

RESOLUTION

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Save the (Mediation) Day



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Imagine a typical civil litigation mediation. The parties try to negotiate a settlement but struggle to bridge the gap. They agree a mediator might be able to help. So the parties propose mediators, and eventually agree on one. They arrange schedules and book conference rooms. Client principals travel from faraway places. The attorneys prepare. The mediation day arrives, and the lawyers, parties and mediator spend a long day and try to forge a compromise. In the end, the parties will have invested significant money, time and effort.

But now imagine that when the parties inevitably become inflexible during the mediation session, the mediator prematurely signals an impasse or becomes exasperated too easily. Or imagine the mediator lacks creativity and does not know what to do after simply going back and forth between the parties. Perhaps the mediator does not have the strength to challenge the weaknesses of the parties' legal positions in order to try to alter the settlement dynamics.

What are the parties to do now? One option, of course, is to let the mediation fail, and then undertake an after-the-fact examination of what

went wrong in the mediator-vetting process. A better alternative is to accept mediator weaknesses as a fact of life and attempt to save the mediation. The lawyers and parties, recognizing the immediate opportunity, should try to overcome the mediator's weaknesses and continue the mediation session.

In particular, when a mediator evidences a lack of strength, stamina, creativity or some other key ability, one of the parties' lawyers can step into the void and assume the role of adjunct mediator. For example, when the mediator signals an impasse, counsel can take the mediator aside and observe that the mediator is giving up too early and should instead keep at it. Suggesting creative ideas – such as a hypothetical scenario for the mediator to adopt as his or her own strategy (i.e., “Maybe if you were able to get them to do X, I could try to convince my client to do Y.”) – often can break through the logjam.

An ideal way to share these approaches is in a side conversation between lawyer and mediator. This setting lends these communications an air of lawyer-as-helper. It also shows the client that his or her lawyer is nimble at mediating and the client's time is well-spent in continuing with the process. Further, it allows counsel to help the mediator resolve a dispute that the parties believed could be settled with the mediator's help.

Another approach is engaging in direct discussions between the lawyers, or even direct talks among the parties. If the mediator is rendered ineffective by his or her own actions, counsel can address the situation directly with counterparts and encourage the parties to work together to avert the failure of the mediation. This approach can be particularly helpful in cases with several defendants or plaintiffs, where co-parties with shared interests can directly approach one another without those discussions becoming adversarial.

Participants in a mediation process must be ready if the mediator does not live up to his or her advance billing. Be prepared for creativity, when needed, to prevent mediation failure. Flexibility in role can lead to resolution, or can at least get the mediation back on the path to settlement. That, of course, is the ultimate goal of the mediation process. ■

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