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At First Glance: Maximizing the Mediator's Initial Contact

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Next month's issue will be the final 2002 edition of *Alternatives*, combining the November and December issues.

At First Glance: Maximizing the Mediator's Initial Contact

BY MARJORIE AARON

ADR TOOLS

First moves matter. A mediator's strategic choices during the initial contact can encourage the next steps that will produce a successful mediation, or render mediation less likely or less productive.

Too often, a mediator receives a telephone call from a lawyer in a case, and without much thought, gathers the essential information needed for a conflict check and scheduling. Trained to listen, the mediator does so, as the lawyer recites his or her version of the case. A tentative date is set, or opposing counsel is contacted to select a date and work out document exchange.

Or a mediator may receive a call from a lawyer, "potentially" interested in mediating, or in selecting the mediator for a case destined for mediation. The lawyer poses questions about the mediator's background and experience, and perhaps asks for a reference or two. The mediator answers the questions amicably and truthfully, and suggests to the lawyer, "Get back to me on the details" if he is selected.

Depending upon the mediator's office set up, intake calls may be handled by administrative staff, who fax or E-mail the mediator's resume and other information indicating areas of exper-

(continued on page 178)

Fair Value Isn't a Solo Standard For Evaluating Settlement Offers

BY JEFF KICHAVEN

COMMENTARY

In a Hasidic folktale, a poor widow saves and saves to buy a kosher chicken to serve her children for Shabbat, or Sabbath, dinner. As she prepares the chicken in her dilapidated kitchen, it scrapes against a rusty nail on the countertop and she worries that the chicken may have become impure and that she will not be able to serve it. Sweating and anxious, knowing that she cannot afford another chicken if in fact this one has become impure, she wraps the bird in a damp towel and rushes it to her rabbi for his opinion.

The rabbi hears the widow's tale and immediately whisks the chicken, and its owner, into his study. He takes out a magnifying glass, lays the fowl out on the table, pulls several books off the shelf and begins to analyze the chicken and the writings. He focuses his attention on a mark that likely makes the chicken forbidden to eat, shifting his gaze between the bird and his books, using the magnifying glass to stare ever closer at each.

After what seems to the widow to be an interminable wait, she stands up, looks skyward and says, "Please, please, stop looking at the chicken. Please, rabbi—look at me instead."

The rabbi closes the books and wraps the chicken back up in the towel. He looks the tearful woman in the eye and nods. "It's still

(continued on page 180)

Fair Value Isn't a Solo Standard For Evaluating Settlement Offers

(continued from front page)

kosher. Go and have a beautiful meal with your family."

This is a story that this author has told more than once in a mediation. It is told to lawyers who insist that their clients should not take less, or pay more, than the "fair value," "full value," "market value," or some similar description, of the case. When lawyers are told this story, their clients generally are seated in the corner of the room, sometimes crying, and always as anxious as the widow in the folktale.

It is a story that I tell far more often than I would like.

It is recounted here to make the point that responsible mediation advocacy — and negotiation strategy in general — does not end but rather only begins with an analysis of "market value" of a claim or defense, just as the rabbi's analysis did not end, but only began, with an analysis of the chicken. A responsible lawyer, no less than a responsible rabbi, looks at the person, too.

Market value analysis is appropriate in analyzing the appropriate settlement value of a case. It provides a kind of benchmark of objectivity.

But as with the errant rabbi, lawyers do their clients a disservice when they fail to broaden their view. Responsible lawyers will advise their clients based, in significant part, on subjective factors pertaining to that client and that client alone—not just on the case's objective dimensions that might be presented to a judge or jury.

The purely objective market value analysis would be adequate if litigation took place in what economists would characterize as a fair, or efficient, market. Critically, though, that is not the market in which negotiations to settle legal claims take place. Indeed, we would be right to question whether these negotiations take place in an environment that can properly be characterized as a market at all. That is why market value analysis of the settlement value of litigated claims is incomplete, and why more needs to be added.

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CHARACTERISTICS OF AN 'EFFICIENT MARKET'

Law has borrowed much from economics in recent years. While economists may quarrel with the ways that attorneys have done that borrowing, even a general look at the definition of markets proves that the concept is inadequate for analyzing the settlement value of litigated claims.

Scores of federal securities cases have adopted the general definitions set forth in *Cammer v. Bloom*, 711 F.Supp. 1264, 1276 n. 17 (D.N.J. 1989):

> An open market is one in which anyone, or at least a large number of persons, can buy or sell.

(continued on following page)

Maximizing the Mediator's Initial Contact

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• *What is the status of this dispute/case? Is it in litigation? Where are you in the discovery process? Have summary judgment motions been ruled upon or are they likely to be? Has a trial date been set? When?*

This information will give you some indication of the lawyers' and parties' current mind set: the dollars that have been spent; how tired of litigation or scared of trial they might be; whether there are likely to be significant differences in information and assumptions; how well crystallized the legal theories and factual disputes are likely to be; how much entrenchment there has been and whether a relationship repair is likely to be an option; what is motivating the parties; and the time constraints within which you must operate.

• *How did the case get to mediation? Was it referred by the court? Suggestion by counsel? Initiated by the client?*

While research indicates that settlement rates for court-referred and mandated mediation are nearly the same as in voluntary mediation, it is still helpful to know how this case came to mediation. The neutral may learn that only one party is anxious to settle, or that the lawyers really want to settle and talked the clients into the process–or vice versa.

• *Are you still in the process of selecting a mediator, or have you agreed?*

It is good to know whether this is in the "beauty contest"/resume-review phase. It can be embarrassing to start checking dates for a conference call or a mediation, and have counsel explain that they haven't yet agreed on a mediator.

Other than to refrain from scheduling, in this author's experience, the mediator "under consideration" should not act much differently from the mediator selected. A "sell" job makes the mediator look too eager, and the mediator's recitation of his or her experience in the area starts to sound like self-serving puffery, suspect and unattractive.

The mediator should acknowledge that there is chemistry in every case. The parties and counsel have to feel comfortable. The mediator might demonstrate interest in the attorney's problem: finding the best-suited mediator and setting up a mediation process most likely to result in a favorable settlement. In order to help, the mediator would want to ask a few questions, to determine if he or she could serve them well, or whether the mediator should recommend someone else. The questions also should drive at a consideration of how the process could best be fine tuned for the particular case, regardless of whether that mediator is hired. The neutral should demonstrate genuine interest asking questions about the case, its dynamics, the barriers to settlement, etc., and explain how these might affect one's design of the mediation process.

Nothing is more appealing to the contacting attorney than a mediator's genuine interest in his or her problem–that is, this case—except perhaps a willingness to think carefully about designing a mediation process to solve that problem.

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Next month, author Marjorie Aaron continues providing examples of questions for neutrals to ask potential mediation parties and their attorneys when the initial call comes in.