NEWSLETTERS

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BEST STRATEGIES IN MEDIATING CASES

When To Mediate

The first strategic step in any case is to decide when to mediate. Mediation has the greatest chance of success when the parties are prepared to engage in meaningful and informed discussions with the mediator. To use mediation effectively, the case must be appropriate for mediation, and the timing of the mediation needs to be deliberately chosen.

Ideally, parties would agree to mediate as soon as possible after their disputes arose. An early mediation may provide an opportunity to better understand the opposing party's point of view. Further, an early mediation can challenge each party to honestly evaluate the strengths and weaknesses of each side of the case. As a general rule, the earlier a dispute goes to mediation, the more likely it will settle. The longer a dispute goes on, the more parties tend to become committed to their positions and less willing to consider another point of view.

It is important for parties to talk to each other when deciding whether it is the right time to mediate. If even only one party feels like the case is ready to settle, then it is a good time to suggest mediation. On the other hand, parties are sometimes reluctant to mediate because the parties are "too far apart." Often these perceptions are inaccurate. In the event the perceptions are correct, then the intervention of a mediator could be helpful in breaking down any barriers.

Mediation is often recommended where both parties have an interest in maintaining their relationship after the dispute is resolved. Disputes about issues such as money, property, behavior, rights, licenses are easier to mediate than disputes based on personal values or beliefs.

When Not To Mediate

There are some disputes where mediation is less desirable. Mediation is inappropriate for a dispute when one of the parties is determined to establish a precedent that will be binding on all future similar transactions or when an issue of law, public policy or interpretation needs to be clarified on the record. Mediation is also not appropriate when the parties are embroiled in a value-based conflict on which they see no room for compromise. Mediation may also not be effective when a party is not unrepresented or represented by inexperienced or unskillful counsel; when one or more of the parties refuses to participate in good faith in the process; or when one or more persons essential to a resolution cannot be brought into the process.

Choosing a Mediator

Mediation has a greater chance of settling the case if all parties believe in the mediator's reputation, personality and qualifications. Lawyers often start by looking for a mediator who has expertise in the type of case at hand. Good mediators will have a reputation for a high degree of effectiveness. An effective mediator often requires an extraordinary amount of patience, and many cases will not settle at the first meeting.

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Preparing Client

In determining whether or not mediation is appropriate and if it will be effective, one of the first things to determine is what are the client's ultimate goals - essentially where do they want to end. If the client mandates an ending which is completely favorable to their position and leaves nothing for the other side, mediation will not work. The client should be advised that in successful mediation, both parties must be willing to compromise. The amount of compromise should be based upon the relative strength of the case if it were to proceed to trial, and should not be based on emotion. It is very important to advise the client of the role of the mediator and his/her role at the mediation. Client participation may be requested at the discretion of the mediator. The client must understand that a mediation is not like a court proceeding and must be clear on the roles of all the participants.

Client Mediation Report

Supplying your client with an assessment of the likelihood of success of the case at trial is a key step in controlling the expectations of your client at mediation. A client mediation report is a good way to convey this information. In such a report, in a concise fashion, lay out the good and the bad about the case. Some possible categories to include are:

1. Controlling law as to all claims and defenses
2. The legal elements of proof for each alleged claim
3. Factual support of record for each alleged claim
4. Facts not yet of record which must be proven at trial
5. All quantified damages at issue
6. Availability of pre-Judgment Interest
7. All defenses of a purely legal nature
8. All factual and affirmative defenses, and whether there are, or are not, proofs of record.
9. All defenses to each element of damages
10. Exhibits
11. Key strategy points for settlement conference
12. Last Settlement Offer
13. Last Settlement Demand
14. Proposed Strategy at the Settlement Conference:
15. Identification of points of vulnerability for each party.
16. Likelihood of Satisfaction of a Potential Judgment Against the Individual Defendants.
17. Factors Unique To This Case

Pre-Mediation Conferences

Some mediators require a pre-mediation conference. Such a conference provides an opportunity to discuss the mediator's approaches and gives the parties a chance to advance their primary goals in the mediation. The parties can identify the interests that their clients hope will be met in the mediation and inquire what obstacles the other attorney thinks may be impeding settlement. The pre-mediation conference also offers an opportunity to be sure that the right people will be participating in the mediation session.

