



A MOVEABLE FEAST: THE KEY TO A SUCCESSFUL MEDIATION

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Like the real life literary characters in Hemingway's memoir about the "Lost Generation" in the 1920s, a good mediator needs to offer a variety of options to participants and their counsel and treat them to an endless supply of ideas and suggestions for resolution. Often times at the end of an initial mediation session, the parties are somewhat adrift in a sea of facts, ideas and concepts, like a rudderless ship. They need direction and continued cajoling from the mediator, in the form of follow-up. As a baseball great is often quoted saying, "it ain't over 'til it's over." The significance of these literary and cultural references is simple; persistence settles cases.

Many consumers of the mediation product currently on the market, made available by professional mediators, lawyers, retired jurists and anyone else engaged in the dispute resolution profession, do not realize the potential impact of persistence. This brief article attempts to discuss the many uses of this underused tool in the mediator's toolbox.

Too often, a very competent and successful mediator will finish a mediation, and if the case does not settle at the session, wish the parties and their counsels well and move on to the next day's business. Many mediators will have their assistant send out a perfunctory thank you letter or an invoice, or may even make a brief personal phone call to counsel, but will do nothing else to move the process forward. The seeds have been sown after mediation, but they need nurturing to grow, mature and ripen into a settlement. That nurturing takes the form of persistence.

As we all know, persistence means not giving up, and for many of us who have raised families it equates to pestering, badgering and downright annoying behavior. The most efficacious mediators possess this trait along with patience, intelligence and foresight. All of these traits are necessary skills to successfully mediating a case to resolution, and they are all used at different stages of the mediation dynamic. But once a full day's or perhaps several days' work has been put in, it is the truly persistent mediator who will close the deal.

Let's examine a frequent and recommended course of action. After some initial discovery, the parties and their counsel decide that an attempt at a mediated settlement is the wise course. Businesses, insurers, courts, in-house and outside counsel all engage in early mediation with increasing frequency, based on many considerations, ranging from cost and time saving to risk avoidance.

An early mediation is scheduled with an agreed upon mediator and the session is held, without success. Perhaps more discovery is needed to prove up a liability exposure, perhaps an injury plaintiff is still being treated, perhaps the business litigants are still involved in market analysis by their experts and damages are uncertain. Whatever the reason, the case does not settle. Everyone goes their own way with the stated promise to "keep talking."

A critical point has been reached here and a wise mediator will commence a comprehensive campaign of persistence. Many mediators not only tell the participants to continue their efforts and to call the mediator if he can be of assistance, but also inform them that there is no charge for follow up telephone calls, emails, correspondence or any form of follow up effort, short of another scheduled session. In the injury case, a phone call to defense counsel might elicit a copy of an independent medical examination report or a key deposition summary which can assist the mediator in his further efforts with the parties. Similarly, in the business case, a market analysis or an accounting or damages statement might be what the mediator needs to "close the deal." Perhaps in the case where more discovery on the liability issue was needed, that has been done and the picture has been sufficiently clarified so that settlement is more plausible. All of this information is available if the mediator chooses to ask for it.

If the matter is in suit, a very useful practice is to inform the court of the status of the mediation personally, by either a phone call to the judge or a brief letter or e-mail to the court. In many cases, continued monthly follow up with contacts, can lead to several mediation clients requesting your attendance at pretrial settlement conferences, and in such cases you are able to offer your assistance to the court, which usually welcomes participation. This is especially helpful in settling cases where the mediator has developed a trusting relationship with one or more of the parties.

It may also be very helpful in litigated matters for the mediator to ask to be placed on the proof of service or mailing list for the case, to assist him in keeping abreast of pertinent developments that might be important to the settlement process. The risk of the mediator being deluged by paper is outweighed by the benefit of increased and updated knowledge about the case, which will expand and increase his ability to effectuate closure and resolution. The key here is for the mediator to stay active and involved in the progress of the case. This ongoing effort by the mediator in turn demonstrates to the decision makers, the parties and their counsel, a level of commitment, sincerity and persistence that most often results in a pretrial settlement.

Timing of follow up is critical to the successful use of this persistent tool. In our case, the mediator might inquire in a follow up phone conversation about the progress of ongoing discovery, so that he can time his persistence appropriately. The old saying of "timing is everything," certainly rings true here. A well timed phone call, e-mail, cup of coffee or lunch meeting can open a door in a case that may not have been in existence several months earlier.

A calendar or tickler system in which every case comes to the mediator's attention on a regular 30, 60 or 90 day basis is very valuable for purposes of continuing follow up. It is easy and it works.

There are unlimited ways to continue the mediation process after the initial session has concluded. Creative and dedicated mediators will find ways to stay involved with the case and be effective with their persistent efforts. Out of hundreds of cases, it is the rare case that does not eventually resolve after continued, routine and persistent contact with counsel and sometimes the court. In a few cases, a second or even third session is required, but this is the exception, not the rule. This success rate is attributed to being persistent and staying in touch with the case as you would one of your own cases. Strict adherence to this concept requires the application to your own mediation practice these same principles: patience, intelligence, foresight and perhaps most importantly, "The Moveable Feast," creative persistence.

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