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ALTERNATIVE DISPUTE RESOLUTION

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Litigation is lengthy and expensive. In addition, the all-or-nothing nature of a litigated result poses substantial risks for the parties. The parties give up the ability to fashion a creative resolution that serves their best interests, and the adversarial nature of litigation can disrupt an otherwise productive, ongoing business relationship. For these reasons, many parties consider using Alternative Dispute Resolution (ADR) to resolve their disputes, either instead of litigation or concurrently with it. In the following materials we discuss: (1) the types of ADR; (2) whether or not to engage in ADR; (3) which type of ADR to employ; (4) selecting and using a neutral; and (5) how to prepare for ADR.

TYPES OF ADR

This section outlines the various types of ADR procedures that can be employed by disputing parties.

PRIVATE ADR PROCEDURES:

There are a wide variety of ADR procedures that parties can privately use to resolve disputes. These include direct negotiations without third party involvement, various non binding procedures involving the participation of a neutral third party, binding procedures in which one or more neutral participants impose a resolution on the disputants, and "hybrid" procedures with both non-binding and binding components.

- **Direct Negotiation:**

  Parties involved in a dispute can attempt to resolve their differences through direct negotiation. When the parties are organizations rather than individuals, successful resolution will be more likely if the negotiations are conducted between senior representatives who have not previously been closely involved in the dispute. This is because an adversarial relationship is likely to have developed between the participants in the events and relationship giving rise to the dispute, and these individuals can be less flexible or willing to compromise as they may have a vested interest in "being right." Different party representatives can reduce antagonism at the negotiating table, and will more likely have the ability to fashion a creative resolution to the dispute that serves the interests of both parties.

- **Mediation:**

  Mediation is a form of negotiation conducted through and with the assistance of a neutral third party mediator. The process is voluntary and non-binding, and the mediator has no authority to impose any resolution on the disputing parties. In its usual form a mediation is preceded by submissions from the parties to the mediator which summarize the factual and legal issues of the dispute. This is followed by a joint session at which the parties orally present their positions to the mediator and each other. After the joint session there is generally a continuing round of individual meetings between the mediator and each of the parties. The mediator uses these individual meetings to discuss the areas of disagreement and to work with each party to identify concerns and underlying interests in order to begin the process of fashioning a possible resolution to the dispute. During the mediation process the mediator may call for one or more face-to-face meetings between the parties in order to help move the process forward. In a successful mediation a common ground will begin to emerge during these meetings which can ultimately form the basis of a final settlement.

- **Arbitration:**

  Arbitration is a process in which one or more neutral third parties are chosen by the parties to hear the dispute and to render a final binding decision. It is less formal than litigation in that the parties can agree between themselves the extent to which, and in what form, the rules of evidence and other procedural rules will apply. Although less formal and more abbreviated than litigation, arbitration is similar to litigation in that the parties generally conduct substantial discovery, evidence can be presented through the testimony of sworn witnesses, and at the arbitration hearing itself each side presents its case to a decision maker who then renders a final binding decision based on the evidence and the applicable law. The arbitration decision can be enforced by the courts, and is subject to judicial review on certain limited grounds.

- **Minitrial:**

  The minitrial is a non-binding procedure in which each party presents an abbreviated version of its case to senior representatives of both parties who have full authority to settle the dispute. As with arbitration, a minitrial is less formal than litigation in that the parties can agree on the extent to which evidentiary and other procedural

rules will be applied, or can fashion their own rules. The minitrial is presided over by a neutral who ensures that the agreed upon procedural rules are followed. After each side has presented its case, the senior representatives of each party meet in an effort to negotiate a resolution to the dispute. The neutral may meet with the representatives, either jointly or privately, to present his or her views of the merits of the dispute and to assist in the negotiation process.

There are a number of other forms of private ADR which are variations on the basic ADR procedures described above. Some of these variations incorporate non-binding and binding components in a single "hybrid" proceeding.

