A Guide to Understanding Mediation

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Mediation - A Theory

How Mediation Works

The mediation process is better understood if we first define the different types of dispute resolution procedures and view mediation in the spectrum of these procedures.

The first method of conflict resolution is **negotiation**. Parties to a dispute may attempt to negotiate a settlement by themselves, to avoid going to court or arbitration. Parties or attorneys acting as negotiators are partial to their own interests. The goal of a negotiator is to make the best deal possible to benefit his or her own interest.

The second method of conflict resolution is **traditional litigation** in court. The essential characteristic of litigation is that a judge or jury has the authority to issue a decision that **binds** the parties. While the decision of the court may be subject to appeal, until it is reversed by a higher court the decision binds the parties. Litigation is the **most formal** of conflict resolution techniques. It is usually open to the public. Judges are assigned randomly, without regard to their expertise in a particular subject matter.

**Arbitration** is a dispute resolution technique that is similar to litigation. An arbitrator is a private judge. Rather than to a dispute do not want to stand in line at the court house, they can select a person and confer authority upon him or her to conduct an arbitration proceeding and render a binding decision. The right to arbitrate is created by agreement. Often, the agreement to arbitrate is already contained in a contract between the parties. Typically, arbitration provisions are included in construction contracts and other commercial contracts. Even if the parties do not have a prior agreement to arbitrate, the parties may agree to use arbitration instead of proceeding in court.

Arbitration is **less formal than litigation, but more formal than negotiation**. Arbitration is also private, and not open to public scrutiny.

While arbitration has its advantages over litigation, the two processes are similar in that **in both litigation and in arbitration, the parties have decided to give up control**
of the process and confer authority upon the judge, jury, or arbitrator to render a binding decision.

**Mediation** is a process in which a neutral individual, selected by the parties to a dispute, aids the parties in their settlement discussions and attempts to have the parties negotiate a resolution of the dispute. Mediation as an alternative dispute resolution technique is increasing as a preferred method of resolving disputes which arise during and after contract performance.

Mediation, if used efficiently and properly, can result in a resolution of a dispute in a much shorter time frame than experienced in the judicial arena. In mediation, the parties are able to fashion a creative settlement to a dispute that a court or arbitrator could not impose upon the parties.

**Mediation is a middle ground between negotiation and litigation.** Parties who choose mediation recognize that they need assistance to resolve their dispute but do not want to confer control of the solution on a third party. In mediation, the parties select a neutral third party, the mediator, to help them arrive at a settlement of the dispute through a process that allows the parties to continue a dialogue with each other. The mediator does not render a binding decision, because the mediator does not have authority to bind the parties. Rather, the mediator is a facilitator, who helps the parties explore the strengths and weaknesses of their case and assists them in making settlement offers. Some have referred to mediation as "assisted negotiation." Keep in mind that a mediator is not a negotiator, as the mediator does not represent the interest of either party.

The essential characteristic of the mediation process is that the parties retain control of the process. The parties do not confer authority upon the mediator to bind them. The mediator can only help the parties reach a mutual agreement. As we will discuss in detail, the mediator is allowed to have ex parte, private meetings with the parties and their attorneys. The goal of mediation is that the parties will agree to a settlement of the dispute. Mediation is confidential and private. Parties may resolve their disputes without subjecting themselves to public scrutiny. The result of mediation can be fashioned by the parties.
I. Voluntary Mediation

Why Mediation Works

Discussion: How does mediation relate to quantum physics?

A major function of the mediator is to facilitate discussion between the parties and transmit information. As simple as this sounds, many parties who have never used mediation ask the question. "If we have not been able to settle the case ourselves, how can a mediator help us?" or "If the mediator has no authority to bind us, how are we going to arrive at a settlement if we haven't been able to do so already?"

There are two reasons why a mediator can help the parties when they are not able to resolve the dispute themselves — Reactive Devaluation and Selective Perception. The first is the process by which a party to a dispute immediately devalues information it receives from the other party to the dispute merely because of the other party's status. The second is the process by which a party decides to selectively listen and value information based upon the source of the information.

We see these concepts often in the parent-child relationship. If you are a parent, you know that your child will often immediately discount anything that you say merely because you are the one who says it. If your child hears the identical information from a friend, or even a friend's parent, your child may have a much more positive reaction to the information, simply because the information is not coming from you. In negotiation and in mediation, a party will listen to the other party and devalue what is heard simply because it comes from the other party. If the same information is transmitted by the mediator, the party receiving the information is likely to perceive the information at face value, and avoid the devaluation which would occur if the information were received directly from the other party.

II. Court-Mandated Mediation

Mediation is usually voluntary. Parties may include a mediation clause in a contract that requires mediation of disputes, or they may decide to mediate a dispute after the dispute arises.
The mediation process has several major advantages over litigation.

1. It is quicker, and often less expensive.
2. It is not adversarial but cooperative - the parties maintain a dialogue with each other.
3. The process is terminable at will by either party.
4. Parties with a significant ongoing business relationship are able to maintain that relationship and retain control of the solution.
5. Mediation is confidential.

[Mediation is usually voluntary because parties may be compelled to mediate their disputes by a court. The use of court-mandated mediation has increased in recent years.]

Questions for Discussion

1. Who are the consumers of the legal process – judges, attorneys, or clients?
2. What drives the popularity for the mediation process?
   a. The desire of judges to reduce their dockets.
   b. The desire of attorneys to offer the most cost-effective services to clients.
   c. The desire of clients to utilize less expensive, more efficient methods of conflict resolution and retain control over the solution of the dispute.
   d. All of the above.
3. Who should decide whether mediation should be pursued as a technique for resolving a specific dispute?
   a. The client
   b. The attorney
   c. The client and the attorney
   d. The judge if the case is already in litigation.
4. Is there a good faith participation requirement in your jurisdiction for court-mandated mediation?


We caution against the use of mediation solely for the purpose of docket control because such a utilization eviscerates the primary purpose of mediation—efficient and cost-effective settlement of disputes. Instead, we advocate a system in which cases
are individually assessed for suitability for mediation since sending a case to mediation could be a futile exercise and result in unnecessary expenses for the parties if the case is inappropriate for mediation. In determining whether a case is appropriate for mediation, a court should assess the likelihood that parties could reach a settlement, make factual stipulations, agree to forego a jury trial in favor of binding arbitration, identify issues, reduce their misunderstandings, clarify their priorities, or locate points of agreement.

III. Mediator Selection

What Personality Type Mediator is the Most Advantageous?

Discussion Questions – What are the characteristics of an effective mediator?

Are you aware of mediator “type” personalities?

The Court's Inherent Authority to Compel Mediation

Excerpt from Atlantic Pipe Corporation, 304 F3d 135 (1st Cir 2002).

