

DAILY BUSINESS REVIEW

BOARD OF CONTRIBUTORS Mediators can be more than 'just number carriers'

Counsel should prep mediators on issues, dynamics of case

by Pamela I. Perry

At a recent American Bar Association meeting, a seminar participant complained that mediators were “just number carriers” — and three others nodded in agreement. An hour later, a charming woman I had never met casually announced to our lunch table that mediation was “just a waste of a day.” I was dumbstruck. It was not a great day to be a mediator.



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I do not know what is happening in mediations around the country, but I do know one way to ameliorate the “numbers carrier” syndrome and avoid a wasted day: Prepare the mediator by giving her something other than numbers to carry — and do it before the mediation session begins.

If counsel has not heard from the mediator days before the scheduled session, he should jump start the process by calling and focusing her on the principal issues and dynamics in the case. Counsel should confirm that the call is confidential and follow up with a summary, key pleadings and core documents. This gives the mediator the tools to learn the case before the session, and, with each side's permission, allows the mediator to ask the lawyers about the flaws in their position — preferably before they have crafted their opening statement.

For the mediator, ensuring that lawyers understand the problems in their case is often a key to resolving it. I cannot speak for other mediators, but I simply do not have the charm to persuade parties to settle a hotly contested lawsuit without a case-based reason. But show me a factual premise I can challenge with a deposition, or a legal position I can question with



illuminating case law, and I will be a big step closer to resolving the dispute.

To be sure, litigants should be reminded of the advantages of settling common to most cases — preserving resources, eliminating risk and achieving closure. In most cases, however, parties making settlement decisions give considerable thought to whether or not they will prevail at trial. As a result, parties tend to settle more readily when the mediation helps them focus on their strong points and vulnerabilities, rather than solely on the risk and expense of litigation. Inquiring into a Title VII defendant's troubling hiring patterns, or asking counsel about an ambiguity in a controlling contract or statute, is usually a far more effective settlement approach than simply harping on the uncertainty and cost of fighting on.

Resolution following a case based mediation also has another advantage: Parties seem to wake up with far less buyer's remorse when a settlement stems from a careful assessment of the specifics of the dispute. A plaintiff alleging religious discrimination who settles for less than she had hoped can usually move on when the mediation persuades her not merely that resolution will afford her a quick recovery, but that a jury could well determine that downsizing — not discrimination — prompted her termination.

A mediation is an evolving process cabined (at least for certified and court-appointed mediators) by prohibitions against giving legal advice, predicting case or issue outcomes and offering opinions designed to coerce the parties, decide the dispute, or direct the resolution of an issue. Within that construct, however, a mediator that has been properly focused can help the

parties critically examine their positions, assess the possible outcomes of key issues and determine what they are willing to give up to avoid fighting a protracted battle or risking an adverse result.

The mediation process plays a central role in our civil justice system and requires constant study and refinement. Lawyers can exponentially increase their chances of reaching a mediated settlement — and avoid squandering a day — by preparing the mediator to ensure that she carries more than “just numbers,” and that the numbers she does carry reflect case specific arguments, in addition to general statements about the advantages of settlement.

So the next time you have a mediation scheduled, start the process by picking up the phone and focusing your mediator. As I wish I had managed to tell my charming luncheon companion, a mediation is a terrible thing to waste.

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