How to Resolve any Dispute and Settle any Conflict, Privately, Confidentially, Timely and Effectively

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A Consumer's Guide to Mediation

Wotitzky Mediation Center

YOUR DISPUTE RESOLUTION SOLUTION

We mediate pre-suit and litigated cases arising out of business and personal

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Introduction

In the normal course of day-to-day affairs, disputes are inevitable. Disputes may arise out of our business, family and personal relationships. Types of disputes that we are likely to encounter through the passage of time include: (1) Disputes arising out of the purchase and sale of residential and commercial property; (2) Landlord and tenant disputes: (3) Disputes arising out of the construction and development of residential and commercial property; (4) Disputes between insured's and insurance companies arising out of claims made under a Homeowners Policy or Auto Policy; (5) Family matters including divorce, visitation, custody, support,…; (6) In short, the resolution of almost any dispute you encounter may be resolved through mediation.

Mediation

Mediation is a meeting between disputants, their representatives and a mediator to discuss settlement. The mediator's role is to help the disputants explore issues, needs and settlement options. The mediator may offer suggestions and point out issues that the disputants may have overlooked, but resolution of the dispute rests with the disputants themselves. A mediation conference can be scheduled pre-suit or soon after a law suit is filed saving time, money, and the aggravation that lingers with an unsolved problem. The conference usually begins with a joint discussion of the case, followed by the mediator working with the disputants both together and separately, if appropriate, to resolve the case. Many cases are resolved within a few hours. Perhaps most important, mediation works! Statistics show that 85% of commercial matters and 95% of personal injury matters end in written settlement agreements. Only 2% to 3% of all cases filed in court are resolved by judgment or verdict. This being the case "Where do you spend your time, money and considerable effort?" Do you spend it litigating your case and preparing for trial or preparing your case for settlement through negotiation and mediation?

Arbitration

Arbitration is referral of a dispute to one or more impartial persons for final and binding determination. Private and confidential, it is designed for quick, practical, and economical settlements. Parties can exercise additional control over the arbitration process by adding specific provisions to their contracts' arbitration clauses or, when a dispute arises, through the modification of certain of the arbitration rules to suit a particular dispute. Stipulations may be made regarding confidentiality of proprietary information used; evidence, locale, number of arbitrators; and issues subject to arbitration, as examples. The parties may also provide for expedited arbitration procedures, including the time limit for rendering an award, if they anticipate a need for hearings to be scheduled on short notice.

How Does Mediation Differ From Arbitration?

Arbitration is less formal than litigation, and mediation is even less formal than arbitration. Unlike an arbitrator, a mediator does not have the power to render a binding decision. A mediator does not hold evidentiary hearings as would an arbitrator but instead conducts informal joint and separate meetings with the parties to understand the issues, facts, and positions of the parties. The separate meetings are known as caucuses. In contrast, arbitrators hear testimony and receive evidence in a joint hearing, on which they render a final and binding decision known as an award.

In joint sessions or caucuses with each side, a mediator tries to obtain a candid discussion of the issues and priorities of each party. Gaining certain knowledge or facts from these meetings, a mediator can selectively use the information derived from each side to:

- reduce the hostility between the parties and help them to engage in a meaningful dialogue on the issues at hand;
- open discussions into areas not previously considered or inadequately developed;
- communicate positions or proposals in understandable or more palatable terms;
- probe and uncover additional facts and the real interests of parties;
- help each party to better understand the other parties' views and evaluations of a particular issue, without violating confidences;
- narrow the issues and each party's positions, and deflate extreme demands;
- gauge the receptiveness for a proposal or suggestion;
- explore alternatives and search for solutions;
- identify what is important and what is expendable;
- prevent regression or raising of surprise issues; and
- structure a settlement to resolve current problems and future parties' needs.

Types of Disputes Resolved by Mediation

Any type of civil dispute can be resolved by mediation. Just about any type of dispute that parties want resolved quickly, privately, and confidentially can be submitted to mediation.

