ADR in the Real World of Wisconsin Litigation

James E. Doyle Inns of Court Presentation

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I. Obstacles to settlement that may require mediation

A. Reluctance to be the first party to initiate settlement discussions – fear of sending a potential sign of weakness

B. Traditional negotiations don't involve both lawyers & clients conferring on settlements at the same time

C. Honest disagreements as to valuations

D. Intransigent parties

E. Unrealistic client expectations

II. Reasons why mediation may succeed where negotiations have failed

A. In contrast to economic incentives on counsel to prepare for trial & to advocate on behalf of clients, mediator has very different economic incentives

B. Confidentiality of mediation process allows each side to engage in a more candid assessment of the issues and risks and benefits of settlement

C. Physical setup of mediation, having parties in separate rooms, allows parties a deliberate consideration of conflicting issues without reflexive responses

D. Skills of the mediator, including the availability, when welcomed, of a neutral evaluation of benefits and risks of trial from an experienced, neutral third party

E. It may be easier for the mediator to give difficult or negative case evaluation to the client than it is for the client's own counsel

F. There is a greater opportunity for a mutual agreement in mediation, as opposed to one that is advocated unilaterally

G. There are a number of circumstances that dictate mediation may be the best option for your client:

1. To avoid the uncertainty & expense of trial - The overall cost in terms of time, energy, monetary investment required for preparation and trial may turn a court win into a Pyrrhic victory.

2. The need for privacy & confidentiality - One or more parties want the negotiations and /or the agreement protected from public scrutiny.

3. The potential for prompt settlement - Mediation can be conducted at any time in the life of the dispute, including prior to filing in court.

4. Parties may be able to preserve an ongoing relationship – In business and family settings the parties will frequently benefit from mediation because it is less damaging to ongoing relationships.

5. Greater control over the process – Parties can be more creative and can fashion the outcome to meet their needs.

III. When to consider mediation

A. In any contested context, whether litigated or not, the logical starting point for settlement is to attempt direct negotiations with the other side. Sometimes, it's clear from the outset that negotiations with the other side will be fruitless. On other occasions, only at that conclusion of extended settlement discussions will it become apparent that parties cannot reach an agreement without the assistance of a third-party neutral. Formal mediation should only be considered once counsel has concluded that further direct negotiations with the other side are unlikely to bring about a settlement.

B. There is no ready answer to the question when is the best time to consider mediation? The answer to this question is dictated by quite a number of factors:

1. Client's need for prompt resolution of the dispute as well as the client's readiness to accept a realistic settlement

2. The adequacy of available information/discovery to make reasoned settlement decisions

3. The availability and willingness of necessary parties to participate in mediation

4. The onset of meaningful deadlines, such as summary judgment, and

5. A subjective perception as to when the other side may be most susceptible to participating in meaningful settlement discussions.

6. For obvious reasons, where the parties have a continuing relationship, the sooner the parties resort to mediation the better. A successful mediation can be an essential tool for preserving and even improving the relationship.

C. Once formal litigation has commenced, there is some danger in waiting too long to commence serious settlement discussions. There can be such a significant mutual investment in the litigation process that the litigation expense, itself, becomes a serious obstacle to settlement. When in doubt, it rarely hurts to ask the other side about when they might be most amenable to exploring a mediated resolution with you. (The process of cooperatively negotiating over the terms of the mediation can set the stage for success in the mediation process itself).

D. On occasion, it may be necessary to ask whether the issues in dispute are even subject to negotiation. If, for example, there is an issue of enormous significance to both sides that necessitates a public resolution, mediation may simply not be an option. Alternatively, there may be instances where one party can afford to believe, rightly or wrongly, that it is in their interest to simply ignore the problem. Although relative rare; not every case is amenable to mediation.

E. Lawyers have an interest in early resolution that is often overlooked.

1. Frequently, the longer a dispute lingers and the greater the investment of time and money, the greater the potential for development of unrealistic client expectations and outcomes that leave client dissatisfied.

2. These expectations can engender feelings of resentment/anger toward the lawyer, even when a much-delayed settlement is objectively reasonable and clearly in the client's interest.

3. It may be as simple as the difference in mindsets: clients frequently enter litigation with the notion that winning is the only acceptable outcome. Conversely, clients should be advised that mediation affords the opportunity to successfully resolve problems.

