

MEDIATION vs. SETTLEMENT CONFERENCE

BY

HOWARD W. BROECKER

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WHAT IS THE DIFFERENCE?

Mediation is a private, confidential, and informal settlement process facilitated by a specially trained and impartial third party. Its goal is to help the parties reach a voluntary, written agreement which focuses on future actions, not past fault. Mediation causes disputing parties, whether before or after suit is filed, to develop their own realistic risk assessments and craft constructive solutions. Often through mediation the parties will create a mutually-acceptable resolution that a court could not award.

For example, in a contract dispute between two small businesses involving the failure of one to timely deliver materials to the other, a court, upon finding the defendant legally responsible, would award compensatory damages to the plaintiff. In mediation, by comparison, the parties would be assisted in identifying their needs and interests (perhaps including the desire to maintain their business relationship) in addition to the litigation positions. This might result in an arrangement where the offending party provided the other company with surplus materials at a significantly reduced cost or some other creative solution. To the extent the parties' interests coincided, such a result might be more satisfactory to both sides than an all-or-nothing, win-lose legal decision, while resulting in significant savings of time, money and the business relationship.

A case evaluation or settlement conference, by contrast, is typically conducted by a public or private judge or other knowledgeable individual with legal experience in the subject matter of the dispute. During the conference, the judge or neutral will attempt to narrow the difference between the parties' positions by offering an expert opinion on the facts, law, likely result or value should the matter proceed to trial. Such an opinion can promote settlement by helping the parties achieve a realistic view of the case. A benefit of this process is that it usually takes less time, and, therefore, results in a cost savings which many clients prefer. It may also narrow the issues and promote an earlier than usual settlement, even if no agreement is reached at the actual conference.

One danger in the case evaluation or settlement conference process is that the neutral's expressed view of the case may alienate one or more parties, thereby hardening positions and diminishing opportunities for settlement. Another danger is that the neutral's evaluation is only an opinion, because no one can predict with certainty what a

particular judge or jury will do. Finally, because settlement discussions are framed by the parties' legal positions, they may be unable to identify creative and mutually-satisfactory potential solutions. For these reasons, before seeking a neutral's opinion, the parties may first wish to fully explore voluntary settlement possibilities through mediation. Many dispute resolution providers will work with participants to design a cost effective sequential process designed to capitalize on the best features of the mediation and case evaluation processes.

HOW CAN MEDIATION BE SUCCESSFUL WHEN THE PARTIES OR THEIR REPRESENTATIVES ARE UNABLE TO RESOLVE A MATTER THEMSELVES THROUGH NEGOTIATION?

Because parties see a dispute from their own perspective, their view of the conflict is unavoidably limited, making it difficult to acknowledge their opponent's interests and arguments. Similarly, because an advocate must zealously represent a client's strongest position in a case, the lawyer's position, at least as expressed to the other side, is usually based upon acceptance of the client's view of the facts and the advocate's view of the most favorable interpretation of the law, facts, and case value. Consequently, when adverse parties and their representatives discuss settlement, they typically are talking at cross purposes about entirely different aspects of the dispute. To avoid any appearance of weakness, neither side is likely to admit any weaknesses in their positions or acknowledge their opponent's strengths. Interaction between the parties and their representatives in these circumstances frequently frustrate efforts at the cooperation and candor needed to promote voluntary agreement.

Legal mediators are specially trained in the communication, analytical and problem-solving skills that will help create opportunities for settlement. An effective mediator provides a forum for the parties to express concerns and vent frustration. The mediator assists the parties to see beyond their narrow legal and factual positions so that they can identify and evaluate their broader interests. These interests may include saving the time, money and emotional costs associated with litigation; avoiding gambling on an uncertain, all-or-nothing outcome; and exploring common ground and the possibility for a constructive, consensual solution which addresses the parties' practical needs.

An effective mediator can assist the parties to settle because the mediator has no decision-making authority or state in any result. Additionally, an experienced mediator of legal disputes is familiar with legal issues and processes and will assist the parties to develop a rational cost/benefit assessment of litigation and settlement options.

WHAT TYPES OF DISPUTES ARE APPROPRIATE FOR MEDIATION?

Mediation can work well in almost any civil or business dispute, before or after suit is filed, as long as the participants are willing to explore settlement in good faith. Because the process is designed to promote communication, it is especially helpful in preserving important relationships. Thus, business solutions, outside the scope of the legal issues,

can be effectively explored.

WHAT ARE THE ADVANTAGES OF PRIVATE DISPUTE RESOLUTION?

In contrast to litigation where a judge controls the process, the parties and counsel control private proceedings. In non-binding processes, rather than submit to the decision of a judge or jury, the parties themselves decide what is acceptable and in their best interests. They also choose the mediator/settlement professional, the time and place of the conference, and the binding or non-binding process. The mediator then devotes the time necessary to prepare for the conference and the uninterrupted time necessary to resolve the dispute, unfettered by a huge docket and inevitable continuances. Additionally, many parties value the privacy and confidentiality of these processes.