WHY ARE ATTORNEYS AFRAID OF CONFLICT IN MEDIATION?

By Jeffrey Grubman, Esq.

The mediation process has evolved significantly over the past few decades. Mediation was initially viewed skeptically by trial attorneys who viewed themselves as warriors who preferred to try cases rather than settle them. Those same trial lawyers believed that if settlement was appropriate, they certainly did not require the assistance of a third party to effect the settlement. They would pick up the phone and call their opposing counsel and either work things out on their own or try the case.

As courts around the country become overburdened, mediation became a popular forum to resolve disputes. Many courts throughout the country require cases to be mediated before the case can go to trial. Consequently, attorneys have been forced to participate in mediation. Because trial attorneys were not accustomed to the mediation process, the process initially looked somewhat like a court hearing or a trial. For example, in the early days of mediation, opening statements in mediation looked and sounded very much like an opening statement at trial. Trial lawyers in the early days of mediation, and some trial lawyers still today, had a difficult time finding the balance between advocating their client's position while proceeding in a conciliatory manner with settlement being the goal of the mediation.

Largely due to attorneys' discomfort with finding that balance, it became commonplace in many parts of the country for attorneys not to make opening statements in mediation. A well prepared and delivered opening statement goes a long way towards achieving a favorable settlement for one's client.

The custom of not make opening statements in certain parts of the country and in certain substantive case types has now led to not even having a joint session during some mediations. Except in the rare situation where there is the potential for violence, this is a mistake. The parties and their counsel should at least be willing to sit in the same room with one another for some period of time while the mediator explains the process and lays the groundwork for a productive day.

When there is a joint session, many attorneys instruct their clients not to say anything during that session. These attorneys apparently believe either that their clients will say things that could hurt the client's case or the client or the adversary will say things that could upset the other person and thereby make it harder to settle the case. The confidentiality that blankets the entire mediation process should ameliorate an attorney's concern about his or her client saying something that court hurt the case. The fact that a litigant may say something that will upset the other party is not enough of a reason not to allow parties to speak. First, the fact that the parties are engaged in litigation is evidence enough that the parties are not happy with one another. Nobody should be surprised or devastated when one of the parties says something the other party does not like.

More importantly, many people want their voices heard not just by the mediator, but by the party with whom they are litigating. This is particularly true in situations where the parties had a pre-existing relationship, such as partners or competitors in a business. I have found joint sessions extremely helpful either with or without the attorneys present where the parties are encouraged to speak directly to their opponents. I can think of countless mediations where the parties met in caucus and negotiated through the mediator for hours followed by a meeting in which the parties spoke directly to one another and in which the case settled during that meeting or shortly thereafter. Nevertheless, many attorneys feel uncomfortable with the conflict that sometimes arises from these direct communications. Hopefully, the next time an attorney reading this article gets that uneasy feeling when the mediator suggests that the parties speak directly to each other, he or she will give it a try rather than viscerally reject the idea. ■

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