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Mediation: Nothing To Lose and So Much To Gain

This article takes look at the mediation process, including agreements to mediate, the benefits of mediation and key takeaways.

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Many corporate executives and in-house counsel believe they would be giving up rights, including their rights to a jury trial and appeals, by engaging in mediation. This is incorrect and demonstrates a misunderstanding of the distinction between mediation and arbitration. Arbitration is similar to but more expeditious than litigation in that discovery generally is conducted, and one or more neutral individuals preside over a hearing and ultimately render a binding, non-appealable decision resolving the parties' disputes. This article does not address arbitration.

Mediation is a party-driven, confidential process through which an impartial person or "neutral" selected by the parties facilitates communication and acts as a catalyst between the parties. Mediators do not render decisions but rather work to draw parties together by eliminating obstacles to communication and guiding the process away from confrontation and towards reconciliation.

The goal of mediation is to resolve the parties' differences through terms that are *negotiated and agreed to by the parties*. Thus, mediated settlements tend to be business-driven, often involving non-monetary compromises in addition to, and sometimes instead of, monetary awards. Often the settlement terms reached by parties through mediation could not be fashioned by a judge, jury or arbitrator.

A high percentage of mediations between reasonable, well-prepared parties result in settlement, and parties who construct the terms of their agreements in mediation are more likely to perform their obligations than those whose resolution has been imposed by a third-party decisionmaker. Indeed, parties tend to be more satisfied with solutions that they have created, as compared to solutions that are imposed by a third-party decisionmaker.

The Mediation Process

The mediation process is informal, flexible, and tailored to each individual case. If litigation is commenced prior to mediation, the litigation generally is stayed or paused while mediation proceeds. A downside to mediation is that a party usually can withdraw from the mediation at any time, but reasonable, willing participants rarely withdraw. The mediation process often involves:

- A preliminary conference to establish procedural ground rules for the mediation, which is attended by the mediator and counsel to all parties;
- The submission to the mediator by each party of a written position statement and supporting documentation, which may be confidential or may be shared with other parties;


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- Separate pre-mediation conversations between the mediator and each party and/or its counsel, during which the mediator attempts to gain further insight into the party, its goals and its positions;
- A mediation attended by the mediator and a representative of each party (with settlement authority) and its counsel, which could last hours, days, weeks or months; and,
- If the parties' disputes have not been fully resolved, follow-up communications between the parties and/or their counsel and the mediator.

Agreements To Mediate

Agreements to mediate may be very detailed and specific or more general, and they may be entered into before or after a dispute arises. It is recommended that such agreements be negotiated, entered into and memorialized

in writing before a disagreement arises when the parties presumably are calm and reasonable. At a minimum, mediation agreements generally contain provisions regarding when in the dispute process mediation will occur (e.g., pre-litigation, after the filing of an answer to a complaint, upon the entry of an order denying a summary judgment motion, upon the completion of discovery), how the mediator will be selected (including criteria the mediator should possess), and any special rules the parties wish to govern the mediation (such as who will attend, how long the mediation will continue, the location of the mediation, and who will pay the mediator).

Benefits of Mediation

The ultimate goal of mediation is for the parties to reach an agreement resolving all disputes between them, thus saving costs (in terms of time, money and manpower) and avoiding damage to brand, reputation and employee morale. A mediated settlement allows the parties to move forward with their lives and business, and also prevents the diversion of key executive time, the incurrence of lost opportunity costs and damaged relationships that could extend beyond the parties to the dispute.

Moreover, mediated settlements eliminate the litigation risk of "win/lose" decisions, affording the parties control over the outcome of their disputes through negotiated settlements involving compromises by all parties. Such give-and-take settlements enable the parties to maintain an ongoing, perhaps even enhanced, business relationship or to terminate a relationship on a more amicable basis.

Significantly, the terms of a mediated settlement and the negotiations related thereto are confidential, and where there is media coverage of the matter, the parties may agree, as part of their negotiated settlement, to the content and terms of a press release that does not reflect negatively on any party.

In instances where a complete settlement of disputed issues is not achievable, a settlement of some issues or a narrowing of the issues to be litigated may be reached, following which, the parties generally are free to engage in litigation, including full-blown discovery and appeals. Even where neither a partial nor a full settlement is reached, the benefits of engaging in mediation generally are numerous and include:

- Each party will be forced to critically evaluate and refine the strengths and weaknesses of its own positions and arguments, as well as those of its adversaries;
- Each party will gain insight into and clarity regarding its adversaries' arguments and positions;
- Each party will have the opportunity to evaluate the performance of its adversaries' counsel, and perhaps its adversaries' witnesses;
- Common positions and goals will be identified, which should streamline subsequent litigation; and
- Creative solutions will be explored that could pave the way for a later settlement.

Takeaways

Early, and perhaps multiple, mediations should be conducted prior to and throughout the life of a litigation. While a complete resolution of the differences between the parties is the goal of mediation, partial settlements, the refinement of disputed issues and the insights and information gathered during a mediation

far outweigh the minimal costs of participating in a mediation. The two critical elements to a successful mediation are a skilled mediator and reasonable participants who understand and want to manage the risks and uncertainties of litigation.

The parties do not give up anything by participating in mediation. If mediation does not result in settlement, litigation (or arbitration, if selected by the parties) will proceed. The work the parties will do to prepare for mediation will be required to proceed with litigation. Thus, the mediator's fee, which frequently is shared by the parties, is the principal cost of mediation. A completely successful pre-litigation mediation will avoid significant litigation costs and risks and will allow the parties to fashion a confidential business-minded resolution of their differences. Any settlement prior to a trial verdict will achieve these goals, with the financial savings diminishing as the trial nears.

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