

MEDINA COURT OF COMMON PLEAS
MEDIATION IS NOT A SETTLEMENT CONFERENCE

By J. Bruce Francis, Esq.*

It has been my experience as a court mediator that some attorneys do not adjust their mind set to allow their clients and themselves to successfully participate in the mediation. While both sides may appear at the table with a strategy, it does not follow that they are open to the process of mediation. The strategy may include zealous advocacy for their position. These arguments are usually directed at the mediator as if an arbitration hearing were being conducted. In mediation the parties are asked to determine the strengths and weaknesses of both their own and the other party's case. Mediators will often ask a party what the other side "needs", as opposed to what they say that they want. This is an attempt to get the parties to look at the whole picture. If the parties are able to view the disagreement as a problem to be solved, the environment can change dramatically.

A model that attorneys are accustomed to working with is the settlement conference. The idea is to persuade the judge that your position is correct and have the judge twist the arm of the other party to settle on favorable terms. Often bluster, tough talk, and bluffing are hallmarks of the settlement conference. It is unlikely that the judge will be willing to spend much time with the parties at such a conference. Unless the parties are close to settlement, the court may keep the pressure on by firming up the trial date and dealing with procedural loose ends. Other judges may share a rough evaluation of the value of the case based on prior jury verdicts in the county in similar cases. While this is done to stimulate the parties, it is hardly a mediated settlement.

Hopefully mediation facilitates a settlement, while providing a participatory experience for the litigants. It is difficult for a mediator to clarify a position and prevent impasse if counsel has instructed the client that their position is the only thing they need to consider. If one party has a closed mind, communication between the parties is unlikely. If the attorney comes in brandishing a sword, the client is not going to generate any options to settle the matter. If the client's mind is poisoned, they will not attempt to understand risk analysis or reality testing. If the clients have been instructed that their position need not be compromised by the person they have chosen to guide them through the legal jungle a mediator will not have a receptive group.

Attorneys who are effective at the mediation table develop a strategy to encourage participant collaboration. In caucus they are open to providing realistic input regarding possible outcomes as to both liability and damages. If there is no basis for an opinion being held by a client, the attorney will seek to give the client information to conclude that their valuation is not realistic. For better outcomes in mediation, prepare your clients; this includes participation with an open mind. Litigants look to their attorney for guidance and will often mirror the behavior of their counsel. You may want to consider what you are reflecting to your client at the mediation table.

*J. Bruce Francis was the first mediator for the Medina County Court of Common Pleas. He retired in 2014 and wrote this insightful article for the original court website.