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Mediation, Arbitration and Non-Litigation Strategies

A Matter Of Timing

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To knock 'em dead in standup comedy, timing is everything. This also can be true of mediation. All too often attorneys wait until late in a case to mediate, facing an imminent trial, in the hopes that a neutral third party can help break the deadlock that the lawyers and clients could not do by themselves. A settlement at this point might occur simply from exhaustion (financial and emotional) at the end of a long, drawn-out case.

How about shaking up the timing and initiating mediation at the beginning of a case rather than at the end? This is by no means a novel idea, but resistance comes from lawyers concerned that they can't fully advise their client on an ultimate position until they have all of the information necessary to do so. They need more discovery, particularly when one side may be in possession of information it is not compelled to disclose in the informal mediation process and is unwilling to do so, even to a mediator skilled at coaxing out the information needed to reach a settlement.

The problem with waiting until the end of the case is that the clients may pay for and endure considerably more discovery than is needed to favorably resolve the case, or even to try it. As massive disclosure of electronic records has become the norm in complex cases, and documents are managed with sophisticated computer programs, discovery becomes an end unto itself. Lawyers accumulate far more information than they will ever need, often for the sake of not missing that one crucial "smoking gun" document on which the case will turn. That usually doesn't happen, and the dynamics of a trial, where the theme and the story are what count most, diminish or eliminate the impact even if it does.

Bent on finding out as much as the rules will allow, counsel may well be positioning their client for an endgame that produces settlement more out of fear of the result at a trial or an unwillingness to incur the actual and opportunity cost of sitting through the trial itself. Once you reach this stage, a hard drive full of documents and depositions available at the push of a button doesn't do much good.

While I admit to being an unabashed proponent of mediation at any time—it's what I do—the idea of pursuing mediation early in a case is an important one. The notion bears reinforcing in order to find alternatives to litigation as it is so often conducted these days. Why not try getting a mediation going early on when a case promises to be complex and protracted? Together with the mediator, the parties can construct a process of issue identification, articulation of interests, and an information exchange including targeted discovery to understand each side's strengths and weaknesses. Then, the parties and the mediator can get back together to engage in the heart of the negotiation of a resolution, all the while preserving the ability to go to trial if the client's interests cannot be satisfied. This approach can shave years and many thousands of dollars from the life of a dispute, while operating in an environment that is conducive to creative solutions with respect to both process and outcome.

The objective from the beginning becomes a consensual resolution, which in almost all cases the lawyers and their clients know is how the case will conclude anyway. They can avoid a war of attrition leading to a threat of a trial that, paradoxically, no one can afford because, by the time that trial approaches, the parties have invested too heavily in the case to risk losing.

Jumping to the bigger picture, the Connecticut Bar Foundation recently sponsored a full day symposium devoted to the future of the practice of law, and the Connecticut Bar Association currently has a blue ribbon task force studying that issue. At the symposium there was discussion of the need for a "new model" in which lawyers focus their efforts all the more on what they can do to provide unique value to their clients. In litigation, one way of doing so is to consider right away the advantages of mediation. Design and use the process strategically, eliminating information overkill while not abandoning zealous advocacy. This new litigation model would maximize the chance for an optimal resolution and minimize the incidence of settlements reached from exhaustion or merely for the sake of risk avoidance. You won't become Jerry Seinfeld, but you will improve your timing—and your results. ■

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