ETHICS FOR ADVOCATES

IN MEDIATION

WITH SOME COMMENTS

ON MEDIATION TECHNIQUES

William S. Goodman, Esq.
Mediator and Arbitrator
Henning Mediation & Arbitration Services, Inc.
Goodman McGuffey Lindsey & Johnson, LLP

CONFIDENTIALITY

Mediation is a confidential process. Two fairly recent opinions of significance have addressed the ethical consideration of confidentiality in mediation.

On June 5, 2009, The Committee on Ethics of the Georgia Commission on Dispute Resolution, in its Ethics Opinion 3, stated in part:

The Committee further recommends that mediators never voluntarily testify about their mediations under any circumstances other than those covered by the exceptions to confidentiality in the Supreme Court **ADR Rules. If necessary, subpoenaed mediators should enlist the assistance of the local court ADR program director or the Georgia Office of Dispute Resolution in quashing the subpoena and educating court and counsel. Likewise courts should never require or allow mediators to testify about their mediations. The mediator's promise of privacy to the parties-which allows them to communicate fully and openly without fear that the information would be used against them later-is critical to the success of the mediation process.**

Thus not only is a mediator never voluntarily to breach the confidentiality of mediation, the court is not to compel a breach. Moreover, the mediator has an affirmative duty to resist a subpoena, absent applicable exception.

The strength of these mandates to a degree may rest uneasily with the unanimous partial holding of Wilson v. Wilson, 252 Ga. 728, 653 S.E. 2d 702 (2007), that the trial court did not err in permitting testimony of the mediator on the limited issue of the apparent competency of a party during a nine hour mediation. The court noted that " ... the mediator did not testify about specific *confidential* statements that Mr. Wilson made during the mediation, but only testified about his general impression of Mr. Wilson's mental and emotional condition .... " Id. at 733. The "significance of the confidentiality of the mediation process and the strong policy considerations that support it" were acknowledged. It urged trial courts to exercise caution in calling mediators to testify. The "better practice" for a trial court would be to hold a hearing in
camera to address the need for calling the mediator as a witness. Id. at 734.

While the policy of confidentiality remains strong, it has been breached. I have uttered one affidavit at the request of counsel since Wilson in order to address a mental incompetence allegation made by a recalcitrant plaintiff. The court affirmed the settlement reached at the mediation.

CAUCUS CONFIDENTIALTY

I inform counsel for the parties as part of my opening remarks that my practice on caucus confidentiality is to take great liberty in disclosing to the other parties what is said in any private caucus unless I am informed that something is off limits, in which event I will honor the request for confidentiality. My experience has been that this approach works very well in practice. Lawyers easily distinguish what they want to be confidential and what they will allow me to use.

WRITTEN AGREEMENT

The strong policy considerations underlying confidentiality dictate that the "best practice" is to reduce the agreement between the parties to writing before everyone leaves the mediation. Ethics Opinion 1 of The Committee on Ethics of the Georgia Commission on Dispute Resolution ends with the following language:

What is recommended is that if it is clear that parties are in agreement, the agreement should be memorialized while the parties are present. There are several reasons for this recommendation. A written agreement guards against the danger of misunderstanding. Reducing agreements to writing while all parties are present provides the best opportunity to correct misunderstanding. Since the writing would be the highest and best evidence of the agreement, a signed written agreement guards against the danger that the parties will try to call the mediator to testify. Finally, a written agreement protects against serious problems of proof when there is a motion to enforce an oral agreement allegedly made in a highly confidential meeting.

PARTIALITY

The mediator must not show any partiality. The mediator also must not show any appearance of partiality. A surprising number of lawyers have suggested that I do mediations involving the law firm which bears my name, Goodman McGuffey Lindsey & Johnson, LLP. to which I am Of Counsel and in which I for years have had no financial interest. I consistently have refused, while appreciating the good will shown by such requests.

CONFLICTS OF INTEREST / BIAS

The mediator must avoid any conflicts of interest or bias. As I no longer have any financial interest in the practice of law, I find that I have avoided many conflicts of interest.

Problems for mediators in law firms include actual conflicts arising out of handling a mediation involving a party which someone down the hall either represents at the time of the mediation, or shortly before the mediation, or takes on representation of that party sometime after the mediation.

THE MEDIATOR'S NUMBER

1. The mediator's number is usually a synthesis of several elements: what he or she thinks will settle the case, together with the number and brackets being exchanged and what is heard from lawyers and parties. The number rarely will be something the mediator has "picked out of the sky," but rather it is a number that has been informed and refined by everything that has gone on during the course of the mediation.

2. The number is most often used, in my experience, by repeating it throughout the mediation, after it is "discovered" by the mediator's questions and observations of facial expressions and body language. Listening to counsel also is useful, sometimes outside the presence of their clients.