- **"Baseball" arbitration:**

  This is a form of binding arbitration that is used principally where the disputed issue is the payment of money. After the parties have presented their cases to a neutral arbitrator, each party submits to the arbitrator a proposed monetary award. In a binding decision, the arbitrator then selects, without modification, the proposed monetary award which in the arbitrator's view is the most appropriate based on the factual and legal issues underlying the dispute. The knowledge that the most credible proposal will be selected tends to make the parties' proposed awards more reasonable. In an often effective variation of "baseball" arbitration, the parties submit their proposed awards to the arbitrator and simultaneously exchange their proposals with each other. This is followed by a negotiation period during which the arbitrator holds his or her decision in abeyance while the parties attempt to negotiate a resolution to the dispute. This approach often results in a consensual resolution because of the reluctance of both parties to run the risk that the other party's proposed award will be the one selected by the arbitrator.

- **"High/Low" arbitration:**

  This is another form of binding arbitration that is used principally where the disputed issue is the payment of money. In a "high/low" arbitration the parties agree beforehand on upper and lower limits to the arbitration award. The arbitrator may or may not be informed of these limits. If the final arbitration award lies outside of the agreed upon limits it is adjusted accordingly. This form of arbitration can be attractive because it gives the parties some certainty concerning the potential range of a final monetary award.

- **<u>Non-binding ADR followed by binding decision</u>:**

  One form of "hybrid" ADR procedure consists of non-binding mediation between the parties which, if unsuccessful, is followed by a binding decision. Under this process the parties make presentations to two or more neutral arbiters, one of whom is designated as the mediator and the others of whom are designated as the arbitrators. Following the conclusion of the parties' presentations, the arbitrators formulate a final decision which is not communicated to either the mediator or the parties. Concurrently the mediator conducts an intensive non-binding mediation between the parties in an attempt to forge a voluntary resolution of the dispute. If no resolution is achieved at the end of the predetermined mediation period, the arbitrators are so informed and at that time announce their final decision, which is binding upon the parties.

- **<u>Non-binding ADR followed by binding selection of the most credible of the parties' own proposals</u>:**

  Under this "hybrid" ADR procedure the parties present their cases to two or more neutral arbiters designated as a mediator and the arbitrators. Following the conclusion of the presentations, simultaneously each party submits a proposed resolution of the dispute both to the neutrals and the other party, along with a brief explanation of why the party's proposed resolution is appropriate and should be adopted. After the exchange of proposals the arbitrators select, without modification, that proposal which they believe is the most credible, but do not communicate the decision to either the mediator or the parties. Concurrently the mediator conducts an intensive non-binding mediation between the parties in an attempt to forge a voluntary resolution of the dispute. If no resolution is achieved at the end of the predetermined mediation period, the arbitrators are so informed and they announce which proposed resolution has been selected. That decision is binding upon the parties.

<u>COURT SPONSORED ADR</u>:

In an effort to promote the early settlement of litigation and to relieve docket congestion, courts in a number of state and federal jurisdictions have formulated a variety of ADR programs and procedures. Depending on the jurisdiction and type of litigation, these programs may be either voluntary or mandatory. Even where ADR participation is mandatory, however,

litigants generally may disregard any award or recommendation and seek a trial de novo on the merits.

Court sponsored ADR may involve a number of dispute resolution procedures, including mediation, early neutral evaluation, the use of court-appointed settlement masters or referees, and summary jury trial. In the federal system, pursuant to the Alternative Dispute Resolution Act of 1998, federal courts are required to: (1) devise and implement their own ADR programs; (2) retain/designate an employee or judicial officer to oversee the court's ADR program; (3) provide litigants with the opportunity to use at least one form of ADR process; and (4) adopt an appropriate mechanism for making neutrals available to litigants.

- **Early Neutral Evaluation**:

  Various federal courts have implemented an early neutral evaluation program. Its purpose is to help the parties clarify the issues in dispute and to provide the parties with an independent assessment of their cases. Depending on the particular program and the nature of the case, participation may be voluntary or may be required. In conjunction with their early neutral evaluation programs some federal courts have implemented mandatory mediation for certain types of cases. In most early neutral evaluation programs the evaluators are volunteer lawyers experienced in litigating the types of cases they evaluate. The evaluator meets jointly with the parties in a session at which the parties make brief presentations followed by questions from the evaluator designed to elicit areas of agreement and disagreement and to explore the strength of the evidence and legal arguments. Immediately after the presentations and questions the evaluator prepares an assessment of each party's case, which is then given to the parties. The evaluator will also assist the parties in settlement discussions if they desire.

