Mediation: Strategic Considerations (Federal)

A Practical Guidance® Practice Note by
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This practice note discusses strategic considerations for participating in mediation as a form of alternative dispute resolution (ADR) in the United States, and it covers topics such as the importance of mediation and arbitration, utilizing mediation as a platform for settlement, various mediation styles, strategies for success, confidentiality, and opening statements.

For more on mediation, see Mediation and Arbitration Agreement, Mediation in International Jurisdictions, and Mediation-Arbitration Considerations.

For resource kits covering ADR, see Arbitration in the United States Resource Kit (Federal), Arbitration-Related Motions Resource Kit (Federal), Arbitration Clauses Resource Kit, AAA Arbitration Resource Kit, ICDR Arbitration Resource Kit, CPR Arbitration Resource Kit, and JAMS Arbitration Resource Kit.

Mediation as a Platform for Settlement

When parties are otherwise unable to reach a consensus on a settlement, consider utilizing mediation to enhance discussions. Mediation offers the parties a new "playing field" where each side can arrive with a new perspective on resolution.

Mediation provides the opportunity to:

- Include a third-party neutral to assist and facilitate those discussions –and–
- Present the parties with an equal and balanced format to allow the bargaining process to proceed without undue pressure

But the approach to the mediation by the parties is important. For a mediation to be successful, everything should be on the table and up for discussion. Flexibility should be acknowledged. The goal of resolution should be presented as a mutual objective.

Parties should initiate mediation with a settlement position that is realistic and supported by facts and law, as opposed to a demand that is unrealistic and excessive. Typically, a mediation that starts with an impracticable demand only delays positive discussions.

Similarly, an attitude of "hard bargaining" with negative behavior can typically lead to negative responses or can make it difficult for the other side to counter. Thus, avoid threats, demands, or warnings during the process, as such behavior typically results in reactions that are negative and nonproductive. If a participant appears not to be acting fairly during the process, the likelihood of resolution will be low.

It is widely understood that negotiation involves a bargaining "process." It is not a onetime event. The process calls for time, deliberation, and a back and forth approach that allows all parties involved to participate and have a sense of control and oversight. Participants in mediation ideally will build a trust that allows them to be open to

trade-offs and compromise. Generally, the best negotiations reach a mutual conclusion through small deliberate steps rather than large jumps. The back and forth in that process may be tedious but often is necessary.

Offers and Counteroffers

To truly be effective, offers should invite counteroffers. A party should not bid against itself. Offers need to be reciprocal to keep the process moving. Mediations often fail when the parties arrive with a "win-lose" or "take it or leave it" philosophy. If a party refuses to respond to an offer, they are failing to demonstrate the needed spirit of compromise.

Try to condition your client against the sense that any settlement offer suggests weakness. In mediation, both sides need to make offers and it should not matter who goes first or last. The goal of mediation must be to find a "win-win" solution.

Mediation Styles

Mediation is not one fixed process and there are different formats for running a mediation. Carefully consider the following styles, as the method you ultimately choose to mediate your dispute will have a big bearing on whether the case settles:

- **Facilitative style.** This is the most common style used, where a mediator will "facilitate" the negotiation process between the parties. The facilitative mediator will support each side to tell their story and then typically allow the parties to break into sessions. The facilitative mediator will then "shuttle" between the different parties with the goal of assisting each side to move in a direction to help create a solution that both sides will accept. The facilitator seeks to enhance communication and understanding between the parties. Although the facilitative mediator may ask questions, the mediator does not offer the solutions. The facilitative mediator also does not offer opinions or predictions regarding the resolution of their case but helps each side "communicate" to each other through the mediator concerning the facts in dispute. In facilitative mediation, it is up to the parties to work toward a self-created resolution.
- **Evaluative style.** An evaluative mediator will express their opinion concerning the advantages and disadvantages of each side's case to help both sides understand the risks inherent in pursuing their case to closure in front of a judge, arbitrator, or jury. An obstinate party may alter its position upon hearing from a "neutral" party the weaknesses of its case. The evaluative mediator can offer the parties an independent cost-benefit analysis of the case at hand and provide opinions regarding the ultimate outcome of the case. For this reason, the evaluative mediator is often seen as heavy-handed and one party may feel that the mediator is not truly being impartial. To be a successful evaluative mediator, that person needs to have a level of experience and knowledge that is sufficient to sway the parties to understand the risk of not resolving the case.
- **Transformative style.** A transformative mediator approaches the dispute to help repair the broken relationship between the parties as a means of then helping to resolve their underlying dispute. Some transformative mediators have a background in mental health or psychology and are successful in connecting with the parties on an emotional level to help create a resolution to their dispute. The transformative mediator focuses on having the parties share their values and interests with the other side.
- **Narrative style.** A narrative mediator is someone that seeks to reshape the conflict by giving it a new "narrative." By reshaping the story, the parties can see the dispute in a new light and hopefully find a new approach from that perspective to help settle the matter.