In January 1996, Thames-Dick Superaqueduct Partners (Thames-Dick) entered into a master agreement with the Puerto Rico Aqueduct and Sewer Authority (PRASA) to construct, operate, and maintain the North Coast Superaqueduct Project (the Project).

After the Project had been built, a segment of the pipeline burst. Thames-Dick incurred significant costs in repairing the damage. Not surprisingly, it sought to recover those costs from other parties. In response, one of PRASA's insurers filed a declaratory judgment action in a local court to determine whether Thames-Dick's claims were covered under its policy. The litigation ballooned, soon involving a number of parties and a myriad of issues above and beyond insurance coverage.

On April 25, 2001, the hostilities spilled over into federal court. Two entities beneficially interested in the master agreement--CPA Group International and Chiang, Patel & Yerby, Inc. (collectively CPA)--sued Thames-Dick, Dick-PR, Thames Water, and various insurers in the United States District Court for the District of Puerto Rico, seeking remuneration for consulting services rendered in connection with repairs to the Project.
A googol of claims, counterclaims, cross-claims, and third-party complaints followed. Some of these were brought against APC (the petitioner here). . . . Thames-Dick asked that the case be referred to mediation and suggested Professor Eric Green as a suitable mediator. The district court granted the motion over APC's objection and ordered non-binding mediation to proceed before Professor Green. The court pronounced mediation likely to conserve judicial resources; directed all parties to undertake mediation in good faith; stayed discovery pending completion of the mediation; and declared that participation in the mediation would not prejudice the parties' positions vis-à-vis the pending motion or the litigation as a whole. The court also stated that if mediation failed to produce a global settlement, the case would proceed to trial.

After moving unsuccessfully for reconsideration of the mediation order, APC sought relief by way of mandamus [alleging] that the district court did not have the authority to require mediation (especially in light of unresolved questions as to the court's subject-matter jurisdiction) and, in all events, could not force APC to pay a share of the expenses of the mediation. We invited the other parties and the district judge to respond... Several entities (including Thames-Dick, Dick-P.R., and Thames Water) opposed the petition. Two others (third-party defendants United States Fidelity & Guaranty Company and United Surety and Indemnity Company) filed a brief in support of APC...

There are four potential sources of judicial authority for ordering mandatory non-binding mediation of pending cases, namely, (a) the court's local rules, (b) an applicable statute, (c) the Federal Rules of Civil Procedure, and (d) the court's inherent powers. Because the district court did not identify the basis of its assumed authority, we consider each of these sources.

When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient... (offering a model to evaluate ADR techniques in terms of their capacity to encourage settlements). The fact remains, however, that none of these considerations establishes that mandatory mediation is always inappropriate. There may well be specific cases in which such a protocol is likely to conserve judicial resources without significantly...
burdening the objectors' rights to a full, fair, and speedy trial. Much depends on the idiosyncrasies of the particular case and the details of the mediation order. In some cases, a court may be warranted in believing that compulsory mediation could yield significant benefits even if one or more parties object. After all, a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position... In such an instance, the party's initial reservations are likely to evaporate as the mediation progresses, and negotiations could well produce a beneficial outcome, at reduced cost and greater speed, than would a trial. While the possibility that parties will fail to reach agreement remains ever present, the boon of settlement can be worth the risk.

This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions—solutions that simply are not available in the binary framework of traditional adversarial litigation. Mediation with the assistance of a skilled facilitator gives parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions. Mindful of these potential advantages, we hold that it is within a district court's inherent power to order non-consensual mediation in those cases in which that step seems reasonably likely to serve the interests of justice. Cf. Reilly v. United States, 863 F.2d 149, 156-7 (1st Cir. 1988) (finding that district courts have inherent power to appoint technical advisors in especially complex cases).

Our determination that the district courts have inherent power to refer cases to non-binding mediation is made with a recognition that any such order must be crafted in a manner that preserves procedural fairness and shields objecting parties from undue burdens. We thus turn to the specifics of the mediation order entered in this case. As with any exercise of a district court's inherent powers, we review the entry of that order for abuse of discretion...

As an initial matter, we agree with the lower court that the complexity of this case militates in favor of ordering mediation. At last count, the suit involves twelve parties, asserting a welter of claims, counterclaims, cross-claims, and third-party claims predicated on a wide variety of theories. The pendency of nearly parallel litigation in the Puerto Rican courts, which features a slightly different cast of characters and
claims that are related to but not completely congruent with those asserted here, further complicates the matter. Untangling the intricate web of relationships among the parties, along with the difficult and fact-intensive arguments made by each, will be time-consuming and will impose significant costs on the parties and the court. Against this backdrop, mediation holds out the dual prospect of advantaging the litigants and conserving scarce judicial resources...

Next, APC posits that the appointment of a private mediator proposed by one of the parties is per se improper (and, thus, invalidates the order). We do not agree. The district court has inherent power to "appoint persons unconnected with the court to aid judges in the performance of specific judicial duties." Ex parte Peterson, 253 U.S. 300, 312, 40 S. Ct. 543, 64 L. Ed. 919 (1920). In the context of non-binding mediation, the mediator does not decide the merits of the case and has no authority to coerce settlement. Thus, in the absence of a contrary statute or rule, it is perfectly acceptable for the district court to appoint a qualified and neutral private party as a mediator. The mere fact that the mediator was proposed by one of the parties is insufficient to establish bias in favor of that party. Cf. Techsearch, LLC v. Intel Corp. 286 F. 3d 1360, 1379 n. 3 (Fed. Cir. 2002) (noting that technical advisors typically would be selected from a list of candidates submitted by the parties). We hasten to add that the litigants are free to challenge the qualifications or neutrality of any suggested mediator (whether or not nominated by a party to the case)...

APC also grouses that it should not be forced to share the costs of an unwanted mediation. We have held, however, that courts have the power under Fed R. Civ. P. 26(f) to issue pretrial cost-sharing orders in complex litigation. See In re San Juan Dupont Hotel Fire Litig., 994 F2d 956,965 (1st Cir. 1993). Given the difficulties facing trial courts in cases involving multiple parties and multiple claims, we are hesitant to limit that power to the traditional discovery context. See id. This is especially true in complicated cases, where the potential value of mediation lies not only in promoting settlement but also in clarifying the issues remaining for trial.

As entered, the order simply requires the parties to mediate; it does not set forth either a timetable for the mediation or a cap on the fees that the mediator may charge...

To recapitulate, we rule that a mandatory mediation order issued under the district court's inherent power is valid in an appropriate case. We also rule that this is an
appropriate case. We hold, however, that the district court's failure to set reasonable limits on the duration of the mediation and on the mediator's fees dooms the decree.

