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Mediator – ally, enemy, or neutral?

A look at the pet peeves of experienced counsel and mediators can help you avoid some common mistakes

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By Wendy W. Kramer

Last autumn, I introduced a panel of speakers at the Southern California Mediation Association's 23rd Annual Conference for their presentation entitled "Attorneys' Pet Peeves about Mediation." The panel was comprised of five individuals: a highly esteemed former litigator and retired judge, now full-time Mediator/Arbitrator; a very successful former litigator and now full time mediator; two highly successful plaintiffs' attorneys and an equally impressive insurance defense attorney. They all possessed courtroom chops, transactional expertise and keen negotiating prowess. What became clear at about the second "pet peeve" is that each mediator and each attorney has their own unique approach to mediation and that mediation is clearly not a "one size fits all" process.

One panelist approached his chosen mediator with what he described as a "co-conspirator mentality," all the while never surrendering any control during the process. Another stated that he firmly believes the process involves "negotiating against the mediator," not with the opposing party.

One panelist never wants the client exposed to the "other room" while the other resents not being allowed access to the opponents. One panelist prefers to approach the mediation "briefless," while another is offended when briefs are not exchanged in advance of the hearing. One panelist felt strongly that the mediator can never be trusted with confidential material, while another felt equally strongly that confidences should be shared and would be kept.

Several of the panel participants felt strongly that if an agreement was reached, the key deal points should be reduced to a writing enforceable in court, while another panelist disagreed and wanted a handshake to suffice rather than spending an additional hour or more hammering out the specific deal points at the end of a long and tiring day of negotiations.

The lesson to be learned is that the tactics useful in one room will not necessarily be successful in another. This requires footwork akin to that seen on "Dancing With the Stars." Having litigated cases for 20 years and transitioned to a full-time dispute resolution professional in both mediation and arbitration, I have found it is equally true that each mediator brings a different skill set to the table, and while that skill set may work for one type of case or litigant, it may not work for another.

Whereas one matter (or one room within a matter) may require an "evaluative approach," another may benefit from a "facilitative approach." Although many cases may seem to only involve the distributive bargaining process and negotiating a "fair" settlement, it may be that, in order to achieve a resolution, an apology is necessary, thereby giving the hearing a "transformative" aspect.

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Approaches which seem to be working at the outset of the mediation hearing may need to be completely overhauled as the day progresses. How does an attorney navigate this minefield of possibilities while achieving the best result for his or her client? I propose a reading of the following "Mediator's Pet Peeves" for guidance!

Failure to communicate

Mediators are often left in the dark to try to intuit and "guesstimate" what the parties, attorneys and insurance professionals want to accomplish in your hearing. Further, within each room, and on each side of the dispute, there may be different goals, styles and motives. There may be client control issues or a history with the client that needs to be communicated. You may need your mediator to help explain things to your client or you may need your mediator to let you do the explaining. You have already spent countless hours working on the case; you know your client and the issues you face the best. Your mediator will greatly appreciate being taken aside and given the "heads-up" on issues she or he may have no way of determining, some of which may have nothing to do with the case at hand. (For example, there may be personal issues which may affect a client's decisions regarding settlement vs. proceeding forward in the litigation process.) Feel free to communicate those issues confidentially either before or during the Mediation Hearing to your mediator. It will only serve to help your mediator achieve resolution of your matter. There is simply no downside.

Failure of timing

Has the hearing been set too soon and is it being used as a "testing ground" to determine what further discovery needs to be accomplished before a second session of mediation can result in a well-reasoned, well-negotiated settlement? Are there pending motions that need to be heard before mediation, or is the mediation timing appropriate with a motion scheduled and on calendar, but not yet heard? Good mediators are trained to be "closers!" Let your mediator know what your goals are. He or she can often provide great assistance with discovery and evidentiary issues if given the information necessary to achieve those goals, then a second session can be scheduled at an appropriate interval. Good mediation techniques can assist the parties in gathering and exchanging whatever information is important to them and the exchange of that information often removes barriers to settlement.

