Federal Court Training
Doing the Best Mediation You Can
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Linked from "Stone Soup: Takeaways From New Hampshire Mediation Training"

Q: War stories situations from hell?

Plaintiff is convinced the case has a certain value based on information from uninformed friends and acquaintances who deem themselves "experts" on the value of the case, which results in unreasonable expectations.

Defense counsel and defendants not agreeing about exposure and how the system works.

Person with authority is not available or not in attendance. If they are not in room, they have no skin in game.

Q: Good mediation experiences?

When parties are not emotional and are prepared, not emotionally invested or at least not acting from emotion.

Lawyers who are involved and have prepared clients for the process and case.

Lawyers who have good rapport with clients.

Lawyers who have prepared an effective confidential statement that client understands; laying groundwork in advance.

Post-mediation follow up by mediator when no settlement is reached during the mediation usually leads to settlement.

Lawyers who allow clients to speak, participate, and be heard.

Q: Joint session - When and why?

As a lawyer, caucus is opportunity to reality test with clients. Lawyer shares with mediator confidential issues that can be better dealt with when not in joint session. Tough to discuss strength of case in joint session. But joint session is effective for clients who need to be heard.

Joint session is used to see what the dynamics are between parties and how they might be able to shape the dynamic moving forward.

In 20% of mediations, lawyers will say no joint session is necessary and mediators will try to talk them out of it. Mediators push for the joint session because they often find out that people never have met each other. Mediators need to suspend parties' love affair with their own case and hear the other side.

Usually corporate clients have rigid requirements. Joint session helps those representatives hear the human side of the other party's case.

Power of joint session is having parties speak so they aren't blinded by the law. Humanizes the case. Parties need to hear compelling story that might come out at trial.

As an advocate, I hate keeping parties together. As a mediator, I want to do it as long as possible.

Some people are increasingly seeing defendants not wanting to have an opening session, make a statement, or hear from parties. Perhaps this is a concern it will increase unproductive emotions.

As a mediator, I often ask parties to keep emotions down and listen during the joint session.

Separating parties seems to lose something in the process.

There's a concern that a joint session is a Pandora's Box. If you let emotion out, one is concerned won't get it back in the box. But that emotion could be necessary to get to settlement.

Q: Is the fact that NH is a small community related to disappearing joint session?

[generally not]

Mediators seem to think it is helpful, but advocates are less convinced.

In small claims mediations, the joint session often the only way to resolution. Emotions are where parties get to the end point.

People should differentiate what makes attorneys uncomfortable vs. what is successful. Sometimes emotion is more uncomfortable for the attorney than the parties.

Q: Pre-mediation memos

As mediator and advocate, I think the memos are useless. I would rather have a useful confidential statement. I want to know what are the real issues we need to resolve to get to settlement.

Rare to get that info in a document.

Q: What makes pre-mediation memos good?

Lay out issues but also the obstacles they see to settlement. Also include what has happened to date.

As plaintiffs, we try to say everything but it seems like the defense statements are just fluff with very little substance. This annoys plaintiffs who made an effort to be thorough.

Confidential statements are the exception in NH.

Q: Would it be useful to start providing confidential statements more often?

Memos are good to provide important chronology and specifics on damages, which is good to have shared. Good for all parties to hear that.

Out-of-state lawyers often submit confidential statements, because that is the common practice outside of NH. As a mediator, when I get those confidential statements, I will work to get that attorney to share the statement with the other side during discussions.

Q: Pre-meditation conversations: Why not more? What makes them effective?

One mediator uses conversations to get what otherwise would be in a confidential memo and finds the conversations very helpful.

The states around NH have very different court-connected and private mediation practices.

Young or less experienced lawyers think ex parte pre-mediation conversations with mediator are not permitted or are wrong. As a mediator, if parties do not call, sometimes I call them before mediation.

<u>Employment Case Role-Play Comments</u>

Q: Parties/lawyers - what did the mediators do well?

Mediator was patient and persistent. He didn't let comments rattle him. He stayed on course with the questioning he wanted to pursue.

The mediator set a good tone to promote rapport. The mediator was respectful, calm and candid.

The mediator was very familiar with the personalities and was prepared for an uphill battle. The mediator began productively by trying to get agreement on less contentious issues, i.e., the concept of a confidential agreement with some resolution; need to find new employment; need for work reference; both parties were respected in the industry and respect was important to both parties.

Listened carefully and learned what heard to ask questions to get to heart of issues. The mediator was nonjudgmental and let the parties feel heard.

Q: Mediator - what think you did well?

It was difficult at the beginning of the joint session because the defense counsel had a conflict of interest that was just disclosed. Also, his client said he only had an hour to mediate. I dealt with those issues patiently and calmly.

I experimented with pre-meditation conversation and indicated an expectation of self-determination among the parties.

Q: What was difficult?

Finding when it was appropriate to admonish parties to stop negative comments that were unproductive.

Tried turning unproductive comments into a question back to them to further explore the underlying issues.

Q: Lawyers what you do think that worked well?

Should have done better job making sure client did not blurt things out that are unproductive.

Thought the joint session was productive overall. Helps mediator to show can s/he can listen to both sides and is even-handed.

Letting the parties in joint session vent at each other, then put those emotions aside.

Mediators need patience and time to be willing to work through issues and circling back to them to finally get resolution. They should not be too rigid in trying to resolve one before move on to the next.

Venting can be productive and is not linear. Mediators need to be flexible to accommodate that circumstance. Staying in joint session is the best way to do that.