For the reasons set forth above, we vacate the district court's mediation order and remand for further proceedings consistent with this opinion. The district court is free to order mediation if it continues to believe that such a course is advisable or, in the alternative, to proceed with discovery and trial.

IV. Cases Amenable to Mediation

Do you make a determination that a case is amenable to mediation?
What factors do you consider?

V. Goals of Mediation


The underlying dispute involved in this appeal is a motor vehicle/pedestrian accident that occurred in May of 1996... The Yosts filed a complaint for damages and request for trial by jury in April of 1998... In April of 1999, Stoehr's counsel sent a letter to the Yosts' counsel that stated, "[a]s this case is pending in Marion County and we will be required to mediate the case prior to trial, I would like to schedule a mediation as soon as possible."

When counsel for Stoehr arrived at the mediation, he informed the mediator that based on the facts of the case he did not believe his client was liable, he questioned the claimed damages, and therefore, he did not intend to offer the Yosts any money to settle their claim. While Stoehr's counsel expressed a willingness to go forward with the mediation and possibly change his position depending on what the Yosts had to say, counsel for the Yosts elected to terminate the mediation upon learning that State Farm would not be making a settlement offer.

Subsequently, the Yosts filed a Petition for Fees and Costs, which alleged that State Farm acted in bad faith by failing to authorize Stoehr's counsel to settle the case. The trial court granted the Petition, but it deferred an award of
sanctions pending an evidentiary hearing. Meanwhile, the case was tried to a jury, which returned a defense verdict. Immediately following the trial, the court conducted an evidentiary hearing regarding the Yosts’ Petition for Fees and Costs...

Following a hearing on the matter, the trial court found that State Farm had acted in bad faith and ordered Stoehr to pay the Yosts' costs and attorney's fees in the amount of $2,139.75. This appeal ensued...

Discussion and Decision

Stoehr argues that the trial court abused its discretion when it awarded sanctions to the Yosts for its alleged bad faith in the mediation of the underlying dispute. In particular, Stoehr asserts that the trial court abused its discretion by sanctioning State Farm for mediating in bad faith when the Yosts failed to provide the trial court with evidence that State Farm engaged in conscious wrongdoing for dishonest purposes or that State Farm proposed mediation with surreptitious or malevolent intent.

Conversely, the Yosts claim that the trial court did not abuse its discretion by sanctioning State Farm. The Yosts contend that State Farm acted in bad faith, and thus, the trial court properly imposed sanctions under Indiana Alternative Dispute Resolution Rule 2.10. Specifically, the Yosts maintain that State Farm's conduct in inducing the Yosts to mediate, when it had no intention of participating, was bad faith. Moreover, the Yosts allege that in spite of the mediator's specific instructions, State Farm did not have someone at the mediation with settlement authority and that State Farm was unwilling to "really listen." Appellee's Br. p. 8 (quoting Mediator's letter of June 7, 1999, Appellant's App. p. 100) (emphasis in original).

The Indiana Trial Lawyers Association (ITLA) adopted a similar position in its amicus brief. ITLA filed a brief advocating the position that the trial court properly imposed sanctions against State Farm for failing to mediate in good faith. ITLA alleges that State Farm acted in bad faith by continuing the trial date under false pretenses, by failing to materially participate in the mediation process, and by failing to timely notify the Yosts' counsel that it had no intention of ever making a settlement offer. Additionally, ITLA argues that the jury verdict
in Stoehr's favor should have no effect on our determination as to whether the trial court abused its discretion by imposing sanctions against State Farm.

Initially, we recognize that:

A trial court, not present at the mediation, is unlikely to appreciate all that took place there and, as a result, may not understand whether the parties mediated in "good faith." Moreover, a trial court that equates "good faith" with the fact or amount of settlement offers, or with the success of the parties in reaching resolution, may fail to recognize that sometimes mediation exposes that a case is not "about money," but rather, is about issues not neatly resolved in a formal legal setting. Gray v. Eggert, 248. Wis. 2d 99, 635 NW 2d 667(Ct. App. 2001). Because the trial court is not present at the mediation and, therefore, unlikely to appreciate all that took place there, it is vital that parties alleging that an opposing party failed to mediate in good faith are able to provide the trial court with some evidence beyond bald assertions of bad faith. See Carter, 658 NE 2d, at 621-22. (Positing "[s]ince a bad faith determination inherently includes an element of culpability, a finding of bad faith should require more than the unsubstantiated allegations of an adverse party"). The Yosts fail to provide us with any such evidence. In the context of mediation, we have previously defined bad faith as follows:

Bad faith amounts to more than bad judgment or negligence; "[r]ather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity.... [l]t contemplates a state of mind affirmatively operating with furtive design or ill will." Id. at 621 (citations omitted). . . . Despite the Yosts' and ITLA's allegations to the contrary, we fail to conclude that State Farm acted in bad faith...

Both the Yosts and ITLA allege that State Farm engaged in bad faith by inducing the Yosts to mediate the case and continuing the trial date to accommodate the mediation session. However, the Marion County Local Rules require mandatory mediation of certain cases... The Yosts argue that if State Farm had no intention of making an offer of settlement, it should have filed an objection to mediation. However, the trial court highlights in its Order that:

4. "Settlement of the whole case is not the only goal of mediation; 'agreement' is another goal, whether it be a factual stipulation, an agreement to forego jury trial in
favor of binding arbitration, an identification of issues, a reduction of misunderstandings, a clarification of priorities, or a location of points of agreement. Thus, even where the odds of resolution are slim, mediation can be beneficial because other goals might be achieved." State v. Carter, 658 NE 2d 618, 623 (Ind. Ct. App.

1995 FN 5.

FN5. Because the chance of effectuating many of these ancillary goals is greater when mediation takes place earlier in the litigation process rather than later, we suggest that parties attempt to mediate earlier to fully realize the benefits of mediation. However, we urge parties to conduct at least limited discovery prior to mediating so that they have an enhanced understanding of the liability and damages involved in the case, and therefore, they are better able to make informed decisions as to which issues, if any, can be conceded.

Appellant's App. p. 53. In light of this statement, it becomes apparent that even if State Farm had no intention of offering to settle the dispute for a certain dollar amount, there are still several valid reasons why State Farm could have sought to mediate the case, rather than try to avoid the mandate of Marion County Local Rule 16.3(C)(1). In fact, State Farm's counsel adopted the position that: [A]lthough we were not going to make an offer at that point and time, we were certainly willing to listen to what they had to say. We were prepared to go forward with the mediation as far as listening to what they had to say, and depending upon what they had to say, I could always go back and see if they might be willing to make some offer. Appellant's App. p. 83-84.

Because mediation is not all "about money," we cannot conclude that State Farm's behavior in suggesting that a mediation be scheduled in accordance with local rules amounted to bad faith...

