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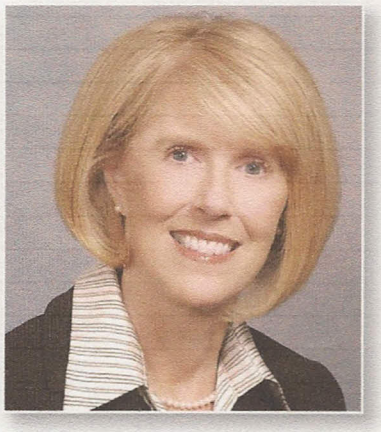
Guest Column

Ten years at the table: A mediator's tips for making it work

By Diane McQ. Strickland

A mediator's opening comments often include a brief biographical sketch, including years and areas of practice, time on the bench and experience as a mediator. This year, when I found myself reporting that I retired from the bench and began mediating 10 years ago, I was a bit taken aback. "How time flies when you are having fun..." and fun is what it has been for me. As I tell all who inquire whether I like being a mediator, I thoroughly enjoy helping people to help themselves.



DIANE McQ. STRICKLAND

In addition to enjoying the practice of mediation, I have also learned a thing or two in the past 10 years. Having already dropped one plat"a"tude, and presuming you are still reading, I will take a chance on employing a few more to share my reflections. I use an "a" instead of an "i" because "plata" means "something of value" in Spanish, and it is my hope that these thoughts will be more than mere banalities.

"You can't fit a square peg into a round hole."

In Virginia, we are fortunate that mediation is an option, not a requirement. Parties who come to the table voluntarily, armed with knowledge of the process, are far more likely to achieve consensus.

Lawyers inform their clients of the alternative of mediation in compliance with the duties imposed by Rule 1.4 of the Rules of Professional Conduct. If the client chooses mediation, counsel should explain the different role that the attorney will play, that of negotiator and conciliator rather than that of litigator. The client should be fully prepared to actively participate in the process, assisting in presentation of the facts and making decisions. It must be made clear to the client that they, not the mediator, will be the decision maker. In this manner, the square corners are rounded.

By contrast, many states require mediation as a predicate to having a case heard in court. When the client and counsel feel the mediation process must be endured in order to have their day in court, the effort put forth is often inadequate to resolve the dispute; the parties will simply spend the required number of hours to entitle them to a trial without genuinely discussing the issues. In this manner, the corners remain square.

"A stitch in time saves nine."

Mediation can be initiated at any time – prefiling, prior to discovery, post-discovery, substituted for the trial date or even on appeal. Both time and expense are saved by commencing the mediation process prior to filing suit or prior to discovery.

Making an informed decision regarding when to mediate requires an evaluation of a number of factors. Do both sides have sufficient knowledge of the facts to appropriately value the case? Are there legal questions requiring a ruling by the court? Are there expert opinions that need to be disclosed? Is an evaluation of the demeanor of parties and witnesses through depositions instructive in evaluating the case?

While time and expense can be conserved with early mediation, it is seldom economically beneficial to commence the process only to have to adjourn for a court ruling or a deposition. Another significant consideration in making the call on when to mediate is the issue of confidentiality. Often there exist important reasons for one or both sides to avoid the potential publicity which comes with filing suit. Adverse impact on an individual's reputation or the economic interest of a corporation may dictate a decision in favor of early mediation in order to keep the case out of the public limelight.

The preservation of relationships is another factor to be taken into account in selecting the time for mediation. Whether it be business colleagues, spouses, neighbors, or communities, the trial preparation process can widen the rift and aggravate the damage. When relationships need to be maintained or improved for economic or personal reasons, earlier intervention will facilitate greater healing.

Consideration must also be given to the impact of the litigation process on the client. An assessment should be made of the potential for disruption of the business of a corporate client with the demands of responding to discovery requests and attending depositions. Likewise, the impact on a physician's practice of a pending medical malpractice

trial should be considered. Counsel should evaluate their client's tolerance for stress and use that as a guide in determining when to commence mediation.

"You catch more flies with honey than vinegar."

Perhaps it is stating the obvious to note that the mediation environment differs from the court room, and the demeanor of counsel is a matter of import. While advocacy has its place in mediation, adopting an adversarial attitude is rarely helpful. Noting a pertinent case supporting one's position may have value; arguing the case exhaustively does not. Making observations regarding how an opposing party will play to a jury may be useful, but attacking that party does not promote resolution. Pointing out the strengths of the background and opinions of one's experts may enhance bargaining position; but an extended debate over the merits of opposing experts rarely advances agreement. Withholding pertinent information and alluding to it is rarely effective; information must be shared to be factored into the other side's valuation.