The most successful mediator will be flexible during the mediation process and utilize all the tools in that mediator's toolbox to help find an approach that leads to a successful resolution of the parties' dispute.

Strategies for Success in Mediation

As the saying goes, a successful mediation is when "everyone leaves unhappy." Certainly, this saying intends to convey that sometimes to make mediation work, the plaintiff receives less than it expected, and the defendant pays more than it expected to pay. Such a sentiment may be true, but there are many metrics to establish whether mediation has been successful.

Of course, the main intent of mediation is to settle the parties' dispute, but there are inherent elements within the process of the mediation itself to measure, including:

- **Shared communication.** Sometimes the only reason a dispute finally settles at mediation is that for the first time, the parties can confront each other in a setting where they can verbally air their positions and

arguments. Separate from any pleadings, discovery, depositions, or motion practice that may have come before, mediations allow the parties to directly vocalize their claims against the other party, to essentially "have their day in court" without waiting for the trial. It is often the release of emotions while in mediation that finally will trigger the next step of moving toward closure.

- **Control.** One of the most significant aspects of mediation is that there is no judge or jury deciding the matter. During a mediation, the parties control their own destinies. For the first time since the conflict began, the litigants are asked what they "want to do," instead of being told that they need to answer questions in discovery or need to respond to motions. They may feel a direct investment in the process and also understand that the mediation might be the last time where they can personally control the outcome. Having this sense of control may spur the parties to settle.
- **Respect.** One of the most essential elements during mediation is mutual respect by the parties. Just the ability of one party to be able to present its claim without interruption or objection may be the trigger to allow the parties to work toward resolution.
- **Cooperation.** In mediation, the parties can create solutions that require mutual cooperation, such as agreeing to payment plans, having to sell property to obtain liquidity, or even reestablishing a working relationship to complete a project. Whatever the action may be, recognizing that sometimes there cannot be a solution without joint cooperation (as compared to individual defiance) can be the missing element needed to solve the problem.

Preparing for Mediation

You must adequately prepare for mediation to ensure its success. Most importantly, advise your clients about:

- What will happen in the mediation
- The time mediation will take
- The importance of participating in the process –and–
- The need to be willing to move from their respective positions

Be sure to engage all involved parties in the mediation, including potentially liable insurance companies, and verify the financial settlement authority of your client. In addition, you should have all of your evidence readily available and be able to articulate why your client will prevail at trial. If you are unable to demonstrate a compelling case, your adversary may check out during mediation and choose to have the case decided in court.

Prehearing Mediation Statements

A mediation statement is an objective outline of the facts and law relating to the dispute. Do not write these statements like you would a motion for summary judgment. A mediation statement is not the place to be argumentative or disparaging to the other side, but rather to demonstrate the strengths of your case.

Without the benefit of prepared mediation statements, parties ultimately might be left with a verbal confrontation between the competing parties and the hope that the mediator will be able to decipher enough of it to help guide the litigants to a resolution.

To be effective, the parties should openly share mediation statements because the statements have the potential to sway the parties' willingness to negotiate during the mediation process. With that in mind, draft your mediation statements knowing that other parties are going to read it.

Mediation statements should not waive the confidentiality of the mediation process itself and should be protected within the boundaries of that confidentiality; they should not be discoverable for use as evidence at trial. Even when parties share mediation statements, certain evidence may remain confidential. For more about confidentiality, see Confidentiality in Mediation.

Opening Statements

There is an ongoing debate over the benefits of including opening statements in mediations. Opponents claim that allowing opposing parties to make (possibly vitriolic) statements, outlining the strengths of their respective cases and the weaknesses of the opposition, is the last thing needed right before the parties attempt to resolve their dispute. Supporters contend that opening statements, when handled properly, permit each side the unique opportunity, perhaps for the first time, to personally present their stories and to hear relevant facts and law that may help to guide the parties toward the needed resolution.

