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## ALTERNATIVE DISPUTE RESOLUTION

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### The Case for Mediation

Civil mediation is strong, flexible alternative to litigation

Mediation, in the context of commercial and business disputes, is perceived by many attorneys as a “weak” alternative to litigation. Many scoff at the court-ordered mediation letter and wonder why their clients should waste time and money in mediation, as I used to. After training and serving as a court-appointed mediator, I realized nothing could be further from the truth. Mediation is the alternative that empowers attorneys and clients to craft resolutions to disputes in ways not possible under the auspices of the court system in traditional litigation. It offers flexibility beyond the Court Rules and case law. It vitiates the uncertainty and risks involved when a judge or jury makes the final decision, and gives the client control over the end result. The key is creativity. A skilled mediator will help the parties focus on their interests, as opposed to their positions.

The New Jersey Uniform Mediation Act (NJUMA) defines mediation as “a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” N.J.S.A. 2A:23C-2. Unfortunately, there is a misperception that mediators simply suggest the parties “meet in the middle.” On the contrary, the role of the mediator is to help

the parties clarify and understand the issues, and distill the most relevant facts and legal arguments. The mediator will also help the parties focus on their business interests rather than the emotional aspects of the case. Most importantly, the mediator will assist the parties and the attorneys in developing creative options by which both sides will have their interests met to the greatest extent possible. This is a technique known as the facilitative method of dispute resolution.

In New Jersey, the main principle underlying mediation is self-determination. The parties must reach a voluntary agreement, which, they believe, best suits their needs. “Clients have the right to make the final decision as to whether, when, and how to settle their cases and as to economic and other positions to be taken with respect to issues in the case.” *Lerner v. Laufer*, 359 N.J. Super. 201 (App. Div. 2003), certif. denied, 177 N.J. 223 (2003) (citing, Pressler, *Current N.J. Court Rules*, Appendix XVIII (2003)).

In that regard, meditation offers far more flexibility than litigation. Unlike a litigated case, the negotiations and final resolution may extend beyond the parameters of what case law and traditional remedies would provide. An example might be an alleged breach of contract between a vendor and vendee who have

been doing business together for several years. Rather than focusing solely on monetary damages, the vendee may be willing to accept additional, even completely different, goods or services that would fulfill a current business need. Decisions rendered by judges and juries simply do not afford such flexibility and creativity. Litigation is adversarial by definition and necessarily creates a win/lose scenario. Mediation, on the other hand, lays the foundation for a win/win resolution because the parties play an integral role in the process and final outcome. Final agreements will be enforced by the courts in the same manner as any other judgment (if resolved after suit has been filed) or binding agreement between the parties (if resolved through private mediation without the filing of an action). Significantly, the need for post-settlement relief on a legal solution designed by the parties and accepted voluntarily is far less than the demand for post-judgment relief where the decision was rendered by a judge or jury and imposed upon the parties.

For any type of mediation to be successful, attorneys and clients must be well prepared. First, attorneys should be certain that they have obtained information sufficient to enable them to engage in meaningful negotiations. Second, attorneys must possess a strong understanding of the factual background, the applicable law, and the strengths and weaknesses of the case from the perspective of all the parties involved. Third, clients must be properly prepared. Clients must understand the strengths and weaknesses of the case; enter the mediation conference

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with a settlement goal; and have a clear understanding of what they reasonably expect to achieve if the matter does not settle and proceeds to trial. Finally, clients should know what to expect regarding the mediation process itself, and understand that the mediator will not decide the case or render any opinions as to its merits. These elements greatly enhance the chances of settlement.

Another advantage of mediation is confidentiality. Pursuant to R. 1:40-4(c), "no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding." The NJUMA also protects mediation confidentiality by giving the parties, mediators and nonparty witnesses the right to refuse to disclose, and prevent any other person from disclosing, a mediation communication. N.J.S.A. 2A:23C-4b.

In *State v. Williams*, 184 N.J. 432 (2005), a case involving aggravated assault, the mediator's privilege was challenged by the Sixth Amendment's right to be confronted with witnesses and have compulsory process to secure testimonial evidence. In balancing the interests at stake, the Court ruled in favor of the mediator's privilege and preserved mediation confidentiality. In so ruling, the Court stated, "[a]n integral part of the increasingly prevalent practice of alternative dispute resolution (ADR), mediation is designed to encourage parties to reach compromise and settlement." When the proceedings are kept confidential, the parties are free to be open and honest in their communications. Without such confidentiality, parties may hesitate to disclose the discussions, for fear of appearing to compro-

mise their position. Although counter-intuitive for trial attorneys, the open exchange of information is the cornerstone of successful mediation. Confidentiality fosters that goal.

Mediation makes sense. It saves the client a great deal of time, money and anxiety. This is particularly striking when one considers the fact, as most lawyers would agree, that nearly 95 percent of cases settle prior to trial. Often, settlement is reached on the eve of trial, after thousands of dollars have been spent in legal fees and costs. The clients' interests can often be better served by getting the parties and counsel together at the beginning of the dispute, rather than at the end. Since any resolution must be well-reasoned and based on competent evidence, mediation provides for limited document exchange in lieu of full-blown discovery.

Consistent with the perception that mediation is a "weak" alternative to litigation, is the reluctance by some counsel to be the first to suggest mediation. Whether real or perceived, some attorneys feel that by suggesting mediation they are sending a signal to the adversary that their case must be weak. However, it would be foolish for an attorney to assume he has the stronger case because opposing counsel has suggested a less costly and less hostile way to approach the problem. Indeed, it would be even more foolish for that attorney to allow his client to entertain such a notion.

Another caveat for the practitioner is to learn more about the court appointed mediator and, if necessary, take advantage of the 14-day window within which the parties may select another mediator. One should be wary

of mediators who profess to have experience in all practice areas, from personal injury to patents. The experiences and skills that a mediator brings to the table cannot be underestimated.

Of course, mediation is not a panacea. There are some cases, due to the facts or legal issues involved, which do not lend themselves to mediation. In some instances, it is an attorney's litigious attitude, or ambivalence toward mediation, that presents the obstacle. In others, it may be too difficult to get clients to acknowledge unrealistic expectations, at least initially. It is for the attorney to evaluate the specifics of a particular matter (unless mediation is court-ordered), to determine whether mediation is feasible. When mediation is court-ordered, participants should approach it with an open mind.

As a final point, there are two areas in particular where mediation may be most beneficial: in disputes between small businesses, which often lack the financial means to sustain protracted litigation; and in disputes involving ongoing relationships, such as family businesses, probate disputes, or parties who have done business together for many years.

Ideally, more members of the bar will come to realize that in many situations mediation is not the "weak" alternative; it is the one that empowers. After considering mediation as a viable alternative to litigation, small firms and solo practitioners, in particular, may find themselves less inclined to send a client to a larger firm or litigator once a dispute arises. ■