Questions Clients Have about Whether (and How) to Mediate and How Counsel Should *Answer* Them

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Today many attorneys recognize the value of mediation to clients. But since many clients have no experience with mediation, there is much they need to know to be able to decide whether to mediate a particular dispute and then to be able to mediate effectively. The questions and answers here can help counsel prepare for these discussions. They should also be of interest to mediators who can ask counsel pertinent questions to facilitate the design of the mediation process.

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If a client is involved in a dispute, the chances are good that it could be settled without going to court with the help of a neutral, independent mediator. Many jurisdictions recognize the importance of considering alternatives to litigation and require attorneys to discuss alternative dispute resolution (ADR) options with their clients. If the client's jurisdiction doesn't have this requirement, counsel should have this discussion anyway so that the client can decide whether it is in his or her best interest to mediate.

This article poses questions that clients have about mediation. We have found that mediation is most successful when attorneys and clients work through these questions together and map out a plan to achieve their objective—an agreed settlement rather than a resolution imposed by a judge, jury or arbitrator.

The questions clients have about mediation are tools that can be used to design a successful mediation. The mediator's understanding of these questions can provide a framework in which to conduct productive mediations.

We have divided the questions into two categories. The first group contains questions pertinent to deciding whether to mediate. The second group contains questions clients tend to ask once they have decided to mediate. The answers to these questions help prepare the client for mediation.

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I: Questions Clients Ask in Order to be Able to Decide Whether to Mediate

What Is Mediation? How Does It Work?

Clients who have not previously participated in mediation will have no idea what mediation is or how it differs from arbitration or litigation. Thus, "What is mediation?" is likely to be the client's first question.

Mediation is one of several alternatives to litigation. It is the most informal of the alternatives (a more formal alternative is arbitration) and the only one that gives the parties control over the outcome. Mediation is sometimes called a facilitated negotiation. The facilitator is the mediator, who must be neutral and have no interest in the dispute. The mediator is there to help the parties persuade each other that it is in their best interests to settle. The mediator does this by helping the parties find common ground and a basis for settlement.

The mediator usually meets at least once with the parties together and then conducts private meetings with each side. This encourages each party to speak candidly with the mediator about its interests and needs that must be met in order for a settlement to occur. Many mediators give "homework" for one side to do while they are in private caucus with the other side.

The parties to mediation have an obligation to participate in good faith. But they have no obligation to reach a settlement. That decision is completely voluntary.

Am I Required to Mediate?

The client may have sought out legal counsel without knowing whether it has an obligation to mediate. In a commercial dispute, the answer will usually be in the transaction documents. For example, mediation is now a requirement of some standard form construction documents.[1]

If the transaction documents are silent as to mediation, the parties can agree to mediate after a dispute arises. This is true even if they have a contract requiring arbitration or litigation. However, one party cannot force the other to mediate.

A client may not ask specifically about court-annexed mediation, but this is relevant to the question of whether the client might be required to mediate. Courts in many jurisdictions require parties to mediate before allowing them to proceed to trial.[2] In our jurisdiction, an increasing number of judges require attorneys to include a statement in their planning reports or scheduling orders that set out their plans for pre-trial mediation.[3] So if the court would require mediation before trial, the client should consider whether it might be better off in private mediation where the parties can select the mediator of their choice and the rules under which they will mediate.

What Are the Advantages and Disadvantages of Mediation?

Clients always want to know the advantages and disadvantages of mediation. Without this information it would be difficult to decide whether to mediate. Here is a brief list of mediation's main advantages.

- *Little discovery is needed.* Mediation can take place without having to complete the time-consuming and expensive "discovery process" associated with litigation. (In discovery, the parties can ask each other to produce any document or information that could be relevant to the dispute.) In mediation, the parties agree to exchange the important documents that support each side's case. Therefore, this process is also more cooperative than litigation.
- *There are no motions.* Motions are not filed in mediation. This means that the lawyers need not

spend time writing legal memoranda in support of motions. This makes mediation much less expensive than litigation or arbitration.

• *Mediation is private.* Mediation is considered a private process. This means that the dispute can remain out of the public eye. It can be embarrassing and disruptive of business when customers or suppliers learn that a company is involved in litigation. So keeping disputes a private matter can be very important to a company.

