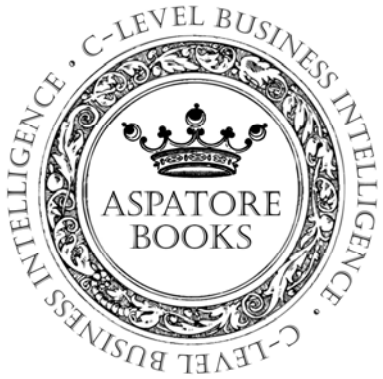
INSIDE THE MINDS

Preparing for Alternative Dispute Resolution Cases

Leading Lawyers on Best Practices for Mediation and Arbitration, Analyzing When to Settle vs. Litigate, and Determining Financial Liability



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Adding Value in ADR

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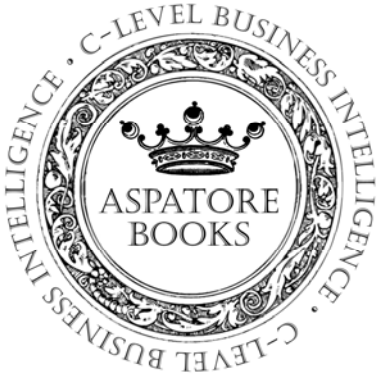

As an attorney specializing in alternative dispute resolution (ADR), it is my job to help clients resolve disputes, whether litigation has commenced or not. I help my clients identify solutions to their problems that may differ from those they might be accustomed to using, or that the courts, traditionally, offer.

In essence, my goal is to educate my clients about the different types of alternative dispute resolution (ADR) that might be available to them and my knowledge of other ADR professionals, such as retired judges and mediators who will work to help resolve conflicts in a way that is favorable to their position. Indeed, an ADR professional can often come up with a solution that a client has never thought of—a solution that may turn into a win-win situation for all parties to a dispute.

Most clients learn about ADR at the time that they are faced with a dispute and are evaluating different methods of dispute resolution. Of course, they can almost always "sue" (or be sued), however, the period after a dispute arises and before the parties are entrenched in "formal" litigation provides a window to attempt resolution by an ADR process. ADR can range from dispute resolution by coin-flips and "rock-paper-scissors" to mediation to a full-blown arbitration. Each method has its own distinct advantages and concerns. Sometimes a client may be subject to contractual requirements that mandate an attempt at resolution via mediation before a lawsuit takes place. Other contracts require dispute resolution via arbitration. Other clients learn about ADR during contract negotiations. Finally, many people learn about ADR from attending seminars, reading newsletters about current legal developments or books such as this!

The Value of the Attorney

Lawyers who are not comfortable in an ADR setting are generally those who do not have experience with it. My clients are fortunate in that I have experienced a multitude of mediations and arbitrations and have extensive training in this area. I have found that the ADR process, especially mediation, can offer clients considerable cost savings in terms of getting to a resolution and time savings to obtain certainty and getting "back to business." (It should be noted that arbitration can be just as expensive or

time consuming as going to court because an arbitration is another name for a private trial, including discovery (sometimes limited), motions, briefing, and presentation of witnesses and evidence.)

Another area where I add value to my clients in the ADR context is in the process of negotiating their agreements. At the outset, everyone who is involved in a deal hopes to make money, and frequently, dispute resolution agreements are not developed. A client that pays attention to ADR (or whose counsel does) can position themselves advantageously when, and if, a dispute arises. All too frequently agreements are reached which do not clearly define how accounts will be balanced, the rights of the parties to inspect documents or materials, the law governing future disputes or interpretation of the contract, the location of future dispute resolution, whether mediation or arbitration of disputes is required, the type of disputes subject to ADR, and whether or not a prevailing party will be awarded its attorneys' fees. Moreover, in the commercial context, parties can agree to waive, in advance, certain claims, such as special or punitive damages which may further limit the downside to a subsequent dispute. By limiting the potential downstream damage award, the possibility of future litigation decreases because the cost of pursuing those claims (by litigation) frequently outweighs any benefit that might be obtained.

