"Mediating the Litigated Dispute"
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The following is an outline to help you learn about how mediation procedures and techniques can help you, your family, or friends settle contentious disputes with less cost and emotion. Ninety-five percent of all court cases are now referred to mediation before trial, and most of those cases are settled. Why have the courts adopted this method of settling cases? Because it works.

Five common approaches to dispute resolution:

1. Avoidance
2. Self-help and use of force
3. Direct Negotiation
4. Mediation
5. Arbitration
6. Court imposed outcome through litigation.

What is mediation and how does it differ from arbitration?

1. Key features that distinguish mediation are the following:

    a. It is a facilitated negotiation by a trained impartial neutral;
    b. All communications during the mediation are confidential.
    c. The mediator may meet with the parties jointly or in separate private sessions where the parties can discuss their case in a frank and candid manner.
    d. Mediation is nonbinding unless the parties enter into a written agreement to become bound to a settlement of their dispute. No judgment is imposed upon the parties.
    e. Parties in the dispute do not need attorneys to represent them in mediation – the same in arbitration. A party may also represent himself in court but would be at a serious disadvantage without knowledge of formal legal procedures. There is no formal legal procedure in mediation, so the party can negotiate on his own behalf without concern that an adverse outcome may be imposed on him without his consent.

2. Mediation differs from arbitration in the following ways:

    a. Arbitration is usually binding – (substitute for a trial or judge) – the arbitrator makes a final and binding decision which can be enforced in court;

    b. In mediation, the mediator frequently gives no opinion about the merits of the case, and if he does, his opinion is not binding. At other times, the mediator will give an impartial evaluation of the case and suggests possible ways to resolve the dispute. The skilled mediator will assist the parties during the negotiation by suggesting steps that will lead to a mutually acceptable outcome. Unless the parties agree in writing to the terms of a settlement, the dispute will continue in court until final judgment.

    c. The arbitrator hears the evidence in a similar manner as a judge – but the rules of evidence are not as strictly applied as in court. The arbitration process is like a trial, each party presents

evidence (documents and witnesses) to support their case. The arbitrator weighs the evidence and decides which version of the facts he believes. The Arbitrator is judgmental. He is supposed to apply the applicable to the facts and state how the dispute is to be resolved. The decision is imposed upon the participants. There is generally no appeal from an arbitrator's decision, even if it is unfair, unjust and not based on law or fact. Arbitration can be very arbitrary.

d. A good outcome in arbitration, like in trial, is to win! Put another way, a good outcome is a loss for the other party. There is no concern about the continuing relationship between the parties. There is no attempt to fashion a fair result, based upon the needs and interests of the parties. Winning is everything!!!

e. A good outcome in mediation is for each participant to achieve a fair acceptable solution, regardless how the law might govern the outcome. The outcome is not forced upon them. Preserving relationships may be a high priority. The parties will seek a creative solution to the problem. There are no winners! But there are no losers. Everyone seeks to satisfy basic needs, interests and wants, and are willing to compromise to achieve this result. A good objective is to reduce the cost of the conflict and to put the dispute behind them. The process is strategic negotiations.

f. In arbitration, testimony is under oath, and the results are not confidential. In mediation, no testimony under oath is required. All statements and procedures in the mediation process are confidential and cannot be used in any other proceeding.

What are the benefits of Mediation?

1. Success – most cases are successfully resolved.
2. Timely – disputes can be resolved more quickly through mediation than through litigation.
3. Affordable – Mediation costs only a fraction of typical litigation expenses.
4. Private and Confidential– Mediated disputes are settled without a judge, jury or media display. All statements are confidential.
5. Reduced Stress – Mediation eliminates courtroom trauma and risk of uncertainty. The mediator can create a calm, rational environment that is conducive to resolution of disputes.

