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A New Mediators Guide to Settle All of Your Mediated Disputes

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In my new found role as a mediator, I have settled every single case I have mediated. Between the title of this article and the foregoing bold statement, I am sure to have your attention. Of course, I must confess to have only mediated three cases. Therefore, the answer to the question in the title as to how do you settle all of your cases - a new mediator's guide - is simple: settle the first case you mediate and then retire.

The true purpose of this article is to discuss this author's viewpoint on the transition from a full-time litigator to mediator in the hope it will help others in the transition. The technical requirements in order to become a certified mediator are not onerous. What tends to be the complicating factor in this transition is how to change one's approach and mindset from that of a skilled litigator to one of a skilled mediator. A skilled litigator, to inadequately

Furthermore, a distinct disadvantage that even the most skilled litigator faces, that a mediator does not, is that the skilled litigator is bound and restricted or constrained by the particular causes of action which the facts will support and the particular defenses that are raised in litigation.

Accomplished litigators know that outcome at trial is uncertain no matter how skilled the litigator or how helpful the facts. In order to limit those uncertainties, skilled litigators attempt to prepare for every eventuality though knowing that doing so is an impossibility. This is another area where the role of the litigator and mediator diverge. A mediator has the ability to act more flexibly and creatively in resolving the dispute. Of course, the mediator is duty bound to act legally, responsibly and ethically, but within those parameters there are no limits but for the

Finally, a mediator needs to gain the trust not only of the individual or corporate parties involved in the litigation, but also the attorneys. The mediator has more than likely conducted the mediation at the urging or behest of the particular attorneys. Just as litigators come to learn that judges have particular peculiarities with regard to their motion or trial practices, attorneys also have peculiarities with regard to their trial practices. Mediators can serve a useful purpose in meeting that attorney's particular needs while facilitating a resolution.

In my experience mediating cases and thereby switching hats from litigator to mediator, I have found the change in dynamics very intellectually stimulating and professionally rewarding. It is unlikely that a mediator can maintain a perfect record if the mediator's sole goal is to consider every case settled at the mediation session, however, in

summarize the Chinese philosopher Sun Tzu in the Art of War , contemplates and anticipates his adversary's moves in order to know his enemy as well as he knows himself and thus achieve victory. In such anticipation a skilled litigator will conduct as much advance planning as possible while using various discovery techniques and tools available in the litigator's arsenal to ferret out the enemy's strengths and weaknesses. A skilled litigator is detail oriented who, cost and case permitting, leaves no stone unturned and who is intimately and extensively knowledgeable in the facts and law relating to that particular litigation matter.

In contrast to the litigator, the mediator often does not know the facts and foundation of the case to any great degree and, in fact, I have found I am lucky to even receive a mediation summary before mediating a matter. A mediator walks in fresh, knowing very little about a particular case and though seemingly that lack of information and knowledge is a negative, it can and, in fact, should be viewed positively as an avenue to keep the slate and mind open to facilitate a resolution.

willingness and imagination of the mediator and participants.

In my opinion, and admittedly, I have not mediated many cases although I have participated as a litigator in scores of mediations, the chief skill of a mediator is creativity. The one certainty facing every mediator going into a mediation is that the parties have agreed to disagree. The difficulties lie in creating strategies needed to breach those impasses so that a facilitative and evaluative discussion can be had, and the matter can be resolved. As a new mediator, coming from the background of litigation, it is difficult not to act almost judgely (a role we litigators often dream about) in imposing our personal opinions based upon our knowledge and experience as to the legal strengths and weaknesses of particular cases. Of course, as mediators we are required, and for good reason, not to take that approach with vigor, but instead to use our knowledge and experience to foster a discussion of possible outcomes and create new mediated outcomes that may differ from the possible litigated outcomes while meeting the parties' needs.

this author's opinion, that is not the only goal toward which the mediator should be striving.

The important goal for a mediator, and how I believe a mediator, new and experienced alike, will and should view successful mediations, is to create a dialogue between the parties. The parties, while possibly not ultimately reaching a decision as a result of the mediation, have nevertheless communicated alternative resolutions to each other and those communications will continue to foster and grow as a direct result of the mediator's activities as the parties continue in the litigation.

This author does not intend, at this point, to give up his day job, although he continues to look forward to assisting in the dispute resolution process for many years to come.

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