Furthermore, increasingly business contracts require some type of pre-litigation settlement attempt or mediation before the commencement of litigation. While no one can be forced to settle a dispute, courts generally will not award attorneys' fees to a party that ignores a mandatory settlement or mediation attempt. It is always a good idea to set up these processes at the outset of a contractual relationship, before disputes actually arise.

Success in this practice area also depends on keeping on top of current knowledge in the field. I keep abreast of the legal cases that govern the area of arbitration, such as when parties can compel arbitration or when motions to compel arbitration get defeated. I also read about cases involving the confidentiality of mediation and the enforceability of agreements that are reached in mediation.

I am also a Judge Pro Tem in the Los Angeles County Superior Court

where I act as a judge in small claims, traffic, and non-jury civil actions. The courts provide training about dispute resolution and acting as a bench officer which facilitates my ability to evaluate statements and testimony and to prepare my clients for ADR proceedings. In addition, I attend Minimum Continuing Legal Education (MCLE) programs dealing with mediation and mediation training and I write and read newsletters and articles dealing with ADR on a regular basis.

Components of ADR Law:

Arbitration and mediation are the two primary areas of ADR; they are very distinct and separate mechanisms, and there are variations that exist within each of those processes.

Arbitration

Arbitration is essentially a litigation process, wherein the parties agree to hire a private neutral party to try their case. Each arbitration is governed by rules either adopted by the parties choice of arbitrator or specifically agreed to by the parties. Organizations such as JAMS and the American Arbitration Association (AAA) are among the groups that have established rules governing arbitrations under their jurisdiction. Whatever rules the parties agree to follow, they are bound to follow down the road if a dispute arises.

There are other variations applying to different types of arbitrations. Arbitrations are most frequently conducted by one neutral, however, a panel of three arbitrators is not uncommon. There are arbitration panels composed of a number of completely neutral arbitrators or "party panels" where the parties each select an arbitrator who acts as an advocate for that party, and the party arbitrators pick a third neutral arbitrator, who becomes the ultimate decision maker. The party panel is likely the most expensive arbitration process.

Other varieties of arbitration include baseball arbitration and arbitration with ceiling/floor. In baseball arbitration, limits are placed on the arbitrator's decision-making process; he or she has to reach a verdict that is

favorable solely for one side, as opposed to "splitting the baby." The parties can also agree to an arbitration process where the risks of a large loss in either direction are mitigated; in other words, if one party makes an initial claim for $10 million, the parties can agree in advance to limit the potential liability to $2.5 million, with a guaranty minimum award of $250,000, even if the arbitrator ends up awarding more or less than the stipulated amounts.

Mediation

Mediation is a form of ADR where there is no ultimate third-party decision maker. Mediation involves the services of a professional mediator—usually a lawyer or retired judge—who facilitates a discussion between the disputing parties in order to help them reach a settlement of a problem. Commonly, the parties will be in separate rooms with the mediator conducting "shuttle diplomacy" to attempt to find common ground. The mediator cannot make any orders that are binding on the two or more parties that are involved in the dispute; the mediator helps the parties resolve their dispute and come to agreement.

A variant of mediation is called early evaluation conference ("EEC") or early neutral evaluation and is required by several Federal Courts. In an EEC the parties retain a mediator on a very limited basis. For an EEC, the parties submit briefs and provide some arguments—either in person or by telephone—in an effort to get the mediator to evaluate the case and put a price on what it might cost to get to trial, the mediator's view of trial risks, and the potential outcome of a trial. This process is aimed at giving the parties a rational basis for coming to some kind of early resolution, based on the "dollars and cents" aspects of the case, including the cost of litigation and the potential upside and/or downside of proceeding with litigation.