Further, we reject the Yosts' contention that State Farm did not have someone at the mediation with settlement authority. Our review of the record shows that State Farm not only sent counsel to the mediation but also sent a claims adjuster. The claims adjuster was in a position to advise State Farm to change its stance and settle the case if the Yosts' argument at mediation merited such action. However, the Yosts
foreclosed this opportunity by refusing to go forward with the mediation once they found out that State Farm's initial inclination was to not offer them any dollar amount to settle the case due to the disputed liability and damages involved. Even if State Farm was not persuaded by the Yosts' presentation, the other goals of mediation, such as factual stipulations, identification of issues, reduction of misunderstandings, clarification of priorities, and location of points of agreement, could have been realized but for the Yosts' decision to terminate the mediation.

Finally, in response to ITLA's argument that State Farm acted in bad faith by failing to timely notify the Yosts that it did not intend to offer them any money to settle their claim, we note that neither the A.D.R. Rules nor the Marion County Local Rules require counsel to notify an opposing party of its intention to not offer any dollar amount to settle a case prior to mediation. While some attorneys may do this as a courtesy, it is not required. Because mediation is aimed at accomplishing more than just reaching a settlement, we do not find that it was bad faith for State Farm to wait until the start of the mediation to notify the Yosts that it did not intend to offer them a money settlement on their claim. However, this is not to say that a party could not be found to have engaged in bad faith by failing to offer a settlement amount if there exists other evidence of dishonest purpose or moral obliquity.

In conclusion, we find that the record is devoid of evidence indicating that State Farm acted with dishonest purpose and moral obliquity. While [the court's ADR rule] requires parties to come to mediation willing to mediate in good faith, the rules do not require parties to reach a settlement. Because we find the evidence insufficient to support a finding of bad faith by State Farm, we find that the trial court abused its discretion in sanctioning State Farm.

Judgment reversed

See also, Massey v. Beagle, 754 So 2d 146 (Ct. App. Fl 2000) – an independent insurance adjuster who attended the mediation without settlement authority could not be sanctioned, as he was not a party to the mediation.

This case arises out of a motor vehicle accident:
While the suit was pending, the trial judge ordered the parties to mediation. Appellant appeared on behalf of Rust and Rust's insurance carrier as an independent adjuster under contract. Rust and the insurance carrier were also represented at the
mediation conference by counsel. The parties mediated for approximately six hours but were unable to reach a settlement. Settlement negotiations impassed when Appellant informed Appellees' counsel that he did not have the authority to settle the case by a lump-sum cash amount, but could structure payments over a period of time. Appellees filed an emergency motion for sanctions against Rust and Appellant, which detailed confidential mediation communications. In turn, Appellant filed a motion for sanctions against Appellees for revealing privileged communications made during mediation.

A hearing on the requested sanctions was conducted, during which the trial court noted that "Mr. Massey, of course, is not a party." During the hearing, Appellant testified that he was not authorized to settle the case up to the amount of Appellees' lowest demand for settlement of $295,000.00, made previous to the mediation conference, unless the total settlement could be paid by monthly payments of $10,000.00. The trial court found Appellant attended the mediation without the required authority to settle and entered a judgment of $2,248.17 against him, as a sanction under the [Florida rule] Rule 1.720(b). The court denied Appellant's motion for sanctions against Appellees. Pursuant to the Florida Rules of Civil Procedure, sanctions are applicable in mediation only where a party fails to appear for mediation, or a party fails to perform under the terms of a mediation agreement... In the case at bar, Appellant is not a party as defined by the [Florida Rule] Furthermore, Administrative Order No. 3.1241, which governs mediation in the Eighth Judicial Circuit, defines a party as: "any insurance company or any other entity or person which may have a legal obligation to pay or claim any damages sought in the litigation and mediation. It is clear that Appellant, as an independent adjuster, does not have an obligation to pay or claim damages in the litigation and mediation, and therefore, cannot be a "party."

Party Empowerment and Control of the Solution.

The parties must be made aware early in the process that mediation allows the parties to remain in control that non-judicial solutions can be achieved. These two concepts are linked, as we will discuss. It will be helpful when discussing these concepts to refer to a sample agreement between the mediator and the parties.
SAMPLE AGREEMENT BETWEEN MEDIATOR AND THE PARTIES

This agreement dated______, between Party 1 and Party 2 (referred to as the “parties”) and Mediator (referred to as the "mediator") sets forth the terms and conditions governing the mediation of the dispute between the parties arising from name of project, family dispute, auto accident, etc. (referred to as the "dispute").

The parties have chosen the mediator as an independent neutral to aid the parties in their attempt to settle the dispute. The mediator will not decide who prevails in the dispute, and will not render an award, verdict, judgment, or otherwise determine fault or blame.

The parties understand that the mediator is impartial, does not favor one party over the other, and will not offer legal advice to the parties. The parties should seek legal advice from their own counsel, and counsel may attend the mediation session.

The mediation is an attempt to settle the dispute, and as such all communications before, during, and after the mediation between the parties, the mediator, and counsel are settlement discussions that are confidential and inadmissible in any subsequent litigation or arbitration.

The parties understand that there is no guarantee that the mediation will result in a settlement of the dispute. Should the mediation not result in a settlement of the dispute, and the parties proceed to litigation or arbitration or other means of dispute resolution, the parties agree that they will not subpoena or otherwise request the mediator to offer testimony or produce any documents, records, or work product. If the parties reach a settlement of the dispute and thereafter sign a written settlement agreement, such written settlement agreement may be produced by either party in a subsequent action to enforce the settlement agreement, but the parties agree that they will not subpoena or otherwise request the mediator to offer testimony or produce any documents, records, or work product.

The mediation may be terminated at the request of either party, or at the request of the mediator, if the mediator determines that a resolution of the dispute will not occur as the result of the mediation...
If the parties reach a settlement, the parties, and not the mediator, agree to draft a written agreement setting forth the matters decided. The parties should review this agreement with their counsel before the agreement is placed in final form.

The parties release the mediator from liability arising from any act or omission during the mediation. The parties recognize that the mediator is not acting as counsel to any party nor rendering legal services in the mediation.

Relevant Case law:

Genoveva Rojas et al. v. Superior Court of Los Angeles, 93 P 3d 260 (Cal. 2004) - California Supreme Court rules that all evidentiary material is sheltered from disclosure and there is no statutory exception that will make it admissible in subsequent litigation.

