

SECURITIES LITIGATION & REGULATION

Litigation News and Analysis • Legislation • Regulation • Expert Commentary

VOLUME 19, ISSUE 4 / JUNE 25, 2013

Expert Analysis

Lost Opportunities in Mediation

By *Jed D. Melnick, Esq.*

JAMS Inc.

Statistics show the vast majority of complex civil litigation are now resolved in a mediation. Mediation, however, is not a passive event in which the heavy lifting is left to the mediator, but rather an opportunity for the parties to proactively influence how the case is resolved.

Lack of active participation can result in lost opportunities and can negatively affect how the matter is resolved.

This commentary considers moments of lost opportunity in a mediation session: failure to set clear and credible expectations ahead of time, failure to take advantage of briefing and opening sessions, and failure to exercise grace at the conclusion of the process as settlement nears.

The settlement process begins well in advance of the actual day of mediation. The critical decisions and moments that ultimately drive how cases are settled (*i.e.*, setting reserves, capturing management's attention, litigation and settlement strategy meetings) occur in the weeks, months and, sometimes, years before the parties actually sit down together to discuss settlement face to face.

This pre-mediation period provides an invaluable opportunity to help set and adjust the expectations for both sides regarding how the process will work and what a reasonable settlement might look like before anyone walks in the door.

Without a careful strategy to shape the expectations of the other parties, they are left to their own devices. Bravado and posturing will lead the other side, at best, to guess what it will take to settle the case, and at worst, to conclude that the mediation will go nowhere and make decisions about authority accordingly.

Faced with "more of the same" from the other side, principals may well be less flexible with settlement authority and will not have the opportunity to confront real options before the mediation session.

Mediation is not a passive event in which the heavy lifting is left to the mediator, but rather an opportunity for the parties to proactively influence how the case is resolved.

It is true settlement options can be confronted on the day of mediation, but tracking down principals or asking management to reconsider decisions during the actual day of mediation can slow down and frustrate the efforts.

Some institutions move slowly, both in how they arrive at decisions about authority and how they go about altering those decisions once they are made. Reserves, once set, are not easily adjusted.

Once you miss the opportunity to influence the expectations of the other parties, you may not easily recapture it.

There are many strategies to set expectations in advance of the mediation session. It is not complicated; the idea is to give the other side a frank and realistic picture of what to expect. The fear that conveying information about expectations might lead the other side to undercut (using that information to create a “floor” or “ceiling”) that information is really a function of two things: credibility and knowing one’s adversary.

Letting the other side know what to expect means they will be ready to discuss it the day the mediation starts. To effectively influence expectations, one must act credibly. Before the mediation, you can say you want \$20 million, but if the case is worth a “mid-seven-figure” number, you will have accomplished nothing more than a loss of your credibility, which could hurt you later.

Mediation briefs offer an effective tool for setting a party’s expectations. It is an opportunity to communicate directly with the risk managers on the other side.

The key to getting the other side to listen involves several components. First, one must attempt to do something new. If it is not new, in either substance or approach, then chances are, no one is going to pay a lot of attention.

Second, one must write with credibility. Rehashing arguments litigated at the motion to dismiss stage and answered definitively in a court order will divert the dialogue to your lack of credibility, not the persuasiveness of your arguments.

Third, the brief must confront, in a candid way, what is driving the value of the case. Refiling an old litigation pleading with nothing more than a new heading depreciates the mediation process and wastes an opportunity to effectively influence the outcome of the process.

Often, adversaries believe that being candid and frank undermines settlement and litigation posture if the case does not settle. But that is based on a false premise.

Candor and frankness are signs of strength and build credibility, which increases the other side’s respect for you, thus enhancing the value of your case.

Too often, parties say they are reluctant to exchange briefs because they are afraid the other side has heard it before, or that the briefing will inflame passions. A creative and effective advocate, however, should be able to answer the party’s concern in a brief that does not retread old arguments or unnecessarily inflame the other side.

Done right, a mediation brief will prompt the other side to reassess their view of the case because they believe you are serious about settling the case.

While bravado may have its place and can be effective, the fact is that rhetoric and bombast usually arouses the same in response. If the goal is to get the other side to

pay attention, being candid and acknowledging the weak points of a case is a more effective way to get the other side to recognize the strengths.

The other side already knows the weaknesses; by acknowledging them, you secure credibility and focus the dialogue on what is important.

However much work goes into setting expectations, at some point the parties will meet. The next lost opportunity in mediation is wasting the chance to talk directly to the decision-makers on the other side.

Parties often seem afraid that opening sessions will be counterproductive, rather than seeing them as a valuable opportunity to learn and to persuade.

Some participants believe they already know what the other side is going to say, or that being face to face will escalate the tension between them.

It is true that repeating the same failed script from the litigation battle will lead to the same result: more tension and no settlement. But effective advocates recognize that they can use the opening session to accomplish multiple worthwhile objectives.

First, it is an opportunity to take the measure of the other side. How effective an advocate is your adversary? Did they carefully prepare? Have they thought through the strengths and weaknesses of their case? How will they present themselves in front of a court?

Second, and needless to say, the opening session is an opportunity to talk directly to and persuade the principals, lawyers and the risk manager on the other side of the table. More often than not, risk managers express disappointment when the other side was unwilling to discuss the case directly.

The opportunity to talk directly to the principal or risk manager on the other side, and provide them with an unfiltered analysis of the case, is not something to be wasted. Effective advocacy involves thinking through how to maximize the payoff of each moment of the mediation session. Lawyers should no more willingly skip an opening session in a mediation than a closing argument to a jury.

After all, a mediation is statistically much more likely to occur than a trial and is thus the moment and opportunity for an advocate to be persuasive with the risk manager on the other side of the table. In even the most difficult cases, if done right an opening session can de-escalate tensions, provide an opportunity to be persuasive and encourage full exploration of a given "reflection point" or "window" in a dispute.

Another moment of wasted opportunity often occurs at the conclusion of the mediation process. Although the average mediation is fraught with tension, hard-fought negotiations and begrudging agreements, there is no reason a deal cannot be closed with grace. In fact, demonstrating grace can have a powerful impact on how a dispute is resolved. When someone knows that the other side is going to show grace, they might move a little further by taking a little less, or agreeing to conditions that make a big difference to the other side.

While I would never second guess a party for trying to maximize their recovery, if it becomes apparent that the other side has reached their limit and is tapped out, then the party that has reached its goal should extend his or her hand and close the deal without tortuously trying to get a little more.

Once you miss the opportunity to influence the expectations of the other parties, you may not easily recapture it.

When counsel shows flexibility on the small points that don't dramatically impact his or her client, but appear important to the other side, they are likely to be repaid with flexibility on the concomitant points. Grace is often repaid with grace.

The settlement process provides many opportunities to drive the settlement value of the case. Setting realistic expectations when the other side is considering settlement authority; crafting an effective and persuasive mediation brief; making full use of the opening session and the opportunity to talk to decision makers on the other side of the table; and being ready to show grace in closing a deal are all moments to be savored and not squandered.

By taking advantage of these opportunities, a good mediator can achieve a beneficial result.



Jed D. Melnick is a **JAMS** neutral based in Philadelphia and New York. He has been involved in the mediation and successful resolution of hundreds of complex disputes with an aggregate value in the billions of dollars. He can be reached at jmelnick@jamsadr.com.

©2013 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.