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THE LAWYER'S ROLE BEFORE AND DURING MEDIATION

Prepared for:

Presenter:

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MEDIATION

1. What is Mediation?

a. Mediation is a structured dispute resolution process where the parties meet with a trained neutral (the mediator) to isolate contested issues, to develop options, and to consider settlement alternatives in an effort to reach a consensual agreement that will accommodate the needs and interests of all parties. It has been called a process of "turbocharged negotiations" and "an alternative form of communication within the traditional justice system."

b. Mediation can be effectively used both before and after suit is initiated. It can be used in conjunction with on-going litigation to resolve certain issues (e.g. discovery, damages only, etc.).

2. How Does Mediation Differ from Litigation and/or Arbitration?

Mediation differs from litigation or arbitration in the following ways:

a. The parties are directly involved in the dispute resolution process. No resolution can be reached without their consent.

b. The mediator, unlike a judge or arbitrator, is without authority to make substantive decisions or to impose an outcome on the parties. Rather, final resolution authority is retained by the disputants and the outcome is more likely to "stick."

c. The focus in mediation is not on "rights" or "power" but rather on exploring and developing options which often are not available to either side through other traditional dispute resolution processes.

d. There is a recognition that the optimal solution or outcome may not turn upon or even be defined by how the legal issues might be resolved.

3. In What Situations Can Mediation Be Used?

Mediation, even should it not result in an overall resolution, can effectively be used to:

a. Put a complex dispute in a manageable framework.

b. Provide a safe harbor for emotionally-charged discussions.

c. Get an evaluation of part or all of a case from a neutral whose judgment you respect.

d. Expedite discovery and further information exchange.

e. Decide when and whether to share specific information.

f. Encourage direct communications which allow each side to speak and to listen directly to each other in a structured and controlled environment.

g. To explore, via a mediator, the other side's motives and interests and to ascertain whether there is a common basis for an early and mutually acceptable resolution.

h. Have the mediator act as an agent of reality with a difficult party, representative or principal. The mediator can explore the consequences of impasse.

4. <u>Considerations in Advising on Whether to Use Mediation</u>

a. The existence of any of the following factors would suggest the use of mediation.

1. When the courts cannot or will not provide the relief the parties are seeking or would "ideally" like.

2. When the parties want the matter resolved confidentially.

3. When voluntary compliance with the final disposition is particularly desirable.

4. When the parties have or may want to establish a continuing relationship.

5. When resolution requires complex trade-offs.

6. When the parties or their representatives are too angry to communicate effectively.

7. When, for whatever reason, the parties have difficulty initiating negotiations.

8. When one side wants to avoid the establishment of judicial precedent.

9. When it helps to have a neutral with a demeanor or expertise that is not available in the public court system.

b. The existence of any of the following factors suggests that mediation is not advisable or is premature.

1. When one side seeks to establish legal precedent or wants the publicity from a trial.

2. When the time is not right to settle.

3. When formal discovery is needed to provide the parties with necessary information. However, as noted above, sometimes the mediator can secure or help the parties voluntarily secure necessary information.

4. When one party stands to gain by a strategy of delay.

5. When necessary parties are missing or have not been joined and whose participation is necessary to resolve the controversy.

6. Refusal by one party to participate in any mediation sessions or to bargain in good faith.

7. When the parties are business competitors in highly concentrated markets (e.g., price fixing, anti-trust).

8. When the other party is likely to institute bankruptcy proceedings and a judgment may be needed to secure a security interest that will give your client a higher priority in a bankruptcy proceeding.

5. Anatomy of a "Typical" Mediation

There are at least five (5) different stages to a "typical" mediation. They are:

a. The Preliminaries
b. The Initial Joint Meeting
c. Individual Private Caucuses and Shuttle Diplomacy
d. Final Bargaining
e. Resolution or Impasse

a. The Preliminaries to a "joint" meeting

(1) Recognition by the different sides of the existence of a conflict or dispute.

