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CORPORATE COUNSEL

# 6 Questions to Ask About Your Company's Mediation Process

The use of alternative dispute resolution (ADR) by U.S. companies—now encompassing all industries and every type of commercial dispute—has evolved in scope and application over the past 30 years.

Notably, as corporate counsel have sought to gain greater control over associated costs, scheduling, duration, relationships, confidentiality and settlement outcomes, mediation has become an integral early step in the corporate dispute resolution process, intended to resolve cases in advance of litigation without significant legal risk, expense or publicity.

Conversely, adoption of domestic business-to-business arbitration appears to have lost momentum during the same time period, according to the most recent survey of Fortune 1000 corporate counsel, administered by the Cornell University Survey Research Institute. This drop-off in arbitration in most types of disputes is related to several factors, notably its similarities to litigation, in terms of its lack of flexibility and the difficulties involved in appeal.

But the relative informality and flexibility of mediation, which is a big part of its appeal, may also encourage a more casual approach to using it. Many third-party neutrals have noted a decline in the time, attention and discipline that companies devote to the process. There is often an opportunity loss associated with casual management of any corporate process, and mediation is no exception.

If your company relies on mediation as part of its conflict resolution strategy, there are several quantitative and qualitative benchmarks to determine whether the process is being applied to your company's greatest advantage. A self-evaluation to determine whether your company's mediation capability is truly buttoned-up should begin with these 6 questions:

**1. Are We Using Mediation Appropriately**?

Because mediation is a discretionary tactic that does not require a court directive or approval, companies are empowered to apply it at any time—even in advance of completing formal discovery. Therefore, timing of mediation is important for several reasons. In addition to the potential cost-related benefits, early mediation is viewed favorably by most courts, and often can stay litigation while mediation is in process. More significantly, early mediation provides parties with the opportunity to engage in constructive conversations to understand and resolve their differences before positions harden and emotions escalate any further, and to avoid the substantial costs associated with discovery.

**2. Are We Selecting the Best Neutrals to Mediate?**

Major companies rely overwhelmingly on three major sources for nominees for neutral roles: their own previous experience, word-of-mouth recommendations and private ADR provider organizations. But selection of a neutral party is critical to the success of the mediation process, and therefore demands greater rigor than simply engaging the same mediator for all matters, or relying solely on a recommendation from a colleague or private agency.

The primary determination is whether your company is better served by a mediator with deep knowledge of the industry or subject matter related to the dispute, or by a mediator who's earned a reputation as a strong facilitator of successful outcomes across a broad range of disputes. Selection of a neutral should be based on your overall mediation strategy, and should begin only after you've defined what type of mediator is best suited to handle the matter at hand, in terms of their experience, reputation and personality.

**3. How Rigorous Is Our Mediation Strategy Process?**

Very often mediation fails because companies either have not properly analyzed the matter or have not adequately prepared their mediation strategy. The strategy process should begin at the 30,000-foot level, addressing key issues such as where your company would like to end up; the other side's likely "must haves" and how you will negotiate around them; what your company can and cannot give up; and the anticipated consequences if the matter does not settle.

With a negotiating strategy established and the proper neutral selected, the most critical task involves preparation of the written mediation statement—usually a confidential document submitted to the mediator on an ex parte basis. This statement should read like a well-crafted legal brief, providing the mediator with a clear summary of the key issues in

dispute, presenting a well-supported argument for your company's position and offering at least one viable resolution of the matter.

The discipline involved in developing a thorough mediation statement pays tangible dividends. It helps to establish and build internal consensus for a sound mediation strategy, it properly "sets the table" for the mediation and mediator and it provides the raw material for litigation documents or subsequent settlement discussions if the mediation process fails.

**4. Are We Taking Full Advantage of Mediation?**

The inherent flexibility of the mediation process, involving such key issues such as ex parte communication and selection of participants, presents opportunities often overlooked by corporate counsel. For example, counsel can send relevant information and can request telephone conversations or even meet in person with the neutral in advance of, or during, the mediation process—both as a means to clarify issues or to gain a better understanding of personal dynamics that may affect resolution of the matter.

Companies also have a broad range of strategic options. For example, who a company selects to attend and speak at mediation sessions is not limited to executives directly involved in the matter. There may be strategic value in having a senior decision-maker attend the initial mediation session, which suggests both seriousness of purpose and corporate support; or in having a senior executive make an opening statement that's designed to set an appropriate tone to foster cooperation and mutual respect for opposing viewpoints.

**5. How Well Do We Manage Mediation Etiquette?**

Because the mediation protocol and physical setting are much less formal than arbitration or litigation, corporate counsel sometimes make the mistake of getting overly casual with the neutral or with the mediation process itself. At all times, you and your company's participants in the mediation process must apply the same degree of professionalism and etiquette that would be displayed at a trial.

Flippant responses, interruptions, anger and negative body language are all counterproductive in a strategy designed to achieve a beneficial resolution, and corporate counsel are well advised to properly prepare their mediation participants in advance of their sessions. If necessary, lawyers should be prepared to conduct a sidebar conversation with an associate who displays any type of inappropriate behavior.

**6. Do Our Mediated Agreements Stand?**

"Buyer's remorse" stands as the most significant risk following a successful mediation. Although reversing can't be entirely avoided, the likelihood of having an opposing party fail to honor a mediated agreement in principle can be greatly reduced through preparation designed to eliminate ambiguity or misunderstanding. In some jurisdictions, courts will enforce a clear settlement reached at mediation. Therefore, it pays for corporate counsel to prepare either a detailed checklist of settlement agreement terms, or even a rough draft of an actual settlement agreement, to review and discuss at the conclusion of the mediation process.

The best assurance of a successful outcome is a written mediation agreement signed by both parties and the mediator, prepared at the session. If this does not occur, it's essential that very little time elapse between agreement in principle and delivery of the formal written agreement for signature.

As mediation continues to gain acceptance as a primary means to resolve disputes in advance of litigation, the "best practices" of the mediation discipline are likely to be more standardized and applied broadly by corporate counsel. Opportunities still abound, however, for those companies that remain ahead of this adoption curve, and that avoid the pitfalls associated with not treating mediation in a disciplined, process-driven manner.

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