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In Recession, Mediation Provides Valuable Options to Disputants

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During recession, disputing parties face additional challenges in the costs of litigation and the real danger that the "winner" may not be able to collect actual monetary damages. Inevitable future conflicts will arise from the desperate deals entered into in lean times. The integrative solutions that are available to disputing parties and litigants through an effectively delivered mediation process often provide the most affordable and sensible outcomes to conflict in tough economic times.

It is the responsibility of neutrals serving as mediators, the representatives of disputing parties, and the bench (when serving as the referring party), to ensure that intelligent and competent examination of the opportunities provided through mediation are fully realized at this time when creative solutions are especially needed. This article reviews how the current practice of mediation can improve, and proposes that correct focus on the processes behind mediation blend effectively with disputing parties' mutual need for cost effective and balanced dispute resolution.

Recession Realities

As Pennsylvania's individual and corporate citizens battle recession and transition to the inevitable recovery, mediation provides valuable opportunities for creative and meaningful resolution of disputes and conflicts arising from challenging economic circumstances. These opportunities should be as attractive to champions of mediation as they are to disputing parties and their counsel. But this shared goal will only be fully realized if the bar, bench and neutrals serving as mediators critically examine their respective roles in dispute resolution, and more importantly, their responsibility to the parties in dispute. There is considerable room for improvement in the services provided to clients through measured, meaningful and thoughtful application of mediation processes. In a downturn, the simplest legal remedy for harm — an award of monetary damages — may not result in a satisfactory outcome for all parties. Judgment may effectively be uncollectible; and in a recession, disputing parties may find their opponent is a business partner or supplier whose economic survival is an important factor in the disputant's own success.

Flexible, Creative Solutions

During a recession, people and organizations struggle to fulfill even basic responsibilities. Financial limitations and other realities have greatly affected the ability of parties to sustain expensive litigation. It is in such downturns — when priorities are overturned and redefined by external forces — that we must look to alternative, and better, solutions to disputes. Mediation can and should provide an opportunity for alternative remedies: outcomes that go beyond the limited win or lose options that litigation mandates.

Mediation is ideally suited to bring a broader, more complex and effective range of potential remedies into play, and when properly conducted, allows the parties themselves to develop and own the resolution of their dispute. Correct application of the mediation process in tough times can only result in better understanding and acceptance of mediation at all times. For example, through mediation, a payment dispute between a cash-strapped component supplier and manufacturer can be resolved through an agreement to continue supplying components for a specified time or volume, at a reduced or increased price, according to the circumstances. Such flexible outcomes avoid the need for either party to find new sources or customers and sidestep issues of uncertain liability trial outcomes and judgment collection.

Part of the Problem?

What may be labeled and evaluated as "mediation" often is not. Properly conducted mediation brings a rich, yet flexible array of tools and remedies to dispute resolution greater than what is available to parties in court or arbitration when constrained by traditional litigation-driven tort, contract and family law remedies. These include the example of the component supplier and manufacturer above. But it also includes an intangible benefit that comes from application of the mediation process beyond a mechanical application of tools and "tricks of the trade." That benefit is the moment when the mediator becomes a witness to the parties' own process of developing resolution of their dispute. It is that time when the successful mediator, if he or she dares, could almost leave the room, without upsetting the momentum toward settlement.

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Of particular concern are currently popular "ad hoc" mediations, where counsel for parties — or, frequently, judges — nominate a highly regarded attorney to mediate the parties' dispute with no consideration as to whether he or she has any training in the mediation process or has a track record of appropriately applying the process to disputes. So where is the harm in a case settling without resorting to all the process recognition preached by the champions of mediation? In truth, there is no harm when mediation is appropriately a straightforward transaction in the overall process of resolving a case; the "easy" negotiation, as opposed to a "complex" case. There are times that parties themselves acknowledge that they simply want to review their likely resolution with a neutral.

