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The Difference between Mediation and a Settlement Conference

More than 90% of all civil cases settle before judgment is entered, perhaps more than 95%. Many of these cases are settled in a traditional settlement conference with a magistrate or retired judge trashing the merits of the claims and defenses; bashing the parties, the lawyers, and the litigation process;[1] and railing about high costs and unpredictable juries. These are very powerful tools for getting cases settled—intimidation and fear. The cases settle, but the question is: "Did they settle well?" That is, was the settlement that was reached the best one the parties could have achieved?

The answer to these questions is, not very often. In a typical settlement conference, an optimal solution is not possible—it is not even the goal. Instead, the parties may have spent months fighting with, posturing toward, and antagonizing each other, and now just want a way out. All sides will have made accusations they cannot back up and the parties will have spent—or face spending—far more than they expected and more than they can afford. Even the term "settlement conference" implies a narrow focus, addressing only the legal claims in the case and of "settling" for less than each believes it should have gotten.

Mediation, on the other hand, has somewhat different goals. An effective mediation process seeks an optimal solution to the dispute. The focus of mediation is problem-solving, not trashing and bashing. Mediation also has the potential benefit, when used early in the process, of avoiding the escalation of tensions and the "making matters worse" of litigation. Early mediation also has the potential benefit of transactional efficiency, that is, the potential for saving all sides a great deal of money.

Rather than focusing solely on legal rights and claims, the mediation process involves identifying the parties' interests, needs and motivations (INMs)—the underlying factors that are driving the dispute. The central stages of a well run mediation sessions consist of (a) problem statements by the parties, (b) exchanging information, identifying the parties' INMs, and clarifying the issues, (c) using the information gathered and the parties' INMs to create option for resolving the issues, and (d) reviewing, evaluating and refining options while bargaining for solutions, *i.e.* problem solving. The typical settlement conference skips directly from (a) to (d), and usually skips directly to bargaining over dollars. Opportunities for creating optimal solutions to the conflict, however, are only found by working through (b) and (c).

Haggling over who should get the biggest piece of the settlement pie may lead to a settlement, but such haggling lacks the depth and breadth of work needed to obtain an optimal settlement—except by accident. An effective mediation process, on the other hand, attempts to achieve both the transactional efficiency and deal optimality goals of an effective mediation process, not just to end the litigation after a long day of hard bargaining with a deal that has reluctantly been accepted. This does not mean the parties will always necessarily be happy with the results of mediation, but they should be satisfied that all options were raised and considered—and that the resolution was the best it could be under the circumstances.

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[1] "Trashing" and "bashing" in the mediation context are terms borrowed from James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is this the End of "Good Mediation"?* 19 Fla. St. U. L. Rev. 47 (1991).