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Avoid the green ones – they're not ripe yet

Mediation: It's all about timing

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By Miles B. Cooper

The mediator came into the room, shutting the door behind her. She looked downcast. "The folks in the Red Company room are fighting with the folks in the Black Company room over whether the insurance coverage was properly tendered. And apparently there's an excess carrier who has just heard about this yesterday. Why are you here right now?"

"Because," the lawyer thought to himself, "it's the court's valiant effort at an early resolution with an early court deadline. Everyone knew it was unlikely to go anywhere until coverage issues and summary judgment were dealt with."

Hope and a plan is better than just hope

Most lawyers experience the day-of-mediation frustration where one party isn't ready. A lot of the time, we sense trouble heading into the mediation. It may seem too early. The mediation may be court ordered. Or there might be an issue – summary judgment – that needs resolution before the other side gets serious.

An early or court-ordered mediation will not, by definition, fail on its own. Approaching it with a negative attitude can cement failure though. One presumes the mediation is a waste, thus one does not take it seriously and the mediation then fails. Beyond shifting one's mindset, how do you prevent this? Communicating prior to the mediation helps.

Call the other side once the session is set. Find out what roadblocks exist. Do they need a defense medical exam? Offer one on shortened time. Coverage dispute? Offer to help write a letter to trigger coverage. Reach out to the mediator as well. Advising the mediator about your "ripeness" concerns well before the session gives the mediator an opportunity to weigh in. Sometimes the mediator will recommend to the court that the mediation deadline be pushed out while an issue is resolved, saving everyone from a wasted day.

Procrastination, or when great is the enemy of good

Most of us are perfectionists (and control freaks.) Many of us plan our deadlines well in advance of the mediation. The mediation brief? Calendared to be out the door three weeks before the mediation session. Then the due date arrives. A medical report is still missing. So is some billing information and a useful photograph. The brief gets delayed. The materials then arrive and finally the brief is ready. But wait! Another lawyer/ paralegal/client wants to read it one last time. It then requires another copy-editing round to remove the new version's typos.

Then, suddenly (but not without warning) the mediation is days away. Meanwhile, the defense lawyer and adjuster, without guidance, have already made their exposure assessments. Defendants' assessment is probably on the *conservative* (their words) or *cheap* (ours) side.

The lesson? In the words of the inescapable "Adele Dazem" (no, not a typo but very 2014 – think big chin and the Oscars), *Let It Go*. Get it out the door well in advance. Send at least two hard copies and an electronic version. An Adobe Acrobat "save as reduced file size" helps for emails. If one is waiting on an item or two, one can always do a short supplemental brief.

"I'm telling you, you've got the wrong guy!"

As part of the communication with the mediator and opposing counsel, find out who the decision makers are. Make sure those people will be there – physically there, not phone standby. Find out if the carrier's upper level people are East Coast, and if so, make sure to get the deal done early in the day, or that the folks in the other room have cell phone numbers so that the last gap can be closed.

A forewarned client is a less frustrated client

If despite all efforts, the mediation is likely to be an exercise in futility, warn the client. Clients are told that mediations are resolution opportunities. Most clients want out – litigation is stressful. When they arrive and suddenly learn that it is unlikely to go anywhere, they get upset. It can make clients angry at the other side, deepen emotional hurts, and make future resolution more difficult. Telling the client in advance that the session is mandatory and unlikely to go anywhere helps. It also helps if the client understands that the session has some utility – learning what needs to be done before the next round.

When you have lemons...

So the case isn't ripe. One can pout in separate caucus or use the mediator to craft a plan for future successful resolution. Take notes about the day's players (who is in the other room) and

what they need in order to have a meaningful second session. Then go out and get cracking.

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A year later (yes, it really was that long), the parties returned. Summary judgment denied. Tender accepted. Excess carrier came in and reassigned the matter to a designated hitter. That day, the right people were all there. The case was ripe for resolution. And, resolve it did.

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