Why mediation is so effective for resolving conflicts The mediation process overcomes the 4 major barriers to a negotiated agreement:

1. Overcomes the strategic barrier
2. Overcomes the principal – agent barrier
3. Overcomes the emotional barrier
4. Overcomes the phenomena of reactive devaluation
5. The process permits an impartial mediator to control the pace and style of the negotiations – and to shape reasonable expectations
6. The mediator can frame the issues so that each party can see the result as a winning proposition for their side – rather than a loss
7. Allows for exploring options and finding creative solutions

What types of disputes can be settled by mediation? Almost any type of dispute or conflict can be resolved by the mediation process:

1. Family disputes – concerning estates, wills and inheritances
2. Divorce and termination of marriage
3. All civil litigation matters
    a. Personal injury
    b. Business contracts
    c. Real estate – purchase agreements
    d. Construction contracts
    e. Employment disputes
    f. Environmental disputes
    g. Neighborhood disputes
    h. Schools and Universities
    i. Even some criminal disputes can now be better resolved through mediation
    j. Appellate cases
    k. Civil unrest – 1996 Democratic Convention in LA – use of mediators
    l. Hostage negotiations
    m. National conflicts between disputing groups

When should you consider going to mediation? The earlier a dispute can be recognized and dealt with, the more likely it will be resolved. Today, many companies have implemented Conflict Management Systems which deal with all conflicts throughout their business environment, both internally and externally. If the dispute has reached the point where lawyers are engaged, early mediation can save parties substantial legal fees. In litigated matters, many attorneys try mediation before onslought of discovery which will burden the dispute with substantial costs. Sometimes lawyers wait until all discovery is completed and all legal issues are sorted out, and will mediate the day before trial. **How to get the other side to participate in the mediation?** Find a qualified mediator who can contact the other party to convene a mediation. The mediator will explain the process and invite the parties to participate. **What type of mediator should you select?** There are many types of mediators – from judges, practicing lawyers and many nonlawyers. Find a mediator who has substantial training and experience. Judges are judgmental – this may be appropriate in some cases, but there are serious problems with judges. Costs are significantly higher. Judges sometimes do not have good interpersonal skills which can offend and alienate parties. Lawyers who have good client skills have adapted well to the mediation process. Nonlawyers may be helpful when the dispute is not heavily based on legal issues and expertise in the field is important – such as a contractor or architect mediator for construction disputes, or an accountant mediator for financial dispute. Ask for references – talk to the mediator – ask what is the mediator's style – judgmental and evaluative, or facilitative? **Valuable tips about how to improve your negotiation skills.**

1. Have a realistic plan and strategy to reach your objective
2. Understand distributive bargaining vs. integrative bargaining
3. Understand collaborative negotiations vs. competitive negotiations.
4. The same approach does not work in every situations – size up the other side and apply the strategy that works in the specific context

How to achieve success in mediation

1. Have a plan and strategy
2. Pick the right mediator and talk with him about the mediation
3. Prepare a written outline of the dispute (what lawyers call a brief)
4. Consider in advance what possible solutions might there be to this problem
5. Consider which solutions are best for your interest
6. Consider what are realistic solutions for the other parties

7. If the dispute is about money, be prepared to with the following

    a. Learn the language of negotiations – how to communicate to achieve your objectives without creating a hostile adversary. While discussing your differences about perception of the facts, be careful about using language that tends to increase emotions. More importantly, avoid language that attacks and demeans your opponent's "identity." Comments that indirectly accuse the other party of lying, cheating, or defrauding – in short, that they are untrustworthy - undermines the negotiation environment
    b. Consider carefully what your opening number should be – it should fair and reasonable, not insulting. It should be higher than your reserve number.
    c. Have a "reserve number" – the number which you would like to have as a good outcome
    d. Know how to make counterproposals – how much each concession should be
    e. Determine your last acceptable number – ascertain from the mediator what the other party should be willing to pay or accept
    f. Determine your BATNA – your walk away alternative g. Don't emphasize a "bottom line" but talk about a "fair and reasonable" number that needs to be achieved as acceptable to both sides.
    g. When the other side gives you a final walk away number, use the process called "Smart Choice" to analyze whether you are making a smart decision – not a perfect decision. Use a decision tree analysis to project what is a good range of outcomes, one of which should be accepted. Consider your tolerance for risk of loss if you don't accept the offer.
    h. Consider the costs, not only in expenditure of money, but also in terms of your emotions, energy, loss of productive time in other ventures.
    i. Always keep the door open even if you reach an impasse. Don't be afraid to return to the negotiating table to continue to work through the obstacles. Sometimes the best deal that can be achieved comes at the eleventh hour, but know when you have obtained the best deal and don't lose the opportunity to make the deal.