By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

MEDIATION – TWO QUESTIONS TO ASK OF COUNSEL

There are two questions a mediator can ask during mediation of counsel (or parties) that can help the process and possibly make for a more productive mediation. The first question would be, "Is there anything different you would like to see in this mediation from any prior mediations or conversations?" The answer to this question can help clarify not only expectations as to the process but also expectations as to the respective roles of the parties, counsel and the mediator.

A significant change in the format of mediations came about with the adoption of Maryland Rule 17.102(d) where the Court of Appeals included in its definition of mediation that mediators are not to give legal advice or recommend the terms of settlement. For many this was a departure from the prior tradition of evaluative or problem solving mediations where the mediator, often a retired judge or learned, senior member of the Bar, would both give legal advice and recommend terms of settlement. Giving legal advice tends to steer the discussions along legal grounds, a process where attorneys felt familiarity and comfort. Certainly some discussion of applicable law has a place in mediations, but in fact, most mediations do not settle along legal grounds as much as on what seems, fair, reasonable and workable. Restricting the conversation to the law restricts consideration of other bases for settlement. And, giving legal advice changes the mediator's role from neutral facilitator to legal counsel, jeopardizing the ethical duty of party self-determination which a mediator owes to her or his clients.

Counsel representing parties in mediation and present in the mediation sessions themselves have also often come to expect the opinion of the mediator as to appropriate settlement. Experienced mediators know that a settlement that seems appropriate to the mediator may not be what seems best for the parties; a party may leave the mediation feeling that the process was not totally voluntary and that they were not understood and that they had their arm twisted into agreeing to terms recommended to them. More importantly, the integrity of mediation as a process *different from* a settlement conference is compromised, not to mention could be questioned as not conforming to standards of ethical conduct. Any opinion of a mediator carries considerable influence and perhaps justifies in the eyes of counsel and others certain terms of settlement. Mediator opinions about settlement terms often dampen the unfolding of the conflict and thwart many other possible understandings and solutions which thus never get explored. Again, as has been stated in this column previously, if mediation is not going to be substantially different from other settlement activities, e.g., settlement conferencing, why have it?

Asking what counsel would like to see different in the pending mediation and the

comparisons it evokes, can clarify to the mediator and to others in the room, what process is being sought by the different participants. A discussion can follow as to what each should expect of each other in light of the Maryland Rule.

Without this clarifying discussion, the mediation can proceed awkwardly, perhaps resembling a card game or sporting event where the players are following different sets of rules. Once the respective roles of the mediator and the other participants are understood, adaptations and adjustments can be made, if necessary, the conversation can continue in a more productive for all manner,and resolution of the conflict or dispute can be addressed in a consistent manner.

The second question to be asked of counsel and the parties is, "Is there anything you/your client has an interest in that is beyond the reach of the court?" For the most part, court remedies are limited to the awarding of damages and injunctions. But there might be something else important to the client, the obtaining of which can aid authentic resolution. It could be, if not an apology, then a statement of regret, that a party will consider valuable. It could be a letter of commendation to a business to help offset the negative public relations effect of an official complaint. It could be almost anything. But it can be something important to one party that the other party can grant without great difficulty or cost, facilitating an outcome is that is often, for parties, more meaningful than the settlement itself. I like to think of it as "settlement-plus". Asking this second question can enlarge the options the parties can consider to enhance wider considieration of many related and salient prospects. There really is no downside to the mediator asking this question and there is potentially a large upside. One of the appeals of mediation is the fact that the parties and counsel can pursue a much greater range of possible options than other processes allow. Finding a mediator skilled in facilitating quality dialogue will render these types of outcomes which are often far more satisfying to clients, the real parties affected by the conflicting and the dispute. For counsel. it never hurts to have a satisfied client. Better process…Better outcome; the transformative approach.

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