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ALTERNATIVE DISPUTE RESOLUTION

Gaining a Winning Perspective in Mediation: It's All About the Frame

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Special to the Legal

In the traditional model of dispute resolution through litigation, a win is easy to define. Most times, there is a winner and a loser identified by who prevailed, on which claims, and what monetary compensation was awarded. Indeed, with the exception of limited equitable remedies available for a small subset of certain claims, this is the predetermined, limited outcome of the litigation process. It is black and white by design.

Mediation, by contrast, is a completely different animal, with almost no absolute rules, no preconceived boundaries on what remedies can be provided to resolve a dispute, and no dualistic filter by which to measure the result. So how do we define a win? Should we even be looking for one in the traditional sense? More importantly, in a culture that is obsessed with score keeping and victory spreads, how do we help our clients obtain a result that they can view as a success? It begins and ends with the frame.

The “frame” is the lens through which we view the choices in front of



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us, and what provides perspective for our decision-making process. It is our view of the problem, and a relative set of boundaries for its solution. To illustrate, think of a sporting event with a close call on a play, and a chance to evaluate (and correct if necessary) the call through instant replay. If shown only one angle of the play through one camera, one may definitively see the outcome a particular way. Shown multiple angles, the outcome may appear drastically different. Each angle viewed is a different frame. The more frames we have

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available to us when viewing a problem (or perhaps more accurately, the greater our ability to shift from one frame to another), the greater the opportunity to see different potential outcomes. The greater the field of potential outcomes, the greater the opportunity to find one that can resolve the dispute on grounds deemed to be successful from the client's own perspective.

Now consider this concept of framing in the context of ongoing litigation. The initial frame through which our clients view their issue (and its potential field of solutions) is often shaped by the pleadings filed with the

court, and the limited scope of damages that are available in that forum. This limited viewpoint fuels a zero sum game perspective whereby a successful outcome can only be achieved based upon the dollars awarded to one party, at the expense of the other party. Our zeal as advocates to advance our client's interests within the litigation process serves to further entrench that frame, creating an anchoring effect relative to what the client views as a successful outcome. The more we advance their interests, the more they buy into the advocacy, and the more difficult it becomes for them to view a successful outcome as anything short of what is being demanded. How do we move from this dualistic approach, to a more expansive one that takes advantage of the flexibility of the mediation process to provide creative solutions that differ from what courts can provide? Simply put, we reframe the concept of a win.

UNDERSTANDING A CLIENT'S NEEDS

Just like beauty, a successful dispute outcome is in the eye of the beholder. It is subjective. It depends upon individual concepts of equity and fairness. It is driven by economic conditions and standing, shaped by one's value system, and can evolve and change over the life of the dispute. In approaching the mediation process, it is incumbent upon us to work with our clients to help construct a frame from which to view and measure outcomes in light of these subjective elements—to help reshape the concept of a win from a settlement perspective. This requires a core understanding of not just what our clients want, but also what the drivers are behind those wants.

In establishing a construct to evaluate and view settlement options, it is

important that we understand what our clients' needs are, as opposed to their wants. Perhaps just as important, we must help our clients focus on those differences. To quote those esteemed philosophers Mick Jagger and Keith Richards, "you can't always get what you want, but if you try sometimes you just might find, you get what you need." Parties engaged in mediation will almost always have wants that cannot be mutually satisfied. That does not mean, however, that they have mutually exclusive needs.

In the classic example of identifying needs versus wants, two siblings argue over entitlement to the last orange in the kitchen. The one sibling wants to make a drink that requires the juice of a whole orange, while the other sibling wants to bake a cake that calls for grated orange peel, again from a whole orange. As neither are able to agree on who should have the orange (and neither informs the other why they want the orange in the first place), the siblings' parent resolves the dispute by cutting the orange in half, and giving one half to each sibling. This resolution cannot be viewed as a win by either sibling, because neither is able to accomplish their ultimate goal with only one half of an orange. Both siblings wanted the entire orange. But neither sibling *needed* the entire orange. If both siblings had recognized what each really needed (one the peel of the orange and the other the juice) both could have satisfied those needs and achieved a resolution that each would have considered a win. The identifiable "want" was the orange. The identifiable "need" was the ability to make the drink/cake. The orange was simply the vehicle through which the need was satisfied.

Understanding a client's needs is the cornerstone to developing the

frame through which to view, and ultimately judge, potential resolutions. Once we understand what the client needs to move past the dispute, settlement options can be identified to target those needs. That will require a deeper dive into the issues at stake, and into the circumstances facing the client.

Needs can vary, and at times be difficult to ascertain. They can be specific (as in the orange example above) or more general (as in the need for certainty, justice, financial security, substantive fairness, procedural fairness, etc.). To uncover those needs, we must invoke our inner "counselor" role that is often used as a descriptor of the services we provide—attorney and counselor at law. Ask more questions. Listen. Dig deeper to a greater understanding. Create a chart with the client of needs versus wants, and how each may be met. Can they be met through litigation? Can the court grant what is necessary to truly satisfy? Can they be met through some type of negotiated settlement?

The more effort that is put in, the clearer the frame becomes. A win is ultimately framed as that outcome that satisfies the client's needs in a more meaningful or complete way than is likely to be achieved moving forward to litigation (or other binding dispute resolution process). This perspective opens the door to creative problem solving, which can lead to creative solutions that are beyond the remedies courts can provide and that the mediation process fosters. In the end, it's all about the frame. ●