The Increasing Popularity and Utility of Mediation

By Zachary G. Newman and Yoon-jee Kim – February 13, 2012

Mediation provides adverse parties and their counsel a unique opportunity to discuss seriously the merits of an action and to engage actively in negotiation outside of the courtroom. Furthermore, mediation allows parties to discuss contested issues and damages with the aid, input, and oversight of a neutral facilitator. The process thus enables parties to resolve disputes in ways not available in traditional litigation or other alternative dispute resolution (ADR) methods.

In addition, courts have recognized the value in compelling adversaries and their counsel to convene and negotiate without the constraints of discovery, pretrial proceedings, or evidentiary rules, and often implement mandatory mediation. Doing so also enables courts to better manage their dockets.

Deciding When to Mediate

First, counsel should determine whether the jurisdiction has mandatory or voluntary dispute-resolution programs. For instance, certain jurisdictions, such as New Jersey, provide comprehensive dispute-resolution programs that "constitute an integral part of the judicial process, intended to enhance its quality and efficacy." N.J. Court Rules, 2013, R.1:40-1.

Some clients decide to mediate at the onset of a case to avoid substantial pretrial expense, particularly when the facts are less complex. Others, however, may be reluctant to mediate without first conducting some discovery of material facts to assess damages. The decision to mediate may also be impacted by the litigation process. For instance, a party is less likely to suggest or agree to mediation after a negative development in the case out of concern that the offer or agreement to mediate will be construed as a sign of weakness of the merits of the case.

A recent New York task force reported that

> [w]hile mediation can facilitate settlement at all stages of a litigation, both parties and the court system commonly can achieve even greater benefits to the extent that the parties are able to resolve their disputes before engaging in the protracted and expensive disclosure and motion practice that modern business litigation typically entail. Indeed, at times parties feel that they have little disincentive to continue to litigate if they already have incurred substantial legal costs.

See Report and Recommendations to the Chief Judge of the State of New York, June 2012.

On balance, mediation has proven effective at the beginning of cases, during discovery, and even after discovery has closed. The decision of when to mediate is largely contingent on the circumstances of the particular case and the parties' desire to have a frank discussion about settlement. Adversary counsel should keep an open dialogue about the possibilities of mediation so that they can gauge the appropriate time to broach the subject with their respective clients.

Tips to Ensure an Effective Mediation

Parties must carefully select an appropriate mediator for the dispute. Certain cases, for instance, may require mediators to have specialized knowledge of a discrete area of the law or of a specific industry. Counsel should review the proposed mediators' résumés, website, and reported decisions to ascertain whether the mediator has the relevant background and experience to resolve the dispute.

Furthermore, the parties should set clear ground rules for the mediation. They should also prepare a joint submission of background materials for the mediator. The parties should be careful, however, to avoid drowning the mediator in unnecessary details or stacks of motion papers. Rather, the parties should provide only documents necessary for the mediator to gain a working knowledge of the issues.

Each party will also have the opportunity to submit a mediation statement, which should be at an agreed-upon page limit, to provide the most salient points of the case and damages calculations. Parties may choose to submit the mediation statements confidentially, share them with each other, or provide both a public and private mediation statement. The private mediation statement can be used to highlight particular issues that counsel may only want to share with the mediator, such as a more detailed damages discussion.

Often, parties enter the mediation process fully prepared to try the case but wholly unprepared to mediate the dispute. This is because the skills required to litigate the case do not necessarily transfer to mediation. The ability to distill statements of fact and points of law to a concise, comprehensive presentation to the mediator and the other side is critical to mediation. Along the way, counsel should have a frank discussion with his or her client about the strengths and weaknesses of the case and to explore all alternatives to settlement.

No More Trials? Mandatory Mediation Programs and Neutral Evaluations

Congress laid the foundation for federal courts to require mediation when it passed the Judicial Improvement Act of 1990, which was aimed at remedying the delays experienced by civil litigants by "refer[ing] appropriate cases to alternative dispute resolution programs . . . including mediation. . . ." 28 U.S.C.S. §§ 473(b)(4), 473(a)(6)(B) (2012). Today, courts impose mandatory mediation to alleviate high caseloads in courts and decrease mounting litigation costs for parties.

