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Pre-Mediation Caucusing: A Useful Tool

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A mediator who takes the time to have separate discussions with each of the parties in advance can avoid some common problems which arise at the mediation session which all parties attend and can give all participants valuable tools to improve the chances of achieving a successful resolution.

In traditional one or two day commercial mediations it is becoming less common to have an opening session in which counsel present their positions. After a brief common session in which the mediator attempts to set the tone and structure of the mediation and provides some messaging intended to reach the parties directly, the mediation is likely to go directly into caucus and shuttle diplomacy format.

If the mediator's initial caucus with an individual party is the first substantive communication between the mediator and that party, some negative consequences can follow. If the session is too short, the party may feel that the mediator has not taken enough time to understand its position. If the session is too long the other party may feel that its time and money in attending the mediation is being wasted. The other party may also start to conjure up black thoughts about how much trouble the mediator seems to be having with trying to get the other side to make a reasonable offer – a theory that will almost certainly appear to be confirmed when the first offer is received. The mediation can get off to a bad start from which it will take the rest of the day to recover.

An extremely useful tool to avoid this negative start to a mediation is the pre-mediation caucus.

Using this technique, the mediation actually begins with a conference call with counsel for all parties who will be involved in the mediation. The purpose of the call is to obtain an overview of the dispute, to canvas the readiness of all parties to engage in the mediation and to organize the logistics of the common session (who, where, when, cost sharing etc.). The parties are invited to agree that the initial caucuses with each side will be conducted before the common session occurs at a time and in a manner convenient to the mediator and the side or party in question. It is explained that this allows the mediator to spend the time that is needed with each party without wasting the time and money of the other parties. It will also mean that the parties should be able to exchange offers more quickly on the day of the mediation and more progress can be made with less, frustrating down-time.

Pre-mediation caucuses need not take long. Often a half an hour conference call with a party and its counsel is enough, although depending on the case more elaborate arrangements may be appropriate. In one case the pre-mediation caucuses each lasted over two hours and took place in three different cities.

The fact that each pre-mediation caucus is arranged as a separate session means that, if needed, individual decision makers who might not have been able to attend the full mediation session can be involved. This makes for a better informed mediation process – and mediator. When gaps in information, analysis or instructions to counsel are identified in pre-mediation caucuses, there is a better opportunity to remedy the deficiency than is the case when such issues arise on the day itself.

In the more relaxed context of the pre-mediation caucus (without the looming presence of the other disputing party) the mediator is better able to establish a working relationship with each of the parties. Often, the pre-mediation caucuses give the mediator an opportunity to help all of the parties to develop

initial settlement offers and approaches that will allow the common session to get off on the right foot and help to develop momentum towards resolution.

To the extent that challenges remain, the pre-mediation caucus allows time for the parties and the mediator to prepare to meet them on the day of the mediation. In one case, pre-mediation caucusing in a dispute involving multiple parties which had been in litigation for over eight years led me to identify an obstacle that was resolved by conducting the mediation as a "blind auction" in which none of the parties knew what the other parties was putting into the settlement. The dispute was resolved by mid-afternoon on the first day of mediation.

Admittedly, the pre-mediation caucus may be more useful in commercial and other substantial disputes. However, when the value of this tool is explained it is almost never rejected by counsel.

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