By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

Mediation is rapidly becoming part of the legal process as a complement, not a competitor, to the professional services rendered by an attorney to the client.

Other professions offer different options for the client to pursue. For example, a physician can offer the choice of surgery or more conservative treatment for a patient to consider. The patient may elect first to try conservative and less intrusive (and less expensive) treatment and resort to surgery only if the more conservative treatment is unsuccessful. Surgery is always kept as a potential fall back.

Converting that approach to the legal profession, going to trial may equate to surgery and more conservative treatment may equate to other approaches such as mediation. A client seeking to resolve some legal dispute or conflict should have different options to consider, including mediation prior to or instead of trial, comparable to options available in the world of medicine.

Some people, including some attorneys, do not fully understand the function and purposes of mediation and how it is, and indeed must be, a substantially different process from other existing settlement procedures. Else, why have it?

This is the first in a series of monthly articles which will cover many aspects of mediation, including the following:

Some attorneys are uncertain as to what preparatory and advisory role they should play before and during the mediation session and how they can best assist their clients. The clients themselves may be uncertain as to the wide possibilities of mediation; what is expected of them; the extent or limitations on confidentiality and other aspects of mediation. They need to have this information before they can make a knowledgeable trial/mediation choice above referred to.

There are different models and philosophies of mediation including the older evaluative model, the facilitative model, and the newer transformative model. There is the issue of the need, or not, for the mediator to have knowledge or experience in the subject matter of the dispute, and the extent to which this can help or hinder the mediation. What qualities in general should the mediator have? At what point in the process should mediation happen? For example, when do counsel and the parties need prior motions and discovery and when can this time and expense be avoided?

Additionally, every professional has at one time or another been *personally* involved in workplace or organizational conflict with one or more people. These situations might be departmental disputes, clients who criticize or don't pay their bills, executives who regularly disagree, board directors who are sluggish or not unified, staff that snipes and does not support management, supervisors who disrespect staff, anticipated layoffs, and unexpected terminations or leaves. All such events leave those affected feeling alienated and distracted.

A proactive conflict transformation approach can lessen the escalated conflict that often results. Thus, how to intervene, when to intervene and what to consider will also be explored in this column.

I welcome reader response and, time and space permitting, I will try to summarize these responses. I also welcome suggestions for topics to be discussed.

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