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Is Your Mediation Confidential? Important Points on How to Participate in a Mediation

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Is Your Mediation Confidential? Important Points On How to Participate in a Mediation

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Introduction

- Mediation as an effective means of alternative dispute resolution – why is it popular
- Difference from Arbitration
- Program Objectives:
  - Issues of confidentiality in mediations
  - Critical preparation and tools
  - How to prepare your client for the process

Principal Benefits of Mediation

- Speed
- Less expensive than other forms of litigation
- Since it is seeking mutual agreement, there will be no decision, no winner, no loser
- Generally confidential and not precedential, although that is a major topic of this presentation
- However, New York GOL Section 5-336 provides that confidentiality may not be a part of settlement of sexual harassment claim unless complainant desires it and has had a 21-day period to consider and then has 7 more days to revoke the settlement

Drawbacks of Mediation

- Depending on timing, the process may take place with incomplete information about the merits/value of the claim (i.e., no discovery)
- The process may result in disclosure of sensitivities/weaknesses in the case and even concessions which may affect the ultimate outcome if mediation is not successful
- The objective is to achieve an agreement; hence there may be more and quicker compromises than take place in a full-scale litigation
- There is no decision on the merits; the outcome is purely one of negotiation and compromise

Issues of Confidentiality

- One of the principal tenets of mediation is that the process is confidential
- What that means is nothing can be used in the existing litigation, or eventual litigation, between the parties to the mediation
- Confidentiality enhances the process and gives the mediator more information with which to work the process
- It is also assumed to mean that the process, or any eventual agreement, cannot be discovered by other parties not involved in the mediation
- This last point is no longer so clear: see my article: “Is Your Mediation Confidential”, 266 NYLJ #97, November 18, 2021

How Does Mediation Happen?

- By agreement of the parties
- Provided for as a preliminary step in dispute resolution in deal documents or contract
- Agreed upon once dispute arises as an alternative means to resolve
- May be ordered by a court as a precursor to setting a trial date or in other circumstances
- Mediation may occur pre-litigation, or in the context of an existing litigation

Why Mediate Before/After Litigation

- Mediation may be required as a preliminary dispute resolution step under a contract
- Even if not contractually required, sophisticated potential litigants often find advantages in an early mediation: cost, time, distraction, preserving a relationship with the other party, among other considerations
- But there are downsides to an early mediation: limited information and no discovery, lack of comprehension of the significance of the dispute by one party or the other, lower expectations of the end result when no litigation has occurred

Why Mediate Before/After Litigation (Continued)

- Mediation in the middle of an ongoing litigation frequently is court ordered (or suggested by the Court)
- If significant discovery has occurred, the parties are in a better position to evaluate the strengths and weaknesses of their own case and of their adversary's case
- The parties often are "tired" of litigating, and not looking forward to the additional expense and time commitment of a trial
- The passage of time frequently dampens the emotional feelings about the dispute which fueled the litigation initially, often on both sides

Should You Mediate in the Middle of a Litigation or Arbitration

- This is a frequent question which arises: in the middle of the pending litigation, or just as an arbitration is about to begin hearings, can the parties make one last effort to settle with mediation?
- The major question here is who will conduct the mediation?
- Can the presiding judge mediate, or more typically a magistrate?
- Can the arbitration panel mediate?
- Pros and Cons about having the eventual decider of fact conduct the mediation
- My strong belief is that the mediator should be a different person than the prospective trier of fact

What Are the Steps in the Mediation Process?

- Gathering of information in advance of sessions – here written, often “ex parte” submissions to the mediator
- Preliminary meetings with counsel/representatives
- General joint session
- Separate caucus meetings
- Frequent back and forth private exchanges with the mediator
- Sometimes adjourned sessions
- Agreement in principal and signed documentation

The Importance of a Written Mediation Agreement

- It is strongly recommended that mediations only should occur with a carefully constructed written and signed mediation agreement
- The agreement lays out the procedures, dates and compensation arrangement for the mediation
- The agreement should contain broad and clearly worded confidentiality provisions – no use in any litigation between the parties, no access to third parties, no sharing by the mediator with the other party without consent, discarding of any documentation at the conclusion of the mediation, assurances that the mediator will not be called as a witness

The Importance of Information to the Mediator

- As a mediator, I find that the more information I have in hand about the dispute, the more effective I can be in helping the parties reach a settlement
- This includes a candid analysis of the strengths and weaknesses of each party and a full understanding of what efforts have gone before to achieve a settlement
- I need to develop trust in the parties and for them to have confidence in me; this comes about by making clear that I do not care about the outcome, who is right or who is wrong, but only what it will take to achieve agreement by both parties

The Issue of Confidentiality Revisited

- The differences between mediation in existing court proceedings and private mediations, not court ordered
  - Court Order, requiring confidentiality – a major benefit of mediation in the context of an ongoing litigation
  - Rule 408, Federal Rules of Evidence
  - State rules, vary by states, e.g., in New York, CPLR 4547
  - Uniform Mediation Act, adopted by 13 jurisdictions: Hawaii, Idaho, South Dakota, Vermont, Utah, Ohio, Washington, New Jersey, Iowa, Illinois, Nebraska, District of Columbia and Georgia
  - Discovery of information vs introduction into evidence

