Mediation 101:
Understanding the Magic

by Nancy Neal Yeend

Mediation is an exceedingly simple and yet extremely powerful dispute resolution process. Principles, process, and prerequisites coalesce to produce the magic of mediation. Those understanding the essential three "Ps" of mediation benefit by becoming better negotiators, thus producing more satisfying results and enjoying higher settlement rates.

PRINCIPLES

The first principle guiding most mediation is control of the outcome belongs to the parties. Empowering the parties, to make the decision of whether to settle or not, and if so, determining the specific terms and conditions, is the foundation upon which mediation is built. Unlike arbitration and trial where an arbiter, judge, or jury dictates the "right" answer, mediation encourages the parties and their counsel to design a settlement that meets the client's unique needs. The concept of party empowerment is the direct result of present-day mediation developing in a society that emphasizes the importance of the individual.

An impartial person, the mediator, manages the process. Mediator neutrality is the second underlying principle of mediation. Most jurisdictions require, and codes of ethics provide, that a mediator disclose all past, present, or anticipated future financial, professional or social relationships with any of the mediation participants or their firms. The presumption is that when a mediator has no vested interest in the outcome, the parties participate in a fair process.

PROCESS

To understand just how mediation works, familiarity with the associated terminology and process sequence is useful. Although every trainer and author on the subject may divide the mediation process into different steps or phases, three essentials stages remain the same: opening remarks, problem-solving, and resolution.

Openings

Following introductions, the mediator begins the session by incorporating essential information into brief opening remarks. Most mediators describe the process with mediator's management role, procedures and party participation. Typically, three procedural items are addressed in the mediator's opening: ground rules, separate meetings and confidentiality. The mediator outlines guidelines or ground rules for managing the parties' discussions and negotiations. The mediation participants may suggest ground rules as well.

Separate meetings within the mediation process may be held at any time. These private sessions are referred to as caucuses, and may include any combination of the mediation participants: mediator with attorneys, attorneys with their

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clients, and so forth. These sessions are productive when the mediator gives assignments to the parties that will help the participants develop options for resolution.

By state statute, court rule, or through use, mediation is a confidential process, and not open to the public. The deliberations and negotiations that transpire during mediation are often likened to court-connected settlement discussions. It is not uncommon for all participants, including the mediator, to sign a confidentiality agreement prior to proceeding with the mediation.

Mediation enjoys an unprecedented settlement rate, because of confidentiality. When individuals are able to discuss and negotiate in a confidential setting, they are more likely to provide information. Without information, people have no negotiation currency. If individuals are not able to negotiate, they have no mechanism to resolve their dispute. Thus, the confidential nature of what transpires during a mediation is exactly why mediation is such a useful settlement process.

Following the mediator's brief opening remarks, the parties and/or their counsel present their openings. The most effective openings accomplish three things: briefly outline the key factors that brought about the situation, identify all issues that need to be resolved, and present the information in a positive, non-adversarial tone. Name-calling, sarcasm and disparaging remarks at the beginning of a mediation set the wrong tone for negotiating a settlement.

Problem-Solving

Approximately 80 percent of mediation time is spent in the problem-solving portion of the process. During this time the parties may be negotiating directly with one another, or they may meet periodically in caucus sessions. Although the personal style of the mediator may influence whether the parties are negotiating directly with one another in a joint session, or if they are meeting separately in private caucus, it has been found that direct negotiations produce better results. A skilled mediator can bring the parties together and get them to focus on defeating a common problem, rather than spending their energy trying to defeat one another.

If the mediation participants are separated for the entire process and the mediator merely runs messages back and forth between the groups, communication is incomplete. If one deconstructs a spoken message, one finds that only seven percent of the communication is the actual words uttered. The remaining 93 percent of the communication is made up of facial expressions, eye contact, tone inflection, etc. All good negotiators understand that the best way to get the complete message is to sit directly across the table from those with whom they are negotiating.

A message carried by the mediator does not indicate if the offer was made in a shrill voice or if the remarks were made through clenched teeth. It does not indicate if there were furtive glances back and forth between counsel and client. It does not indicate if someone was nervously tapping his or her toe on the floor. All of these non-verbal communications might indicate if the offer was genuine or if there is team unity on the other side. That resulting information may well influence how to strategically proceed with the negotiation.

Resolution

Mediations typically result in full settlements over 80 percent of the time. No rights are waived as a result of participating in mediation, and if there is no resolution, the parties may continue to resolve their differences in another forum, such as binding arbitration or trial. Even if there is not a global settlement, often issues are narrowed, and if the parties need to go to court, the case is focused, thus saving some litigation expense.

When there is an agreement, the parties enter into a contract, reducing the terms of the settlement to writing. Should there be a breach of the terms, the agreement is enforced under contract law. Another major benefit of mediation is that since the parties' design the terms of their settlement agreement, they are much more likely to honor those terms. Results of trials and non-binding arbitrations are appealed on a regular basis, but it is rare that cases settled using mediation need to be revisited.

