

Mediation, The Basics, Part 2

By Jerome F. Weiss, Esq.

Who Hires the Mediator?

Neutrality and Confidentiality are key elements of the process that may be affected - or appear to be affected - by who pays. Usually the parties or their counsel bear the expense of the Mediator equally. There are certain circumstances where there may be agreement to give this responsibility different weight or to have one side pick up the total expense. The professional mediator will never lose sight of - and should constantly emphasize - the fact of his or her neutrality, much the same as a member of the judiciary. If this key element is lost, the obvious result is erosion of confidence and in turn, disintegration of the process. If the payment is not fifty-fifty, then a written acknowledgment is in order, including the mediator's reminder that such payment, and who is responsible for it have no bearing on neutrality. The participants and mediator should always remember that the only client the mediator has at the table is resolution.

Isn't Mediation Just Like a Settlement Conference or Final Pretrial?

Simply stated, the answer is No. Parties and their lawyers are in an entirely different mode in a settlement conference or pretrial. In the pretrial, lawyers are advocates who usually can not shed the zeal and promotion of the client's cause and come to a bottom, bottom line. (This, along with several other related points, some of which are discussed herein, are considered in Richard M. Markus, *Fundamental Misconceptions About Mediation Advocacy*, CLEV. ST. L. REV. 47:1). Ideally, mediation does not entail the "angling" usually found in the pretrial. This is because of various reasons. First, at the pretrial our clients are usually sitting right there or at least, close at hand and we do not want to give them the impression that we, as advocates are doing anything less than giving it our very best fight. Second, the person conducting the settlement conference is a judge or other judicial officer. Can we really bare all in front of the person who may ultimately be presiding over the matter? It's a natural tendency to save something for later. Besides, it would be foolish to reveal the vulnerabilities of our case to a judge who is going to later on be making rulings on that same case. Finally, no one wants to disclose a top or bottom position without reasonable assurance that they will not be prejudiced. This usually can only be provided in a mediation with a neutral facilitator brokering the resolution.

Mediation is different, with a total trust in the mediator as a neutral facilitator who will not divulge a fact or number unless given permission to do so. The result is the implicit understanding that there will be total candor. Lawyers not used to this process - and most are not - need some time to become comfortable with it since the advocacy edge needs to be put on the shelf. Even with the absence of traditional posturing and advocacy, experienced trial counsel and the most hardened clients find that the mediation approach, if accepted by all participants, works. The skilled mediator can be very helpful in assisting the lawyers and parties to change hats and look at the mutual approach, interests and resolution as opposed to the usual reactive approach that litigation processes such as settlement conferences bring with them.

How Long Does it Take?

As long as it needs. Many of those mediations that fail, do so because someone wasn't prepared, or came without proper authority, or thought that it should get done in one quick session. I'll never forget the session I attended, as an advocate representing a party. It was a court annexed program in a nearby county. Our session was set to begin at 2:00 p.m.. The Mediator came into the room with his coat over his arm and promptly informed us that we had until 3:15 p.m. because he had to go see his son play little league baseball. You can imagine the outcome. We might as well have not been there. Sufficient time is always important to success and in most instances depends on the gravity and complexity of a case. I have presided over mediations that have taken only two hours to successfully conclude and others that have taken multiple sessions over five or more months with numerous intermissions and where only a few issues at a session were resolved. The key is that they got resolved. We were all there and ultimately all equally interested in, and understanding of the process and its ultimate prize - Resolution.

Sometimes it takes a while for everyone to get on the mediation "page". Sometimes mediation is not right for a case for a number of reasons. But if it is and if everyone's mindful of the mediation context, the effort can be rewarding.

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