What Litigators Should Know About the Mediation Process

Judge Stephanie H. Klein (Ret.)
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The word mediation is frequently used by litigators, but it often describes different processes. For example, the Delaware County Court of Common Pleas uses a senior judge to help settle cases and his efforts are commonly referred to as mediation. In a conference that might last 45 minutes, he speaks to attorneys after carefully reviewing their memoranda. He then might speak to each side separately, evaluating the strengths of each case and trying to lower expectations on each side to move them closer to a settlement. The back and forth between the attorneys is about numbers, and the willingness to move on these numbers is based on an evaluation by the parties of potential outcomes in court. The judge's assessment of those outcomes influences the parties to adjust their initial demands and constitutes the force that moves them to agreement. Further, attorneys' respect for this judge increases the value of his opinion and further bolsters his successes. This kind of mediation is usually called evaluative, because the mediator assesses the value of the case.

Compare evaluative mediation to the definition of mediation in the Model Standards of Conduct for Mediators, adopted by the American Bar Association dispute resolution section, the Association for Conflict Association, and the American Bar Association. This kind of mediation is usually called facilitative. Here mediation is defined as a "process in which a third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute." Further, "mediation serves various purposes, including providing the opportunity to parties to define and clarify

issues, understand different perspectives, identify interests, explore and assess possible solutions and reach mutually satisfactory agreements, when desired."

Another hallmark of mediation as defined in the Model Standards of Conduct is self-determination. Self-determination is defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." Thus the parties create the process and outcome, not the mediator or the attorney.

The court conferences described above clearly differ from the definition of mediation in the standards of conduct. The standards' definition contemplates a longer drawn-out process, a process by which parties, not just attorneys, have the opportunity to tell their stories so as to flesh out their perspectives to one another. The purpose of telling these stories is to identify interests with the aim of finding solutions to reach "a mutually satisfactory agreement."

As discussed in the book, "Getting to Yes," by Roger Fisher and William Uhry, the philosophy underlying the standards' definition is that disputes arise because people develop positions in opposition to each other. These positions become irreconcilable. Mediation around positions, or evaluative mediation, always results in compromise where each party retreats from a position to reach an agreement. Both parties compromise; neither is ever happy.

In the mediation model described in the Model Standards of Conduct, in contrast, the parties refrain from negotiating around positions. The mediator helps them find and discern their interests surrounding their positions. When parties' true interests are revealed, common ground is found. When there is commonality, parties can work together to brainstorm to find solutions. Frankly, the Model Standards of Conduct do not contemplate a role for attorneys—the process is completely party driven.

Does this definition have any basis in reality? Is it not some idyllic notion of how disputes might be resolved but has no practical application to the real world? Why should clients pay good money to attorneys and mediators to sit for hours to ferret out interests with the hope of resolving their disputes?

The answer is that it works in many disputes. In personal injury cases where the parties are strangers and the only issue is how much money will the parties compromise on their demands, the settlement conference evaluative model works very well under the guidance of an experienced and trusted mediator. It is efficient—an evaluative mediation inevitably is shorter than a facilitative mediation.

However for many commercial and employment disputes in which parties had a long-standing relationship, the dispute is about much more than numbers. Misunderstandings arise which lead to a lack of communication and legal disputes.

When that relationship breaks down because of a discrimination allegation, an allegation of breach of contract or wrongdoing, the damage is not only about numbers. The damage involves perceptions of breach of trust and betrayal. If the employee or business associate still works in the industry and paths may cross, it might be important to not only resolve the numbers but also try to mend the tattered relationship or at least clear the air. To do business together in the future might warrant the expenditure of time and money to engage in facilitative mediation.

What would that mediation be like? Parties may convene together with the mediator or have separate sessions with the mediator. If parties are willing to sit together, those joint sessions might be the first time that each side has heard the other's point of view. It may represent the beginning of a process where parties convene separately, and share their account of the dispute and concerns. These sessions are confidential, but the parties may agree to allow the mediator to share some or most of the session to help the other party gain an understanding of each other's thoughts, concerns and values underlying their positions. They explain what is important to them and may rank those interests and concerns in terms of importance. They will explain what relief they seek and the rationale for that relief. In addition to monetary relief, nonmonetary relief may include an apology, an expression of regret, or an assurance of a neutral reference. Nonmonetary relief may ease the path toward reconciling competing views of monetary relief.

For example, a mediation involved an employee who still worked for the company. She alleged sex discrimination in the assignment at work and sought monetary damages because she lost those assignments. The supervisor supplied a plausible nondiscriminatory basis for her decisions but the employee insisted that the supervisor had discriminated against her. A breakthrough occurred when the supervisor explained, first in a private session, and then meeting with the employee, how much she valued the employee's experience, work and skills. This meeting was accomplished without counsel. After that, the dispute was quickly and cooperatively resolved in a few rounds of negotiation between the employee, supervisors and counsel.

Many litigators prefer the evaluative approach. After all, the evaluative approach really is a drawn-out negotiation where parties parry the strengths and weaknesses of the case, and the party with the biggest pocket, biggest tolerance for risk, and the best case comes out ahead. It utilizes litigators' talents to their best advantage and encourages parties to take a back seat, letting paid professionals do the heavy lifting.

Some mediators trained in facilitative mediation disdain that approach contending that under the uniform standards, evaluative mediation does not constitute mediation at all. Clearly under the standards of conduct, evaluative mediation does not meet the definition of mediation. In the facilitative standards of conduct model, parties are front and center, both disclosing their interests and creating the process. Indeed, this controversy between evaluative and facilitative mediation has become politically charged in some sectors of the mediation community.

However, whatever we call this process of reconciliation of disputes, we mediators must be sensitive to the parties' needs and desires about how to resolve their cases. Does the case require parties to tell their stories to resolve their dispute? Perhaps even in a personal injury case where the plaintiff is grievously injured in a motor vehicle accident, the plaintiff needs to express her pain and suffering to the defense counsel and the insurance adjuster to reduce her settlement demand. On the other hand, if liability is not at issue and the question is whether the insurer will approve $150,000 or $50,000, does the injured plaintiff have to be part of the mediators' laborious process of persuading the parties to reduce their offers and demands to a reasonable number? The challenge for mediators is to have all of these tools in their "bag of tricks" and be sensitive and flexible enough to alter our approach as necessary. We should honor the process but most of all, we should honor parties and their desires and needs, using all of our knowledge and techniques to resolve their cases. •

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