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VOLUME IV - MEDIATION – IS IT GOOD OR BAD FOR YOU? DISADVANTAGES

In Volumes I and II we discussed some of the advantages and disadvantages of arbitration. In Volume III we discussed some of the advantages of Mediation. In this Volume IV we will discuss some of the Disadvantages of Mediation.

WITH ALL THE ADVANTAGES WHY WOULDN'T I ALWAYS WANT TO MEDIATE? ARE THERE ANY DISADVANTAGES?

As with all dispute resolution processes there is simply no perfect system, only tools. Some tools are good for certain situations and other tools are good for other situations. Below are some of the perceived potential disadvantages of Mediation:

- **Lack of Definitive Result**: The parties can attend Mediation and come away without a settlement. When this occurs it is common for the parties to conclude that the Mediation accomplished nothing. After all, the desired final resolution was not achieved. It is normal for the parties engaged in the Mediation to consider it a failure if it does not result in an immediate settlement. It is understandable that the parties are disappointed and with the opinion that all they accomplished was a waste of time and money! Even when a settlement is not reached, seldom is Mediation a total waste of time. Often during this process important information is obtained concerning your opponents resolve and demeanor. In most circumstances, something is gained that can be used in future settlement discussions. Whether or not the gain justifies the cost is another question and can only be answered when the dispute is finally settled either through future negotiations or through arbitration or litigation.
- **Polarization**. If the relationships are particularly cantankerous going into the Mediation, and remain so during the Mediation, the lack of perceived reasonableness can serve to further separate the parties. This is rare but it does occur on occasion. In those circumstances, where one party attends with no intent whatsoever to settle, Mediation can serve to increase costs, enhance the hostilities all with little corresponding benefit. For example I once attended a Mediation where the Mediator exhibited a passive style. Unfortunately opposing counsel was boorish and continually interrupted the Mediator and threatened my client. At that stage, I advised opposing counsel that he was out of order and that we were all here for the purpose of conducting fruitful settlement discussions. His exhibition of poor manners and unprofessional attempts at instilling fear in my client would not be tolerated! At this stage the Mediators passive style just didn't work, some loud words were spoken in a rapid fashion and I am not sure anybody was listening to the other side. The Mediation adjourned with the parties accomplishing absolutely nothing and left more convinced than ever that an amicable settlement would not be reached.
- **Subject Matter and Process Sophistication:** I am about to opine in an area of great controversy in which reasonably astute intelligent individuals will differ greatly as to their opinions. Those that have been well trained in the art of "process" −that is how to mediate− generally deem themselves worthy of solving any problem. If they are worth their salt they should feel that way! At the other end of the scale are those that are highly sophisticated in the "subject matter" −that is expertise in the area of the law/industry in question− and they feel that in order for the Mediator to really add value to the Mediation he or she must be knowledgeable in the subject matter of the dispute. It is my belief that if you have

