

Two rules to keep in mind for Mediation/Settlement Discussions **By Hon. (Ret.) Carmine Cornelio**

No two mediations go the same way, and no two cases are alike. There are always some differences in terms of evaluating liability and damages. I have written before on negotiation strategy (i.e. don't use the "Art of the Deal" tactics of starting off too high/too low, as this frequently shuts down productive discussions). Now, I'd like to discuss two general rules to consider in being more effective.

USE THE PARETO PRINCIPLE / RULE IN CASE EVALUATION

This is a fairly well known and accepted business "rule" (e.g. 80% of your sales come from 20% of your clients). Named after an eighteenth-Century Italian economist, it has general application to a wide variety of situations. For example, Wikipedia mentions that 20% of sport exercises result in 80% of improvement. Consider using this rule in case evaluation. No experienced Attorney thinks that any case (no matter how good) is a 100% winner. What is it then? The best of cases should be evaluated as (at most) an 80% winner. Honest case evaluation should start there and go down from there in potential case value. There are almost always "warts" on a particular case. It may be the facts for liability, causation or how likable (or not) the client will be to a jury. Consider that the best of cases is an 80% winner.

THE 5 MEETING RULE

The Wall Street Journal columnist Andy Kessler recently wrote about this Rule not too long ago. I have found that it can apply to mediations. Simply stated, it takes 5 meetings for success. This may explain why negotiations and mediations take somewhat longer than one would think. If someone tries to "close" a deal too soon, something is being left on the table. If it takes too long or the meetings are out of sequence (going past the 5 meetings rule), it may never close.

Kessler describes the 5 steps / meetings as follows: first, the SNIFF meeting. He compares it to two dogs checking each other out. If it goes well, there is a reason to keep meeting. Next is the STORY meeting. This is where the story is told and is perhaps the most important meeting. Each side tells the mediator their story and vents some emotion. After that is the DATA meeting. This is the time to get down to brass tacks of details of the case (positive and negative) and evaluation. This meeting is followed by the ASK meeting. Offers and Demands should not, usually, be conveyed until after the first two meetings have been productive and it's

time for the ASK. This, meeting will involve a fair amount of back and forth “mini” meetings on the ASK. Finally, is the CLOSE. This is successful when the other steps have been taken and were productive. One cannot attempt to rush to the CLOSE or advance it in the earlier meetings.

CONCLUSION

Honest case evaluation should always include the chances things in trial don't go well. Hence the realistic start of case evaluation is the 8/20 rule. Negotiations have their own tempo and timing. However experienced practitioners should recognize the 5 stepped meetings I've outlined and the merit of their sequence. The kabuki dance of negotiations will more likely be successful if each step in the meeting process is followed. Each step will have its own time frame. A successful mediation need not take all day, but more than one or two meeting will be necessary. Rare, if ever, is a mediation successful when the ASK or CLOSE happens too soon and without the other meetings.