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Learning the Lessons of Impasse

Learning how to prepare for mediation and how to mediate well is not easy. One problem I encounter when training others is the difficulty in teaching a process that is confidential. There are no transcripts or recordings. Great opening statements, clever negotiation tactics, egregious ethical violations and all of the good, bad and ugly cannot be memorialized, distilled or reviewed. The process is privileged and confidential. That makes mediation difficult to teach compared to most other law-centered skills. For these reasons, I offer mediation training sessions and approved CLE courses to law firms of all kinds and to risk managers and insurance companies who want to optimize the mediation process and get better results.

In litigation there are transcripts, videos, recordings and written accounts of trials, depositions, published opinions and a host of resources to teach ourselves how to be better lawyers and litigators. The absence of these records and tools can make mediation a challenge to learn. We enter into a cloistered process, and a few hours later, we either have a settlement or an impasse. As lawyers we do not have the ability to study in detail what we saw or heard because it is not recorded. There is no good feedback loop available to allow us to export lessons learned during the mediation or to improve the performance of the participants. If the matter settled, there is usually not much discussion or post-mortem analysis about why that happened. The case is resolved. We move on. There is some post-mortem analysis when we reach an impasse, but we cannot study and recall verbatim what actually happened and what precisely was said during

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the course of the mediation. Trying to reconstruct several hours or an entire day of negotiation is very difficult.

In multi-party cases there is an opportunity to witness a lot of behavior. Some productive, some weird or hostile, some humorous and some disconcerting. You have all of that to digest and ponder. You should take the time after an impasse to sit down with the other attorneys and claims representatives, if possible, and try to determine what were the issues, factual discrepancies or underlying forces driving the decision making. What were the interests or positions motivating one side or the other to stand firm at a particular number? If you reach an impasse, make the most out of it. Spend some time with the mediator to figure out what was driving the other side. Consider the possibility that you are looking in the wrong direction. Maybe there are factors unrelated to the merits that are impacting the willingness of a party or company to settle. Why didn't the other side see the "wisdom" of your last offer? When you impasse a case, don't be in a hurry to return to litigation activity. Spend some time digesting what happened. Talk to the other participants and their attorneys to try to determine what information or perspective might bridge the gap.

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