

## Coulson and Trueman: Subject matter expertise in mediation

By: Commentary: Jeff Trueman and J. Mark Coulson © January 7, 2021

How much of an expert should a mediator be on the substantive law or practice specialty at issue in litigation? Certainly a mediator should have some awareness of legal issues particularly germane to the outcome, such as the availability of certain types of damages or the viability of certain defenses. But beyond what a mediator might be aware of in the ordinary course, or be made aware of in the pre-mediation submissions of the parties, does greater subject matter expertise on the part of the mediator necessarily make for a more successful mediation?



Many lawyers would answer "yes." Few accept the facilitative, "hands-off" model of mediation. Instead they opt for an evaluative mediation focused on the "merits" conducted by one with actual or perceived expertise on those merits. In short, many want a mediator to accept the dispute as lawyers have decided to frame it, and then hope for the mediator to render an "expert opinion" telling them they are right and their opponent wrong.



A subject matter expert can be a perfect fit in binding arbitration or other forms of ADR "on the merits." But if such expertise is the key to a successful mediation, why is the case in litigation at all?

Typically, it is not because of a significant knowledge gap. Usually, at least the lawyers and sometimes their clients are "experts" of a sort. Yet each side has applied expertise and come to opposite conclusions. In such situations, empiricism has its limits in negotiating a solution acceptable to both sides.

That's because what's really at the heart of a dispute may escape expert analysis. Often, clients have concerns that do not rise and fall with "objective" opinions. A former business partner feels betrayed. A nonbreaching party is angry. An ex-employee seeks respect. A former employer bristles at being accused of discrimination. An injured party feels ignored.

Likewise, other drivers of settlement value can be divorced from the legal merits. Parties to a commercial dispute might have more interest in preserving a business relationship than in "winning" the mediation. An insurer might be more driven by timing of payment than amount. An individual might highly value avoiding the stress of testifying in court.

Such situations are common and are not usually solved simply by educating a given side on the law or subject area. This is not to say evaluative opinions have no place in mediation. If a trial is contemplated, the parties, at some point, need to come to grips with the strengths and weaknesses of their case. For mature torts and other traditional case types that have a track record for valuation, each mediation lives within the shadow of prior settlements and verdicts. Counsel on each side will know those ranges, no doubt. And, when properly timed by the mediator, such evaluations can close the gap.

But relying primarily on anecdotes about “what these cases settle for” or “what juries do with these cases” overlooks that the settlement value of a case is largely a function of the micromarket the parties create, and how they have subjectively assigned value to it. Finding and driving overlap in those respective valuations will determine the mediation’s success. Tools such as active listening for common ground, building trust and rapport, and creative problem solving are often more helpful than subject matter expertise in resolving such disputes.

Finally, every mediation should include a comparison of the offer on the table with the consequences of not settling. In the absence of a negotiated solution, the ultimate decision-makers in your case are unlikely to be experts themselves. The presiding judge is most often a generalist by necessity, and jurors lack subject matter expertise by design.

What they rely upon to make decisions in the absence of subject matter expertise should be at least as important in assessing value. Moreover, variables like witness performance, how jurors will reconcile competing expert opinions, “likeability”, etc., also affect outcome. Depending on a subject matter expert to posit reliable predictions about such factors may be expecting too much.

To be sure, there certainly are subject matter experts who are skilled mediators, and their success in resolving disputes speaks for itself. But subject matter expertise alone may not be any more likely to result in a successful mediation. Ultimately, a mediator who seeks to learn from the parties is more successful than a mediator who depends on the parties learning from him or her.

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