This trend spread to the bankruptcy courts with the passage of the Alternative Dispute Resolution Act of 1998, which authorizes bankruptcy courts to use mediation to resolve adversary proceedings. 28 U.S.C.S. §§ 651–58 (2012). Even prior to the passage of the 1998 ADR Act, a number of bankruptcy courts successfully implemented mandatory mediation programs. *See generally* "A Bankruptcy Court's 'Preference' Towards Mandatory Mediation," 1 St. John's Bankr. Research Libr. No. 26, at 1 (2009).

A New York task force recently concluded that when a court requires parties to engage in mediation, business disputes can be resolved efficiently and cost-effectively. The task force reported that ADR is generally underutilized and proposed a mandatory mediation program for New York County's Commercial Division. *See* Report and Recommendations to the Chief Judge of the State of New York, June 2012. Many jurisdictions have begun pilot programs that permit parties to opt for mediation or to have the case evaluated by a neutral party. Some courts have also empowered the judiciary to compel the parties to mediate disputes by referring the case to the court's mediation program. These programs have a pre-approved list of private mediators, and usually permit the parties to choose another mediator provided it is consensual. The case typically is stayed pending the mediation.

Binding Mediation—An Emerging Trend?

While parties are generally familiar with binding arbitrations, binding mediations are less common. Yet, there is a developing trend toward compelling mediation to resolve disputes.

Some parties have started including provisions in their agreements that require mediation before litigation can be commenced. This agreement provides the parties with an immediate and certain dispute-resolution process that must be exhausted prior to commencing litigation. Failure to participate may result in the award of fees or other expenses. *See, e.g.*, *GA Buckingham, LLC v. SA-GA Operator Holdings, LLC*, 2012 N.Y. Misc. LEXIS 500 (N.Y. Sup. Ct. Nassau Co. Jan. 26, 2012) (the master lease included a provision that provided for the settlement of rent disputes by "a neutral firm of independent certified public accountants of national standing . . . , whose determination shall be final, binding and conclusive" to be enforceable).

Another form of compulsory mediation gaining attention is a binding mediation agreement. Under a binding mediation agreement, the parties submit to mediation and agree that if a settlement is not reached after an agreed number of mediation sessions or within a certain time, the mediator is authorized to render a binding decision. The parties agree upon additional protections, such as defining the scope of the authority referred to the mediator and setting parameters on damages such as high and low limitations in the event the mediator renders an unexpectedly high or low damage award. *See also* Phil Diamond, "Binding Mediation: A Way to End Disputes Quickly, Cheaply,"North Bay Business Journal, July 30, 2012.

A binding mediation provision was recently upheld in *Bowers v. Raymond J. Lucia Companies, Inc.* 206 Cal. App. 4th 724 (Cal. App. 4th Dist. 2012), *rev. denied* 2012 Cal. LEXIS 8305 (Cal., Aug. 29, 2012). The *Bowers* plaintiff, brought defamation and other business tort claims. The defendant filed an arbitration proceeding against the plaintiffs asserting similar claims. During the arbitration proceeding, the parties agreed to settle their arbitration dispute and to submit the state-court claims to "mediation

with a binding arbitration component." *Id*. at 729. The parties further agreed that if the dispute was unresolved after a day of mediation with a mutually acceptable mediator, the mediation would convert to an arbitration with a potential damage range between $100,000 and $5 million, and the mediator was given the ability to award damages after the parties presented their case. *Id*. The parties then codified their settlement agreement in writing, which provided:

> The Parties shall then proceed to a mediation/binding baseball arbitration with a mutually agreed-upon neutral within sixty days of the execution of this agreement. To wit, the Parties shall participate in a full day mediation. If, at the end of that mediation, the Parties have failed to reach an agreement, the mediator shall be empowered to set the amount of the judgment in favor of Plaintiffs against Raymond J. Lucia Companies, Inc. at some amount between $100,000 and $5,000,000, such binding mediator judgment to then be entered as a legally enforceable judgment in San Diego Superior Court without objection of any Party.

