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Helping people resolve disputes since 1990
Mediation Services, Mediator Certification Classes, Continuing Mediator Education

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EFFECTIVE MEDIATION ADVOCACY
OR
"DID YOU REALLY JUST SAY THAT?"

What should you do, and not do, in order to make the mediation process as productive, helpful and effective as possible?

Goals: 1. Gain a better understanding of the unique opportunity mediation presents to resolve disputes, and, where possible and desired, to preserve and build relationships;

2. Gain a better appreciation of the importance and value of proper preparation for mediation, of yourself, of your client, and of the mediator;

3. Gain a better understanding of the mediation process as it is designed and intended to work in Florida, of the role of the mediator, and of the potential, and limitations, of the mediation process;

4. Understand that the Rules/Ethical Standards/Standards of Conduct for Certified and Court-Appointed Mediators are vital to the proper functioning of the mediation process, and to the confidence placed in the mediation process by the Bench, the Bar and the public.

TOPICS FOR DISCUSSION – INEFFECTIVE MEDIATION ADVOCACY

How would you react to the following, and how might these scenarios affect mediation?

1. In joint session with all parties and counsel present, lawyer A says to lawyer B, "I don't know how long you have been practicing, but clearly you have never been before Judge C, if you think she will agree with the preposterous position you are taking in mediation."

How would you handle this as a mediator? As the insulting attorney? As the insulted attorney?

As difficult as it might be, the better practice is to exercise restraint and discuss your sentiment privately with the mediator. The mediator will then be in a better position to discuss privately with opposing counsel, in a less inflammatory way, how a judge might respond to a position taken in mediation.

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2. While explaining the confidentiality of the mediation process, one party expressed the desire to have a non-party (in this instance, her father) either present in the caucus room of that party, or, if necessary, waiting in the hall, but available for discussion and consultation about what was happening in mediation. The other party objected to the participation of a non-party, and threatened to terminate the mediation if the non-party participated. Counsel for the party requesting the non-party participant, stated that confidentiality applied only when the mediator was present and, therefore, his client could talk about what was discussed in mediation with whomever they wanted so long as the mediator was not present. The mediation resulted in an impasse when opposing counsel refused to allow the father to participate in the mediation.

What can the mediator do, beyond, perhaps, discussing privately with counsel the application of Chapter 44? (In this instance, counsel did not budge in his position.)

Chapter 44, Fla. Stat., the Mediation Confidentiality and Privilege Act, lists six exceptions to confidentiality in mediation. I have yet to find a "father – daughter" exception listed in the statute. This should go without saying, but counsel should know and understand the nature and extent of confidentiality in mediation. Review Chapter 44 from time to time.

These two examples illustrate how an opportunity can be lost, or at least temporarily derailed, by ineffective mediation advocacy, in these instances, by insulting opposing counsel, and by not understanding how confidentiality applies in mediation.

What other examples of ineffective mediation advocacy can you think of?

EFFECTIVE MEDIATION ADVOCACY

What does effective mediation advocacy mean and look like to you?

1. Understand and explain to your client that the mediation process is very different from the judicial process. Relevant Standards of Conduct for Certified and Court-Appointed Mediators: Rule 10.210
   Rule 10.220
   Rule 10.230

   You likely know about these Standards. Your client likely does not.

Another key difference between mediation and court: What happens if you or your client get "ticked off" at the judge, or opposing counsel, or the other party? In court, not much. In mediation, depending on the circumstances and the actions and reactions of all involved, the process can blow up.

Rule 10.420(b)(3)

2. Prepare. Prepare. Prepare. Prepare yourself, prepare your client, prepare the mediator. Also remember, you are preparing to negotiate, not litigate.

Preparation means, among other things, to know, and make sure your client knows, your weaknesses as well as your strengths;

In addition, know, and make sure your client knows, the strengths and weaknesses of the opposing party.

If you know and trust your mediator, the above information can be invaluable in helping the mediator help you, by having the candid and sometimes difficult discussions that need to be had in caucus, so that the process can move forward in a productive fashion. A well informed and well prepared mediator can be invaluable in helping you deal with not only your client's expectations, but also in talking with you and your client intelligently and persuasively about the strengths, weaknesses, risks and uncertainties that exist in every case.

1. How and why should you approach and prepare for mediation differently than trial? Mediation is not court. Court orders parties to attend mediation. Court does not order them to settle.

2. Why you and your client should be aware of Mediator Standards of Conduct. Mediator Standards of Conduct provide that any party can leave at any time (10.430(b))

A. What does this mean?

As a practical matter, if lawyers and/or clients approach the process in an overly aggressive fashion mediation may be over before it has even started.

To which Mediator Standards of Conduct should you pay particular attention?

Process is different, unique. Can, if handled properly, provide an unparalleled opportunity to resolve differences, preserve confidentiality, minimize cost and legal exposure, forge new business relationships. At a minimum, can allow parties and counsel to design a road map for how best to navigate the dispute and simplify and crystalize issues if not resolve them outright.

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Here's the catch: if you treat / prepare for mediation like a trial, you may still reach a resolution, but it is less likely.

B. How do you prepare?/Schedule sufficient time for mediation; How to most effectively prepare for mediation.

Different mind set than litigation (for you and your client)

we are here to negotiate-- today / this process is the day /opportunity to resolve at lowest cost, least exposure– or to create the opportunity for such a resolution at some point in the near future– after necessary discovery (formal or informal), investigation, input from experts, etc.

C. How to most effectively prepare your client?

Same considerations as above, but you have to really believe it in order to convince your client that this isn't "just another hoop" before trial.

D. Why and how much should you prepare the mediator for mediation? How do you prepare the mediator? Note: to not do so, or to give this consideration short shrift, does a tremendous disservice to your case and your client.

Hire a mediator you can trust with your weaknesses, opposition's strengths, your negotiation strategy; This information is vastly more valuable to the mediator and can help the mediator help you and your client far more than a sanitized restatement of the facts and all arguments in your favor.

The significance of confidentiality in mediation (Chapter 44, Fla. Stat.) Mediator ethics protect you/your client/ the process– confidences can be shared with the knowledge that any breach by the mediator can and will be met with serious sanctions.

What to do if you seriously think mediation will be a waste of time: Consider alternatives to mediation: early neutral eval; arb/med-arb/arb-med., etc. (See Florida Bar Rule 4-2.4, Lawyer Serving as Third Party Neutral. See also Committee Note to Mediator Standard of Conduct 10.310 Self Determination. Anecdotal evidence that judges are open to a Motion to Dispense with Mediation if a viable alternative exists. Not so much if the argument is simply that mediation will be a waste of time.

Consider role, personality, style of mediator vis a vis your client: what type of mediator will be most effective and have your client's ear?