Best Practices for Successful Mediation: A Lawyer's Role

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Prepared for Tennessee FastTrack: Memphis
August 7, 2020

Introduction

Especially with the Tennessee Supreme Court's Order limiting civil jury trials and other in-person proceedings because of COVID-19, mediation is becoming even more the preferred means of resolving disputes. Mediators are now adept at conducting mediations remotely with virtual conference rooms, waiting rooms, and breakout rooms. Furthermore, with many litigants struggling to make ends meet because of reduced income, increasingly parties are choosing mediation to reduce their legal costs and resolve their disputes more quickly. Because of the challenges of going to trial while wearing masks and remaining physically distant, lawyers may prefer virtual breakout rooms and virtual mediation tables to courtrooms these days. Judges see the impact of this phenomenon as we enter more consent dismissals than usual.

In mediation, when lawyers advise their clients on strategies for resolving their disputes, it is important for them to understand that mediation calls for different skills than trial advocacy. Not recognizing the differences can be detrimental to a client's best interest. Supreme Court Rule 31 on Alternative Dispute Resolution addresses standards for mediators but gives no guidance for attorneys. Rule 31 provides in Section 6 simply, "Attorneys may participate with their clients during Rule 31 Mediations." Later in the Rule we learn in Section 9, "Under Tenn. Sup. Ct. R. 8, RPC 2.4(c)(9), violation of any of these rules and procedures by any Rule 31 Mediator who is an attorney constitutes a violation of the Rules of Professional Conduct." Very few other references to attorneys as advocates appear in Rule 31, and nothing directly addresses the behavior or ethical requirements for attorneys representing a client in mediation.

While Supreme Court Rule 8, the Rules of Professional Conduct for lawyers, addresses lawyers serving as mediators, it says nothing about lawyers "participat[ing] with their clients during Rule 31 Mediations." There is language, however, that suggests the role of a lawyer when representing a client in mediation. We learn in the Preamble to Rule 8, Section 3:

> As a representative of clients, a lawyer performs various functions. **As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.** As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. **As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.** As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. (emphasis added)

In mediation, the lawyer acts "an advisor" and "a negotiator," so it is safe to assume the descriptions highlighted above apply to the mediation advocate. Unlike a lawyer's role as a trial advocate - when the lawyer is required to "zealously assert the client's position" - the lawyer in mediation, as an advisor and negotiator, serves the client by "informing," "explaining," and "seeking a result advantageous to the client but consistent with requirements of honest dealings with others." The question remains, "What are the ethical standards for a lawyer representing a client in mediation?" Following are some suggestions.

Competently Prepare for Mediation

A competent mediation advocate prepares herself and her client for mediation. Tennessee Rule of Professional Responsibility 1.1 provides, "A lawyer shall provide competent

representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." This Rule applies not only to cases going to trial but also to cases in mediation. Furthermore, just as it is important to prepare a client for trial, a lawyer should prepare her client for mediation. A lawyer should make sure the client understands the rules – confidentiality, openness, honesty, willingness to listen, willingness to compromise. Participants should also be open to criticism and able to come up with – and/or listen to – creative solutions. Lawyers should warn their clients not to be offended by the first demand or offer, that mediation is designed for parties to negotiate; both parties have to start somewhere. Clients should understand skilled negotiators will start at a point to give plenty of room to negotiate.

For a corporate client and for insured claims, lawyers should make sure the right person(s) attend the mediation. If the decision makers are not present, attendees may be discouraged, assuming the matter is not considered important enough to the opposing party for the right people to attend. The representative should have the authority to settle. Holding virtual mediations, of course, facilitates having decision makers present with no additional cost, even if they are located miles away.

The lawyer should explain the role of the mediator and the process the mediator will use to facilitate negotiation. The client should be reminded that representation during mediation may look quite different than representation at trial. The lawyer should present to the client reasonable settlement options considering the advantages and risks of going to trial and the strengths and weakness of the case.

The lawyer should know her client. Is the client a skilled negotiator or a novice? Is the client familiar with legal processes? Is the client likely to be realistic about the strengths and

weaknesses of the case? Is the client likely to be empathetic with other points of view? Depending on the answers to those questions, the lawyer should prepare to loosen or tighten the reigns accordingly.

A competent mediation advocate prepares and properly manages a client during the mediation process. During mediation, the lawyer should keep in mind not only Rule 1.1 but also Rule 2.1 of the Professional Rules of Responsibility: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."

