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You say you want a resolution (but what you really want is a deal)

A MEDIATOR WITH STRONG BUSINESS SKILLS CAN IMPROVE YOUR CHANCES OF ACHIEVING SETTLEMENT

In the realm of litigated cases, selecting the right mediator can significantly impact the outcome of a dispute. Mediation is expensive – not only in the context of the outlay of time and mediation fees but also in the psychological toll an unsuccessful mediation can take on the client. With many practitioners entering and leaving the mediation space, and with the limited availability and expense of the more well-established mediators, counsel can face a challenging decision.

Mediator selection

The allure of a retired judge is obvious – the robe typically represents a gravitas and depth of knowledge that will earn the respect and confidence of the parties. However, as with all professions, there are traits that will make some former judges better mediators than others, and while it makes sense to rank the judicial credential highly in selecting a mediator, to elevate it to a *requirement* or to value it *beyond other skill sets* seems unnecessarily limiting.

While it is undeniable that a grasp of the relevant law is an important factor in selecting a mediator, the weight given to deep legal expertise may be overstated. The role of the mediator is not to provide legal advice, but rather to have enough familiarity with a given area to effectively play devil's advocate, gain the parties' confidence, and assist counsel with managing the expectations of a difficult client.

There is a point at which the mediator's legal knowledge can become superfluous to the goal of the mediation – *the goal of achieving settlement*. It might even impede settlement by creating the appearance of bias – for example, if a knowledgeable mediator pushes back too hard against a position counsel had taken, particularly if the pushback occurs in front of the client. There are instances where a mediator's peacocking their legal knowledge can undermine a client's confidence in his own lawyer, and this can become problematic, especially if the case is not settled at mediation.

Formal mediation training addresses the resolution of a wide range of conflicts, however, in the context of a *litigated* case, it has limited applicability. When a complaint is filed and a dispute between parties escalates to active litigation, mediations become less about traditional "dispute resolution" and the seeking of "creative solutions" per se and more about reaching an economic deal. Simply put, cash is the only meaningful currency in the litigated case.

To achieve settlement, a deal must be struck whereby all the interests of adverse parties are reduced to one agreed-upon dollar amount. The assistance of a person with substantial



business experience can bring a unique approach to mediation negotiations.

Deal-maker mediators

A mediator's role essentially attempts to broker a deal between two opposing parties represented by capable advocates. This mirrors precisely the role of the business deal-maker – an experienced professional negotiator who has developed specific skills geared to closing deals. The type of expertise that makes business deal-makers powerful as mediators cannot be taught in a class. Rather, they are skills and instincts typically acquired over a long career steeped in negotiation. A person with a deep background in successful deal-making is likely to have developed the following tools that may prove invaluable to settlement of litigated cases:

Persistence

Resolving disputes through negotiation requires persistence. Most practiced business deal-makers have worked in an environment where failure to close a deal is not an

acceptable option. All too often in mediation, a mediator will declare that a case isn't "ripe" for settlement and terminate the session early. Sometimes it may be true that a case isn't ripe, but for some mediators this bar is set very low.

A mediator with a business background is more likely to keep pushing forward, leaving no stone unturned in trying to find the key to settlement. A mediator who has frequently experienced situations where an unreasonable position has threatened or even killed a deal is typically able to help parties cut through to what is important and to not lean in on tangential issues that may be ego-driven or irrelevant. A successful deal-maker should also have the tools to avoid impasse.

Reading the room

Any mediation involves a certain degree of posturing by the parties. This makes being able to see behind the posturing key to moving forward to a deal. A successful deal-maker is fluent in the language of posturing and adept at reading the room. This means understanding the significance of not only what is said by the parties, *but also what is not said.*

A mediator who is practiced in reading the room will likely be able to glean an accurate picture of where the parties stand and use that knowledge to move the negotiation forward. Likewise, the mediator with experience in business deal-making understands the temperature in each room and is capable of reducing mediation failure.

Communication

Successful deal-makers are typically effective communicators. Effective communication means not only being able to clearly convey one side's position to the other, but also ensuring that the messaging behind that position aligns with the party's intent.

As the only party having access to both rooms, the deal-maker mediator is proficient in picking up cues that help ensure that the parties fully appreciate

what they offer, demands, and other communications may be messaging to the other side. A good communicator can frame the delivery of an unwelcome or potentially inflammatory communication in a way that is least likely to result in an impasse.

Leverage

Successful deal-makers are mindful of the many different types of leverage at play in a given situation. A good business negotiator understands how to identify and deploy leverage in the context of a negotiation – and that the best use of leverage is generally not "blunt force."

Leverage is an important skill for a mediator, essential to both effective messaging and controlling negotiation cadence to maximize the chances of success. The experienced deal-maker mediator understands that leverage can change or disappear on a dime and assess at what point in a negotiation it is likely to have the highest value.

Interpersonal skills in managing conflict

Dealing with conflict is a part of everyday business life. Successful business deal-makers have developed skills and acumen that work with and manage conflict and chaos.

Litigated cases often involve high emotions and the deal-maker mediator is generally equipped to respond in a way that de-escalates tensions and manages confrontations. Sometimes the mediator can become the focus of one (or both) parties' ire. The deal-maker mediator has the experience to recognize and manage their own responsive emotions and readily maintain a calm and constructive atmosphere.

Risk assessment

A mediator with a business negotiation background is adept at assessing risks and helping the parties make decisions that mitigate potential negative outcomes. While most lawyers have the capacity to clearly evaluate risk, sometimes a lawyer or client will come into a mediation wedded to a "walk away" number. That number may have made

sense at a point in the litigation when the lawyer or client first became anchored to it, but in the heat of litigation, things change.

Adherence to a walk-away number may blind a party from an opportunity to settle the case at the reasonable settlement value on the day of mediation. The deal-maker mediator adept at minimizing risk can assist the parties to re-consider the risk, and, perhaps, avoid proceeding toward trial.

Flexibility

Successful deal-makers are nimble and flexible thinkers. Negotiation involves give and take, and the ability to adjust an approach based on new information and changing circumstances is key. In a mediation context where, for example, the mediator is first presented with new and meaningful information that did not make it into the briefs, the deal-maker mediator has a basket of experience allowing for adjustment of the evolving dynamics.

Conclusion

Selecting the right mediator for a case is an important decision. Many factors distinguish one mediation from another, but all mediations share the common goal of settlement. For many cases, choosing a mediator with strong deal-making skills and experience can vastly improve settlement opportunities.

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