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Guest Article

The art of ethical advocacy in mediation

What to say and how to say it


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It has been a little over a decade since mediation hit the mainstream in Virginia. Legislation has been enacted, training and certification processes established and canons of ethics for mediators adopted. The number of mediations convened annually in the commonwealth now far surpasses the number of jury trials conducted. Virginia Rules of Professional Conduct require that lawyers understand dispute resolution options and address them with their clients. The role of the attorney in the position of advocate for a client in mediation has evolved in a manner that is both similar and dissimilar to the role of the litigator. It is important that counsel appreciate the differences in order to effectively represent their client's interest in the increasingly preferred venue of dispute resolution.

Collaborating with your client

Pursuant to Rule 1.2 of the VRPC, a lawyer "shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes...." When discussing mediation, your client should be educated first regarding the nature of the process - that it is a nonadversarial, collaborative session and that it differs from arbitration or trial, for no third party will decide the case. Explain that the format will be less formal without rules of evidence and procedure. The advantages to be shared include the facts that the client will have control of the outcome; that mediation is private and confidential, that it is less stressful and less expensive; that the proceeding may be more expeditiously convened; and that it can preserve or improve relationships between the parties. Discuss with your client the qualifications of available mediators, the basic role of the mediator and assist in selecting a mediator best suiting the needs of your client.

As with trial, your client will need to be prepared for the mediation session. While the client need not be prepped on the art of responding to cross examination, since it does not occur in mediation, he should be counseled on his role as an active participant. Advise him that this is his opportunity to develop rapport with opposing counsel and parties. A likable client is a successful client. Prepare your client to understand that your role will differ from that of a litigator in trial in that you will be more of a negotiator and a problem solver than a gladiator.

Be sure that your client understands the incremental process involved in the mediation negotiations, and that he has a realistic perspective of where the other side is likely to open the discussions. Make certain that you understand what is important to your client and what your settlement authority will be. Encourage your client to remain flexible and prepared to adjust expectations as a result of information learned during the mediation.

Attorney preparation

A strategic decision must be made as to when in the pretrial process the mediation will be conducted. It may be appropriate to mediate early in the case in order to save your client the time and expense of discovery and pretrial motions practice. Cases are sometimes mediated before suit is even filed. In other cases, it is preferable to wait until both sides have been educated as to the strengths and weaknesses of their positions. In the latter cases, the attorney's preparation for mediation is often as extensive as that for trial. Recognizing that this is the best, and perhaps last, opportunity for settlement, the attorney puts his best case forward.

The premediation submissions can sometimes be extensive, including pleadings, depositions, contracts, medical records and expert reports. The attorney's presentation for the opening session in these cases is also more elaborate, often involving the use of exhibits, charts, and even PowerPoint. Some attorneys have gone so far as to arrange for a brief appearance by a nondeposed expert witness in order to provide the opposition with the flavor of his testimony and his effectiveness.

The opening session

One of the most common errors committed by counsel in the opening session of the mediation is to address the mediator as if she were deciding the case. It is critical to recognize that your audience is the opposition who must appreciate the merits of your case, not the mediator. Address the decision maker on the other side of the table directly and respectfully. The term "zealous advocacy" has been replaced in the Rules of Professional Conduct with the requirement of "diligence." The comment to Rule 1:3 states that "...lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests." A courteous, cooperative attorney is more likely to win the admiration and respect of the opposition and with it a better result for his client.

Your goal in the joint opening session should be to educate the other side as to the strengths of your client's case. It is not essential to persuade the opposition to agree with your position; often a mediation agreement is reached without either side accepting the viewpoint of the other. What is critical is to inform the decision maker on the opposite side of case regarding the merits of your client's position in order that she might better assess the risks of the case and evaluate it appropriately.

It is most often helpful for the client to actively participate in the opening session. Some clients need to be able to tell their story to respectful, if not sympathetic, listeners before they can negotiate an agreement. If you are mediating a case where you admit liability, it can be beneficial to have your client offer an apology. A sincere apology has been known to save a culpable defendant many dollars.

Caucusing

The caucuses which follow the opening session provide an opportunity for counsel to clarify the issues and adopt creative problem solving strategies. As stated in the comment to Rule 1:3, "...diligence includes not only an adversarial strategy but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interests of all parties." It is essential that the client be kept actively involved in exploring settlement options during the caucuses. Make sure that your client realizes that during these sessions, the mediator will be doing reality testing to assist the parties in evaluating strengths and weaknesses. Encourage your client to share fully and openly. If you want to settle the case, there is nothing to be gained by holding your aces for trial. Lay them on the table for all to see, thereby strengthening your bargaining position. More than likely, your secret cards will be discovered anyway.

In order to reach an agreement, the client must be kept fully engaged in the process; this often requires the attorney to continually explain the negotiation process. Pursuant to Rule 1:4(b), it is the attorney's responsibility to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions...." Encourage your client to listen to the points being advanced by the other side and to search for overlapping areas of common interest. Don't assume that you know what your client really wants, but be sure that she has adequate information to make reasonable choices. As stated in the Comment to Rule 1:4, "(t)he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued...." Remember that non-legal matters are often at the heart of a dispute; hence possible solutions may include business and personal matters that would not customarily be addressed at trial.

Patience is essential when allowing the process to work. As often as not, it takes the pressure of dinnertime or even bedtime to move the dispute to resolution. If you reach an impasse, you have the option to involve the mediator by soliciting input on issues or the question of value. Recognize, however, that mediators differ in their level of comfort in assuming an evaluative role. Many mediators will assume this responsibility only if asked by both sides and all opinions are shared jointly and equally. The Standards of Ethics and Professional Responsibility for Certified Mediators require that "(w)hen providing information, the mediator shall do so in a manner that will neither affect the parties' perception of the mediator's impartiality, nor the parties' self

determination." While evaluative input may move the parties closer, ultimately it is the self determination of the parties aided by their advocate's advice that is fundamental to achieving an agreement.

Closing the deal

When the parties have reached a meeting of the minds, the agreement must be reduced to writing. This is generally the responsibility of the advocates. Some attorneys come prepared with boilerplate documents which can be adapted to the resolution achieved. Others prefer to write the agreement out longhand to fit the needs of the parties. It is important to be mindful of the holding in Golding v. Floyd, 261 Va. 190 (2001). A memorandum of agreement "subject to execution of" a formal agreement is not an enforceable contract. The agreement must do more than merely highlight terms subject to execution of another document. If it is to be an enforceable contract it must clearly manifest the intent of the parties and require no extrinsic evidence to determine the terms of the agreement.

Conclusion

The effective advocate in mediation is an attorney who understands the process and explains it clearly to his client. Strength of position during mediation is achieved by educating the opposition regarding the merits of your case and listening with an open mind. The skills of collaboration, creative problem solving, and negotiation are more important than the art of persuasion. More than 90 percent of the cases that I have mediated have resulted in an agreement. With careful preparation, guided client participation, and patience with the incremental process, your case, too, will achieve agreement.

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