

Sotomayor Law

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Mediation, Arbitration and Business Dispute Services

Self-Determination in Mediation

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Parties and lawyers involved in mediation – and to a large degree mediators themselves – often pay lip service to the theory of self-determination that underlies the process. In fact, many cases demand (and most lawyers hope for) a mediator who can “beat up” both sides to hammer out a deal.

I am continually uplifted by the wisdom parties often demonstrate if given the chance to participate meaningfully in the mediation process. In the United States, parties often play little or no role in mediation; they sit there silently, glad not to have to say anything, and relieved that their lawyers can do all the talking for them. Usually I encourage the lawyers and parties to engage in a joint session, and usually I face strong opposition to that part of the process. The joint session develops useful information and provides the opportunity for the clients to preview their opponents and the lawyers, and get impressions of how the stories will play in court.

Usually everyone is pleasantly surprised at how useful a joint session turns out to be. But not every case is the “usual” case. In fact, every case should be treated as unique, and so mediation must be tailored to the situation. That means that sometimes, the process is re-ordered or a joint session takes a different form.

Take the example of a recent international business case I mediated, involving allegations of breach of fiduciary duty, misappropriation of trade secrets, wage and hour issues, and defamation. The manager who had been fired had worked with the company for over 10 years. It was a family owned business, and the owner entrusted the operation of the company to this young protégé. The mutual allegations of mismanagement, unfair competition, fuzzy accounting, and under-the-table dealing would be daunting to prove. The parties and lawyers decided to mediate six weeks before trial.

The lawyers agreed to exchange briefs simultaneously in advance. (That rarely happens, until everyone actually arrives at the mediation, when most seem to hand over their briefs without worry.) Not only did that save tons of time, but in this case, it got the parties thinking about what lay at the heart of the lawsuit and what they really wanted.

The parties struggled to assign a monetary value to the case, highlighting what everyone had come to realize were the key issues – personal disappointment, possible financial devastation, and above all, a sense of betrayal. I received entirely mutual, yet independent, requests for the two principal parties to meet one-on-one.

The meeting lasted three hours. The lawyers, other parties, and I sat around trying hard to create value with the time. I asked one of the attorneys to start drafting a settlement agreement. I was very optimistic

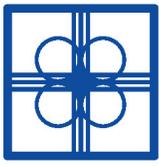
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that the principals were developing a solution. I was sure they were looking for reconciliation, not money, even though the legal and factual issues involved money.

I was wrong.

The principals emerged from their meeting with no deal and as much mistrust as they had at the beginning. But – apparently having gathered as much information as possible insofar as they had not even spoken in over a year – they were ready to start exchanging financial settlement offers. That was progress.

The mediation went late. We finally had agreement on a settlement number, but the deal nearly fell apart over the payment terms. More mistrust. Finally, the deal was struck. I could tell that both parties had learned enough about the other – and more importantly – about themselves, that the deal that had been reached reflected a genuine desire to wipe the slate clean, learn from mistakes made, and move on.

This was a paradigm case of mediation setting the stage for the parties to take control of the outcome of their dispute and to clarify and define the future of their relationship..

What did the parties pay for that day? A process that allowed intractable parties to meet in a confidential setting in which their discussions could not be used against them, to gather information of mutual benefit, to reflect on a longstanding personal and professional relationship, and to settle all disputes between them. I think that's a lot of value.

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