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Jurisdictional Defenses – Opportunities And Responsibilities

A Blueprint for Mediation

by Andy Flink

We all know the purpose of mediation is to initiate discussion that will ultimately lead to settlement; however, there is a good chance your client will appear at mediation feeling nervous, anxious and quite uneasy. Who could blame them? They are about to negotiate with a soon to be or current ex-spouse over very important issues, and a deal if reached will affect them and their family for years to come.

My job is to ensure that everyone in the room is at ease and that your client becomes very comfortable talking to me. While I need to hear the legal side from you I want to hear the personal side of the dispute from them. They are about to share information that is extremely personal, emotional and sensitive in nature. As the guardian of the process I must assure them that I am not only listening but really hearing what they have to say. Perhaps this is the first time they have been given an opportunity to share their concerns with someone outside of their immediate "circle." Giving your client that opportunity is critical to their attitude and will affect how invested they become in the session.

At the onset I'm watching everyone's body language. Who is appearing open and engaged and who is off to the side arms folded looking down and focused solely on their laptop? If in a joint session any party is showing these signs I will immediately break to caucus (and most likely stay in caucus). Although offers will then be relayed back and forth between each room I remind both clients and attorneys that they may receive an initial offer they'll consider highly unreasonable. It may take anywhere from four to six or more rounds of negotiations before the parties start to feel they are making progress or reach a deal. Rarely does the first offer get accepted.

There are all kinds of tools I can use in mediation to help parties along if the negotiations begin to bog down and progress slows to a halt. Two shifts I may initiate is to either meet alone with the attorneys or alone with the parties. That is where I hope to recreate a venue of progress and when I will try to be as detailed as possible about what the real issues are that both sides are trying to settle. Small misunderstandings can turn into large gaps in mediation, and what might be trivial to one side could be monumental to the other. I must also make sure I manage my time reasonably and do my best to provide each side a similar amount of time and the same opportunity to explain their side of the equation.

But is that really the case? Does "being fair" mean that I must spend the same amount of time with each side? I've had parties state they would only pay 25% of my fee since I spent 25% of the total time with them. In other cases parties are appreciative I spent most of my day in the other room. One attorney put it best by stating: "we want you in there, not in here. If you are talking to them and reality testing with them it stands to reason that you are explaining to them why our offer makes sense." "By nature we believe that means they are helping us get closer to our terms."

Regardless of which room I am in, the more engaged all of the parties are in the mediation process, the greater the chance there will be progress and perhaps a settlement. Your mediator needs to get everyone on that "same page" and once they do must focus on details and issues that are paramount to each side. If the mediation progresses to this point then the probabilities of making significant progress are increased exponentially. There's even a chance that the case you never thought would ever settle in mediation ends up reaching full agreement.

That's a blueprint for mediation: the combination of creating actions and ideas that allow those involved to maintain an open mind and positive attitude – leading to continued negotiations within an atmosphere of common ground eventually leading to a positive conclusion. **FLR**



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