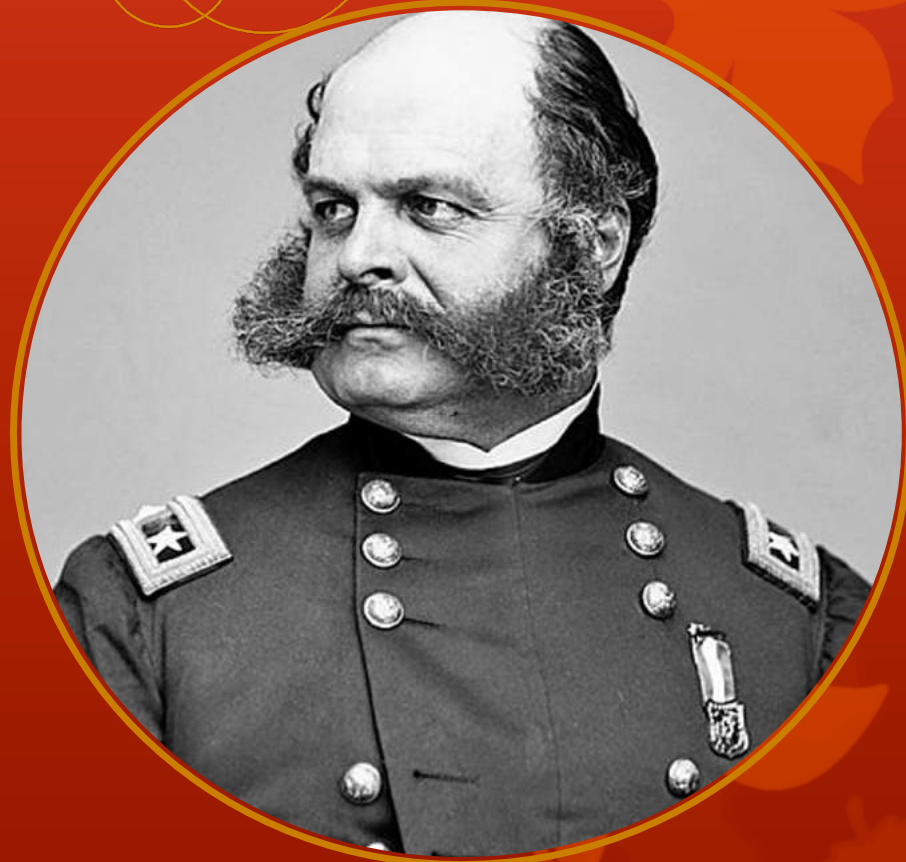


AVOIDING MISTAKES IN MEDIATION

For Mediators and Parties

“Only Burnside could have managed such a coup, wringing one last spectacular defeat from the jaws of victory”.

Abraham Lincoln after the Battle of the Crater 1864



Situations to Avoid in Mediation



Mistake # 1 - Don't Understand Mediation Process

- Mediation - voluntary collaborative process – not adversarial.
- Litigation and Arbitration are adversarial processes.
- Party autonomy is essential – mediators do not make or impose decisions.
- Focus on problem and solution – not winning the argument.
- Recognise that disputes often go far beyond issues as defined by parties.
- Analyse what a party needs to resolve a dispute – it is often more than a legal or rights based outcome.

Mistake # 2 - Don't Understand Dynamics of the Dispute

- Can be difficult personal, relationship and commercial issues between parties, stakeholders, family members, insurers, banks and others having a commercial interest.
- Mediation Models? Beneficial or Counter Productive?
- Style of Mediators.
- Major commercial disputes cannot be resolved on purely relationship based model – mediator must recognise influence of boards of directors, shareholders, banks and lawyers in outcome.
- Mediation will usually fail if a party perceives unfair treatment.

Mistake # 3

Choose the
Wrong
Mediator



- Look for mediator with real practical experience.
- Mediators mediate – good mediators do not judge.
- Mediators do not determine rights - they allow the parties to arrive at own decision.
- Select a Mediator who is:-
 - Empathetic.
 - Can and will listen.
 - Is calm, focussed and persistent.
 - Is creative.
- Specialist knowledge or expertise?
- Technical or cultural issues - co-mediators?

Mistake # 4 – Inadequate Preparation



MEDIATORS

- Find out what party really needs and wants.
- Know the dispute in advance – pre–mediation meeting or documents..

PARTIES

- What do you really need to resolve the dispute?
- Consider carefully:-
 - Who will or should be present at mediation?
 - Whether other side must be there personally?
 - Should a support person be present?
- Consider who will speak and what will they say.
- Prepare for related issues – consents, accounting, tax, publicity issues.

Mistake #5 - At the Mediation

Don't ensure everyone plays the same game – on the same field



- Courtesy and respect to parties and their representatives are most important.
- Perceptions of bad faith and unfairness are always counter-productive.
- Any attempt to control the process is contrary to spirit of mediation and may be unethical.
- Tactics of browbeating and haranguing opponents is counter-productive.
- Rational discussion with the other side is constructive.
- Be sensitive to cultural and gender issues.
- Be frank with the mediator – if you cannot be, you have selected the wrong mediator.



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