If handled correctly, a joint session with opening statements may restore civility. If the statements are cordial and the parties can meet face-to-face, it may help to diffuse any hostility that existed as a cause of the original dispute, as well as to ease any acrimony that may have developed during litigation.

Listening to opening statements and the recitation of the main factual and legal issues might provide needed insight for the mediator. Finally, joint session opening statements may assist in the consideration of some of the intangibles of the case, including the quality of the lawyers involved and the effectiveness of the parties as potential witnesses at trial.

The answer, as to whether to allow opening statements, can be found in the ultimate flexibility in the ADR process. Before the mediation starts, a mediator can review the type of case involved, as well as the nature and demeanor of the parties and their counsel. The mediator may then decide whether to begin with opening statements.

If the parties and the mediator agree to participate in joint opening statements, consider the following few guidelines:

- **Brevity is important.** Franklin Delano Roosevelt once said, "Be sincere; be brief; be seated." The same is true for opening statements.
- **Show gratitude.** Use the time to thank the other side for participating in mediation. Most cases will indeed settle, especially those that participate in this type of ADR approach.
- **Visuals.** Visuals add to a presentation and PowerPoint programs are often successful. "A picture is worth a thousand words."
- **Avoid negativity.** You can be an advocate for your client but try to avoid finger-pointing or negative assertions in your opening statements. At this point in the case, the facts are the facts. Arguing them as a method to inflame or insult the other party will fail to motivate the parties toward a successful resolution.

Successful Mediations and the Power of Listening

A great expression is "we have two ears and one mouth so that we can listen twice as much as we speak." This adage holds true in mediation, where listening is crucial.

During mediation, focus your attention on the party talking. Obviously, if one party is talking and the other side is interrupting or is distracted by extraneous factors (e.g., a smartphone), the person talking might reasonably believe his or her comments are not being heard or considered. Without the trust that the party listening is paying attention to what is being said, the credibility of the conversation is weakened.

Eye contact between the speaker and the listener is key. Without it, the speaker might assume that the listener cannot be swayed, is bored, or, possibly, that the listener is suffering some guilt or shame regarding the matter being discussed.

After the speaker finishes, it is typical for the mediator to set aside time for questions. You should take that opportunity to ask questions about anything unclear. Such questions are often very helpful in clearing up issues for both sides.

Additionally, another part of listening or "hearing" the other side during a discussion of a potential resolution is the need to maintain an open mind to the facts and law. Such openness in communication can create a connection between the parties.

Confidentiality in Mediation

A cornerstone of mediation is confidentiality. Settlement discussions under both federal and state law are protected communications. Certainly, as the law understands and supports, parties in a dispute would never entertain settlement or compromise discussions if those conversations were admissible and could be used against them to demonstrate weakness in their case.

The same logic applies to confidentiality in mediation and is a central ingredient in the trust relationship that the mediator and the participating parties develop between each other. The best starting point to establish that comfort of confidentiality is in the mediation agreement itself. It is within the terms of that agreement where the parties can acknowledge and agree that their discussions will remain confidential, including the restriction against calling the mediator as a witness in any proceeding arising from the mediation.

The mediation agreement should highlight that confidentiality extends outside of the mediation itself, especially in those circumstances where the parities do not reach a settlement and the mediator continues to facilitate discussions with the parties afterward.

Certainly, there are exceptions to the shield of confidentiality in mediation. Although generally, conversations and information disclosed during mediations are privileged, the protections do not apply if:

- A party makes a threat against another party or person concerning physical harm or property damage –or–
- Information concerning the commission of a crime is revealed

Additionally, confidentiality can be waived if a claim is asserted by a party against a mediator alleging professional

misconduct. In such a case, the mediator reserves the right to defend himself or herself by relying on confidential information.

Virtual Mediation

There has been a strong effort to move matters out of the court into ADR. Where digital access is limited, witnesses who testify may be forced to attend proceedings using shared spaces instead of private conference rooms. Further, negotiations that might otherwise be held in private may be pushed into public areas where parties may be restricted in what they can say. Finally, with limited access to phone or computer service, some parties may only be able to connect with the participants sporadically rather than during an entire hearing, which can directly complicate the process.

While there may not be an easy answer to this digital access issue, recognizing the problem is a significant first step. If mediators are aware of the issues before the hearings and sessions begin, it will be possible to remove some of the implied bias that may come from one party being able to easily connect compared to another party who cannot.

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