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# Mediator responds to Rodent: Present case, not just number


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Early this summer, the Rodent cynically complained that mediation "hasn't progressed much since the days of the Hatfields and McCoys." (DBR, June 19, 2012). I'm not sure if the little guy needed a vacation or just lacked perspective, but his rat hole has a very limited view.

The Rodent's premise — that mediation consists of snarling demands and counteroffers, followed by disingenuous comments by the mediator, ultimately resulting in impasse — undoubtedly reflects some unfortunate mediation episodes. Fortunately, though, it does not reflect all mediations. Counsel can avoid this inflame and impasse syndrome by capitalizing on a key tenet of modern mediation, namely, focusing on the merits of the case and not just the numbers — an approach I call merit-based mediation.

**Contrary to the Rodent's assumption, mediation need not be a game of cat and mouse comprised of unrealistic case evaluations and apparently arbitrary exchanges of offers and counteroffers.**

Providing a credible reason for someone to accept an offer is hardly a novel concept: we don't ask judges for rulings or juries for verdicts without first making our case. Mediation should be no different.

The implied threat in every mediation offer is that the offeror's case is so good that his adversary will be sorry if he rejects it and stays in court. That threat can ring hollow, however, unless counsel bolsters it by recapping the key components of his position, preferably with exhibits, a Power Point, or similarly persuasive tool. Although the parties may have spent years duking it out in deposition and motion calendar, a comprehensive opening can help an adverse party see the big picture, and understand that despite winning small battles along the way, his prospects of winning the war at trial may not be particularly rosy.

Not surprisingly, because mediation typically follows

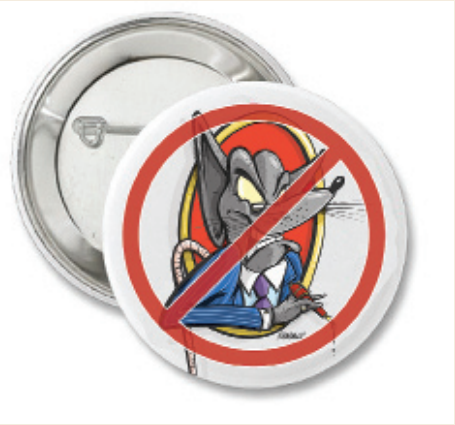
months of contentious litigation, lawyers are often disinclined to objectively listen to the very opponent with whom he has been locked in combat. But if the mediator is properly prepared, she can help each side examine their opponent's arguments — positions they may have previously resisted or ignored. Unlike the attorneys litigating the case, the mediator has not been part of the fight, and lawyers tend to listen when the mediator uses the facts and law to highlight the weaknesses in their case — or in Rodent speak, the holes in their cheese.

Although mediators are not allowed to take sides, we do not — and should not — check our legal experience at the mediation door. As such, if we are properly prepared before the session begins, we can credibly explore key legal and factual issues with both sides. We cannot do this, however, unless counsel helps us by providing a summary of core disputes, along with related documents including depositions, expert reports, damage models, and case law. That way, by the time we sit down to begin the mediation session, we can not only mediate the case, but can help explain opposing views to each side.

Contrary to the Rodent's assumption, mediation need not be a game of cat and mouse comprised of unrealistic case evaluations and apparently arbitrary exchanges of offers and counteroffers. Instead, it should be an exercise that includes an examination of the merits of the dispute –a process that will inevitably be accompanied by the posturing, games of chicken, and threats by defendants to declare bankruptcy that send mediators home long after the sun goes down.

To be clear, there is no doubt that strategic negotiating is – and always will be — part of the process. This is life, not law school, and poker playing matters. But considering the merits of a dispute provides the parties with a rational basis to formulate offers, and gives the mediator ammunition to ask parties to adjust them. This may seem self evident, but as the Rodent pointed out, mediations often do not involve the actual merits of the dispute at all.

We live in an era where litigating in our beleaguered court system costs too much and takes too long. As a result, it is essential that we consider merit based mediation to optimize the



possibility of settlement, since in these tough economic times "alternative" dispute resolution is often a party's only practical option for resolving their dispute.

So the next time you are set for mediation, be sure to present your case through persuasive legal and factual analysis, and make sure that the mediator understands it as well. And if you see our mischievous little friend, please tell him that mediation has indeed progressed — at least for parties who engage in merit-based mediation. You might also tell him to consider booking a vacation; I hear there are some very entertaining rodents working in a theme park in Orlando.

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