

MEDIATORS SHOULD BE FACILITATORS AND EVALUATORS

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I have conducted commercial mediations for many years, attended ICLE's forty hour training seminar and received many additional hours of advanced mediation training. To my knowledge, however, none of the training seminars focus upon what attorneys and advocates ("Advocates") are looking for from a mediator or the mediation process. I attempted to find out. This article describes what I learned.

The Method

I formulated a 13 question survey and sent it to approximately 200 Advocates in the greater Metropolitan Detroit area with whom I had conducted mediations in the past. The survey inquired about various items and posed questions such as: what mediation format do you prefer (i.e., facilitative, evaluative or combinations thereof); what criteria do you use in selecting a mediator; what is the best time to mediate; should the process begin with a joint session or a caucus; do you prefer to give opening statements; is there a benefit to providing the mediator with a confidential settlement position prior to the commencement of the mediation; do you object to clients speaking directly to the opposing party in joint session; do you feel that statements made in caucus sessions should be confidential and not repeated to the other side unless authorized or should nothing be kept confidential unless specified; in cases where the negotiation is about money and an impasse exists, what is the best approach for the mediator to take; when should the mediator declare an impasse and end the mediation; and do you find discussions between counsel and the mediator without clients present helpful?

A surprising 34% of those who received the survey responded. Most provided useful detail. The results are quite revealing.

The Selection and Approach

Most Advocates in commercial disputes expect the mediator to use a combination of facilitative and evaluative approaches. They recognize that the early part of the mediation will likely be conducted on a facilitative model. As closure is approached, however, they expect -- and actually want -- the mediator to move towards an evaluative approach. Many Advocates would encourage the mediator to utilize topic specific expertise as well as knowledge of the court system and the assigned judge to provide the parties with insight about the anticipated or potential outcome.

The Advocates' apparent preference is consistent with the criteria they use to select commercial mediators. Responses revealed that the most utilized criteria for selecting a commercial mediator are:

- (a) the personality of the mediator;
- (b) the topic specific expertise of the mediator; and
- (c) the Advocate's knowledge of the mediator's effectiveness as gleaned

through past experience or recommendation.

In short, Advocates select a mediator they believe will be effective in closing a deal or settlement directly with their clients, based upon expertise and personality.

The Timing and Process

Advocates in commercial matters also overwhelmingly agree that in order for mediation to be effective some discovery needs to be taken. They also agree that mediation should occur before case evaluation. Few Advocates believe that mediation should occur prior to suit, shortly after the case is started, or after case evaluation.

Once the mediation has started, the consensus among Advocates is that mediation should commence in a joint session. However, the vast majority of Advocates report that opening statements should not be required or made since they reinforce a tone of advocacy and do not foster facilitation. Advocates report that the proper purpose of the joint session is to give the mediator an opportunity to describe the process and how the mediation will be conducted.

The responding Advocates are evenly split on whether or not submitting a confidential settlement position to the mediator prior to the start of the mediation process is helpful. They uniformly believe, however, that such confidential settlement positions are never really the parties' ultimate positions, and, that by submitting them, settlement positions may actually harden. The alternative view is that by submitting the settlement position, the mediator has an idea of where the parties are and what needs to be done in order to obtain resolution.

Confidentiality and Client Participation

Currently, the Supreme Court Administrative Office is considering amendments to the mediation rule to cover issues relating to confidentiality of statements made during the mediation process. Survey responses address this issue precisely. Virtually all Advocates favor absolute confidentiality in joint sessions and caucus sessions alike. They suggest that the mediator should not be authorized to repeat statements made during caucuses unless specifically authorized. However, in joint sessions, Advocates do not oppose clients speaking directly to opposing parties as long as the sessions are also confidential. Regardless of the approach taken, all Advocates believe it is essential for the mediator to let the Advocates know in advance how they treat confidentiality and direct participation by clients. Such disclosure gives the Advocate an opportunity to make clients aware of the mediator's desires concerning client participation and confidentiality and avoids surprises.

Impasse

In commercial mediations where negotiations are generally about money, an impasse often occurs. Often, an impasse focuses the issue concerning how active the mediator should become. Should the mediator make a settlement recommendation, offer a settlement range or simply declare an impasse and adjourn. As a corollary, when, if at all, should the mediator even declare an impasse?

Based upon responses discussed above concerning the types of mediation approaches and the reasons for selecting a particular mediator, it is no surprise that most Advocates believe that upon an impasse, the mediator should recommend a settlement number or, at least, a range for settlement. As is widely recognized, Advocates also think a mediator should weigh and balance the desire to minimize the expenses of the clients (both as to dollars and time) as well as the possibility of obtaining a resolution as part of the recommendation.

Finally, Advocates are generally appreciative when a mediator continues his or her efforts even after declaring an impasse and terminating the day's activities. This can take place by phone, email, or in person, and is a way of providing services as an intermediary or buffer between antagonistic parties post-mediation. I have found that many settlements have occurred this way.

Conclusion

The survey teaches that Advocates need to get know their mediators and what to expect from them. Similarly, mediators need to know the participants. Where a commercial mediator has previous experience with the participants, the mediator should draw on that experience to determine the best format to utilize. Where at least one of the Advocates is new to the mediator,

a preliminary conference call prior to the mediation allows all parties and the mediator to discuss what is expected. If expectations are managed by the Advocates and the mediator prior to the commencement of the mediation, the chances of mediation success increase exponentially.

The information gleaned from the survey may prove beneficial in future mediation training. Advocates have been fairly clear in describing the types of concepts they prefer in commercial cases. The primary users of the commercial mediation process are not believers in a purely "facilitative" approach to mediation. They do not view the pure facilitative approach as the best way to manage the process. Rather, the primary users in the commercial setting have expressed a desire for an evaluative format. Those who develop and teach mediation should take this into consideration and teach evaluative mediation techniques for commercial mediators so as to improve these skills. It is the Advocates who steer clients into mediation. They, as demonstrated in the results of this survey, expect that some facilitative techniques will be employed but clearly recognize the need for evaluative techniques and will be disappointed when they are not utilized. Educators in this area need to appreciate this and be careful not to ignore instruction on evaluative techniques.

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