

## Taking a Transactional Approach to Mediation of Litigated Cases

**IF THE ONLY TOOL YOU HAVE IS A HAMMER**, the tendency is to treat every task as a nail. Instead of addressing mediation like a hammer-wielding Thor, litigators can increase the likelihood of success and client satisfaction by thinking and acting more like transaction lawyers. Litigators typically approach mediation as an advocacy event, arguing the strength of their case and the weakness of their opponent's. This fits the evaluative style of mediation in which the mediator focuses on legal issues and the uncertainties and cost of litigation to achieve a compromise, often with the stated goal of leaving parties equally unhappy. While this approach often works, clients tend to be neither integral to the discussions nor satisfied with the result. There is another way. A transactional approach to mediation involves: identifying the differing viewpoints, interests, and needs of the parties; finding the settlement ballpark and deal points needed to settle; defusing perceived fairness issues; and conducting the exchange of offers and counteroffers in a choreographed manner.

Cases come to mediation on the wings of competing viewpoints. Clarifying those viewpoints—with explanations and evidence—facilitates making a deal. Lawyers should use the mediator to gain and communicate information useful to clarifying viewpoints rather than trying to turn the mediator into a super advocate. The goal is to get each side to understand how the other sees the issues, and the degree of reasonableness therein. This applies equally to damages cases, including personal injury and employment, in which clarifying viewpoints can drive settlement value.

Each lawyer should imagine how the other side views the case and how to show them the viability of opposing views. Key documents and expert reports should be available at the mediation. Even if shown only to the mediator in confidence, they enable the mediator to clarify viewpoints. Clients can directly understand and participate in discussions of differing viewpoints—especially as to what happened and the consequences. This approach leads to a more durable result, as compared with lawyer and mediator discussions focused on legal positions, in which the client simply defers to the lawyer.

Limited joint sessions can be used so the other side gets to experience the impact of evidence, for example how a party will present at trial. This is particularly useful when a decision maker, such as an adjuster or in-house counsel, was not directly involved in the underlying events.

In a premediation client conference each lawyer needs to determine:

- Interests that reflect what each of the parties wants.
- Needs that are what each party must have to settle.
- A ballpark monetary range within which to settle the case.
- A reservation price that for a plaintiff is the lowest amount required to settle; for a defendant, the highest amount that will be paid. The reservation price should be adjustable based on what is learned at the mediation.

This conference should begin with instruction that mediation is not about adjudication; it is a highly impersonal negotiation, based on competing viewpoints, in which the plaintiff is selling and the defendant is buying. Competing perceptions of fairness, however, are often detrimental to negotiations. This should be explained at the client conference. While most disputes are couched in terms of material interests, perceived fairness issues can lead otherwise sophisticated parties to take positions that are contrary to those interests. Time is often spent at mediation airing fairness issues in order to allow the material negotiation to progress. Trial lawyers are predis-

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posed to emphasizing fairness issues, as that is what often sells to a jury, but it is counterproductive to the mediation process. Defusing fairness issues in advance reduces their impact on the mediation process. Having this conference well before the mediation provides the confidence of considered positions that have been “slept on,” increases the client’s connection to the process, and decreases the likelihood of clients’ having buyer’s or seller’s remorse.

Lawyers should condense their clients’ interests and needs to discrete deal points prior to the mediation. With these points in mind, counsel should confer prior to the mediation on a draft settlement agreement in order to establish cooperation and arrive at a long-form agreement. If cooperation is not obtainable, a draft settlement agreement should still be prepared in advance. Doing so avoids the peril of leaving drafting to the end of a long day in mediation or ending up with a generic short form and hoping problems do not arise when drafting a long form after the mediation session.

As with any negotiation, anticipating the flow of offers and counteroffers at mediation increases the likelihood of presenting numbers that encourage the other side to continue to negotiate and decreases the likelihood of being stymied in the process. It also helps to prevent the numbers from getting away from you by, for example, making moves that are disproportionate to what the other side is doing, in a way that undercuts the credibility of your (undisclosed) reservation price.

Underlying all of this is the lawyer’s intention to shift from conflict and advocacy to problem solving and deal making. Consciously reaffirming this intention as the mediation progresses minimizes getting sidetracked and keeps the focus on getting the deal done. ■

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