

ARE FORCEFUL MEDIATORS EFFECTIVE?

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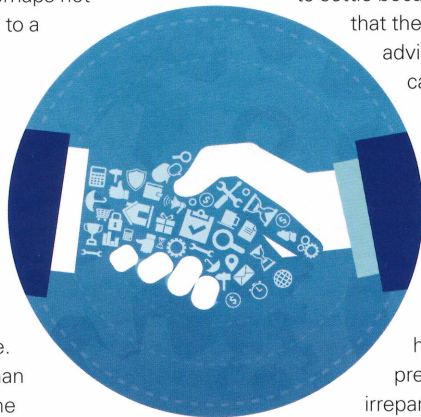
We frequently hear lawyers voice the need for a strong (or forceful) mediator for their dispute. What kind of qualities do lawyers expect in a "strong mediator"?

Is a strong mediator expected to make the parties tremble? Or is it someone who is able to "bang heads together" or who knows the law or can evaluate who has the best case and tell the parties so. Or is it a tough negotiator or someone who has little regard for the classical models of mediation but can accomplish a settlement – or someone who is just simply a good mediator?

The way a mediator deals with a party is perhaps not much different from a lawyer who, in pitching to a potential client, needs to gain their trust.

In the pre-mediation meeting on the day of the mediation the purpose is usually to introduce yourself to the parties, gain some understanding of relationships, have a conversation (and not an interrogation) and make the person feel comfortable. In many cases a party will be in a heightened emotional state and anxious. I see the mediator's task as being to reassure the person and to instil a sense of self-confidence. It's really about how to build rapport, rather than viewing the person as just a litigant. Should the mediator succeed in doing so then the most valuable tool for the mediator's toolbox will have been acquired, namely trust, which in my view outweighs being a strong mediator, whatever that might mean.

Mediators will often, in their opening, inform the parties that no one should leave the mediation with the impression that the mediator has acted unfairly and if they believe so, they should inform the mediator. One of the risks in taking a robust approach with a party (as opposed to a more restrained style), especially if represented, is that such an



approach might put the representative or the party off-side and may in fact make the matter much harder to resolve. Some might consider it hard to reconcile a mediator's assurance of acting fairly with a more robust approach.

Having commenced or defended proceedings, the lawyer has presumably told the client that he or she has a good case and is likely to succeed. This may even have been repeated in the mediation in the presence of the other party. Other than cost risks (which would in all probability have been explained to the client already), to advise a client to settle because of pressure from a "strong" mediator would mean that the lawyer would have to explain to the client that the initial advice given was perhaps erroneous and that the client's case is not as strong as previously advised – an almost certain recipe for creating tension between the lawyer and the client.

For the robust mediator there are also risks. After having settled, a party may on reflection consider that too much pressure was placed on them and might not adhere to the agreement on the basis of duress. This could very well come back to bite the mediator. Further, given that a mediator's performance is critical to his or her good reputation among lawyers, applying too much pressure on a party could damage the mediator's status irreparably.

Rather than seeking out a robust mediator it's probably of greater benefit to find a mediator who is likely to have good people skills, be a good listener, be creative, a problem solver and unlikely to be so forceful that the trust that he or she may have worked so hard to create dissipates and one of the parties walks away. ■

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