Mediation

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While adversarial proceedings remain at the heart of our legal system, an extremely low percentage of disputes actually proceed to trial. In fact, the overwhelming majority of an attorney's time is spent advising clients and seeking solutions to prevent win-lose litigation. When a dispute between parties occurs, using alternative dispute resolution (ADR) procedures, such as mediation and arbitration, can alleviate pressure on overflowing court dockets. The purpose of this article is to provide an overview of the mediation process and to help attorneys prepare clients to participate and succeed in achieving dispute resolution through mediation.

WHAT IS MEDIATION?

To understand the use of mediation as an alternative to expensive and time-consuming litigation, it is helpful to know what mediation is and how it differs from arbitration and litigation. Simply stated, mediation involves confidential negotiations between disputing parties that are facilitated by a neutral third party – the mediator. The mediator's role is confined to helping the parties arrive at a mutually agreeable solution. Unlike arbitration or litigation, the mediator does not decide the outcome of a mediation proceeding, but encourages settlement. Parties can mutually select a mediator or may choose a mediator from a roster of qualified neutrals offered by an experienced ADR Administrator such as the National Arbitration Forum (NAF) or the American Arbitration Association (AAA). It is beneficial to the parties to select a mediator who is an experienced legal professional with expertise in the subject matter of the dispute. The ability of an attorney to shape mediation proceedings is influenced by ethical and due process protocols, preferences of the individual mediator or forum, and any statutory or procedural rules governing the mediation.

HOW ARE MEDIATION SESSIONS CONDUCTED?

Mediations may be facilitative or evaluative. Mediators acting in a facilitative capacity guide the parties through negotiations without offering clear indications as to the strengths or weaknesses of the claims. An evaluative mediator will interject his or her observations more aggressively, and might make some recommendations for a potential agreement.

Depending on the mediator, negotiations during mediation proceed in the form of joint sessions, private caucuses, or a combination of the

two. If a joint session is used, each party can make an opening statement to outline key facts, issues, and positions. In contrast, private caucuses allow the mediator to meet separately with each party to ascertain true interests and roadblocks to settlement. The private caucus also gives the mediator an opportunity to consider information that the parties do not wish to disclose to one another. Private caucuses are generally favored by mediators because the format is less likely to breed hostility between the parties and may lead to actual progress in negotiations.

In most cases, mediation sessions take place within the course of a single day. However, particularly complex or hostile disputes could require multiple mediation sessions.

WHAT DOES A CLIENT NEED TO KNOW?

Even before the mediation session begins, a lawyer has an ethical duty to communicate the risks of both mediation and subsequent legal action to the client. "A client's level of trust in his or her lawyer can be irreparably damaged if the client learns for the first time at mediation that there is a risk of summary judgment or that anticipated attorneys' fees and costs will be substantial." To be successful, an attorney must simultaneously focus on securing a positive outcome for the client and on protecting the integrity of the mediation process.

While time and money will often prevent an attorney from setting up a "mock" mediation session, the client should be told what is likely to happen at the mediation and be prepared for the types of exchanges that can occur between the mediator, the parties, and the attorneys. Since mediation is generally less formal than a trial, the client should be ready to play a role in the process and can, if desired by the attorney, field questions directly from the mediator. To prepare the client to participate, the attorney and client should compile a list of the client's interests and needs, possible needs of the other party, and information the client would like to obtain through the mediation session. By making sure that the client understands the purpose of mediation and the potential benefits to early settlement, the attorney can keep the client focused during mediation and ensure that any proposed settlement provides the desired relief.

WHEN SHOULD MEDIATION OCCUR?

As a general rule, a party interested in mediation should begin mediation as soon as possible. There are several advantages to expediting the mediation process. First, since mediation often occurs within the time constraints of other court proceedings, early mediation

allows for more time to sort out the complex issues preventing a settlement.

Second, early mediation can significantly reduce the costs associated with discovery. Third, the true motivations of a party are not always clear, and the exchanges that occur in mediation could satisfy many of a party's grievances without a formal court proceeding. Certain clients will not settle a case until they feel that they have had their "day in court." Other clients simply need to hear the opposing party acknowledge some remorse for the alleged harm. Of course, adverse parties usually avoid communicating in this manner out of fear that such statements may be used against them as an admission if further court proceedings are necessary.

