

**GETTING TO THE TRADING ZONE
LESSON #2: CONDUCT JUST THE RIGHT
AMOUNT OF FORMAL DISCOVERY BEFORE YOUR
MEDIATION**

Albert Einstein famously said: "We can't solve problems by using the same kind of thinking we used to create them." And yet many litigators believe that before a legal dispute can be resolved they need to thoroughly review every shred of evidence, including noticing and enduring a series of uncomfortable and expensive depositions from every identifiable potential witness.

But you don't need to undertake such thorough discovery before mediation if you do this.

In modern American litigation practice, it is assumed that every case will have opportunities for settlement, whereas fewer than 5% will go to trial. So why try to "win" by overburdening your adversary with discovery if you and your clients genuinely want to attempt to solve your client's problem? Instead, from the moment you undertake a case, the discovery plan should consider the minimum necessary to convey your client's convictions and minimize their expense and discomfort before giving mediation a try. Often times, it is only after preliminary discovery is conducted that counsel see the wisdom in engaging in settlement discussions. But after too much painful discovery, the moment may be lost in the anger, frustration and investment of time and capital that has occurred during the scorched earth phase of the litigation.

In most instances, you will want to know the basis for your opposing parties' claims or defenses. This means that if it is unclear in the pleadings, you will need some preliminary discovery, such as contention Interrogatories, a basic document exchange and the deposition of the Plaintiff. But unless the matter fails to settle at mediation, you don't need to take the depositions of every potential trial witness, you don't need to have the Plaintiff examined or have experts weigh in with their opinions. In a business dispute, for example, you probably don't need to review all of your adversaries back up documentation before a mediation. Trust your client's side of

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the information. And allow for some ambiguity so that the process itself can work it's magic.

While discovery can be truly informative, it is, unfortunately used as frequently as a hammer to burden the other side with formalities. Too often, those kinds of formalities are what lead your client's into conflict to begin with. As Albert Einstein suggests, they are not perfect tools for cracking open the doors leading to a reasonable resolution of the disputes before us.

***P.S.** I am proud to have published an Article in the February 6, 2015 Daily Journal regarding Workplace Investigations "Protect Investigation Integrity in mediation". Send me an email if you'd like a copy of it sent to you.*