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Rudolph, Fine,
Porter & Johnson, LLP

Developing Skills in the Practice of Law

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Alternative Dispute Resolution “Mediation Ruminations”

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Why Has Mediation Supplanted the Jury Trial?



1. The Past: “The Greatest Generation”

(Risk ↑ Expense ↓ Speed of Communication ↓)

2. The Bridge: “Talking ‘Bout My Generation”

(Risk ↔ Expense ↑ Speed of Communication ↔)

3. The Present: “The Social Network Generation”

(Risk ↓ Expense ↓ Speed of Communication ↑)

4. The Current Transition and Future: “The Pre-Suit Generation”

5. The Constant and the Re-occurring Question

The Mediation Basics



1. Selection of a Mediator

a. Geographic location

b. Qualifications:

- 1) “Any person” may serve subject to court approval. 2.5(A)(1)
- 2) A judge may serve in a case not pending before the judge. 2.5(A)(5)
- 3) “Registered” mediators must be lawyers. 2.5

c. Full time or part time

The Mediation Basics



2. Pre-Mediation Paperwork

a. Conflict issues

- 1) Identification of potential or actual conflict(s). 7.4(C)
- 2) Disclosure of potential or actual conflict(s). 7.3(A)(6)
- 3) Consent after disclosure. 7.4(C)

b. Mediation Advisement. Appendix A.

c. Engagement Letters

d. Cancellation Fees

e. Mediation Submissions

- 1) Confidential
- 2) Shared

The Mediation Basics



3. Attendance

a. Client

b. Insurance Adjusters/in-house counsel

c. Attorney(s)

d. Others – See C. 1. *Infra.*

The Mediation Basics

4. Process

a. Opening Sessions

- 1) Requirement/optional?
- 2) Approach:
 - (a) Final Argument
 - (b) Coffee House Chat
 - (c) Advantage for the Defense

b. Negotiation Style

- 1) Personal and predictable imbued with hubris
- 2) Sporting and unpredictable
- 3) Seize the advantage
- 4) Make them mad

The Mediation Basics



4. Process

c. Mediation Settlement Agreements. 2.7(E)(2)

- 1) Writing required pursuant to the Rules. *Vernon v. Acton*, 732 N.E.2d 805 (Ind.2000)
- 2) Oral agreement reached, reduced to writing, but not signed by the parties was enforceable. *Silkey v. Investors Diversified Serv., Inc.*, 690 N.E.2d 329, reh. Den. (Ind.App.1997)
- 3) Oral mediation settlement agreement repudiated by party prior to execution was not enforceable. *Spencer v. Spencer*, 752 N.E.2d 661 (Ind.App.2001)

The Mediation Basics



5. The Goal:

- a. Resolve “all or any part of the issues.” 1.3(A).
- b. “Assist in identifying issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise, and finding points of agreement as well as legitimate points of disagreement.” 2.1.
- c. Reach an agreement, “in whole or in part.” 2.7(E) (2).

The Mediation Basics

6. The Power of the Mediator:

a. Report to the Court. 2.7(E)

- 1) Generally two options – settle; did not settle. 2.7(E)(1)
- 2) Exception – with permission of parties may report on other issues, which, if resolved, would facilitate the possibility of a settlement. 2.7(E)(1)

b. Termination of the mediation. 2.7(D)

c. Ordering a second mediation session (implied power?). 2.7(D) “At any time after 2 (two) sessions have been completed , any party may terminate the mediation.”

d. 2011 Rule Amendments (See Appendix B with proposed and adopted changes; comment re same).

The Mediation Basics



7. Sanctions

- a. For failure to comply with the rules in general 2.10
 - 1) Motion filed by a party; decided by the court; not by the mediator
 - 2) Limited to mediation costs and attorneys fees related to the process
 - 3) To recover, there must be the conscious doing of wrong because of dishonest purpose or moral obliquity that contemplates a state of mind affirmatively operating with furtive design or ill will. *State v. Carter*, 658 N.E.2d 618 (Ind.App.1995) (disapproved on other grounds by *Lake County Trust Co. v. Advisory Plan Com'n of Lake County*, 904 N.E.2d 1274 (Ind.20089)).

The Mediation Basics



7. Sanctions

- a. For failure to comply with the rules in general 2.10
 - 4) The *State v. Carter* decision held that because any sanction is punitive in nature, and because the State is immune from punitive awards, the State cannot be liable for mediating in bad faith and required to pay mediation costs and attorneys fees related to the process. However, the *Lake County* case held that governmental entities are not immune from the imposition of sanctions. 904 N.E.2d at 1278.

The Mediation Basics

7. Sanctions

- b. For the breach of a mediation settlement agreement: Under 2.7 (E) (3) if a mediation settlement agreement is breached/not performed, the court may impose sanctions, including entry of judgment on the agreement.

8. Confidentiality 2.11

- may not be waived; even by the parties

The Mediation Basics

9. Pre-Suit Mediation a/k/a Rule 8 Optional Early Mediation

- a. Originally a “Guideline”
- b. “Information sharing is encouraged.” 8.5
- c. Twin Agreements:
 - 1) Before mediation. Appendix C
 - 2) As a result of mediation

The Problems



1. The “invited” disinterested/interested person dilemma
 - a. The brother of the plaintiff who, as sibling and corporate lawyer, is “helping” his brother with his personal injury case
 - b. The law school student attending a mediation as a class requirement
 - c. The mother of the plaintiff, where the son is suing his father for personal injury even though the mother and father are both named insureds under the applicable policy of liability insurance

The Problems



2. How to pay the mediator more: retaliatory offers
3. How to make enemies, waste money and kill the mediation: the really good offer and change in authority shortly before mediation
4. When to be a human being: always but especially in catastrophic cases

The Problems



5. Missed opportunities: when you get to talk to the plaintiff, don't blow it
6. Footing the bill: when and where to pay mediation cost and expenses
7. The Walkout: "really"?

Negotiation Styles, Tactics and Considerations (in no particular order)



1. The self-insured retention (SIR) high deductible defendant – fight or flight
2. Power of an apology
3. Settle all or part
4. The Final Say
5. Bracket(s) and their implications
6. The “Pass”
7. Will not pay
8. Limit of liability issues
9. Medical Malpractice and their caps
10. Small Cases
11. Conditional
12. Mediator Suggestions
13. Double Incentives
14. Surprise! Additional damages
15. Going Backwards
16. Multi-Party/Multi-Day
17. Medicare and Indemnity issues (Appendices D and E)

1. Rules of Professional Responsibility/ADR Rules

- a. Rule 1.12/Rule 7.6 Proscription of post-participation representation where the prior participation was personal and substantial unless informed consent.
- b. Rule 2.4 The lawyer as a third-party neutral (as opposed to non-lawyer)

2. ADR Rules applicable to Conflict issues

- a. Identification of potential or actual conflict(s). 7.4(C)
- b. Disclosure of potential or actual conflict. 7.3(A)(6)
- c. Consent after disclosure. 7.4(C)

3. No interest in the outcome:

a. Monetary: 7.7

(a) Contingency

(b) Referral Fees

b. Interest in the outcome 7.4(E)

Questions & Answers

Feel Free to Contact Me

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THANK
YOU!



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