IV. Effective mediation preparation

A. The first aspect of preparation is to educate your client as to the nature of mediation itself. This requires advising the client on the potential advantages of mediation, the strategies for this particular mediation, the voluntary nature of the process, the need for reasonable expectations as to outcome, and the appropriate demeanor when interacting with the mediator and opposing counsel.

B. Creative solutions and responses from the client should be encouraged.

C. Clients should be prepared to respond to probing questions from the mediator involving their fundamental interests, their priorities for settlement, and their view of the facts in dispute.

D. Inevitably the strengths and weaknesses of each side's case will be discussed in depth with the mediator.

E. The client needs to understand that mediation may entail a long day with significant downtime and that, frequently, the real action in the mediation process doesn't occur until the very end of the process.

F. It is helpful to learn the mediation style of the mediator you have selected. The primary styles are the classic facilitation style (one that focuses on enhancing the communication between the parties) and an evaluative style (focused on offering substantive feedback from the mediator to the parties) or some combination of the two.

G. If you are uncertain as to the mediator's style, a straightforward inquiry to the mediator on this subject is warranted.

H. It is also helpful to gauge whether your opponent is approaching mediation from a problem-solving perspective or, alternatively, from a competitive vantage point.

I. There is an essential need to have critical and persuasive information, preferably in a distilled format, available to present to the mediator.

J. Preparation also involves having a familiarity with the detailed minutia associated with the competing claims made by each side.

K. In consultation with your client, you need to develop an overall strategy for the mediation itself. Your client needs to understand that mediation is not a competitive process where the goal is to win the process; rather, it is a collaborative process, where the ultimate goal is to settle the dispute. A high percentage of unsuccessful mediations have their failure rooted in unrealistic client expectations for settlement.

L. Clients need to understand that all cases have weaknesses as well as strengths. Ultimately, clients will need to evaluate their best litigated alternative to a negotiated outcome (BATNA) as well as the worst litigated alternative to a negotiated outcome (WATNA).

M. The client should understand that the mediation process will likely involve a series offers and counter offers, and that neither side is likely to make their best offer on their first offer. Initial offers need to be framed in light of the history of pre-mediation settlement discussions.

N. Obviously, you'll need to have those with the ultimate authority to settle the case present or at least readily available for consultation by phone.

V. Stages in the mediation process

A. The mediation process starts with the scheduling of mediation with all of the parties and the agreed-upon mediator.

B. Once the mediation begins, the normal course is for all parties to meet in joint session. The joint session may range from the simple set of introductions and overview of the process by the mediator to a more extensive session involving the giving of opening statements by counsel and a substantive review of the facts and legal issues with all parties present.

C. Typically, the mediator will caucus in separate session with each of the parties and their counsel in order to allow a more candid discussion of the issues without the other side(s) being present. It is understood that what is said in separate session will not be shared with opposing sides, unless authorized by counsel.

D. Wisconsin Statutes, Wis. Stats. § 904.085, make communications in the mediation context inadmissible in any subsequent court proceeding.

E. Once the mediator has had the opportunity to meet separately with all parties to get an overview of their respective positions, the mediator will elicit settlement proposals and communicate those proposals to the other parties.

F. The remaining focus of the mediation will typically center on an evaluation and exchange of settlement proposals.

G. Mediation is a fluid and dynamic process. All participants need to be flexible and creative for the process to have its' best chance for success. If the parties are able to reach either a partial or complete agreement, there will normally be an effort to reduce that agreement to writing and have the parties sign off on the agreement.

V. Mediation presentation

A. Conceptually, there are two parts to the pre-mediation submission**:**

1. One is a narrative description of the facts and law at issue, the other is a strategic summary of how you believe the case should be resolved. The mediator will likely place substantial reliance on this overview as he/she approaches the mediation. Sometimes key pleadings, attached as exhibits, will assist the mediator in getting a handle on the nature of the particular dispute.

2. The second is a suggested perspective on settlement

B. Particularly handy tools in mediation are charts, summaries and timelines, where those devices serve to explain the issues in dispute for those not previously familiar with the intricacies underlying the dispute.

C. To the extent you can offer objective standards and criteria supporting your position in the litigation, those standards are frequently more persuasive than simply engaging in a process of "horse-trading" of numbers. Your ultimate goal is to persuade the other side and not the mediator (except in the situation where persuading the mediator is a necessary step in persuading the other side).

D. It is almost never appropriate to formulate starting offers that are less generous than the last offer presented in settlement discussions. That is because a retrenchment from either side will be perceived as a form of retrograde bargaining -- -- always a negative and counterproductive perception for purposes of mediation.

