Ten Ways to Use Mediation to Assess Risk More Effectively

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In a perfect world, before giving a client advice about whether to settle or try a case, counsel would be in possession of all relevant information about the matter. Counsel would know whether her client's witnesses will dazzle the jury or disappoint; would have seen the hidden skeletons lurking in the client's files; would have assessed how the other side's counsel and witnesses performed during their depositions; and would have

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learned how determined the opposing party is to wage war. All of this information would enable counsel to determine the ultimate question: whether her client's case is a dream or a dog, or more likely something in between.

Although the world is imperfect, lawyers are routinely called upon to decide the value of a case when all they have is imperfect information and an overwrought client. Lawyers do the best risk analysis they can under such conditions, but often what they tell clients is just an educated guess. This is particularly true if they are asked to value a case before any discovery has taken place. So what can counsel do?

This article suggests that mediation may be one possible answer to achieving better risk assessment and case valuation. A fair number of practitioners still denigrate the use of mediation as a discovery device. And though I am not advocating that mediation substitute for formal discovery, I am suggesting that it can help counsel obtain vital information about both sides of the case that will lead to better case valuations and decisions about settlement.

Waiting to mediate until after some discovery has concluded usually guarantees a more difficult settlement process.

This article describes 10 mediation techniques that can help counsel undertake a more effective risk analysis and obtain key information that could lead to a settlement. For these techniques to be effective, the parties need to be willing to share with each other more than just superficial information about their respective cases; they also need a resourceful mediator unafraid to push for greater disclosure to further the risk analysis process and the likelihood of settlement.

1 Pre-Session Exchange of Documents

Lawyers often say that they cannot be ready to mediate a case until the parties have conducted at least some document discovery. The problem with that approach is that waiting until discovery has concluded usually guarantees a more difficult settlement process. By that point, both parties have already made financial and psychic commitments to the litigation process. Those commitments then become obstacles to resolution.

Many cases can and should be mediated without any formal discovery. An agreement by the parties' attorneys to informally exchange relevant documents more quickly provides the parties with the information they need to assess risk more confidently. In this way they obtain information much sooner than they otherwise would via formal discovery.

The mediator's role in this process is to act as the intermediary in negotiating the type of key documents to be exchanged. Although this exchange is informal, it is entirely appropriate for the mediator to memorialize the informal agreement in writing, and describe the scope of the agreed information exchange. The mediator should check with the parties to see if the exchange is taking place and functioning well, and if not, monitor the process to encourage compliance. The mediator has an interest in seeing that both sides have the essential documents needed to properly evaluate their case.

Take a typical employment dispute: the plaintiff claims he was terminated because the defendant employer discriminated against him due to his age. The employer insists that the termination occurred because the plaintiff obtained consistently poor evaluations. But the plaintiff does not have copies of those evaluations.

At the outset of the mediation process, the mediator inquires whether there are any critical documents either side needs to make the mediation as productive as possible. The employer agrees to turn over the personnel file to the plaintiff before the mediation. Now the plaintiff's lawyer need not rely on her client's characterization of the evaluations; she will get to see them first hand before she has to give her client advice about settlement.

2 Exchange of Mediation Submissions

A common model of mediation calls for each side's mediation submission to be submitted only to the mediator. I advocate changing this model to allow the factual statement and legal analysis sections of the submission to be shared with the adversary. I believe that, in most cases, these parts of the submission can be shared with no harm to either side's bargaining position. The reason is that this information would be included in an early pleading or motion if the case were proceeding in court. So the parties are not going to give anything away. While the mediation submissions are intended to educate the mediator as to each side's view and analysis of the case, at the

end of the day, each side must understand the opponent's legal and factual analysis if settlement is to be achieved. Thus, there is much to be gained from allowing each side to read the chronology and legal analysis of the claims and defenses.

Counsel are sometimes hesitant to exchange even parts of their submissions. I try to assure counsel that they are not revealing confidential information or any positions on settlement or settlement values. I remind them that sharing their perspective on the facts and the law with the adversary can convince him that the case is not as strong as he thinks it is. However, the risk is that the opposite is also a possibility: The doubting adversary can become convinced he has a much stronger case than he originally thought. But in my experience, cases do not often settle in the dark. Parties who are not given sufficient information to make an educated risk analysis usually wind up walking away from the settlement table.