It's Hard to Say I'm Sorry

Apologies, considered case suicide in litigation, can work wonders in mediation. Even in straightforward personal injury cases, carriers are recognizing that affording plaintiffs the opportunity to be heard to their satisfaction results in lower, quicker and fair settlements. When the defendants are able to acknowledge and accept responsibility for even a portion of their role in the dispute, the outcome is likely to be even more improved. There are many examples where being understood on both sides of the table leads to settlements in a form totally unexpected at the commencement of mediation.

Imposed Settlements

Often in the current practice of mediation, the time or wherewithal to engage in abstract reviews of party interests just is not there. And it is not just in ad hoc practice where this occurs; sometimes commercial third-party services and some court supported programs measure successful mediation by settlements "on the day." Even for mediators who claim to know better, the temptation to shortcut the process in response to counsel or party expectations is hard to resist. When uninformed neutral pressures or lack of training lead to imposed settlements, the parties gain no appreciation for the underlying value of dispute resolution, they view mediation as no different from the daunting and confusing court process they sought to avoid.

The Challenge and Opportunity

For mediators, the challenge to communicate the opportunity provided in mediation while addressing the perceived shortcomings arising through inadequate mediation practices lies in those more complex cases frequently involving dismal economic forecasts and realities. For these cases, the application of effective process beyond simply applying "party tricks" of decision tree analysis and means testing (very effective tools when used within process, but not process in and of themselves) is vital. Opportunities for effective dispute resolution and further acceptance of mediation are missed when a neutral who is not fully and effectively prepared in the application of the broad spectrum of mediation tools runs into parties, representatives or issues that create barriers to settlement.

Parties to a dispute and their lawyers can contribute to a more positive outcome by inquiring into a mediator's training, background and credentials. Every trained mediator maintains a list of completed training and general information on cases mediated that does not disclose confidentiality. By contrast, a mediator who keeps a won/lost record of "his" mediations is telling a lot about his attitude toward the process and the parties. Mediators should consider the importance and value of thoroughly explaining to the parties and their counsel, the mediator's approach to the process, what they can expect, and invite and answer any questions. The more we do as mediators to describe the value of successful, real mediation, the more useful and accepted the process will become.

Preventative Measure

It is not necessary to wait for a dispute to arise before looking to mediation. The process is particularly effective when applied to issues before they become full-blown disputes. The desperate business decisions referred to earlier (such as low bids, underestimated proposals and promises of impossible delivery timetables) that are too good to be true, or to pass up, are going to haunt us in the not too-distant future.

Mediation is an effective alternative that can and should be adopted now, by contract, before the consequences of rash bids and acceptances come home to roost. Creative solutions — including commitment to ongoing mediation of issues as they arise — can provide valuable opportunities for businesses that are open to the advantages of integrative solutions. Through the commitment to

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contractually agreed mediation, an owner and contractor four months into a one-year project can revise terms and schedules to finish a project on time and within an agreeable budget. The value is great compared with the alternative outcomes of threatened or actual default, costly rebids or litigation.

The Take-Aways

Mediation — the exploration and facilitation of dispute resolution options — must be facilitated, but not determined, by a neutral third party. This correct approach has sometimes suffered because mediators succumb to the lure of the easy fix. To an experienced mediator, a broad, unformed situation is a blank canvas, providing unlimited opportunity not only to create rapport and trust with and among the parties, but to develop creative solutions that address all the issues at the table. Parties observe that often mediations seem to take hours to get started. In truth, it does take a considerable investment of time and reexamination of positions and interests before entrenched parties — often supported and sometimes restrained by counsel — see and appreciate the interests expressed on the other side of the table. This acceptance can be a necessary prerequisite to commencing meaningful discussions with the mutual goal of resolving a dispute. The promising outcomes for mediation have not yet been fully realized, but through respect for the value and practice of effective mediation, neutrals and the parties they serve will realize great benefits from and aid in the advancement of mediation, especially in recession.