



The windup before the pitch

Starting mediation with “tiger blood” still flowing is usually a waste of time. Wait for emotions to calm

This story is for you if:

- You have had lots of mediations that have not settled;
- You like the process but feel like it has become marginalized in some fashion;
- Customizing the settlement in big exposure cases makes sense to you.



Krivis

BY JEFFREY KRIVIS

Baseball has a way of bringing good metaphors to light. Before a ball can leave a pitcher’s hand and reach a batter with enough velocity to be hit or missed, the pitcher must wind up — prepare his body in such a way as to release the ball with enthusiasm. Without the windup, there would be no pitch.

Many complex litigated cases come to mediation during the windup but before the pitch. What do I mean by that? The willingness to mediate is not always a joint venture between the parties since the court system has come to believe that somehow every case ought to be mediated. With such an expectation, cases are often mediated while not ripe for a full-blown negotiation, resulting in imminent failure and frustration with the process.

Process vs. timing

Yet, it’s not the process that has failed. It’s the timing of the event. A good batter will never swing at the ball until after the pitcher has wound up and let go of it. The windup is the preparation for a good pitch. Why would a litigator mediate a case without getting fully ready for such an important event?

Here are some ideas on how a litigator might wind up (customize the process) before jumping into mediation:

- Conduct a pre-mediation conference with a qualified mediator. This is a simple telephone conversation where the mediator can make an assessment of where the parties are in the case and discuss optimal chances for a successful negotiation. This can be done before the parties have actually agreed on a mediator. Call a mediator you trust to get his/her impressions and ideas on how to convene the case properly.

- After selecting the mediator, participate in an “abbreviated mediation” of a couple of hours where the goal is not necessarily to settle. This allows the mediator

to learn the agenda of the parties, diagnose the impediments to resolution and make suggestions. This approach allows the mediator to do an assessment of the motivation of the parties early on, and can keep the process fluid while a game plan is agreed on.

- Give the mediator the ability to conduct a pre-hearing negotiation in which initial demands and offers are discussed and revealed if the mediator feels it would be helpful. This way you go into the process with a running start.

Consider the case recently filed by Charlie Sheen against his studio and producer. Trying to mediate that case while the tiger blood is flowing is probably not an optimum time for resolution. The case will have to play out in the press a bit, and the emotional waters will have to calm. Once that occurs, the lawyers can assess what, if any, additional information is needed to sit down and discuss a way to settle. Yet, if the court orders that case to mediation quickly, the parties will likely have a frustrating experience. If anything, the parties can select a mediator and talk privately with him/her for an hour or two and develop a game plan for resolution. That game plan might involve a full-blown arbitration or trial, but at minimum the mediator can make an assessment of the situation for the parties.

This holds true for garden variety tort cases where significant damages are at stake, such as brain injury situations. Often it takes a year or two to make a realistic assessment of the extent of such injuries. Throwing a party into a full-blown mediation without having completed the evaluation of the victim will likely backfire. Doing a pre-mediation conference with a qualified mediator will allow for an impartial diagnosis of what would be the best approach toward using efficient resources to get the case in a position of settlement.

In sum, one size fits all doesn’t apply to complex cases. Working with the neutral early on to determine an approach that maximizes resources and doesn’t waste time and money will create better results in mediation. Jumping into the process before the pitch has left the pitchers hand is a recipe for disaster.

Jeffrey Krivis has mediated complex issues in Northern and Southern California for 20 years. He teaches at Pepperdine Law School/Straus Institute for Dispute Resolution and has been named one of the Top Neutrals in the state by the Daily Journal. Visit his Web site: www.firstmediation.com.