IADC COMMITTEE NEWSLETTER

ALTERNATIVE DISPUTE RESOLUTION

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IN THIS ISSUE

With costs of taking a case to trial escalating, parties are turning more and more to mediation as a form of resolving litigation. Have you ever thought about becoming a mediator? What skills and traits make effective mediators? And how can you be a more effective advocate for your client in mediation? This article briefly discusses traits of effective mediators and how you can become a better advocate for your client in mediation.

So You Want to be a Mediator?
Brief Thoughts on Traits for Effective Mediators and Becoming an Effective Advocate for Your Client in the Mediation Process

ABOUT THE AUTHOR

Anthony W. Livoti is a shareholder of Murphy & Grantland. Anthony concentrates his legal practice in the areas of insurance defense, trucking and automobile defense, and premises liability. He also is a certified circuit court mediator and has experience in both State and Federal Court. He is a member of the Richland County Bar Association, South Carolina Bar, International Association of Defense Counsel, South Carolina Defense Trial Attorneys Association and the Defense Research Institute. He can be reached at awlivoti@murphygrantland.com.

ABOUT THE COMMITTEE

The Alternative Dispute Resolution Committee serves all members who use mediation and arbitration to resolve disputes, as well as those who have become mediators or arbitrators in their own practices. The Committee publishes newsletters and is developing as a global resource for our international members, corporate counsel and insurance executives, to offer expertise on negotiating and drafting alternative dispute resolution provisions and on the effective use of alternative forms of dispute resolution. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

Scott H. Sirich
Vice Chair of Publications
Plunkett Cooney, P.C.
ssirich@plunkettcooney.com

As jury trials become more expensive (and rare), alternative dispute resolution (ADR) has become an essential way of resolving lawsuits. ADR can take on many forms: it can be formal (an international arbitration), informal (opposing counsel meeting for cocktails to settle a case), or dangerous (dueling pistols). Fortunately, the more dangerous methods of ADR aren't utilized any longer (duels are banned in almost all 50 states). But one area of ADR that has seen tremendous growth is mediation. Mediations are utilized more and more to resolve lawsuits. Many jurisdictions, on both the state and federal level, require mediations before cases go to trial. Chances are that if you are a litigator, you have been involved in mediation. And you likely have been involved in mediations where the mediator was very effective, ineffective, or an additional advocate for the other side. What makes some mediators better than others? What skills are really useful in becoming an effective mediator? And how can looking at these skills make you more effective either as a mediator or as an advocate in a mediation?

I have been a certified mediator in South Carolina since 2013. The training to become a certified mediator here is long and intense: it is a 40 hour course taught over a five day period. Like many defense counsel who go through this training, I was hoping to learn those "magic words" that mediators use to get the plaintiff off their ridiculous policy limits demand and get serious about settling their case. Unfortunately, there is no such magic phrase. But I did learn more about the mediation process, traits for effective mediators, and what things are important to helping the parties resolve their dispute. In the short time I have acted as a mediator, I have observed what I believe to be traits of effective mediators and things defense counsel can do at mediation to create a conducive environment for settlement.

An essential element that the instructors focused on over and over is that mediation is a "self-determining process." The parties are the ones that come together to make agreements to settle a case; decide how they want the mediation to go; and are the ones who make the decisions to settle the case. The mediator is a "neutral" who is there to help steer the parties toward agreement and not to make decisions. However, we have all been in mediations where the mediator isn't necessarily making any decisions, but is surely letting everyone know what he or she thinks. There are some mediators that will even identify an area where an attorney may not have been prepared or may have missed some key point, and the mediator steps in as a "pseudo-advocate." Some mediators go from "facilitators" to "evaluators," evaluating the potential value of a case and sharing opinions with the parties. That can sometimes be tricky and potentially affect the mediator's role in being a neutral facilitator to help the parties settle the dispute. A mediator is not an arbitrator or a judge and is generally not there to make any decisions. For some attorneys who become mediators this can be tricky because, as litigators, we are trained to see a problem, attack it, and advocate for our

clients. One key trait of a successful mediator is to resist the urge to jump in and advocate for one side or the other and make decisions. An effective mediator is one who listens and asks questions to get parties to evaluate and re-evaluate their positions to move the parties toward resolution of the dispute.

Of course, that is sometimes easier said than done. How do you get parties who are entrenched in their positions to view a case differently or to begin to see the other side's point of view without deciding anything for them or injecting your opinion into the process? One of the key skills discussed in our mediation training is active listening. As a mediator, I often mediate personal injury disputes and the injured plaintiff is usually the only person in the room who is new to the process. I will often talk to the plaintiff in the first private caucus and ask them to tell me their story to help me learn a bit about them. I will ask about the incident, how this has effected them, and what they hope to get out of the case. Active listening involves hearing what the other person is telling you, and repeating it back to them in some way to let that person know they are being heard. Often as I try to summarize something a plaintiff has told me, I will finish with "do I have that right?" This gives the person a chance to tell me if I have it right and correct me if I don't. That also accomplishes the goal of making sure the person (often an emotional and upset personal injury victim) feels like someone has heard their story and validated their feelings.