The mediator sussed out common ground to become the focus point on agenda to move the mediation forward.

Q: Regarding the apology? Anyone get that resolved?

One group got it and that helped ease way to resolving the other issues.

Mediator challenge was that it was difficult to get one party to start venting / get off his chest what he wanted to because his lawyer did not want him to speak. But once party was able to express his feelings, things got easier.

Q: Lawyer-client pairs: Was mediation different because of your preparation together?

Helped define the issues and the importance of those issues

Q: What do you think about the amount of time for mediation?

Long day of mediation is grueling for plaintiffs. So efficiency in process is better for plaintiffs.

Mediation is no less important than a trial and parties need just as much work, preparation, and commitment.

Need patience and time to keep people patient.

Some people use time - running out of it - as a face saving excuse

Afternoon Session

Q: Why do so many mediations end up occurring shortly before trial?

Because lawyers want to know as much as they can about the case before they mediate.

Emotionally, parties are not ready to resolve the dispute until eve of trial.

Parties have spent a lot of money to get to that point

Q: Where is the sweet spot?

After expert report disclosures so that lawyers know enough. They may not need to wait until after depositions of experts.

After paper discovery and depositions of key players.

Q: How do you get to the sweet spot?

Work with opposing party to agree on what needs to be exchanged to get to mediation.

Plan for what you really need. But this seems to be exception not the rule.

Q: Why not mediate early?

Clients are less likely to settle early because they are still charged up about the situation.

Plaintiff may not know the full extent of damages.

Q: Why mediate if you have a good case?

Because costs to litigate may be more than what you can get if you mediate quickly. How much do you want to spent to win a great case?

No matter how good the case is, there is always risk. Settlement mitigates risk.

Time to trial, appeal, etc. result in a long time to resolution.

There is always a nuance that cannot be resolved by a trial that you can more likely address in mediation and settlement.

To maintain more control over outcome.

Q: Why (or when) mediate rather than negotiate?

When it is really hard to communicate with opposing counsel.

When you are expected to mediate not resolve by negotiation.

Experienced mediator is more likely to be able to work through difficult issues.

Maybe start with negotiation and then move to mediation if it is not working

It is easier for clients to say “no” when they are not in the room at a scheduled mediation.

It helps for clients to tell their stories to a person (mediator) they associate with court process, which helps resolve the case.

Climate for settlement can improve with the investment parties make to get to mediation.

Q: Why not call mediators in preparation for mediation?

Mediator impartiality concerns about ex parte conversations.

Question may be what is a party trying to achieve with a pre-mediation conversation with a mediator.

It can help if mediators are transparent and let parties know will have confidential conversations with each side.

Q: Is it a good idea for lawyers to talk with the opposing party pre-mediation?

Maybe, if they will exchange needed information.

It can help to make sure the other side has what they need to mediate successfully.

It can help to work out logistics, e.g., preparing a common set of documents.

It can help to work out some terms that can be part of a final settlement which can be agreed to in advance.

Q: What preparation in your cases has been effective?

In death cases, there is a real need to prepare clients emotionally for the process, to try to prepare them for the offensiveness of talking about money as a way to redress a death.

Prepare your client not to be offensive.

To learn information from clients that you need to be better prepared, including information that might be shared with opposing party so they are ready for mediation.

Debrief Simulation of Commercial Dispute

Q: In client-lawyer meetings, what was useful?

Each picked up on different information about the case.

My lawyer made it seem like we should litigate not settle because we can win at trial.

Lawyer listened well to client.

I just wanted to find out what my client wanted. I asked what my client would do while litigating if opposing counsel laid out a very confrontational case and pressed for a particular solution. The client responded by asking, "Ok, what if we do that, where does that take the parties?," which changed the dynamic.

Listened to client's anger and then getting client to reflect on that feeling without telling the client to calm down or be reasonable.

Q: Mediators: what did you do well in meeting with lawyers?

Wanted to know whether clients were interested in a continued relationship. Tried to find some common issues to work on.

Tried to get a list of what are the potential problems that the parties will need to overcome.

Q: Lawyers: what did mediators do that worked well in preliminary meeting with mediator?

Had suggestion to get a third party expert to come in to give opinions or "hot-tubbing," where both side's experts meet together.

Mediator asked critical question: if parties have considered how ending contract would impact their respective businesses.

Mediator asked is there anything that will be an impediment to mediation being successful.

Q: How did mediators help the attorneys during the mediation session?

Mediator delivered a message I haven't been able to effectively deliver to my client.

Helped communicate better with opposing party.

Create a safe place for client to express self.

Q: What worked well in the simulation?

We never broke up into separate caucuses because the players were experienced business people and experienced attorneys and got to business.

Because of the personalities, joint session was not productive. So breaking out into caucus was productive and creative ideas came out.

Mediator kept clients talking when it was clear that the attorneys were the impediment.

Identifying common ground quickly so we could move to areas that needed to be resolved.

Mediator suggested a process by which the mediation could work with a neutral expert that neither party liked but got the mediation to progress.

Mediator had good tone. Mediator set objective of “don’t we want this to work” that the parties ended up adopting. Always actualizing what the agreement would look like as we discussed specific points.

Mediator worked on a loss of trust between the parties to create some safeguards in place that were necessary to get to a resolution (i.e., penalties if parties fail to perform contract and proof of ability to pay or penalties for late payment).

Let parties take over when they were making progress on their own.

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