PREREQUISITES

When the principles upon which mediation is built and the essential stages of the process are understood, the parties are better equipped to participate. An athlete needs to wear the appropriate attire, bring the requisite equipment, and specifically prepare in order to effectively participate in a game. Thus, someone playing football would not fare well wearing a tennis outfit and carrying a racket. So too, mediation is not the same "game" as arbitration or trial, and the preparation is also different.

To enhance the probability of finding an appropriate and comprehensive settlement requires knowing the rules of the game and preparing for it. There are five crucial aspects of mediation preparation: Assembling the facts, delineating the chronology, conducting case analysis, determin-

ing criteria, and generating options.

Gathering the facts for mediation is not as daunting or resource intensive as preparing for trial. Typically, little if any discovery is required before undertaking mediation. Before going to the mediation, having a list of the important facts, and dividing them into two categories, disputed and undisputed, will save a lot of time during the negotiations and discussions.

Preparing a chronology of the events, together with an outline of any settlement discussions, including offers or demands, provides a basis for negotiations. Gathering facts and developing the chronology helps client, counsel, and any experts not only to work more effectively together, but also to provide an image of a cohesive team. That alone is a major advantage when negotiating a settlement.

Conducting a case analysis, prior to attending the first mediation session, separates the novice from the experienced negotiator. After all, mediation is merely a facilitated negotiation, so failure to prepare is tantamount to stalemate. There are two phases of case analysis, and many individuals only do half of the exercise. A case needs to be viewed from all perspectives: plaintiff as well as the defense. The strengths and weaknesses of the case for each side need to be identified and listed in the case analysis—a 360 degree view of the case, or an "our side" and "their side" examination.

Mediation participants who assume that they are right and the other side is all wrong will inevitably make a major blunder and become the proverbial positional bargainer. Parties who come to the mediation table with only one position missed the final two aspects of comprehensive mediation preparation: assessing their decision-making criteria and identifying potential settlement options.

Criteria are those factors that a decision-maker takes into consideration before determining if an offer is acceptable or not. People unconsciously use criteria every day when making decisions. If a person wants to buy a new car, he or she would not just walk into a dealership and say, "Sell me a car." He or she would have a list of criteria, and if those criteria were met, then the person would buy the car. For example, when purchasing a car the criteria might include: 4-door model, leather interior, sunroof, chrome wheels, red color, and costs less than $40,000. If the dealer has such a vehicle, more than likely the purchaser will buy the car.

When the parties develop a list of criteria that they will use to decide if a proposal is acceptable, their negotiation time in the mediation is far more productive. Criteria are as varied as the mediation participants are different. The subject matter of the case may also influence the criteria. Some criteria tend to surface regularly: time, economics, industry custom, future protection, and relationship preservation among others. For example, when considering time as criteria for making a decision, someone might accept a specific amount of money if it is paid today, but will reject that same amount of money if it is not paid for two years.

Generating a list of options prior to coming to the mediation benefits everyone. Even if the ideas thought of in advance of the mediation are not accepted by the other side, they may spawn new ideas. More importantly, coming to mediation with a variety of potential solutions will keep the participants from becoming positional bargainers. Those parties who come into the mediation with a sophomorically simple solution of "take it, or leave it" never fair as well as those who come prepared.

Understanding the philosophical principles of mediation, possessing a clear view of the step-by-step process with its important procedural elements, and exploring the five elements for preparation produces the magic of mediation. Success in mediation, as with most things in life, is based on planning and preparation. VE

Additional Resources

NACVA and the Center for Economic and Industry Research (CEIR) can give you access to a selection of supplementary sources to support your analysis. The following sampling can be obtained in greater detail by contacting us at nacva1@nacva.com and ceiranalyst@C-E-I-R.com respectively.

NACVA Resources:

National Litigation Consultants' Review (monthly: call NACVA Member Services at 800-677-2009)

How to Win Any Argument (Robert Mayer); call NACVA Member Services at (800) 677-2009

Web sites:

The Philadelphia Business Journal
January 28, 2005
http://www.bizjournals.com

"Directors' & Officers' Perspective in Securities Litigation": a slide presentation
http://www.nera.com/image/Juneja securities_litigation_PP_2_2005.pdf

Institute for Conflict Management
www.adradvantage.com and (310) 892-4268

Dispute Resolution Center www.austin-drc.org and (512) 371-0033

MTI International
www.mediationworks.com and (888) 222-3271

NACVA Educational Courses:

NACVA Consultants' Training Institutes: 09/22/05 (Jersey City); 12/08/05 (Las Vegas) http://www.nacva.com and NACVA Member Services: (800) 677-2009.