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Court Mediation and Some Thoughts about Mediation

by Judge John M. Lewis (retired) - for the Charles Doe Inn of Court

During my time on the Superior Court, I mediated many cases. I made it known I would do this if the parties thought it worthwhile. I mediated personal injury cases, business/contract/employment disputes, land issues, municipal controversies, and family problems.

I was most successful when I was able to establish a willingness to compromise-- to have each party recognize, at least to some extent, the other side's point of view; to have each party understand that by reaching a mediated settlement the party would be walking out either feeling she/he gave too much or received too little. I talked about mediation as being a bit like going to the dentist—short term pain for long term relief. I emphasized that a court decision did not always result in a satisfactory resolution, and that when parties were able to work a dispute out by themselves, this was, more often than not, the best thing.

Before starting court mediation, certain understandings and conditions needed to be placed on the record. First, the parties had to agree that my functioning as a mediator, with all that that entailed, would not serve as a ground for my disqualification if mediation failed. Second, the parties had to agree that I could meet with each party outside the presence of the other side, and that nothing said or done during the mediation would be admissible as evidence in a trial, or considered by me if I had to decide the case.

I would usually first meet in chambers with the lawyers alone to discuss the status of settlement. We focused on what was obstructing resolution, and we were often able to come up with approaches that had not been tried before. If an earlier mediation had been attempted, we discussed why it had not succeeded. I sought to have the attorneys identify the facts not in dispute and agree to the range of remedies we needed to consider.

Next, I would meet with everyone. We would review what mediation entailed: hard work; often frustrating interactions; the removal of the litigation hat (with the attitude that I am out to "win") and the donning of the "problem-solver" hat. While the parties then had a judge's attention, I could not force them to settle, but could only assist them in reaching their own resolution. I usually did not wear my robe during mediation and took the time to shake the hand of each party and get each to feel more at ease. I sought to discuss the parties' relationship and communication difficulties.

Sometimes, the lawyers would make presentations; sometimes they would not. I knew the case well, and offered my understanding of what I thought the material facts, disputes and contentions were. Sometimes an attorney would seek to correct something I said, and

sometimes the parties themselves would offer statements. The process usually went well; I insisted upon politeness, courtesy and respect.

We reviewed the respective settlement positions, and I then usually started to meet with each of the parties separately. I usually started with the plaintiff, and used all the mediation techniques I knew to get the parties to come to a resolution that each recognized to be a compromise. I generally employed a mixed facilitative/evaluative approach. I did engage in discussion, when I deemed it appropriate, going to the strengths and weaknesses of each party's position, to include the expression of opinions as to settlement value and offers and demands; and, if the case involved a jury trial, I discussed the challenges this presented. I reviewed the costs entailed in pursuing the litigation and the benefits of compromise. I tried to understand where a party was coming from, and what the party really needed to end the matter. As the mediation proceeded, I sometimes would meet just with the lawyers, if I thought this would help communication and achieve progress.

Sometimes the mediation would take a full day (with me on occasion doing other things while the parties worked without me or the lawyers fine-tuned proposals). Other times, the mediation session would conclude after a few hours or a half day. On occasion, I did more than one day.

I had a high success rate. I was helped by the circumstance that I was a judge and the parties certainly experienced a certain cathartic effect in proceeding before me. They were in a way having their day in court.

I very much enjoyed the success of a mediated result—actually more so than opinion-writing.

Where you think it is worthwhile, I encourage you to query the judge before whom you appear to consider doing a mediation. If a case is settled, the judge also enjoys a benefit. After all, a trial involves the devotion of a good deal more judicial resources.

Let me add some additional far from exhaustive thoughts about mediation.

First, be as prepared as you can be and work to get your client ready for the process. The client needs to be ready to compromise. Mediation often has a strong element of emotion, and it is important to have clients ready to hear what they do not want to hear. Clients need to be aware of the litigation costs involved if mediation fails.

Second, select the mediator with care, be aware of her/his style and approach (evaluative, facilitative, a “mixed” approach depending on the circumstances), and talk to her/him in advance concerning how the mediation will proceed, and other matters. Provide a good mediation summary, and other pertinent documents the mediator would need to understand the case. Bring draft settlement documents to the mediation. Work out arrangements respecting confidential information you wish to give the mediator. Be aware that multiple party mediations present their own particular challenges.

Third, make sure all essential persons attend the mediation. Also, be ready to deal with lien issues, to include Medicaid and Medicare liens. Pick a good location for the mediation.

Fourth, do not give up at the first sign of impasse, or even when impasse seems impossible to overcome. Persevere and expect the mediator to do so. Remember, mediation is a process and all participants need to hang in there, through thick and thin, for it to work. Expect the mediator to employ all the tools she/he possesses to break an apparent impasse, including “bracketing” efforts, and other techniques to have the parties get closer and work out their differences. The mediator should expect “impasses” and is there to overcome them.