• *Mediation is easier to schedule*. The scheduling of mediation is not dependent on the court's calendar. As a result, mediation can take place whenever the parties are ready and the attorneys and the mediator have the time available.

• *Mediation produces a faster result.* Mediation is usually the fastest way to resolve a dispute because procedures associated with litigation are not imported into the process. This enables the parties to more quickly put the dispute behind them and get on with their business and their lives.

• *Mediation makes more productive use of resources*. In mediation, the client's resources are focused on resolving the dispute as opposed to building armaments of evidence to buttress legal and factual positions.

• *Mediation can preserve business relationships*. Mediation is less adversarial than litigation or arbitration, so the parties often can salvage their relationships. Often the parties to mediation find themselves doing business again.

• *Mediation allows the parties to vent and tell their stories.* Mediation is the only process in which each party has an opportunity to tell the adversary its side of the story. The parties can also vent their true feelings to the mediator in private sessions.

Disadvantages of Mediation

Are there disadvantages to mediation? We think it is fair to say that any disadvantages are minor.

One concern some clients have is that if mediation fails to resolve the dispute, they will have wasted time and resources. But the counter-argument to this is that mediation has a very high success rate (said to be around 80%), so the risk is usually worth taking.

Also countering this concern is the fact that mediation can be worthwhile even when it does not result in a complete settlement. The reasons are that during mediation the parties can see the other side's point of view, learn the strengths and weaknesses of both sides' case, narrow the issues in dispute, or even reach a partial settlement. Mediation can also help counsel identify the discovery that needs to be undertaken. One day of mediation can save counsel days of probing deposition time.

Some attorneys and clients express concern that mediation provides too much discovery to the adversary or that the adversary is willing to mediate only because it can obtain "free discovery." We believe this concern is largely unfounded because the information voluntarily shared in mediation usually would be produced in response to a discovery request in litigation.

Finally, attorneys who have little or no experience with mediation fear that their litigation or arbitration strategy will be compromised by mediation. This is where it helps to have an attorney who is experienced in mediation. The mediator is not empowered to require the disclosure of any facts, law or legal strategy.[3] And a litigator experienced in mediation will know how much, if any, strategy to share, since that is in the attorney's control.

In general, the advantages of mediation outweigh these perceived disadvantages. Mediation has the most upside potential for both sides than any other dispute resolution process (except possibly unassisted negotiation) because it is the only one that puts the outcome in the parties' hands.

Would My Mediation Be Confidential?

For mediation to work the way it is supposed to, the parties must be willing to speak candidly with the mediator, and they will not do this unless they know that the mediation is private and what they say and do in mediation will be kept confidential. Given the need for confidentiality, is there a legal basis for it?

There is no federal law protecting mediation communications, although there are protections for settlement discussions that could apply to mediation.[4] However, most states have laws protecting the confidentiality of mediation to one degree or another.[5] The importance of confidentiality to mediation was recognized by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which created the Uniform Mediation Act (UMA) and, with the support of the American Bar Association, proposed its adoption by the states. Under the UMA (which a few states have already enacted and some others are considering), unless an exception in the UMA applies, a mediation communication (i.e., statements made and information exchanged with the mediator) in a mediation are privileged and not subject to discovery or admissible in evidence in a proceeding unless waived.[6] There are several exceptions to the confidentiality privilege.[7] However, courts often require a high threshold of proof to overcome the confidentiali-

ty protection afforded by mediation.[8]

Confidentiality also applies in court-annexed mediation.[9] The judge who is assigned to the case may not be given any information about what took place during the mediation process. In that situation, the referring court is entitled to learn only three things about the mediation proceedings: (1) whether any party failed to participate in good faith; (2) the outcome of the mediation; and (3) if the dispute settled in whole or in part, the terms of the settlement (which is usually provided to the court in the form of a summary agreement).[10]

Absent a statute or a public policy requirement, courts will not go beyond the face of the mediation settlement agreement itself to determine the parties' intent.

It should be noted that the UMA does not provide for confidentiality outside of judicial, arbitral or other formal proceedings. Thus, it would not prevent a mediating party from making disclosures about the mediation to the press. To obtain that level of confidentiality, the parties should enter into a private confidentiality agreement that contains enforcement mechanisms.

