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Verdicts & Settlements

"Sixth Sense: Successful neutrals sometimes rely on intuition to help settle disputes."

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The importance of selecting the right mediator for a particular dispute cannot be overemphasized. Ideally, the neutral must be able to quickly establish rapport with the parties and their counsel, and engender trust and respect. The successful mediator exudes intellect, patience, diplomacy, tenacity, flexibility, charm, creativity, experience, compassion, wit and honor.

The mediator must be sufficiently perceptive to know when to be evaluative and when to be facilitative. He or she must be sufficiently intuitive to identify and work through the roadblocks to settlement, and sufficiently clever to propose a settlement that all parties will approve. Timing is critical. For example, a brilliant proposal made before the parties feel they have had their "day in court" may be rejected simply because the parties are not psychologically ready to cease hostilities.

Should the mediator be an expert in the field of law that is the subject of the dispute? Opinions vary widely; all are strongly held. Previous success as a mediator is probably a more potent predictor of success than success as a practitioner in a particular field of law. Experienced mediators know how to deal with unexpected contingencies--obstreperous parties, counsel who posture excessively, negotiations that get off-track.

If settling a case turned on which party had the law on his or her side, the matter could be disposed of on motion for summary judgment, making mediation unnecessary. Frequently, cases fail to settle because someone has "emotional baggage" that prevents him or her from rationally evaluating the risks and benefits of litigation, as well as the strengths and weaknesses of the case. An experienced practitioner, while sometimes more expert on the fine points of law, does not necessarily have the process skills necessary to help the clients move from their intractable positions, and clear-headedly assess the other side's position and their own risk-reward ratio.

Knowing when to be facilitative, and when evaluative, while maintaining trust and rapport with all parties and their counsel, requires that the mediator have a strongly developed intuition. Sometimes the parties are in the dark as to what is preventing them from accepting a "reasonable" settlement proposal, and it is the mediator's intuition that breaks the logjam. On some occasions, the right thing is for the mediator to be evaluative, thus assessing the parties'

strengths and weaknesses. Other times, it behooves the mediator to be facilitative by assisting the parties in understanding each other's position.

Occasionally the mediator's intuition is invaluable in sensing the source of intractability and proposing an unanticipated solution. Mediators' training and experience, combined with that intangible, intuition, make them better able to assimilate the parties' legal positions and their spoken and unspoken interests. As an example, consider the following successfully mediated contract dispute between a computer software designer and a software distribution company.

After beginning work pursuant to a software design contract, it became apparent the parties were proceeding under different assumptions concerning the software's format. The parties legal positions were diametrically opposed: the designer, having already produced the rudiments of the design in his customary format, was suing for the balance due under his contract. The distributor, unwilling to put resources into what it considered to be an unproven format, wanted to rescind the contract for fraud. Consequently, their settlement postures were also diametrically opposed--the designer wanted tens of thousands of dollars, representing the balance due under the design agreement; the company wanted its first payment returned, and to be absolved of any future contractual obligations

At this point, an inexperienced mediator might have evaluated the relative merits of the parties legal positions. But such intervention would have been premature, prejudicing an eventual settlement by alienating the side whose position would have been identified as weak. Instead, the seasoned mediator encouraged the parties to continue dialogue about the conflict. Among the issues explored were when the parties realized they had different understandings about the format of the software, who said what and when it was said.

Sometimes the mediation appears to lack direction until the mediator finds "the hook." An experienced mediator can tolerate the anxiety that comes with not yet knowing where to go, of not having any inspiration, and with the pressure of knowing the parties are looking to the mediator for a breakthrough. Eventually, the mediator finds the hook that allows the parties to move more freely toward resolution.

In the contract example, the mediator observed that the designer was unwilling to move into monetary negotiations, and that he had focused criticism on a former employee of the distributor three different times. The mediator intuitively brought the discussions back to the plaintiff's feelings about this former employee, ascertaining that the plaintiff thought the man had purposely sabotaged the deal because he did not have confidence in the format in which the designer worked. That turned out to be the hook.

The plaintiff expressed in joint session his intense disappointment that his contract was being abrogated because of a former manager's lack of confidence in the format in which the plaintiff worked. The mediator elicited from the designer that he believed the design would be successful if the resources were available to complete and market it.

At this point, the mediation stopped being about legal rights and started focusing on the client's more intensely felt interests. The mediator knew the company was concerned about "throwing good money after bad" on the design, manufacture and distribution of software in a format with which it was unfamiliar. Now the mediator had learned that the designer was anxious to get his first product to market, and that he had tremendous confidence in its potential profitability. Her intuition produced a previously unanticipated direction for the settlement negotiations, so she asked the plaintiff-designer "Would you be willing to put your money where your mouth is?" He replied instantly and without reservation, "Yes."

The mediator then made a suggestion that would not have occurred to her had the mediation focused exclusively on legal rights, and that probably would have been rejected had she presented it earlier. She suggested that the parties restructure the design contract into a joint venture. Instead of getting a pure design fee and turning the completed design over to the distributor to manufacture and market, the plaintiff would assume some of the economic risk of producing and marketing his design, in return for increasing his possible monetary reward, as well as gaining access to the marketplace as a designer. The distributors were delighted to place a portion of the risk onto someone who had a vested interest in cutting costs and making the product a success. The synergy created by having both sides pulling in the same direction, instead of in opposite directions, appealed to both parties, and a win-win solution was hatched.

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