We granted review in this case to consider the scope of Evidence Code Section 1119, subdivision (b), which provides: "No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery..." In a divided decision, a majority of the Court of Appeal held that application of this statute is governed by the same principles that govern application of the work product privilege under CCP Section 2018. Applying those principles, the majority classified raw test data, photographs, and witness statements as non-derivative material that is not protected. By contrast, the majority held, material reflecting only an attorney's impressions, conclusions, opinions, or legal research or theories is absolutely protected. Finally, the majority held that derivative materials--amalgamations of factual information and attorney thoughts, impressions, and conclusions--are qualifiedly protected; they are discoverable only upon a showing of good cause, which involves a balancing of the need for the materials and the purposes served by mediation confidentiality. . . .We conclude that the Court of Appeal's interpretation of section 1119, subdivision (b), is contrary to both the statutory language and the Legislature's intent. We therefore reverse the Court of Appeal's judgment.
In re Paul Daley, 29 SW 3d 915 (Ct. App. Texas 2000) – Court refuses to overturn motion compelling deposition of mediation participant regarding of mediation participant regarding early departure from mediation session. Holds that confidentiality protections are not so broad as to bar all evidence regarding everything that occurs at mediation from being presented to the trial court.

While a court may compel parties to participate in mediation, it cannot compel the parties to negotiate in good faith or settle their dispute. Furthermore, [Texas law] requires that communications and records made in an ADR procedure remain confidential; consequently, the manner in which the participants negotiate should not be disclosed to the trial court. Id. (citations omitted). If the Austin court's holding means that all communications and records made in an ADR proceeding remain confidential, we do not follow it. Our interpretation of [the relevant code section] is not so broad as to bar all evidence regarding everything that occurs at mediation from being presented in the trial court. Rather than a blanket confidentiality rule for participants, the statute renders confidential "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an ADR procedure." (emphasis added). We do not find the questions----whether Daley attended the mediation and whether he had the mediator's permission to leave when he did----concern the subject matter of the underlying suit or the manner in which the participants negotiated.

Enterprise Leasing v. Josiah Nathaniel Douglas Jones, 789 So. 2d 964 (Fla. 2001) – Disclosure of confidential mediation information to a trial judge is not in and of itself sufficient to disqualify the trial judge.

Judges are often privy to information that is confidential or inadmissible as evidence when they review motions in limine or perform in camera inspections of proprietary information. Therefore, we agree with the Fifth District that a presumption of bias threatens to disqualify a judge whenever he or she is required to make "in limine rulings concerning plaintiff’s prior settlement with a co-defendant or non-party, a litigant's DUI or other criminal history, or his or her personal habits, religious beliefs or sexual preferences." Enterprise Leasing, 750 So. 2d at 115. We also agree that "mere appraisal should not support recusal, else the statutory disqualification exception swallows the common law rule." Id. See also Rivera v. State, 717 So. 2d 477(Fla. 1998) (there is no presumption of prejudice where judge allegedly relied on nonrecord
evidence in sentencing); Moser v. Coleman, 460 So. 2d 385 (Fla. 5th DCA 1984) (a judge whose decision has been reversed often rehears a case and is not required to recuse himself even if he has already determined the matter).

Other states also follow the presumption disfavoring prejudice or bias on the part of the judge. See Pizzuto v. State, 134 Idaho 793. 10 P 3d 742 (2000) ("[E]ven where a trial judge is exposed to prejudicial information, judges are usually presumed to be 'capable of disregarding that which should be disregarded' in our judicial system."); Hite v. Haase, 729 N.E. 2d 170 (Ind. Ct. App. 2000) ("A judge is presumed by law to be unbiased and unprejudiced. A mere allegation of bias without a specific factual showing in support is insufficient to require disqualification."); State v. Lake, 98 Wash. App. 1020, (1999) (prejudice is not presumed, and the party claiming bias or prejudice must support the claim with evidence of the judge's actual or potential bias). We can see no compelling reason to treat a trial court's knowledge of inadmissible information in the mediation context any differently from the other situations presented every day where judges are asked to set aside their personal knowledge and rule based on the evidence presented by the parties at the trial or hearing.


When becoming too intimately involved with discovery and case management, which may inevitably lead to settlement discussions, a judge may reach a point where it may well appear to the clients that one side is being favored over another. We caution that excessive involvement in proceedings before trial in cases where that judge will ultimately be the fact finder would dictate that the judge should step aside and allow another judge to try the case because of opinions expressed. We are not addressing the usual non-jury case where a judge must necessarily be involved to some degree, although not completely immersed, in attempting to move a case or encourage settlement of a case. Settlements, of course, are always desirable from the standpoint of the litigants as well as the court system. . . . [I]t may well be appropriate before this case reaches trial for the judge to consider whether he should step down from hearing the actual trial of the case because of the degree of involvement.
Mediation - A Procedure

VI. Types of Mediation - Facilitative vs. Evaluative

There are two main types of mediation. These types are determined by the nature of the help that the parties seek from the mediator. It is important that the parties determine the type of mediation that they wish the mediator to conduct.

Facilitative mediation is considered classic mediation, because most mediators are trained as facilitative mediators. In facilitative mediation, the mediator helps the parties by analyzing the strengths and weaknesses of the parties’ positions, transmitting settlement offers, and suggesting solutions. However, the mediator does not offer an opinion as to which party might prevail if the case were to be presented to an arbitrator or judge. The mediator's role is to guide the parties to a settlement, but the mediator is not asked to evaluate the merits of the parties' cases or predict an outcome.

Evaluative mediation goes a step further. In evaluative mediation, the mediator may be asked at some point in the mediation to offer a non-binding opinion, not only as to the strengths and weaknesses of the parties' positions, but also a prediction as to which party would prevail, based upon everything presented to the mediator during the mediation. Evaluative mediation is used often in complex mediations.

If you wish the mediator to be an evaluative mediator, you should discuss this with the other party and agree that this is the type of mediation that is preferred. The parties should make this clear to the mediator at the earliest possible stage, preferably during the initial conference with the mediator, or even during the mediator selection process. You do not want to proceed with mediation with the parties having different expectations as to the type of mediation that will take place.

It may be said that evaluative mediation is not a separate process, but an extension of facilitative mediation. The parties may request evaluative mediation and resolve the dispute during the facilitative stage before the mediator renders an evaluation.

Discussion

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Are the types of mediation separate and distinct processes or are they a spectrum of processes that can be used in one proceeding?

VII. Ex Parte Communication and Private Caucuses

Managing Pre-mediation Submissions, Initial Contacts with the Mediator, and Mediation Procedures – Is the Caucus Model for Everyone?

After selecting a mediator and executing the mediator’s agreement, the mediator will promptly schedule a pre-mediation conference. This will either be held in person or on the telephone. A typical agenda of the pre-mediation conference is as follows:

A. The mediator briefly introduces his/her background.
B. The mediator briefly explains the mediation process.
C. The mediator and the participants discuss whether the mediation will be evaluative or facilitative.
D. The parties offer a brief summary of their positions in the case.
E. The mediator requests a brief memorandum summarizing the issues and a limited number of relevant documents.
F. The parties agree to the location and time for the mediation session.