3. Quite often neither party would either payor take the number at the beginning of the mediation. This gets at the heart of why mediation is so successful, in my opinion: The parties literally change their minds during the course of the negotiation. As everyone knows, this may take place on the day of the mediation, or sometime thereafter.

4. A different form of mediator's number is what I call "The Mediator's Silver Bullet." This is a formalized technique which is used at the close of a mediation, when it appears the parties are at an impasse and it appears that the negotiation has failed. A) I hand into each separate room my number, the "Silver Bullet," written on a piece of paper. B) I explain the ground rules by saying that each party is to consider the number separately and let me know privately whether they would agree to accept it. C) The number is my number to be accepted or rejected, and is not a negotiating number. D) If both accept it, the parties can slap each other on the back and go home settled and successful. E) If one accepts the number and the other does not, I send them both home unsettled. F) The party who does not accept is never told that the other party did accept. This technique has proved very effective, particularly in cases where parties, for reasons of ego or emotion, have not been able to close the deal.

5. A final form of mediator's number, less formal than the silver bullet, involves the mediator simply telling the parties at the end of the day, together or separately, the number the mediator feels would be reasonable. This technique also has been successful.

MY TOP FOUR ELEMENTS INDICATING LIKELIHOOD OF *SUCCESS* OF *THE MEDIATION*

1. The number one indication for the success of the mediation is that the lawyers are getting along well. Professionalism is of crucial importance here.

2. Number two is a level playing field as to the facts. If the parties have significant factual disagreements, the case may be much more difficult to settle.

3. Number three involves unusual or highly contested areas of the law.

4. Number four is the evaluations of the parties. If those evaluations of the likely ranges of success in court or before a jury overlap, we have a pretty good chance of settlement. If the evaluations are vastly disparate and do not overlap, trouble is brewing.

TIPS FOR ADVOIDING IMPASSE

1. Make Plaintiffs feel at home.

2. Let them know they are respected.

3. Let Plaintiff know she is the decision maker. (The lawyer is her "fighter," not her decision maker.)

4. In wrongful death cases, let survivors know that we won't be discussing their value of the deceased's life, but the value of a "case," as determined by legal principles.

5. In bodily injury and wrongful death cases, tell Plaintiff how sorry we all are for the injury. Although the Defendant's representatives are there because they have a "business responsibility" for the case, they take no joy in the injury and bear Plaintiff no ill will.

6. In transactional cases, emphasize cost saving. Get the lawyers to estimate costs of trial and appeal.

7. What is the range of ten likely verdicts, your best day, your worst day, and the bell curve in between?

8. Identify likely delay and cost.

9. Analyze limited monetary benefit to Plaintiff of additional amount Plaintiff is holding out for.

10. Analyze the risk to Plaintiff of the workers' compensation carrier saying Plaintiff is fully compensated by a verdict, whereas a release agreement based on a compromise may include the statement: "The Plaintiff has not been fully compensated."

11. Consider lien and reimbursement issues.

12. Consider the "offer of judgment."

13. Encourage both the parties, repeatedly.

14. Discuss with Plaintiff the dissonance between her stated desire to "settle the case today" and the desire to hold out for more money.

15. In insurance cases, explain to Plaintiff the insurance company's legal mandate to establish a "reserve." Explain basis for this reserve.

16. In cases not involving insurance (or with large retentions), explain to Plaintiff that the money is coming off the bottom line of the Defendant, so the case may be more difficult to settle.

17. Use brackets to close gaps. Explain the use of brackets.

18. Explain to Defendants that, with the Plaintiff, it always seems to be about the mid point, whereas the Defendant is offering real dollars.

19. Be prepared to make suggestions, as well as to explain your reasons therefor.

20. Be nice to the parties. At appropriate times, brighten the situation with a little humor.

21. Get Plaintiff to sign an agreement to settle for a number that Defendant is reluctant to pay, the offer to be open for a limited time.

22. Use lawyer talk to break log jams.

23. Continually "fish" for numbers, e.g., "For my ears only, would you pay (or accept, as the case may be) $250,000?

24. If the case is about to tank, ask each party, for your ears only, to give you their bottom and top numbers, respectively, so you can advise them whether it would be beneficial for them to continue negotiating.

25. Have the principals talk with each other privately, most often with only the mediator present.

26. In transactional cases, “expand the pie,” e.g., with the possibility of continued business together.

27. In transactional cases, exchanged offers are to be written out by the parties to avoid mistakes in communication.

28. In writing an Unliquidated Damages Interest Act letter, be sure to include in the letter or by separate email that the number demanded is an ending number, not a posturing number. Your beginning demand at mediation therefore will be much higher. This will avoid much grief at mediation.

29. “Highly recommend” the final number.

30. Keep everyone in the building.

***