MEDIATION IN THE U.S. LEGAL SYSTEM

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1. INTRODUCTION

The use of mediation as an example of modernization in the United States' legal system is ironic in two respects. First, the words "mediation" and "modernization" hardly seem to belong in the same sentence; mediation is one of the oldest forms of peaceful dispute resolution. Second, the United States has been a late-comer to recognize the benefits of mediation; other cultures have used mediation to resolve disputes for centuries.

Having finally realized the benefits of mediation as a dispute resolution mechanism, the United States has made mediation a critical part of its efforts to solve its serious court congestion and backlog. In most jurisdictions in the United States, mediation is offered as one of several alternatives to the traditional legal process. Indeed, in many jurisdictions, mediation has become the most popular method of alternative dispute resolution.

2. WHAT IS MEDIATION?

Mediation is a procedure designed to resolve disputes through agreement, i.e., through the mutual consent of the parties. Although the procedure is frequently confused with arbitration, it is fundamentally different. In an arbitration, the neutral reaches a decision based upon evidence presented by the parties; in a mediation, the neutral facilitates discussion between the parties with the objective of reaching an agreement between the parties. Mediation relies upon the consent of the parties; arbitration does not.

A successful mediation is thus dependent upon two inter-related factors: the willingness of the parties to resolve their dispute; and the skill of the mediator in guiding the parties to the point where agreement is possible. One of the most skilled mediators in California—and a frequent participant in ISDLS programs—has said that there exists a point in every dispute where the parties can reach agreement; it is the duty of the mediator to help the parties find that point. The existence of parties acting in good faith to resolve their differences, however, will significantly assist even the best mediators in achieving their objectives. The combination of a talented mediator and motivated parties will generally result in resolution of even the most difficult disputes.

3. WHAT ARE THE BENEFITS OF MEDIATION?

The benefits of mediation are so obvious, it is surprising that it took a clogged judicial system for the United States to embrace the concept only when the courts began to be overburdened with civil cases. Mediation as an alternative dispute resolution mechanism is:

A. Fast.

As the amount of time necessary for the parties and the mediator to prepare for the mediation is significantly less than that needed for trial or arbitration, mediation can occur relatively early in the dispute. Moreover, once mediation begins, the mediator can concentrate on those issues he or she perceives as important to bring the parties to agreement; time consuming evidence-taking can be avoided, thereby making the best use of the parties' time and resources. Even if all of the evidence gathering has already occurred, it almost invariably takes less time to mediate a dispute than to try it in a court.

B. Flexible.

There exists no set formula for mediation. Different mediators employ different styles. Procedures can be modified to meet the needs of a particular case. Mediation can occur late in the process—even during trial—or before any formal legal proceeding begins. The mediation process can be limited to certain issues, or expanded as the mediator or the parties begin to recognize during the course of the mediation problems they had not anticipated.

C. Cost Efficient.

Because mediation generally requires less preparation, is less formal than trial or arbitration, and can occur at an early stage of the dispute, it is almost always less expensive than other forms of dispute resolution. If the mediation does not appear to be headed in a successful direction, it can be terminated to avoid unnecessary costs; the parties maintain control over the proceedings.

D. Brings parties together.

In the United States, parties often form opinions about their dispute that over time become intractable. The other side becomes the "enemy"; winning becomes a matter of principle. The only side a party can see—even if counseled otherwise by their attorney—is their own. Sitting down in a neutral setting with the opposing side can bring a better understanding of the problems with one's own case, particularly if guided by a skilled mediator. Listening to the opponent's case—and having it evaluated by a neutral—can give pause to even the most ardent believers in their own cause.

E. Convenient.

The time, location, and duration of the proceedings can be controlled to a significant extent by the parties. Scheduling is not subject to the convenience of overworked and sometimes bureaucratic courts.

F. Creative.

Resolutions that are not possible through arbitration or judicial determination may be achieved. For example, two parties locked in a dispute that will be resolved by an arbitrator or a judge may be limited to recovery of money or narrow injunctive relief. A good mediator makes the parties recognize solutions that would not be apparent—and not available—during the traditional dispute resolution process. Two companies may find it more advantageous to work out a continuing business relationship rather than force one firm simply to pay another money damages. The limit on creative solutions is set only by the variety of disputes a mediator may encounter.

G. Confidential.

What is said during a mediation can be kept confidential. Parties wishing to avoid the glare of publicity can use mediation to keep their disputes low-key and private. Statements can be made to the mediator that cannot be used for any purpose other than to assist the mediator in working out a resolution to the dispute. Confidentiality encourages candor, and candor is more likely to result in resolution.