The best advocates in mediation are those who effectively and courteously make their point and move on. Maintaining civility at all times not only results in respect from the other side, but also increases the likelihood of settlement. It is not necessary to convince the opposition (or the mediator) that a position is correct; rather that it might be accepted by the court or the jury. This can be accomplished most effectively by not becoming adversarial.

"A bird in the hand is worth two in the bush."

Calculating one's best day at trial is only one of the variables to be considered when determining a fair settlement of a client's dispute. Also to be considered are the time saved, the expense saved, the stress avoided, and perhaps most importantly, the uncertainty of litigation. Over the more than 15 years that I served on the bench, I saw some unusual verdicts; and before that, during my 14 years as a trial lawyer, I received some surprising verdicts. It is challenging to predict which witness or piece of evidence or instruction of law will be the determining factors in the final decision. This uncertainty is avoided in mediation where the stakeholders are also the decision makers.

While one's best day at trial may be the starting point in the evaluation, no worthy opponent will voluntarily agree to that assessment. They are looking for their best day as well. Mediation is a matter of compromise; to achieve a settlement, both sides must give. While this results in parties potentially leaving the process with less than they might have achieved through litigation, it may just as likely result in securing more than might have been accomplished through trial. There is a certain comfort that comes from avoiding the extremes of the range of outcomes, and a mediated agreement accomplishes that goal.

"All things come to those who wait."

Mediation can be a frustratingly slow process, though rarely as time consuming as trial. The frustration is produced by several sources.

Counsel and clients often initiate negotiations by assuming positions on the outer limits of, if not off, the playing field. The common wisdom is that this will allow enough room to move as will be required by their opponent's equally extreme opening demand or offer. These extremes can be avoided through pre-mediation discussions guided by the mediator, with the goal of commencing negotiations within the scope of a realistic trial outcome. However, even when the process begins with the parties miles apart, resolution can be accomplished with patient deliberation.

Another source of frustration results from the downtime waiting while the mediator is working with the other side. Advising a client to bring work or reading materials can be helpful in this respect. If hosting, counsel should consider providing a television and snacks in the caucus rooms.

Co-defendants or multiple plaintiffs should attempt to work out their differences before mediating with the opposition. Much valuable time can be spent trying to determine the percentage of contributions or settlement proceeds to be allocated while the other side is left hanging. The mediator can assist by hosting a conference call or premediation gathering with one side to address division of responsibility or proceeds.

Frustration also occurs when, during the process, it becomes apparent that the person with the full authority to settle is not at the table. While it is the norm to address this issue during the pre-mediation conference call, for a variety of reasons the ultimate decision maker is sometimes not available in person. Technology has assisted to some extent by providing teleconferencing, Skype participation, or at least involvement via conference call. When all of these approaches fail, it is critical that the final decision maker may be reached by phone when necessary. The downside to this approach is that it is extremely difficult to bring the decision maker up to speed on the information shared, the in-person observations of the parties, and the momentum of the negotiations.

Even with the best preparation, the mediation day can go slowly. Attorneys should prepare clients by explaining that mediation is an incremental process and that just as they may not wish to take that big step to move the cause along expeditiously, the same can be expected from the opposition. Whether the dance is done slowly or at a more upbeat pace is not predictive of outcome. What does determine success is the willingness to remain open minded, to listen carefully to the information shared, to reexamine strengths and weaknesses, and adjust positions based upon what is learned.

"All's well that ends well."

When an agreement is reached, it should be reduced to writing. It becomes an enforceable contract, though it is rare to have a mediated agreement require enforcement due to the participation of the parties. The document can be as bare-boned or as detailed as may be required; but it should not be "subject to execution of a formal agreement," under *Golding v. Floyd,* 261 Va. 190 (2001).

It is helpful for counsel to bring a draft agreement to the mediation. Better yet, counsel can share the proposed draft, minus the items to be mediated, with the other side prior to mediation. This not only gives them "skin in the game" but also projects a positive sense that agreement will be reached.

With the execution of the agreement, success is achieved. The client is satisfied because they have been heard and had a hand in crafting the resolution. They have avoided the costs, time expenditure, and stresses resulting from trial. Relationships have been preserved and uncertainty avoided. Counsel can move on with satisfaction to the next case and to the next client.

Judge Diane McQuade Strickland (Ret.) served in the Roanoke Circuit Court before joining The McCammon Group 10 years ago.