If mediation is conducted under the rules of a particular provider, it may have a provision on confidentiality. An example is the American Arbitration Association. Rule M-9 (privacy) in the AAA commercial mediation rules says that mediation is a private proceeding. Rule M-10 (confidentiality) requires the mediator to maintain the confidentiality of information disclosed by the parties and all documents the mediator received in connection with the mediation. This includes not testifying in any proceeding about the mediation. The rule also calls for the parties to maintain the confidentiality of mediation. In furtherance of confidentiality, Rule M-11 does not allow for a stenographic record of mediation proceedings.[11]

In addition to the above, the mediator may have a confidentiality provision in his or her retainer agreement.

So there are confidentiality protections for mediation. As a result, what happens in mediation tends to stay there.

Is the Mediator Like a Judge?

Clients who are learning about mediation for the first time invariably want to know whether the mediator can adversely affect their core interests in the dispute. The answer is "no" because the mediator must be neutral and remain so throughout the proceedings. The mediator is not a decision maker and has no authority to require the parties to settle. The decision to settle belongs only to the parties.[12]

While judges are supposed to be impartial, they are decision makers. They decide motions and like juries can decide who is right and who is wrong on the merits. This is not the case in mediation. The mediator, even one who takes an evaluative approach, is strictly a facilitator. What mediators do is assist the parties to explore and reconcile their differences.

Is There a Recipe for a Successful Mediation?

The success of mediation is mainly determined by the parties. It is their process and they are in control of the ultimate result. While there is no guarantee that any mediation will succeed, there are some common elements found in successful mediations:

- The mediator selected by the parties had the skills, knowledge and style (i.e., evaluative or facilitative) that fit the dispute and personalities involved in the mediation.
- People with knowledge of the dispute and others with authority to settle on each side's behalf were present at the mediation.
- The parties exchanged enough information to be able to understand the positions and perspectives of the other.
- The attorneys and the party representatives were well prepared to mediate.
- The parties identified their respective needs and interests and formulated proposals that would satisfy the interests of each participant.
- The mediator, the parties and their attorneys were committed to making the mediation work. They did not give up on the process too early and were willing to explore all available avenues and options.

Will a Settlement in Mediation Be Enforceable?

The answer is "yes" if the settlement is memorialized in a written settlement document that is signed by all parties and their counsel.[13] The settlement agreement is not confidential and can be enforced in court just like any other contract. However, if called upon to enforce a mediation settlement, the court will look only at the face of the document because, as we have previously said, mediation documents and conversations with the mediator remain confidential (excepting documents and information exchanged by the parties).

Do Some Mediations Fail to Settle? If So, Why?

Not all disputes settle in mediation, but the

failure rate is low. The reasons why particular disputes do not settle vary. It could be that one or more of the ingredients for a successful mediation listed above may be missing. Or it could be that a party added new demands late in the game. Sometimes, one side is emotionally stuck and cannot see how both parties' interests and needs can be fulfilled by a settlement. Or one side may have a policy reason why it does not want to settle even if it would be in its economic interest to do so. It is also possible that one party never intended to settle when it agreed to mediate. In addition, a mediation might not end the dispute because the mediator may not have been the right person to get the job done.

A mediation could also fail as the result of being scheduled too early. This often happens when the parties' contract requires mediation prior to the commencement of arbitration or a lawsuit. Often at that point, there is insufficient information known about the dispute to make a realistic assessment of the parties' positions.

A mediator who realizes that mediation is premature may suggest that the mediation be recessed until more information about the dispute is gathered and exchanged. Take this example. The owners of a subdivision brought claims against the developer, the water district and certain contractors for damages resulting from the rupture of a water main. The owners claimed, among other things, that the re-sale value of their property was diminished as a result of the flooding. At the mediation the subdivision owners were not able to provide any appraisals or other data that would support or quantify their diminished value theory. Consequently, the mediation was recessed until a later date. The owners were required to provide the defending parties with an appraisal report that validated the extent of their diminished value claim.

Many mediations that do not settle in mediation do so soon thereafter, based, in part, on the work accomplished in the mediation. Those that don't would have benefitted from the mediation effort if the reduced the number of issues or facts in dispute or can now better plan their need for discovery, motions or other matters preparatory to trial or arbitration.