E. Some mediations are commenced with the giving of opening statements by counsel in a joint session. Conversely, some mediators dispense with the giving of opening statements as duplicative of pre-mediation submissions or because they may serve to antagonize one or both sides. If you are giving an opening statement in joint session, your intended audience ought to be the opposing side rather than the mediator.

VI. Bringing the Mediation Process to a Successful Conclusion

A. The process of bringing a mediation to a successful conclusion requires that the mediator take the critical interests and concerns of all parties into account in the settlement process.

B. A critical task for the mediator is to help each side and evaluate the advantages and disadvantages of settlement proposals in comparison to the likely risks and benefits of proceeding with litigation.

C. Mediation is considered a voluntary process in which both parties are presumed to operate out of their respective enlightened self-interests.

D. The mediator should be viewed as a resource person capable of assisting each side in communicating with the other side(s) and formulating settlement proposals that are likely to bring about an agreement. If the parties fail to reach agreement on their own accord, and mediators can frequently assist the parties in finding means to bridge their differences Those techniques can range anywhere from the mediator's proposal to a blind bidding process within a prescribed range.

E. Listening is a key skill in mediation. That means listening not only to your client, but the other side and the mediator as well. You need to accurately hear and understand what is being communicated in order to effectively respond.

F. One of the best techniques to resolve a successful resolution in a binding fashion is to draft a bullet point agreement highlighting all of the essential terms of the mediated agreement. Assuming there will be a need to draft formal legal documents to implement the agreement, a provision specifying that any disputes as to the wording of such documents will be subject to binding arbitration with the mediator will eliminate the prospect of “buyer’s

remorse" based on a claim that all of the essential details were not captured in the written mediation agreement.

VII. **Trends in ADR**

A. Use of pre-litigation mediation

B. Use of med-arb

Mediation Pearls of Wisdom

"...you earn your mediator currency in the first half of a mediation and you spend it in the second half." What this equates to, for me, is the critical nature of both listening and fully exploring each participant's positive interests and map of reality until participants experience themselves to be fully heard. It is only then, when they experience you to be "one with them," that they are open to joining you to explore new options. Advice to a budding conflict specialist: gently nod your head a lot; say "uh huh" a lot; only speak about half the time you are tempted to; only speak half as long as you might. In your humility and uncertainty lies their power and clarity.

Jim Melamed, Pres. & CEO Mediate.com

A Mediator's Work
(*in 52 easy steps*)

Establish Relationship with Parties

1. Make first contact
2. Include appropriate participants
3. Develop rapport with participants
4. Educate parties about mediation
5. Build credibility/trust
6. Build commitment to mediation process
7. Establish an open and positive tone

Gather Information/Become Informed

1. Substance of conflict
2. Accurate and material data
3. The parties and their relationship dynamics
4. The context of this mediation

Design Mediation Strategy/Procedure(s)

1. Assess/select appropriate conflict management approach (with parties)
2. Identify contingent/ non-contingent case specific tools/tactics
3. Present ground rules
4. Manage process

Define Interest/Issues

1. Focus attention on interests
2. Frame issues of concern
3. Limit some discussion topics
4. Determine issue sequence
5. Gain consensus on issues
6. Set agenda

Build Parties' Relationship

1. Build (model) trust
2. Get parties talking
3. Help parties listen
4. Check parties' perceptions
5. Clarify communications
6. Build legitimacy recognition
7. Adjust for cultural differences /stereotypes
8. Handle strong emotions

Generate/Evaluate Options

1. Lower rigid commitments
2. Review interests of parties
3. Help generate options
4. Help assess cost/benefits
5. Explore mutual gain options

Help Parties Agree

1. Manage resistance
2. Exchange offers
3. Seek out doables
4. Manage impasse
5. Narrow differences
6. Deal with outside parties
7. Opine (as appropriate)
8. Offer settlement formulae
9. Consider partial settlement

Resolve Dispute/Preserve Agreement

1. Announce terms of agreement
2. Gain acknowledgment/commitment to agreement
3. Acknowledge parties' contribution to agreement
4. Determine writing requirement
5. Assess procedural steps/details to formal agreement
6. Assess impact of mediation on parties' relationship
7. Raise any new relationship possibilities
8. Create commitment/enforcement mechanism
9. Disclose agreement externally (when appropriate)

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