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MEDIATION AND ETHICS

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MEDIATION AND ETHICS
Materials Supporting Brice Presentation
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The materials for this presentation consist of a Texas Supreme Court Docket Order entitled "Ethical Guidelines For Mediators," plus copies of the evidence rules regarding non-admissibility of settlement discussions, the Civil Practice and Remedies Code language pertaining to mediation and confidentiality, the three published opinions of the State Bar Ethics Committee involving mediation, and a series of short, situational reflections which I have accumulated over the years and which have helped me understand what happened or should have happened in real case situations.

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MEDIATION MYTHS:[1]

The following paragraphs address some of the issues which arise when cases come to mediation. They may warrant discussion or disagreement when considered in the context of any particular case, but that discussion itself may be useful in the mediation process.

1. "Who chooses the mediator?" When I was handling cases for defendants, I preferred to have my opponent(s) choose the mediator. My client always retained the checkbook power, and if we were being "reasonable," a mediator trusted by the other side might recognize it more readily than an interested plaintiff or an advocate with his or her game face on. I now believe the same analysis works from the plaintiff's side, although the decision to go forward to trial tends to substitute for that discretionary checkbook, if a defendant is being unreasonable. Of course, whether the parties were being "reasonable" was frequently what the mediation was testing in the first place.

2. Credible Objectivity – for Lawyers and especially for Clients. Some lawyers believe a "strong" mediator is necessary to force a case to conclusion, and this may be true in some cases. Some lawyers believe a more malleable mediator is desirable to help them reach a particular result, and this may also be true in some cases. In most cases, however, effectiveness in a mediator results from the persuasive force inherent in bringing credible objectivity to bear on the respective parties' positions. That is, in order for a mediator to be effective, both the lawyers and their clients must come to believe that the mediator is both impartial and informed about the case, its forum, the needs of the respective parties, and the strengths of the respective advocates. This confidence in the mediator helps the participants in the mediation to have confidence in their own decisions, including the decision whether to settle their dispute in the mediation.

3. "Bidding Against Oneself." In many negotiations, a party would not wish to change its position (either lower a demand or increase an offer) unless its opponent had made at least a gesture toward compromise by moving its own position in the correct direction. This generalization is sometimes petrified into a rule forbidding bidding against oneself. This "rule" will occasionally betray you, however, if it prevents a defendant from getting enough of its intended offer on the table to make plaintiff aware that an eventual compromise might be possible, however distasteful that compromise might be to either party. Similarly, if a plaintiff hangs the meat too high, the dogs won't jump (to borrow a graphic image from experienced plaintiff's attorneys). Both sides in a mediation are sending unexpressed messages by the positions they take in negotiation – neither should permit a rigid rule to block the message that a compromise might eventually be possible, unless that rigidity is in fact the intended message.

4. "Pre-planned Negotiation Limits." Discipline or dogmatism? Planning for a negotiation, whether or not mediated by a neutral third-party, frequently involves evaluating the dispute for available jurisdictions, potential recoveries, potential exposures, potential or actual problems on

Title search: Mediation and Ethics

Also available as part of the eCourse
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