WHAT MEDIATION STRATEGIES ARE HELPFUL?

During the mediation discussions, the lawyer should keep in mind two overarching guidelines. First, both the attorney and client should consider any potential benefits of following the motto: "Hold the facts; disclose the law." In other words, while it is important to cooperate in facilitating negotiation between the parties, there may be strategic advantages to the client in not disclosing all of the facts that are known by the client, particularly if the facts do not favor the client's position. For example, from a strategic standpoint, it might make more sense for the attorney to simply express that the law is on his or her client's side, rather than to attempt to ambush the opposing party with a fact witness. Second, an attorney must be thoroughly prepared and able to communicate to the other side that he or she is willing and able to bring the case to trial. Negotiation simply will not work when one party believes that the opponent is attempting to barter out of a weak position. With that concept in mind, an attorney might wish to establish the litigation option by revealing some of the stronger points of his or her case. During mediation, the attorney must always balance strength and conviction with flexibility and compromise.

WHAT HINTS MIGHT A MEDIATOR SHARE?

One of the more obvious, yet frequently overlooked, miscues by attorneys is a failure to appreciate the input of the mediator. Not only is the mediator a neutral party with knowledge of the proceedings, but, in many cases, mediators offer expertise concerning the dispute's subject matter, as well as experience in settling similar disagreements. As such, the attorney should listen carefully to proposals from the mediator and discuss their feasibility with the client.

Once the mediation moves into the private caucus stage, the discussions between a mediator and party are technically "confidential." However, an attorney should seek to read the mediator's reactions to the client's statements, and pay attention to any hints the mediator might provide. For example, the mediator might indicate that a settlement figure would be "difficult to sell" to the opponent. If the attorney knows that the mediator has already participated in private caucus with the opponent, then the mediator's statement likely reflects that discussion. Such a scenario provides an example of why a client in mediation should remain flexible and hold back from expressing a "bottom line" to the other party or the mediator. The parties may use numbers and proposals to gauge the likelihood of settlement, but should stop short of any stubborn tactics that would breed hostility and compromise the spirit of negotiation.

To foster cooperation and to guide the mediation, one useful practice for attorneys is to prepare a one-to-five page position paper, which can be delivered to the mediator, and to the opposing party, if desired. Concise position papers are extremely useful for mediators, who have the task of comprehending multi-faceted disputes in a short period of time. Upon the request of a party, the mediator will keep the contents of the position paper confidential.

SHOULD SETTLEMENT AGREEMENTS BE USED?

Even when mediation sessions go well, the negotiation does not end with a verbal agreement. After the parties have arrived at a mutually agreed upon resolution to the dispute, the mediator will request that the parties discuss and clarify any agreements. At this juncture, the attorneys might also determine who will be responsible for drafting a final agreement. In any event, it is imperative that the parties solidify any agreement in writing and sign the document before leaving mediation. Of course, the goal is not "settlement at all costs," and the parties should be able to leave the matter open, "subject to mutual acceptance of final document provisions." It is advantageous for the attorneys to get the parties to sign a document detailing the terms of the agreement to eliminate any subsequent confusion over the terms of the agreement. Often, a mediator will prepare a "binding term sheet," which provides a summary of agreed upon terms and indicates that counsel shall prepare formal documents to be signed at a later time. Meanwhile, the signed term sheet represents a binding and effective agreement as to what was decided at the mediation.

WHAT IF MEDIATION IS UNSUCCESSFUL?

Since the parties agreed to mediate in the first place, mediations have great potential for success. However, in the event the first meditation session is unsuccessful, the attorney should view the meeting as part of an ongoing process of dispute resolution. Remembering that the vast majority of disputes settle short of trial, the attorney and client should meet after an initial mediation session and discuss the next move.28 Even if parties cannot agree on a subsequent mediation date, the exchange of information and ideas from the first mediation session could prove valuable in settlement negotiations prior to trial. If the parties trust the mediator, the mediator could also be valuable in a conciliation role leading up to settlement.

MEDIATION: A BETTER SOLUTION?

Too often, attorneys approach disputes as “win or lose” contests without first considering more practical solutions. With proper preparation of the client and a clear understanding of what might be accomplished during mediation, attorneys should add mediation to their arsenal of dispute resolution tactics.

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