Friedman Mediation
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# Commercial Litigation Requires an Evaluative Approach

By: Bruce A. Friedman, Mediator and Arbitrator

In my experience, in the mediation of commercial cases, the parties and their counsel want an evaluative mediation approach. I have found that even if a mediation is unsuccessful, the parties and counsel seem satisfied if they have received an honest appraisal of the strengths and weaknesses of their case.

## TYPES OF MEDIATION

As any experienced neutral knows, there are several different approaches to mediation: facilitative, evaluative and transformative.

Evaluative mediation is a process modeled on settlement conferences held by judges, where the goal is often to address the legal rights of the parties, as opposed to their needs and interests. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases and predicting the conclusion a judge or jury might come to. Next, an evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. An evaluative mediator structures the mediation process and directly influences the outcome of mediation.

In facilitative mediation, the neutral creates a process designed to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions, validates and normalizes parties' points of view, searches for interests underneath the positions taken by the parties, and assists the parties in finding and analyzing options for resolution. However, the facilitative mediator does not make recommendations to the parties, give his or her advice or opinion as to the outcome of the case, or predict what a court would do in the case. This neutral's goal is to have the parties make the decisions.

Transformative mediation is the newest mediation type, and most "liberal." Based on the goal of establishing the parties' individual empowerment and allowing them to recognize the other parties' needs, interests, values and points of view, transformative mediators hope to allow and support the parties in mediation in determining the direction of their own process. In transformative mediation, the parties structure both the process and the outcome of mediation and the mediator follows their lead.

While each approach has its merits and may be useful depending on the circumstances of a given mediation, I have found that the facilitative process does not seem to work in the business litigation context. For the most part, the parties are not interested in directly engaging one another during the process. Instead, they are looking for a rational analysis of the factual and legal issues of their case. I refer to this evaluative approach as a principled negotiation. By that I mean a negotiation where the settlement figure is based on provable damages and reflects the strengths and weaknesses of the case and the risks presented by the facts, law, and legal process. A principled negotiation is not a

discussion based on what the plaintiff wants and what the defendant will pay.

EXAMPLES OF CASES

A few examples of the application of evaluative mediation to commercial cases may be helpful. In an insurance coverage mediation, there is no substitute for a substantive discussion of the policy provisions at issue, the cases interpreting them and the underlying pleadings and facts in a third party case or the facts in a first party dispute.

The same is true for a professional liability case. An evaluation of the professional standard, its breach, causation and recoverable damages is necessary to successful resolution of the case.

Class Actions present a plethora of issues to address as the class issues of the adequacy of the class representative and whether the claim is appropriate for class treatment sit on top of the substantive allegations of the case itself. There is also the important element of what the court will approve. Even when the evaluation of class and substantive issues are resolved, a case is not settled until the issue of class counsel's attorney's fees is negotiated and resolved.

HOW CAN THE MEDIATOR PREPARE

The mediator needs to provide a rational argument of the issues to each party in an effort to allow the party and counsel to reach a settlement figure that reflects the strengths and weaknesses of the case and the risks of litigation. This evaluative approach requires careful preparation by the mediator. It is not enough to simply read the briefs and show up at the mediation. The mediator must also read the statutory and case law that is critical to the case and develop a list of questions, both factual and legal, to address to the parties. In my experience, pre-mediation telephone conversations and/or meetings with counsel are very helpful in understanding the dynamics of a case – elements or intricacies that may not jump off the pages of a mediation brief.

As any trial lawyer would do, I have found that it is important to research the judge in the case. Understanding the judge and reviewing his or her profile has enabled me to speak intelligently about the chance of a successful pre-trial motion; such as a motion for summary judgment, motion in limine, or Daubert motion regarding the qualifications of an expert witness. In that same vein, knowledge of the forum, state or federal, and the jury pool also provide useful tools in a discussion of litigation risks. Federal judges are more likely to dispose of a case on a motion for summary judgment than a state court judge. The federal jury pool may be more conservative than the state court pool. Federal juries are smaller and require a unanimous verdict even in civil cases. A state jury may decide a case on less than a unanimous verdict. All of these court and process related issues are very helpful in a discussion of the risks inherent in the judicial process.

Of course, evaluative mediation has its limits. A mediator should not succumb to

answering counsel's inevitable question: who will win the case? or what the case is worth? Answering either question does not promote a settlement. After all, why should a party settle, offer more, or accept less, if the mediator has told them that they are going to win? As far as the question regarding settlement value is concerned, a mediator can never know enough about the case and / or motivations of the parties to place an accurate value on the settlement. The settlement value of the case is the amount the parties agree upon in a settlement agreement, not the mediator's number arrived at without review of the documentary evidence and an assessment of the credibility of the witnesses.

I am not suggesting that successful mediation of a business case can only be accomplished based on a purely evaluative approach. There are times when elements of a facilitative approach are useful in promoting a resolution. In the vast majority of commercial cases, however, the evaluative approach is necessary to the successful resolution of the case. The lawyers demand it and are reluctant to return if they don't get it.

Bruce A. Friedman is a mediator with a national practice. With years of litigation experience behind him, he understands the needs of the parties and counsel in the mediation process and will do his best to ensure that they are met. For more information on the mediation services that Bruce A. Friedman provides, check out his website at http://www.FriedmanMediation.com or call him at (310) 201-0010.