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Thinking Outside of the Mediation Box

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Most lawyers who have anything to do with litigation are familiar with how mediation works: there is a dispute between your company and another person or company, the parties select a mediator, and after a series of offers and counter-offers, and a little bit of luck, the matter is resolved. Of course, different mediators have different styles or approaches. Some like to have all parties attend a joint opening session while some never do. Some are comfortable making a Mediator's Proposal when the parties appear to have reached an impasse. Some are hesitant to suggest to the parties what the solution should be. But all of these approaches are focused on the traditional mediation model. Are there any alternatives to this model, and if so, when should they be used?

The answer is that there are several different and often useful models for dispute resolutions, and they should be used whenever it makes sense to do so. For example, if there is a dispute arising out of a disagreement about the law, for example, an intellectual property issue, the parties might engage an expert to evaluate the case from a neutral perspective. This expert would not be a mediator in

the traditional sense, conveying monetary offers and counteroffers. Rather, he would shuttle from one party to the other in order to discuss the law and give his opinion to each side of what the likelihood is of that side prevailing in court. Once the expert has given his opinion to each side,

they can engage in a more traditional back and forth bargaining session.

Another approach is to combine mediation and arbitration in what has been called "med-arb." In this process, the parties retain a neutral to help them settle their dispute, but also agree that if the case is not settled the same neutral will arbitrate the matter. This creates a completely different kind of mediation, as the parties are dealing with the very person who might end up presenting them with a binding non-appealable decision. Recognizing this possibility, the parties might make offers and present arguments to the neutral that are very different from what they might say to a mediator.

Parties often wait to mediate until a matter has been litigated at least to some extent, with key documents exchanged and key depositions already taken. Some lawyers feel that this is necessary to fully understand the case and negotiate from a position of knowledge. But another approach which can also be successful is pre-litigation mediation, with no prior discovery. One obvious advantage of this approach is saving the attorney's fees that would have been spent on discovery. It's certainly possible that some of those dollars might be used to settle the case. For in-house counsel, this approach limits the intrusion into the time of business executives who don't have to spend hours in deposition preparation and then in deposition. But beyond the money and the time suck of litigation, the potential advantage of a pre-litigation mediation is quick resolution before positions harden and settlement becomes more difficult. Pre-litigation mediation can be a win-win as both sides save time and money. While discovery is surely helpful, it is often the case that there are no surprise "smoking gun" documents and the parties are often in a good position to evaluate the case without the need of costly discovery.

Each of the above approaches differs from the standard mediation model, but under the right circumstances can be immensely useful.

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