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LITIGATION

Mediators Can Best Help Those Who Help Themselves

Lawyers Should Work With Clients To Develop 'Tool Box' of Objective Standards

BY RUTH D. RAISFELD

IT IS WIDELY ESTIMATED that 90-95 percent of cases settle before trial, but generally after long, expensive, and frustrating motion practice, discovery and court appearances. With civil dockets growing and agencies and courts facing budget constraints, the pressure on parties to settle has resulted in more tribunals ordering mediation, and more litigants opting for mediation voluntarily. To make it a more effective process, litigators need to prepare as thoroughly for mediation as they do for litigation.

In their ground-breaking book on negotiations, Getting to Yes, authors Roger Fisher and William Ury of the Harvard Negotiation Project posit that to conduct an effective negotiation, a negotiator should "insist that the result be based on some objective standard."[1] This important negotiating tool is often left back at the office when lawyers participate in a court-annexed or privately arranged mediation.

How can lawyers help themselves to settle a case in mediation even in the face of a large gap between initial negotiating positions? By working with their clients to come to the mediation with a "tool box" containing objective standards that the mediator can use to assist the parties to enter a "settlement zone" that may result in resolution of the case. Given data, documents and precedents to work with, the mediator is in a better position to facilitate a settlement acceptable to both sides.

The goal in mediation is not to "win," but to come to an agreement that both sides can live with. Generally, a case will settle when both sides make the same estimate of the value of the case, which is a function of the likelihood that the plaintiff will prevail, the amount of the potential award, and the costs of litigation. Of course, getting parties to the same settlement zone depends upon a host of psychological and emotional factors. Mediation can be effective in reducing the potency of these subjective issues if counsel come to the mediation having marshaled the available evidence and applicable precedent beforehand.

This kind of preparation can move the parties from subjective and irrational positions to an objectively fair and rational agreement. As Fisher and Ury state: "No negotiation is likely to be efficient or amicable if you pit your will against theirs, and either you have to back down or they do.… [T]he solution is to negotiate on some basis independent of the will of either side — that is, on the basis of objective criteria."[2]

The Psychological Factors

Regardless of whether the parties enter mediation by order or consent, counsel should not depend on their sheer conviction that they have a strong case, that the law is on their side, and that a judge or jury will vindicate their position. Preparation of objective standards prior to the mediation can temper the impact of traditional negotiating postures.

Individual negotiating styles fall somewhere between the "Gladiator" and the "Cave Man." The Gladiator takes a rigid "I win, you lose" approach, using anger, aggression and intransigence to dominate the negotiation. If both sides are Gladiators, the mediation will look more like sparring at a deposition than a true attempt to reach agreement. At the other extreme is the Cave Man, who is nervous about his case, fears going to trial, and literally "caves in," taking less than he deserves just to be done with the discomfort of negotiation.

These traditional negotiating postures reflect a variety of psychological tendencies that are at play in litigation settlement discussions. For example, decision-making analysts have identified a psychological phenomenon known as "reactive devaluation," which refers to people's tendency to assess and respond to offers and counter-proposals differently depending on the source of the suggestion. In other words, the mere fact that an offer or a particular proposal emanates from an adversary causes the receiving party to distrust the proposal, discount it, and reject it. However, if the very same proposal is linked to an objective standard, originates with an outside expert, or is conveyed by a mediator, it can evoke an entirely different response by the parties to the negotiation.

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Another psychological element at play in negotiations is the tendency of advocates to view the strengths and weaknesses of the case they are handling through "rose-colored glasses." Empirical studies demonstrate that individuals tend to make economic decisions based on "delusional optimism rather than on a rational weighting of gains, losses, and probabilities."[3] To counter-balance this overly optimistic approach, business strategists recommend that decision-makers use an objective forecasting method that incorporates an "outside view" that examines the outcomes and experiences of similar cases or analogous projects. This evaluative process yields a much more realistic or accurate estimate of probable results than one focusing only on the case at hand.

