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Key elements of the successful mediation

The key elements of successful mediation – writing a “brief” brief, establishing what each side really wants, assessing when final is final and focusing on settlement rather than disputed facts – help litigants to be realistic about settling their disputes

Over the years of doing alternative dispute resolution, I have found that *how* information is communicated many times may be more important than the facts in resolving mediated cases and in deciding arbitrated cases. The following article chronicles my observations of what works in a mediation to bring the matter to a successful resolution.

Brief means be brief

I always request counsel’s briefs before a mediation. I have previously written in the Advocate on this subject: (*Mediation Roadmap: The mediation brief – plain English trumps legalese* Advocate October, 2008). The brief should be short, concise and void of legalese. The facts should be bare bones. Explain who the key players are and what their relationships are. Explain a time line of what happened when. Explain where the events occurred and explain your client’s allegations of why things went wrong.

The briefly stated legal analysis should explain your clients’ key legal arguments with brief summaries of the main cases on your side. If possible, briefly distinguish the key cases against your side. This should not be a Brandeis brief. Make it a short analysis of the law. Key documents, the contract, the police report, or the crucial e-mails should be attached. However, including exhibits that could be used for weight lifting is overkill. Keep it short and to the point.

Determine what each side really wants

Sometimes litigants who file suit and litigants who defend actions and perhaps file cross complaints are not clear on what they really want. Is it just money that is sought? Are there some other concessions that the plaintiff really wants, as well? Sometimes it takes hours into the mediation to find out exactly what is

non-negotiable. Sometimes when a party says, “Absolutely not, I will never agree to that,” they do not really mean it. With the help of counsel, I try to get at what is really going in order to figure out what each side *really* wants.

Assess whether the “last and final offer” really is final

A mediation is like a play: act one; act two; act three. First, setting out the main characters and facts in act one. Then act two with the twists, turns and revelations. In act three, the resolution is hopefully realized or the parties just leave. Many times act three pops up prematurely and the parties, or at least one side, pack up to leave before the matter is resolved. Some matters cannot be settled because of the stage in the case, the stances of the parties or some of each. Sometimes a party says it is over, packs up and says “This is it, I’m leaving.” “Tell them to take it or leave it.” But many times this party does not really mean it. How do you know? Perhaps experience in analyzing, non-verbal cues, timing, the facts of the case, or maybe just a hunch or intuition that gives a clue.

After the parties hear more about their downside risks of leaving abruptly or giving an ultimatum, they may reconsider their “last and final” offer. Sometimes, that is when I try a Mediator’s Proposal: a proposal to settle the matter that does not come from the parties, but from the mediator. The proposal is not negotiated with the mediator, but sometimes the Mediator’s Proposal gives the parties a breather to assess their risks, reconsider their “last and final” offers and save face when they come back to the table. When all parties are at an impasse, I usually try such a proposal if I have good reason to think that both sides might just be willing to go there.

Avoid getting mired in the factual disputes

Sometimes the litigants just need to vent. The pent-up anger and frustration of a long drawn-out litigation may take a while to dissipate. I have found that sometimes it is more about what each side will agree to than what the true facts are. I even tell the parties at the outset that while I need to hear and understand the facts, in a mediation, a mediator is not there to make a decision, and many times I just need to figure out what each side will agree to and not whose story is the accurate tale.

Realistic solutions may not make litigants happy

In the last act of a play, sometimes the audience is not happy with how the plot resolves. Realistic solutions in a hotly contested mediation means that the parties may not leave happy with the result. My goal is that the parties feel satisfied with the finality of a settlement. Usually neither side is delighted but they all know it was probably about right. The attorneys play a key role in making the resolution work, helping the clients assess the risk and settling when the time is right.

Conclusion

So remember, brief briefs, assess what the parties really want, determine when a final offer is final, don’t get mired in the facts and help your clients to be satisfied with a realistic solution when the time is right.

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