SUCCESSFUL MEDIATION... NOT DOING IT OR NOT DOING IT PROPERLY IS LIKE BURNING MONEY

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There are some advantages to being an "old guy"... not many, but a few. After several decades of civil litigation practice, representing both plaintiffs and defendants and acting as mediator or arbitrator in several hundred matters, I have arrived at some fundamental "truths" about mediation which I would like to share with you.

The typical "how to" advice on the subject, in the end, boils down to being prepared and dealing professionally with the opposition. Of course both hold true; but, I would like to offer a few different observations which I have made over the years, both as counsel and as a mediator. They may save you and your client time and money in the end.

TIP NO. 1: IT'S NOT WHAT YOU SPEND... IT'S WHAT YOU SAVE

I have an elderly friend who loves to shop and she loves say "it is not what you spend but what you save", as she comes through the door with her purchases in her arms. The same, in fact, holds true in civil litigation and mediation.

The fact of the matter is that in 99.9% of cases **it is in the interest of both the plaintiff and the defendant to try to resolve litigation as quickly and as early as possible**. Litigation is costly for everyone involved, in terms of dollars and the draining of emotional capital as well. As a retired Superior Court judge friend says on a daily basis, "there are no winners in litigation". Mediation can be the answer.

Truth No. 1 – Let's start with the premise that **every case has a "true value" for settlement, based upon the totality of the evidence which ultimately would be offered at trial** by the parties. That "true value" may not be known or evident to everyone until at least some initial discovery is conducted, of course, and that "true value" may fall anywhere along the spectrum from zero dollars to seven figures. More importantly, that "true value" may not be the same figure as that which the plaintiff hopes to receive, nor may it be the same figure that the defendants hope to pay.

Truth No. 2 – The second axiom of civil litigation is that, as in horse racing, **there is no such thing as a "sure winner".** Over the years I have certainly dealt with some of the best plaintiff and defense counsel in the state of California. I can confidently say that I have never heard any of the truly experienced lawyers on either side offer their clients guarantees, either as to the outcome of their case or the amount of the award or verdict.

Sometimes good cases can be lost and poor cases can be won. But too frequently our clients become wrapped up and insulated from the reality of that fact due to their emotional investment in the case and their desire that their respective positions be vindicated. This allows them to lose sight of the possibility that a jury will not agree with them and the case could be lost. In my view, it is an important part of counsel's job to bring their client back to the reality that, if the case gets so far as to actually reach a trial, by definition then, there are "triable facts",

e.g., there are factual disputes which the jurors will hear and make judgment upon... and legal issues for the Court to rule upon.

Consequently, as a mediator, I have sometimes found it quite telling to ask each of the parties and their counsel, outside of the presence of the other parties, a question which is not often asked. It often cuts through the posturing and "closing arguments" and puts the parties back on track towards a more realistic middle ground. It is a question which is sometimes uncomfortable for those counsel who have not sat down with their clients to discuss the pros and cons of proceeding to trial. The question is simply "tell me realistically **how you could lose this case**? Since there are no guarantees in the outcome of litigation and there is no such thing as a "sure thing", at the very least the question tends to push both counsel and his or her client to consider some more reasonable ground, in which, possibly, mediation can succeed.

Truth No. 3 – The third axiom or truth to be considered is that it is **always in the plaintiff's interest to resolve a case early**, at or near the "true value" of the case. The longer litigation proceeds, the costs for all parties go up proportionately. If there is a "true value" of the case, whatever that number is, the more attorney hours which are spent, the more court costs, deposition costs, etc. before the case is settled (or tried), the more "diluted" and diminished the recovery will be for both the client and counsel. The "trick" for the plaintiff, therefore, is to fairly determine the "true value" of the case early on and reach reasonable expectations as to the case's settlement value.

Truth no. 4 – Fourth, it is equally true that it is **always in the defendant(s)' interest to resolve a case early**, at or near the "true value" of the case. The defense certainly is not immune from the geometrically increasing cost in terms of both dollars and time, the longer litigation continues. Moreover, resolving the case early at or near the true value removes the potential exposure for for the defendant and insurer of an unhappy high dollar verdict.

Nothing in what I have said thus far is meant to suggest that either side should simply "cave in" and not vigorously advocate their respective positions; but, only that they should, early on, undertake a realistic and reasonable evaluation of the evidence and the possibilities as to how that evidence would be received by a jury and how the case could be lost. Remember, in the end, "it is not what you spend but what you save", that puts more net dollars in the plaintiff's pocket and, at the same time, saves in defense costs and risks of that unexpected high award at trial.

TIP NO. 2: "HIDING THE BALL" IS NOT THEY WAY THIS GAME SHOULD BE PLAYED

Truth no. 5 – Being argumentative, posturing or uncivil **does not equate to being an effective advocate** for your client .

As plaintiff's counsel, if you have a case of sufficient merit that you are willing to take it through the trial, to the extent your comfort level and your strategic aims allow, show the other side what you have at mediation. Posturing and blustering are not productive, nor do they move the case towards what should be an end goal for both sides... reasonable resolution at or near the case's "true value". Moreover, to an experienced defense attorney or claims person obstruction and argumentativeness is just a telltale sign of a weak case, not a strong one, and it is not something which will promote the plaintiff's interests and the goal of a higher recovery

If there is one consistent trait which I find common to all great plaintiff trial lawyers, it is the fact that they prepare their cases well and they are thorough both in their development of the factual evidence and their legal analysis. Early on as a young lawyer, I noted that invariably when I came up with a "great idea" for investigation or discovery, those truly good plaintiff lawyers had been there six weeks before I was. When the case was ready

to mediate, they were prepared and, more importantly, they were forthright in putting forward at least the more salient and fundamental evidence supporting their client's claims. Rarely does such an experienced counsel obstruct or "hide the ball" and they need not engage in bald posturing. They have a good case and they let the defendant and its/his/her insurer know it and have no doubts about it.

For their part, experienced defense counsel and claims professionals will then fairly and intelligently evaluate the evidence, the potential exposure and, from that, adjust their settlement authority evaluations accordingly.

TIP NO. 3: COME TO MEDIATION WITH A PURPOSE, DON'T JUST GO THROUGH THE MOTIONS

Okay, you have gotten this far and so I will offer up a truism... mediation is only successful when all sides come to the table with the good-faith intention resolve the case short of trial. If you are present only because the court ordered you to be there, the case will not resolve.

On the other hand, if you are there because you recognize that

1 – Your case has a "true value",

2 – There are most likely strengths and weaknesses in your case and in the opposition's case, and that either side could lose when they go to a jury,

3 – You recognize and appreciate the ongoing emotional and financial costs of litigation and

4 – You know that your plaintiff recovery or your defense exposure and costs will **never be better than they are today**...

Ten, very likely, mediation will be a success.

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