These studies appear particularly relevant to decision-making in the context of litigation. Trial lawyers are typically (and necessarily) self-confident, convinced that to win, "all they need to do is get before a jury." However, before getting to the jury, there are many uncertainties: establishing liability (or a defense), ability to prove damages, costs of litigation, attorneys' fees, success of motions, time to trial, judicial temperament, composition and behavior of juries, and outcomes of appeals. Any lawyer who has ever attempted to prepare a budget at the beginning of a case is familiar with the difficulty of predicting any of these eventualities.

Therefore, litigators intending to conduct a successful mediation would be well served to evaluate the uncertainties of litigation by reviewing similar cases in similar jurisdictions. Using the data generated by this "outside review" as a basis of comparison should yield a more accurate assessment of the value of a case than an assessment based solely on the advocate's and client's overly optimistic hopes for victory. A lawyer who appears at a mediation with concrete and focused settlement demands based on data obtained regarding similar cases will be better prepared to disarm the adversary who may exaggerate the merits of his case and the probability of success. Effective use of this information by the mediator can help to minimize the "grandstanding" about the value of the case.

Finally, individuals negotiating under uncertain conditions make subconscious assumptions that have an impact on their decision-making.[4] These assumptions include the individual's tendency to discover, retain and process information in a self-serving manner. Thus, litigants tend to seek information that confirms their pre-existing beliefs, to ignore information that contradicts their point of view, and to "anchor" their estimates on conspicuous numbers rather than empirically sound data. For example, plaintiffs in personal injury cases will have great difficulty distinguishing their case from huge jury verdicts against the tobacco companies. Sexual harassment plaintiffs will invariably recall the notorious cases of Monica Lewinsky, Paula Jones and Anita Hill.

A consequence of "anchoring" on available information is the inaccurate assessment of the value of one's own case and the probability of success on the merits. Advocates who are proponents of mediation know that a mediator can provide the needed "reality check" to impress on their clients the differences between their case and those reported in the media and the tabloids. However, it is counsel's role to furnish the mediator with the factual tools that will help the mediator paint a more realistic picture.

In sum, in light of the psychological factors involved in negotiating, settlement proposals based on objective standards are likely to be more acceptable to an adversary than those that are arbitrarily derived. Further, using standards will make it easier for the other side to "back-off" of initial extreme demands. Finally, a settlement proposal backed up by reference to objective standards or evidence is usually more persuasive than proposals based solely on emotions.

Thus, when preparing for a mediation, advocates should consider forms of objective criteria that will help to answer the following questions:

- What is this case worth?
- What is the likelihood of prevailing if the case proceeds to trial?
- How can we get the other side to accept our proposals?

Pleadings Are Not Enough

In order to get the parties to a settlement zone, mediators and the parties need more information about a case than is available in the pleadings. The pleadings, by definition, represent the "best case scenario" for both sides, and place the parties at polar extremes. To help the mediator gather the information needed to frame settlement proposals, counsel should be prepared to "fill in the gaps" between allegations and defenses.

The ability of counsel to provide such needed information depends, of course, upon the stage of the litigation and the degree of discovery obtained so far. However, even prior to significant discovery, counsel should already have done some "due diligence" in deciding whether to take a case and should have an idea rooted in the available evidence of what the case is about.

In reviewing the file prior to the mediation, counsel should determine whether there is any critical piece of information that can be conveyed through attendance of a particular witness, an illuminating portion of deposition testimony, or by sharing with the mediator, a particularly salient document. The other side may be unaware of the evidence or its potential significance as an element in the case. If the mediator is authorized to disclose it to the other side, this kind of information can provide the mediator with a basis for bringing the parties closer to a realistic assessment of the case than the pleadings alone will provide.

Calculate the Damages

Prior to the mediation, counsel should attempt a mathematical calculation of damages. Even the process of attempting to arrive at a damage figure can help move the parties from unrealistic assessments to a factual analysis of reasonable possibilities.

Guidance for this approach is found in CPLR 4111, which sets forth the format for itemized verdicts. At trial, jurors are required to specify elements of special and general damages, including allocating amounts intended to compensate for past and future damages. Should such an itemized award be attacked on appeal, the standard of review is set forth in CPLR 5501(c): "'The appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation."