Position Paper

The mediator may require either a confidential position paper or require the parties to exchange position papers with the other side. When preparing a confidential position paper counsel must be cognizant that the mediator, while a neutral, has a different agenda than you do – he is charged with the responsibly to settle the case, not to secure a favorable outcome for your client. In preparing this confidential report, it should contain more advocacy than neutral assessment. The mediator will use any weakness broadcast in this memo to convince your client to reduce its demands. Similarly, he will use any advocacy in your report as a tool to extract concession from the other side. Look at this report as an opportunity to arm the mediator to advocate – many times directly to the

principal for the other side. However do not overstep in such a report to give the mediator the impression that settlement is out of reach and reiterate your willingness to compromise where possible.

When preparing a position paper to be exchanged with the other party, it is important to focus on the correct audience when drafting the position paper. The primary purpose of the position paper is to address the other parties' decision makers. The secondary purpose of position papers is to inform the mediator a summary of what the dispute is all about and to help create an agenda for the mediation day.

The parties will be looking to see how strong the opposition's position really is. Supporting arguments should be provided although it is not necessary to write a lengthy legal brief. Attach key documents and other exhibits as well as copies of cases that you believe to be controlling. The mediator will be interested in learning about the factual background of the case, the key issues and the areas of agreement and disagreement.

The position paper is a powerful tool that a lawyer does not have during the ordinary course of litigation. The position paper should stay focused on the goal of ending the dispute.

Successful Negotiation

When bargaining is not working or taking too long, the parties could try negotiation "bracketing" to narrow the gap. "Bracketing" is a mediation term used to summarize the process of negotiating the high and low of the zone in which bargaining will take place, i.e. "I will offer you $200,000 if you will reduce your demand to $400,000."

Bracketing moves the parties closer to the true gap and makes bridging that divide seem far more attractive and possible. There are several ways to respond to a bracketed proposal: terminate the negotiation, because the signaled range is out of your range; accept the bracketed proposal and see what the other side does next; ignore the brackets and treat it as an absolute offer, making the appropriate monetary response; propose a new and different bracket that expresses your view of where the case should settle; accept half the bracket and modify the other half.

During the mediation process, the mediator will assess the viability of the process and will end the mediation if he or she concludes that it is unfair or prejudicial to any party, or unlikely to resolve within a reasonable time.

Settlement

The most common cause of a failed mediation is the absence of persons with real settlement authority. Settlement authority means the authority to agree to whatever is necessary and reasonable in order to dispose of the case. All parties must have the proper authority for mediation.

If the mediation results in a settlement, the parties should not leave the mediation session without a signed agreement. At a minimum, the participants should draft and sign a handwritten agreement that contains the agreed-upon essential terms. The settlement agreement could contain an alternative dispute resolution clause so that any disputes regarding interpretation or compliance under the agreement could be resolved expeditiously. If the parties agree, it is even possible to refer the matter back to the original mediator.

If the mediation fails to fully resolve the dispute, the parties should consider signing a partial agreement that resolves some of the issues as well as what discovery still needs to be done before trial. The parties may also be able to agree which keys facts are uncontested and which key ones are still contested.

Benefits of Mediation

Even if mediation is not completely successful in resolving the entire dispute, it can be productive for the parties. There are several benefits to participating on the mediation process.

• The mediation process can help to identify facts and issues on which there is no dispute

• Mediation can save lots of time and money. The cost of a mediation pales in comparison to trial or arbitration costs. One reason for this is that discovery in mediation is usually quite limited.

• Mediation alone puts the outcome in the hands of the parties. It offers the parties the opportunity to craft their own customized solutions to the dispute, which need not involve the exchange of money.

• Terms of a mediation settlement may often be protected from public view under the terms of a confidentiality agreement.

• A settlement produced by the process will be a final contract not subject to appeals, and will be immediately enforceable.

• Even an unsuccessful mediation process can help the parties narrow the disputed issues.

• Because it is less adversarial and requires a certain amount of cooperation, the process helps the parties preserve business relationships.

• The parties retain control of the outcome so there can be no unexpected, unacceptable results.

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