MEDIATION PRACTICE AND PROCEDURE: The Role of Legal Counsel

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By

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Introduction

Professional mediators and accredited alternative dispute resolution (ADR) practitioners often make the mistake of assuming that the word "mediation" is understandable by consumers of ADR. Yet it is not. Neither do a majority of prospective clients appreciate what mediation entails. What mediation is features as one of the most frequently asked questions that I am called to answer in and outside training events and public speaking engagements.

What is Mediation?

Mediation is assisted negotiation. It is a consensual process whereby parties in dispute appoint a third party neutral (who has no interest or stake in the subject matter of the dispute) to facilitate resolution of their dispute on mutually agreed terms. Mediation, which is also commonly referred to as conciliation, is a dynamic, structured, interactive process in which a neutral third party assists disputing parties in resolving a dispute through the use of specialized communication and negotiation techniques. The process is voluntary, confidential, and the mediator/conciliator does not render a decision, but helps the disputants to generate a mutually acceptable outcome.

Mediation and other ADR mechanisms guarantee party control of the process, informal and simplified procedures, expedition (quick to commence and conclude), cost-effectiveness, and quality outcomes (a mediation agreement generated by the collaborative effort of the parties). The process maximizes on quality procedures and quality outcomes that serve to restore, maintain and strengthen the family, business or other legal relationships often destroyed by unresolved disputes.

What Does the Process Entail?

Let us begin by appreciating that every legal relationship is characterized by rights and obligations. In an attempt to assert those rights or to enforce the corresponding obligations, the relationship stands the risk of conflicting needs and interests. In turn, the conflicting needs and interests might escalate to full-

blown disputes, which the parties may elect to take upon themselves to resolve by negotiation or seek the assistance of a third party neutral. Where negotiation fails, the next most appropriate step is to seek the assistance of a professional mediator, who has no interest or stake in the outcome of the process beyond its successful resolution.

More often than not, disputants seek the help of legal counsel for (a) legal advice; (b) representation; or (c) as a final resort, court litigation. Where the parties engage the services of legal counsel, the counsel play a critical role in the appointment of a mediator/conciliator. As we will shortly see, the participation of legal counsel in the process is limited to either (i) legal advice to their client during break-away sessions; or (ii) comment on the practical aspects of any point of agreement mutually generated by the parties – reality testing. In most cases, the disputants are unrepresented. Whatever the case, advocates play a critical role in the mediation process either as accredited mediators or legal counsel, who may sit in and stand by to safeguard the needs and interests of their client during the process without actively participating in the process.

How Mediation Works

When parties in dispute fail to reach a negotiated agreement, one or all of them might agree to submit to mediation. If so agreed, one of them (or all of them jointly) identify and appoint a mediator. Once appointed, the mediator commences the process by communicating with each party separately to establish (a) their identity, addresses and other personal details; (b) the nature of the dispute and the issues in contention; and (c) whether they voluntarily submit to the process of mediation. The mediator might, at this stage, require the parties to confirm their submission to mediation by signing and returning a draft Agreement to Mediate containing the mediator's terms of engagement. Alternatively, the mediator might reserve the Agreement to Mediate and terms of engagement to the introductory meeting convened immediately upon confirmation by the parties of appointment and submission to the process.

At the introductory stage of the mediation session, the mediator (a) conducts introductions, confirms the identity of the parties and, in the case of corporations or other institutions, confirms representation and their authority to negotiate and bind the principal; (b) explains the voluntary nature of mediation, the process of mediation and the role of each player in the process; (c) lays and explains the ground rules to which all must adhere; (d) seeks concurrence on the terms of engagement (including their fees – if not previously agreed upon); (e) requires the parties to sign the Mediation and confidentiality Agreements; and (f) invites brief representations to ascertain the nature of the dispute and the issues in contention.

To set the stage for mediation, the mediator must –

(i) get the sitting arrangement right;

(ii) have all accessories and refreshments placed appropriately;

(iii) ensure provision of adequate space and comfort; and

(iv) explain where conveniences are located.

Once the stage is set, the mediator is ready to commence the process by, and sets the ball rolling by -

(a) introducing himself/herself;

(b) highlighting his/her experience to build trust and confidence;

(c) requesting the parties or their representatives (as the case may be) to introduce themselves;

(d) if any of the parties is represented, ascertaining the scope of the agent's authority; and

(e) setting the ground rules.