In a recent decision, *Morsette v. "The Final Call,"* 2003 N.Y. Slip Op. 16879 (Sept. 25, 2003), the Appellate Division, First Department, explained:

> In order for us to determine whether the award in this matter 'deviates materially from what would be reasonable compensation,' we are required to review awards approved in similar cases, … while mindful of the fact that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance of precise mathematical quantification.

So, too, in preparing to exchange settlement proposals in a mediation, counsel should attempt to itemize elements of damages and to be able to point to other cases supporting their view of "what would be reasonable compensation." Estimates rooted in numbers that have been approved in similar cases in the particular jurisdiction can provide a frame of reference that is more useful than arbitrarily or emotionally derived predictions and demands.

To offer an objective basis for framing a "reasonable" settlement proposal, litigants can review available jury verdict data for similar claims in similar jurisdictions. This information is readily available on a variety of databases, including "Settlements and Verdicts," "Verdict.com," and other reported surveys. In addition, counsel can employ the services of forensic accountants and economists who can provide analyses using economic, statistical and legal expertise. The New York Law Journal provides an index of valuation experts on subjects ranging from "accidents" to "x-rays" who can assist in providing financial analysis of damages, economic loss, lost profits, potential future earnings, etc.

If counsel can bring such a report to a mediation session, the report can serve two purposes. First, if presented appropriately, it can frame continued settlement discussions. Second, even if rejected as a basis for settlement, the report can serve as a "reality check" as to the uncertain nature of continuing the litigation.

An example of the use of expert reports illustrates the point. Assume a partnership dispute that involves a disagreement over the value of a piece of real estate. One partner makes an emotional assessment of what the parcel is worth, dwelling on the fact that he inherited the property and basing the assessment on anecdotal recollection of what other parcels have sold for in the neighborhood. The other partner, who has worked to develop the commercial value of the property, has hired a real estate appraiser who provided a written report showing the comparables in the area, the value of improvements, etc.

Use of the appraisal at a mediation may help set a rational tone to the discussions. The parties can move from an emotionally charged discussion reflecting their self-serving views of their contributions to the value of the property, to an informed discussion of market value. On the other hand, there is also a possibility that the appraisal can drive the parties even further apart, with each insisting that he have the opportunity to find his own expert.

However, even if one party's proposed market value is rejected as the basis for settlement, it will provide both parties with an idea of what forms of proof may be required for trial: the prospect of a potentially expensive "battle of the experts" may be sufficient incentive to settle.

Prevailing Case law

Another source of "objective criteria" that a mediator may be able to use to bring the parties into the settlement zone is the proverbial "case on point."

Mediation provides an excellent opportunity to educate the opposing side as to prevailing case law, historical precedent, or industry practice that will be presented to a court should the case go to a motion to dismiss or summary judgment. Even modest legal research can yield significant results.

The other side may not have done this research. The client who is present at the mediation may think his case is unique. The existence of other cases — described in reported decisions, a law review article or newsletter — which were disposed of less favorably than the adversary's hopes and expectations for his case can focus the parties on the uncertainties of proceeding with litigation. Skillful use of published precedent by a mediator can help counsel and client test their assumptions about litigation outcomes and may make settlement more attractive.

Conclusion

Objective criteria in the form of difficult-to-dispute facts, expert or third party sources of information, and published precedents provide helpful tools for a mediator to use in the effort to transform a litigation into a problem that can be solved.

Mediation is not a panacea for all hotly contested cases; there will be those where litigants won't back down or where new law must be made. However, advance preparation that takes into account the psychological influences affecting processing of information in negotiations can contribute to efficient and effective dispute resolution long before the parties are on the courthouse steps.

(1) R. Fisher and W. Ury, Getting to Yes, Penguin Books (1983) at 11.
(2) Id at 85.
(3) D. Kavallo & D. Kahneman, "Delusions of Success: How Optimism Undermines Executives' Decisions," Harvard Bus. Review (July 2003), at 58.
(4) See generally R. Birke & C. Fox, "Psychological Principles in Negotiating Civil Settlements," 4 Harvard Neg. L. Rev. 1-57 (1999).

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