What Franchise Litigators Can Learn from Transactional Lawyers about Mediation

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Litigators champion their clients' rights. If someone breaches the franchise agreement, the litigator is ready to pounce. Likewise, when the litigator gets to mediation, the litigator's goal is to turn the mediator into an advocate for its side of the dispute. When litigators ask for a "strong" mediator, they are really asking for an ally in the caucus room who will use the litigator's legal position as a cudgel to convince the other side to abandon their claims or payout handsomely to settle. For the litigator, "success" is not hard to define—you give up/I win/we all go home. As a former litigator, I speak from firsthand experience on this mindset.

Why should we be surprised by litigators acting like litigators whether in court or in mediation? Being a litigator is what fuels the fire of many lawyers. Others, often transactional lawyers, stay as far away from conflict as they can, preferring to negotiate a resolution with opposing counsel that facilitates agreement. When transactional lawyers negotiate a contract, they do not often take an intractable position that screams "my way or the highway." There is an effort to understand what the other side is advocating and, more importantly, why they advance that approach. Among transactional lawyers, that effort is reciprocal because they each share the goal of reaching an agreement, rather than prevailing over the other. Without agreement, neither side is in business. If you've pummeled your counterparty, the parties' future relationship, agreement or not, may bear the scars of your aggressive tactics. In a long-term business relationship, even one presented on a "take-it-or-leave" basis, as many franchise contracts are, not stretching to understand why your counterparty wants what it wants misses an opportunity to strengthen the bond between clients at a time when they most need it.

Compare the litigator. Winning is everything. Litigators may even sometimes regard the decision to engage in mediation as giving in. Why should I go to mediation when I am going to win my termination case on the papers, a litigator may ask. All too often, a litigator's certainty about the outcome is all the excuse a client needs to forget that being in a lawsuit is not part of a successful business plan.

Why, then, do most franchise agreements require mediation before suit or arbitration? Part of the likely answer is that a transactional lawyer wanted its client to have the opportunity to avoid the all-out battle that a dispute can become. If parties do not strain to understand *why* they disagree, rather than merely

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repeat at increasing decibels *what* they disagree about, they miss the opportunity to grow their relationship by working through their conflict. The exchange of positions is not negotiation, and it is also not mediation.

Another reason why franchise agreements call for early mediation is that we have left the stone-age days of "settling on the courthouse steps." In those days, lawyers were slow to broach settlement with the other side, or with their own clients, for fear that even the hint of an interest in settlement would make them look weak. Although the threat of going to trial was more braggadocio than reality, it literally required a judge to suggest settlement rather than trial in order for lawyers to present the concept to their clients.

What has changed? With respect, some lawyers have changed. Those lawyers see the resolution of a dispute not as a test of their own personal fortitude but as a transaction to complete in the most efficient way possible. For a contingent fee lawyer, an early settlement is literally money in the bank. For a defense lawyer, exploring an early settlement may be counterintuitive by some measures, but presenting the option to a client may be just the thing to cement a long-term relationship for other cases to come.

More significantly, franchise agreements have also changed. Pre-suit mediation clauses present a potential for early settlement that did not exist without them. Mediation now appears as an event triggered by mandatory contract language, not as a white flag waved by the party (or lawyer) who has the nerve to bring it up first. Having an event at the beginning of a dispute that addresses settlement removes the fear of looking weak to a client or an adversary—it is on the calendar because transactional lawyers put it there. They put it there not as a roadblock to resolution but as an opportunity for resolution.

Early mediation provides the opportunity for clients and counsel to learn why they disagree and to do something productive about their disagreement. It gives everyone the freedom to be creative—something no one has ever accused the law of doing—by its confidentiality, its emphasis on problem-solving, and the involvement of the mediator as both an agent of reality and an agent of change. To be open to its possibilities, however, takes a different approach than a litigator may be accustomed to, or comfortable with, bringing to the table. After all, acting like a litigator may lead to an impasse, with both sides in court over a dispute that spawns its own ecosystem of depositions, discovery, and monthly billing. A cynic may call this a win/win for a litigator but not for the client.

If you are a litigator, reconsider how you act in mediation. The litigator should channel their inner transactional lawyer—be balanced and thoughtful.

1. Prepare for mediation as if you were preparing for a negotiation and not for an adjudication. Identify common interests, including the literal and figurative price of not reaching an agreement. Use the mediator as your golden bridge to better communication, not as your hoped-for secret weapon to punish the other side. As part of this approach, tailor your mediation statement so that it addresses common interests rather than only your case for total victory. Although you may believe that the righteousness of your client's position will rally the mediator to your cause, it does not usually have that effect. The mediator's job is to assist the parties to settle their dispute, not to cement your victory. He or she is agnostic as to how the dispute resolves and is a champion of resolution in whatever form it takes that will satisfy the parties. Like a transactional lawyer, take a balanced approach that emphasizes that both parties have a problem in need of a solution, and then propose a solution that speaks to their mutual interests and needs.
2. Do not make an opening statement that eviscerates the other side's view followed by a tepid expression of hope that the mediation will succeed. Instead, recount all that both sides have in common, and use that commonality as a basis for a resolution through problem-solving.
3. Shift your mindset from advocacy to problem-solving. You are not going to win this mediation; no one wins a mediation. In mediation, the parties resolve disputes. You can help mediation succeed by looking to the future, not to the past. Save the past for the courtroom, which is where you will likely end up if you concentrate too much on it at mediation.

If you are a litigator, it might be hard for you to let go. Mediation advocacy is not how lawyers behave in court or arbitration where rights determine the outcome. In mediation, rights take a back seat to common interests, and that is what litigators can learn from transactional lawyers. Bring them to their senses, say transactional lawyers (and mediators), not to their knees. ■