Failure to prepare

It goes without saying that showing up for your mediation hearing "trial ready" will maximize your settlement options. This includes making sure that you have deposed or obtained statements from all favorable (and sometimes unfavorable) witnesses and that you have completed all discovery necessary to fully evaluate your case. This also means ensuring that you have fully ascertained and documented wherever possible your client's damages and that you have considered all of the potential defenses to liability and your client's items of damages. This includes not only your client's medical specials, but any loss of earnings, alleged diminution in value of property damage, life-care plans, actuarial opinions, and expert opinions regarding the potential costs and details of any further medical expenses or other forms of care needed. Bring all of your documents to the hearing. Don't pare down your file and bring the "Jenny Craig" version! Whenever possible and appropriate, documents and information should be exchanged with your opponent prior to the hearing. This allows the defense and insurance professionals to run the information up the flagpole, so to speak, and avoids the often heard complaint that new information has just been sprung and, "Nothing can be accomplished today…"

Disrespecting the mediator or your opponent

Mediation can be frustrating. Tempers can flair, patience lost, voices can be raised, tears may flow…mediation can be messy. All of this is fine . . . it is expected, and your mediator is trained to deal with these occurrences. That said, it is one thing to express your frustration in a professional, respectful manner, and quite another to engage in unprofessional behavior. Name calling, eye rolling and character insults serve no purpose and may do irreparable damage to your position or at the very least, waste valuable time and resources, which must then be spent trying to get the process back on track.

Although as noted above, being "trial ready" is essential, it is not necessary to try your case at the mediation. Mediation presents a unique opportunity within the litigation process for candid, confidential discussions about what might or might not happen if the case proceeds to trial. Keep an open mind. Listen to the points being addressed by your opponent and the mediator. Draw upon your stores of patience, and most importantly, keep your sense of humor. Inflexibility and arrogance are not useful traits to bring to mediation and there is a vast difference between healthy vs. unhealthy distrust for your opponent and your mediator.

Dressing inappropriately

There are only a handful of attorneys who have the "presence" to pull off dressing in a casual manner for a mediation hearing. For most, appropriate business attire does indeed buy a measure of respect. First impressions are important. You are judged by your opponent not only on the content of your arguments but the package in which they are presented. I recall a hearing where the injured party's young attorney appeared in jeans (and was also chewing gum). He had just taken over the case and had not yet met the defense team. He wanted to be put face-to-face with his opponents – a 30-year insurance defense trial attorney and an experienced insurance professional. He wanted to explain why he was going to beat them at trial and why they should recommend policy limits to avoid such an outcome. His presentation did not go well. He had a good client and a good case, but he was not taken seriously, simply because he did not look the part

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(although he did follow my suggestion to spit out the gum).

It is equally important that your clients appear for mediation well dressed, well groomed and be prepared to possibly meet informally with the defense folks. Often this is the first time that the insurance professional or the actual defense trial attorney will have an opportunity to meet your client and evaluate his or her potential viability as a witness. This can tip the scales in favor of a good settlement if you have a properly prepared client who presents well.

Don't be late or forget your client

Showing up late to a mediation, really late, without an adequate reason, is a surefire way to get things started on the wrong foot. Although your mediator can get things started with the other side, there is only so much that can be accomplished without your presence. If there is something unavoidable, provide the mediator with your cell phone number so that communications can get started.

If you fail to adequately estimate the amount of time that you need for your hearing, this can result in the necessity for a second session and increase your costs. If you are uncertain how much time you need, discuss the issue with your mediator during the scheduling process. That way, he or she can schedule your hearing in a way that allows the flexibility to continue on without having to adjourn and reconvene, wasting precious time and resources.

Not bringing your client without first clearing it with your opponent and your mediator is another surefire way to get things started on a chilly note.

Conclusion

Optimal results can be achieved when you recognize that your mediator is a neutral party and yet treat your mediator as an ally and not an enemy. If you cannot trust your mediator, the process will be fraught with difficulties. The appropriate mediator's mantra is to "Do No Harm" to your case and as such, he or she will maintain strict confidentiality as requested. A well trained mediator has the flexibility to use whatever style, strategies and skills that are dictated by the parties' needs as they evolve throughout the hearing.

Wendy W. Kramer is a full-time, independent mediator and arbitrator in Santa Monica. She specializes in personal injury, business disputes, professional malpractice and complex litigation. Ms. Kramer has mediated over 1000 matters and is known for her ability to deal with difficult personalities and complex legal issues. She is the President-Elect of the Southern California Mediation Association. More detailed information can be found on her Web site: www.kramermediate.com.