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LAWYERS IN MEDIATION

EFFECTIVE TECHNIQUES AND BEST PRACTICES

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Presenter Bio

Katie L. Kestel Martin, Esq., MSW, attended SUNY at Buffalo for her Bachelor of Arts in Psychology/Sociology, Master of Social Work, and Juris Doctor. She has been an advocate for the mental health community and for individuals and families since bar admission. She is currently an associate attorney at Pusatier, Sherman, Abbott, & Sugarman, LLP practicing as a litigator and mediator in Matrimonial and Family Law. She is active in the Erie County Bar Association's Matrimonial and ADR Committees. Katie volunteers with the American Cancer Society Cancer Action Network, a grassroots organization, as a Vice-State Lead Ambassador and Congressional District Lead. She currently serves on the local chapter Advisory Board for the American Cancer Society. Katie created an inspirational blog, www.dreamactinspire.com, that aims to engage and motivate helping professionals to achieve their best potential by engaging, collaborating, and communicating genuinely.

NOTE: This presentation provides general information regarding state laws and practices, but it is not intended as legal advice. The opinions and statement provided by this presenter does not represent the opinions of Pusatier, Sherman, Abbott, & Sugarman, LLP.

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What is Mediation?

Mediation is a private, consensual, and informal process that allows disputing parties to craft their own binding agreement through a neutral third party.

This process is typically most useful in cases where negotiations have broken down or are otherwise at a stalemate. However, mediation can help in many civil matters including commercial, real estate, divorce, family law, restitution, and more.

Types of Mediation

While negotiations are common in litigation or transactions, negotiations within mediation can look a little different as the intention may be to keep a relationship intact or provide a more amicable process that is not so adversarial or contentious. Also, for many it can be cost effective, efficient, and conclusive. That being said, there are at least three ways that the mediation process can be used: 1) facilitative; 2) evaluative; or, 3) transformative.

In each, the mediator is a neutral party who provides a platform for private, constructive negotiations. The difference between the types of mediation is mainly in the way the mediator is used to help the process along. The names help describe these methods fairly simply, but what is most important is to be prepared for meeting with the mediator and the other party (or parties) to discuss the interests, rather than just the positions, of your side and work towards whatever mutual goal.

Regardless of the type of mediation, it is important to remember that this process is meant to be done with all parties presenting their interests with intentions of negotiating in good faith, gentler advocacy (i.e. not name calling, accusing, etc.), and patience. This is what may separate mediation most from settlement conferences, courtroom litigation, or arbitration.

Why come to the table?

Some courts may require mediation as an attempt to settle a matter rather than proceed in litigation. This may allow cases to be handled in a more timely and productive matter while pending a hearing date. However, one of the goals of mediation is to have parties consensually or voluntarily come to the table in an

effort to settle or resolve smaller issues. Therefore, you may be required to go to mediation regardless of your predispositions, but it can be seen as an opportunity.

Other reasons parties may want to mediate is to maintain relationships, prevent future litigation, provide a more creative settlement than what may otherwise be directed by a court, or (sometimes) because it can be more cost effective.

How does it work

A certified mediator is neutral to the matter and will first ensure there are no conflicts of interests between the parties and the mediator. Once it has been determined that there are no conflicts, the mediator may proceed in the following ways depending on how the matter was brought to mediation.

A mediator may start by meeting with parties separately but it is more typical that the mediator will meet with parties in a joint session, or where all parties (and attorneys, if applicable) are present. This is can be at the mediator's office but can also be somewhere the parties agree upon.

At the initial mediation session, the mediator will explain the process including the need for good faith negotiations, civil and open discussions, and the importance of confidentiality. Mediations are not always privileged, but it is common (if not prudent) for a mediator to require the parties to agree to the sessions being confidential. It is atypical for a mediator to be subpoenaed when negotiations breakdown and go in front of a judge, but it can happen. (*See*, *Hauzinger v. Hauzinger*, 10 NY3d 923 (2008) (upholding a Fourth Department decision regarding waiver of privilege); *see also*, CPLR 3101[a][4].)

The parties will have an opportunity to provide opening statements. This is an opportunity for the parties, not the attorneys for an oral argument or recitation of the facts. An opening statement can explain a person's dilemma, their interests, and their hope for the mediation.

It is important to note here that mediation focuses on interests rather than positions. Most negotiations will be based on the objectives or positions of the parties rather than why they are seeking those positions. By focusing on the interests rather than the positions, mediation can open discussions to more creative or versatile solutions.

The parties may meet with the mediator separately, which is called caucusing. These are private, separate discussions that can allow the mediator to gather more information and get a better understanding of potential blocks or pitfalls in the negotiations. Some mediators will heavily rely on caucusing, others will make every effort to avoid them. It may depend on the type of case, the type of mediation, and the preferences of the mediator.

Advocacy in Mediation

First and foremost, you are still an advocate for your client. You are advocating for your client's interests but it's understood that the parties are agreeing to good faith discussions that are made without prejudice and with confidence.

Second, your client and their interests are there to be heard but to also listen. Mediation allows for parties to discuss interests and positions more openly than if they are strictly in settlement conferences or court settings.

Third, because of this style of negotiations, there may be creative or unorthodox resolutions not typically found in legal remedies. For instance, an apology.

Effective Techniques and Best Practices

Preparing your client for the experience

An attorney should prepare their client by discussing both the best and worst alternatives to a negotiated agreement. This can include costs/expenses, deadline or time available, need for multiple issues to be addressed, and ultimately the success in court.

Listening to your client and understanding their interests can make you especially equipped to continue discussions without need for constant side-talk or recesses. Furthermore, it will provide the advocate the confidence to help prepare a client to do most of the talking.

Discovery, or not

If the mediation is happening before a court matter occurs (i.e. separation agreements) or in the beginning of litigation, discovery might not be obligated by either party. It may be important to discuss with your client what could be helpful for the mediation process, especially if documents or records are needed for true good faith negotiations.

Be Honest

Be honest with your client about the best- and worst-case scenarios going into mediation. Make sure this process is a good fit for your client, but also make sure they can make their own decisions based sound advice. This also includes assessing the impediments to settlement. Look at every angle to have the best idea of where the case likely headed and where your client would like to go.

It may be helpful to analyze with your client what the other side has to gain or lose when in the mediation. This is not necessarily to pounce on a perceived weakness. Identifying a cost/benefit for your opposing party can help you and your client better plan and likely foresee the success of the mediation.

Don't be afraid to get creative with your client too. Play out possible scenarios. Not only will this help you analyze the matter more fully, it may assist you when you are in the mediation room.

Participating as an advocate

It is important to listen to understand the other side's interests as well. This may help resolve simpler issues faster to allow for discussions on the more complicated issues. Also, it provides a perspective the probable end result.

Critical negotiation skills are imperative for a successful mediation. An advocate needs to be on their best game to engage in negotiations and set goals throughout the process.

And, don't forget, you are still an advocate. You may not be standing up and pronouncing your client's demands, but you are effectively promoting their interests, protecting their rights, and helping create something that can be long standing. Make sure to have patience with the process and stay active throughout.

However, don't overestimate the benefits (or over-anticipate the detriments) for your client. Know when to push, when to walk away, and when to pause.

After Mediation has ended

Make sure to debrief with your client afterward. If there is a signed agreement, make sure they are fully aware of any loose ends that need to be executed or enforced before any set deadline. If the agreement has not been signed, make sure to review and see if revisions are necessary, preferably through further mediation sessions.