

Winning at Mediation

A famous trial lawyer welcomed his junior partner back from a hard fought trial. The famous trial lawyer congratulated his mentee on her win at trial. The junior partner responded that, “you must be mistaken, I lost at trial. The jury returned a verdict against our client.” The senior partner responded, “wasn’t the verdict less than the plaintiff’s last settlement demand.” “Yes,” replied the junior partner. “Then you won!” said the senior partner, “It is all about how you define win!”

When it comes to defining winning a mediation, the question is whether the mediation produced a result better than your client would likely obtain at trial. Put this way, clients and counsel win mediations every day. In a thin liability case, a plaintiff that leaves a mediation with money in his pocket has won the mediation. At trial, the likely result would have been a defense verdict and the plaintiff would not have received anything. In a significant exposure case the defense lawyer who negotiates a settlement at a reduced damage figure not only reduces the ultimate exposure, but also saves the client the cost of continued litigation. That defense lawyer and client have won the mediation. Agreements to discontinue certain conduct, to continue a business relationship, to resolve a personal or family dispute that should not be aired in a courtroom are all mediation wins. These benefits of mediation are often not encompassed by the pleadings and will not be a part of any verdict or judgment.

The fact is that almost every case gets mediated and only a very few go to trial. So why is it that we spend so much time as trial lawyers honing our trial skills, engaging in trial strategy, practicing our opening statement, working on our examinations and cross examinations, and not nearly the time and energy in preparing for mediation? We need to rethink our belief that a trial victory is somehow more gratifying and career enhancing than a mediation win. The truth is that the mediation win is much better for the client and is likely to be better economically for the lawyers as well.

So how do you win a mediation? The answer is longer than this blog will tolerate, but here are a few pointers to get you started with more to come in the future. First, counsel must objectively analyze the strengths and weaknesses of the case and the extent of recoverable damages. A good lawyer can try either side of the case and you should analyze your case in that fashion. Second, one must fashion a negotiating strategy to obtain the best result. It may not be possible to stick to the strategy throughout the mediation, but counsel should have thought about it in advance. Select the right mediator for the case. Do you want a judge or lawyer mediator? Do you want a mediator with expertise in the subject matter of the case? Write an excellent mediation brief providing the mediator with details as to the law and facts supporting your position and get the brief to the mediator with adequate time for the mediator to study the brief. Prepare your client for the mediation. Bring them into the office and walk

them through the mediation process. Prepare them for the mediator's questions. Do they want to talk? If so, what do they want to say. Neither you nor the client should be surprised at the mediation by what you, the client or the mediator say about the case.

With proper preparation and a good mediator there isn't a case that cannot be settled and won in mediation.