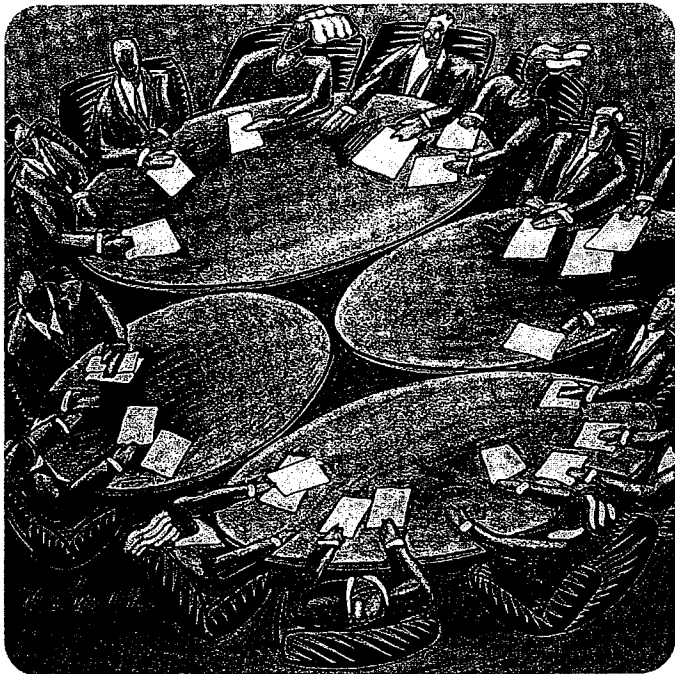


Mediation as an Opportunity Process

BY HOWARD D. VENZIE JR.



Commercial mediation has reached such a level of acceptance that in some industries it is fast becoming an integral part of the corporate risk management program. Indicative of this development is the recent incorporation of a mediation clause in the standard form American Institute of Architects contract for construction between owners and contractors.

One explanation for this acceptance is mediation's excellent track record in producing a cost-effective, prompt and final resolution of disputes, which if left unresolved, would become an uncertain and expensive drain on business resources. Other reasons often cited by business leaders for adopting mediation as a business practice include the fact that the process is voluntary and non-binding and that it creates a more conciliatory and less contentious environment for conducting settlement discussions.

Yet there is another reason why the business community is embracing mediation as the preferred method of dispute resolution—that is due to the “opportunities” it creates for business to transform a negative circumstance into a positive outcome. These opportunities should be of considerable interest to counsel who see the advantage of providing services the client associates with positive results.

What are some of these opportunities?

1. THE OPPORTUNITY TO IMPROVE THE OUTCOME

Through mediation, the parties have the opportunity to participate directly in the negotiation process and control the resolution of their dispute. The agreement to mediate both creates a forum and adopts a method that puts the parties at the center of the dynamics of the dispute resolution process. The mediator, who serves as a neutral facilitator, creates a conciliatory environment in which the principals can

communicate with each other directly, or indirectly through the mediator. It is the principals who participate in the ebb and flow of the negotiation process in mediation. This is not characteristic of negotiations outside of mediation, where the attorneys take over. Frequently, settlement attempts outside of mediation lack credibility because they are dominated by adversarial dialogue.

2. THE OPPORTUNITY TO REALISTICALLY EVALUATE THE CASE

Mediation affords an opportunity for parties to control the outcome of the dispute resolution process through the decisions they make and the manner in which they conduct themselves during the process. Once they embark on a course of litigation or arbitration, they relinquish this control and substantially diminish their ability to affect the outcome.

2. REALISTICALLY EVALUATING A CASE (CONTINUED)

For mediation to be effective, the parties to the dispute must realistically evaluate with their counsel both the strengths and weaknesses of the entitlement issues and the ultimate monetary value or "worth" of the case. The structure of the mediation process encourages these types of assessments. How does this happen?

For one thing, the principals, with the mediator's assistance, have the opportunity, in joint sessions and in private caucuses, to look at both sides of the dispute, to listen to opposing points of view, and to assess the consequences of an impasse and the failure to achieve a settlement.

In addition, a skilled mediator, whether or not of the evaluative school, makes every effort to focus the parties' attention on the "jugal" issues that will determine the outcome of the dispute. This helps

to establish realistic expectations (a "reality check") for settlement and realistic parameters for the dollar ranges of negotiation.

Another factor pushing the parties to evaluate the issues is the fact that technical information can be developed and exchanged using outside technical expertise, if appropriate. With such expert assistance, the parties can better achieve a resolution of the technical issues that often drive a dispute, thereby opening the way for a monetary settlement.

The mediator also facilitates case evaluation by (i) peering behind party positions and exploring such issues as the direct and indirect costs of commencing or continuing litigation or arbitration; (ii) performing a risk/reward analysis; and (iii) offering an assessment of the probable outcome on entitlement and monetary issues.

3. THE OPPORTUNITY TO CRAFT A CREATIVE SOLUTION

Mediation is a flexible process, one that is unhampered by structure, protocol or ritual. As a result, the parties are not constrained by rules limiting their remedies; they have the opportunity to fashion creative, practical, businesslike solutions that provide for mutual gain. Some examples include (i) the sale of products or goods at discounted prices; (ii) the furnishing of services at discounted cost; (iii) payment in goods or services; (iv) rent abate-

ment or lease extensions; (v) joint/cooperative efforts in marketing or other marketplace activities of mutual interest, such as joint ventures; (vi) flexible payment and repayment terms involving payouts, loans and secured transactions; and (vii) new or extended business opportunities in the form of more work or contracts, access to markets, or opportunity to compete for a party's business.

4. THE OPPORTUNITY TO RESTORE OR IMPROVE A BUSINESS RELATIONSHIP

Unlike litigation, which tends to destroy business relationships, mediation is perceived to be a "constructive" and "remedial" process, one providing an opportunity to restore or even improve a business relationship that has become impaired because of unresolved claims or disputes. Many mediated settlements are driven to closure because of large concerns over the need to restore

a business relationship the parties have a mutual interest in preserving.

Because of the conciliatory nature of mediation and the skills of the mediator as a facilitator, the parties are often able to "save face," "bury the hatchet," and acknowledge a willingness to put the matter behind them, and then move forward in matters of mutual interest.

5. THE OPPORTUNITY TO OBTAIN CERTAINTY AND FINALITY

The business community has always been uncomfortable with uncertainty and adverse to indefinite and open-ended circumstances in which the quantification of risks is obscure. Mediation provides commercial parties with an opportunity to get off the "runaway" litigation train and bring finality to uncertain circumstances. Many mediated settlements are reached because of a need for a party to eliminate the potential for downstream problems, which may adversely affect larger, more important business interests. The mediation process gives a party a chance to maneuver the dispute toward a final settlement, while, at the same time, negotiating for something of value that is acceptable as a secondary benefit.

Mediation is "business-friendly" because, as a constructive process, it creates opportunities for achieving positive outcomes from business disputes. Although executives in some business sectors are still unfamiliar with the process and its benefits, it is only a matter of time before these sectors obtain a whiff of the business opportunities mediation offers to transform a liability into an asset. ■

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