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Thoughts For Attorneys in Mediation (Part 2 of a two-part series)

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

Last month's article presented some thoughts for attorneys entering mediation of a client's dispute and ended with a discussion on what the parties might focus on in mediation ..... the "law and proof" or the "interests and needs" of the parties.

Related to the thought above is the fact that mediation must of necessity be significantly different from traditional settlement efforts such as the usual lawyer bargaining or settlement conferencing, else why have it? In what ways should it be a different process? We mentioned one in the previous paragraph. Another change might be how negotiating takes place. Lawyers tend to see settlement in monetary terms which leads to positional bargaining and compromising. To be sure, some of this can occur in mediation. The attorney's fee, for instance, might be based on a financial settlement. While any mediated settlement can include a side provision for payment of counsel fees, there are often other interests and needs *of the client* that can be as important to them, or more, than money, or than paying their attorney a lot of money in litigation costs and fees. Meeting these interests and needs can make for a satisfactory settlement for one party, and a "doable" settlement for the other. Maybe win-win, but often WIN-win. The way to avoid WIN-win is two-fold. Choose your mediator wisely (covered in next month's column) and prepare for your mediation beyond a firm grasp of the case law and beyond an exploration of the needs and interests of your client. For possibly even more important than the interest and needs in the dispute is the <u>way</u> the topics are discussed and how the parties interface with each other…and how you, counsel, interface with the other attorneys present at a mediation.

Coming into mediation, lawyers should realize that they don't have to prove things as they do in court or in arbitration. To be sure, the potential exposure of each party to a poor result in court can be discussed, but a settlement in mediation can be reached without any agreement as to the facts. Instead of trying to prove your case in mediation, a larger objective should be efforts at how your client can speak and be heard and giving and asking for ideas on what a good settlement for the parties might look like. The potential of mediation can often best be reached when the attorneys temporarily put aside their adversarial roles and become collaborators, working together under a flag of truce. When this happens, and this writer has seen it happen often, good things happen.

And one of the beauties of mediation is that the quality of exchange of ideas is enhanced by the fact that mediation discussions are confidential and non-admissible. Thus, there is an opportunity to explore many possibilities for resolution or not, in a more comfortable setting for all.

The following is the hard part for some lawyers . . . letting the client exercise his or her rightful role. This is the hard part because lawyers are trained to put their protective arms around the client and be the spokesman lest the client say or volunteer the wrong thing. But a client not only has the right to a speaking role in a matter of importance to him or her, it can be quite valuable to the process. The maxims "only answer the question" and "don't volunteer any information" are misplaced in mediation. Confidentiality rules limit the use of information coming to light during mediation and it has been the writer's experience that enormously helpful information can be volunteered by a party, often helpful to both parties and to the settlement effort. People can hold back information if not asked about it by their counsel or invited to discuss it by a mediator. If not asked, they may feel it is not important. And if a party doesn't speak, their opportunity to make a favorable impression on the other counsel may be lost. A suggestion for attorneys - have your client sit closer to the mediator than you. This invites them into the process where they belong.

Finally, don't be disappointed if settlement doesn't happen at the first mediation session. Mediators are satisfied with progress and quality. Less complex matters usually do resolve in a session; however, more complex matters may have a first session that culminates in the parties and counsel agreeing to homework, acquiring and sharing information or otherwise taking steps to facilitate dialogue and settlement. Indeed, a mediation where the parties leave with homework assignments can be very productive.

In sum, lawyers, you might consider increasing your expectations of mediation to include the potential to have a quality dialogue with the other counsel as well as between and among the clients. You may thus prepare for your mediations differently by reviewing not only the facts and the law, but also the client's interests and more importantly the way that the dialogue can be most meaningful for your client which is more than likely to give him or her the ability to speak and to enter the conversation and "get on the record" their views on the dispute, how it has affected them and to talk about, if they so choose, those things that may seem or be "irrelevant" that indeed may be quite important to them. Allowing your client's voice to be heard, along with your own in the mediation, will in all likelihood yield you big dividends in your clients' eyes. They not only will appreciate you, they will turn to you again for your wisdom.

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