Questions for discussion

1. How does preparation for mediation differ from preparation for litigation?
2. What would you include in the premediation memorandum. How would it differ from a prehearing brief in court?
3. Would you mention possible settlement positions in your premediation memorandum?
4. If the answer to the above question is “yes,” what would be the advantage to discussing possible settlement positions in writing with the mediator early in the process? What might be the possible disadvantages?
5. In litigation, parties act as “witnesses” and respond to examination and cross-examination. In mediation, parties participate in discussions with
each other and the mediator. How does this different procedure affect your preparation of your client?

The Structure of the Mediation Session

Questions for discussion

1. Does mediation have specific rules and procedures?
2. If so, who determines the rules and procedures?
3. What is your understanding of the rules and procedures of mediation?
4. What rules and procedures do you consider essential to the mediation process?
5. Can information and discussions in mediation be used in subsequent litigation?
6. Who can attend a mediation session?
7. Are expert witnesses helpful in mediation?
8. Is there usually a court reporter present at a mediation session?
9. What if one of the parties demands that a court reporter be present?
10. What about confidentiality of the mediation session?

Typically, the Mediator establishes Rules and Procedures.

A. Mediation is voluntary.
B. Any party can withdraw from the proceedings at any time.
C. Everyone must cooperate with the mediator and be respectful of each other.
D. In the joint session, the mediator will designate who speaks and when.
E. No one will interrupt the person who is speaking.
F. Any one can ask a question of anyone else in the room.
G. Even though a question is asked, the person who is asked is not required to answer.
H. Confidential information revealed to the mediator will not be revealed to the other party unless the party confiding the information authorizes the mediator to do so.
I. Nothing said in the mediation session can be quoted or used in any way in litigation or any other dispute resolution procedure if the mediation does not result in a settlement.
J. Before any party decides to withdraw, they must consult with the mediator first and explain why they wish to withdraw.
Procedures of the Mediation Session

**Joint Session** - Fact-Finding and Issue Definition

Query – is it always wise to have a joint session?

**Mediator's Opening Statement**
Mediator briefly describes his/her background and the mediation process and rules of procedure.

**Parties' Opening Statements**
Parties vent their emotions and frustration. Parties state factual basis of dispute.

Query – Should the Mediator always ask for Opening Statements from the parties?

**Mediator asks clarification questions and list issues of the dispute.**

**First Private Caucus** - Fact-Finding and Issue Definition Continued
Parties continue to vent emotion and frustration.
Mediator asks the parties to rank the issues in order of importance. Parties divulge confidential information.
Mediator plays "devil's advocate" - determine strengths and weaknesses.
Mediator determines hidden agenda Items and throwaway issues.

**Second Private Caucus** – Parties Begin to Seek Resolution
Mediator explores the parties' initial settlement offers.
Parties do not authorize transmission of settlement offer.
Mediator determines disparity in range of initial settlement offers.

**Third Private Caucus** - Negotiations Begin
Mediator requests permission to transmit settlement
offers. Mediator discusses possible solutions with the parties.
Mediator and Parties brainstorm possible solutions. Mediator may suggest possible solutions.

Fourth Private Caucus - Negotiations Continue
Parties make counteroffers and authorize mediator to transmit the offers.
Mediator transmits settlement offers and reviews parties reactions to settlement offers.

Impasse in Negotiations

Mediator uses various techniques to break impasses that result.

Closure - SETTLEMENT AGREED.
Parties list points of agreement and sign the list. Mediator and the parties make sure there are no unsettled issues.

Formal Drafting of Settlement Agreement
Settlement agreement drafted by parties and their attorneys, not the mediator.

Questions for Discussion

1. The above procedure describes the “caucus model” of mediation. To what does this refer?
2. Have you ever participated in a mediation that the mediator did not meet with the parties ex parte in caucus?

VIII. The Stages of Mediation

The first stage of the mediation session consists of the mediator’s opening statements and the parties’ opening statements. The parties’ opening statements are similar to opening statements in trials, yet are also very different. The parties’ opening
Statements are the first opportunity for the parties to express themselves face to face with each other. The opening statements in a typical mediation can be fifteen to thirty minutes. In a more complex mediation, with many issues, the opening statement can be an hour, two hours, or even more.

First, let us explore how a party's opening statement in mediation is similar to an opening statement at trial. At trial, the attorney has the opportunity to state the legal arguments and factual basis for his client's position. However, during a trial, the focus is convincing a judge and jury. During mediation, the goal is dialogue with the opposing party.

Questions for discussion
1. Should the attorney frame his/her opening statement in the same tone as if he/she were in court?
2. Is the attorney limited to summarizing what his client intends to demonstrate, or can the attorney use other demonstrative aids such as charts, affidavits, or live testimony?
3. What efforts can the attorney make to create an atmosphere of cooperation during the opening statement?
4. During the parties’ opening statements, should the opposing party interrupt and ask questions, given the informality of the procedures?

During the private caucuses, the attorneys and their clients have a unique opportunity to meet in private with the mediator. This type of procedure is not available during litigation.

Questions for discussion
1. What should be the attorney's role in the private caucus?
2. How can you maximize the effectiveness of the private caucus?
3. If there is confidential information to be transmitted to the mediator in the private caucus, how does the attorney aid in transmitting the information?
4. What should the attorney not do in the private caucus?

During mediation, there may be instances in which you as an attorney may wish to speak privately with the mediator without your client present. This certainly is not allowed in litigation.
Questions for Discussion

1. What circumstances would compel you to speak privately with the mediator without your client present?
2. What would be the advantage of your speaking privately with the mediator?
3. How will you explain to your client that you wish to speak to the mediator without him/her present?
4. Should you discuss this option with your client before the mediation?
5. What if your client does not want you to speak to the mediator privately?

The Role of the Client in the Mediation Session

In litigation, the client speaks in a controlled setting. The client is examined and cross-examined. The examination of the client by his/her own counsel allows the client to testify in an orderly manner, presenting evidence by testifying and referring to relevant documentation. Even when the client is cross-examined by opposing counsel, the examination is only allowed within the bounds of the rules of evidence.

In mediation, parties do not "testify," and they are not examined and cross-examined by attorneys. Instead, they participate, in the joint session, where they may offer portions of the opening statements.

Questions for Discussion

1. How do you perceive your client's role in the opening statement?
2. Will your client's participation in the opening statement depend on his/her personality?
3. What cautions would you give to your client as to how the client's portion of the opening statement should be delivered?
4. Should your client speak in a narrative fashion in the opening statement or should you examine your client?
5. Even if your client speaks in a narrative fashion in the opening statement, how can you help your client during his/her delivery?
6. Should your client ask questions of the other party during his/her opening statement?
7. What is the advantage of allowing your client to deliver a portion of the

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opening statement?

