your mediator, as in the sharing of weaknesses of your case, you give your mediation a much greater possibility of success–no magic wand is required. It's fairly straightforward: Take off your trial hat and become a problem-solver at the mediation. In the end, a realistic assessment of the case will result in a reasonable settlement.

Bruce A. Friedman, Esq. *is an accomplished dispute resolution professional who has mediated and settled a wide range of cases including insurance, class action, professional liability, business, real estate and entertainment. Mr. Friedman began his neutral career in 2011 following 37 years as a trial lawyer handling cases in the areas in which he now mediates. He was lead trial counsel in dozens of jury trials, bench trials, and arbitrations. He routinely represented clients in high-stakes litigation. Mr. Friedman has been recognized by Chambers USA as a leading mediator.*

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