

Mediate or Fight it out in Court?

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Mediation – What is it?

Mediation is simply an informal meeting between two parties with a neutral third party – called a Mediator – whereby the Mediator listens to both sides and attempts to help the parties reach a settlement. It is a non-binding and confidential process. The Mediator does not decide the case, but instead offers insight to both sides of the dispute as to the risks and costs involved with litigation and helps find common ground between the sides so that settlement is possible.

Why mediation?

The vast majority of cases settle — from 80 to 92 percent by some estimates (<http://www.nytimes.com/2008/08/08/business/o8law.html?hp>) – so why pay for a Mediator?

First off, both sides split the cost of the mediator. The mediation usually takes place in one sitting and forces both sides to negotiate at that time – as opposed to both sides trading offers of settlement over the course of months or waiting for a year or two for a trial date. Often times, a successful mediation can take place before a lawsuit is even filed, thereby saving thousands of dollars in attorney fees for discovery, depositions, and trial preparation. Although the parties still incur the cost of the mediation itself, it is usually quite small compared to the cost of the full life of a lawsuit.

Secondly, anyone can participate in the mediation process. This is true whether the parties are represented by counsel or not. Even parties who have an attorney can benefit from the neutral Mediator’s viewpoint and experience.

Finally, often-times a Court will require the parties to participate in mediation before allowing a case to proceed to a jury trial. If a dispute is going to be mediated anyway, it sometimes makes economic sense to mediate the case earlier, rather than later in the litigation process.

Which Mediator should I select?

Most Mediators are practicing attorneys, some of whom have other practices as well. Still others make their entire living from the mediation process. Regardless of which Mediator you select, the most important aspect of any successful Mediator is a person that has the ability to be neutral and has the kind of experience to see both sides of the issue presented in the dispute.

For instance, in a personal injury case, a good Mediator should have a solid understanding of how an insurance company makes decisions in evaluating cases, but also understand how a jury will likely view a particular injured party and the likely jury awards in such a case. A good Mediator should also be able to empathize with both parties so as to understand what is driving the settlement negotiations from both sides.

The Mediator should have enough life and legal experience to realistically and credibly help both sides consider the risks and costs of taking a case to trial. The Mediator should also be able to help manage the expectations of both sides of a dispute.

I'm ready to mediate. Now what?

As with any dispute, communication is the key. If the fight has not yet reached the level of a lawsuit, you can contact the other side and see if they are willing to attempt to resolve your differences through the use of a Mediator.

Location of a local mediator can be accomplished through local referral services, the internet, or even the yellow pages. However, it is important to find a Mediator with expertise or knowledge of the area of law involved in your dispute.

Once both sides have agreed to the mediation process and a Mediator, the Mediator usually will take over the process from that point by sending out correspondence to schedule the mediation session. (Some Mediators have scheduling calendars on their website that speeds that process considerably.)

When both sides arrive for the mediation session itself, the key to success is open minds, open communication, and a willingness to negotiate in good faith. Most Mediators will take whatever time is necessary to either settle the case or determine that settlement is not possible. Regardless of whether the case settles, both parties will leave the mediation with knowledge that they did not have before. Often in cases where a settlement is not reached at the mediation, this additional knowledge allows the parties to reach a settlement on their own later.

By this definition, there is no such thing as an unsuccessful mediation.