In addition to the foregoing, the mediator's opening statement spells out what the parties must know:

(a) what mediation is and what it is not;

(b) the voluntary nature of mediation;

(c) your facilitative role as mediator;

(d) the process and purpose of private sessions (commonly referred to as caucassing);

(e) the principle of confidentiality and what that means;

(f) that the possible outcome is in their hands;

(g) what to do with the mediated agreement on all or any of the issues in contention;

(h) the need to sign the mediation and confidentiality agreements; and

(i) what is expected of each of them in the process.

Getting on with the Process

The first meeting might be convened in preparation for the substantive session. On the other hand, it might serve as the beginning of the substantive process. In a less complex dispute, the mediator might choose to facilitate resolution of the issues in contention in a systematic manner so as to help the parties to reach agreement on each issue towards a mutually generated outcome. Indeed, it is not difficult to resolve all issues in one sitting and reach a mediated settlement in a matter of hours. In practice, three to four hours are considered ideal for mediated settlement of a not-too-complex a dispute involving many parties, corporations, government agencies, and other institutions, whose subsequent approval might be required for settlement of disputes that touch on matters of policy or other high stakes, in which case subsequent sessions would be necessary.

While joint sessions are preferable, private sessions (commonly known as caucuses) with the mediator often become necessary. In private sessions, the mediator sits with one party at a time in privacy to hear their position, proposals and desired terms of settlement. The mediator undertakes not to disclose any information shared in confidence to the other party without the express authority of the disclosing party. The information disclosed in confidence serves to equip the mediator with insight on the respective positions and goals of the disputants, which in turn helps to generate proposals and settlement options designed to bridge the emerging gaps and eliminate barriers that impede settlement on mutually agreeable terms. In addition, the mediator uses private sessions to take a test of the corresponding proposals for settlement and give the parties the opportunity to weigh their best alternatives to negotiated agreement (BATNA).

At the ensuing joint sessions, the mediator uses knowledge of facts supplied in private sessions to steer negotiations towards mutually agreeable settlement options. This process might acquire a back-and-forth style of engagement with the prospects of settlement on every issue in contention. However, caution is exercised to ensure that every corresponding proposal traded by the parties is realistic and mutually beneficial. In the process, the mediator skillfully conducts the discussions in such a way as to eliminate any apparent imbalance of power or attempted dominance by any of the parties over the other. Accordingly, equality of arms becomes the mediator's primary task to guarantee. Only then would all parties feel appreciated as they engage in generating mutually acceptable outcomes.

Then comes the big leap to final settlement, and broad smiles light the room. A shaking of hands in light conversation gives the mediator a brief moment to sum up all the terms of settlement for confirmation by all parties. This done, the mediated settlement agreement is ready for reduction into a legally binding instrument and execution. And this is what happens eighty percent of the times a mediator conducts such ADR sessions.

The Role of Legal Counsel in Mediation

We need not say much about the role of legal counsel in mediation. More often than not, parties who are familiar with ADR, and mediation in particular, might choose to appoint a mediator and only seek legal advice separately either before or after reaching mediated settlement. Either way, lawyers play a significant role in the process. For instance, legal counsel might assist in (a) the appointment of a skilled mediator; (b) providing advice on legal issues in contention; (c) sit in and consult with their client from time to time during the mediation process; (d) in drafting the mediated settlement agreement. Moreover, most trained mediators are advocates, who cherish ADR practice in place of litigation.

It should be borne in mind, though, that mediation is not a trial in which counsel appear to lead evidence or make submissions on legal issues. If they accompany their clients to the mediation session, they do well to respectfully and silently let their clients take control of the process and generate what

they consider to be the terms of settlement that satisfy their mutual and corresponding needs and interests. More often than not, legal counsel's interests sharply contrast with those of their client. While an advocate might press on their client's legal rights and do whatever is within their means to secure success in their claim, their client might, on the other hand, be more interested in restoring and strengthening their relationship with their counterpart.

Conclusion

It is deeply satisfying to mediate in disputes between marriage mates, family members, bankers and clients, insurers and claimants, and see them walk out of the mediation room with big smiles on their face, having reached settlement in their own terms. Their tears of joy spur me on to tell people what mediation has in stock for all of us. The process is voluntary, informal, expeditious, cost-effective, party-controlled, and its mutually generated outcomes deeply satisfying. Indeed, mediation and ADR holds the future for dispute resolution around the globe.

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