(2) The parties confer with their representatives and attorneys.

(3) Resolution options are explored.

(4) A mutual commitment to mediate is secured.

(5) The parties select a mediator.

(6) The mediator confirms with the parties their desire to mediate.

b. At the Initial Joint Meeting:

(1) The parties meet with the mediator at an agreed-upon date and location.

(2) The parties sign a Mediation and Confidentiality Agreement (if not previously done).

(3) The mediator confirms the agreed-upon mediation “ground rules” and/or uses the opportunity to secure from the parties an agreement concerning procedures and time limits which will be used during the mediation process.

(4) Each side presents an opening statement designed both to educate the mediator about the nature of the dispute and to communicate directly their understanding of the conflict and the relief they seek from the other side. Each side is given an opportunity to respond. The parties agree upon the scope of the issues to be resolved.

(5) The parties with assistance from the mediator explore whether additional “discovery” is needed.

(6) The parties also explore whether additional participants or parties are needed to effectuate an acceptable final resolution.

(7) Depending upon the procedures adopted, the mediator may request a further clarification of a particular point. The thrust of the initial joint meeting is to develop a common understanding concerning the nature of the dispute, develop an operational agenda and determine the sequence for handling each of the issues identified.

(8) The initial joint meeting is usually completed in less than two hours, depending upon the nature of the dispute and the degree of sophistication and experience of the parties.

c. Separate Caucuses Between the Mediator and the Parties/”Shuttle” Diplomacy

(1) The mediator meets privately with each side. During these private caucuses the mediator and the individual parties exchange information, review facts, explore settlement options and assess progress. Each side should be encouraged to trust the mediator with proposals, concessions and/or "facts" which may be unknown to the other side. These private communications are considered and treated by all participants as confidential and will not be disclosed to the other side or anyone else unless specifically agreed to by the communicating party. The mediator may, however, encourage their communication if he/she believes it will foster settlement. The length and number of such meetings depends in part upon both the nature of the dispute and the parties to the dispute.

(2) The private caucus is a time for creative exploration of acceptable settlement options, as well as for obtaining reality testing in regard to a party's position.

(3) Once the mediator begins private caucus sessions he or she will shuttle back and forth between the parties exchanging additional information authorized to be communicated by one side to the other and explore settlement options. There may not be any more joint sessions save for a final meeting to confirm and finalize the agreed settlement.

(4) The mediator's goal is to reduce the gap between what is being requested by one side and what is acceptable to the other and to create an environment that produces cooperative, rather than competitive, bargaining.

(5) If there is a lack of progress the mediator should explore what is inhibiting the flow of ideas.

(6) The mediator can use the private caucus to float new ideas without putting one side or the other in the awkward position of rejecting a proposal in front of the other side.

(7) An experienced mediator will usually withhold suggesting potential solutions until the parties have had ample opportunities to explore their own ideas. Mediation works best when the parties themselves come up with the ultimate solution. The mediator, however, can become the architect of a proposal that either side is reluctant to make itself.

d. Final Bargaining - Resolution or Impasse.

(1) If and when the parties begin to narrow some of their differences, the mediator should encourage them to reach a final agreement (which should be reduced to writing and reviewed by counsel).

(2) Should the mediator or the parties determine that they have reached an impasse, the process will end.

(3) Frequently, however, even if no final agreement can be reached, the parties may have gained a better understanding of the other side, settled part of the dispute, become able to stipulate to certain facts, agreed to take certain steps to maintain the status quo or move the process ahead, and/or created the basis for resolving the dispute at a later time.