The final benefit to the parties sharing certain portions of their mediation submissions in advance of the mediation session is that the mediator has to do less shuttling back and forth between them to convey their views of the facts and the law. It also avoids putting the mediator in the position of having to deliver negative messages to both sides for a good portion of the session. When regularly placed in the position of the bearer of bad news, at some point the mediator starts to look like the enemy, which does not help the process.

3 Substantive Use of the Joint Session

In a significant number of cases I mediate, the attorneys say that they prefer not to have counsel make substantive presentations about the case in the joint session. They claim that these presentations merely provide an opportunity for grandstanding, inflame the passions of the parties, and make negotiation of a settlement that much more difficult. All in all, they view such presentations as having a negative effect on the process.

In my view, this may be true of a minority of cases. However, in most cases, the parties can learn a great deal from substantive presentations, provided the mediator exercises control over the presentations. For example, it is up to the mediator to ensure that the presentations are not deliberately provocative or overly adversarial. One approach is for the mediator to discuss these limitations on the presentations in an early telephone conference with counsel, and then, immediately prior to the joint session, remind them in a private conference that overly adversarial remarks will not advance the mediation and will not be tolerated. The mediator should also prudently inquire about the length of counsel's presentation so that it does not wind up eating away at precious session time. I always ask the attorneys to tell me in confidence and in some detail what they plan to cover in the mediation. By this point in the process, I have read both parties' submissions and usually have a sense of what topics may be most effective to stress. In this way the mediator can act as a coach so that the parties can make the most effective presentation possible.

Presentations by counsel of the critical aspects of the claims and defenses and the facts on which they are based can trigger important insights for the adversary, which cause it to reevaluate its case and see weaknesses in its litigation strategy; these insights and the reevaluation are both important elements in analyzing risk. At the very least, the presentation by each attorney allows the nonpresenting party to evaluate the presenter's advocacy skills.

4 Client Participation in Joint Session

Joint sessions can be used not only to evaluate counsel's performance, but the performance of client representatives who are participating in the mediation. This can reveal how persuasive or unpersuasive they would be in court or arbitration.

There is no substitute for seeing and hearing the case directly from the mouths of the parties (as opposed to their attorneys). If a party representative is articulate and persuasive, the value of the case may shift significantly in that party's favor. For example, seeing the claimant as a very credible and sympathetic presenter can be the single most effective way of convincing the decision makers for the respondent that they need to shift their valuation of the case (and give less or no weight to certain arguments), and consider settling.

There is no doubt that allowing a party representative to participate in the joint session means exposing a key witness (who presumably has not been deposed) to evaluation by the adversary. But it is not as if the witness can be hidden away indefinitely. He or she can usually be deposed by the other side should the case go forward, under the much more trying circumstance of formal examination. Having a client present in mediation without the risk of probing cross-examination gives each side the opportunity to put its best foot forward for settlement purposes.

A party representative should be prepared for the mediation by counsel for the party. This should be a prerequisite to allowing the representative to speak at the mediation. And if counsel concludes that the representative won't make a good witness, counsel can certainly decline to have this person speak. However, this is also important information to process for purposes of settlement decisions. If the client representative is unlikely to persuade in the soft arena of a mediation session, can he or she withstand the rigors of a trial or arbitration?

5 Further Information Exchange During Private Caucus

Before the parties get down to the business of making demands and receiving counter offers, they will usually participate in one or more separate private meetings (caucuses) with the mediator. These meetings allow the mediator to probe for additional information from the caucusing party and for that party to ask questions of the mediator or the adversary. The mediator will then ask these questions of the other party when it is that party's turn to caucus. The mediator will try to persuade each party to allow the mediator to share the answers with the other party. This may encourage the parties to ask their own questions during caucuses with the mediator. The answers to these questions can provide important information that will facilitate risk analysis and views about settlement.

Because the mediator meets with only one party at a time, it is a safe environment in which each side can explore the nuances of its case and gain some insight into what the other side thinks.

6 Listening to the Mediator's Questions

Often the questions the mediator asks hint at either what is on the mediator's mind or what the other side is thinking. In either case, the information may be highly relevant. For example, the mediator may ask counsel for the claimant how it intends to substantiate the damages claimed. That question signals to the claimant's counsel that it is important to develop persuasive evidence of damages to prove that the damages are real and substantial.

If the mediator asks a seemingly innocent question (such as, "Now can you explain to me again how you support your limitations defense?"), it is not an indication that your mediator is dense. Rather it could be that the adversary is not convinced on this point. It is critical to evaluate each question to determine what the mediator may be signaling. In mediation, it is not the mediator that the parties have to convince. One side has to convince the other that its case is the stronger one. That is why mediation involves a consistent rethinking to arrive at a more nuanced risk assessment of the case.