4. WHAT MAKES A GOOD MEDIATOR?

Because mediation differs from arbitration, a good arbitrator will not always make a good mediator. Obviously the two forms of dispute resolution have some overlap, and there certainly exist individuals who are both excellent arbitrators and mediators. However, the ability to render a decision is not the same skill as that required to bring parties together to reach agreement. The following are some of the qualifications that make a good mediator:

A. Trust.

This is the most important characteristic. If the parties do not respect the mediator, the chances of success are small. Mediation often involves private discussions between a party and the mediator. If the party does not trust the mediator to keep confidences disclosed at such a session, there will exist little chance of success. Similarly, if the parties cannot trust the mediator to evaluate their positions impartially, the mediation is doomed.

B. Patience.

Parties frequently come to the mediation with set positions that take a long time to modify. A mediator must have the patience to work with the parties to bring them to the point where agreement is possible.

C. Knowledge.

The chances of success are greater if the mediator has some knowledge or expertise in the area of dispute. Because mediation does not result in a decision by the neutral, knowledge of the subject matter is not as crucial in mediation as it is in arbitration. However, the parties in a complicated dispute over software, for example, will have more confidence in a mediator who knows something about software technology than they would in a mediator who knew nothing about the subject. Furthermore, such expertise will enable the mediator to better assist the parties in identifying nontraditional solutions to their dispute.

D. Intelligence.

A mediator must be resourceful and attentive to understand not only the nature of the dispute, but also the motivations of the parties. Through an understanding of what is important to each of the parties, the mediator can bring them into agreement much more quickly. The requirements are thus not only an ability to understand the subject matter, but an ability to understand people and their motivations as well.

E. Impartiality.

This characteristic is closely related to trust. A mediator must be impartial. Some mediators will express their opinions about the position of a party, or will use their powers of persuasion in order to bring the parties to agreement. Other mediators will not analyze or evaluate the merits of a dispute, but will cause the parties to realize on their own where the settlement potential lies. In either case, the parties must be satisfied that the mediator is neutral. In the former situation, if the mediator is not viewed as neutral, any opinions will carry no weight; in the latter situation, the parties will refuse to follow a biased leader.

F. Good communication skills.

An arbitrator needs only to listen to the evidence and render a decision based upon knowledge of the law and good judgment. Although these talents are extremely valuable ones, an arbitrator need not have the ability to communicate with the parties. A mediator needs good judgment and good communication skills; it is the mediator's job to evaluate and understand the motivations of the parties, foresee potential solutions, and then bring the parties to an agreement. Without good communication skills, this task is impossible.

5. TYPES OF MEDIATION

A. Statutory.

There are some types of cases that are required by law to go through the mediation process. Labor disputes and domestic (family law) disputes are two prime examples. In the United States, however, this type of mandatory mediation is rare.

B. Court ordered.

Most jurisdictions in the United States require some form of alternative dispute resolution before a case may be resolved through the traditional judicial process. The Northern District of California (San Francisco, California)—long an innovator in the ADR process—is an excellent example of how mediation has become a key component of an effective dispute resolution program.

As soon as a case is filed in the Northern District, the parties are provided a number of ADR options. They must, unless exempted by the Court, select and pursue one of these options. Included as an option is mediation. The Court maintains a list of mediators—skilled and experienced attorneys selected by the Court—who are available to the parties. For parties who elect this option, the Court will appoint a mediator and designate a date by which the mediation must be completed. The results of the mediation are confidential—the Court will not know what occurred at the mediation, unless of course, an agreement (or partial agreement) is reached. If an agreement is reached, that agreement is enforceable as a judgment of the Court.

C. Contractual.

The parties to a contract, as part of the terms of their agreement, may include a mediation clause as a mechanism to resolve disputes. Although binding arbitration is a much more common contractual term since it will always result in a resolution, mediation can be an effective tool to resolve contractual disputes before they blossom into a protracted battle. The selection of the mediator, as well as the conditions of the mediation, are usually stated in the contract. If the mediation is successful, the results can be enforced as a judgment of a court.

D. Voluntary.

The parties to a dispute may decide to seek mediation without being compelled by law, court order, or contract. They may choose to mediate their dispute at any time: as the dispute is developing, before initiating legal action, or even while legal action is pending. The conditions of the mediation—e.g., who will be the mediator, when the mediation will occur, the rules of the mediation—are controlled by the parties.

6. CONCLUSION

Mediation is a valuable dispute resolution tool because the means of reaching an agreement can be as varied as the disputes that need to be resolved. Mediation procedures can be tailored to a variety of factors: the personality of the mediator; the nature of the dispute; the time or resources available; and the antagonism between the parties. The procedure can thus minimize contentiousness, cost, and resources. If it is unsuccessful, the parties can always resort to the courts or other means of dispute resolution. In short, mediation is a valuable weapon against delay, cost, and injustice.