Dealing with emotional parties in mediation is not just limited to personal injury actions, however. How emotionally involved do you think parties can be in business disputes? Companies that have done business together for years but now find themselves disagreeing about something can get very emotionally attached to the dispute. Or how about in employment litigation? Workplace litigation is filled with emotion, on both sides. Or how about construction defect litigation? Do you think the homeowner whose dream house is now falling apart does not have some emotional connection to the case? Nearly all disputes have some emotional component to them. As a mediator, it is important to be able to actively listen to the parties, to validate those feelings and emotions, and then be the facilitator in getting the parties to move past the emotional component of the case and focus on resolving the dispute.

Good mediators are also patient. The mediation process takes time and requires patience from the participants. Many times, as defense attorneys we see a path to resolution and want to move there quickly. "Why can't the other side just see the case our way? Why is this taking so long? They are being so unreasonable." In opening caucuses, I tell the parties that mediation is a process. It often takes time to work through some of the issues involved in the case. Being an effective mediator requires patience to help both sides get through the emotion, or intransigence, and to get serious about resolving the dispute. An effective mediator looks for ways to keep the parties engaged in the process. Continuing to talk to both sides, asking

probing questions, and listening to the answers is a way to keep parties engaged in the process to move toward resolution.

From my brief experience as a mediator, I see neutrality, active listening, patience, and helping parties move beyond emotion as some key traits to being an effective mediator. Yet after conducting mediations as a mediator (and participating in them as an advocate) there are also things I have observed that defense counsel and their clients can do to create a more effective mediation process.

Nearly all mediations I conduct start with an opening session or caucus. I use this time to explain to the parties my role and what will take place. Once I have concluded my opening remarks, I invite the parties to tell either me or the other side about the case. More and more attorneys are using this as an opportunity to speak directly to the other side. This is an opportunity for defense counsel and the client to make an impact on the other side, either positive or negative. When the plaintiff's attorney or the plaintiff are giving their opening, are you giving the other side your full attention? Are you making eye contact and showing the physical signs that you are listening? Or are you typing notes on a computer or fidgeting with your phone? How about your client? I once attended a mediation with a claims adjuster and he continued to type on his computer and do work while the plaintiff's attorney and I did our opening statements. By doing this, the adjuster sent the message that he wasn't' focused on the process and he was more concerned with something on his computer. By focusing on the plaintiff's attorney and the plaintiff in openings, you can convey that you are there to hear what the other side has to say. Oftentimes, if a party can tell their story and know that someone has heard them and acknowledged what is important to them about the dispute that can go a long way toward resolving the case. Use that time in openings to communicate, both verbally and non-verbally, that what the other side has to say is important. You might not agree with everything they say, but they have a right to say it. Letting the other side know they are being heard communicates that and helps diffuse emotion, creating a conducive environment for settlement.

How about the openings for defense? After you have done a great job of listening and being respectful, you can blow up a mediation by making antagonistic, sarcastic, or disrespectful remarks. There is a way to be powerful but low keyed; to make your point forcefully, but not in a demeaning or degrading way. You can tell a plaintiff that you do not think they have much of case without being insulting or disparaging. Oftentimes the mediation may be the first time a plaintiff hears they have problems with their case. Which way do you think is more persuasive and would lead to resolving the case: Antagonizing and demeaning a plaintiff or pointing out weaknesses in their case in a respectful and measured way?

Just like trial work, mediation is most useful when the parties are prepared. Preparation includes knowing the strengths and

weaknesses of your case, as well as the strengths and weaknesses of the other side. Preparation also includes anticipating arguments from the other side and being ready to deal with them. An effective mediator will ask probing and challenging questions of both sides about the case; be prepared to an answer them so the mediator can utilize that information to challenge positions and assumptions the other side may have. All of this moves the parties closer to resolution.

Whether you are thinking of becoming a mediator or are representing clients in a mediation, the skills and traits discussed here are useful for bringing about resolution of cases. Mediation is about finding the areas of true disagreement in a case and continuing to evaluate those areas to reach compromise. As a mediator, it is important to continually listen to the two sides, ask questions, and challenge the parties' positions and assumptions to bring them to a decision point to settle the case. As an advocate, it is essential to be prepared and to examine critically the strengths and weaknesses of your case to find areas for compromise to bring about settlement. Utilizing some of the skills and strategies discussed here can help you present an effective case during the mediation conference, zealously and respectfully advocate for your client, and bring about a settlement of your dispute. It's certainly better than dueling pistols.

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