ARTICLE 2 OCTOBER 2004

Thoughts For Attorneys in Mediation (Part 1 in a two-part series)

By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

This is the second in a monthly series of articles on mediation which is a growing addition to the resources lawyers and business executives may turn to in addressing and resolving a client's or their own conflicts or complaints. Mediation is an alternative to going to trial. It is also an alternative to traditional settlement practices in the practice of law and to traditional negotiation in the business setting. Mediation can offer different and more creative approaches to resolving conflict. This article, presented in two parts, offers some suggestions for the attorney or business executive to consider before and during the mediation session.

The first suggestion is that attorneys and clients should always remember that most lawsuits or threats of lawsuits never go to trial. It has been often reported that 90% of filed cases settle. *Therefore it makes sense for a lawyer and business executive to handle and prepare a case as fully for settlement from the very beginning as for a trial that probably isn't going to happen.* For you, lawyers, think of the things that you do to prepare for trial and then ask, will this help or hinder settlement? For example, sharing, even volunteering, information with the other side might not be in a trial lawyer's hand book, but might it help settlement? And, things that you might do to help settlement in all likelihood won't hurt trial preparation anyway, especially in this day of full discovery. And offering and providing information makes you look - and usually feel - like a good guy. Maybe preparing for settlement should even take precedence over preparing for trial.

Second, it is natural that lawyers see conflict as involving legal issues and factual disputes and thus to conclude that these are exclusively involved in any settlement process. But think of conflicts outside a lawsuit setting that you have been involved in or witnessed in your personal lives. How many were resolved along legal grounds as opposed to what seemed fair and reasonable to the parties? Ask your business executive clients. Was the law even mentioned? Probably not. Fairness may have been, but the law probably was not. And was agreement always reached on the facts before settlement? Probably not, but still the parties may have reached some fair resolution of their dispute. The instinct clients have to discuss and resolve matters on what seems a fair and reasonable basis rather than on a legal principles alone, or at all, is the very opportunity mediation provides.

I am not suggesting that there is no room in mediation for discussion and consideration of the law and the facts. There is, of course. What I am suggesting,

however, is that room be allowed for your clients to consider and discuss *other or additional* bases for resolving their conflict, if they so choose, bases that may be quite satisfying to them ....

Example: Business A had a client who was over 180 days in arrears in payment of an outstanding invoice for $82,000.00. The reason given: the services were not rendered per the contract. Upon further inquiry, Business A felt Client B was nickl-ing and dim-ing them to cut as they were unable to pay. The Chief Financial Officer of Business A was personally affronted since it was he who had negotiated the contract.

At a subsequent mediation session between the two disputing parties, there can be discussions of legal issues such as whether deficiencies in the services were objected to in a timely manner or whether they were substantial enough so as to give rise to a cancellation or counter claim, and this could give rise to some kind of settlement, possibly a financial settlement.

But what the business client wants is to get these needed services performed in a proper manner and what Business A wants is to get paid. There can be fruitful discussion of these needs totally apart from the legal issues. They can discuss how the services can be better provided and a payment plan that would be mutually satisfactory, without the assumption of any compromise on the amount owed. There can be discussions about how improvement in the services and payment can be assured. Resolution of this conflict could therefore be made on an "interest and needs" basis rather than on a "law and proof" basis that might be preferable to the parties. More importantly, mediation would provide the setting for a quality conversation between these two people who were either avoiding the situation or in a heightening state of emotion about the situation. A quality dialogue usually has the outcome of quality decision-making.

For you business folks, this is worth discussing with your counsel, not only because of the huge potential cost savings, but also because of the easier, more satisfying experience that can be had from a facilitated conversation with other folks who have either done you wrong or have accused you of doing them wrong. And you might be surprised how receptive your legal counsel may be; the growing trend is that the most sophisticated lawyers and executives initiate using mediation.

Louise Phipps Senft is founder of the Baltimore Mediation Center. She can be reached at 443-524-0833 or www.BaltimoreMediation.com. Her column, The Negotiating Table, appears in this space on the last Friday of every month.