What Would Happen if My Mediation Fails?

After an unsuccessful mediation, the client has several options. It can agree with the adversary to take a break from the dispute or resume negotiations at a later date. Or it can agree with the adversary to resume mediation a short time later. Alternatively, the client could decide to arbitrate or litigate. If the failed mediation is court-connected, the next step would probably be litigation. If that route is taken, the lawsuit would probably settle before trial, as happens in most cases.

II: Questions Clients Have After Agreeing to Mediate

How Do We Get the Mediator to See It Our Way?

The client who asks this question has not understood the mediation process. This client erroneously believes that it must persuade the mediator that it has the best case. Thus, the client must be reminded that the mediator does not decide the dispute, so persuading the mediator is not the goal. The goal is to persuade the decision maker for the adversary that it is in both side's interest to enter into mutually agreeable settlement.

It is important to educate the mediator about the dispute but the reason for doing so is not so the mediator can reach a decision on the merits. It is to enable the mediator to engage in "reality testing" with each side so that they recognize that there are good reasons to settle, and to serve as an an effective intermediary in the dispute, conveying information and offers back and forth between the parties.

When and Where Should We Mediate?

Mediation can take place at any time before litigation is commenced or if already commenced, before the jury reaches a verdict, a judge hands down a ruling, or an arbitrator renders an award.

When to mediate will vary with each case. The chemistry of each case will dictate the answer. The main danger is in mediating too soon. So it is important to keep in mind the elements of a successful mediation to make sure they are in place before beginning the mediation.

As to where to mediate, the location is usually determined by the mediator and the parties. If the mediation is administered by the AAA, the case administrator and the mediator will work with the parties to determine the place and date for the mediation.

How Do We Get Started?

There are many things for counsel and the client to do prior to mediating. A key task is to prepare the client to participate in the mediation. This is essential to a successful mediation outcome, because unlike arbitration and litigation, in which counsel for the parties do most if not all of the talking, mediation involves client participation. However, some clients feel more comfortable than others in representing its interests.

Other tasks include determining whether there

is any reason not to hold a joint session, identifying the documents and information to be exchanged, who should attend the mediation on behalf of the client, whether one or more experts will be needed, who the ultimate decision makers will be who must attend the mediation on the client's behalf because without them the dispute cannot be settled.

Preparing the client for mediation. Clients need to know what to expect at the mediation and how to conduct themselves. They need to know that mediation is less adversarial than other processes, and they should be prepared to be civil and even pleasant to the adversary during joint sessions and leave their anger at the office. Venting can take place in private sessions with the mediator.

Prior to mediation the client and counsel should identify the strengths and weaknesses of each side's case. Some counsel fear that by helping the client see weaknesses in its own case, they will be perceived to be less than a zealous advocate. So some attorneys leave this task to the mediator. But a client who has a realistic view of the case when he or she walks in the door is in a position to reach a settlement much sooner.

Since the mediator will try to learn what each side would desire as a settlement and what needs and interests a settlement would have to satisfy, the client should try to identify these items prior to the mediation. This will help the mediator and the client develop proposed options for settlement.

Discussions concerning information to be revealed. The client and counsel discuss the information and documents to be exchanged with the adversary and what will be revealed in the client's mediation statement. A mediation statement presents a party's view of the facts and the applicable law. Whether the parties' mediation statements will be given only to the mediator or exchanged by the parties will be decided before the mediation by counsel for the parties and the mediator. Mediators usually will ask the parties to prepare confidential mediation statements to be viewed only by the mediator. Where appropriate, the parties can agree to exchange their mediation statements with each other.

The mediator may ask the parties' attorneys to prepare confidential summaries of the strengths and weaknesses of each side's case and their objectives for the mediation. Counsel and the client should discuss how much confidential information to initially disclose to this statement, as well as in the private caucus. The client's views on this could change during the mediation as the client develops trust in the mediator.

The mediator will determine how far in advance of the mediation the mediation statement and any confidential summaries should be submitted. These documents ultimately will educate the mediator so that he or she can engage in "reality testing" and help the parties assess the offers and counteroffers that will be transmitted by the mediator during the mediation.

