

Why and When to Mediate

By Lawrence R. Mills

Think about the last time an angry client came to your office to discuss suing someone for damages. That's what lawyers do, right? The job description of a litigator is to file a lawsuit, lay waste to adversaries, and win all for the client. The civil litigation model is combat between warring parties. Unfortunately, the costs to the client of pursuing an aggressive litigation strategy can be prohibitive and rarely is the client satisfied with the outcome – or the lawyer who pursues this path.

So how do you deal with a pushy client who wants results? The best approach starts with a radically simple correction in your attitude. You should acknowledge that the fundamental job of a litigator is the same as for a transactional lawyer: to put together an agreement that is reasonably fair and workable for all parties. Business deals would rarely come together if the orientation of the negotiations was to take all from the other side.

Lawsuits in which resolution has eluded the best efforts of smart, hard-working litigators, despite the investment of tens of thousands of dollars and months or years of time, routinely settle in a single day of mediation. Why? Not necessarily the magic of the mediation process or the skill of the mediator. The reason is that the parties approach mediation with a mindset of problem solving and not fighting.

Looking at this another way, we know that well over 95% of cases will settle before the trial or arbitration hearing. It is unlikely that a case will increase in value over time. The earlier the settlement, before significant costs and attorneys' fees are incurred, the more likely there will be a higher net recovery for the plaintiff or claimant. Your client will be happier, and happy clients are the best source of referrals and repeat business for you.

The best approach is to develop a settlement strategy early. This includes getting information regarding the facts, the interests and goals of the parties, the legal viability of the claims, and the value of the claims, at least within a range (big case or small case). Then, it is up to you to consult with your client regarding the options for a dispute resolution process consistent with your client's objectives. Usually this will include some form of mediation – the most effective proven technique for resolving disputes.

When should you mediate? As soon as you can – pre-litigation, if possible; if in litigation, certainly before all discovery is completed. Just get the information you need to settle the case as soon as possible. Share basic information and documents freely with the other side (they will get them anyway).

As mediation has become more accepted, it should be easier for you to propose mediation to your client -- without the client questioning whether you believe in the strength of the client's case -- and to the other side, because the advantages of mediation in potential cost savings, speed of resolution, confidentiality, ability to control the results, and a non-binding process (what have you got to lose?), are obvious and compelling.

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