Mediation for Conflict Resolution

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SUMMARY

The costs of preparing and defending lawsuits and, more broadly, the human and emotional toll taken by litigation have caused many people to turn to mediation. The success stories resulting from mediation suggest that the time and minimal expense incurred by the participants may be worth the effort. However, there are also times to go to court instead of opting for mediation. Here's how to tell the difference.

WHY MEDIATE?

Mediators concur that there are several points during the development of most claims when the claim becomes "mediate-able." Parties may not notice those possibilities, though, and may need encouragement to consider mediation. Mediators report that getting parties to the mediation table is the hardest part of their job. Once the process begins, there is a 75 percent or better resolution rate.

Why do parties ultimately choose to mediate? The reasons are varied. Litigation is financially prohibitive and emotionally exhausting. Mediation is cheaper, faster, and takes less of an emotional toll. In our cluttered courts, with civil backlogs of up to six years in some jurisdictions, mediation may be the best, if not the only, way to get a case resolved expeditiously. In many jurisdictions, courts themselves recognize this benefit and have established their own mediation capabilities to combat rising caseloads.

Mediation is not characterized with the formalities and rules of the court system. It is conducted in layman's terms easily understood by participants. More important, in a well-conducted mediation, everyone can win. No party may get everything it wants, but no party should leave feeling it was victimized by the process. Mediation also differs from arbitration and litigation in that it involves only stakeholders (and their key legal and insurance advisors). Witnesses are not necessary. The strength of a case is only one of many factors parties take into account in deciding how to resolve the case. Moreover, mediation is private, so all the parties share a sense of personal control and an understanding of the importance of the case.

Mediation is usually voluntary, although courts increasingly are requiring parties to try mediation before going to trial. There are two significant advantages to early voluntary mediation. According to Linda R. Singer, principal in ADR Associates, a leading Washington, D.C., mediation firm, "Sitting down with the other parties early, before positions harden, may avoid both unnecessary hard feelings and additional transaction costs. Coming to the table voluntarily without waiting for a court's encouragement or order also allows the parties to select their own mediator and thus retain more control over the process."

WHY NOT MEDIATE?

If the reasons favoring mediation are so compelling, why aren't all cases mediated? Some claims do not come into mediation because they turn on legal issues that only a court can resolve and because parties need, if not want, a definitive court ruling. Some continue in court because parties without liability refuse to "pay up" solely to make the case disappear. Others are not resolved because parties and their counsel need to "know more" before they can secure their mediation stances. (Even these cases can be resolved more quickly if a creative mediator and cooperative parties devise a limited discovery schedule.) Still others are not resolved because of grossly uneven bargaining power among the parties that the mediator cannot undo or manage effectively. (Here again, a little creative mediation might succeed in negotiating an effective resolution once the mediator has brought the parties together.) Finally, some cases remain pending due as much to the incompetence of a poor mediator as to the reluctance of the parties.

HOW TO DECIDE

The fact remains that the very inducements to mediate can also be seen as reasons to avoid the

process—namely, it is hidden and without rules and formalities. How, then, do you decide whether or not to mediate?

Evaluate your own case. Will your success turn on a legal issue, particularly one that will free the firm without a trial? The solution may then rest in court unless the firm has a reason not to take the chance of an unfavorable ruling. Alternatively, if some wrongdoing can be laid at the firm's door—because of the law, evidence, or equities—then mediation may prove the better route.

Evaluate the mediator. There are no formal standards, training, or licensing procedures with which one must comply to wear the label "mediator." Anyone can enter the fray with minimal or no training. Therefore, before you agree to mediation, you should ask the mediators about their philosophy on mediation, how they view their role, and about their training, experience, and references. Only when you are certain that the mediators will in fact maintain a neutral stance should you agree to proceed.

Determine your stance before you begin. As informal as mediation may appear, it has most of the attributes of a well-run settlement conference. The firm will need to determine negotiating strategies and best- and worst-case alternatives ahead of time. In particular, the firm will need to know where it will bend and where it will break and how to use those insights to its best advantage. Most important, you will have to be prepared to settle the case.

Make sure you have the authority you need to settle. All sides should know that coming to the table with settlement authority is a prerequisite for attendance. Mediators often ask in confidence about the scope and nature of the authority already granted. Good mediators keep that information confidential. If asked, they may use its implications to test the settlement waters and to encourage the parties to get settlement authority more appropriate for the case, when necessary.

Mediators also recognize that during the course of mediation, settlement ideas and restructuring options may surface that no one could have anticipated. A good mediator can help the parties develop ways to present those options to their respective management if that would help speed case resolution.

ABOUT THE CONTRIBUTOR

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RESOURCES

More Best Practices

The following AIA Best Practices provide additional information related to this topic:

09.03.02 Pros and Cons of Arbitration

09.03.04 The Mediation Process

09.03.05 Preparing for Mediation

For More Information on This Topic

See also "Managing Disputes" by Frank Musica, Esq., Assoc. AIA; "Arbitration" by Howard Goldberg, Esq.; and "Litigation" by Katherine Davitt Enos, Esq., Assoc. AIA, *The Architect's Handbook of Professional Practice,* 13th edition, Chapter 12, page 345.

See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at bookstore@aia.org.

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Key Terms

- Practice
- Legal management
- Disputes
- Mediation claims