

Settle Up!

Settlement Newsletter



June 2018

The Mediator Who Wasn't

He came late.

The mediation was all set to begin at 9:30 a.m. But by 9:00 a.m. there was no sign of the mediator. The plaintiff was present with two attorneys. The defendant was present with two attorneys. Everything was all set to go – but no mediator.

At 9:00 a.m. I grew concerned. Where was the mediator? I called his office. No answer. I checked my email. Nothing. No text from him either.

What to do? I couldn't reach him, had no idea where he was, assumed he was coming but didn't know for sure. The parties had exchanged briefs a week before and held a pre-mediation phone conference. But now the mediation was ready to start without a mediator.

Finally at 9:20 a.m. I called another local mediator to see if he could serve as

backup and do a mediation on 10 minutes' notice. No luck - he was in joint session with a large group. If my mediator didn't show up soon, I was going to have to do some quick thinking.

Finally, while I was on the phone with the other mediator's office our mediator showed up – five minutes late. Why didn't he call? Why didn't he take my call when I tried to reach him earlier that morning?

We started the joint session and the mediator began asking questions. I was floored. He was asking questions about everything in my brief. After several minutes I realized he hadn't read my brief - not at all. We then spent the next hour (in joint session) educating him about all of the points in my brief.

After he got his arms around the issues, the mediator started asking questions. He didn't walk on eggshells. He dove right in

and started asking pointed questions about sensitive issues - issues I'd just as soon not discuss in front of the other side. He

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drove right through the sensitive issues in my case and started making comments and observations in front of everybody in joint session.

Why would he do such a thing? Here we were at the start of the mediation and he was empowering the other side. How did he ever hope to convince them to take less when he was spending precious time in joint session driving roughshod over the weaker, more sensitive parts of my case and emboldening the plaintiff? In reality, I think he was pleased with himself that he had accurately identified the weaker

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parts of my case. I think he felt he was really getting somewhere. It all happened so fast that it was difficult to put an abrupt end to the joint session - I did not want to appear to be concerned about the questions he was asking. And then he did the same thing to the other side - probing the weaker parts of their case in joint session. I don't think it even occurred to him that he was encouraging both sides to dig in to their respective positions.

We broke for caucus. Within an hour our mediator told me he felt the parties would shortly be at impasse. No surprise there. He had just spent the last hour in joint session entrenching the parties into their respective positions.

Why would a mediator do such a thing? This mediator came well-recommended

and had a long history with the American Arbitration Association. Why would he think such an approach would persuade either party to move off their respective positions? He was a seasoned attorney with decades of experience.

Effective mediators don't encourage the parties to dig in. They use tools of risk, cost and uncertainty to help the parties see that a negotiated result gives them power over the outcome of a case. Skillful mediators look for hidden values and priorities that serve as powerful tools in helping parties re-evaluate their positions.

Our case didn't settle. Would it have settled with a mediator who skillfully probed the client values and explored alternative options in caucus? I believe so. The day wasn't entirely wasted

because the parties learned more about each other's "dig-in" points. But was it an optimal mediation? Not at all. With even a marginal degree of mediator skill, this case should have settled.

The upshot from this experience? We were reminded (once again) that a mediator's skills are critical to mediation success.

The foregoing article is provided for general informational purposes and should not be used in connection with any specific legal matter. Persons with legal issues or matters should consult competent legal counsel.

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