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Efficient Mediation: The Fastest Route to the Goal Line

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In the world of litigation, mediation is defined as a confidential, voluntary, facilitative exercise in which parties, with the assistance of a neutral mediator, seek to reach a mutually acceptable resolution to the dispute at hand.

The core underpinnings of mediation consist of:

- *Confidentiality:* The mediator shall not disclose any information gleaned from the mediation to anyone outside of the mediation without the express consent of the parties for such disclosure.
- *Impartiality and Neutrality:* The mediator will be neutral and impartial as to the parties and the process.
- *Voluntary Participation:* The parties consent to the process as a practical mode of resolving their dispute.
- *Finality and Self-Determination:* The parties have far greater control over the outcome of the mediation than the vagaries of a court or jury trial.
- *Streamlined Process and Cost Saving:* Parties avoid not only the risk but the cost of time consuming and expensive litigation.

The benefits of mediation are obvious. Aside from controlling their own destiny as opposed to having a resolution imposed upon them by a judge or a jury, parties have a more positive approach. The focus of a mediation is collaborative, and parties treat one another with respect and work toward a common goal of efficient resolution. Furthermore, mediation is not binding and it is therefore undertaken by the parties with the understanding that if an agreement is not reached, the traditional litigation process is still available for ultimate resolution of the dispute.

Mediation Styles and Efficiency

Since mediation involves a neutral third party mediator who facilitates discussion and resolution

of contested issues, the efficiencies of the mediation process are an extremely important component. How best is efficiency in mediation achieved?

The job of a mediator is not to make decisions but rather to assist parties in reaching resolution of contested issues. Mediators normally employ one of two basic styles: facilitative or evaluative. A facilitative style is the traditional modality of mediation, in which the mediation neutral facilitates or guides the parties toward an agreement by questioning, probing, caucusing and using information gleaned from the parties for the purpose of guiding them to make their own decisions about settlement or resolution.

The evaluative style involves the mediator expressing opinions as to issues in the case and the scope of damages. An evaluative process involves the mediator assessing and urging or pointing the parties toward a specific outcome or form of resolution. For some mediators, an evaluative style can be difficult to employ as by definition, it can force a mediator to take positions on issues which appear to be less than neutral.

There is clearly a continuum from facilitative to evaluative and in any mediation there is of necessity some overlap between the two styles. A good mediator recognizes this and may adjust his or her style accordingly to fit the particular mediation, depending on the parties, counsel, and the issues involved in the particular case. When the appropriate style is identified by the mediator, efficiency of the process is maximized.

Bad Habits

Some mediators revel in the process of mediation. Others believe process can become a waste of precious time. Those who believe in process tend to spend time getting to know the parties and counsel, telling war stories and engaging in detailed discussion of facts and questions of law. Mediators at the no process end of the spectrum tend to move more quickly, identify key issues and the true agendas of the parties early on, and push as quickly as possible toward a mediated solution.

There are bad habits or pitfalls on both sides of the process versus no process continuum. Since each mediation is different, has its own dynamic and must be evaluated by the mediator as such, it is difficult to generalize with statements like a simple case needs very little process, or Aa more complex case needs more process. As does a quarterback in a football game, a good mediator must read the defense and try to make the right play call. The mediator must be able to use his or her eyes to see which receiver is open — or most likely to be open — and which receiver is not. To continue the football metaphor, the effective mediator must use the tools of judgment, experience, timing, trust and knowledge of the subject matter of the dispute to call the play with the best hope of scoring a touchdown, which in the context of mediation means settlement of the dispute at hand. A good mediator, like a good quarterback, may need to call an audible. This means that a skilled mediator sometimes needs to change the mediation strategy to achieve maximum efficiency.

Perhaps, the mediator has attempted to use the process of bracketing to position the various parties for settlement, and due to recalcitrance, anger, unwillingness or inability to compromise, the attempt at bracketing the dispute is unsuccessful. In such a situation, perhaps more process is

needed and the mediator needs to spend more time discussing factual, legal or other key issues with parties or counsel. When such a situation occurs, time and the use of process can be become a very strong tool for the mediator and may lead to ultimate resolution of the case.

Perhaps, after a failure of bracketing and the use of time and the process as tools of efficiency, the mediator may suggest the use of a mediator's proposal. This approach normally requires a good understanding by the mediator of the bottom-line positions of the parties and each parties' ultimate willingness to compromise. The use of a mediator's proposal as an efficiency in mediation normally only occurs and is successful after all other available interim settlement tools have been employed and have failed to spawn settlement. A mediator's proposal is most often a last-resort tool, and if it is premature or unsuccessful there is a reasonably strong likelihood that the proposal will scuttle the mediation.

Good Habits

In selecting a mediator, many litigators look for the following traits: integrity, experience, impartiality, good judgment and hard work. Enthusiasm helps too! Party empowerment, giving the participants a voice, is also paramount. The good faith of the mediator and the process, along with party empowerment, leads most willing participants to realize individual self-determination. Part of this empowerment process, with the guidance of a capable mediator, is making the participants (and to a lesser extent their counsel) feel they have equal access to the justice they seek. Certainly, the education of the participants by the mediator as the process unfolds goes a long way toward facilitating party empowerment and self-determination.

The skilled mediator will discuss with the parties the functioning of the civil litigation system, the concept of confidentiality, party autonomy and the advantages of cost-saving, speedy resolution, risk avoidance and perhaps most importantly, flexibility of outcome that are the hallmarks of 21st century mediation.

A mediated resolution or settlement may not only mean the payment of money. The mediation may involve the meeting of the parties, an apology in a particular situation, a memorial to a victim, or a perpetual funding of a scholarship or charitable organization. Creative solutions are the hallmark of a well-orchestrated mediation and are usually applauded by parties and counsel.

Efficiency is Resolution

Parties to a dispute who agree to use mediation as a preferred form of alternate dispute resolution are by their agreement being efficient. There is no one way, lock-step approach to mediate efficiently. The most efficient mediation is the successful one. Sometimes mediation may take several hours, sometimes several days or longer. The efficiency is the dedication to the process and to the concept of alternate dispute resolution outside of the court system.

After over four decades of the extensive use of mediation by courts and litigants here in California, throughout our country, and internationally, one observation is abundantly clear: mediation is efficient by its very nature, as a confidential, autonomous, timely, flexible and economical method of dispute resolution.

In our 21st century world where vast amounts of knowledge and information are at our fingertips on a daily basis, we as lawyers and mediators look for better ways to resolve disputes efficiently. Clearly, mediation by its very definition and implementation is such an efficiency. To say anything less would be imprudent; to say anything more, boastful. We have created in the last half century a unique adjunct to the California and American judicial form of litigation of disputes: Mediation.

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