The Benefits of Mediation in a Nutshell

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are that:

- parties are directly engaged in the negotiation of the settlement;
- the mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives which they might not have considered on their own;
- as mediation can be scheduled at an early stage in the dispute, a settlement can be reached much more quickly than in litigation;
- parties generally save money through reduced legal costs and less staff time;
- parties enhance the likelihood of continuing their business or personal relationship;
- creative solutions or accommodations to special needs of the parties can become a part of the settlement.

Other Benefits of Mediation

Mediation is an informal process that does not require discovery, pleading, motions practice, hearings, or rules of evidence. This isn't to say you can just wing it. Thorough preparation is the cornerstone to effective mediations and good agreements. Resources are conserved for the court system as well as for the individual disputants when mediation is used.

Mediation is associated with a high quality of settlement. It has been demonstrated that mediation is associated with greater quality of consent and psychological ownership of the outcome than settlements produced by more adversarial alternatives.

Research suggests that mediated agreements are complied with to a greater degree than are judicial awards.

Mediation tends to short circuit a competitive conflict cycle, promote cooperation, build mutual trust, and create solutions that better meet all disputants' most deeply seated interests.

Bringing a neutral third party into the discussion often improves the quality of the negotiations by changing the dynamics of the interpersonal interactions. Neither disputant wants to lose face by looking like an irrational "bad person". As such, the mere presence of the mediator in the discussion often improves the disputants' negotiation behavior.

Mediation is specifically targeted to interrupt a cycle of competition and encourage a cycle of cooperation. Mediators use a number of techniques to reframe perceptions, build mutual trust, create a sense of personal validation on the part of each disputant, and avoid and defuse tangential disputes.

Mediators can also, by virtue of their neutral position in the negotiation, create communication opportunities where there were none. For example, a point or suggestion that, if made by the

other disputant, would be reactively devalued can be more easily heard when made by the mediator.

Mediation can have important conflict management benefits by streamlining the conflict or dispute—even if agreement isn't reached—by clarifying the conflict, narrowing the issues, and often making communication more civil. Thus, even if other methods are needed to resolve the conflict, mediation makes these other methods more efficient. That is, makes future settlement prior to trial more likely.

Mediation has the capacity to deal more comprehensively with interpersonal conflict than other alternatives. For example, litigation deals only with issues that can be stated as causes of action. If you have a dispute with another individual that cannot be set into this mold, it cannot be addressed in litigation.

Mediation is widely regarded as the most effective dispute resolution process for preserving ongoing disputant relationships. Examples of such situations include parents who are divorcing, disputes between neighbors, disputes between corporate shareholder groups, landlords with rental disputes with tenants, parent-teacher conflicts, business partners with disputes over partnership agreements and responsibilities, employee grievance situations, and buyers and sellers of goods and property.

Mediation typically provides the disputants with a communication structure in which they are required to relate to one another in a mutually respectful, amicable, clear, and self-assertive manner, and they are assisted in doing so.

Mediation offers remedial flexibility and creativity unavailable in litigation.

Because of the consensual nature of mediation, there is generally more satisfaction with the settlement and less likelihood that the agreement will be sabotaged later.

Mediation can sometimes also lead to a disputant's point of view being acknowledged by the other disputant for the first time.

Mediation can improve disputant perspective taking, encouraging disputants to see and understand the point of view of those with whom they disagree.

Mediation can be very helpful to a lawyer whose client's expectations are unreasonable.

Mediation allows a mediator to be the bearer of bad news about the lawsuit, preserving for the lawyer the zealous advocate role. This is a form of reality testing that allows the disputant to reach his or her own pessimistic conclusions, in effect discovering for him or herself the unpleasant truths about the alternatives to a negotiated agreement.

Primary Disadvantage or Drawback to Mediation

Perhaps the most important drawback of mediation is that disputants who could benefit most from the process typically don't choose it. By the time disputants find they are not able to negotiate an agreement on their own, their conflict has frequently entered an escalating phase with mutual hostility and recrimination. These litigants find the idea of cooperating with their enemy to be repugnant and would rather have an authority figure assigned to punish the opposition. There are two problems with this perspective, of course; the first is that only the winner of the litigation obtains the sought after vindication, and the second is that adversarial conflict resolution tends to be so costly and time-consuming, and ineffective that even the vindicated litigant typically loses as much as he or she gains. Research indicates that many of the most angry and hostile disputants, when forced to participate in mediation, often become its biggest fans.