6. Some Practical Suggestions to Promote Mediation Success

a. If the other side is reluctant and your client has a general counsel, consider having the general counsel call his/her counterpart to explore whether the other side will participate in mediation. Mediation works best when it is voluntary.

b. Select a trusted mediator in whom you and your client have confidence.

c. Make sure each side's mediation representative has adequate settlement authority. The best representative is someone who is knowledgeable about the dispute but who had no direct involvement in the underlying controversy and who is therefore neither judging the actions of his or her superior nor defensive about his or her own conduct.

d. Have the mediator structure and conduct the private caucus meetings in a way to minimize "down time" for you and your client.

e. During the joint session try to use value-neutral terms when explaining either the controversy or your client's interest. Listen carefully to what the other side says and doesn't say when explaining its position and interests.

f. Use the mediator to float ideas to the other side and encourage the mediator to be a "reality" agent when dealing with the other side.

g. Try to put yourself and your client in the other side's shoes. Look at the controversy from their perspective.

h. In evaluating possible resolutions, compare both your best and worst alternatives to the negotiated alternative, known in ADR parlance as "BATNA" and "WATNA".

7. What Are Some of the Advantages of Mediation?

When compared to either pubic litigation or private arbitration there are several advantages to a mediated outcome. They include, but are not limited to:

a. It is voluntary. The parties need not agree to any resolution unless and until their needs are met, with all evaluation decisions resting with the parties and counsel.

b. The process seems to open up channels of communication that may have become clogged by the formalism of litigation.

c. The parties are in control. They control the process, choice of the neutral, timing, and outcome. This eliminates the possibility of an unpredictable or unacceptable jury award or a judicial demeanor that is difficult to explain to your client.

d. The process is private and confidential. Mediation offers the parties an opportunity to resolve their differences without publicity or public notoriety.

e. The focus is usually prospective, rather than stressing the past and the conflict. Less emphasis is placed upon culpability, duties or rights. Settlement discussions usually focus upon future conduct and remedies, producing a more reasoned, less emotion-laden process.

f. The process is informal, flexible and more user friendly, often resulting in efficiency and economy.

g. Parties are more likely to comply with the terms of their settlement agreement than with the decision of an outside third party.

h. The neutral can be an expert at settlement facilitation or the subject matter of the dispute, or both.

i. For the above reasons, there is usually greater satisfaction with the end results.

j. Mediation works well in resolving multi-party disputes.

DISPUTES GET RESOLVED IN ONE OF THREE WAYS:

- **Asserting Power**
- **Exercising Rights**
- **Negotiating Interests**

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g. **When the parties are business competitors in highly concentrated markets (e.g., price fixing, anti-trust).**

h. **When the other party is likely to institute bankruptcy proceedings and a judgment may be needed to secure a security interest that will give your client a higher priority in a bankruptcy proceeding.**

i. **When the effective decision maker cannot or will not attend the mediation.**

Raising the Possibility of Mediation

(Getting the Other Side to Participate)

1. **How and when should the subject be brought up?**

2. **Is suggesting mediation a sign of strength or weakness?**

3. **Who should suggest the mediation process?**

    a. **advocate**

    b. **general counsel**

    c. **principal**

    d. **judge**

Selecting a Mediator

The success of a mediation is frequently a function of the mediator's skill.

1. **The selection process is a cooperative endeavor**
2. **Mediator shopping is okay**
3. **What kind of mediator?**
    a. **facilitative or evaluative**
    b. **process or substantive expertise?**
4. **Exchange a list of possible mediators**
5. **Sometimes it makes sense to agree to your adversary's choice**
6. **Interview with mediator**
    a. **mediation training**
    b. **mediation experience**
    c. **absence of conflict**
    d. **fee structure**
    e. **require pre-mediation submission?**
    f. **references**
    g. **adequate time**
    h. **adequate facilities**

Preparing to Mediate

1. **Is the controversy the kind which would benefit from a consensual resolution process?**

    a. **Need to undertake a risk/benefit analysis of pros and cons:**

        1. **Factors which favor mediation**
        2. **Factors which do not favor mediation**

