

ARTICLE

In Mediation, Right is Irrelevant

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Good lawyering advances successful outcomes for our clients in both litigation and ADR. But the skills that work in trial-like settings (litigation and arbitration) are different from those that work in mediation. The German general Clausewitz reputedly said that “war is politics by other means.” Lawyers who approach mediation as if it were litigation “by other means” miss the opportunity to achieve better outcomes for their clients.

Years of experience with mediation, both as a labor-and-employment lawyer and, for over twenty years, as a court-appointed mediator, teaches me that with respect to mediation outcomes, right is irrelevant – or nearly so. Mediators do, of course, need to know at the outset what each side’s legal position is, but that alone does little to produce a successful outcome from the client’s perspective. Lawyers who approach mediation trying to convince the mediator that their side is “right” – that their side will ultimately prevail on the legal merits of the dispute – are largely wasting their time.

Mediators are searching for the parties’ “ZOPA” (zone of possible agreement). Where that is and getting the other side to accept a settlement closer to your end of the ZOPA than your opponent’s has very little to do with the legal merits. After all, as a mediation begins, counsel for both sides have already assessed their likelihood of success and are still far apart (or, sometimes, by posturing, appear to be far apart when they really are not).

What gets the parties into “the zone” depends on a variety of factors that have nothing to do with the merits of the lawsuit. Avoiding litigation costs and (in commercial cases) business disruption; differing comfort levels with prolonged uncertainty; differing levels of risk tolerance; collateral consequences of the pendency or outcome of the lawsuit for a party’s reputation and ability to effectively compete for new business; achieving business or personal objectives implicated by the dispute that underlie the legal issues, and internal politics from different



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constituents of each side's organization – all of these, more than the merits, will affect where exactly the mediation settles.

For these reasons, what lawyers should be doing in mediation is helping the mediator identify the ZOPA or, where none previously existed, to create one. They do this by "clue-ing in" the mediator on what is really or collaterally at stake for each side – sometimes subtly, sometimes less so.

One technique is for lawyers to let the mediator know why their side has little flexibility. "Opening the floodgates of litigation" is an example of that – often used by insurers to explain why they are unwilling to compromise. Another technique is alerting the mediator to the other side's vulnerabilities. This may relate to the litigation (*e.g.*, discovery will be much more costly to them than us; their key witness has significant credibility problems). Or, it may relate to collateral matters (*e.g.*, there is some important event coming up, like a shareholder's meeting or industry conference, and they need to have this lawsuit wrapped up by then).

Lawyers also should encourage their client to "think outside the box," identifying outcomes other than how much money is given or received. There may be some things your client wants from the other side that is of low cost to them but of high value to your client. Finding a way to let the mediator know if and what they are, is an important lawyering skill for mediation.

Why your client will win on the merits gives the mediator less to work with than how much flexibility your client really has and why, what unseen or unstated vulnerabilities the other side is facing, and what alternative outcomes exist that are valuable to your client. Effective advocacy in mediation requires knowing when and how to let go of the former and focus on the latter.

