Ethical Conduct in Mediations, Grievances and Negotiations

The Role of the Mediator, Attorney and Client

Presented by:

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My many thanks to Mike Amis, Attorney Mediator, Dallas, Texas, the author of *The Art of Mediating Lawsuits*, originally published for the Texas Wesleyan School of Law, 15 *Tex. Wesleyan L. Rev*. 517

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THE ART OF MEDIATING CIVIL LAWSUITS

Mike Amis, Dallas

"art: the conscious use of skill and creative imagination; implies a personal, unanalyzable creative power (the art *of choosing the right word)."*[1]

INTRODUCTION

Bearing in mind the definition of the word "art," the Author proceeds with a mixture of trepidation and bravado in committing to print his description of the "unanalyzable." What follows is the Author's sharing of the methods with which he approaches and conducts his role as a mediator of civil lawsuits, crediting most, if not all, he has learned to his trainer, Steve Brutsche (1947–1991), and to the hundreds of lawyers who have appeared as advocates in mediations he has conducted over the past nineteen years. The discussion will generally follow the chronological flow of a typical day of mediation and will direct particular attention to the close of the session.

THE MEDIATION PROCESS

Effective mediation of civil lawsuits (including disputes that have not yet been articulated in the form of pleadings presented to a court but that have been defined sufficiently to engage lawyers on at least one side) is indeed a *process.* There is a beginning, middle, and end. This process is in essence a meeting chaired by someone: (1) who has been trained in mediation and can capably apply the authorities, statutes, and any order governing the session; (2) who invites equally the trust of the parties and counsel, usually meaning someone who has knowledge of the context of the dispute and the dynamics which govern the path along which prospective or continued prosecution of

[1] MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 65 (10th ed. 1993).

the claims and defenses in the courts or other forums might take; and (3) who is neutral, meaning the mediator has no stake in the outcome and is truly concerned with the matter only as an advocate of a settlement the parties might voluntarily reach.

The foregoing is basic, but the mediator quickly learns that each of these elements will be strongly tested by counsel and clients whose paramount concern, understandably, is what they perceive to be in their best interest that day and how best to achieve it through whatever means they might employ. The challenge for the mediator operating in the legal context is that he or she must build a bond with *both* the lawyer and the client. The mediator is there to support the lawyer's commitment— mandated by Texas' Disciplinary Rules and its Lawyer's Creed— and to serve the best interests of the client. The mediator must be alert at the outset for one or both counsel wanting to take control of the session, dictate the format, often insisting that a joint session be disregarded, and that "let's just get started, not waste time; we'll know in the first 30 minutes whether or not it will settle" attitude. Experienced mediators will use all their communication skills in getting the parties and counsel to engage in a joint session so as to lay the framework for an effective session and process. Establishing the opening stage often calls for a "mini-mediation" and is critical for the work that follows. The mediator may caucus as to the format of the joint session separately with each party and his or her counsel, or separately caucus with just counsel, to set agreed-upon ground rules. The "opening stage" begins with a joint, or convening, session chaired by the mediator followed by separate, initial, private caucuses by the mediator with each side (a "first caucus"). In this stage, the mediator establishes his or her credentials with the parties, the format and agenda that the session will follow, and, in the first caucus with each, gathers as much factual and

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