a good Judge or Arbitrator that you can receive a fair hearing and ruling. Obviously, the more learned the Judge or Arbitrator in the matter at hand, the more likely the ruling will be in accordance with the law and will require less work by all of the parties. Judges are very intelligent individuals with significant legal acumen. When a matter is set for litigation the Judge may not have the slightest experience in the matter at issue. Some Judges like to think of themselves as being capable of hearing any matter (sort of mini - Solomon's). The fact that the Judge may not have any knowledge or experience in health care, real estate, corporations or the issue at hand does not prohibit him/her from presiding over such matters. For the most part Arbitrators are selected primarily for their subject matter experience and acumen in a given area. Even if the Arbitrators experience is only peripherally related, it is helpful (e.g. significant real estate development experience but little leasing experience, he or she could still Mediate over lease dispute and add some subject matter value to the discussions). Another school of thought and the school that I belong to, insists that the more complex the issue at hand the more subject matter sophistication is necessary for the Mediator to add value to the process. All of us that have sat through numerous Mediations have met with the frustration of a Mediator well trained in the process trying to facilitate a case with a subject matter that they know darn little about. Their general solution is "splitting the baby," "opining on something they don't know," or worst yet resorting to "you know if this goes to trial it will cost you X." Pontifications as to the obvious are of little value. For example, I was once part of a Court annexed Mediation concerning a complex hazardous waste issue. This Mediation was held in San Francisco and the parties had to fly into town in order to attend. To say that this Mediator added little value to the settlement process would have been an upgrade from reality. At the table were the two clients, four sophisticated counsel that had been working on this case for the better part of four years prior to this Mediation. After the Mediator's introductions and setting of the grounds rules for the process, the assigned Mediator commenced to provide a lecture on hazardous waste 101. After a short period of time it was clear that our layman clients knew more about hazardous waste law than this Mediator. Within minutes the Mediator lost all credibility and the parties were forced to spend the majority of the day educating the Mediator on our respective positions, the law and the issues that we could not bridge. This Mediator was well trained in the process but despite this sophistication, this matter did not settle and it should have! Instead of focusing on the issue of settlement we were forced to focus on our respective positions under the law and the facts of the matter at hand. By the time we had fully educated the Mediator the parties had little energy or desire to enter into settlement discussions. The time that should have been spent seeking solutions was spent educating the Mediator. It is my opinion that the more complex the issue, the more extensive experience in the exact field is required for the Mediator to be effective. Second example, I was once part of a Mediation where the Mediator knew nothing about real estate and the issue involved a rather complex leasing issue. This Mediator was well trained in the process but admittedly had no clue about leases. After a short period of time the Mediator sat silently, became an observer and the parties were able to negotiate a settlement. This Mediator proudly walked out and exclaimed to me in a boastful fashion that he had settled another one! After I controlled my urge to regurgitate, I realized that this would go down in his record as a Mediation resulting in settlement where he did nothing but stay out of the way. What settled this matter was the **Mediation process** of getting the parties together. In this instance the Mediator clearly did nothing to settle the case; the Mediation process and negotiation did (i.e., all parties agreed that this Mediator added no value). At the same time, I fully recognize that this Mediator received credit for a successful Mediation. Perhaps this Mediator deserves the credit since he knew to stay out of the way! Most sophisticated parties have a very good idea what the matter is going to cost them to take it to Court, they don't desire to split the baby, they do not desire a 101 lecture and the dislike being advised that their case is weak. A Mediator directly experienced in the subject matter is particularly essential when the parties are far apart and the issues complex from a subject matter perspective! A knowledgeable well respected Mediator brings to the table significant credibility to his or her suggestions and recommendations. The further apart the parties the more complex the issues, the more subject matter knowledge and skill necessary to assist in bridging the gap. The more specialized the field the more important that the acumen and the experience of the Mediator match the dispute at hand! The validity of the **old reality check** is predicated upon the party's belief that the Mediator knows his/her stuff! As demonstrated above, on occasion the parties only need to get together to reach a settlement, an informed and learned Mediator, who is as sophisticated as the legal counsel representing the parties, can serve as a strong facilitator to the parties. The only downside of using a Mediator well versed in the subject matter at hand is that he/she may try and guide the settlement to what it should be and not where the parties may be heading. The same qualities that make this individual one of the best in his/her field may foster a desire to see a technically correct resolution.

- **No Award**: It is a well-perceived fact that juries provide some very unusual awards. It is a perception amongst most litigators that as a general rule,

arbitrators do not award unjust punitive damages. Mediators simply do not issue awards, the parties do! This can be a significant drawback if one or more of the parties enter the Mediation with less than honorable intentions. In other words, all the parties must enter into the Mediation with the good faith intent to settle if a settlement is to be achieved. If not the Mediation has little hope for success. Additionally, if you are a plaintiff and the true value of your case lies in the extraction of punitive damages then Mediation is probably not the correct vehicle for your matter. Large sums of punitive damages are seldom voluntarily agreed to.

