

Mediator, go work your magic

Mediators need our help to settle cases successfully


Cooper

By Miles B. Cooper

The lawyer, walking downtown, ran into a mediator he had not seen in a long time. They exchanged hellos and the mediator began telling the lawyer about the day's frustrating mediation.

"The plaintiff's lawyer in today's case told me, 'Go work your magic.' He gave me a mediation brief the morning of the mediation, told me the brief was confidential and couldn't be shared, refused to talk to the other side, and refused to let me have the other side meet his really impressive client 'until there's enough money on the table.'"

"So how did it go?" the lawyer asked. The mediator's brow furrowed as the corners of the mediator's mouth turned down. The look told the lawyer everything he needed to know…

Share your briefs

Some lawyers worry that sharing a detailed brief provides the other side with a trial road map. Set that worry aside. One should not underestimate or overestimate the opposition. Like game theory, one must presume that the other side's decision-making group is composed of rational players. Rational players should be able to predict our moves, just like we predict theirs. Yes, I recognize that *your* specific opposing counsel might seem irrational. But that's one member of a decision-making group that typically includes an adjuster, a committee, or a shot-caller.

We also have the burden of proof. In order to settle successfully, we have to convince the other side that we will win at trial. Sending a mediator into the other room to do all that convincing is a heavy burden. One might get lucky and do well occasionally. But one's chances of success go up dramatically when one directly controls the message instead of putting it all in the mediator's hands.

Give the other side plenty of time to evaluate your brief

The bigger the case, the more time the other side needs to evaluate plaintiff's position. Most insurance companies make decisions by committee. These committees have regularly scheduled meetings. Add in an excess layer, with another committee, and the settlement authority decision-making gets very complicated. Conducting all these meetings takes weeks. No matter how important we think our case is, these institutions are unlikely to deviate. Changing the decision-making process is like turning a supertanker. The captain may want to avoid that iceberg, but the collision was written long before impact. We've seen more than one case that went to verdict while the committees were still trying to cobble together an offer.

Call the mediator

Yes, the mediator received the brief early because you were on top of things. But a conversation several days before helps direct the mediator to key points or logistical issues. Your client absolutely, positively, does not want to see the wrongdoer at any point? The call is the time to work that out. The mediator thinks some additional information might be useful? Better to arrange it before than day of. Day of means the case likely requires a second mediation to resolve. Before means it may get settled at the first mediation.

Mediator as mouthpiece

If the mediator is the sole communicator, it may cause inadvertent issues. Remember the childhood game Operator? One person whispers a phrase to another, and then another. The initial phrase, "I like beet and kidney pie," eventually becomes "I like feet. I don't know why." A miscommunication.

When the mediator is forced to make all of one side's points, it also forces the mediator to decipher what is and is not confidential. That increases the risk that one of the aces that was supposed to be kept for a later negotiation round or a later expert deposition gets played. Having the mediator make all of one side's points also runs the risk of making the mediator look like the mediator is attempting to advance that side's agenda. The mediator does not want to lose credibility by getting tarred as an advocate.

Consider direct communication

Mediation is wonderful for toning down rhetoric, posturing, and emotion when negotiating. But there are benefits to direct communication. What's more compelling, a mediator saying the plaintiff presents well or the other side seeing the plaintiff directly? Nuanced legal or factual points requiring granular knowledge are best handled by the lawyers. Counsel live with a case for years. The mediator crams the data into a day.

Outro*

Back to our lawyer and mediator. The mediator said, "You know, you write that column. This would be a great topic. It would certainly help me in resolving cases if the parties all understood how important it is to share information and be

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willing to directly engage the other side. I frequently work magic at mediation, but miracles are much harder."

"A good idea," said the lawyer, "Thanks for the suggestion."

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