Counsel should discuss with the client its feelings about participating in a joint session with the adversary. If the client is concerned or anxious about this, counsel should relate this to the mediator, who can then design a process that will make the parties feel comfortable and safe.

Decisions concerning mediator selection. One of the most important decisions to be made in mediation is deciding who should be the mediator. Counsel and client should discuss the qualifications desired in the mediator. This can include mediation skills as well as subject matter expertise in the area of the dispute. Counsel should explain the difference between an evaluative and facilitative mediator so the client can determine what kind of mediator it would like.

When preparing the client for mediation, it is not necessary for the client to know what its final offer or demand would be. Indeed it is better to be flexible and not have reached this point. However, the client should be made aware of the alternatives if the mediation does not result in a complete settlement so that when the mediation actually takes place, the client can weigh those alternatives, especially if the parties end up in an impasse situation.

Do I Have to Deal with the Opposing Party?

Since mediation usually involves at least one joint session with the mediator, the client will have to sit around a table with the opposing party. Counsel should discuss with the client its feelings about participating in a joint session with the adversary. If the client is concerned or anxious about this, counsel should relate this to the medi-

ator, who can then design a process that will make the parties feel comfortable and safe. For example, the mediator could decide to conduct a brief joint session solely for the purpose of explaining the mediation process and the mediator's role, thereby foregoing the opening statements. Then the parties would participate in separate private caucuses with the mediator.

How Do I Deal with the Mediator?

Mediation allows for more client participation than arbitration or litigation, where the client's only participation may be as a testifying witness. This means that the client should be prepared to actively participate in mediation, particularly in the private caucuses with the mediator. As noted above, these meetings are confidential in order to encourage the parties to speak candidly with the mediator. Some people do not trust easily and the mediator will have to work hard to build trust.

Clients should be warned in advance that some mediators like to meet with the parties without their attorneys.

Who Should I Bring to the Mediation?

Client representatives. More is not better. The attorney and client should bring one or two employees who know the facts of the dispute. The problem is that often the employees most involved in a dispute have a vested interest in protecting their personal turf. Counsel and the client may have to decide how to handle an employee who was intimately involved in the dispute but has an agenda that doesn't fit in with the client's objectives for resolution. For example, this employee may be more interested in shifting responsibility for what happened to someone else.

Experts. The attorney and client also need to decide whether an expert will be needed. Experts are usually needed only for highly technical or scientific disputes. They can be involved before or during the mediation or both. An expert can be retained before the mediation to help prepare the client and counsel for the mediation session.

In certain technical disputes, the expert can also be retained to participate at the mediation. For example, the expert could deliver part or all of the client's opening statement at the joint session. In addition, or alternatively, the expert could participate in private caucuses with the mediator in order to explain technical or scientific matters.

Sometimes bringing an expert to the mediation can complicate matters by adding another layer of advocacy and taking the focus off finding potential solutions. Counsel should know whether the case requires an expert and the precise role the expert should play. The expert should be clearly advised of the limits of his or her role prior to the mediation. The client, meanwhile, should be aware that retaining an expert will raise the cost of mediation.

What Counsel Should Ask the Client Before the Mediation

- Have you participated in mediation before?
- Have long you been doing business with the other party? How did you get along at the beginning? What is your relationship now?
- Are there any hurdles or difficulties you know of that we should expect to be encountered during the mediation?
- Why haven't you been able to resolve the dispute yourselves?
- Is there anything about the other side's personality, that would be helpful to know in advance of the mediation?
- What are your real interests in getting this matter resolved?
- What resources are you able and willing to commit to the continued arbitration or litigation of this case?

Decision maker. It is essential to bring the client's decision maker to the mediation. If there is more than one, they all should attend. If the client is insured, the adjuster must attend and have a supervisor available by phone in case additional settlement authority is needed. If the client is a public entity, a representative of the board or executive committee with valid authority should attend.

Without a decision maker present for both sides, the potential for settlement drops dramatically. If the decision maker is not able to attend in person, that creates difficulties, but the case could still settle if the decision maker is available by phone. Take this mediation involving a design-builder who was terminated from a renovation project by a school district. It made a claim for the value of unpaid work, termination costs and lost profits on the remaining work. The design-builder and members of the school board attended the mediation. They reached a settlement, but it could not be implemented without the superintendent's approval. But he did not attend because he was on vacation. He was located and the mediator conducted several caucus sessions via telephone with him and the members of the school board. As a result, the conflict was settled.