Unique Aspects of ADR

The laws applying to ADR vary depending on the jurisdiction where the case is being tried. For example, California has a special law that provides that all communications during mediation must remain confidential; theoretically, the strategies and information that are disclosed are not supposed to be utilized outside of the mediation process. For public policy

considerations, the law provides that the confidentiality afforded to mediation exceeds that associated with ordinary settlement communications. The mediator cannot be called as a witness in any future proceeding absent everyone's agreement, including the mediator's.

Another unique aspect of ADR is the fact that an arbitrator, unlike a judge, does not necessarily have to follow the law in rendering a decision. An arbitrator's decision will not be overturned by an appellate court even if he or she failed to follow the law. The courts hold that the parties who agree to arbitration agree to the risk that the arbitrator will not follow the law, and will not overturn an arbitrator's decision based on either a "mistake" or because the decision is not in step with the current state of the law. Therefore, a party that relies on the UCC or a specific code to facilitate their business may be out of luck if the arbitrator does not understand the legal argument, and does not follow the law, as a court will not overturn the arbitrator's decision for the arbitrator's misinterpretation of the law.

Further, unlike traditional courts, there is no precedent in arbitration; in other words, you cannot site other arbitrations or court cases as binding precedent on the arbitrator. You can suggest that the arbitrator follow the law—and most good arbitrators want to—but they do not have to do so.

There are very few grounds for overturning an arbitrator's award in court; those grounds generally include fraud or deception by the arbitrator by failing to disclose a prior relationship with one of the parties. In addition, an arbitrator must consider all of the material relevant evidence relating to the dispute. Indeed, many parties that lose an arbitration will appeal to the court claiming they did not have an opportunity to present all of their evidence, and/or the arbitrator failed to allow the introduction of relevant and material evidence. For this reason, it should be noted that many arbitrators are much more hesitant to provide an award of summary judgment than a judge. This is especially significant in the employment context. Employers generally want to have discrimination, harassment, and other public policy claims dismissed on summary judgment to eliminate the risk of any award of punitive damages against them. However, an arbitrator may be less likely to award summary judgment as a great deal of evidence that would normally be excluded from a court trial is frequently allowed in

arbitration, as there are no rules of evidence (absent the parties' agreement). Thus, hearsay and other forms of inadmissible evidence will be allowed at an arbitration, and an arbitrator may feel compelled to listen to that evidence obviating a summary judgment motion.

Likewise, an arbitrator without authority to conduct the arbitration in the first instance provides grounds for a court to overturn an arbitrator's decision. An arbitrator is only empowered to arbitrate disputes that the parties have authorized him or her to arbitrate. Pre-dispute agreements are usually quite broad and may encompass "any and all disputes arising from the agreement between the parties." However, if the parties limit arbitration to disputes over a value of less than $25,000, for example, or disputes about a specific portion of their relationship, the arbitrator has no authority to make rulings beyond the authorized scope, unless the parties agree to let him or her do so.

Successful Strategies: Know Your Neutral

One of my most successful strategies for success in ADR is developing a strong relationship with the neutral party in the process, whether it is an arbitrator or a mediator. I always want that neutral party to know that they can come to me with any questions, and I will provide them with answers, accurate briefings or other requested information in a timely fashion. I strive to be as candid as I can be in an effort to get my client's problem resolved.

In mediation, I want the neutral party to work for me; indeed, I want them to be an advocate for my client's position with the other party. Many lawyers do not know that in the mediation context there is absolutely nothing that prohibits a lawyer from having what otherwise might be considered *ex parte*, one-on-one, contact with the mediator before the mediation. Your lawyer meeting with the mediator in advance of the mediation allows them to work out a strategy for resolving the problem. They should discuss the format of the mediation and ensure that it is orchestrated in the manner that is most likely to get the particular dispute resolved.

A lawyer must be candid with the mediator about his or her client's position to resolve their dispute. However, candor does not mean giving the mediator your client's bottom line. Your lawyer should supply information about the personalities of the clients, the lawyers, the industry, the history and other information so that the mediator may determine whether it will be helpful or harmful to have a joint session at the mediation and other ways to bring about resolution. Almost every mediation benefits from some a form of shuttle diplomacy, where each party is in a separate room, and the mediator goes back and forth between the parties to discuss the issues and the potential for resolution.

