

MEDIATION

“A lawsuit is a machine where man goes in as a pig and comes out as a sausage.”

A. Pierce, *The Devil's Dictionary*

Good lawyers try to keep their clients from becoming sausages, and mediation is a way to do it. This article will give three suggestions that will help make mediation easy, even mediation of divorce and other emotion filled cases. It will also give a suggestion on how to get the most out of a mediation which fails to settle the case.

Most lawyers today do not need to be convinced that our clients' best interests are well served by an early settlement of their lawsuits, especially family lawsuits, or that mediation is a useful tool to achieve these early settlements. They may, however, be reluctant to agree to mediation because it is unfamiliar. Most of us have more experience trying cases than mediating them. We are reluctant to step into the unknown waters of mediation. Fear not. Mediation is much, much easier than trying a case. After all, should you make a mistake, the worst that will happen is that the case does not settle. Lawyers will not read about your mistakes in the Southern Reporter for generations to come.

More good news: by following a few simple suggestions, you will be an effective advocate for the client in mediation. Following these rules plus getting a little experience will make you a very effective advocate. Here they are:

Don't poison the well you drink out of.

The water you want to drink is a favorable settlement for your client. The adverse party is the “well.” For there to be a settlement the adverse party must be persuaded – not a judge or a mediator – but your adversary. Everything you do in the mediation session should be aimed at this result. You have a golden opportunity in the opening session. This is the only time you can ethically speak directly to and try to per-



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suade adverse parties without going through their lawyers. *Don't Blow It.* You do not persuade people by making a frontal attack on them. You diplomatically and tactfully let them know that you understand their position and then gently point out to them where they are wrong and why they should modify their stance. Civility is the name of the game.

This does not mean you do not advocate your position vigorously, but that you do it with diplomacy and tact. This is not always possible, but do your best. At the very least, give the other party a way to concede without losing face. Threats usually backfire.

Consider carefully who the actual decision maker is. Is it the lawyer? the client? both of them? a relative or advisor of the client? or is it the insurance adjuster? Ask the mediator for help on this delicate issue. Obviously, a different tact will be taken with an insurance adjuster who is concerned only with dollars and cents from that taken with a physician accused of malpractice, who is more interested in his or her reputation than how much money the insurer has to pay. If the adjuster is the sole decision maker, then a frontal attack on the other party may be made. Just be sure that the insured does not have a veto over any settlement.

Mediators are not decision makers, but they can influence the decision makers. Depending on the style of the mediator, he or she may be an advocate for the other party in the caucus sessions. Arguments for your position coming from the mediator are more persuasive than coming from you. The mediator is not hobbled by reactive devaluation, that is, the natural tendency to devalue anything your adversary says. If the mediator genuinely believes that your cause is just and you should prevail, then that mediator will be

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a much more persuasive advocate. That is, the mediator cannot make the decision, but can be a factor in persuading the adverse party to accept your proposal.

Involve and prepare your client.

Not only is the adverse party a decision maker, but your client also will have to agree to whatever decision is made. A well-prepared client will make a better decision. Your client knows far more about the case than you will ever know, especially a family lawsuit. Spouses usually know how the other spouse thinks. Brainstorm with your client to suggest creative ways for win-win situations; that is, what will the other party consider important that you client does not? For instance, consider the use of a summer home or generous visitation times in a divorce case. Sometimes a simple apology will go a long way. Apologies have been known to work wonders in malpractice cases. The more concessions of this

type you can provide, the better financial results can be obtained.

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want in a mediation. After all, the other side must also agree. If both parties' needs are not reasonably met, no agreement will be forthcoming. Clients need to understand that the most they can expect is not a "fair" agreement, but an agreement that will be better than litigating the matter.

Probably the most important part of client preparation, especially in a family dispute, is recognizing and dealing with the client's emotions. Fear and anger are present in almost every family law mediation. Self-pity and even sadness frequently are present. Recognize these emotions and help the client face them and deal with them prior to the mediation. If these emotions are not dealt with, they can block an otherwise advantageous settlement. Frequently, a client depends on a friend or advisor for support and advice going through the stress of litigation. By all means, make that person a party to the mediation. This support makes the mediation session easier for the client and reduces the risk of having the advisor veto the settlement.

Be ready to close.

All agreements reached in mediation should be in writing. Rule VIII-A Mississippi Rules for Civil Mediation. Obviously the more issues in dispute, the longer the settlement agreement will have to be. Divorces usually involve child support, custody and visitation, equitable distribution and alimony. They need more lengthy documents than a simple personal injury suit, but even the personal injury suits require a complete and absolute release which can sometimes run into several pages. Disputes involving business matters can also require lengthy settlement documents, such as non-compete agreements, division of assets, payment schedules and the like.

It is unrealistic to expect the parties at the end of a long, hard mediation to sit down and draft a complete document with which they are satisfied. To avoid this problem, prepare a draft settlement agreement prior to the mediation and submit it to the other side for review. Try to have as many of the issues resolved as possible before the mediation session. Then bring the disk to the mediation and, as the agreement is reached on different issues, make changes to the document. The dead time in caucuses can be utilized to review the latest draft.

Good negotiators try to work from a document that they have prepared. By

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following this practice, you will have a checklist to make sure that none of your important points are overlooked. When you reach agreement, you will have a settlement agreement which you have prepared to sign on the spot with no late night drafting or waiting until the next day to execute the agreement. The first can lead to errors, and the second can lead to a party backing out of the agreement.

Remember a half a loaf is better than none.

As effective as mediations are, about 15% of them do not end in a settlement. If this happens, has the mediation been a waste of time and money? Not if you go after the half loaf of cutting down the expenses of preparing and trying the case. The easiest and most profitable cost saver is the reduction in discovery time. Mediators want to help you reach a settlement. Convince the mediator that you cannot accept a settlement without sufficient information, and you do not want to go through the expense of obtaining it by discovery. Get the mediator to convince the adverse party that everyone would be wasting time in the mediation unless they all have the necessary discovery materials. Many expensive discovery disputes have been resolved by this simple approach. Of course, it is in your interest to reciprocate and provide the needed discovery material to the other party.

Another fruitful source of savings is in the handling of the experts. Experts are more and more a part of modern day litigation. If they are true professionals and they have the same set of factual assumptions, their conclusions should not be too far apart. If they are too far apart, then the odds are that they are working from different factual assumptions. Suggest to the mediator that he or she arrange for the experts to meet by themselves and exchange their factual bases for their opinions. This usually results in a substantial decrease in the amount of difference of opinion and can lead to an early settlement. This is far less expensive than lengthy and costly depositions and other discovery of the expert.

Mediation can also result in the narrowing of issues. Sometimes through the mediation process, the parties have only one issue upon which they cannot agree, and they arbitrate that issue, resulting in a large savings in trial time.

Conclusion

Mediation is the most popular form of alternative dispute resolution. Every law-

yer who deals with conflicts in or out of court should know how to use this valuable tool to resolve these conflicts. These suggestions are not, of course, all encompassing, but they may be of some assistance to you as you use this valuable tool. Our clients and the legal system of which we are a part deserve our best efforts to resolve disputes with as little cost in time, money and emotional strain as possible. ■

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