

The Resolution Advocate: Tips on Getting to the Goal Line in Civil Litigation

MEDIATION AS A DISCOVERY TOOL

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So the case does not settle at mediation! Disappointment perhaps, but there are other benefits to going to a mediation. One of them is the exchange of information that takes place between or among the parties. This is particularly true of a mediation that takes place early in the case, or at a certain point in time after the parties have exchanged limited information. Even though a mediation takes place, it is sometimes the case that the parties simply do not know enough about the other side's position or the facts of the case; therefore, productive negotiations just don't happen. Or, it may be that the perception of the parties is just quite different and more information needs to be exchanged before settlement can be reached.

We had an employment discrimination case recently that I thought had some real merit. It was different from other employment discrimination cases in that the employee was still being paid in full; however, he had been reassigned, and had not been allowed to pursue some job opportunities that had been posted by the company. He had documented a series of events that looked as if he had an actionable case, and some very large damages since he was only 55 and had several years of employment left. It appeared he was being shunted aside primarily because of his age, although he was African American and believed race was also an issue.

The employer – a major national corporation that advertised highly its emphasis on non-discriminatory practices – really wanted to mediate the case before any litigation was to commence. The employer had a program in place for pre-litigation mediation, and offered to pay the cost. A free looksee at their defenses.

We huddled and decided to accept, and I am very glad we did. We found out a lot about our case, and what damages we might claim, and the other side was able to hear from us. As a result, we have all agreed to give the matter a month or so (no statute problems) to contemplate a possible resolution that might avoid litigation and potentially lead to continued employment – a real positive for our client. The early exchange of information allowed us to find out more about the case and assess its merits. Likewise the employer had the opportunity to do so. We all gained by the early exchange of information and could each reassess our position and possibly avoid a costly and very unpredictable fight.

So, mediation can be very productive as a discovery tool and opportunity to learn more about your client's case, and what the other side has to say IF the parties come in good faith, with a view towards getting the important facts on the table. But if one side is attending simply to demonstrate that it is playing hardball and merely wants the other

side to capitulate for reasons that are not meritorious, then a mediation is not worth the time or money.

One issue that you face is how much you tell the other side. For example, what if you have significant negative information on the other party, or impeachment potential; do you share that? Maybe not. Maybe it has to be saved to avoid the adverse party being able to defuse this potential damaging evidence. Or, it might be that you can disclose the essence of this information in a private letter to the mediator, and can go over its substance and level of importance in your case in a private caucus. That is a judgment call that you as counsel need to make. If you follow this approach and hold it back or disclose it only to the mediator, the mediator might use it if he or she believes it may result in closure. Again, that is something you and the mediator need to discuss to put together a strategy.

My experience is that an early mediation is a valuable tool if the parties are really interested in obtaining a resolution without protracted litigation. Even if the case does not settle, there can be an exchange of information that allows the parties to re-evaluate the case. If necessary, they might fashion out a limited discovery plan, complete that part of the discovery process, and reconvene for a later session at a time when they are more ready to talk about a solution.

If the parties come in good faith, settlement or not, a mediation can be a good means of obtaining more information about the merits of your client's case. A good faith exchange of documents and facts can lead to an early evaluation of the case so that a resolution can be achieved.

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Good mediating...

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