Success in ADR

The ultimate success in ADR is when the client's problem has been resolved in the most efficient manner possible. In order to accomplish this, the client must fully understand their problem, the costs for each of the potential resolution processes, the risks associated with pursuing litigation, the probabilities of success, including the potential for different outcomes, including devastating losses and the amount time and business interruption that accompanies litigation or arbitration. In essence, the client must be realistic about the expected outcome of mediation or arbitration. Ultimately, the matter is likely to be resolved in such a way that no party to the dispute will get everything that they want. In other words, both sides may be somewhat unhappy with the settlement, but nobody will be so unhappy that the dispute continues—ideally, everybody should get something out of the resolution, including an ability to go forward without an ongoing dispute.

The ultimate victory for me as a lawyer is when I am able to come up with a unique solution that creates a win for everybody—my client gets what it wants, and the other party also gets something. While that does happen occasionally, it is indeed rare. One time I was involved in an employment dispute where the employee was still with the employer. The employer wanted to be rid of the employee and obtain a complete and confidential release of liability. The employee wanted, at the outset, money and continued employment. During the mediation, the mediator learned that a written apology was highly valued by the employee. As a result of the mediation, the employer obtained the employee's resignation and a

complete release of claims, and the employee received some compensation and a confidential written apology as well as job placement services to facilitate that employee's subsequent job prospects. The entire dispute remained highly confidential and my client did not have to spend money defending itself in court, and was very satisfied with the settlement payment.

The Art of Negotiation

The art of negotiation involves reaching a solution in an efficient manner. It is also important that everybody who is a party to negotiations should walk away feeling as if they have gotten something out of the process. The ultimate achievement of a successful negotiation is when all parties walk away feeling as if they both got and gave up something.

The art to achieving this goal is, first and foremost, being prepared in terms of understanding as much about your client's goals, business, and agenda as you possibly can. Frequently, it is not enough to understand the present dispute; you also need to understand your client's business or industry as a whole and, at times, future relationships between the parties to the dispute that relate to your client's business down the road. Parties frequently have much to gain by resolving disputes in a creative fashion.

Therefore, preparation for negotiations also involves knowing the other party's business; what their claim consists of, whether they have the "stomach" for a protracted dispute, and how they are going to portray themselves. Having that knowledge prior to negotiations and being able to use that knowledge correctly and effectively with the mediator, or in a face-to-face negotiation with the other party, is the true art of negotiation.

Preparing for Negotiations

Therefore, when preparing to enter negotiations, I make sure that I know as much as I can about my client, their business, their industry, and their goals with respect to the issue in dispute, as well as their overall goals, and I try to do the same with respect to the other party. I require my client to provide me with all documents related to the dispute. Frequently, materials that

clients believe are "not important" may have great impact to filling in all of the facts. I review the documents with my client, as if cross-examining them about their story. This helps to prepare them for questioning by a mediator. I also educate my client as to the probability of different kinds of outcomes; the cost of getting to a resolution; and different settlements that we may reach that they should consider to be successful. For example, some situations may put a premium on confidentiality, others may prioritize damages or the return of property.

If we are entering mediation, I want to be sure that I have reached out to the mediator to establish a relationship with him or her, so that the mediator is comfortable communicating with me and understands my position. Part of the preparation for mediation also involves developing a full understanding of the law behind the claims and the defenses that are involved. If the case is susceptible to being dismissed as a matter of law in summary judgment, any potential claim value is going to be diminished.

The Importance of Experience, Flexibility and Honesty

Experience is essential to effective negotiating—indeed, the more you do it, the better you get at it. For example, experience has taught me that it is very ineffective to come into a negotiation and say, "This is our bottom line," because frequently, it is not the bottom line. If it is absolutely the bottom line, then there would be no need for negotiations, because the other side would have to either take the offer or refuse it. All parties must come to a negotiation in a flexible mindset, without having a preconceived bottom line. Also, parties usually come to a negotiation to negotiate. They do not expect the other party to announce and stick with its bottom line from the outset. So, while that bottom line may ultimately be achieved, it is not likely to be reached at the outset of negotiations. And, ironically, it is usually, in the long run, more efficient to give oneself leeway by preparing for flexibility than a "bottom line" opening position.