7 Further Evaluation of Key Fact Witnesses During the Mediation

Where I have felt that the outcome of the mediation rested on the credibility of one or more key witnesses who had not yet been deposed, I encourage the parties to invite these witnesses to be interviewed by the mediator in a subsequent joint session so that the parties can evaluate them. In most cases, they have agreed that the exercise was helpful in obtaining important new information related to their risk evaluation.

I firmly believe that if this technique is used, however, the interview must be conducted solely by the mediator. The parties and their counsel must remain silent during the entire interview. Before the joint session, counsel may submit written questions to the mediator to ask the witnesses. But it is within the mediator's discretion whether to ask them. I write these ground rules in advance and ask both parties to consent to these conditions.

8 The Mediator as Fact Finder

Mediators may play many roles during mediation, with the agreement of the parties. One effective role is that of an informal "fact finder." I

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have played this role when an attorney was not willing to make highly relevant documents or witnesses directly available to the other side. In this circumstance, the parties agreed to allow me to privately interview one or more of this party's witnesses and review its critical documents. This enabled me to evaluate the credibility of the witness and the impact of the documents and provide my evaluation to opposing counsel.

There are other times where a party is unwilling to allow me access to a witness or even to reveal the witness's identity to me. In those cases, counsel has allowed me to read a redacted version of the witnesses' statements. That still gives me the ability to go to the other side and advise them of what their opponent's witnesses are likely to say under oath, even though I cannot disclose those witnesses' names.

Not all lawyers are comfortable with these approaches. It takes a high degree of trust in the mediator and a willingness to share information that the other side might never have access to, certainly in the limited discovery world of arbitration. Most lawyers, however, recognize that if the mediator can convince the other side that there will be witnesses who will support their version of the facts, that translates into real gains at the mediation table.

9 Expert Participation in Mediation

There is often no substitute for both sides to directly evaluate the other side's expert witness. This can be done during the first joint session, but it tends to be more productive in a later session. I don't advocate for this process unless the case heavily depends on expert testimony. But in complex cases that do rely substantially on experts (cases such as patent infringement claims, construction disputes, or aviation accident cases, to name a few), neither side may be willing to make significant movement toward settlement in a mediation until they have had a better sense of the expert's opinions. Usually that realization comes at the end of a relatively unproductive first session.

When one or both sides have retained experts, I have sometimes invited the experts to make presentations directly. At the very least, I urge each side to share an expert report if one has been prepared. But as with fact witnesses, there is no substitute for seeing each side's expert in action. Each expert can present in a separate session, or both experts can present simultaneously in one, allowing the experts to debate the issues directly with the participation of the parties. In this way, both sides can obtain a far more nuanced understanding of the opponent's case.

As with the other processes I have discussed, this approach can make some lawyers uncomfortable. They may prefer to allow the mediator to privately interview both experts and then provide his assessment to the parties. Even this concession would certainly assist the mediator in providing the other side with an assessment of the other side's expert case.

10 Mediator Evaluation

Evaluative mediation remains controversial. It may be inappropriate for some types of disputes, but it is largely appreciated and sought by parties to commercial disputes, since they want real risk assessments and impartial valuations in order to be able to decide how to dispose of the dispute.

An evaluation of a case must be requested by both parties. To be effective and credible, the mediator's evaluation must be well thought out and substantiated by real analysis of the facts and the law. It should be delivered with gravitas at the appropriate time in the case. Mediators who provide their views too early in the process risk irreparably alienating parties and their counsel.

I believe that mediator evaluations help parties resolve their dispute and do not cross the line of impartiality and neutrality. When done right, the mediator does not take sides or become the advocate for one side at the expense of the other. Rather, the mediator gives an unbiased analysis of the strengths and weaknesses of both sides' case based on the applicable authorities. The mediator's purpose is not to twist anyone's arm to settle, but to give each party a reality check. An evaluation by the mediator can make the difference between resolution and a failed mediation. Mediator evaluations are especially useful when an impasse is looming. At that point in time, the parties need better information to help them revise their risk assessments so that the process can move forward.

Conclusion

In sum, the skilled mediator can help the parties and their counsel elicit the information they need to reach a more informed and nuanced view of their case. That in turn helps them develop a more accurate risk assessment to maximize the likelihood of settlement. Cases can be settled without using the tools and techniques discussed here to obtain this information, but the odds of settlement are much greater if all parties are willing to share information. ■