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Assessment tools in mediation

Assessing credibility of the plaintiff is integral to case evaluation in mediation or arbitration

Why go to mediation?

There are various reasons to use a mediator: getting help in sorting out the facts, identifying and narrowing in issues in dispute, enhancing communication between parties and counsel, giving a reality check to both sides, etc.

A very important and many times little used or mentioned use for a mediator is to have the mediator give you the good or bad news about the client's credibility or likeability. Whether going before a judge, jury or arbitrator, how your client is perceived becomes critical to how the decision maker will decide the matter. The likelihood-of-success determination factor may be critical in deciding how to resolve the case. An analysis of whether your client is a great asset, a real liability or just neutral helps in evaluating whether to settle and at what number. As a mediator, giving my assessment of this issue of credibility/likeability is an important part of the "woodshed" discussions I usually have privately with counsel during mediations. In addition, recent technology, discussed below, may assist in evaluating how an arbitrator may evaluate this issue of party and/or witness credibility.

How mediators might uniquely assist in assessing the value of a case

While caucusing with one side or the other, the mediator may give more direct and sometimes harsh reality checks to the party and counsel. However, in the appropriate situation, a mediator's insights in a separate private session with one attorney or the other may be invaluable. A client's "edge" or nasty side may surface during the mediation. It has been my experience that this usually occurs in the late afternoon of the mediation. The mediator telling counsel about the counsel's clients' edge may be a confirming

statement to counsel who was concerned about this. However, in some cases this insight may actually be a heads-up to an attorney who has not been able to step back and have a reality check about his own client.

As a professor of communication and as a jury consultant for many years before I became a lawyer, I usually did just that. I used to give an analysis of credibility of witnesses and clients to the lawyers who used my services. I also helped to rehabilitate a nasty or difficult person for counsel. This was part of my professional work before I went to law school.

As a mediator, I now just "give the bad news" or sometimes the good news about a client to counsel, without the rehabilitation part, as I am a neutral. Explaining the downside risk to counsel and their clients is sometimes very helpful to settling the case.

Having taught classes on receptive/leakage communication and having reviewed extensive research on evaluating veracity has, also, been very helpful to my mediation practice. I can usually spot deceptive behavior, lowered eyes, nervous twitches, etc. I will then, privately tell counsel if their client might have a problem in being believed by the finder of fact. Even though many clients hide the truth from counsel and from the mediator, after a day of mediation, many times the true colors show through. I have seen many cases settle for just this revelation presented by me privately to counsel for one side or the other and sometimes privately to each side about their clients.

Additional technology to help to assess the case in an arbitration

In addition to a mediator helping counsel and their clients, during a mediation to do a pretrial analysis of witness/client credibility which might help to

settle the case, a new technology has given counsel an additional tool to help assess their clients and their case prior to arbitration. If you are going to appear in front of an arbitrator and want to have help beyond what a mediator may provide as far as insights into your case and clients, CaseXplorer[®] Arbitration[™] may be a helpful, fast and economical online tool.

Until recently, it was very expensive and time-consuming to have an in-person mock evaluation of an arbitration. CaseXplorer[®] Arbitration[™], a collaboration between the American Arbitration Association[®] (AAA[®]) and DecisionQuest[®], is an online case evaluation tool, providing a lower cost and faster alternative to in-person mock arbitrations. Lawyers receive an objective evaluation of their case from 3 or 5 experienced AAA evaluative arbitrators who are not the arbitrator(s) in the actual matter.

The evaluative arbitrators will answer counsel's questions online through the arbitrators' portal on the CaseXplorer Arbitration platform. Counsel may submit videos of witnesses at deposition or of their clients to get a "read" from the evaluative arbitrators. Counsel receives the evaluative arbitrators' written responses once all evaluative arbitrators have completed their responses. The evaluative arbitrators are asked to submit their responses within 48-72 hours of receiving access to the CaseXplorer Arbitration case study.

Conclusion

This article described a way to use the mediator to do more than identify issues in dispute and to go deeper and analyze veracity and credibility of the litigants. Also, this article discussed how the use of an online evaluative tool, CaseXplorer[®] Arbitration[™], may help to get a read on your arbitration risks to assist in assessing settlement strategies.