2. **Is there a right time to engage in mediation? If so, when is it?**

    a. **Mediation could occur at any time, both before and after a complaint is filed.**

    b. **Reasons for early mediation:**

        1. **Frequently parties are more flexible with respect to resolution early in the dispute. Positions harden over time. Re-evaluation becomes more difficult.**

        2. **Parties have a need for closure.**
        3. **The litigation process creates distrust.**
        4. **Cost savings**
        5. **Time savings**

The Lawyer's Role

1. **Assess the problem**

2. **Investigate facts**

3. **Research law**

4. **Advise client**

5. **Select a dispute resolution process**

6. **In mediation, the attorney serves the client by being:**

    a. **advisor**
    b. **protector**
    c. **advocate**
    d. **negotiator**
    e. **problem solver**

7. **Requisite skills**

    a. **diplomatic communicator**
    b. **excellent listener**
    c. **firm and fair negotiator**
    d. **creative problem solver**

Client Preparation

The client's role during an effective mediation is different than in litigation. Clients must be prepared. The role of preparing clients rests with the lawyer. There may be a difference between plaintiff and defendant clients in first raising the possibility of mediation.

1. **Explain the mediation process**
    a. **how mediation differs from litigation or arbitration**
    b. **mediation does not preclude other avenues of resolution**
    c. **anatomy of a mediation**
2. **Selection and role of the mediator**
3. **Explain counsel's role during mediation**
4. **Explain client's role during mediation**
5. **Discuss and agree upon goals**
6. **Identify potential barriers to a consensual resolution**

7. **Review proposed mediation agreement**

8. **Review pro-mediation submissions**

9. **Emphasize client participation in both joint and caucus meetings**

10. **Evaluate your strengths and weaknesses**

11. **Evaluate adversary's strengths and weaknesses**

12. **Identify potentially sensitive issues and agree on ways to deal with them**

13. **Who should participate?**

    a. **who should be in attendance from your side**

    b. **who should be in attendance from other side**

14. **Information Exchange**

    a. **what information will be exchanged?**

    b. **what information should not be exchanged?**

15. **Communicating with the mediator**

    a. **answering mediator's questions**

    b. **non-verbal communications**

    c. **communications during joint meetings**

    d. **communications during private caucuses**

16. **Stress the importance of listening, patience, creativity and open-mindedness**

17. **Scope of settlement authority**

18. **Negotiation strategy**

19. **What to do in the event of impasse?**

20. **Brainstorm creative solutions**

The Mediation Agreement

1. **Written Agreement**
2. **Negotiated Terms**
    a. **nature of the agreement**
    b. **appointment and authority of mediator**
    c. **fees and expenses (division of cost)**
    d. **who will participate**
    e. **rules and procedures**
    f. **privacy**
    g. **confidentiality**
    h. **exchange of information**
    i. **communications with court**
    j. **termination of mediation**
3. **Agreement executed by the parties**

Pre-Mediation Submissions

1. **Will there be any?**

2. **If so, written or oral?**

3. **If written, will they be exchanged between the parties or will it be a confidential communication to mediator?**

4. **Form**

    a. **chronology of events**

    b. **history of negotiations**

    c. **copy of relevant pleadings or administrative charge**

    d. **citation of relevant case authority**

    e. **key discovery information from fact and expert witnesses**

    f. **theory of liability**

    g. **calculation of damages**

Opening Statement

Unique opportunity to speak directly to the other side's decision maker.