In every mediation, counsel and the client's decision maker should be fully prepared for the mediation and know the client's strategy and objectives for the mediation.

What Should I Bring to the Mediation?

Essential items to bring are the documents provided to the mediator and exchanged with the other side (i.e., the mediation and position statements, and documents provided to the adversary), as well as all information requested by the mediator.

Optional items should be determined in a discussion with counsel. These could include pleadings, motions, expert reports filed in the case, and charts or time lines that help illustrate key points when making the opening statement or in private meetings with the mediator.

What Should I Wear to the Mediation?

Mediation is informal so the parties can wear comfortable business attire. Mediation is not the place to be offensive. For example, if the adversary in the mediation is the chairman of the Republican Party, the client should not wear a tie with a donkey on it.

How Long Will the Mediation Last?

The length of the mediation is important, not only because of cost, but because all necessary participants, including the decision makers for both sides, must be at the mediation for as long as it lasts. The length depends on the complexity of the dispute and how interested both sides are in reaching a settlement. The majority of two-party mediations are completed in eight hours or less.

More complex disputes can take more than one day. They can be scheduled for the convenience of the parties over the course of several consecutive days or several days during consecutive weeks.

There is no magical length of time in which to conduct a successful mediation. It takes the time necessary for the parties to agree that they have interests in common and that they can satisfy each other's needs without sacrificing interests that are important to them. However, it is vital that counsel and client commit the time and effort to give the mediation process time to succeed.

What Happens in Mediation?

Every mediation is unique. The mediator will work with the parties and counsel to devise the appropriate format for the mediation. In general, however, mediation has four stages:

Opening joint session. The mediation usually begins with a joint session. At this session, the parties will be seated and the mediator will introduce everyone to each other. The mediator will also set out some rules of appropriate conduct. Next, the mediator will explain the mediation process and its goals. This discussion will be general in nature. The mediator will also explain the mediator's role. After this, the parties usually make their opening statements. Opening statements generally explain what the dispute is about, its affect on the party and the party's desired outcome. The opening statement should be directed to the decision maker for the other side, not to the mediator. In most cases, the attorneys make these presentations. Clients can participate in the opening statement, but should they? The answer is usually "no" and "never" when the parties are very hostile to each other. But if personal hostility is not a problem, a very articulate, sophisticated client could make an effective opening statement.

Private caucuses. Private sessions with each party make up the guts of every mediation. This is where each party can feel safe in talking about the dispute. The mediator may caucus with each party several times, if needed. These sessions have three functions: information gathering, negotiation and consensus building.

It is important to the success of mediation that the mediator discuss with each party the strengths and weaknesses of its case, its interests and needs, and its desired outcome. The mediator will engage in some reality testing causing the parties to reevaluate their positions on certain issues. The mediator will also focus them on possible ideas for settlement. When this information gathering is completed, the mediator shifts the focus to opening negotiations and the exchange of offers and counter-offers.

A question that every client wants to know is this: Who makes the first move in mediation? Some parties feel that making the first move signals weakness. But this perception has no foundation. Someone has to make the first move and the mediator, an expert facilitator who knows the strengths and weaknesses of each side's case, will know what each side must do to move toward a mediated resolution. Usually, the mediator will first seek a consensus on the easy issues and then work toward an agreement on more difficult matters. Negotiations cannot be rushed. Once there is some movement, the mediator will try to keep productive discussions going. As the only person who has been in both caucus rooms, the mediator is the only person who knows how much flexibility each side has to negotiate and what it will take to achieve closure. The mediator may ask the parties to consider making a concession that is important to the other party but has limited value to them. The mediator will also recognize when it is necessary to "sweeten the pot" to complete the deal. Some deal sweeteners include offering to pay for settlement document preparation, writing a letter of apology, agreeing to continue to

do business with the adversary, having one side or the other pay for the total amount of the mediator's fee, or trading something of value.

