MEDIATION LESSONS LEARNED THE HARD WAY

WILSON WORLEY
— ATTORNEYS AT LAW —

Russell W. Adkins
Wilson Worley PC
P.O. Box 88
Kingsport, Tennessee 37662
(423) 723-0401
radkins@wilsonworley.com

Through my practice as an attorney who frequently represents parties during mediation, I have had the opportunity to learn from the good and bad habits of other mediators. I have found these lessons to be useful, both as a lawyer and as a mediator, in making the dispute resolution process more effective:

1. **Be active and engaged.** A good mediator does more than shuttle offers between rooms. A mediator's experiences (both good and bad) with similar cases can be instrumental in helping to guide the parties to a resolution. Most personal injury attorneys want mediators who will candidly offer the benefit of their observations and offer honest reality checks. Mediators can often be too passive about offering reality checks to participants who need to hear them.

Standards of Professional Conduct, §6(a)(1):

A Neutral shall maintain impartiality while raising questions for the parties to consider as to the reality, fairness, equity, and feasibility of proposed options for settlement.

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2. **But it's not all about you.** A surprising number of mediators really don't get that. Don't bog down the process by spending too much time talking about yourself. Spend that time getting to know more about the parties.

The mediator doesn't have to be the smartest person in the room. If a party or counsel finds something important enough to say to a mediator (even if it is wrong), the mediator should never be dismissive. Listen and understand. Test those comments and

offer reality checks if necessary. But don't dismiss them outright. And resist the urge to raise your voice at a mediation participant. (Yes, I have seen that too.)

Standards of Professional Conduct, §5:

(d) A Balanced Process. A Neutral shall promote a balanced process in an ADR Proceeding and shall encourage the parties to conduct the proceeding in a non-adversarial manner.

(e) Mutual Respect. A Neutral shall promote mutual respect among the parties throughout the dispute resolution process.

3. Opening statements can close doors. Party opening statements were once popular, but they have fallen out of favor in my circle. Although they may still be useful on a case-by-case basis, Party opening statements can be, and usually are mutually offensive to the participants and wasteful of precious time. I find opening statements to be counter-productive to the process of reaching a consensus.

Standards of Professional Conduct, §1(c):

General Principles. A dispute resolution proceeding under Rules 31 and 31A is based on principles of communication, negotiation, facilitation, and problem-solving that emphasize:

(1) the needs and interests of the participants;
(2) fairness;
(3) procedural flexibility;
(4) privacy and confidentiality;
(5) full disclosure; and
(6) self-determination.

4. Time is money. Some mediators don't pay enough attention to the pace of the mediation process. A mediator should be respectful of the parties' time and money. Typically, the parties are paying both you and their lawyers. While it is important to build rapport, most parties want to move the process forward without long speeches and excessive idle talk from the mediator. Late-evening settlements should be the exception, and not the rule.

Standards of Professional Conduct, §4(c):

Avoidance of Delays. A Neutral shall plan a work schedule so that present and future commitments will be fulfilled in a timely manner. A Neutral shall refrain from accepting appointments when it becomes apparent that completion of the dispute resolution assignments accepted cannot be done in a timely fashion. A Neutral shall perform the dispute resolution services in a timely and expeditious fashion, avoiding delays wherever possible.

5. Attitude is everything. Mediation is stressful. Sometimes the mediator's most important job is to increase the parties' comfort level. Optimism, humor, kindness and empathy can go a long way toward relieving tension and creating an environment conducive to resolving disputes.

Standards of Professional Conduct, §1(b):

Neutral's Role. In dispute resolution proceedings, decision-making authority rests with the parties. The role of the Neutral includes but is not limited to assisting the parties in identifying issues, reducing obstacles to communication, maximizing the exploration of alternatives, and helping the parties reach voluntary agreements.

6. When is enough, enough? A mediator should observe and listen. When it becomes obvious that settlement is not realistic, a mediator is ethically obligated to terminate the proceeding. A participant can become paralyzed by indecision due to emotions, exhaustion, illness, incomplete information, or sheer stubbornness. At that point, the mediator must suspend or terminate the proceeding.

Standards of Professional Conduct, §10(b)(2):

Termination by Neutral. If the Neutral believes that the participants are unable to participate meaningfully in the process, the Neutral shall suspend or terminate the ADR Proceeding. The Neutral should not prolong unproductive discussion that would result in emotional and monetary costs to the participants. The Neutral shall not continue to provide dispute resolution services in an ADR Proceeding where there is a complete absence of bargaining ability.