PREPARING THE CLIENT FOR MEDIATION: QUESTIONS CLIENTS ASK THEIR LAWYERS

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INTRODUCTION

If you are involved in a legal dispute, you may be able to settle it without going to court. One way to do this is to work out a solution with the help of a mediator - a neutral third person. This article addresses some of the many basics in preparing the client for mediation.

WHAT IS MEDIATION?

Mediation is an alternative to the traditional litigation process. Mediation is an informal process in which a trained neutral third party, the mediator, assists the parties in reaching a negotiated resolution to a dispute. Mediation is forward-looking. The goal is for the parties to work out a solution they can live with. Mediation focuses on solving problems, not uncovering the truth and applying facts to legal principles.

WHAT ARE THE ADVANTAGES OF MEDIATION?

- Parties control the process.
- It is confidential.
- It is flexible.
- Parties are usually more comfortable.
- Parties are responsible for the outcome.
- Disputes are commonly resolved in a fraction of the time.
- Agreements reached through mediation leave open the possibility for future relationships.
- It costs less than traditional litigation!

HOW SUCCESSFUL IS MEDIATION?

There is no authoritative study on the success rate of mediation. The American Arbitration Association reports an eighty five percent success rate. This percentage is consistent with the success rate reported by other institutional and individual alternate dispute resolution providers.

WHAT ARE THE ELEMENTS OF A SUCCESSFUL MEDIATION?

The success of a particular mediation is mainly controlled by the parties. Some of the critical components of a successful mediation involve:

- The background and capabilities of the mediator.
- Attendance of the right people with the knowledge and authority to settle.
- Appropriate level of information exchanged.
- Needs and interests of the parties.
- Whether a trial or arbitration has been scheduled.
- The commitment of the parties and their attorneys to prepare for and participate in the mediation.

WHEN AND WHERE DO I MEDIATE?

Most mediations occur after a claim has been filed and some exchange of information has taken place.

Mediation is most successful when the dispute is in its early stages before the parties have expended their resources.

The mediation should take place at a neutral site. The location is often arranged by the mediator.

IS THE MEDIATOR LIKE A JUDGE?

No. The mediator does not decide who is right or wrong, neither does the mediator make findings of fact, or rules on issues of law. The mediator has no authority to impose a settlement on the parties. Instead, the mediator helps the parties to jointly explore and reconcile their differences. If mediation does not generate an agreement, the parties do not lose their right to trial, and either side is free to sue or propose binding arbitration.

HOW LONG DOES THE MEDIATION PROCESS TAKE?

Mediation is a very efficient process that saves time and money. While the length of mediation will vary in each case, the majority of mediations are completed in eight hours or less. More complex cases, however, will often times require more than one day to mediate. Also, since the mediation process is voluntary, either party may leave at any time if they wish, and the mediator can terminate the meeting if it does not appear to be working, although this is very rare.

HOW SHOULD PARTIES DRESS FOR MEDIATION?

Dress comfortable, but respectable. Mediation is informal and the parties should feel comfortable.

WHO AND WHAT DO I BRING TO THE MEDIATION?

- Legal counsel: Yes, if represented.
- Client: The person with authority to settle -

others with knowledge of the facts.

- Experts: Avoid having experts involved. They are hired to support your position and often complicate the process where settlement options are being discussed. Experts, however, may be helpful to describe technical information.
- Documents: Less is better. Summaries, graphs and charts are useful.
- Others: Associates, secretaries or assistants are discouraged. If there is a need, make advanced arrangements so all parties approve and understand their respective roles.
- Other information requested by the Mediator.

WHAT HAPPENS IN MEDIATION?

Every mediation is different and unique. Experienced mediators will use a format that is best suited for the particular dispute. Generally, the process of mediation falls into six stages:

- *Mediator's Opening Statement.* After the parties are seated, the mediator will introduce the parties, explain the goals and rules of the mediation and likely encourage each party to work jointly toward a settlement.
- *Parties' Opening Statements.* Both parties are allowed time to explain, in his or her own words, what the dispute is about and how they have been affected by it, and to present a few ideas for resolving it.
- *Joint Deliberation.* The mediator may attempt to get the parties talking directly regarding what was said in the opening statements. This allows the mediator and parties time to determine what issues need to be addressed.
- *Private Caucuses.* This is the guts of every mediation. The private caucus is a chance for both parties to meet privately with the mediator to discuss the strengths and weaknesses of his or her position, and brainstorm ideas for settlement. The mediator may "caucus" with each party once or several times if needed.
- *Joint Negotiation.* After private caucuses with each party, the mediator may bring the parties together again for direct negotiation.
- *Wrapping it Up.* This is the end of the mediation. If the parties have reached an agreement, the mediator will likely put the main provisions in writing while the parties listen. If the parties wish, they may write up and sign a legally binding contract. If no agreement is reached, the mediator will review the progress made by the parties in the mediation and advise each party of their options, such as meeting again later for further mediation, going to arbitration or going to court.

IS THE MEDIATION PROCESS CONFIDENTIAL?

Yes. All mediation proceedings are confidential. Documents created for the mediation are also confidential and may not be introduced during a subsequent trial if the dispute is not settled. Likewise, the mediator should not testify or be compelled to testify at a subsequent trial. If the dispute subsequently goes to trial, the judge who is assigned to the case is not told the identity of the mediator or given any information about what took place during the mediation process.

WHAT HAPPENS IF A PARTY FAILS TO COMPLY WITH THE AGREEMENT REACHED AT MEDIATION?

No party shall be bound by anything said or done at the mediation unless a written settlement is reached and signed by all necessary parties. If a settlement is reached, the agreement must be in writing, and, when signed and approved by the appropriate authorities for all parties, it will be binding upon all parties. An agreement reached during mediation is enforceable in court just like any other settlement agreement.

CONCLUSION

Mediation is one technique to settle disputes. Mediation is not appropriate for every dispute, but it has the advantage of allowing the parties to choose the process and outcome rather than have it determined for them by a judge, jury or arbitrator. Mediation is designed to give the parties a great deal of control over the outcome. To be successful in mediating the parties must understand the mediation process, the merits of their case, and strategies to obtain a good result.

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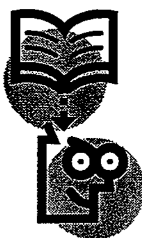

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