

Building Your Mediation Practice: November 2008

Mediation: Likes, Dislikes and Suggestions

By Robert E. Lee Wright

An important part of managing a mediation practice is delivering high quality services which meet the needs and expectations of our clients. One of the challenges is getting critical feedback from clients, reluctant to offend someone they may use again in the future. Ideally, we would each hire a consultant to interview our clients with a promise of confidentiality, to find out how we are truly perceived. Short of that, we can turn to a general survey of focus groups.

Similar to the extensive focus group research conducted by Section Taskforce on Mediation Quality - their final report and recommendations on improving mediation quality can be found at

<http://www.abanet.org/dch/committee.cfm?com=DR020600> - an informal survey of local attorneys and mediators was conducted during a breakout session in a recent Bench/Bar conference, sponsored by the Federal Bar Association for the Western District of Michigan. Participants were asked to identify their likes, dislikes and suggestions for improvement concerning the federal court's mediation program. All participants were licensed, Michigan attorneys practicing in the Western District of Michigan. Several attorney mediators were also in the audience.

The author recorded all of their responses. It is hoped that these responses may assist mediators in designing or redesigning their processes or encourage them to become more transparent and explain why they do certain things. Some of the suggestions were quite intriguing.

What Participants Like About Mediation:

Participants identified several things they like about mediation.

1. Mediation generally works well.
2. Getting decision-makers to sit down together in the same room.
3. Mediators can devote more time to settlement negotiations than magistrate judges.
4. Parties can disclose things to mediators they don't feel they can tell judges and magistrate judges.
5. Tenacity of good mediators; their willingness to stick to it and not give up.
6. Well-prepared parties, attorneys and mediators.

Dislikes:

There were a few things which participants dislike about mediation. These dislikes or areas for improvement led to a discussion of possible changes.

1. People who are "not enthusiastic about being in mediation." [Referring to those who choose mediation because they think the Court wants them to

- do so, but whose "hearts are not in it." The same would apply to court-ordered mediations in other jurisdictions.]
2. Parties who will not budge without prodding from a judge or magistrate. "Mediation doesn't work for them."
 3. Expense of mediation.
 4. Mediators who are afraid to be more evaluative (in caucus sessions) to give a recalcitrant party a reality check.
 5. Lack of preparation by parties/counsel/mediators.
 6. Pending motions for summary judgment. [Although some said they thought the uncertainty of the pending motion helped move parties along, others said it locked people into a position and they were unwilling to budge. There was no clear consensus as to whether it helped or hurt mediation. However, one participant observed that a belief in a strong case and confidence in prevailing on the merits is an aspect of most mediations and settlement conferences.]

Suggestions:

1. Discuss any discovery needed to make mediation more effective, at or prior to the pretrial scheduling conference so it can be reflected in the deadlines set by the scheduling order
2. Mediators should stay involved until all settlement documents are finalized. Parties may need help from the mediator with the language for release clauses and other provisions. There appears to be frustration when the settlement process is drawn out by haggling over settlement terms. Some mediators put a clause in their retention agreements stating they will remain available to assist the parties with settlement terms. It was suggested that the Court might require the parties to exchange settlement language prior to the mediation, as part of their mediation summaries.
3. Require parties to exchange settlement demands and offers prior to mediation and to identify any impediments to settlement in their mediation summaries.
4. Train the next generation of mediators so that the knowledge and experience of more experienced mediators will not be lost. Mentoring, possibly through an apprenticeship program, was suggested as a way to pass along this knowledge.
5. Develop local training for new mediators, though not necessarily a 40-hour program; possibly a one day or weekend training to determine whether a participant wants to invest in a 40-hour program.
6. Provide a training session for lawyers on how to effectively represent clients in mediation.
7. Mediators should follow up on cases which don't settle at the mediation session to see if they can be settled afterwards.
8. When cases don't settle in mediation, hold a wrap-up session with all parties in the same room to identify areas of agreement/disagreement; confirm outstanding offers/demands; discuss what can be done to move

the parties toward settlement, (e.g. take a deposition, wait for the ruling on a motion, etc.); and to determine the extent of the mediator's continued involvement.

9. Mediators should not give up too soon. They should keep the parties working toward settlement until there is clearly no hope before calling it quits.

Being aware of these likes, dislikes and suggestions for change may provide guidance to mediators on how to modify their style of practice.

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