It is also important to me to be sure that the client is not hiding some other agenda from me. I make sure that my client understands that they need to lay their cards on the table with me. I let the client know that I am going to advocate and work to their best advantage, and I will not reveal anything

they do not want revealed, but I need to know about any hidden agendas. Undisclosed information or goals can prove to be a huge impediment to settlement during a negotiation.

The Client-Attorney Relationship

The nature of the client-attorney working relationship during negotiations differs, depending on the client. Some clients want their lawyer to negotiate for them; while they provide the goals, the bottom line, and ultimately make the business decision in terms of settlement, this client will essentially tell the lawyer, "Do the best you can. We want the deal closed, and we are willing to pay up to this amount. If you can do better than that, great." That type of client does not want to be involved in the hour-to-hour aspect of negotiations.

The paradigm is the client wants to be the chief negotiator; they just want me to provide counsel and advice. They may want to be able to say to the other side that their lawyer will not let them take a certain action, but they want to handle most aspects of negotiations themselves.

Before going into negotiations, you have to establish what the lawyer's role will be, and what the client's role will be. Neither lawyer nor client should create the perception that he or she are on different pages. That impression will greatly reduce a party's credibility, bargaining power, and the chances of settlement. I have attended mediation sessions where, in front of me, my client, and the mediator, counsel to another party loses all patience and starts screaming at his client. In that context, it is clear that that lawyer has lost control with the client, lost credibility with the mediator, and given my client a higher level of confidence in my client's position. Such a breakdown does not facilitate resolution. To avoid that situation, the lawyer should have recessed the joint session to discuss, alone with his client, where they are going, and what each person should or should not be saying as the process goes forward.

Overcoming Challenges

It has been my experience that unless both parties are fully ready to enter

into a settlement, negotiations may not completely resolve any given dispute. The cases that are often hardest to resolve are those involving clients who are emotionally invested in an issue. All too often a contract will be signed and work commenced only to have personalities or emotions take control and turn the relationship on its head. This often occurs when one party has a significant change in personnel and the "new team" does not want to live with the agreements reached by their predecessors, or does not understand verbal or other informal agreements that may have allowed their predecessors to work together.

There are also times that I need to advise my client that they would be wasting their time and money to enter into a settlement or negotiation proceeding without first taking some discovery and depositions or starting litigation before the other party takes negotiations seriously. On the other hand, another client may have some understanding of the facts of the case but may not be mentally ready to enter into a negotiation without investing some time, and money, in formal investigative processes. This is frequently the case when there is significant distrust between the parties. If one side believes it has been "cheated," it usually takes formal discovery, including depositions, to establish baseline facts and information before settlement negotiations may successfully proceed.

In other cases, particularly those involving employment disputes, the plaintiff may have an emotional need to tell their story to a third party. Frequently, in an emotional employment case, it is often worthwhile for the defendant to agree to agree to pay for the mediator to give the plaintiff the opportunity to vent to a neutral party. Allowing the employee to get the grievance off the employee's chest and having someone sympathetic listen to their story often gets the employment plaintiff to the point where they are ready to put the dispute behind them so that we can negotiate the "dollars and cents" of settlement.

Deal Killers

Hidden agendas are the biggest deal killers in the negotiation process. If two parties are negotiating a contract for the sale of widgets, for example, and they do not provide their lawyers with all the information about their

goals of the negotiation, it will be difficult to reach a successful resolution. If one party wants to be able to control the color of the widgets, but they do not reveal that fact until after the deal is mostly or fully negotiated, it will become apparent that they have a hidden agenda and/or they are keeping information hidden from the other side and not really getting all of their issues on the table. Such actions are likely to defeat any kind of trust that the other side may have developed during the negotiation process, and that party may walk away from the deal.

