DEMONSTRATING STRENGTH BY ACKNOWLEDGING WEAKNESS IN MEDIATION - National Arbitration and Mediation

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Generally speaking, human nature is such that none of us will readily acknowledge our weaknesses, particularly in a public setting. This trait is especially pronounced and amplified in attorneys advancing the cause of a client, who often feel compelled and duty-bound to hold tight-fisted to every issue, refusing to release even an inch of ground until ordered to do so by a court. And, even then, at least for appearances sake, an attorney will file an appeal or, minimally, continue to voice objections as to how the judge “got it wrong”. The irony in this approach is that the weakest points in a client’s matter can then be caused to absorb an undue amount of time and energy, leading to a hardening of positions on both sides.

The privacy of Mediation allows litigants the opportunity and freedom to strategically retreat from weak positions and establish themselves on higher ground from which their more meaningful claims or defenses can be pressed. The sophisticated practitioner, for example, will make note in his or her opening statement that: "For today's purposes – and for today's purposes only – we are not going to contest liability." In this fashion, the defense can then attempt to focus the discussions at Mediation solely on damages – where its strengths lay, rather than allow the plaintiff to "beat the drum" on liability and, therefore, detract from the defense as a whole. In this same vein, a plaintiff's attorney may come to a Mediation session and announce that he or she is only going to focus on their top 3 claims for purposes of the proceedings. Again, this approach serves to defuse debate on any defenses the other side may have on the plaintiff's weaker claims which, in turn, would be employed as a diversionary tactic and a means to "taint" the plaintiff's overall case.

Most importantly, acknowledging the shortfalls in one's case at Mediation, even tacitly, builds credibility. One can emphasize the strengths in their position by acknowledging their weaknesses without fear of ultimate admission or compromise because it is done within the safety of the Mediation process. The message being communicated is that the practitioner has evaluated his or her case realistically and has come to the Mediation with confidence, the intention to negotiate in good faith and, in short, to "get the job done". Adversaries are encouraged accordingly to respond in kind and to forego more pedestrian arguments, leading to meaningful and productive discussions. The opposite proposition, though, is equally true. Those practitioners who refuse to acknowledge even the slightest flaws in their most tangential points can appear unprepared and/or arrogant, since they are unable or unwilling to address the issues in an educated and balanced manner. While the goal might be to appear tough and fearless, the reality is that the contrary impression is conveyed – the practitioner appears weak and out of touch, lacking an understanding and appreciation of their strongest claims or defenses.

The bottom line is that this Mediator strongly encourages counsel to demonstrate the strengths of their client's positions by acknowledging their weaknesses. It is an approach that will lead to a more focused, productive and, ultimately, successful Mediation.

Richard Byrne, Esq. is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. In 2019, for the fifth year in a row, he was voted a Top 3 Mediator in the country by the National Law Journal Reader Rankings Survey and was also voted a Top 3 Mediator by the 2018 Corporate Counsel Best of Survey. Also, in 2018, for the third straight year, he was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide. Further, he was ranked a Top 10 Mediator in New York State by the 2018 New York Law Journal Reader Rankings Survey for the fifth year in a row.

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