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Why Cases Don't Always Settle in Mediation and How to Improve Your Chances

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In advance of any mediation, I subconsciously get a sense of which cases will settle and am often surprised when they don't. As a result, I try to remind myself that settlement is always possible but never certain. I also think about three scenarios that often present barriers to settlement.

Is it too soon?

It's not uncommon for parties to have a mediation very early in their dispute—even before a complaint has been filed. Sometimes this is because one or both parties want to explore a resolution before they incur the costs of litigation. Other times, the mediation may be required by the terms of an underlying agreement, providing for example that the parties must mediate before any suit can be filed. In such situations, the process is burdened by one or both parties not having the benefit of information they would obtain in discovery; as a result, a party may be reluctant to make concessions because the mediation is occurring "too soon."

In my experience, mediation can never happen "too soon." Regardless of where the parties are in the process, there is always something that is unknown and will be discovered later. The only way to negotiate after all the facts are known is to wait until the jury returns. As a mediator, it is my job to help parties avoid the "too soon" problem by discussing in advance what each side needs to more thoroughly evaluate the case. Phone calls in advance of the mediation date are critical in this regard, and counsel should consider what their side believes it still needs. Where more extensive information exchanges are necessary, such calls sometimes lead to a continuance of the mediation date or a pre-session mediation on informal discovery. Alternatively, the mediation itself may uncover gaps that can be addressed by adjourning the mediation and resuming it at a later date.

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In the end, though, parties and their counsel must recognize that any settlement process is a risk management exercise where the goal is to liquidate the risk of what is not known. Counsel needs to remind their clients that no one can "know what they don't know." In any litigation, that is the risk they are liquidating through settlement.

Does a party have unrealistic expectations?

By far, the biggest hurdle in many mediations is one or both parties' unrealistic expectations. Both parties and their counsel have a tendency to see things only from their perspective and overlook or underrate the strengths of the other side's position. This is one factor that leads to wildly divergent gaps between the initial demand and offer. Sometimes such gaps are simply a negotiating ploy and are recognized as such by each side; however, they may also reflect unrealistic expectations. Mediators employ

different tactics to address this problem, but counsel can and should use the same approaches when preparing their clients for mediation. If a plaintiff prevails, what are the high and low ends of their likely recovery? What issues pose a risk of loss? It is important to develop a list of such risks and assign a percentage to each separately and then aggregate those risks. Going through such an exercise forces a plaintiff to discount the value of their claim and a defendant to increase the value. Too often, an attorney will assure me they will win a particular issue, but then hesitate when asked if they will guarantee this to their client. When asked to express their confidence as a percentage, counsel is more likely to say 80% than 100%, which represents a 20% risk factor.

As a mediator, I don't like leading an attorney through a detailed risk analysis in front of the client, and I shouldn't need to. Counsel should do this beforehand. Some counsel may be reluctant to engage in the exercise because they feel it suggests a lack of confidence in the case or will undermine the client relationship. That shifts the burden to the mediator to provide the reality check, which is a problem that becomes even more difficult if, during the mediation, counsel continues to adhere to their pre-mediation assessment. In such situations, I look to the other side to present new information so I can provide a rationale to the attorney who needs to alter their pre-mediation risk assessment.

As a result, when reviewing the other side's mediation statement (which, for reasons discussed elsewhere, I believe should always be exchanged), counsel should look for differences in the other side's risk analysis and consider facts or arguments with which to arm the mediator to present to the other side. The mediator can then ask counsel to identify any facts that may present a problem for their position. If either side omitted key facts in their risk analysis, the mediator can implore counsel to make an adjustment to it, and counsel can use the new information as a reason to do so.

But while risk assessments are often helpful, it is important to understand that unrealistic expectations are less the result of analytical errors than a reflection of natural human emotions. This is why the *process* of mediation is so critical. Rigidity during the morning may turn into flexibility in the afternoon depending on whether the mediator has established a relationship of trust early on in the process. Counsel should welcome direct interaction between the mediator and their client as one of many ways to promote that. If counsel "shields" their client from such interactions, it may be more difficult for the mediator to work through unrealistic expectations. To jump-start this process, counsel may want to consider involving the client in the calls in advance of the scheduled mediation.

Is there a threat to a party's business model?

Another problem arises when the case is not just about money, but implicates a key element of a party's business model. In such cases, paying a plaintiff may lead to a host of follow-on claims or force major changes in the defendant's business model. Reaching a settlement in such instances can be a challenge; however, it is important to recognize an adverse ruling after a trial or arbitration presents the same risk or even the more difficult challenge of making the necessary adjustments after a decision that may receive wide publicity or have collateral estoppel effect.

Cases presenting this challenge need to be identified early, and counsel should raise the issue with the mediator as far in advance as possible. If so engaged, the mediator can share in the development of possible risk management solutions. Initially, these issues may need to be discussed with the understanding that the mediator will not discuss them with the other side; otherwise, the admitted risk may be used as leverage in the mediation. Occasionally, one of the solutions is to give the defendant more time to make adjustments to their model. In such instances, the mediation may need to be spread over multiple sessions or involve an extension of the trial or hearing date. If the case is not a class action, another approach is to settle on claims that do not present a risk to the business model—again, to afford the defendant more time to adjust. Whatever the approach, this third barrier is the most interesting challenge.

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