

All-In Mediation



One of the more recent James Bond movies, *Casino Royale*, features a high-stakes Texas Hold 'Em poker game, and *007* is playing poker with the Queen's money. His goal is to serve Queen and country by bankrupting a terrorist financier. Early in the game, Bond's arrogance gets the best of

him and he goes *all in*, hoping to deliver an early knock-out punch to his foe. Unfortunately, Bond misreads his adversary, who cleverly bluffs him, and Bond loses his stake from the Bank of England. His aggressive ploy backfires and Bond is *all out*. However, thanks to a TARP loan from his CIA friend, Felix Lighter, *007* buys back into the game. Who wouldn't lend a friend \$5 million to continue playing poker? Shaken, but not deterred, Bond re-enters the game after killing a few terrorists and surviving a drug-

induced heart attack. With a new perspective on the situation, Bond again goes *all in*, and in dramatic fashion he (*****SPOILER ALERT*****) wins the game.

So, what does this have to do with mediation? As Kenny Rogers sang in "The Gambler," "You have to know when to hold 'em [and] know when to fold 'em." There are some very interesting parallels between the Texas Hold 'Em game in *Casino Royale* and the mediation process. As corporate counsel, you are playing for the house and you can improve your odds for a winning hand with a few simple tactics:



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Know the Players

First and foremost, know yourself! Before mediation, take the time to reflect on your own style, including your strengths and weaknesses. Know your opponent's style

and strategy and, if you are using outside counsel, know them as well as you know yourself. When negotiating with a tougher and more aggressive adversary, either adjust your style or consider using outside counsel as the bad cop. If you are mediating with outside counsel, always plan your strategy in advance. If you typically play the bad cop, be aware that there are times when you may need to dial it down. Felix Lighter knew that he could not win the game, but Bond could, so he backed Bond's play—he knew the players, including himself.

When mediating, you should know everyone at the table well enough to predict their behavior. You should do this by gathering information about them from outside counsel, from the Internet, and by talking with others who have mediated or negotiated with them. You should keep comprehensive notes on yourself, your opponents, and every mediator. Know their tendencies, their "tells," and their strategies. Keeping a book of knowledge on the players can markedly improve your results in mediation. The mediator is the dealer in the game. He or she cannot change the cards, but can control the pace of the game. If you know the players better than they know themselves, your odds of success improve substantially. If you can accurately predict their reactions, you will consistently win more hands.

Remember that Knowledge is King and that assumption is the mother of all mistakes!

Questions Are More Important Than Answers

Before mediation, question yourself and your analysis. You must vigorously probe the strengths and weaknesses of the case. Use your outside counsel to question your case and your mediation strategy.

At mediation, if the worst case scenario is no settlement, then make something out of every hand you play. You are getting to spend a day with your adversary and his or her client. Most of your time may be spent in private caucus, so the mediator should be getting the answers to your questions for you. Posing good questions to the other side will help you better understand your case, yourself, your opponent, the other

party, and their case. Your knowledge of the Socratic Method will allow you to use the hard questions from your adversary to help you educate your client, shore up weaknesses in your case and build upon your strengths. There is no better place than the mediation table to find out what the plaintiff really wants. Does the plain-

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tiff just want money? What does success look like for your adversary? What is he or she trying to achieve? When an offer/demand is made, consider responding with questions that begin with *who, what, when and why*, before just responding with an amount. Think in terms of "checking," and not making a bet on every hand.

No one likes to be told the weakness of their case and an aggressive adversary will always defend his or her position. However, a skilled mediator asking good open-ended questions can lead the other side to more concessions, or at least, give you additional information which may be useful in the next hand.

Questions create opportunities for resolution and are the Queen in your winning hand.

Just Settle for Winning

There is an old saying: "If you don't know where you are going, any road will take you there." This applies in poker and in mediation. The day of the mediation is not the time to be figuring out how your client defines a win. A huge part of preparing for mediation is clearly defining with your client exactly what a successful resolution looks like.

