Win your case through mediation

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There is little doubt that the economy and the court financial crisis is making litigation an impractical way to resolve most disputes. The courts are encouraging a paradigm shift from the adversarial system, to the problem solving approach of dispute resolution - with mediation at the top of the list. But angry inexperienced litigants often want to prove they are right and want their day in court.

Numerous state and federal statutes and court rules encourage or require various forms of alternative dispute resolution. Unfortunately, some disputants perceive entering into settlement negotiations or mediation as a sign of weakness and a blow to their ego. After almost 29 years as an attorney mediator, I have seen what protracted litigation and intense conflict does to my fellow attorneys and clients who late in the “game” come to mediation to finally escape the courtroom battle.

What does it mean to win at court? If our clients win at the expense of their health, or experience business interference or a diminished reputation , or lose valuable time with family and friends that cannot be retrieved, or expend a fortune “winning” and trying to collect such a win, is it worth it ? And is that result truly a win?

WHAT IS A "WIN" AT TRIAL OR ARBITRATION?

A win at trial or arbitration means that the opposing party loses. The adversarial contest is over, but the dispute and rivalry persists. Collection of the judgment may be impossible. If it is a high stakes case, the conflict may proceed to the appellate level. Costs may be astronomical and unpaid attorneys fees may take years to recoup if at all. Conscientious, hard-working, ethical attorneys put in myriad painstaking hours of preparation, yet many clients not realizing the time and effort, may dispute the billing even if there is a win, or be unsatisfied if the result is not as they had hoped. Client satisfaction after trial or arbitration is outweighed by the stress, strain, time lost, and costliness of our adversarial system, even if there is a win.

IS THERE A WIN THROUGH POSITIONAL BARGAINING?

A settlement "win" through negotiations, just prior to trial or some major motion may take place due to the need for one or all of the parties to avoid a high risk loss. Sometimes the "win" occurs because the losing party cannot afford to litigate further. This type of ending is often frustrating and dissatisfying for clients since they have already expended a fortune in fees and

costs in the adversary proceedings. The fight ends, but the losses are heavy, and a win for one side causes anger and aggravation for the other side. So what are the results? The loser wants revenge- which can lead to bankruptcy; insidious on-line attacks or worse yet, even violence.

WHAT IS A MEDIATION WIN?

Interest based mediation is a problem-solving process in which the trained neutral structures and facilitates negotiations between the parties. Unlike litigation or arbitration where the parties look backwards at blame, guilt and fault, mediation focuses on the present and the future, and how the challenges can be addressed to bring about solutions. Unlike a judge or arbitrator, the ethical mediator should not impose a specific settlement option, nor should he or she use "strong arm" tactics to force settlement on either party. The parties, with the aid of their attorneys, are guided to propose workable options for settlement based upon the underlying interests supporting each stakeholder's positions. Since the neutral does not make a decision, arguments to be used at trial are only useful to educate all as to what may occur if agreement is not reached. The leverage of risk is important to motivate the parties to be realistic, but legal posturing and extensive arguments should not be the focus of the process.

An experienced mediator will move the parties beyond the arguments to the heart of the issues to work out a deal which resolves the bases for the conflict. The seasoned mediator will build a golden bridge for the parties to come together to set forth a positive approach to find solutions to the conflict.

Often, clients believe in good faith that they are 100% right, and the mediator needs to acknowledges the legitimacy of each perspective, but shift the spotlight to the parties' interests and desires which underlie the oppositional positions. Most conflict is caused by miss-communication, miss-perceptions, and lack of effective interactions. Business disputes become legal lawsuits when egos, anger, frustration, and retribution lead parties to take actions that become legal issues. The need for objective criteria (legal precedent, codes, standards, best practices) and for greater understanding the matters are discussed rather that argued.

If the parties wish to avoid revealing all their private and confidential information in a public setting, mediation can be used as a way to bring discovery to all the stakeholders so that the necessary information and documentation is provided in the limited setting. This doesn't preclude formal discovery if the mediation does not bring the parties to a full settlement. Parties, acting in good faith, can stipulate to discovery, and they can create

terms of non-disclosure, and insure greater confidentiality and privacy than a court could offer. It is almost impossible to get a court to seal documents in a case, and protecting an entire case from disclosure is not going to happen.

To protect the process and privacy, the mediator acts as the trustee of discovery to make sure one side is not prejudiced. Once all the objective criteria is gathered (agreed upon experts can be used in the process. e.g. a forensic accountant can be used to give a range of values of a business), the parties are encouraged to brainstorm options for settlement. The alternatives are prioritized and harmonized. Then, creative negotiations continue to sift out blame and the unacceptable parts of the various alternatives.

Mediation empowers clients and their attorneys with the responsibility to explore and use their intellectual imagination to generate options that will provide a mutually satisfying agreement. This doesn't happen in court or in arbitration where the parties delegate the outcome to the trier of fact. In mediation, the nature of the dispute itself and the people involved provide the seed of the solutions. The dispute itself gives the parties the opportunity to be creative and inventive. This engaging approach builds a commendable relationship between attorney and client and relieves the burden of the attorneys to fight to win every point.

We have all had the disgruntled client who cannot understand why he will not receive everything he wants. In mediation, the client has no reason to blame the attorney for not representing all of his or her interests because the client is there to be heard, learn the pitfalls of his/her case, and is encouraged to suggest alternative solutions that will be satisfying. The practiced mediator supports the attorneys and their clients to offer well thought out, informed decisions on how to successfully resolve the case.

A dedicated mediator will keep all parties calm and respectful of the proceeding, yet encourage them to share in open session their feelings, concerns and interest. But "secret" information discussed only in caucus (a private meeting with mediator, attorney, and client without the opposing parties) assures the attorneys that they need not fear that the case will be prejudiced if settlement is not achieved.

Mediation gives a chance for lawyers and clients to work in tandem to form efficient strategies, and propose settlements which all allow them to retain their personal power and control. In accordance with the Evidence Code, offers to compromise or admissions are strictly prohibited from disclosure in court. No agreement is binding until all sign the written settlement which must say that the parties intend for the document to be *binding and enforceable* in a court of law.

Written settlements prepared by the mediator with all stakeholders present and contributing assure quick closure and enforcement without delay. A win in mediation is a successful mutual gain solution for all the parties and their attorneys. The dispute is resolved and unlike court the conflict ends. The parties can regain peace of mind and still have money left in their pockets to pay their lawyers. As one who mediates attorney/fee disputes, I have never had to mediate a fee dispute between a lawyer and client whose case settled in mediation.

In fact when the clients themselves are involved in the mediation process and take responsibility for the resolution, they feel more confident about the their decision, feel better about their lawyer, and they are far more likely to happily pay their attorney in full and in a timely manner.

Mari Frank, Esq. has been an attorney/mediator in private practice in Laguna Niguel for over 30 years. She has taught negotiation and mediation at UCI and as a MCLE Trainer. She is an Executive Committee Member of the LPMT Section of the State Bar of California. She is a mediator for the Civil Mediation Panel of the Orange County Superior Court and she hosts two radio shows, Prescriptions for Healing Conflict which airs on KUCI 88.9 FM (www.kuci.org) in Irvine every Monday morning at 8:30 AM. (www.conflicthealing.com), and Privacy Piracy which airs at 8:00 AM on the same station (www.PrivacyPiracy.org).