Another frequent deal killer involves the definition of "reasonable." Negotiations are often concluded by parties' agreement to do something in a "reasonable" amount of time, or by using a "reasonable" method. Unfortunately, if there is no clear definition of what "reasonable" is, which often creates problems down the road. Avoid this problem by negotiating a clear standard that can be tested in real-time.

Tax considerations can also become deal killers, in many cases. Although every case ultimately involves price issues, if one party is looking at receiving settlement proceeds without considering payment of taxes on the proceeds and the other party is looking at paying $X, no more, those differing viewpoints can have a major impact on whether the parties can reach a settlement. In the employment context, settlement proceeds may be taxable to the employee. Be sure that if you represent an employer, at the outset make it clear that your monetary proposals are fixed and that the employee will be responsible for tax liability, if any.

The Importance of a Time Frame

Another major deal killer may be the time frame for negotiations. Sometimes a long period of time for negotiations does not help the parties get to a resolution; in other cases, not having enough time for negotiations prevents resolution. The time frame for negotiations is something that needs to be measured in each case and usually depends on the complexity of the issues being negotiated. The greater the number of factual and legal complications, the longer time needed. There must be enough time for effective give and take and communication between the parties.

Sometimes in litigation a first mediation session may be helpful to identify the major differences and to identify and schedule discovery that needs to be conducted before a second mediation is attempted. Those decisions can provide the framework for a second (or third) mediation where the case actually gets settled.

If the case has progressed to litigation, settlement is often encouraged by setting a distant trial date, due to the fact that the costs of getting to trial will continue to increase during that period. Other times the courts will do the opposite and announce that the case is going to trial very soon, so either get ready for trial or get the case settled. The key witnesses for both sides will have to be at the trial and away from their jobs—a fact that, alone, often provides incentive for settlement.

To Settle or to Litigate

Settlement is almost always the best result. Cases that typically settle are those where both sides are facing uncertainty in the outcome, or where the potential litigation costs increase the likelihood that there is going to be a settlement. For example, if it is going to cost $5 million in attorneys' fees to get the case to trial without certainty of victory, it is likely that the money could often be better put towards settling the claims.

Indeed, the only time where settlement is not the best course of action is when your client has invested in having a neutral party make a decision regarding their dispute; in other words, they do not want to reach a settlement, they want to present their case with all their evidence, and have a neutral render a decision, either, "Yes, you are right, and you win," or "You lose." That scenario will often present itself in the context of an issue of secrecy or trademark violation. In those cases, money is not necessarily the object, but injunctive relief is the primary goal so a court order or an arbitrator's order is required to tell the other party that they cannot do something—and better not do it in the future. In such a context, pursuing a settlement is frequently out of the question and a waste of time and money. Many movie studios, for example, are going after pirates who are making illegal copies of movies; the same thing is happening in the music industry where CDs are frequently ripped off. In those cases, the client is not interested in settling a copyright violation for a small

amount of compensation or collecting damages from copying a $16 dollar CD; they are interested in setting a precedent by getting a court order to prevent other pirates from doing the same thing.

Judging Financial Liability

When approaching settlement, it is always important to judge the client's potential financial liability or upside. I take a three-pronged approach to that process. Based on my experience, I first make a ballpark estimate of the client's potential liability or upside, depending upon the contract that is in dispute and the type of claim that is being made. Frequently, I will identify a range of different potential outcomes.

Next, I ask the client for their estimate, because they frequently have expertise in the area; for example, an insurance company is likely to be able to make a pretty good estimate as to the potential downside of the different kinds of claims that are made against it.

Finally, if we enter into litigation, I will usually recommend retaining an expert consultant in the field, such as a CPA or a forensic accountant, to do a liability analysis for me under the attorney-client privilege or work-product protection. I will then make a decision as to whether I want to designate that expert as a testifying expert, or whether I will retain a different testifying expert for trial or arbitration to evaluate damages.