When impasse happens. In many mediations the parties reach an impasse in negotiations. Sometimes this occurs because a party is frustrated and decides it does not wish to settle. Trying to overcome impasse is a challenge for everyone involved in mediation. The mediator might decide to bring the parties together in a joint session to explore means and methods for overcoming impasse or, if experts are involved, to have the experts go over the issues point-by-point to determine where they agree, where they disagree, and the basis for these opinions. This can help narrow the issues. The mediator also might ask counsel for permission to speak privately with the parties, singly or together, out of counsels' presence, in order to develop new ideas or even add a new twist to old information that would assist in eliminating the impasse.

Invariably, the mediator will remind the parties what is likely to happen if a settlement is not achieved—developing a litigation budget and calculating the resources that will be needed for a long, drawn out, costly trial. If the client is a public corporation it also means carrying this as a potential liability on its books.

Settlement, recess or termination of mediation. If the parties reach a settlement, the mediator may orally summarize the main terms. The attorneys for the parties will prepare a draft summary of the settlement terms, which the parties and attorneys must sign. No one should be allowed to leave the mediation until this is accomplished. Later, one of the attorneys usually prepares a more detailed settlement agreement. This agreement is likely to state who pays the mediator's and attorneys' fees, and the interest rate that will apply on unpaid sums. Because disputes could later arise as to what the settlement terms were or what they mean, settlement agreements often contain a dispute resolution clause providing first for mediation and then arbitration. The parties may want to consider appointing the same mediator to handle the mediation if a dispute arises out of the settlement agreement.

When a settlement is reached during mediation, counsel and client should discuss the client's reactions the next day. Some parties experience what is known as "buyer's remorse." When this happens, counsel should remind the client of the many reasons for mediating in the first place, including the ability to get back to business and move forward with life.

If the parties do not agree to a settlement, the mediator will review the progress the parties made during mediation and advise them of their options. One option is for the parties to gather and exchange additional information, and meet again later for further mediation or negotiations.

We have seen several cases settle in a second mediation after a recess. In a recent mediation, the sole owner of a successful business died unexpectedly. The business needed to be sold to support his ailing widow. The widow and her four daughters agreed that the eldest daughter would purchase the business, since she had been active in running the business. But the price and payment terms needed to be resolved. On the one hand there was the widow to provide for, since her children wanted her needs to be met for the rest of her life. On the other hand, the oldest daughter was concerned about how much the business could afford to pay. The mediation was recessed, and a second mediation was scheduled with the mediator and a financial planner who helped establish a financial plan and budget for the widow to the satisfaction of her children and a business plan for the purchasing daughter. The interests of each participant was addressed using objective criteria furnished by the planner. The fears of each family member was addressed and overcome by the mediator.

Another mediation involved the owner of a steel mill, its financially impaired contractor, and the surety that issued the performance bond. The owner claimed that the contractor failed to provide an adequate waste disposal plan. The contractor disputed this, contending that if formulated an adequate plan that met the owner's needs. At the mediation, the contractor's project manager took a hard line, disavowing any liability to the owner. The surety was in a difficult position because it had not seen the plan and could not realistically assess its exposure to liability. The mediator wisely recessed the mediation. The surety hired a consultant to review the contractor's waste disposal plan. The consultant identified some deficiencies. When the mediation resumed, the mediator recommended that the project manager not attend. The dispute was settled with with a payment by the surety to the owner.

Conclusion

Mediation is very effective in helping parties settle all kinds of disputes. But to work, the parties must remain flexible and avoid "drawing a line in the sand." Nothing brings the mediation to an impasse quicker than focusing on the "bottom line" approach.

The parties select the mediator they want to serve as a catalyst in negotiations. The parties control the ultimate outcome.

The questions and answers presented here identify the information parties need to know in order to decide whether to mediate, as well as the information they need to know to be prepared to engage effectively in mediation.

The parties' reactions to this information is highly germane to the means and methods that will be used in the mediation. Thus, after learning the client's reactions and their preferences for the mediation, counsel should convey this information to the mediator so that they can design the appropriate mediation protocol. Mediators should also be interested in the questions that parties ask their counsel about the mediation process so that they can be aware of unstated concerns in private caucuses. ■

ENDNOTES

[1] See e.g., American Institute of Architects standard form construction agreement General Conditions of the Contract for Construction, AIA A-201 2007, §§ 15.3.1 & 15.3.2 and the Engineers Joint Contract Documents Committee (EJCDC) Document C-700 ¶ 16.01 (2002 ed.).

