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Avoiding Mediation Missteps in the Litigated Case – An Insider's Perspective

By: Michael W. Winfield. Esq.

Introduction

Those who promote the use of mediation often laud its high success rate (typically measured by a complete settlement of the parties' dispute). Indeed, statistics published by the Financial Industry Regulatory Authority show a settlement rate of matters resolved through mediation of 76% for calendar year 2018, and 89% for the first two months of 2019. Likewise, the United States Department of Justice reports a 75% success rate for calendar year 2017 for all voluntary ADR proceedings. My own experience as both an advocate and a mediator supports these reported results. The focus of this article, however, is not on those mediations that succeed, but on those that fail, and the reasons why. As an advocate for twenty-four years, and a mediator for eleven, I have witnessed the same missteps repeated in those mediations that breakdown without any resolution. Although there is no formula for guaranteed success, avoiding these missteps will decrease your chances of being in the statistical minority of failed mediations.

Submitting to Mediation Too Early

It is often said that timing is everything. Those words ring particularly true for mediation. Submit to the process too late, and positions can be too entrenched, and sunk litigation costs too great, to enable the parties to find common ground. Because of this, and perhaps increased interest by courts to encourage parties to submit to mediation early, many mediations are being conducted before any real discovery occurs, and before the parties experience any of the inconveniences associated with the litigation process. In those cases, there is a heightened risk that the parties are not ready to move off of their initial positions as framed in the pleadings (and which led to the commencement of the litigation in the first place). Early on in the litigation process, parties are particularly strong in their convictions with regard to their legal positions – whether it be entitlement to monetary damages or specific performance, or exoneration for unjust claims being asserted. These convictions are reinforced by the attorneys advocating on their behalf, in the pleadings and other papers submitted to the court, and in the early discussions of the dispute. The parties often need the distance associated with the passage of time in order for these convictions to normalize to the point where compromise has a greater opportunity to take hold. Advocates need the opportunity to gage the strengths and weaknesses of the case based upon some amount of discovery, in order to provide a proper risk assessment. Both of these are vital if mediation has any real chance of achieving a successful outcome.

Choosing the Wrong Mediator

Mediation, as a process, allows for significant flexibility to be exercised by the mediator and the parties. Each mediator is different in how he or she approaches the process and takes advantage of that flexibility. Some mediators prefer to keep the parties together for as long as possible, while others prefer to move to caucus either immediately or in short order. Some mediators are reticent to offer their opinions on the value of a case, while others freely offer evaluations. Some mediators are forceful, while others are more reserved. There is no correct or perfect set of attributes for a mediator. The question that should be asked in every case prior to selecting a mediator is: *what attributes of a mediator are best suited for the type of dispute, and the particularly participants, at hand?*

If the attorney or client is expecting the mediator to provide an evaluation of the case, and the mediator selected does not feel comfortable doing so, the potential for a successful mediation diminishes significantly. Along the same lines, if the nature of the dispute and the personalities of the participants require a more forceful personality, and a more reserved mediator is selected, the risk of a failed mediation increases. Properly evaluating the suitability of a mediator for the case typically requires more than simply reviewing a CV and comparing rates. In most, if not every, case where the mediator being considered has not been used previously, a phone call to the mediator to ask how he or she runs their mediations should occur. Unmet expectations often result in failed mediations.

Not Having the Decision Maker Present

Too often those attending the mediation session do not have full decision making authority for the matter at hand – that is the authority to settle the case at the full amount at issue (irrespective of whether that individual has any intent to exercise that authority). Worse yet, sometimes those attending have a predetermined limit of authority, effectively conveying to the other side that they were only ever willing to bargain to a certain amount, regardless of what happens at the mediation. It is fundamental to the success of every mediation that those participating have the ability, if not the inclination, to resolve the dispute, without having to obtain the consent of others not present. Perceptions over the value, strengths, and weaknesses of a claim can and often do change as a result of information exchanged during the mediation. That information can come from the presentation of the parties, the exchange of information, and the discussions with the mediator and others present. Those changes are inevitably the result of emotive responses to sensory experiences of the participants. Those not present are incapable of processing the information in the same way. Imagine a jury not actually witnessing the trial, but instead relying only on the transcript in order to come to its decision. Think about all of the information that would be lost, and the difficulty that jury may have in appreciating all of the nuances of the case. An absent decision maker during a mediation suffers from the same liability.

