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Keeping Your Mediation Out of the Ditch

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Keeping Your Mediation Out of the Ditch

In today's legal environment, trials are no longer a certainty; however, it is clear, beyond peradventure that every case will be referred to mediation. Since Chief Justice Burger's original admonition to the American Bar Association that the legal profession needed to do something about the plethora of cases being litigated and that the Court would do something about it if their lawyers did not, mediation has almost become a household word. Just as in trial, mediation presents unique opportunities and challenges. It is often that we as lawyers hear a client say that a case or a mediation has gone off the rails. This is caused by a variety of factors.

In this interactive session, we will explore how to keep your mediation out of the ditch; that is, how do we keep your mediation from going awry from the very beginning and throughout the process.

1. Select the right mediator

This concept is almost too elementary to discuss; yet it is one of the most important that will be faced by the litigating/mediating party. A wrong mediator can set the tone and direct the case into oblivion such that it would never be found again.

Many people ask what experienced litigators look for in a great mediator. Frankly, we believe that it boils down to two concepts: they must work hard, and they must shoot very straight with the litigants. Clearly, everyone expects a mediator to work hard and be engaged; however, all lawyers and clients know that is not necessarily the case. We want mediators who are experienced, who will talk to us about the case, who will read all of the materials provided to them and be engaged. Likewise, we as lawyers, really want mediators who will shoot very straight with us regarding the strengths and weaknesses of the case. While mediators are sworn by the court to be "neutrals," there is meaningful discussion that can take place regarding the strengths and weaknesses of a case. All clients expect their defenses to be evaluated or discussed by the mediator. All lawyers and clients at a mediation expect solid reads on the other parties. In short, a mediator must be prepared to call "balls and strikes"; otherwise, he or she is practically worthless.

Likewise, the question arises as to who selects the mediator. Most defense lawyers will say they do not care who the mediator is so long as the other party will listen to him. It is important for the lawyers to understand the relationships of mediators to the other lawyers in the litigation. We typically try to steer away from mediators who were connected extensively to opposing counsel. Most lawyers maintain a list of well-respected mediators. Where a mediator is suggested that we do not know, we typically will reach out to them and have private conversations before making an ultimate decision.

2. Communicate your expectations

One of the cardinal sins in mediation is with the parties not communicating their expectations to the mediator. From having mediated 1,100 cases, I have learned that there are many motives for a mediation. When I began serving as a mediator, I had always assumed that everyone wanted to settle their case at mediation. I was quickly proven wrong. Some people are required to go to mediation by the court so that they can get a trial date. Some courts require early mediations where the case is discussed and the framework is established for a later successful mediation closer to the trial date. Finally, believe it or not, there are actually many lawyers who want to settle their case at mediation.

Whenever I am involved in a case, I clearly articulate my purpose to the other mediator. I let the mediator know the explicit purpose for my mediating the case with him or her and work to figure out how we are going to make the purpose be accomplished.

3. Equip your mediator to deal with your adversary and your client

Every mediator needs to understand the rules of engagement of the mediation. He or she needs to understand if the client is a problem or if the adversary is a problem and being a hindrance to resolution of the case. In most cases, this is accomplished via the mediation position statement. Candidly, this is a controversial thought. Some people do not want to provide mediation statements to the neutral; rather, they prefer to discuss the case with him as the case progresses. Most lawyers feel the need to communicate the status of the problem, where the case is situated, and the current extent of settlement discussions. From talking with a number of mediators, we believe that a candid assessment of the strengths and weaknesses of the case is essential to a meaningful mediation-type statement. A good mediator will read the strengths and weaknesses and discuss them extensively with the parties. Likewise, if there are particular challenges, it is essential to equip the mediator with that information. If he is equipped with the challenges and has a full understanding of them, he can more easily deal with them. Finally, it is critical to let the mediator know the status of the case at the time of the mediation.

4. Be respectful of the mediator

Again, this is common sense, but many people view the mediator as an adversary and not as someone who can help get the case done. The mediator is your friend, and he/she should be treated as such. If the mediator is your adversary, you have chosen the wrong mediator for your case. Choose someone to serve as the mediator who you and your client can respect.