8. What should you be doing while your client is delivering his/her portion of the opening statement?

9. After your client concludes his/her portion of the opening statement, what if you believe that significant points have still not been made that you intended to be made?

10. Should you expect the mediator to ask your client questions during or after the opening statement?

11. Should you expect the other party and the other party's counsel to ask your client questions during or after the opening statement?

12. How should you deal with relevant documents during the opening statement - while your client is speaking, or after your client finishes speaking?

13. Should you use other exhibits during the opening statement, such as charts, power-point presentations, etc.?

The Client also participates in **private caucuses** with the mediator. This is an opportunity that the client does not have in other types of dispute resolution such as litigation or arbitration.

**Questions for discussion**

1. What should be the client's role in the private caucus?
2. What should be the client's tone and attitude in the private caucus?
3. What should the client not do in the private caucus?

During mediation, there may be instances in which your client may wish to speak privately with the mediator without you present. This certainly is not allowed in litigation.

**Questions for Discussion**

6. What circumstances would compel your client to speak privately with the mediator without you present?
7. What would be the advantage of your client speaking privately with the mediator?
8. Should you counsel your client that he/she has the option to speak to the mediator without you present?
9. Is it your option to counsel your client not to speak to the mediator privately?
Being Persuasive is certainly one of the goals of Mediation. In mediation, both the attorney and the client have the opportunity to exercise persuasiveness.

**Questions for discussion**

1. Can you be persuasive by doing something other than talking?
2. Is there a difference between hearing and listening?
3. Have you ever heard the term "active listening"?
4. What are you doing and what message are you trying to convey when you are participating in active listening?

**IX. Overcoming Impasse and Achieving Settlement**

Should impasses in negotiations be feared or welcomed?

**The Role of the Mediator - Questions for Discussion**

1. The role of the mediator is to facilitate a settlement. Does the mediator give the parties a non-binding opinion as to a possible outcome of the case if the case were litigated?
2. Litigation is adversarial and the focus at trial is to convince a judge of jury of the correctness of your position. What is the focus during mediation?
3. It has been said that “dialogue” is an essential ingredient of the mediation process. From what you know of the procedures of mediation, who participates in this dialogue – the mediator and the parties, just the parties, the mediator and the parties separately, all combinations previously stated?
4. The mediator has the following functions. Describe each function in detail:
   a. Establishes Procedures and Rules
   b. Controls the Process
   c. Clarifies and Prioritizes Issues
   d. Transmits Information
   e. Suggests Solutions
   f. Functions as an Agent of Reality
5. What is the purpose of the Mediator’s Opening Statement?
6. What is the mediator’s function during the parties’ opening statements?
7. In the initial private caucuses with the parties, what will the mediator do?
8. What is the advantage of having the mediator meet with the parties in private caucus?
9. Will the mediator only be assessing the value of the information transmitted by the parties during the mediation process?
10. Will the mediator be assessing the motivations of the parties?
11. Can the mediator meet only with the attorneys without their clients present?
12. Can the mediator meet with the parties without their attorneys present?
13. Can the mediator meet only with one attorney without the client present?
14. Can the mediator meet only with one party without the attorney present?
15. Who will decide whom the mediator will meet with at any given time in the mediation process?
16. Once the parties begin framing settlement offers, what is the mediator’s role?
17. How can the mediator help if your client comes to the mediation with unrealistic expectations?
18. Once the parties reach a settlement, does the mediator draft the settlement agreement?
19. What if the parties want the mediator to draft the settlement agreement?
20. What if the parties and the attorneys draft the settlement agreement and ask the mediator to sign it, also?
Who Must Be Persuaded – the Mediator or the Opposing Party?

What is the burden of proof in mediation? In order to discuss the burden of proof in mediation, consider the following:

1. There is no judge.
2. There is no jury.
3. The mediator does not have the authority to render a binding decision.
4. Mediation is essentially a structured settlement procedure.
5. The result of a successful mediation is usually a compromise solution.
6. There is no procedure in place to make “objections to evidence” as in litigation.
7. An independent third party does not test the weight of the evidence that is presented in mediation.
8. The mediator often is not called upon to render an opinion as to the possible outcome of the case if it proceeds to trial.

Now, consider the following:
1. In mediation, the person that must be convinced is the other party, not the mediator.
2. Successful mediation requires an exchange of relevant information.
   a. You must come to the mediation prepared to present information verbally by the participants and with relevant documentation.
   b. The parties have the ability to request additional relevant information during the mediation if the information is not present.
3. The parties and attorneys engage in a dialogue.
   a. The parties and the attorneys can probe information in a more efficient manner than if presented in a courtroom.
   b. The parties have the ability to speak and question, and they are the individuals who best understand the facts and circumstances of the dispute.
4. The time frame for mediation is different than in litigation.
   a. You are not dealing with a crowded docket and a judge who was randomly assigned.
   b. The attorneys, clients, and the mediator have the ability to review documentary evidence together or in private.
5. Compromise is not based upon lack of information, but on completeness of information.
6. Compromise does not usually occur as a convenience, but only after sufficient information is exchanged so that a rationale for compromise can be devised.

7. Settlements will usually occur only if the parties trust each other and have confidence in the quality and accuracy of the information presented.

X. Who Enforces the Rules of Evidence in Mediation

You will often hear that the rules of evidence do not apply in mediation. I believe that this is an incorrect statement. The rules of evidence are not esoteric principles that exist solely for the benefit of lawyers and judges. We use the rules of evidence every day to deal with almost every aspect of our lives. The rules of evidence were not created by the legal system - they are rules of social intercourse.

The rules of evidence evolve from three major concepts - authenticity (is it real?); relevancy (is it pertinent to the subject matter?); and credibility (is it believable?). Don’t we use these concepts in almost every situation in our lives, whether it is personal, business, or otherwise? Of course, we may choose to suspend these rules momentarily, when we watch TV, view a movie, tell a joke, or read a book of fiction, but we do not do so as a matter of course.

We learned in law school that the legal system has devised detailed rules of evidence from these basic concepts in order to test the sufficiency of evidence presented to a trier of fact. During a trial or arbitration hearing, information that a party may believe is not authentic, relevant, or credible is challenged by an objection, and the judge or the arbitrator rules on the objection, thereby deciding whether the evidence will be considered or not considered.

