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Table Stakes

VIEWPOINT: In mediation, staying in the process can be critical to achieving meaningful movement from both sides.

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The earlier parties get to the mediation table, the earlier that they can settle, the more time and money they can save and the sooner they can move on with their lives. When parties defer settlement discussions, they risk intractability and entrenchment in their respective positions.

If the early mediation session does not result in immediate settlement, lawyers and their clients should keep two interim goals of mediation in mind:

- Development of a cooperative, problem-solving relationship with the other side that serves to minimize the cost of continuing litigation and to facilitate further negotiations.
- Discovery of the respective parties' "true" settlement positions so that as parties move forward they can make an informed choice about whether to settle or litigate.

Staying at the table is essential to achieving these interim goals.

Be Proactive

To get to the mediation table early in the dispute, lawyers must use a combination of collaborative problem-solving skills and persistence, balancing the desire to explore settlement with the ethos of the zealous advocate.

Some useful tips for the zealous negotiating advocate are:

- If the client is resistant, explain that mediation is a risk-free opportunity to explore settlement, that 90 percent of cases settle before trial and that the investment of time and money is very small compared to other litigation processes, with a potentially huge savings.
- If the lawyer fears looking weak to the client or the other side, counsel should explain that it is the lawyer's policy to go to mediation as soon as possible. The benefits have proven themselves repeatedly. If the case does not settle, the lawyer will aggressively litigate the matter.
- If the lawyer desires to interview key witnesses or wants testimony under oath before proceeding, counsel can schedule mediation 60 to 90 days in the future and also agree to first depose key witnesses and exchange important documents.
- If the offer of the defendant is too low or the demand of the plaintiff too high, counsel should convey a willingness to listen and to negotiate. Conditioning mediation on a particular demand or offer has a chilling effect. Counsel should explain to the client that mediation is the better process in which to request significant movement.
- If internal client issues or other issues need to be addressed first, the lawyer can immediately convey to the other side that early mediation is desirable as soon as it is practicable to do so.

- If there is an arbitration clause in a contract, the parties can choose to schedule mediation first, before or after selecting the arbitrator.
- If before the court, request the judge to order the parties to mediation.
- If all else fails, use a professional service provider to convene the case. Whether or not counsel has approached the other side, a neutral convener can be successful where a party's counsel was not.

Be Patient

Too often attorneys walk out of the mediation process prematurely, feeling that the other side is not moving far enough fast enough.

To understand the value of staying in the process, consider a typical mediation with a large disparity in valuation between the plaintiff and the defendant. An experienced employment mediator has been retained to mediate a "he said-she said" wrongful termination case.

The process typically involves a one-hour joint session where both sides present an overview of their respective cases, the mediator sets a collaborative tone, and the parties themselves sometimes talk.

The mediator spends the next hour with the plaintiff's side in caucus, giving the plaintiff a chance to vent. The mediator is discovering the real "needs" of the plaintiff and what is required to make the plaintiff whole (often a combination of acknowledgment, apology, job and financial security, and various forms of monetary damages).

In addition, the mediator is discussing the strengths and weaknesses of the plaintiff's case, the range of possible trial or arbitration outcomes and the net recovery for the plaintiff in each outcome. The mediator then helps the plaintiff develop a negotiation strategy and a demand package with a message.

Two hours have passed and the plaintiff's first demand, with a message, is delivered to the defendant. The plaintiff wants a written apology and $500,000. Counsel believes that the case is valued well above six figures and is willing to come down from $500,000 but only if the defendant makes a significant offer.

The mediator then engages in the same process in caucus with the defendant, but first must keep the defendant from leaving the room. Employers also need to vent, and they resent the idea that they should pay any money at all, let alone a lot of money, unless they feel that the evidence justifies it.

In this case, the defendant feels there is minimal liability and establishes a settlement target range of $30,000 to $60,000. The defendant does not make the significant offer requested by the plaintiff against a demand of $500,000. Instead, they begin much lower, at $15,000, leaving several negotiating moves to the target range.

The defendant sends the offer with a message to the plaintiff that the employer will offer more but that this is not a six-figure case. If the plaintiff's demand can come down significantly, the employer can offer more money.

This is the point at which the plaintiff often leaves, feeling that the process is useless and a waste of time.

The mediator must reinforce to the plaintiff the defendant's message that there is more money to offer. This encourages further movement in order to discover the best possible offer the defendant is able to make, and the mediator explains that the only way to find this out is for the plaintiff to make another move.

After many more such moves from both sides, the plaintiff is at $170,000 and the defendant at

$65,000. Both sides feel hopeful and frustrated at the same time. The mediator continues to move the parties, sometimes toward a moving target zone suggested by the mediator, perhaps $90,000 to $130,000.

So long as the plaintiff keeps making moves, the defendant becomes more motivated by risk avoidance and cost control, and more willing to put more than its targeted range of settlement money on the table. Likewise, as the plaintiff sees the defendant offering money approaching an amount that might be worthy of consideration, he or she stays invested in the process.

The mediator begins to focus the plaintiff on the certainty of a settlement in the target range that puts net dollars in the plaintiff's pocket and that also fills the plaintiff's underlying needs. These net dollars are compared to the net recovery (or net cost) in the range of possible outcomes at trial or arbitration.

In many cases the gap will close and the case will settle. The worst thing that will happen is that the parties will not budge from their last moves. However, the parties now possess a great deal more information about settlement possibilities than they did, they have learned more about the case and their opponents, and counsel are better able to advise their respective clients of the risks and benefits of settlement versus continuing litigation.

The stalemated mediation is still not over, however.

Will the parties benefit from a mediator's proposal or additional discovery? Is a summary judgment motion or determination of the forum for tribunal required before resuming discussions? Can the parties agree to ways to streamline these next steps?

The plaintiffs who stay through the closure process receive copies of their personnel files, and the defendants get the names of key witnesses without formal discovery.

It then makes sense to actively consider a return to the table in the future because staying there in the first place created a realistic expectation that settlement could occur.

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