Problem Solver, Trusted Advisor, and Confidant: The Legal Advocate's Role in Mediation

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Mediation has increasingly become an expected adjunct process to all types of litigation, whether the dispute concerns divorce or custody arrangements, business breakups, breach of restrictive covenants, claims of employment discrimination, or contract disputes. Whether parties come to mediation through a court-mandated alternative dispute resolution program or by agreement, lawyers need to be prepared for to be effective mediation advocates. Yet even the most skilled and experienced trial advocates sometimes miss the boat when representing clients in mediation because the adversarial advocacy style that works in the courtroom can derail the mediation process.

An effective mediation advocate's role means acting as a problem-solver, trusted advisor, and confidant. The client should be advised that in addition to understanding the client's position (including strengths and weaknesses of factual and legal assertions, evidence and witness testimony, legal risks), for mediation it will be equally as important for their legal counsel to explore the client's unique interests (*i.e.,* underneath what the client says they want – their needs, hopes, values, beliefs, expectations, fears, limitations, etc.). This approach is consistent with Rule 2.1 of the Pa. Rules of Professional Conduct which provides, ". . . In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." *Pa. Rules of Professional Conduct, 204 Pa. Code § 81.4., Rule 2.1.*

"Nothing is more expensive than a missed opportunity." -- H. Jackson Brown, Jr.

It is important for mediation legal advocates and their clients to understand how mediation differs from adjudication of a legal dispute. In the typical adjudication of a legal dispute typically, a decision-maker (*e.g.,* arbitrator, judge, or jury) determines which party is "right" or "wrong," and then issues a judgment against the losing party. Unfortunately, many clients (and some attorneys) come to a mediation loaded with factual and legal arguments and have the expectation that the mediator will agree and strong-arm their opponent to settle the case on their terms. When that approach fails, they frequently blame it on their "unreasonable" opponent or opposing counsel, the "bad" mediator, or the "waste of time" mediation process. By following a hard-line adversarial strategy that is typically taken in a legal adjudication proceeding, those clients (and attorneys) likely have missed an opportunity to resolve their case on terms that might be more favorable to what could be achieved in a legal adjudication.

In mediation, the goal is to find a resolution that the parties can live with. The goal is not to find fault, assign blame, or to determine who is "right" or "wrong." Instead, mediation needs to be approached as a problem-solving exercise where the parties, their respective mediation advocates, and the mediator work together to identify subjects of agreement that satisfy the parties' *interests* or concerns. Instead, an effective mediation advocate:

- patiently and diligently explores all possible problem-solving options with their client, the mediator, and their opponent;
- allows the client to talk candidly with the mediator and express their interests;
- persists in developing options and proposals that result in the opposing party offering their very last and best option to litigation; and
- allows the client to meaningful choice based upon the options developed through this problem-solving approach.

"You can't always get what you want. But if you try sometimes, well, you just <u>might</u> find, you get what you need." -- Mick Jagger and Keith Richards

Effective mediation advocacy does not mean convincing the opposing party through argument to agree to a settlement that would give your client the full remedy that could be achieved through a legal adjudication or whatever your client thinks they "deserve." Instead, effective mediation advocates carefully prepare for mediation by:

- Explaining the difference between mediation and adjudication to their clients;
- Spending significant time with the client, prior to the mediation, to gain an understanding of and have a candid discussion concerning the client's position and interests;
- Discuss the opposing party's possible interests;
- Frankly discussing potential fees and costs to the client, win or lose;
- Brainstorm creative solutions (both monetary and non-monetary) that could meet your client's (and opposing party's) interests (*Remember, mediation settlement options can include solutions that are not available as legal damages or remedies in an adjudication*);
- Don't establish absolutes about what must be or what will never be paid or achieved;
- If there is a possibility of a continuing relationship between the parties, discuss terms for future interactions (and including how the parties will try to resolve any conflicts);
- Discuss BATNAs (best alternatives to a negotiated settlement agreement) and WATNAs (worst alternatives to a negotiated settlement agreement);
- Having an *ex-parte* pre-mediation call with the mediator to discuss any unique issues, obstacles to settlement, request for a "reality check" in a private caucus with the client, or other needs;
- Advise your client that you will be wearing a different "hat" as a mediation advocate, and your tone in the mediation will be less formal and more collaborative than in litigation;
- Prepare your client for questions from the mediator and communication of options and interests;
- Look for small points of agreement to build upon; and
- Don't give up if settlement is not achieved in the first mediation session – continue to explore creative options that meet your client's interests with the mediator.