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Opinion

As mediation evolves, the procedure is changing

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At its core, mediation is nothing more than a formal negotiation. As such, there are no fixed rules for how the process must be structured.

It has been over 40 years since mediation first appeared as a dispute resolution mechanism. During that time the process has evolved and changed in some significant ways. Parties and their attorneys need to be knowledgeable about, and comfortable with, the process in order for mediations to succeed.

The following are some recent developments in mediation that deserve consideration.

Pre-mediation caucuses

Traditionally, mediations start with a joint session, usually after the mediator has spoken to counsel and reviewed written submissions from them.

After the joint session, the mediator meets with each party for a significant time to discuss the case and to learn the positions and interests of the parties. This often results in long periods of time when each party is not meeting with the mediator, and negotiations do not begin until several hours into the mediation.

In order to avoid this situation, some mediators have begun to offer to meet, or to have a conference call, with each counsel and his or her client, in the days prior to the commencement of the mediation. These meetings serve the same purpose as the first private caucuses of a mediation, without the parties having to sit in a room without the mediator for extended periods.

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In complex cases, this process can be preferable to the traditional model. Counsel should ask their mediators if they would be willing to conduct pre-mediation caucuses in an effort to make the mediation process more efficient.

In simple cases, the extra time involved in having the pre-mediation caucuses may not make it an attractive alternative.

Mediator proposals

When the parties in a mediation reach an impasse, the mediator can utilize several approaches to break the impasse. Most of these approaches involve innovative ways to try to get the parties to change their positions.

Conditional offers, brackets and adding other non-monetary concessions are some of the tools mediators use. In addition, the mediator is often asked to make a mediator's proposal to attempt to break the impasse.

Traditionally, mediators have been reluctant to make proposals, for fear that one or both of the parties may view the proposal as evidence that the mediator favors the other side. Once a mediator has lost the trust of a party, he or she cannot be effective, so mediators generally avoid making proposals.

Some mediators are now attempting to finesse this dilemma by couching their proposal as an opinion of what the parties will accept as a settlement, rather than as an evaluation of the merits of the case.

Mediators are often in a position to determine what the parties are willing to do to settle a case even if the parties have not articulated their true bottom lines to the mediator.

In such cases, a mediator's proposal can be an effective tool for settling a dispute. Often this is done by the mediator proposing a number to both sides and asking each side to accept or reject the number.

Unless both sides accept the number, the mediator does not disclose to either side how the other side responded. If one side rejects the proposal, it will not know whether the other side has accepted or rejected the proposal. Even if the mediator's proposal is not accepted, the negotiations can continue, as the mediator should not have alienated either side by making the proposal.

Mediator evaluations

Unlike mediator proposals, mediator evaluations are evaluations of the merits of the case. It is important for the mediator to know before the mediation begins if the parties are expecting the mediator to evaluate the merits of the dispute and to give them an opinion of the settlement value of the case.

Though mediators are often chosen based partly on their experience and expertise in the area of law that is in dispute, if the parties are looking for an evaluation of the merits it is particularly important that the mediator be respected by both sides for his or her expertise in the area of the law involved.

It is becoming increasingly common in commercial litigation for the parties to seek a mediator who is willing to make such an evaluation.

If a mediator is chosen because he or she is willing to issue an evaluation of the merits of the dispute, the mediator must be very careful in determining how and when to make an evaluation.

While in all mediations the parties attempt to convince the mediator of the superior value of their position, the mediator generally uses this information to try to obtain concessions from the other side. In evaluative mediations, however, the mediator also uses this information to form and then disclose an opinion of the value of the case.

This process can result in one or both sides feeling that the mediator has not given proper weight to the information it has provided to the mediator. For this reason, all possible alternatives should be explored before the mediator presents an evaluation of the merits of the case.

Only if the parties cannot reach a settlement after all the other tools the mediator can call upon have been used should the mediator consider giving an evaluation.

If a mediator is expected to evaluate the merits of a dispute, the parties and the mediator must understand that the likely result of the evaluation is either settlement or the end of the mediation.

Conclusion

Mediation is an evolving process of dispute resolution. As we all gain more experience with the process, innovative changes continue to occur.

By being aware of these innovations, and by being willing and able to take advantage of them, both counsel and mediators can increase the likelihood that their mediations will be successful. MLW

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