In mediation, there is no “trier of fact” that is making an ultimate decision to consider or not consider evidence. Rather, the parties themselves must assess the information presented and judge the information’s sufficiency, to decide whether settlement discussions can rely upon such information and whether a settlement can be rationally based on the information. Does this mean that the rules of evidence are not applied? Of course not! Questionable information is challenged in a different manner in mediation.
Questions for Discussion

1. In mediation, how would you challenge information that you believed was not authentic?
2. In mediation, how would you challenge information that you believed was not relevant?
3. In mediation, how would you challenge information that you believed was not credible?
4. In litigation, the trier of fact does not consider evidence that is deemed inadmissible. What is the effect in mediation of a party’s attempt to rely on information that would be deemed inadmissible by a court?
5. How is expert opinion used in mediation? Should you have an expert witness present at a mediation session, or should you incur the expense of an expert witness only if it appears the matter will not be resolved by mediation?

Achieving Settlement

The Inappropriate Use of Litigation Techniques in Mediation

Mediation is not litigation. As simple as this sounds, many participants often lose sight of this fact. Your demeanor as a mediation advocate and the demeanor of your client play an important role in setting the tone for the mediation and may lead to the ultimate success or failure. Perceptions are critical in mediation, and you and your client should assume a posture and attitude toward the other party and the mediator that is positive and cooperative.

Remember, the ultimate result of the mediation process is that the parties will shake hands and agree to a settlement. Keeping this goal in mind, here are a few postures and positions that you should avoid:

1. Do not repeatedly mention the past history of the dispute, pointing out the delays or inattentiveness of the other party to resolving the dispute.
   a. You can’t change what has occurred
   b. You can control what will occur in the future
2. Do not seek sympathy from the mediator.
   a. The mediator may at times empathize with the parties' positions, but emotional pleas do not translate into successful settlement strategies.
   b. If you ask the mediator to convey emotional pleas to the other party, you must realize that settlements are usually based on rationale, not guilt.

3. Do not "beat up" the other side.
   a. You do not “score points” in mediation as you might in litigation, by aggressively challenging the veracity and credibility of the other party
   b. Embarrassing or berating the other party is counter-productive in mediation.

4. Do not act disrespectfully towards the mediator.
   a. Do not argue with the mediator in front of the other party. The mediator is not a party to the dispute.
   b. If you disagree with something the mediator says, discuss this during a private caucus.

5. Even though the parties are compensating the mediator, do not treat him or her as a subordinate.

6. Do not lose sight of the fact that the mediator is an experienced professional, and should be treated as such.
   a. At the beginning of the negotiation phase, do not make comments to the mediator such as "Now its time for you to really start earning your money."
   b. In the heat of the exchange of settlement offers, do not tell the mediator to "Go in there and let me see how good you are - come back with an offer I can accept."
   c. You should remember that during the mediation session, the mediator is working continuously, whether the mediator is listening, speaking, or planning for the next stage of the proceeding.

7. Do not ask rhetorical questions.
   a. For example "If they had no intent of reviewing our claim, why did they wait six months to deny it?"
   b. Such questions will only serve to create an adversarial,
combative atmosphere that the mediator will have to defuse.

8. Time Limits are also used inadvertently to the parties’ disadvantage by those who are not experienced in mediation.
   a. Drawing lines in the sand with regard to the time allowable for mediation is not advisable.
   b. If you impose time limits, you run the risk of not allowing sufficient time for the other party to react to settlement offers.

9. Neither party should interrupt the other party's opening statement.
   a. Take notes if you must, noting the questions you have or the statements they have made that need clarification.
   b. The other party may mention a key fact that you have forgotten, a fact that may be favorable to you.

10. Do not carry on a conversation with your client during the other party’s opening statement.
    a. You are not in a courtroom. Typically mediation occurs around a conference table, in close quarters. If you have the need to communicate, write a quick note.
    b. Do nothing to indicate that you are not listening attentively.

11. Be careful if you make “take it or leave it” settlement offers
    a. If you mean, and it is the last offer, such an offer is appropriate.
    b. If you don’t mean it, but make such an offer as a negotiation tactic – remember - Any party can terminate the mediation at any time. You may cause an unwanted termination.

12. Do not play games with settlement authority.
    a. Be clear as to who has settlement authority and the limits of settlement authority.
    b. If the person attending with settlement authority only has limited settlement authority, do not wait until that settlement authority is exhausted to reveal that ultimate settlement authority lies elsewhere.
Query: Do you know the difference between positive and negative settlement authority?

XI. Drafting the Settlement Agreement

Questions for discussion
1. Who drafts the settlement agreement? The mediator or the parties?
2. When is the settlement agreement drafted? During the mediation session or afterward.
3. Does the mediator sign the settlement agreement?

XII. Why Some Mediations Fail

There are mediations that do not result in a settlement. This happens for many reasons.

One of the primary reasons for failure of a mediation is that one or both parties do not understand the process of mediation, despite the mediator's attempts to explain the process. If one party, or both, view the mediation process as informal, adversarial litigation, the process is almost doomed to failure. Parties who act in this fashion spend their efforts speaking to the mediator, rather than each other, attempting to convince the mediator they are right and the other party is wrong. While it is true that in evaluative mediation one of the functions of the mediator is to assess the merits of the parties positions and predict an outcome, that is only half of the equation. If the parties fail to establish a rational dialogue with each other the mediation will fail because the mediation never actually began.

Another reason why a mediation may fail to produce a settlement is that a party may continue to believe that a better result can be achieved in litigation. If a party becomes more convinced of the merits of its case as the mediation proceeds, and the negotiating does not result in an offer close to the party's bottom line, the party may decide to terminate the mediation and litigate. This is a business decision that can always be made. In this circumstance, the mediation process may have failed to produce a settlement, but the withdrawing party may have gained benefit from it by assessing its case during the process. The only way to test the validity of the party's assessment is to proceed in litigation and achieve a commensurate outcome.
Failure to achieve a settlement can also be caused by the sheer force of personality. Some disputes have their origin in personality conflicts that are beyond the bounds of the issues in dispute. There are instances when the parties simply have burned their emotional bridges before the mediation begins and cannot repair these bridges sufficiently during the mediation to establish any type of meaningful dialogue and settlement posture.

Impatience is a major reason why some mediations terminate without a settlement. A party may expect results too quickly or may think that the process is simply not working. Some parties come to a mediation and immediately begin creating deadlines or other milestones for achieving results. If the time frame is not met, they begin a countdown towards walking out the door. This attitude can be non-productive and worse, it can be self-defeating.

There are times when the parties blame the mediator. Under certain circumstances, they may expect too much from the mediator. The parties may arrive for mediation with very little preparation, and then turn to the mediator and say that it is time for him or her to "do magic." There is no magic in mediation. The parties control the end result, not the mediator. If the parties are not willing to prepare, speak to each other candidly, and work toward a solution, they will not achieve a settlement solely from the mediator's efforts.

Conclusion

Mediation as a dispute resolution technique is gaining in popularity and is constantly evolving to meet the needs of parties.