PET PEEVES ABOUT MEDIATORS

By

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Some years ago when I began mediating, I decided to keep "mediation statistics;" that is, notes about types of cases, about parties, and about counsel. From time to time, I have spoken with counsel with whom I have mediated, giving extra attention to those lawyers who have asked me to mediate twice or more. Lately, I imposed on these attorneys further, seeking their feedback about what went right and what went wrong and asking their opinion about why and how. Also I asked what they dislike most about mediators. Their responses aren't randomized, double-blind controlled studies, but our conversations led to a list of "pet peeves" these lawyers have developed about mediators.

This is the first of a series of articles for the TAPM newsletter intended to provide fellow mediators with observations about mediation pitfalls and lawyers' thoughts about how to stay clear of them. Each article

describes a “pet peeve” which responding lawyers noted and remembered from their mediation. For us mediators, the most important and noteworthy item is that the informant attorneys encountered similar circumstances often enough even to *have* a list of “pet peeves.” That suggests we mediators may be making and repeating the same mistakes.

The Mediator Was Not Prepared

The “pet peeve” most often listed is failure of the mediator to prepare. I use “preparation” here as a single term to embrace distinct concerns.

Fact Preparation

One attorney specifically stated a strong dislike for mediators who request that certain pleadings and records be submitted in addition to mediation statements and then – obviously – failing to read them. This comment exposes two problems: (1) not learning about the case, and (2) not letting the parties know the material has been studied. These problems are not the same.

The first introduction a mediator has to a case is the submissions of the parties, and every mediator knows from hard experience whether submissions are thorough, exhaustive, detailed and complete varies widely from lawyer to lawyer to lawyer. We all have received woefully incomplete mediation submissions. But mediation submissions are merely the *foundation* for preparation; they do not limit preparation and they may sh0w what needs to be down. A mediator's first task is to determine whether the foundation information is – or can be made – adequate.

With increasing frequency mediators are asked to undertake "pre-discovery" mediation. Such requests should raise a red flag each time. Do the parties have enough information to be *able* to mediate? What do I not know which I must know? If these questions can't be answered, the best course may be to tell the parties that mediation is best postponed until they can be answered, while specifying the information needed. This process avoids parties' considering the mediator to be unprepared when – relying solely on submissions – it is impossible to be other than unprepared.

Postponing mediation and investigating behind inadequate submissions are defensive measures, but they are calculated to lead to a chance for success. Don't rely entirely on submissions, and don't let submissions control your preparation.

Assuming discovery has proceeded far enough that the parties wish to try mediation, and when an inadequate pre-mediation submission is made, a mediator's task is to seek supplementation and request discovery materials. When supplementation is requested, mediators must read all items submitted. The goal is to have in mind at the beginning of mediation sufficient knowledge to be able to focus on the parties and their reactions to identify impediments to resolution. Bearing in mind the "pet peeve" of not knowing facts of the case, it is important that mediators go out of their way to demonstrate that they do indeed know the case. Mediators establish credibility and create trust by showing a sufficient study has been made.

One contributing attorney said she looked to demonstrations of knowledge of the case as a measure of the mediator's effectiveness.

I have found she was correct: another attorney responded:

> "I recently participated in a mediation where there were 7 parties. The mediator remembered exactly who was who, and he even knew who the individual, non-party witnesses were. It was clear he had thoroughly prepared, which we really appreciated."

Preparation for Personalities

Knowledge of facts is but one aspect of preparation. Detailed discussions with attorneys before mediation often reveal personal information about the parties which proves immensely useful in avoiding impasse. Gleaning advance information about the parties, their views, their attitudes, and their emotional states is distinct from knowledge of the facts, but commensurately important. Discussions with attorneys can reveal whether a Plaintiff is fragile requiring empathetic approaches. Especially in early stages of mediation, knowledge that a Plaintiff is particularly fragile or sensitive is golden. Knowledge that a party is exuberant, aspirational, out-

of-control, opinionated or "sulled up" permits the mediator to prepare alternative and overlapping approaches, which might include getting all the opinions out early and prepare serial revelations about the opposing party's strongest points. Discussions with attorneys affords mediators an opportunity to learn the attorneys' assessments of their clients and that affords a basis for assistance to the attorneys in keeping clients focused on essential points and less emotional about side issues.

Independent Research

Often submissions by attorneys include references to jury verdict results. If a submission does not include such references, mediators should inquire from all available sources about results in similar or arguably similar cases. Discussing these results in mediation is an alternative avenue to gaining credibility. Noting similarities in other cases and other results can be useful as examples of possible or probable outcomes.

Takeaways

1. Learn the facts and let the parties know – early – that you know them. Mark testimony in depositions for easy reference. Be sure correctly to mention such easy things as names, addresses, times, and street names.
2. List what must be known. Ask the attorneys to supply you with omitted facts.
3. Assess the degree of attorneys' client control or lack thereof.
4. Determine when a party is sensitive or fragile and about what and whether there is an impediment due to personality.
5. Plan questions or fact references which are inconvenient for unrealistic parties.
6. Discover and obtain details about concrete results in as many similar situations as you can find.

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