1. **Normally, the opening statement is made by counsel. Consider the pros and cons of having the client make the presentation.**

2. **Introduce self and clients; be personable (similar to jury voir dire).**

3. **Thank the other side for participating.**

4. **Express a positive view of mediation process**

5. **Emphasize that you and your clients are prepared to both listen and to act in order to resolve the problem, and you hope there is an equal commitment from the other side.**

6. **Identify the problem, use objective and diplomatic language.**

7. **Consider acknowledging the uncertainty of a litigated outcome and the mutual benefits that would be derived from a negotiated resolution.**

8. **Explain the basis of your client's position, and when possible, identify those issues where there is a good faith dispute, either factually or legally.**

9. **Make a commitment to use this opportunity to honestly try to find a negotiated and consensual resolution.**

Caucus Conduct

1. **Communications are confidential unless agreed.**
2. **Explore ideas and share information.**
3. **Most likely, there will be multiple caucuses.**
4. **During the first caucus the mediator will likely:**
    a. **get to know the parties**
    b. **establish acceptance and trust**
    c. **assess negotiator's style and personality**
    d. **identify contested or sensitive issues**
    e. **identify barriers to resolution**
    f. **encourage a free expression of emotions**
5. **During the first caucus the Party will likely:**
    a. **test the mediator for bias**
    b. **attempt to influence his/her thoughts**
    c. **advocate for its preferred outcome**
    d. **seek additional information**

6. **During the second caucus, the Mediator will try to have the parties:**
    a. **identify the strengths of their case**
    b. **identify the weaknesses of their case**
    c. **identify their needs and interests**
    d. **examine and understand the other side's positions' interest and needs**
    e. **understand different negotiations styles**
    f. **identify obstacles to resolution**

7. **During the third and subsequent caucuses the Mediator will probably:**
    a. **assist the parties in exploring and brain storming potential settlement options.**
    b. **deliver messages and proposals.**
    c. **encourage the parties to continue to negotiate in good faith.**
    d. **overcome settlement obstacles.**
    e. **look for creative currency.**
    f. **encourage the exchange of additional info.**
    g. **explore both BANTAs and WANTAs**
    h. **assess whether to continue the process.**

BIOGRAPHY
ANDREW S. PRICE

Andrew S. Price, Esquire is the founder of Andrew S. Price Associates - *Alternative Dispute Resolution Services*. It offers custom designed, private and confidential dispute resolution services in the form of mediation, facilitation, arbitration, fact finding, minitrials, med-arb and neutral evaluation to manage or resolve a broad range of disputes. Mr. Price is a trained mediator and an impartial arbitrator skilled in assisting disputants in the selection and use of appropriate ADR procedures.

Mr. Price has received advanced mediation and dispute resolution training at Harvard Law School, PennACCORD, the American Arbitration Association and the National Academy of Conciliators. He is a founding member of the National Coalition for Dispute Resolution and a member of the AAA panel of labor and commercial arbitrators.

Mr. Price graduated from the University of Michigan Law School in 1969. Prior to becoming a full time dispute resolution neutral, he was the founding partner of the Philadelphia law firm of Bazelon, Less & Price. He was also a partner in the Philadelphia law firm of Obermayer, Rebrnann, Maxwell and Hippel. Before entering private practice, he was a trial attorney with the National Labor Relations Board in Detroit, Michigan and an attorney with the law reform unit at Community Legal Services, Inc. in Philadelphia, PA. He is a member of the Pennsylvania, Michigan and Illinois Bars.

He has taught courses at Temple Law School and has lectured at the University of Pennsylvania, Swarthmore College and St. Joseph's University. Mr. Price also speaks regularly at various continuing legal education courses, including the the Pennsylvania Bar Institute, the Philadelphia Bar Education Center, Institute of Business Law, and Council on Education in Management.

Mr. Price has represented, advised and served clients throughout the United States. The primary focus of his advocacy practice was in the areas of labor management and employer-employee relations, healthcare, commercial litigation, construction/real estate, securities and commodities law. He has represented hospitals, colleges, universities, school boards, large and small businesses, their owners and management, as well as other private individuals in many other substantive business and related areas of the law.

He has mediated employment, commercial, environmental, construction, securities, commodities, partnership, insurance coverage, real estate and public policy funding and educational disputes. He has also served as an impartial arbitrator and has rendered in excess of fifty written opinions.