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ADVOCATING FOR ADVANCEMENT

HOW TO PREPARE YOUR CLIENTS FOR MEDIATION

RECOMMENDATIONS FROM ADR SYSTEMS' NEUTRALS

By: Michael Koss & Jann Johnson

Mediation is a popular alternative to expensive, drawn-out litigation, but many clients come to mediation with misapprehensions about the process, their role, the neutral's role and even their very own case. A client may expect a quick solution because there's no judge or jury. They may suppose the neutral is there to advocate for them, or that they will receive everything they want because they control the process, or that they are merely there to spectate as their attorney negotiates.

These misconceptions can stymie the neutral's efforts to facilitate negotiations between parties.

Counsel can do a great deal to correct these misconceptions and ready their clients by providing an accurate picture of what will happen during their mediation.

DEFINE THE NEUTRAL'S ROLE IN ADVANCE

Plaintiffs and defendants have, on occasion, presumed that their neutral is a second advocate or a decision-maker with the authority to order the case to settle – perhaps because many mediators are retired state and federal judges.

Counsel should anticipate this misunderstanding and clarify the neutral's role, explained Hon. Christopher E. Lawler, (Ret.), senior mediator and arbitrator at ADR Systems. Except in the case of binding mediations, a neutral's role in mediation is that of impartial facilitator, favoring neither side, seeking to bring parties to a settlement that is acceptable for all involved. A misunderstanding like this can complicate the mediation proceedings if an attorney must clarify the neutral's role on the day of mediation.

> "By clarifying clients' expectations and misunderstandings of mediation, counsel can prepare their clients for a more efficient and productive proceeding, one in which they are prepared to participate and contribute to the settlement of their dispute."

Clients may also benefit from a better understanding of how their neutral's background as an attorney and judge qualifies them to act as a mediator for their case.

"Our years of experience in the courtroom and on the bench, presiding over jury trials and conducting pretrial conferences, have given us an eye for the issues at play in the cases your clients find themselves in," said Judge Lawler. "They can trust that they are working with seasoned practitioners who know how to determine value and evaluate liability – who have seen it all and helped these disputes settle in the past."

UNDERSCORE THE NEED FOR PATIENCE

Mediation understandably attracts parties because it offers an efficient means to resolution, but they may misconstrue efficient with immediate.

"Mediation is punctuated by periods – sometimes extended periods – of silence while the neutral works with each side in turn," said Hon. Margaret A. Brennan, (Ret.), senior mediator and arbitrator at ADR Systems. "Different parties require different lengths of time to discuss the case from their perspective and inch toward common ground. Some parties may be willing to leapfrog toward a settlement agreement while others may need to touch upon each lily pad before they are comfortable drafting the terms of an agreement."

Frustration with either side's approach is common and understandable, especially after waiting for this day for so long, but counsel should prepare their clients for the likelihood that the other side will address the process differently than they will.

"Respecting each other's timetable, knowing the other side earnestly sees the case from a different perspective but has still agreed to mediate their differences in good faith, can help ameliorate tensions," added Judge Brennan.

PREPARE YOUR CLIENT TO FULLY PARTICIPATE DURING THE SESSION

Mediation is a legal proceeding involving representation by legal counsel, but many clients have taken this to mean that they need only spectate at the proceeding or not attend it at all.

"Neither are useful," said Hon. Jack Callahan, (Ret.), senior mediator and arbitrator. "Your clients carry decision power; they resolve the dispute; they agree on the terms of settlement. Not only that, they lived through the case. We want to hear what they have to say about that experience and the case's substantive issues, strengths, and weakness."

Such demonstrations convey a willingness to listen with open ears – to not simply be concerned with what they have to say – explained Judge Callahan. Movement toward settlement cannot happen without a client's willingness to hear the other side out.

READY YOUR CLIENT FOR NEGOTIATION

It is often said of mediation that if everyone leaves the proceeding a little unhappy, then they have struck a decent deal. Whether that conventional wisdom is empirically true is up for discussion, but it conveys a key point: Mediation involves the give and take of negotiation and compromise.

"This is why patience and full participation are so important," said Hon. Kay M. Hanlon, (Ret.), senior mediator and arbitrator at ADR Systems. "They help establish realistic and pragmatic expectations of the process. Neither side is there to get all their desires and goals satisfied. Clients need to understand this beforehand to start the proceeding off right."

Counsel should therefore consider exchanging submission materials with the opposing side and review them with their client. By comparing these materials – fact patterns, assessments of the extent of injuries or damages, expert testimonies, and coverage analyses – counsel and their client can begin to conceive of places where both sides can find common ground.

By clarifying clients' expectations and misunderstandings of mediation, counsel can prepare their clients for a more efficient and productive proceeding, one in which they are prepared to participate and contribute to the settlement of their dispute.

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Michael Koss graduated summa cum laude from DePaul University in 2019 and is the Business Development & Marketing Assistant Manager at ADR Systems.

Jann Johnson is the Chief Operating Officer and Executive Vice President, Marketing at ADR Systems. She previously worked as a lawyer in private practice specializing in business and employment law. Prior to her legal career, she was a Manager in Marketing & Communications at Accenture.

321 S. Plymouth Court
Chicago, IL 60604