Settlement Strategies: Getting the Best Deal

In order to get the best settlement deal for a client, it is important to have a thorough knowledge of what the other side wants out of the deal. There are two strategies that I employ to gain that knowledge. First, I do background research and investigation relating to the other party. I want to find out about other settlements or deals they have been involved in; I try to learn how important this issue is to them and I need to know how well financed they are to fight the dispute further in court. I need to know whether insurance is involved at their end, and whether there are liability limits on that insurance. I attempt to conduct this research without discovery, and without talking to the other party.

Next, I will talk to the other party's lawyer—or the mediator, if we are in mediation—about what is important to the other party, outside of the dollar amount they are seeking. For example, in the employment context there will frequently be issues about someone's future employability, as in cases where an employee filed a lawsuit saying their employer wrongfully terminated them. Getting a job reference, job training or placement services in such cases might have more value to the plaintiff in terms of future employability than another $10,000 in a settlement. In other employment cases, the employer may not want to set a precedent by settling cases with employees who sue them; they may, however, be willing to pay for job training, placement services or an office for the plaintiff. Such creative solutions can often help lead to a settlement in cases where a money settlement may not work.

The Lawyer's Role

In essence, the key strategies to reaching a successful settlement are preparation and creativity, and in many cases, forming a friendly, professional relationship with any mediator or other lawyers who are involved in the case.

I make it a practice not to make any agreement that I am not prepared to live with, whether verbal or in writing. I am not going to overstep my authority; I am not going to come back after making an agreement and say to the other side, "Oh well, I thought I could get you that concession, but now my client says no, it is not going to be available." The lawyer's extensive knowledge about factual and legal issues as to where the case is going to go, where settlement is possible, and reaching agreements that you know your client can live with in order to settle, are critical to create conditions for favorable settlement.

It is a stereotypical view that the best lawyer will be the loudest one who pounds their fists on the table. In fact, lawyers who take a very aggressive approach to a settlement or a negotiation in an attempt to bully the other party are unlikely to reach resolution because that type of behavior arouses a defensive posture from the other side. A belligerent approach does not engender trust. If the opposing party finds that the lawyer is inflexible, they in turn will be more likely to reject creative solutions and become inflexible.

A much better atmosphere exists if both parties approach a negotiation or the settlement of a dispute in the same way that they approach getting into a contractual relationship, with knowledge and persuasion. At the outset, in a negotiation the parties try to entice each other into the deal; they try to sweeten the pot in some way to make it happen. A similar approach is the most helpful to settle disputes. It is always important to respect the other side's position, although you do not have to agree with it, and to make any necessary accommodations so that everyone can walk away from the dispute and get back to their business.

Success in Negotiations

I think that any negotiation process can be considered a success if the parties reach a resolution, and it is a resolution that both sides can live with. It may not be the best-case scenario for either of the parties—indeed, it is very unlikely that it will be—but it is also not going to be the worst-case scenario for either party. Further, once a negotiated settlement is achieved it must be immediately reduced to a writing signed by all parties. Without a final written and signed agreement, all of the hard work to achieve compromise risks will be lost. Further, such a settlement should provide a mechanism to resolve future disputes, if possible.

A successful settlement is a solution to a problem, or some kind of rational business model that will avoid the future cost and uncertainty of litigation. Settlement allows the parties to move forward with their businesses and do what they should be doing—which is making money in their business, as opposed to spending money on lawyers and disputes with other parties. Every settlement is a success.

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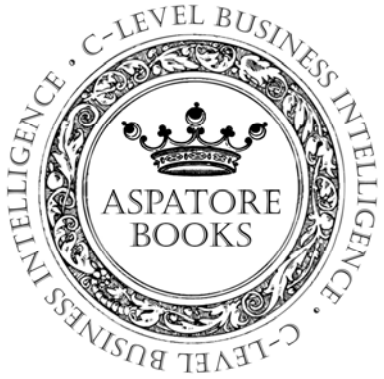
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