It is critical for corporate counsel to have an end game strategy. Is this one case or one of many that have been or will be filed? In a one-of-a-kind case the end game may be about the amount of money paid to settle or whether to settle at all. In multi-

case litigation, the end game strategy must encompass a comprehensive resolution of all matters. In high stakes litigation, corporate counsel must work closely with senior management to develop the end game strategy. Since outside counsel will most likely be handling the mediation, it is imperative for them to buy-in and have a full understanding of the end game strategy.

As much as he wanted to, Bond did not play poker with a blank check and successful mediation requires more than a blank check. Thorough preparation must include a complete analysis of legal, factual, monetary and emotional negotiation strategies. A great poker player knows the odds of drawing a better hand than he or she is holding. In *Casino Royale*, Bond knows his odds of winning, but more importantly, he analyzes and understands the odds his adversary is facing. He ultimately makes an informed decision based on both knowledge gained during the game and a thorough analysis of the risks of losing to a better hand. Sometimes you may want to intentionally lose a few smaller hands to set up your end game. Never lose sight of this concept: A win may mean leaving the table with more money than you expected to lose and not necessarily cleaning out the other side.

Before you place a bet, you should have a realistic idea of whether your next card is a Jack or a Joker.

10 Hours Is Not Enough

A successful mediation takes time, patience and persistence from all of the players. The poker game in *Casino Royale* lasts more than a day. Just like the dealer in Bond's Texas Hold 'Em game, the mediator has the ability to control the pace of the game. Do the parties need a break, a jump-start, time to get more authority, or a reality check? A good mediator should pick up clues from the start of the mediation as to where the pressure points lay, but, more importantly, when they should be applied. It takes time for this process to unfold and work its magic—four hours at a minimum and, if progress is being made, as long as it takes.

Once you have invested in the game, then plan to play it to the last hand and do not be too eager to end the process.

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Develop an offer and concession strategy with the understanding that timing is critical to your success. If you know what is in your hand and you know your strategy, your time is best used watching for “tells” from your adversary. You should actively suggest ideas and strategies that will facilitate a winning hand or at least a perception that you hold a winning hand. Think in terms of raising the stakes and/or bluffing. Practice your moves and work on your poker face.

It took Bond all night to win in Casino Royale, so if it takes 10 hours to draw a 10 for your winning hand, be prepared to play the game to the very end.

All In

Ultimately, you will want to go *all in* and take your best shot at resolving the case. Before you make your last move, take stock

of the players and the table stakes while maintaining flexibility in your position. At the end of the day, is the other side really going to walk over x dollars? If you are within your sweet spot (a defined win) and you can close the deal, then do it with authority by announcing you are *all in*. You may buy the case cheaper than you thought.

Sometimes, *all in* will not settle the case and when that occurs, leave yourself and the other side room for additional negotiations. When Bond cleans out his adversary, the game takes a wicked turn as the villain resorts to stealing the pot. Ultimately 007 prevails with some luck and help from unexpected sources. He keeps his options open even after he goes *All In* and his last card is the Ace he needs for his winning hand.

Drawing the winning Ace in mediation is not about getting what you want; it

is about getting All you can within your sweet-spot.

**King, Queen, Jack, 10, Ace =
Winning Hand**

Texas Hold 'Em is a game of chance and chance favors the prepared mind. In mediation, it is better to be good than lucky. When trying cases, preparation is the key to consistent positive results. It is no less so with mediation. When Bond sits down at the poker table, he is mentally prepared to clean out his opponent and there is no better time for him to do it. There is no better time to settle your case than at mediation, if you have the right **K**nowledge; ask the right **Q**uestions; **J**ust settle for winning; put in **10** hours or whatever it takes; and you are prepared to go **All In**. If you do these things, your chances of a royal flush at the mediation are excellent. 