The Issue of Confidentiality Revisited (Continued)

- *Rocky Aspen Management 204 v. Hanford Holdings*, 394 F. Supp. 3d 461 (S.D.N.Y. 2019) (Magistrate Gabriel Gorenstein) – no protection against third parties if the mediation is other than court ordered
- *Accent Delight International v. Sotheby's* (S.D.N.Y. December 2020 (District Court Judge Jesse Furman) – protections apply equally to private mediations
- *In re Teligent*, 640 F.3d 53 (2d Cir. 2011) – a party seeking disclosure of mediation information concerning others must show: (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery; and (3) the need for the evidence outweighs the interest in maintaining confidentiality.

Practical Considerations for the Mediation

- Understanding the risks to mediation, how best to proceed with the process?
- Remember that the point of a mediation is to reach a resolution, so one must be willing to take some chances to secure a satisfactory outcome
- The nature of the dispute may impact concerns about confidentiality
- If the dispute is an isolated one, e.g., the interpretation of a specific contract, there should be less concern about subsequent discovery requests in unrelated matters

Practical Considerations for the Mediation (Continued)

- By contrast, if the dispute centers on a company policy or a situation likely to reoccur, e.g., a sexual or age discrimination case, one must consider the likelihood that unrelated parties in similar disputes in the future will seek to discover information from the mediation
- Tailor the amount of information shared with the mediator and the way in which it is presented
- Oral presentations, without documents, may be less effective but they minimize the risk of subsequent discovery
- Try to use existing documents to provide information rather than newly generated documents for the mediation

Practical Considerations for the Mediation (Continued) (2)

- Likewise, summary documents prepared as demonstratives should be carefully constructed so that the information is limited to the dispute at hand
- The use of expert testimony can be quite effective in a mediation, but this too must be balanced against the risk of future discovery
- As a general matter, historical information, especially in a summary format, may be quite attractive to discovery in subsequent unrelated cases
- Use your good judgment in deciding how much you tell the mediator can be shared with the opposing side
- The mediator should clear with you any information to be exchanged with your adversary

Mediator's Proposal

- In some mediations, the mediator concludes that it is best to present her/his proposal to both sides to settle the case
- This is called "a mediator's proposal"
- The mediator typically will base the proposal on an evaluation of different positions, the continuing areas of disagreement and the amount of separation between the parties
- The mediator's proposal is presented as "take it or leave it" and normally not for further negotiation; after all, if each side seeks to make modifications to the proposal, it is merely the resumption of negotiations and not an end to the dispute

Mediator’s Proposal (Continued)

- If the mediator’s proposal is not accepted by both sides, this may mean that the mediation is over
- Mediator may no longer have the confidence of the parties to continue because her/his proposal to settle has not been accepted by both sides
- Mediators often are reluctant to make a proposal because it may signal the end of the mediation process
- Mediator has to feel that no further productive discussion can continue without a proposal, and that agreement should be within reach

Mediator's Proposal (Continued) (2)

- In some disputes, a non-economic term may be the lynchpin for a settlement
- For example, a job reference or recommendation; an agreement to place a future order in a specified time period; some amount of free services
- In some disputes, these non-economic terms can bridge the gap and facilitate a resolution
- This is particularly true if there is an ongoing relationship between the parties and a desire to continue it

If The Parties Reach Agreement

- If the parties reach a verbal agreement during the mediation, it is important to reduce this to writing as quickly as possible
- Some mediators press to get a “memorandum” of understanding, subject to execution of a more definitive agreement
- Very good idea to have a signed piece of paper when you leave the mediation
- Clear understanding whether this is a document on which either party may sue, i.e., a binding agreement

Is the Settlement Agreement Confidential

- It is commonplace and generally important to provide a confidentiality provision against disclosure to third parties of the settlement agreement
- However, such agreements are not immune from discovery requests in third party or unrelated litigation
- The standards discussed in *In re Teligent*, supra, and its progeny, should be expected to apply to subsequent requests for discovery in unrelated disputes
- Recall here the three-prong test of *In re Teligent*

Is the Settlement Agreement Confidential (Continued)

- As before, uncertainty remains whether the heightened standard set out in *In re Teligent* will be applied to settlement agreements reached in a private (i.e., not court-based) mediation
- Here, it is a good idea to avoid recitals or admissions in the settlement agreement, or alternatively to make the recitals so specific to the dispute in question that they cannot be of value to others in unrelated matters

Is Mediation for Your Client

- An important process, but not for every client or every dispute
- Critical to make sure client has a clear understanding of what is involved and how the process will work
- With appropriate expectations, mediation can be a very successful and effective form of alternative dispute resolution
- Since the parties “own” the process, they “own” the result
- The risks of confidentiality should be recognized, but generally should not prevent the use of mediation as an effective dispute resolution tool

Questions

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