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Mediation: A Powerful Forum to Resolve Disputes

Our judicial process is entrenched within an adversary system reflecting our individualistic and confrontational culture. We are a culture that thinks in terms of “winning” and “losing.” Numerous barriers to settlement exist within the lawsuit atmosphere. Hard bargaining and the quest to maximize or minimize “settlement dollars” dominate the discussions to resolve disputes.

Conflicts of interests exist between the lawyers and the clients as to what represents a good resolution. Antagonistic mindsets, ineffective and destructive communication, high emotional states and the pursuit of face-saving strategies can further entrench the parties in their conflicting positions and diminish efforts to rationally resolve their dispute.

All of the foregoing dynamics operate under the umbrella of the court system. The current system provides few opportunities for the parties to discuss and work towards settlement in a non-threatening and collaborative manner. On a discovery treadmill, many cases consider settlement only weeks before trial, after substantial investment of money, time and efforts. Certainly there is increased use of both court and private mediations; however, conducting mediation too close to the trial date limits its potential. In light of the current economic slowdown, rising insurance rates, the significant expenses and person-hours incurred in litigating and the inherent communication problems present in lawsuits, the question arises how can mediation be more effective in resolving lawsuits.

Mediation is not unique to, nor did it originate in the legal field. Throughout the ages, in many different cultures and places, and in vari-

ous forms, mediation has assisted people to resolve their conflicts. Currently used by government agencies, schools and universities, businesses, labor/unions, community, family and in the international arena, the use of mediation in resolving lawsuits is very much in its infancy. Sadly, some lawyers still do not know what mediation is and confuse it with arbitration. Erroneously, they think that the mediator is going to “decide” the outcome for them or present them with a workable resolution that is “fair” to all. Secondly, attorneys often do not know how to represent clients most effectively in a mediation setting.

Mediation is a confidential process whereby the mediator facilitates the negotiation and discussions between the parties using a collaborative approach. As an unbiased third party neutral, the mediator provides an informal forum and assists the parties in developing a mutually acceptable resolution. A skillful mediator can assist the parties in listening to what is being said and communicating more effectively. Furthermore, a mediator helps the parties gain a better understanding of the other side’s perspectives, underlying interests, needs and priorities; deal with cognitive and emotional barriers to resolution; and in the disclosure of pertinent information.

So how can mediation be more than a glorified settlement conference or an exercise in shuttle diplomacy? The following suggestions can assist in better utilizing the mediation process.

Consider the Timing of Mediation in the Litigation Process

Most lawsuits are ready for mediation when the parties have a sincere interest in resolving their dispute and enough information to assess their risk and evaluate their options. Moreover, by establishing communication early on in a lawsuit, the more opportunities there are for settlement. For example, with smaller claims, consider scheduling the mediation within 60 days of filing of a lawsuit after providing each party with pertinent information before the mediation. If the mediation does not resolve the claim, it should bring you closer to resolution by narrowing the issues and identifying information needed by the parties. It may also limit the need for formal discovery when the case does not settle.

For disputes involving an ongoing relationship such as employer-employee, business partners, business-customer, doctor-patient or family, scheduling mediation early in the litigation process can establish a dialogue, promote an understanding of the interests and needs of the parties and provide an opportunity to deal with the relationship issues. Early mediation of a dispute can help the parties from becoming further polarized and entrenched in their positions. Mediation can foster recognition and empowerment among the parties enabling them to better understand each other’s perspective, work toward a collaborative settlement and possibly maintain or improve their relationships.

Prepare and Participate Constructively in the Mediation

Preparation is key to a successful mediation. The necessary information and right parties must be present and ready to work diligently at the mediation sessions. It is important that the participants come to the mediation with the four C's: A willingness to Collaborate, Communicate, Commit and be Candid. When the parties are physically present and willing to constructively participate by listening, thinking and speaking, the more effective the mediation will be. Be ready for private conversations, discussions with different combinations of parties, general opening sessions and less reliance exclusively on caucuses throughout the mediation. The parties should identify specific goals that they will accomplish at the mediation. For example, parties' goals may include conveying the key points of their cases, and gaining a better understanding of their case and the other party's case.

Mediation is a process based on respect. It offers an informal, non-threatening and non-adversarial environment to work towards resolution. Interacting in ways that are consistent with the philosophy of mediation will only help you to resolve your dispute. Acknowledging the obvious can help promote feelings of trust and candor and fuel a constructive mediation.

Remember that mediation is facilitated negotiation. Although the mediator needs to handle sensitive and emotional issues, over-reliance on a mediator to communicate every point throughout the mediation is less effective than candid, face-to-face conversation by the parties. It is your case. You know it best. Your confidence and sincerity in face-to-face conversations with the other parties will build trust and legitimize and resonate your message more than you realize.

Custom-Design Your Mediation Sessions: Use the Flexibility and Creativity of Mediation Process to Meet Your Needs.

Mediation is your process. Make sure your needs and goals are met and your situation addressed in the mediation.

For example, in cases of complex litigation/multi-party claims, consider scheduling a mediation directed to providing an efficient exchange of information, scheduling of limited discovery and identification of issues, interests and options to resolve. This provides a controlled forum for the key parties to discuss the claim with each other. Consider designing negotiation sessions geared to optimize resolution of at least some of the issues. Co-mediation

or the use of two mediators can assist in managing the process more effectively, and deal with the complex issues and multifaceted nature of the dispute. Even if the mediation does not completely resolve the case, it will often resolve parts of the dispute and narrow the disputed issues.

The hard bargaining nature of personal injury and tort claims involving only money are challenging to resolve. In these cases consider scheduling mediation with a set time limit and/or a limited number of predetermined offers or demands and designate certain persons who must attend the mediation. These techniques can help overcome parties' delays in getting serious about negotiating and minimize positioning by setting specific ground rules. Moreover, having the proper parties at the mediation helps ensure the decision makers are present and take the process seriously.

When communication and emotional issues are present, tailoring multiple sessions to deal with those issues separately can help build momentum. For example, in a case involving the parents of a deceased child, an initial joint session with a set time limit to give the parents an opportunity to convey their feelings and sense of loss and to hear from the defendant can be very effective. You can schedule subsequent mediation sessions in order to work on the legal issues and settlement. The mediation process can successfully address the human side of disputes by allowing the parties to express themselves in a respectful environment, acknowledging their emotions and feelings and enabling them to move forward.

Use your creativity in communicating your message. For example, you may want to use video presentations, Microsoft PowerPoint, client narratives, informational summaries and other means of information sharing. Encouraging the parties' participation in the mediation can help satisfy their desire for "a day in court" by giving them a voice and acknowledging their perspectives.

Educate Lawyers, the Public and the Business Community About Mediation

The training of lawyers in collaborative negotiations, mediation and mediation advocacy is critical to effective participation in the mediation. Mediation requires a different mindset than litigation and therefore a different way of interacting. Adversarial posturing and face threatening interactions are not beneficial in a mediation session. Furthermore, there are

different models of mediation such as facilitative, transformative, evaluative and directive. Understanding the various models can assist in choosing the right mediator and approach to suit your needs.

The public and business communities need to be better educated on the purpose and nature of mediation. It is critical that they understand and accept mediation as a viable alternative to litigation in order to expand and increase its effectiveness. By recognizing that mediation is a different process than litigation which utilizes different tools and approaches, lawyers can provide greater opportunities for dispute resolution that are more satisfying for all those involved and potentially less expensive and time consuming. ⁱⁱⁱ



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