

A PARTICIPANT'S GUIDE TO MEDIATION

Mediation is one of a variety of options that can be used to resolve a dispute. Other options, such as arbitration and litigation, typically require a greater commitment of time and are more expensive than mediation. In mediation, you retain the power to control how your dispute will be resolved, a benefit not found in the above options. The mediation process works best when each side is willing to listen to the other side and to compromise expectations, if warranted. Mediation is a means to achieve a mutually acceptable, often creative, solution to your dispute, which could put an end to what has often been a long and painful experience. Unlike litigation, which forces people to relive unpleasant experiences over and over again, mediation provides the opportunity to put this matter behind you and move on with your life.

While there is a standard course of events that generally takes place during a mediation, it is important to remember that you are in control. A mediation is not a trial or hearing. As a mediator, I do not make findings or rulings and cannot impose a settlement on you. Instead, mediators like me are trained to impartially facilitate or manage settlement negotiations and, if requested, provide an evaluative analysis based on my experience in the field.

I am neutral and do not favor any side. However, you should know that I usually play role of devil's advocate, testing each side's information and position and hopefully causing each side to more critically examine the strengths and weaknesses of the case. I will not give anyone legal advice during the mediation, but I will try to help you and your lawyer develop negotiation strategies and settlement options.

A mediation is a private and confidential process. As such, your statements during the mediation cannot be used against you later, if your case is not resolved. To succeed, all parties must feel free to speak candidly and openly. Even if subpoenaed, I cannot and will not testify for or against you.

Your mediation may be scheduled for three hours or more; be prepared to arrange to stay longer if the discussions have momentum. Some mediations continue late into the evening. A full discussion of the case and how it might be settled takes time. It is important for you to be patient.

A. The Joint Session

At the mediation, all parties and counsel convene with the mediator in a joint session, unless it is agreed that such a session would be too painful or counterproductive. At the joint session, a mediation agreement, which has already been given to your lawyer, is signed; the ground rules are explained; and each side is given an opportunity to express his/her view of the dispute, which is sometimes called an opening statement. The opening statement may be made

Nicholas DeWitt, Esq.

Los Angeles Telephone: (213) 891-1114; Facsimile: (213) 891-1470

Honolulu Telephone: (808) 523-1234; Facsimile: (808) 537-1377

Email: nickdewitt@sbcglobal.net; Website: nicholasdewitt.com

by counsel and/or the parties may make a statement if they desire. It can be quite helpful for the parties to actually speak to each other in the joint session. If you desire to use this opportunity, work with your counsel to prepare a persuasive presentation. The objective is to have the decision-makers come to a point at which they can see, even if not agree with, the other side of the dispute. It is most effective when the opening statement, whether by counsel or the party, is not alienating or accusatory.

The joint session is not intended to be adversarial. It is the time when one's commitment to resolution may be stated, or when the depth of one's feelings may be shared. We may spend a few minutes in a joint session, or many hours, depending on the parties' desires. I may ask questions of the lawyers or the clients in the joint session in order to clarify a position or better understand the factual basis of your dispute.

B. Individual Sessions

After the joint session, I will generally meet separately with each party and his/her counsel in a separate, private session, sometimes called caucusing; most often, the first caucus is with the complaining party. The initial caucus may last 45 minutes to an hour. Spending more time with one party than the other does not mean that the mediator is favoring that party. One side may have more people in attendance, may be more entrenched in its opinions, or may simply need more time to vent than the other. There are times that I might meet alone with your counsel in order to best convey certain information. This is not meant to be exclusionary. There are times when you may wish to confer with your counsel about something I have said or a settlement proposal from the other side. It is perfectly acceptable to ask me to leave the room so you can talk privately.

During the private sessions, I will explore major factual discrepancies, the strengths of each side's legal positions, and the evidentiary support. It is during the private sessions the mediator works as a devil's advocate, helping each party to prioritize interests, set realistic goals, and formulate proposals for settlement. One of the most important roles of a mediator is to force the parties to re-examine their positions and act as a reality check for parties with unrealistic expectations. You will be encouraged to be flexible and realistic during the mediation. It is likely that you will learn information during the mediation from the other side that you did not know before. You may discover that your understanding of the case is inaccurate or incomplete. Understand that information provided to the mediator in the private caucus may be communicated to the other side unless a specific request is made for confidentiality.

The process at this stage has been described as shuttle diplomacy, with the

Nicholas DeWitt, Esq.
Los Angeles Telephone: (213) 891-1114; Facsimile: (213) 891-1470
Honolulu Telephone: (808) 523-1234; Facsimile: (808) 537-1377
Email: nickdewitt@sbcglobal.net; Website: nicholasdewitt.com

mediator shuttling back and forth between the parties, communicating the interests and needs of each party to the other, as well as various settlement proposals. The mediator helps the parties to communicate with each other, while searching out opportunities for agreement, always reminding the parties of what will happen in the event that no agreement is reached. The mediator does not typically tell you what your case is worth; it is worth what one side will accept and the other will pay. The settlement expectations you had at the outset of the mediation may become unrealistic, based on information you learn during the session.

The mediator may suggest a proposal for you to make or to respond to one made to you. As the mediation continues, the mediator will spend less time focusing on the facts and more time proposing and exchanging settlement terms. Keep an open mind. If successful, the gap between proposals and counter-proposals gradually narrows until settlement is eventually reached.

In some cases no settlement is reached; further information may be required or additional people may need to be involved in the decision-making process. If necessary, the mediation can be continued to another date. I will tell you if I think settlement negotiations are no longer fruitful and should stop if, for example, the parties' settlement expectations remain too far apart for too long or a crucial piece of information is missing.

C. The Settlement Agreement

There are many options to consider when reaching resolution. The beauty of mediation is that you are not limited to what a court or an arbitrator might award. More creative solutions are possible. Think about what the other side might have to do that is important to you. For example, items you might consider when resolving an employment dispute include reinstatement, transfer, continuation of benefits either at your or your employer's expense, consultant agreements for ongoing services, outplacement services, training programs, early retirement options, deferred payment plans, characterizing the monies paid as something other than wages, agreed upon reference letters and/or public statements, sanitizing of your personnel file, personnel policy changes, contributions to pension plans or charities, direct reimbursement of attorneys' fees, and/or extension of stock option periods.

When a settlement is reached, it is best to have the documentation prepared for signature at that time. The lawyers will probably bring draft settlement agreements to the mediation session, so that any disagreements with respect to terms may be worked out immediately, rather than by drawn out negotiations at a later date. Although mediation is voluntary and non-binding, if an agreement is reached and properly drafted, it will be enforceable in court.

Nicholas DeWitt, Esq.
Los Angeles Telephone: (213) 891-1114; Facsimile: (213) 891-1470
Honolulu Telephone: (808) 523-1234; Facsimile: (808) 537-1377
Email: nickdewitt@sbcglobal.net; Website: nicholasdewitt.com