



# THE MEDIATOR'S MINUTE

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## OPENING STATEMENT

Will you do better or worse if you go to trial instead of taking that last settlement offer? Read on and find out what the research shows.

## LOOK WHO'S QUOTING BOB BERLINER

Continuing our history of focus in the press when mediation enters the sports world, we were interviewed by The Fiscal Times for a piece on the NBA lockout. [Click here](#) to read it. (No, that is not a photograph of your reporter.)

Then, more recently, we were interviewed by the Associated Press for a piece on the dispute between the New York Mets owners and the trustee of the Bernie Madoff bankruptcy estate. Many different news outlets have picked up the story; [here](#) is the ESPN posting.

## IF I DON'T SETTLE, WILL I DO BETTER AT TRIAL?

Every lawyer—and many a client—knows how expensive litigation can be, not only in terms of legal fees, but also the other costs: emotional stress, time away from the client's business, distraction, etc. Winning in court can cure a lot of these ills. Settlement can save costs, especially if settlement occurs early, but the desirability of settlement depends in large part about how likely winning really is. As alternative dispute resolution, particularly mediation, has become more established as a way of saving these costs, academics have appropriately turned to the underlying question, empirically, how likely is a litigant to do better at trial than by settling?

Several studies have been published which deal with this question. Perhaps the most useful of these studies attempt to compare the outcomes in adjudicated cases with the last settlement proposals before trial. The results of these studies are summarized in Kiser, *Beyond Right and Wrong* (Springer 2010). In the samples that these researchers studied, they found that:

- 55-60% of plaintiffs rejected a settlement offer that was more than they recovered at trial.
- 25-30% of defendants rejected a settlement offer under which they would have paid less than they lost at trial.
- plaintiff errors resulted in an average loss to the plaintiffs of \$50,000-75,000,
- defendant errors resulted in an average loss to the defendants of \$900,000-1,400,000.

Bottom line: in these samples, both plaintiffs and defendants committed decision errors at significant rates. Plaintiffs committed decision errors at a substantially higher rate than defendants but defendants' errors were much more costly.

Interestingly, parties whose attorney advocates had completed formal mediation training (and thus were presumed to be more disposed to the advantages of settlement) also committed significant decision errors, but at a reduced rate from parties whose attorneys had not been so trained. The decision error rates of parties represented by attorney-mediators were about 80% of the decision error rates of parties represented by other attorney advocates. However, the magnitude of the decision errors for the parties represented by attorney-mediators was about the same as for other parties, and the attorney-mediators were not more likely to settle their cases than other attorneys.

Why these results? Mr. Kiser goes through a series of explanations and discusses the factors that can influence lawyers' attitudes toward their cases and how settlement proposals arise and become accepted or declined. Some of this material derives from cognitive studies on decision-making (which we may explore in a future issue). But one can intuit at least some of the reasons for these results. Every litigant (or almost every litigant) believes in his or her case; that's why there's a lawsuit in the first place. And litigating lawyers are advocates for their client's position; if they didn't believe in their cases, they would no doubt be less effective advocates. Those beliefs, though, may tend to make the client and perhaps the lawyer more optimistic about the value of their cases than the cases actually deserve, resulting in a tendency to overvalue them. Even attorney-advocates who have been through formal mediation training seem to share this tendency. Advocates have that name for a reason.

So what does that have to do with mediation? A good mediator can help a party and counsel evaluate the merits of the case in a confidential setting, without risk of disclosure to the other side or to the judge. Typically, the mediator will be the first person having no interest in the outcome who will have heard all sides of the story. As such, he (or she) can give a perspective on the weaknesses of a case that a party or his (or her) advocate may be minimizing or overlooking but that may well have a significant effect on the outcome. Indeed, sometimes a neutral voice can persuade a party to focus on those weaknesses when the party's lawyer has found that difficult to accomplish. And once a party has a more complete understanding of the weaknesses of his (or her) case, he (or she) may be more inclined to settle on a sensible basis or, at least, should be able to reduce the likelihood of decision error. Who wants to be one of the 60% of the plaintiffs who makes a decision error or one of the 30% of the defendants who makes a decision error that costs hundreds of thousands of dollars?

## NEWS

### CONTINUING EDUCATION

Your reporter and our Illinois chapter of the Association of Attorney-Mediators (of which your reporter is Vice President and Secretary) continue to be active on the educational front:

- A presentation in September to the attorneys of the Business Services and Transactions department of Jenner & Block, titled "Not Just for Litigators: Mediation and the Business Lawyer." Attorneys participated in person and by videoconferencing.
- A panel presentation to the Will County Bar Association in November (coordinated and led by your reporter) titled "Fundamentals of Mediation for the Practitioner." One hour of a three hour presentation qualified for Illinois CLE ethics credit.

All presentations qualified for CLE credit in Illinois and in the other states where the lawyers participated.

If any of our readers is interested in a presentation on a mediation subject, with appropriate CLE credit (including at least some ethics), at no cost, please contact us.

### WILL COUNTY

As previously reported, our Illinois chapter supplies pro bono mediators in the small claims courtroom in Joliet (Will County) virtually every day that court is in session through a program begun and informally led by your reporter. Through 2011 our Illinois mediators had mediated over 530 cases, over 84% of which had been settled.

## THE CLOSING

Our teams had very different outcomes this summer. Our 55 (age) Marlins did not win a single game all season, suffering a few heartbreakers. Our 60 Jaxx, on the other hand, much like the world champion St. Louis Cardinals, finished third in the regular season but won the league championship in the playoffs. The Cardinals do, we must reluctantly admit, play at a slightly higher level than our Jaxx (and are somewhat better compensated), but the principle is still the same. As the days finally begin to get longer, spring training and the regular season can't be far behind.

We took our 2-year old grandson to his first baseball game this summer, watching the Brooklyn Cyclones (a Mets farm team) take on the Lowell Spinners. Although it was beastly hot, he lasted through five innings and still proudly wears his Cyclones cap. What fun! We also had a reprise opportunity to Trick or Treat in Brooklyn with a certain fireman, where we once again impersonated a major league baseball player. Regular readers of The Mediator's Minute may have figured out that Halloween is a very important holiday in our world. And we spent the first part of the holidays in the east with the same cast and all the kids, and then our 93-year old Mom spent the New Year's week with us in Chicago. She's still the life of the party!



Halloween in Brooklyn with fireman

Pitchers and catchers have reported; spring is around the corner. Hope your year is going well.

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