- **Lack of Force**: The Mediator cannot force you to settle. If the parties are not serious about settlement the entire process can be viewed as a total waste of time and money by your client. As stated earlier, Mediations are seldom without some fruit. This is the first and best chance to evaluate your opponent and to test his/her resolve to see this through to arbitration or litigation. If nothing else you will have a very good idea whether there is a settlement to be had or not.
- **Time**: One of the chief advantages of Mediation is the reduction of cost and the ability to rapidly move on, especially with ongoing relationships. Although a big advantage, this could also be a disadvantage. If the matter is complex and highly dependant on the ascertaining of numerous facts from many sources the Mediation could occur before either party feels that it knows enough to conduct fair and knowledgeable settlement discussion. Any Mediation held before its time is destined to doom.
- **Lack of Preparation or Authority:** Nothing will get the blood of a Judge or Mediator boiling faster than parties attending Mediation unprepared and without the requisite authority to settle! When does this happen? Unfortunately all too often! On many occasions the subject matter of Mediation is covered by some sort of insurance and as such no settlement can be entered into without the consent of the insurance carrier. When the settlement funds are emanating from an insurance carrier it is essential that the carrier is present. Most insurance policies do not require the carrier to be present at Mediations, but as a general rule a representative will attend. Notwithstanding that the Courts and the alternative dispute resolution associations diligently insist upon the attendance by people familiar with the case and with the requisite authority to settle, sometimes insurance companies simply ignore or are oblivious to this requirement. Insurance companies often have numerous levels of authority and often the candidate chosen to attend has "limited authority." For example let's assume that we have a personal injury matter before us and the assigned adjuster has authority to settle this matter up to $25,000. Pre-mediation this adjuster is clearly of the opinion that this is a less than a $25,000 matter and his/her supervisor has granted limited authority of $25,000. Fast forward and the parties to the Mediation all agree that $40,000 is a reasonable settlement. Surprise, surprise, the adjuster that has attended the Mediation does not have the authority to settle the matter at $40,000, notwithstanding that the policy has a $100,000 limit! I have seen some Judges, Arbitrators and Mediators become ugly, real fast! One word of advice, as counsel for the plaintiff you should always make inquiry and insist upon attendance of a party that has the authority to settle within the policy limits! Although attendance by someone who lacks the authority to settle is irritating, attendance by an individual who knows nothing about the case is just unprofessional. I once attended a Mediation where the adjuster was totally unfamiliar with the facts of the case, rude, insulting and without any inclination to settle. This individual was totally belligerent to my client, the Mediator and me. The first Mediator was passive and just shook his head and advised the defendant that it appeared that he would have his day in Court. Much to my surprise this same matter was again set for Mediation by the Judge. This time the same adjuster appeared, same attitude, same lack of preparation, however we were graced by a different Mediator. The second Mediator was not by any description passive and immediately took the adjuster aside. I can only imagine what was discussed. One thing I do know, we took a half hour break and when we returned the adjuster was no longer in attendance but his supervisor was. The matter settled in less than 5 minutes (and it should have)! On those occasions when the carrier does not attend or the carrier attends with the lack of authority to settle, you will have two options: (a) have the adjuster obtain the authority necessary over the phone; or (b) proceed on the old "subject to" scenario; that is yes we agree subject to our carrier agreeing to pay "X". I call the latter the "subject to" or "vetoable" Mediation. This type of process places the carrier in a very strong negotiating position and often they will take advantage by countering very close to what was agreed to at the Mediation. For instance if $40,000 was agreed to, it is not uncommon for the Carrier to offer $38,000 knowing that the plaintiff is now in the settlement mode and really does not desire to expend additional time for the possibility of few additional dollars. When this happens −luckily this is rare− the Carriers have managed to take advantage of the negotiation process by having their opponents committed before they are. This type of scenario will produce a very strong pressure on the plaintiff's to modify their settlement. Another example can be gleaned from the old corporate limited authority. In this particular example a senior officer of a corporation was accused of some unsound conduct towards an employee. The officer of this corporation had his/her life totally disrupted by these allegations and strongly

desired to settle the matter so he/she could get back to concentrating on business. The general counsel of the corporation refused to attend the Mediation while at the same time reserved all rights and powers over offers tendered at the Mediation. After a long day of Mediation a number was agreed to by the parties in attendance. It was a fair settlement considering all involved and the cost of continued defense of this matter. When the general counsel was finally reached he or she decided to second guess the entire process and rudely countered - offered without any knowledge of the discussions and with no basis whatsoever to this unilateral determination. In the general counsel's opinion this matter was meritless and should go full term. This greatly frustrated all the parties present as we had all worked very hard at finding a solution that was acceptable from all reasonable perspectives. The plaintiff's quickly became frustrated and outraged by this conduct and threatened to terminate the Mediation. After spending sometime in damage control with plaintiff's counsel and conducting a mini - mediation with the general counsel on the phone − almost a new Mediation in itself− we were finally able to convince the general counsel as to the righteousness of our suggested settlement. He or she begrudging consented to our proposed settlement. When we approached plaintiff's counsel he jokingly said: "Did we get our mommy's permission?" He made his point clear but the matter was settled.

CONCLUSION

Mediation or any ADR procedure is not a panacea for the resolution of disputes. Properly crafted and conducted Mediation can reduce cost and lead to a more rapid settlement of most disputes. In order for Mediation to be of any use, it should not be entered into lightly. In certain circumstances, Mediation may not be conducive to you or your business objectives.