Perspectives On Mediation: Which Do You Endorse?

Articles August 29, 2018

This article appeared on the American Bankruptcy Institute's website.

A recent article in the Lawyers Journal published by the Allegheny County Bar Association "Early Neutral Evaluation in the Western District of PA," Vol.20, No. 10, (May 11, 2018), addressed the early neutral evaluation and mediation opportunities that are part of the mandatory ADR program in the United States District Court for the Western District of Pennsylvania. In that program, the parties may choose ENE, mediation or arbitration. An interesting statistic provided that in 2017, 18 percent of parties in eligible cases chose ENE and 80 percent chose mediation. Of those in ENE, over 50 percent morphed into mediation before the neutral provided the evaluation called for in an ENE scenario. In that federal court, approximately 89 percent of eligible cases go through mediation fairly early in a case. Statistics like those enable many mediators to hone their skills.

Mediators, like most facilitators, want to be prepared for the task at hand. When asked what she wanted from the parties, Patricia L. Dodge, the experienced mediator featured in the Lawyers Journal article expressed the desire that both counsel and the parties commit to the process and not just go through the motions. In her opinion, commitment requires counsel to fully prepare clients for the process they will encounter during the session. And while counsel must be prepared to present their positions and respond to questions, they must also keep an open mind and listen to different viewpoints from the other parties.

In my discussions with mediators across the country, I like to ask whether the mediator wants a written summary or argument in advance of the in-person session. I hear different answers to this question. Generally, the answer is "yes," a summary of the relevant facts and law and a brief statement of at least the opening position the party intends to take are viewed as helpful. Many mediators conduct a pre-mediation conference call to discuss what should be submitted, whether the information will be kept confidential or be shared, and a timeline. When written pre-mediation statements are submitted, a practice point I recommend is to include all relevant documents with the statement so that the mediator's time during the session is not devoted to seeing material for the first time. A better use of the mediator is to assist in keeping the conversation going when the parties are together.

Some mediators point out that circumstances do not always lend themselves to sending the mediator a written statement in advance of the session. Perhaps the issues do not warrant that level of detail or perhaps the parties do not have the capability or time to put together a document that fairly addresses what the mediator would like to have, even when producing it would assist the mediator.

Some mediators explained that they do a substantial amount of pro bono mediation for parties who cannot afford counsel or facilitate in situations where a lawsuit has not been filed and the mediation is an effort to reach a consensual resolution of a problem without the need for lawyers.

When a lawsuit has been filed, mediators may want to read pleadings from the docket and other information that is available about the case, even when the parties are reluctant to pay for the time involved in all that reading and any analysis that flows from the information. Although the parties may have a clear goal in mind, that may not always expressed to the mediator. Learning what has happened in the case before the mediation begins can provide insight into those goals and clues to a creative solution that will assist the parties in revising or reaching the objective.

Uniformity seems to exist on these topics: When the mediation session is not held in the mediator's office, mediators appreciate the courtesy of parties who bring copies of all documents to the session. Providing a separate office space for

the mediator is always welcome. Making snacks and beverages available during the day as well as lunch is helpful too.

Many mediators prefer to have a written document that summarizes any agreement reached before the parties leave the final session. Some, expressing the opinion that any agreement should clearly be seen to be that of the parties without any influence by the mediator, prefer to defer documenting a settlement, to provide the parties with a cooling off period that is not as pressure- sensitive as the session itself.

Wherever you find yourself on these issues, mediators are committed to using their best efforts to assist the parties in resolving their dispute in a consensual manner that, hopefully, they believe to be better than the alternatives they face. The benefits of a negotiated solution are legion: shutting down the on-going costs of the conflict, staving off trial and/or appeal, going home without the need to waste more time and energy on a matter that is emotionally or financially draining, putting the matter behind and taking a step forward in a new direction. All these and more.

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