Sponsored Content

THOUGHT LEADERSHIP POV
IBJ MEDIA CONTENT STUDIO

Mediation 30+ years

Standing the Test of Time; What is the Secret?

The Indiana Rules for Alternative Dispute Resolution ("ADR") were first put in place in 1992. Today, mediation is an integral part of our justice system and considered a normal aspect of most Indiana lawyers' practices. What is the secret to the longevity and success of the mediation process? The Indiana Lawyer explores with Caroline Gilchrist, a veteran mediator in both family (1987) and civil (1993) mediation, her perspective of how the mediation process has stood the test of time since its introduction to the Indiana Bar in the late 1980's and how attorneys and mediators can continue to capitalize on the mediation process.

CAROLINE GILCHRIST
Civil and Family Law Mediator
The Mediation Group

Caroline Gilchrist is a civil and family law mediator with The Mediation Group, following over 40 years as a trial attorney, focusing on medical malpractice and personal injury. Caroline also serves as a Medical Review Panel Chair. For 25 years, she has been ICLEF's primary trainer for the Basic Family Mediation Training and frequently speaks in continuing education programs.

Q: Since 1992, have there been many significant changes that impact the mediation process since the adoption of the ADR rules in 1992?

It has been intriguing to me that over the course of 32 years, there have been very few changes or amendments to the ADR rules that govern mediation (primarily Rule 2 and Rule 7). I believe that is because the ADR rules advance and protect the basic foundations that are so important to the success of mediation. The neutrality of the mediator, decision-making by the parties, the confidentiality of the process, joint problem solving, and the enforceability of mutually acceptable agreements reached, are some of the tenets that make the process work. Rule 7 provides solid and specific guidance for the conduct of the neutral. Very few amendments have been added to the ADR rules since 1992. In 1995, amendments were made to Rules 7.7A and B, prohibiting contingency fees or fees based on the outcome of mediation, or any commission, rebate , or renumeration for referring any person for ADR services; further supporting the importance on the neutrality of the mediator.

Q: Has there been case law over the years that has significantly impacted the mediation process?

There have been several published cases over the years relating to mediation. In my opinion, most of the cases reported have essentially affirmed the basic tenets of the process and the ADR rules. For instance, case law confirming the enforceability of written mediated agreements executed by the parties was litigated early in 2000, beginning with *Reno v. Haller*, 734 N.E. 2d 1095 (Ind.App. 2000), which related to the enforcement of handwritten notes of an agreement signed by the parties and counsel.

Q: Is there any area of mediation that you think may continue to become more defined in the future?

Confidentiality is an area that could still raise some unanswered questions in mediation. Rule 2.11 states that mediation sessions are closed and confidential, that confidentiality cannot be waived, that a mediator cannot be required to testify and disclose *"any matter occurring during the mediation except in a separate matter as required by law"*, that mediation is regarded as *"settlement negotiations"* per Indiana Evidence Rule 408, and that evidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation. The 2004 appellate case of *Bridges vs. Metromedia Steakhouse Co. et. al*, illustrated that not all questions have been addressed. In *Bridges*, Plaintiff claimed she had a burn injury and a witness was allowed to testify at trial that she observed the plaintiff's hand during mediation and saw *"nothing"*. In upholding that this was admissible evidence, the court determined that it was not *"nonverbal conduct intended as an assertion"* or a statement made in the course of mediation and, therefore, was admissible evidence. This case, as well as the language in Rule 2.11 *"except in a separate matter as required by law"*, potentially raises some questions relating to what would be upheld as confidential in a mediation. For instance: observations as to *"emotional distress"* claimed by a party; whether a participant appears to be under the influence of alcohol or drugs; questions relating to the possible intent to commit a crime; evidence disclosed that could relate to tax violations or fraud. The 2021 Indiana Supreme Court case of *Berg v. Berg* held in part that documents produced prior to and in anticipation of mediation are confidential. Knowing these nuances is important and both mediators and counsel need to think about these possibilities and guard the confidentiality of the process.

Q: Have remote or Zoom mediations impacted the success of mediation?

Covid 19 presented many challenges to mediation, however, both mediators and parties quickly adapted to Zoom and remote mediation. In my experience, Zoom mediations have had surprising success. For successful remote mediations, it is important for the mediator to promote good communication, ensure sessions are not recorded, confirm whether undisclosed people are attending, use breakout rooms wisely, be familiar with how to share documents, and the use of electronic signatures. The mediator should also be deliberate in the effort to personally connect with the parties. For attorneys preparing for a Zoom mediation, it is especially important to make sure documents are provided in advance to the mediator and opposing counsel. Attorneys need to weigh the pros and cons of whether your client should be present in your office, as opposed to attending from their home. Providing the mediator with a well thought out confidential mediation submission can also be important, as you can't just grab the mediator in the hallway to chat. While there are certainly cases where in-person mediation may be key, such as when sensitive issues are involved, I have rarely encountered a mediation that I felt was not a success because it was done by Zoom. People have also recognized added benefits with remote mediation, such as less travel, unproductive down time, and lower costs.

Q: What are some of the secrets for a successful mediation?

A well-prepared attorney. An opening that highlights the intangibles, such as a likeable witness, stories or examples that bring life to an aspect of a claim or identifies significant pitfalls. A thoughtful and informative confidential statement. An opening that highlights the intangibles, such as a likeable witness, stories or examples that bring life to an aspect of a claim. Video or visual presentations can be impactful. In one case, looking at the face of the plaintiff did not show the injury, but the X-ray with all of the hardware needed to repair the multiple fractures told the story. Making the mediator aware of highlighted deposition testimony, medical records, or evidence that supports or contradicts claims made. A willingness to listen, re-evaluate, and look at the situation from all vantage points. Providing opposing counsel well in advance of mediation of significant factors relevant to the case (bills, liens, lost wages, expert opinions) cannot be overrated.

Q: What are a few of the best qualities in a mediator who stands the test of time?

A good listener, who doesn't miss the non-verbal cues. A willingness to ask tough questions. A mediator who guards neutrality and doesn't assume that he or she has the only answer. A mediator who maintains a positive attitude. Someone both open to and an advocate of creative solutions. Someone who is detail oriented. A person who respects the decision-makers. A mediator who is patient, persistent, chasing agreement until a clear determination is made. Someone who helps the parties weigh all of the factors, such as: when is the trial date; what evidence may not be admissible at trial; the financial costs of trial; the emotional costs of trial; is there a relationship between the parties that is at stake; and can things change for the better or worse before trial. It is very important to ensure the written agreement is detailed, complete, memorialized and executed. A mediator does not have to have expertise in the case, just expertise in letting the process work. Mediation works.

Q: What is one piece of advice that you would offer to attorneys who have a case going to mediation?

Prepare your case in a way that makes it as easy as possible for the other side to reach a decision to settle at the mediation. For example, an attorney may choose to do an opening that highlights and briefly outlines the strengths of the case or the other side hears directly from a party who has not yet been deposed. It could be sharing an expert report or deposing an impactful witness in advance of the mediation session. It is very important to provide to the other side, in advance, what is needed for counsel and the decision-maker to evaluate the strengths and weaknesses of the respective positions. While attorneys may debate whether they want to show their "hand" completely before a mediation, mediation is a valuable opportunity to explore to its full potential whether a case can be settled. Most cases settle at mediation.