ARTICLE 3 NOVEMBER 2004
Thoughts For Attorneys in Mediation (Part 2 of a two-part series)

Columnist treatment, with headshot
By Louise Phipps Senft

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Last month's article presented some thoughts for attorneys entering mediation of a client's dispute and ended with a discussion on what the parties might focus on in mediation ..... the "law and proof" or the "interests and needs" of the parties.

Related to the thought above is the fact that mediation must of necessity be significantly different from traditional settlement efforts such as the usual lawyer bargaining or settlement conferencing, else why have it? In what ways should it be a different process? We mentioned one in the previous paragraph. Another change might be how negotiating takes place. Lawyers tend to see settlement in monetary terms which leads to positional bargaining and compromising. To be sure, some of this can occur in mediation. The attorney's fee, for instance, might be based on a financial settlement. While any mediated settlement can include a side provision for payment of counsel fees, there are often other interests and needs *of the client* that can be as important to them, or more, than money, or than paying their attorney a lot of money in litigation costs and fees. Meeting these interests and needs can make for a satisfactory settlement for one party, and a "doable" settlement for the other. Maybe win-win, but often WIN-win. The way to avoid WIN-win is two-fold. Choose your mediator wisely (covered in next month's column) and prepare for your mediation beyond a firm grasp of the case law and beyond an exploration of the needs and interests of your client. For possibly even more important than the interest and needs in the dispute is the <u>way</u> the topics are discussed and how the parties interface with each other…and how you, counsel, interface with the other attorneys present at a mediation.

Coming into mediation, lawyers should realize that they don't have to prove things as they do in court or in arbitration. To be sure, the potential exposure of each party to a poor result in court can be discussed, but a settlement in mediation can be reached without any agreement as to the facts. Instead of trying to prove your case in mediation, a larger objective should be efforts at how your client can speak and be heard and giving and asking for ideas on what a good settlement for the parties might look like. The potential of mediation can often best be reached when the attorneys temporarily put aside their adversarial roles and become collaborators, working together under a flag of truce. When this happens, and this writer has seen it happen often, good things happen.

And one of the beauties of mediation is that the quality of exchange of ideas is enhanced by the fact that mediation discussions are confidential and non-admissible. Thus, there is an opportunity to explore many possibilities for resolution or not, in a more comfortable setting for all.

The following is the hard part for some lawyers . . . letting the client exercise his or her rightful role. This is the hard part because lawyers are trained to put their protective arms around the client and be the spokesman lest the client say or volunteer the wrong thing. But a client not only has the right to a speaking role in a matter of importance to him or her, it can be quite valuable to the process. The maxims "only answer the question" and "don't volunteer any information" are misplaced in mediation. Confidentiality rules limit the use of information coming to light during mediation and it has been the writer's experience that enormously helpful information can be volunteered by a party, often helpful to both parties and to the settlement effort. People can hold back information if not asked about it by their counsel or invited to discuss it by a mediator. If not asked, they may feel it is not important. And if a party doesn't speak, their opportunity to make a favorable impression on the other counsel may be lost. A suggestion for attorneys - have your client sit closer to the mediator than you. This invites them into the process where they belong.

Finally, don't be disappointed if settlement doesn't happen at the first mediation session. Mediators are satisfied with progress and quality. Less complex matters usually do resolve in a session; however, more complex matters may have a first session that culminates in the parties and counsel agreeing to homework, acquiring and sharing information or otherwise taking steps to facilitate dialogue and settlement. Indeed, a mediation where the parties leave with homework assignments can be very productive.

In sum, lawyers, you might consider increasing your expectations of mediation to include the potential to have a quality dialogue with the other counsel as well as between and among the clients. You may thus prepare for your mediations differently by reviewing not only the facts and the law, but also the client's interests and more importantly the way that the dialogue can be most meaningful for your client which is more than likely to give him or her the ability to speak and to enter the conversation and "get on the record" their views on the dispute, how it has affected them and to talk about, if they so choose, those things that may seem or be "irrelevant" that indeed may be quite important to them. Allowing your client's voice to be heard, along with your own in the mediation, will in all likelihood yield you big dividends in your clients' eyes. They not only will appreciate you, they will turn to you again for your wisdom.

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