Id. at 729–30. Mediation was unsuccessful and, after receiving the plaintiff's final demand for $5 million and the defendant's final offer of $100,000, the mediator awarded the plaintiff $5 million in damages. The appellate court explained that the trial court properly found that the parties mutually consented to a binding mediation process set forth in a written settlement agreement, and the defendants never requested a full panel arbitration after the mediation. *Id*. at 734–35.

The appellate court also rejected the argument that the term "binding mediation" was ambiguous, finding that the defendant expressed its voluntary submission to the agreed-upon process. Lastly, the appellate court found a voluntary jury waiver, noting that "it has always been understood without question that parties could eschew jury trial either by settling the underlying controversy, or by agreeing to a method of resolving that controversy, such as arbitration, which does not invoke a judicial forum." *Bowers* at 737 (quoting *Madden v. Kaiser Foundation Hospitals*, 17 Cal.3d 699, 713 (1976)).

The agreement to submit the dispute to binding mediation must be clearly set forth, and there can be no ambiguity in the enacting provisions. *See Lindsay v. Lewandowski*, 139 Cal. App. 4th 1618 (2006) (the document the parties signed was inconsistent where in one version the term "mediation" had been crossed out and the term "arbitration" typed above it). Yet, courts have looked at parties' intent in finding binding mediation agreements enforceable. For example, in *Cummings v. Consumer Budget Counseling, Inc*., the court found that "[b]y agreeing to 'abide by the decision of the mediator' . . . the parties manifested an intent to submit any disputes arising thereunder to 'a specified third party for binding resolution.'" 2012 U.S. Dist. LEXIS 135711 (E.D.N.Y. Sept. 19, 2012). The court thus stayed the litigation pending the mediator's final decision. *See also Display Techs., LLC v. Display Indus., LLC*, 2011 U.S. Dist. LEXIS 143624 (S.D.N.Y. Dec. 5, 2011) (directing parties to mediation pursuant to their licensing agreement providing for binding mediation to determine certain disputes).

Some critics compellingly warn that binding mediation is "no mediation at all" when a mediator is to be called upon to make a binding final decision if the parties cannot reach an agreement. *See* Alan G. Saler, "Binding Mediation Is No Mediation At All," Advocate (Journal of Consumer Attorney Association for Southern California) (Jan. 2007). In that situation, the mediator is acting as an arbitrator and not a mediator. The concern is that the mediator will not be able to fully perform his or her role as a neutral party because he or she may be called upon to act as an arbitrator if the mediation does not result in a mutually agreed-upon settlement. The mediator may be hesitant to raise points or play devil's advocate for fear of appearing non-neutral, or may even be swayed given the apparent financial benefit to him or her if the case does not settle during mediation. The mediator also may be unable to "unlearn" information that was revealed through the mediation process that would be inappropriate for arbitration. Another legitimate criticism is that there are fewer (or no) procedural safeguards to parties in a binding mediation. For example, because there is no formal hearing with sworn testimony, there is no opportunity for cross-examination of parties and witnesses. *See* Phil Diamond, Binding Mediation: "A Way to End Disputes Quickly, Cheaply,"North Bay Business Journal, July 30, 2012.

Conversely, knowing that the mediator will be able to make the ultimate decision if the parties are unable to come to a compromise on their own may prompt parties to work harder to compromise. In addition, the parties may consider the mediator's opinions on the issues more seriously given that he or she will play arbitrator and decide the issues if the parties are unable to come to a resolution. Having a mutually agreed-upon mediator the parties trust to be impartial and dedicated to finding a fair resolution may also be important to parties.

Conclusion

Ultimately, corporate clients and their counsel have many alternative dispute resolution methods at their disposal. Mediation provides an extremely flexible process that does not require a prohibitive investment, and an open format to permit the parties to actively engage and participate. Whether a mediation is an informal gathering before the local town attorney or the result of a binding mediation clause, counsel should be fully prepared to take advantage of all the benefits the mediation process has to offer.

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