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A Time to Get Together: A Lawyer's Role in Mediation

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If you come at me with your fist doubled, I think that I can promise you that mine will double as fast as yours; but if you come to me and say: " Let us sit down and take counsel together, and, if we differ from one another, understand why it is we differ from one another just what the points at issue are," we will presently find that we are not so far apart after all, that the points on which we differ are few and the points on which we agree are many, and that if we only have the patience and the candor, and the desire to get together, we will get together.

--Woodrow Wilson

INTRODUCTION

In court, judges decide who wins and who loses. In mediations the parties ask the mediator to help them arrive at their own solution. Judges evaluate and decide for parties while mediators help the parties focus on their underlying interests, evaluate the strength of their arguments and arrive at their own solution. In court lawyers are expected to resolutely argue positions on behalf of their clients and convince the judge. In a mediation lawyers are expected to help their client engage in a conversation with the opposing party and the mediator. This paper will discuss how the roles are different and how a lawyer can best prepare their client and themselves to reconcile these roles and engage in a mediation.

LITIGATION FOCUS

In litigation a lawyer is expected to argue their client's best legal position, and this requires an understanding of the facts and law. Lawyers analyze the facts and determine what legal principles apply to give their client the most favorable result. This analysis is a retrospective view of what happened in order to determine what remedy or prayer for relief will be requested in the statement of claim. A legal remedy is intended to either compensate the plaintiff for the defendant's non-compliance with the law or provide a declaration that will establish the plaintiff's legal rights and ensure that these rights are recognized on an ongoing basis.

Clients seek legal advice to help them navigate the legal system and obtain the remedy their lawyer advises is available. Within the limits of the law and the powers of the court a lawyer provides valuable assistance to clients to help them obtain the best result possible.

EVALUATIVE MEDIATION

Most Judicial Dispute Resolutions (JDRs) are evaluative and parties expect that the presiding judge will evaluate their positions and provide an opinion about the strength of their legal arguments. Many counsel and parties want mediators to evaluate their arguments. Some prefer that this evaluation occur in a confidential meeting, referred to as a caucus, and that this evaluation not be shared with