[2] Some court rules will allow the parties to forego mediation if one side believes that the effort would be worthless.

[3] There is a court-annexed alternative dispute resolution (ADR) program for the District of Utah. District of Utah, Civil Rule, DUCivR 16-2, promulgated pursuant to the Civil Justice Expense and Delay Reduction Plan of 1991, 28 U.S.C. §§ 471-482 & §§ 651-658. Utah also promotes the use of ADR in state courts through an ADR program administered by the Administrative Office of the Courts established under Ut. Code Ann. §78-31b *et seq*. Other states have similar programs.

[4] See Fed. R. Ev. 408.

[5] Edward J. Costello & Cynthia Archuleta, "Mediation Confidentiality: A Look at Current Statutory Laws and Rules," 4(1) *ADR Currents* 20 (March 1999).

[6] On May 1, 2006, Utah became the eighth state to adopt the Uniform Mediation Act (UMA). See Ut. Code Ann. §78B-1-108. Ten jurisdictions have enacted the UMA. These are the District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.

In addition to the mediation privilege, the UMA provides that mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

[7] The UMA exceptions to the confidentiality privilege are in § 6. A key exception is for a written settlement agreement. This exception can be essential to the enforcement of a mediation settlement. Another exception allows disclosure of information made during a mediation required by law to be open to the public. There is also an important exception that applies when a court, agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available; there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.

[8] *Wilmington Hospitality, LLC v. New Castle County*, 788 A.2d 536 (Del. Ch. 2001); *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928 (2d Cir. 1979); *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158 (Ct. App. 1994); *Lyons v. Booker*, 1999 UT App. 172, 982 P.2d 1442; *Nat'l Union Fire Ins. Co. of Pittsburgh v. Price*, 78 P.3d 1138 (Colo. Ct. App. 2003); *Gordon v. Royal Caribbean Cruises Ltd.*, 641 So. 2d 515 (Fla. Dist. Ct. App. 1994); *Cohen v. Cohen*, 609 So. 2d 785 (Fla. Dist. Ct. App. 1992); *Hudson v. Hudson*, 600 So. 2d 7 (Fla. Dist. Ct. App. 1992); *Vernon v. Acton*, 732 N.E. 2d 805 (Ind. 2000); *Spencer v. Spencer*, 752 N.E.2d 661 (Ind. Ct. App. 2001).

[9] See, e.g., Utah's ADR Plan, discussed *supra* n. 3 Section 3 calls for confidentiality in ADR proceedings and ADR communications. Subsection (a) provides, in relevant part:

> The court intends ... that ADR proceedings offer an alternative to the formal litigation process. To that extent, ADR proceedings must be conducted in a manner that encourages an informal and confidential exchange among counsel, the parties, and the ADR roster member(s) to facilitate resolution of disputes. ADR proceedings will be conducted in private, similar to confidential settlement conferences, whose general purposes they share...

[10] Subsection (a) provides, in relevant part: "Motions, memoranda, exhibits, affidavits, and other oral or written communication submitted by counsel or the parties to the ADR panel member(s) ... must not be made a part of the record or filed with the clerk of court...." Section 3 further provides that that the foregoing communications "must not be transmitted to the district or magistrate judge to whom the case is assigned except as required elsewhere in this plan. The clerk will ... include in the court's record only the order referring a case to ADR and other ADR scheduling and proceeding notices." See also *Foxgate Homeowners Ass'n v. Bramalea California, Inc.*, 26 Cal.4th 1, 14 (Cal. 2001); *Reese v. Tingey Construction*, 2008 UT 7 (Feb. 1, 2008). In the *Reese* case, the Utah Supreme Court concluded that the content of mediation is confidential.

[11] The American Arbitration Association (AAA) Commercial Mediation Procedures can be found at www.adr.org.

[12] For example, AAA Commercial Mediation Rule M-7 provides, among other things, that "[t}he mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." Significantly, this rule also expressly states, "The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly."

[13] *Reese*, *supra* n. 10, holding that mediation agreements must be reduced to writing in order to be enforceable.