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PERSPECTIVE

Successful mediations call for an artist's touch

By Robert McGuinness

Mediation is essentially an art, not a science. Along the lines of Justice Potter Stewart's definition of pornography, you will know a good mediation when you participate in one. You may not necessarily understand the reasons for its success, but you recognize that the process succeeded. Hundreds of books and articles have been written about the mediation process, but the reality is that no two mediations are ever the same. Each is particular to the facts, the parties involved in the dispute, and their counsel. It can certainly help to access resources that analyze the process, dissect the dynamics, and evaluate the factors that produce a successful mediation, but what worked with parties on a Monday may not work with the same parties on a Friday.

A successful mediator is part psychologist and part poker player. He or she will be learned in life, the law, and business. Good mediators will understand and appreciate the importance of earning and giving respect and of developing rapport with parties and their counsel, all while keeping an eye on timing and listening for signals that they should intervene to assist the parties in reaching resolution.

Preparation

How much time does a mediator actually need for preparation before the process begins? There is no set answer. The proper amount of preparation time is "in the eye of the beholder." For a seasoned mediator with considerable experience, it may



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not be long, while newer mediators may require significant time to get up to speed on the cases before them.

But even mediators who have years of experience must be sensitive to the importance of the matter to the parties. They must provide time and space for counsel to persuasively advocate on their clients' behalf. The mediator preparation process is not unlike the balancing tests applied to constitutional law matters: too little information could deprive the mediator of a full understanding of the facts and the arguments being put forth by the parties; too much information potentially obscures and clouds a productive resolution discussion. The mediator should thus be diligent in securing enough informa-

tion about the parties and their positions so that he or she will be in the best position to conduct a successful mediation.

Building rapport, earning respect, fostering trust

No mediation can succeed without two-way dialog, and no dialog can occur when parties or counsel are mistrustful of the mediator. The mediator's ability to establish rapport with the parties and counsel is, therefore, crucial to a successful mediation.

It starts with building bridges. The mediator should look for ways to reach across and connect with those involved in the process. There will always be commonalities, such as common background,

common education, common interest, or other bridges that can serve to connect the diverse people in the room or on the Zoom. Think about the ways you might engage with a stranger you meet at a party: travel, books, music, hobbies. The degrees of separation rapidly close as you find those links.

A good mediator will use those points of connection to establish a comfortable, open dialogue, creating true rapport with all participants in the mediation process. When there is mutual respect, parties and counsel will be open to have an honest discussion with the mediator about their goals and expectations for the process, and the possibility of attaining those goals increases significantly.

Critical to earning respect and fostering trust is the mediator's ability to listen and observe. If he or she does not appear to be paying attention, regularly interrupts the discussion, or asks inappropriate questions, the message conveyed to the parties is that their perspectives and concerns are not a priority.

The biggest mistake a mediator can make is to inject his or her own opinion about how the matter should be resolved too early in the process. In the early stages of the process, the mediator's job is to listen carefully, both to what is said and what is not said. Just like a poker player, he or she should observe any "tells" as they occur and make note of their potential significance.

The mediator who promotes continuous ongoing discussion, while listening and observing closely without interjecting his or her own opinions, will be in a much better position later in the process to bring the parties to a successful resolution of their matter.

The negotiation process

Negotiations have been conducted for thousands of years. The manner and methods of negotiation are well known, and there has

been very little new development in terms of methods or processes. It is always incumbent on the mediator to determine early on in the process which negotiation method will best serve the particular counsel and parties involved. This may depend as much on the mediator's experience and customs as it does the subject matter of the dispute or the personality dynamics of the participants.

Once a method has been agreed upon, the mediator should be ready to bring as much energy as possible to the discussions, optimistic that resolution can be achieved. At the same time, the mediator should be prepared to consider other approaches if the process appears to be stalling. The wise mediator may look at pausing the negotiations and regrouping, engaging with the parties and counsel individually to parse through their positions, switching the method of negotiation, or determining whether it is time to suggest a mediator's proposal.

The mediator's proposal is a valuable tool in the mediator's toolkit. Such a proposal can help break a deadlock in the negotiations while addressing the parties' interests. The mediator's proposal, which will not be binding unless

expressly agreed by the parties, should reflect the mediator's unique knowledge and understanding of the facts. Relying on his or her experience as a trial attorney and/or judge, the proposal should thoughtfully reflect and balance each party's risk and reward based upon the mediator's own observations of the mediation process.

Conclusion

My father served as a trial judge for 26 years. Over the course of his career, he observed that parties involved in legal disputes were always happier, as well as better able to live with the results, when they resolved their legal matters between themselves, rather than relying upon an uncertain and often seemingly arbitrary trial outcome.

Mediators today play a key role in providing litigants with the opportunity to arrive at a mutually satisfactory resolution of their issues while also helping to remove countless matters from overburdened court calendars. Parties who are able to resolve their matters through mediation enjoy the benefits of enhanced privacy, as well as greater control over the timing of cases that would otherwise take years to resolve through conventional litigation.

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