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Omitting the Joint Session

The traditional mediation model begins with a joint session with all participants and the mediator, during which the parties often make opening presentations followed by a general discussion led by the mediator. The current trend is to omit the joint session and conduct the mediation exclusively in private caucuses. I have participated in mediations where the parties never actually see each other, let alone engage, during the entire process. The justification most often cited is that the joint session has the potential to enflame the discord between the parties which is counterproductive to resolution. In reality, the omission of the joint session renders a mediation *less*, not more, likely to succeed.

Isolating parties from interacting out of fear or concern that they may have an emotional reaction to the other side's position is short sighted, and evokes a lack of confidence in the emotional and intellectual capacity of the participants, and in the mediation process itself. Disputes are emotional. So are trials. Parties can and do handle both. Experienced mediators are capable of managing the mediation process to deal with the emotional responses of the participants. As most trained mediators can attest to, addressing the emotional underpinnings of the dispute often leads to the ultimate resolution of the dispute.

Moreover and more importantly, one of the reasons that mediations are typically so successful is that they satisfy the parties' need to be heard – to have their proverbial "day in court". Parties want to see their representative advocate on their behalf. They want to know that the *other side* heard them – not just the mediator. The cathartic impact of that experience can profoundly impact settlement discussions as the mediation progresses. Omitting the joint session prevents the parties from having that experience.

Not Adequately Preparing for the Mediation

A mediation session is just as important as the trial of a matter, insofar as both have the potential to achieve the ultimate goal of the participants – to end the dispute on terms deemed to be favorable or acceptable. The significance of the process warrants a high degree of preparation. That preparation should include, at a minimum: a thorough assessment of the risks of the case and the costs to proceed; establishing with the client their goals for the outcome of the matter (which may differ from what a litigated outcome can provide); and developing a negotiation strategy to achieve those goals. Part of developing a negotiation strategy is attempting to understand what the ultimate goals of the other side are, their own risks of proceeding forward, and what strategy they are likely to employ. Proper preparation requires a dedicated effort specific to the process. As Benjamin Franklin is often attributed as saying, "by failing to prepare, you are preparing to fail."

Attempting to win the Mediation

The goal of mediation (to find a mutually acceptable resolution framed by and agreed to by the parties) is fundamentally different than the goal of litigation (to win), and requires a different type of advocacy. Approaching the mediation session as if it was the trial on the merits does little to advance that goal. Overly aggressive advocacy on one side often begets similar aggressive advocacy on the other, further entrenching the parties into their litigation positions, and diminishing the prospects of finding common ground. In addition, the advocacy lends little to what the mediator is trying to accomplish.

Conclusion

Mediations are filled with promise and opportunity for those that embrace what they have to offer. While there are no certainties as to any outcome in an particular mediated matter, avoiding the above missteps will enhance the opportunity for a successful outcome.

How Mediation Works in the Middle District

Local Rule 16.8 governs the mediation program in the Middle District. While the rule permits judges to order parties to mediation, it is anticipated that a majority of mediation sessions will be voluntary. When the Court determines that a case is appropriate for mediation, the judge and the parties will select a mediator from a list of certified mediators, who provide their services free of charge.

After the selection of a mediator, the judge will then enter an order referring the case to mediation. The mediator will contact the parties to schedule a time to meet in an attempt to settle the lawsuit. All discussions with the mediator are confidential and the Local Rules prohibit the mediator from being called as a witness at the trial. The mediator will not try to impose a settlement on the parties, nor will he or she give legal advice. Rather, the mediator will promote better communication, explain the parties' respective interests and help develop options for settlement.

The mediator may choose to meet several times with the parties. At the conclusion of the mediation, the mediator will submit a report to the Court. The mediator will not disclose any information discussed at the mediation session. Rather, the report the mediator submits to the Court will indicate only whether or not the mediation session was attended by the parties and counsel and whether it resulted in a settlement.

For more information about the Middle District mediation program, please visit: https://www.pamd.uscourts.gov/alternative-dispute-resolution