Occurrence of Mediation

Mediations can originate in different ways. First, mediation can occur when a dispute initially arises and before a lawsuit is ever filed. Second, mediation can occur as an adjunct procedure to pending litigation. That is, as soon as the parties file a lawsuit, they can use mediation in an effort to resolve the dispute at the inception of litigation or at any time thereafter but prior to a trial being held. Third, mediation can occur during or immediately after a trial but before a decision is announced by a judge or jury. Fourth, mediation can occur after a judgment has been rendered in litigation. There might be a disagreement over the meaning or manner of carrying out a judgment, or concern about the possibility of lengthy court appeals. The parties can seek the assistance of a mediator to help them resolve these problems.

Preparation for the Mediation Session

To prepare for mediation:

1. Define and analyze the issues involved in the dispute;

2. Recognize the parameters of the given situation (what you can realistically expect, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.);

3. Identify your needs and interests in settling the dispute;

4. Prioritize the issues in light of your needs;

5. Determine courses of action, positions, and tradeoffs and explore a variety of possible solutions;

6. Seek to make your proposals reasonable and legitimate and be willing to accommodate needs of the other party;

7. Ascertain the strengths and weaknesses of your case;

8. Ready facts, documents, and sound reasoning to support your claims;

9. Anticipate the other party's needs, demands, strengths and weaknesses, positions, and version of facts;

10. Focus on the interests, not the position, of each party;

11. Develop your strategies and tactics through discussion of issues, presentation of proposals and testing of the other party's positions.

The Mediation Conference

The parties should come to the mediation conference prepared with all of the evidence and documentation they feel will be necessary to discuss their respective cases. Parties are, of course, entitled to representation by counsel.

At the outset, mediators describe the procedures and ground rules covering each party's opportunity to talk, order of presentation, decorum, discussion of unresolved issues, use of caucuses, and confidentiality of proceedings.

After these preliminaries, each party describes respective views of the dispute. The initiating party discusses his/her understanding of the issues, the facts surrounding the dispute, what he/she wants, and why. The other party then responds and makes similar presentations to the mediator. In this initial session, the mediator gathers as many facts as possible and clarifies

discrepancies. The mediator tries to understand the perceptions of each party, their interests, and their positions on the issues.

When joint discussions have reached a stage where no further progress is being made, the mediator often meets with each party in caucus. While holding separate sessions with each party, the mediator may shuttle back and forth between each party and bring them back to joint sessions at appropriate intervals. During each caucus, the mediator attempts to clarify each party's version of the facts, priorities, and positions, loosen rigid stances, explore alternative solutions, and seek possible tradeoffs. The mediator probes, tests, and challenges the validity of each party's position. The mediator serves not as an advocate but as an "agent of reality." The mediator must make each party think through demands, priorities, and views, and deal with the other party's arguments.

An effective mediator knows that demands and priorities shift as ideas meet opposition, different facts are considered, and underlying circumstances change as parties reappraise and modify positions. In effect, the mediator increases the parties' perceptions of their cases in order to construct a settlement range within which the parties can assess the consequences of continuing or resolving the dispute. By having parties focus on the risks and burdens of litigation, the mediator creates in the minds of the parties the idea that there are alternatives to seek. The parties articulate these possibilities by moving toward tradeoffs and acceptable accommodations.

During the final caucuses and joint sessions, the mediator narrows the differences between the parties and obtains agreement on major and minor issues. The mediator reduces a disagreement into a workable solution. At appropriate times, the mediator makes suggestions about a final settlement, stresses the consequences of failure to reach agreement, emphasizes the progress which has been made, and formalizes offers to gain an agreement.

The mediator acts as a facilitator to keep discussions focused and avoid new outbreaks of disagreement. The mediator will often

have the parties negotiate the final terms of a settlement in a joint session. The mediator will then verify the specifics of an agreement and make sure that the terms are comprehensive, specific, and clear in the final session.

The Settlement

When the parties reach an agreement, they should reduce the terms to writing and exchange releases. If the mediation fails to reach a settlement of any or all of the issues, the parties may continue to pursue other appropriate forms of dispute resolution.

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