5. Do not let the mediator or the other party take control of your mediation

Most mediations begin with meaningful sessions where the strengths and weaknesses of the case are discussed. Then, awhile later, settlement numbers begin being exchanged. As a mediator, it is almost invariable that the original demand from a plaintiff will be one of two things: it will be high, or it will be irrational. I remind litigants all of the time that the first person that gets real is the one that gets the best deal. This attorney or party will lead the other party to his reasonable number. As a result, most really good mediators counsel plaintiffs not to respond to numbers presented by the other party. Rather, they should present rational and reasoned positions regarding their numbers and provide reasons for them. Quite simply, if a party sticks to its guns with this approach, it will resolve every case on its terms. Again, someone will lead the other party to a number. Whoever gets reasonable first is the person that will get the best deal.

6. Always have a few tricks up your sleeve

Without question, mediations are unpredictable. It is helpful that you know the materials in hour case extensively and that you a few last-minute tricks up your sleeve.

a. Brackets. Many mediators will suggest the use of brackets in the settlement discussions. Most experienced lawyers love brackets; most inexperienced lawyers detest them. A bracket is, quite simply, if one party goes to X, the other party will go to Y, and the parties will negotiate between those two numbers. Invariably, many inexperienced counsel cannot understand the concept of brackets, but once it is understood, it is an invaluable tool.

b. Always be creative. Just because something has not been sought in a discussion does not mean it is not something that is wanted. Always provide intangible benefits to plaintiffs in cases to make them feel as they are receiving a better deal.

c. Let the other side know that the end is near. Occasionally, I will use the phrase, “I am running out of gas.” This connotes to the opposing party that there is a small amount of authority left, but not much.

d. Try a “but if” proposal. In this alternative proposal, the party will explain, “I will go to $300,000

but if an offer of $350,000 will be made, it will be accepted." This alternative strategy communicates volumes to the other party.

e. Meet with the attorneys face-to-face without clients. I have found that this tool is often one of the most effective when everyone is stuck in a mediation setting. The attorneys can often meet together without the flammability of the litigation setting and work out a framework for moving forward with the case.

f. Ask to get out of the mediation gracefully so that you can survive for another day. There are any number of reasons that a lawyer and his or her client may want to be excused from a mediation. The most significant is that they have learned new information at the mediation which will affect the settlement discussions going forward. The claims professional has learned that he or she does not have enough authority to resolve the case but, with the new information, he or she may be able to get it within the next 14 days. In this case, I asked the mediator to get me out of this mediation session gracefully so that we can continue these negotiations at a later date.

7. Draft the settlement memorandum carefully

One of the biggest mistakes that can be made in a mediation is not having a settlement memorandum that is timely and accurate. In most jurisdictions, the courts require all of the parties to sign a term sheet of the mediation terms. If the term sheet is not signed, there is no deal. Drafting a settlement memorandum is often a team effort for all of the attorneys. It has to be signed as soon as possible and contemporaneously with the mediation. Zoom mediations present unique challenges, but most experienced mediators have figured out a way to get Zoom agreement signed promptly.

8. Button up the deal quickly

Just as you want a contemporaneous mediation term sheet, make sure the deal is signed properly. If the mediator does not send something quickly in a Zoom mediation, prepare your own term sheet and circulate it to the other parties. If the case does not settle, send a letter to all of the other parties outlining where the parties ended the negotiations. As a mediator and one who sees several cases that have been mediated prior to coming to me, there is often a dispute regarding where the mediation ended. Please document the ending point of all mediations.

Summary

Mediations are critical tools in today's litigation environment. Virtually every case will be sent to mediation. It is essential to have a handle on the mechanics of the mediation, the facts of the case, and how to steer your case toward resolution. All mediation sessions have ups and downs, but the experienced litigants know how to manage those up and downs and the strengths and weaknesses of their particular case to their advantage.

Thank you for this opportunity and let us know if you have questions.