



And So It Goes!

A Quarterly Newsletter from David M. Zacks, Esq.

Often times in mediation, the complexity of a case is tied to the most sensitive issues for both sides. Sometimes those emotional aspects are different, but given the right representation, these seemingly insurmountable details can be smoothed out to clear the path for settlement.

I was fortunate to serve as mediator in a large, commercial business dispute which involved Native American tribal issues as well as standard breach of contract matters. This was not the first dispute I have handled involving a Native American tribe, but unique to this case was that Native American counsel was represented on both sides. Throughout the extensive negotiations, two Native lawyers met and conferred privately by phone and in person. They discussed sovereignty issues as well as cultural factors that could assist or impede resolution.

The job of the mediator in such an instance is to recognize and give space to the aspects of a case that brings parties to the table. Those aspects are not always driven by the facts of a case, but rather parallel tracks, mutual understandings and civility. Kudos to counsel for their persistence and willingness to be creative and flexible to reach resolution!

On the “QT”

In mediation, if the mediator fails to suggest that both sides exchange release documents and deal points (in commercial cases) early on in the process request that he or she do so. This saves time and money if the case is resolved. It also sends a signal that both sides want the process to work resulting in a fair resolution.

Worth Reading

I read two books over the summer by the same author, Kristin Hannah. I highly recommend both to you. The first, *The Nightingale*, was a real page turner involving a young girl who risked everything to assist Jewish families in peril during the reign of Nazi Germany.

The second, *The Great Alone*, is the story of a returning Vietnam veteran who takes his family to Alaska and the challenges they all face in *The Great Alone*.

Going from Better to Best

I. Confidentiality:

As counsel, if you happen to see a cell phone on the table, be sure to have the mediator inquire

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if it is recording any part of the process. That should not be allowed. I suggest all parties and counsel acknowledge that no one is recording the process be it in a general session or caucus. If an adjuster is not present but participating by phone, the mediator can email a confidentiality agreement to him or her, have them sign it and email it back. All these safeguards are about keeping the integrity of the process. Without confidentiality, there can be no effective mediation.

II. Use of Your Expert at Mediation:

Could the success of your mediation depend on bringing your expert along? Some cases revolve around differing expert opinions. Consider involving your expert in the pre-mediation process. It will not only ensure you're fully prepared for the mediation, they may also be of value in helping you select the right mediator for your case. The firm Jones, Skelton and Hochuli PLC recently addressed this topic in an article and it included several cautionary points worth considering. If you bring your expert witness to mediation there is potential for waiver of confidentiality or work product by prematurely disclosing the expert witness's or your work product to the opposition if the case does not settle at mediation. It is recommended that you label all information provided to your expert witness prior to the mediation "for settlement purposes only" or similar limiting language.

My suggestion would be to discuss with opposing counsel having both sides bring their expert to the mediation. This ensures there is clear understanding and agreement on

how communications will be protected going forward. Since most cases are resolved during the mediation process serious consideration should be given to bringing this asset along, assisting the mediator in understanding your position and letting the other side see how effective your expert will be on trial if the case is not resolved.

Lastly, if you do intend to bring your expert, I suggest full disclosure prior to commencing the mediation. Discuss it with opposing counsel, make sure the mediator knows that one or both experts will be present so that parameters can be set on what you plan to do with them. Are they going to just observe and listen or will they be there to educate and answer questions during the general session as well as private caucuses? These are important considerations which should be evaluated on a case-by-case basis going forward. In my judgment it is another effective tool that is rarely utilized at the present.

The Last Word

One of my favorite lines in any song is by the Rolling Stones. It goes like this:

***"You can't always get what you want
But if you try sometime you find
you get what you need"***

This is not only a good rule for us to follow in life, it's also a good one to follow in approaching mediation.

Have a great Fall! —David