

Apgar: Mediation failure and how to avoid it

By: Peter Vieth © October 28, 2015



ROANOKE – Going light on preparation can doom your client's mediation session, one retired judge says.

Failure to properly prepare the client was number one on Judge Jonathan Apgar's list of reasons that mediations don't work out.

The retired judge, now sitting as a judge designate and serving as a private mediator, spoke to lawyers here on Oct. 9 on how to avoid pitfalls of mediation.

Preparing a client for mediation means more than just giving them the address, date and time, Apgar said.

Help clients explain their own cases

Mediations often succeed where arm's-length negotiations fail because of the opportunity for parties to directly address the other side and explain their cases. Going to mediation without coaching a client about that unique opportunity for personal expression can undermine the chances for reaching an agreement, Apgar said.

The lawyer needs to express his view of the case as well, in the form of a pre-mediation brief.

"You wouldn't believe how many of these I've had where they don't file anything," Apgar said. "It's beyond me why you wouldn't file a pre-conference statement on behalf of your client."

A brief should be no more than five pages for a judicial settlement conference, he cautioned.

Set the proper tone

Clients must be cautioned that a mediation session is not a battleground to seek victory over the opposition.

"Make sure the client understands the whole point of this is to try to find a compromise," Apgar said.

In emotional cases, including difficult divorces, a client may want to penalize the other party. One way spouses do that is by changing demands in the midst of talks: "The husband wanted A. Now he says he wants A, B and C."

Clients must be counseled against such punishment tactics, Apgar said.

"You can't have a moving target like that if you're making an honest effort to resolve the case," he said.

Logistics

A client looking at her watch is not likely to focus on the task at hand, the judge advised.

Make sure your clients understand they should set aside at least an entire day for mediation, Apgar said.

Just as access to decision makers is important on the defense side, lawyers for plaintiffs should probe about family members and others who may be involved with the case. Bring them along.

Imagine the difficulty for a plaintiff who – after leaving home with dreams of a \$200,000 settlement – calls the wife four hours later to explain that he is now down to \$40,000. Perhaps it would have been well to have the spouse on board throughout the process, Apgar counseled.

"If that's going to be a problem with a spouse or family member, have them present so they have the benefit of the process and the information that comes out," he said.

Apgar warned against putting the mediator in the center of the tug-of-war by proposing to shift responsibility for the mediator's fee.

"If your agreement was to split the fee, suck it up and split the fee. Don't put the mediator in the middle of negotiations," he said.

A lawyer should make sure mediation is the client's choice. It is incumbent on an attorney to advise the client of all potential alternative dispute resolution methods, including arbitration and a summary jury, Apgar said.

The lawyer should go over the strengths and weaknesses of each method and the factors involved in the case.

Another element to consider is what to keep secret at a mediation session. Was there a missed deadline, a party caught in a lie, or a plaintiff with Facebook blunders? Attorneys need to consider if, when and how to play such cards, the judge said.

As with any personal injury claim, clients should be warned about the dangers of social media. An accident victim claiming disability who boasts on Facebook about running marathons is headed for trouble.

"Obviously, that's going to create problems," Apgar said.

When the case is not ready

An unprepared case can be just as deadly as an unprepared client at mediation.

You may think you know all about the issues in your client's divorce until someone brings up that forgotten piece of property in an outlying county. A surprise like that at mediation means the case cannot be resolved that day.

"You have to investigate the case sufficiently," Apgar said.

For personal injury cases, be sure to consider the number of empty hands waiting for the settlement proceeds.

"You have to know the liens. You have to know if they can be negotiated. You have to have all the bills," Apgar said.

Preparing the case also means preparing yourself to make the right kind of presentation. It's not a trial, the judge cautioned. The two sides will be talking to each other directly, Apgar said. Avoid over-dramatization.

"If the plaintiff gets too worked up, it can cause more harm than good," he warned.

"Don't make the other side cry," was the advice from one attorney, Apgar said.

"Calming the other side down after they've been crying adds another hour to the process," he said.

Lawyers also should put away their "game face" bravado, the judge suggested.

Slogans like, "We win cases. That's what we do," may be fine for advertising, but it can polarize a mediation session.

Likewise for condescending or insulting remarks, Apgar said. Don't be heard saying, "This is a complete waste of time."

"You're guaranteeing you're going to have a poor result," the judge said.

Once a deal is reached, get signatures on paper right then and there, Apgar counseled.

"You can't let the folks leave without reducing it to a written understanding and getting the folks to sign it before they leave," he said.

Apgar highlighted differences between private mediation and the Judicial Settlement Conference Program offered through the Supreme Court of Virginia.

In private mediation, the mediator is neutral throughout the process, he said. In the JSC program, however, the judge is allowed to express his opinion on the potential outcome of the case and encourage parties to settle, Apgar said.

"The judge has a little more leeway in terms of saying, 'I think this is how this is going to play out,'" Apgar said.

Other than that distinction, Apgar said, the format of settlement sessions is essentially the same. Lawyers would do well to review the checklist for lawyers on the Supreme Court's website – the checklist is helpful whether in the JSC program or private mediation, Apgar said.

Updated Oct. 28 to note that the five-page brief limit is for judicial settlement conferences.

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