Focus

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The Practitioner Alternative Dispute Resolution

Disclosure Doubts

Mediation Parties Must Decide How Much to Divulge

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Parties in mediation often consider two questions: "What should be disclosed to the other side?" and "What should be disclosed to the mediator?" A party does not want to give away too much in negotiation and then, if the case does not settle, lose advantage at trial by revealing information not otherwise known or discoverable. On the other hand, some information must be transmitted to the other side—otherwise, settlement would rely entirely upon the credibility of the mediator and his ability to convince each side to compromise based only on the mediator's judgment.

A party who relies on the mediator to "set the other side straight" makes the assumption that the mediator will be operating essentially in an evaluative role, much like a settlement-conference judge. This assumption ignores the fact that mediators also take a more facilitative approach to resolving disputes. Indeed, many mediators move into a more evaluative mode only when absolutely necessary.

This is certainly not to minimize the importance of a mediator's credibility. There may come a point in the mediation when the mediator offers an evaluation of the strengths and weaknesses of the parties' cases. However, rarely will the mediator be able to substitute his own assessment for the independent evaluation of the parties.

To determine whether a mediator's assessment is accurate, a party must possess sufficient facts with which to make an evaluation. A party cannot be expected to settle simply because a mediator says the party should. It is unrealistic to expect a party simply to rely upon the mediator's assessment of information revealed only to the mediator.

Even when the mediator is well-respected, a party is not likely to allow that mediator's evaluation to supplant the party's own. A mediator's reputation alone is unlikely to impress a party sufficiently to make him doubt, for example, the extent to which a jury may find him credible. When the mediator expresses the opinion that information revealed to him in confidence would greatly undermine a party's credibility, it is not often that such a party will accept that opinion without knowing the basis of it. People tend to think they will be believed.

If, however, the mediator can present facts to which other witnesses will testify, or other evidence in contradiction to the party's testimony, and then offer an opinion as to what facts he finds the most credible, settlement recommendations are no longer simply a matter of the mediator's credibility but also of his evaluative abilities. At that point, a party can more easily accept the mediator's opinion.

Parties will rarely settle unless they perceive that they possess and can evaluate all information needed to determine that the settlement is the result of an informed consent. Consider the situation in which one party possesses a crucial piece of information that the party knows the other side does not have and is not likely to obtain through discovery. For example, there could be a prior inconsistent statement or other testimony of a witness who might be called for impeachment purposes only. Or the other side may have failed to perform an action that would be necessary for the proof of an essential element of their cause of action.

What should the mediator be told? What should the mediator be authorized to disclose to the other side? If the information will assist in settling the case, and the goal is to settle and not try the case, the inclination might be to disclose the information to the other side. But is that truly the best course? Even when there is no desire to try the case, consideration must be given to just how such information is most effectively disclosed. Moreover, further consideration must be given to the fact that just because one side doesn't want to try the case doesn't mean the other side also wants to avoid trial.

A balancing of objectives and utilization of the expertise and confidentiality of the mediator is what is called for. First, with respect to confidentiality, it is important to be familiar with Evidence Code Sections 1119 and 1120. Under those sections, nothing said at mediation may be used at trial or be subject to discovery, nor can production of any such writing be compelled in trial or arbitration. Further, all communications between participants to a mediation are confidential.

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However, under Section 1120(a), evidence otherwise admissible or subject to discover outside of a mediation does not become inadmissible or protected solely by reason of its introduction or use in a mediation. In short, if there is a fact that is independently verifiable that a party does not want the other side to know, it should not be revealed (at least to the other side) nor should its disclosure by the mediator be authorized.

But there are good reasons to make the mediator aware of the confidential information. Nothing said to the mediator may be revealed without the consent of the disclosing party. Therefore, if a party is uncertain whether to reveal a fact, he or she is perfectly safe disclosing it to the mediator and reminding him that it is a fact the party does not wish the other party to know. It is advisable to confer with the mediator about whether the fact should be disclosed and whether that fact will help move the mediation forward. Then a decision may be made as to whether to disclose it to the other side an, if so, when to disclose it.

Often, disclosure of a fact does not help move the mediation toward settlement and may inflame the other side. For example, one party telling the other a personally embarrassing fact about that person, even if relevant to the case, may make the other party more intransigent in his position and more willing to fight rather than compromise to keep a fact from public view.

Because the mediator will be attempting to gain the parties' trust, it is important that the mediator understand the strengths and weaknesses of both sides' cases. In order to achieve a compromise settlement, the mediator needs to be able to understand and express the point of view of each side in an unbiased manner. To do this, the mediator must be given ammunition consisting of the facts as well as the law. A mediator cannot be expected to convince a party to see the other side's point of view if the mediator is not provided with the means to effectively present that point of view.

Among the frustrations a mediator faces is being told by one party what the facts are, leaving a private caucus, and then finding out from the other party that ther are certain facts of which the mediator has not been apprised. It is better that the mediator know everything and keep some matters confidential rather than be uninformed. This knowledge affords a mediator the opportunity to present a position in the most favorable possible light, consistent with the principles of confidentiality.

A real impediment to a mediator's effective performance is not having sufficient information to withstand assertions made by one side after the mediator has been in private caucus with the other side for some extended period of time.

A mediator may be attempting to persuade the other side to alter its position based upon an evaluation of evidence disclosed to the mediator. It is not difficult to imagine how ineffective such a presentation might be in a traffic collision personal injury case if the fact that the defendant had been drinking at a bar before the accident was not disclosed to the mediator. If the mediator makes a recommendation of settlement based upon insufficient facts, that recommendation will be rejected out of hand and the mediator's effectiveness undermined.

The presentation to the other side may be discussed in private caucus with the mediator. It is not important that a party know in advance precisely how that mediator is going to present the party's case. It is only important that he not reveal confidential information and that he make an effective presentation. Therefore, it is important to have trust in the mediator. If at any point the mediator loses that trust, he cannot be effective—and he knows this.

There are also strategic reasons for authorizing the disclosure of information to the other side. First, a disclosure of information by one side may result in the other side feeling the disclosing side has nothing to hide and therefore is negotiating in good faith. However, it is important to weigh this "feel-good" rationale against giving up information that provides a tactical trial advantage. It is rarely wise to give up information that will impeach the plaintiff's star witness simply to show "good faith" in negotiations.

The goal of mediation is reaching a settlement. This cannot be accomplished without the disclosure of certain information to the other side and, in many instances, even more information to the mediator. To deprive the mediator of information and still expect a case to settle is unrealistic. An analysis that includes thinking about the information both sides need in order to give that consent will help a party understand the other side's position and may even help the party achieve a frame of mind more conducive to resolution of the matter.

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