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The importance of efficiency in mediation

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Commentary

When it comes to obtaining a good outcome for clients relative to resource management, settlements usually provide outcomes more efficiently than litigation. Typically, the earlier the resolution, the better for everyone concerned.

On the plaintiff side, clients and law firms can net more money without investing much into the case. On the defense side, higher legal costs do not ordinarily decrease indemnity payouts.

Unfortunately, when either or both sides overplay their hands or believe they must engage in discovery before negotiating, inefficiency can creep in and take over. Before you know it, you're a year or two into the litigation and no one's talked to the other side to find out what they really want.

For lawyers, efficiency can be measured with metrics such as the lifecycle of the firm's caseload, the percentage of cases settled within the first 90 days, the percentage of cases settled without depositions or a dispositive motion, and the average legal cost compared to the average settlement amount. An increasing number of institutions are asking counsel for these performance metrics.

Despite counsel's best efforts, sometimes cases are not settled until the eve of trial. Who's to blame when cases settle later than they should? Usually, each side blames the other. But the truth is either side can lead the way to greater efficiency.

Good negotiators find a way to engage the other side and get around the complexities of a case. This includes an early assessment or resolution strategy that finds something of interest to the other side that will motivate them – not compel them – to talk.

A personal touch can make this happen. Pick up the phone and call the other side. Don't hide behind email. Build credibility by conceding obvious issues in your case. Ask big-picture, open-ended questions, inviting the other side to talk about whatever is important to them. And then listen – I can't stress that enough. Most lawyers and claims professionals are dying to talk about how great their case is, but they fail to appreciate what the other side really wants.

One tradition that leads to inefficiency is the belief that a demand is needed from the plaintiff before an offer can be made from the defense. First of all, the manner in which a demand is requested may influence the amount demanded. Second, there is no rule about who goes first. A strong opening offer that is within your expected payout is not giving anything away if it serves a broader strategy.

In other words, have a plan to bring about cooperation or identify when and how you will exit the discussion if the other side prefers to compete. The first one to show how serious they are about negotiating in good faith controls the board.

Managing impasse is another area where inefficiency can emerge. If and when you encounter impasse, ask yourself and your team, "What are we really fighting about at this point?" Greed and overconfidence can influence all participants. Rather than ask yourself what a jury is likely to do based on your experience, perhaps the question is what an emotional, irrational group of people will think about your client.

Perhaps liability does not drive the case's value as much as the damage potential. We all know that if the plaintiff's likable, liability may be found against the defense more readily. And claimants who appear to be overplaying their hand are not likeable.

There many ways to restart settlement talks after impasse. Additional information may need to be provided or exchanged. Joint discussions among counsel may generate additional movement, assuming they have mutual respect for one another. Consider exchanging short, written case summaries that include the last demand and offer.

Perhaps a high-low agreement can be negotiated. Your mediator will likely have ideas as well. Keep in mind that shifting eye contact, changes in voice pitch or pacing, or some other physical change in demeanor may indicate bluffing, especially when the last 10% is up for grabs.

Efficiency comes from the right approach and mindset. Toward that end, ask yourself are you looking for ways to refine and improve your negotiation skills? Should you change your settlement strategy? When should you negotiate with the other side directly or engage in mediation?

Regardless of training or how much we work to refine our skills, we need to keep the big picture in mind, especially when things heat up. In our work, it's easy to allow emotions or tradition to take the driver's seat. But please don't forget that efficiency is one of the main reasons why everyone comes to the table in the first place.

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