For the Client and Mediator, Present an Honest Assessment of the Case

As a former mediator and a judge who often conducts judicial settlement conferences, I have seen helpful mediation statements and no-so-helpful ones. Properly preparing the mediation statement sets the tone for the mediation. A trial brief and a mediation statement are different in many ways. In a trial brief, the lawyer attempts to convince the reader to adopt a view that places his client in the best possible light. In a mediation statement, the lawyer presents a balanced view – setting forth both the strengths and weaknesses of the case. In mediation the goal is win-win. Each side has to give a little and acknowledge, no matter how strong a case the client thinks she has, there is a chance she will lose at trial. A trial brief presents the client's strongest case – assuming everything will go the client's way. A mediation brief presents a balanced view of the case, assuming the client will win some points and lose some points. Submitting a mediation statement that points out both the strengths and weaknesses of the client's position helps the mediator and helps the lawyer prepare to give honest advice to the client. Lawyers should remember the goal of mediation is to settle. Acknowledging in the

mediation statement that the case is not a slam dunk signals to the mediator the client and lawyer are there in good faith. As required by Rule 4.1 of the Tennessee Rules of Professional Conduct, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions." Overstating the case hinders the client from listening to the opponent and considering compromise.

Have a Mediation Strategy

A day of mediation is not a day off for the lawyer when the mediator does all the work and the lawyer just does what the client says do. Just as a lawyer needs a trial strategy, he needs a mediation strategy. The lawyer must decide, for example, the advantages and disadvantages of making an opening statement and whether to encourage the client to speak during the opening statement. If the situation would benefit from an opening statement, it is important to adopt and maintain the proper tone and to avoid accusatory or inflammatory language. Discounting the opponent's position is seldom helpful. The lawyer should state the facts and how the jury will likely favor the client's position without demeaning the opposite side.

At mediation, the lawyer should have a plan in mind to work to the bottom line. Like in other situations, in mediation, patience is a virtue. The lawyer should make sure he and his client come prepared to stay as long as it takes to get where the client reasonably should be. The lawyer should offer sound advice in light of the client's goals. To accomplish that end, the lawyer must understand the case, the law, and what the client and the opposing side value.

Don't "Draw a Line in the Sand"

Just as a line drawn in the sand will shift when a strong wind comes along, positions should gradually shift during mediation as the parties listen to each other and adjust their

demands and expectations. The lawyer should not assume a posture of no negotiation and should discourage the client from doing so. For mediation to work, both sides need to be flexible. When a bully shows up – either on one side or both – mediation will stall.

In addition, clients should understand the benefits of listening. By listening carefully, the lawyer and client will not only learn more about the case but will also be able to discern what the opposing side values. That knowledge is perhaps the most valuable knowledge for purposes of negotiation. The mediation process is designed for each side to present its views so the parties can gradually meet somewhere in the middle. The lawyer should know and help the client to understand the opposing party's point of view so she can give an honest assessment and suggest reasonable responses to offers and demands.

Remain Civil: Empathy Goes a Long Way

The least persuasive and least effective tactic in mediation is assuming an overly aggressive or belligerent stance. In many cases, the opposing parties have an ongoing relationship. Even with divorce cases, especially when children are involved, maintaining a relationship is important. The mediation should not be the place the relationship ends because a party is overly confrontational or insulting. Most assuredly, the lawyer should not be the person in the room whose behavior inhibits the parties from preserving an important business or personal relationship.

The Rules of Professional Responsibility address civility before "the tribunal," usually thought to be a reference to the courtroom or arbitration forum. Lawyers should, however, be civil whenever and wherever they represent their clients. In Section 10 of the Preamble to the

Rules, lawyers are reminded they should always maintain, "a professional, courteous, and civil attitude toward all persons involved in the legal system."

Remaining civil during mediation goes a long way in keeping the other side from seeing the lawyer or client as engaging in personal attacks. Lawyers can be firm without belittling the other side. The sides can disagree without being disagreeable. Nothing is gained by being rude and discourteous. Of course, sometimes the issues being mediated are difficult. When mediating difficult issues is burdened with difficult behavior, mediation is seldom successful. In appropriate circumstances, even apologizing (without admitting liability) or a simple concession can advance negotiations faster than maintaining an acrimonious stance.

Remember the Oath

The new Tennessee Lawyer's Oath provides: "In the practice of my profession, I will conduct myself with honesty, fairness, integrity, and civility to the best of my skill and abilities, so help me God." Lawyers must be true to the Oath not only in the courtroom but wherever they practice their craft. The mediation conference room – even a virtual one – is no exception.

Suggested Reading

Cary Menkel-Meadow, *Ethics in ADR Representation: A Roadmap of Critical Issues*, DISPUTE RESOLUTION MAGAZINE (Winter 1977).

Kimberlee K. Kovach, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith*, DISPUTE RESOLUTION MAGAZINE (Winter 1997).

John A. Sherrill, *Ethics for Lawyers Representing Clients in Mediations*, THE AMERICAN JOURNAL OF MEDIATION (2012) available at http://www.americanjournalofmediation.com/docs/JOHN%20SHERRILL%20-Ethics%20for%20Lawyers%20Representing%20Clients%20in%20Mediation.pdf