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Publications

How to Make the Most of Mediation, Straightline

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Today it seems that every case is mediated at some point, either voluntarily through private mediation services or involuntarily pursuant to court order. Mediation offers the parties a consensual resolution of their dispute at a relatively modest cost compared to litigating in court or before an arbitration panel. Most courts have either adopted mediation programs or endorse and encourage litigants to pursue private mediation. Litigants should welcome mediation and take it seriously, since it is an opportunity to avoid the cost, burden and uncertainty inherent in litigation. Many lawyers and clients, however, miss this opportunity by not handling mediations properly.

Consider the following questions:

Should I Provide for Mediation as Part of the Dispute Resolution Procedure in My Contract?

With certain caveats, the answer is no. Providing for mediation alone or providing that mediation take place before arbitration or litigation can thwart a party's ability to go to court to seek preliminary relief, should that be necessary. It is better to provide that, notwithstanding the chosen dispute resolution mechanism, the parties will hire a mediator for the duration of the matter. Having a mediator from the beginning can facilitate settlement talks early and/or bring the parties together at various opportune times.

When is the Right Time to Mediate?

There is no formulaic "right" time to mediate and much depends on the nature of the litigation, the parties and whether the mediation is voluntary or court-ordered. Mediations are usually most successful after some discovery has taken place and the lawyers have assessed the relative merits of their respective positions. Pointing out relevant documents and/or excerpts from deposition testimony during a mediation can help the other side see the case in a different light, and help the mediator broker a rational settlement.

How Do I Choose an Appropriate Mediator?

Selecting a mediator should be based on the four "p"s: personality, patience, perseverance and practicality. The personality of the mediator is very important. Some cases require the mediator to be more like a psychiatrist willing to listen and empathize with the parties; others require a hammer. The best way to determine if a mediator is right for the case is to interview him or her. Patience on the part of the mediator is essential. Mediation may be one day or may last several days sequentially or sporadically over time. Mediation is a slow process, requiring the mediator to maintain harmony and not express frustration if parties backtrack or become intransigent. The mediator must persevere and adhere to the procedures set in advance. Changing the rules midstream can cause the parties to lose faith in the mediator and the process. Most importantly, the mediator should be practical and look for non-monetary ways to resolve disputes. Sometimes parties want an apology. Sometimes a letter of recommendation can settle a case. Sometimes the litigants may be able to continue working together notwithstanding the lawsuit and non-monetary concessions may take on added value. In a mediation the parties can get relief that a court cannot award.

The knee-jerk reaction of not consenting to a mediator proposed by the other side should be avoided. The adversary no doubt respects the chosen person and is more likely to listen to that person's recommendation on settlement.

How Much Preparation is Required for the Mediation?

It depends, but preparation is imperative. Most mediators will schedule a pre-mediation conference with the attorneys to gather background on the case, and any pleadings, and set the parameters for mediation statements. The mediation statement is a critical document providing the parties the first opportunity to persuade the mediator of their position. The mediation statement is not a legal brief. Instead, it is intended to give some background, state how the dispute arose and, most importantly, why the parties have been unable to resolve the matter on their own. A good mediation statement will highlight the history of negotiations and point out the personalities involved in the matter so the mediator understands any obstacles before mediation day arrives. The parties can agree to exchange statements or keep them confidential. Lately, parties are adopting a hybrid approach, exchanging facts and arguments with the other side but revealing settlement possibilities in a separate submission for the mediator's eyes only.

Who Should Attend the Mediation?

Ensure the right client representatives attend the mediation. A high-level executive sends the right message and permits a party to commit to a settlement on a moment's notice. Conversely, sending a lower level employee may signal to the other side that you are not serious about settlement. If insurance is involved, the insurers must be part of the mediation

process. They need not physically attend the mediation, but should commit to a settlement figure in advance and be available by phone.

How Should the Mediation Conclude?

Make sure any settlement is documented. Since the participants are generally exhausted by the time a settlement is reached, it is critical to prepare a draft settlement agreement in advance. Settlement agreements should provide that the mediator has continuing jurisdiction over the settlement. Oftentimes if the parties just agree to a term sheet, questions arise during the process of documenting the settlement that the mediator can resolve.

Conclusion

Mediation offers a relatively inexpensive and expedient alternative to resolving cases, resulting in a settlement fair to all parties. The key is to take advantage of the process, recognize that it is serious, and commit time and effort to reach resolution.

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