

MEDIATION ADVOCACY

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Mediation is an increasingly utilized alternative means of resolving disputes. Its hallmark is the principle of self-determination, that through the facilitation of a neutral mediator, parties retain the power to resolve (or not resolve) their own dispute. Settlement rates during mediation are reported at rates of 85% or higher. Many courts are now requiring parties to mediate at some point in the proceeding. Even where participation in mediation is mandatory, whether or not the parties reach an agreement remains within their control.

Mediation is a joint effort between the parties, their counsel (if they are represented) and the mediator. Advocates can improve the chances of settlement and the quality of the settlement with effective preparation. In addition, attorneys and parties should be aware of the evolving and developing body of law related to mediations as a form of dispute resolution.

Getting the Most From Your Mediation

Carefully select the mediator. Check references, background and experience. Is the mediator an effective closer? Would resolution be aided by a mediator with expertise in a particular area of the law? What personality or mediation style would be most effective with your clients or the opposing parties?

Prepare your closing argument. You aren't likely to deliver it at the mediation, but this exercise will aid your advocacy for your clients. Convincing the opposing parties (either directly in an opening statement or indirectly through the mediator) that you have a great jury case will improve your chances of a good settlement.

Consider aids to settlement. Gather facts and figures that might be stumbling blocks at the mediation, such as costs to date, loss amounts, etc. Are there documents or witnesses you could bring to reinforce your position?

Think creatively. Look beyond “just money” and consider whether there are settlement terms that one side might consider a great benefit, perhaps even beyond the perceived cost to the other. What really matters to your clients? To the opposing parties? What barriers are there to reaching a settlement?

Realistically evaluate the opposing parties’ positions. This will help you anticipate their negotiating posture and goals for settlement. What are the strengths and weaknesses of their legal arguments? Are there difficult-to-explain facts in their favor? What other factors might play into a willingness to settle?

Prepare your clients for mediation. Your credibility and corresponding ability to help clients make a decision about whether and how to reach a settlement will be enhanced by making sure they are not surprised either by the process or the messages they hear. Explain the mediator’s role. Discuss personalities and what they are likely to experience from opposing counsel. Talk about confidentiality. Make sure they aren’t hearing the weaknesses in their case for the first time at the mediation. Let them know the mediation could go all day or even into the evening so they can clear their schedule.

Contact the mediator in advance. This helps the mediator help you. Learn as much as you can about the mediator’s style. Provide thoughts you have about communicating with your client or the other side. Do you believe opening statements in joint session would be helpful? Consider a succinct, confidential mediation statement that will help prepare the mediator for the issues in dispute.

Legal Considerations in Mediation

If you resolve the dispute, take steps to leave the mediation with an enforceable agreement. At times, cases are settled in mediation after protracted negotiations, when the parties and attorneys are exhausted. The temptation is to shake hands and deal with the agreement in the future, but that can be risky. There could be a dispute over the core terms of the agreement or the form of a subsequent written settlement agreement. Buyer’s remorse could cause a party could change his or her mind altogether, leading to an action to enforce the agreement. A mediator may be reluctant to testify or even sign an affidavit about the agreement reached. Counsel (and their clients) will be in a much better position with a

written document memorializing the terms, even if it is handwritten and in outline form.

Understand the rules and risks related to confidentiality of the mediation process. Either by agreement of the parties or under applicable state or federal law, mediations are generally governed by strict rules of confidentiality. Be aware of what confidentiality rules govern. For example, the Kansas Dispute Resolution Act, K.S.A. § 5-512 addresses confidentiality of mediations under that statute. You may be asked by the mediator to sign a confidentiality agreement and that should be reviewed in advance. Under what circumstances may parties or the mediator testify about the mediation proceedings or the conduct of the parties? This might include communications necessary to stop the commission of a crime, proceedings to enforce a settlement or ethical proceedings against the mediator or an attorney involved in the mediation.

Follow the applicable rules regarding attendance at the mediation. Typically a court order requiring mediation will require a party to have a representative physically present who has full and independent authority to enter into an agreement to settle. Failure to do so could subject a party or attorney to sanctions. Certainly the process is more effective if necessary individuals are actively involved. However, counsel representing companies may have some difficulty persuading decision-makers to attend mediations. With a large corporation it may be unrealistic to have a representative with full, independent authority to settle due to normal decision-making protocols. Even if a representative attends with a certain amount of authority, there may be new information that develops through the mediation process arguing for exceeding that amount. It simply isn't feasible in all situations to send a representative with blanket, unlimited authority to bind a party. It may be that the best representative with knowledge of the case is unable to travel. If there's insurance coverage, an adjuster may be an essential participant, but may refuse to attend in person. The best course of action is to sort this issue out in advance so that there are no surprises or misunderstandings.

Consider the ramifications of factual representations and undiscovered information, particularly when the mediation is conducted early in the proceeding. There are times when a party is motivated to settle a case early,

knowing there are harmful facts which may come out in the mediation. While settling early before there is a duty to make disclosures can be an ethically supportable strategy, counsel should take care to avoid express or implied misrepresentations that might void an agreement reached in mediation.

Be aware if a contract requires mediation of disputes. Courts have become increasingly supportive of parties' efforts to write mandatory mediation or arbitration provisions into contracts. This means a case may even be dismissed if the plaintiff failed to attempt to mediate the dispute before filing a lawsuit.

Consider the neutrality of the mediator. Attorneys and mediators should pay careful attention to what seems to be a trend toward conflict rules for mediators not dissimilar to those of arbitrators. Some jurisdictions' rules for mediations require full disclosure of cases mediated and relationships with counsel or parties. Even though the mediator is not a decision maker, pre-existing knowledge of facts, or business or social relationships with counsel or parties could possibly affect the success or outcome of the mediation.