- **Settlement Masters and Referees**:

  In most jurisdictions, court rules permit the court to appoint a neutral settlement master or referee to assist the parties in efforts to settle their litigation. The use of a settlement master can be especially effective in multi-party litigations, where the complexity of the litigation and the presence of numerous parties is an obstacle to engaging in concentrated settlement discussions. In consultation with the parties, the settlement master formulates a non binding mediation process which may involve limited discovery, the submission of mediation briefs, and oral presentations followed by an intensive mediation

period. The court will often stay the litigation of the case while the settlement master conducts the mediation.

- **Summary jury trial:**

  Summary jury trial, the most formal of the non-binding ADR procedures, is generally reserved for complex "trial-ready" cases. It is quite useful where settlement has not been possible because the parties strongly disagree over how a jury will view the evidence and apply the law. The summary jury trial involves the summary presentation of the parties' cases to an advisory jury, which renders a non binding verdict. In many respects it is an abbreviated trial; the Court may require trial briefs and motions in limine, jurors are picked from the local jury pool through a voir dire, the rules of evidence apply, a judge or magistrate presides at the proceeding, and there is a charge to the jury. Following the summary jury trial, the parties can reassess the strength of their case in light of the jury's verdict, then engage in settlement discussions with a more realistic view of their litigation risks.

WHETHER TO ENGAGE IN ADR

Although some form of ADR can effectively and efficiently resolve the vast majority of disputes, in some cases, litigation rather than ADR is more appropriate. An opening question for disputing parties, therefore, is whether to attempt to resolve their dispute through the use of ADR. Listed below are various criteria and considerations that should be considered in deciding whether to pursue ADR.

CRITERIA FAVORING ADR:

- **Speed:** Mediation and other non binding forms of ADR can resolve disputes in a matter of days or weeks. Even the arbitration of a complex commercial case can be concluded in less than a year. By contrast, it usually takes years to obtain a final judgment in a lawsuit, especially if there are appeals. This is particularly true in federal courts, because of the priority given criminal cases. For example, in the year ending June 30, 1992, the U.S. District Court for the Southern District of California devoted only 14 percent of its trial time to civil cases.

- **<u>Cost</u>:** Litigation costs can be enormous. It was reported several years ago that legal expenses in the lawsuit over the cancelled A-12 Navy bomber were running over $60 million a year. Successful resolution of a dispute through ADR significantly reduces the parties' legal cost. Not only is the dispute resolved sooner, saving the costs of continuing litigation, but the costs of participating in an ADR proceeding generally are much lower than those of litigating the dispute.
- **<u>Confidentiality</u>:** Frequently the parties prefer that the details of a dispute—especially the terms of settlement agreement—be kept confidential. Although court records can often be sealed, there is a growing movement to make the sealing of court records more difficult. By contrast, the parties may agree that an ADR proceeding and the terms of any resulting settlement agreement will remain confidential; such an agreement usually can be enforced against the parties so agreeing.
- **<u>Control</u>:** In ADR, disputing parties can exercise substantial control over both process and result. An ADR proceeding can be structured to meet the needs of the parties, and it can be tailored to fit a particular nature of the dispute. In non-binding forms of ADR, a proposed resolution is accepted only if it is satisfactory to the parties. By contrast, once a lawsuit has been initiated, the parties have little control over the litigation process and none over the result. Subject to the control of the court, they are required to follow the existing procedural rules and accept whatever result is imposed on them.
- **<u>Ongoing business relationship</u>:** The adversarial nature of litigation can polarize the parties and poison an existing business relationship. Earlier resolution of a dispute through ADR avoids the acrimony and ill will inevitable in extended litigation. For this reason ADR is especially desirable when a dispute arises between parties who wish to preserve an otherwise productive and mutually beneficial business relationship.
- **<u>Complex issues or specialized field</u>:** Often a case involves complex technical issues, such as patent disputes, or a specialized field, as in construction or labor disputes. In such cases the parties will often prefer to have the dispute decided by someone familiar with the relevant technology or specialized practice. Rather than attempting to educate a judge or lay jury, as would be necessary if the case were litigated, the parties can employ an ADR procedure that utilizes the

services of a mediator or arbitrator already familiar with the relevant technology or practices.

- **Independent assessment:** Throughout a lawsuit, the parties and their attorneys sometimes become so committed to their positions that objective evaluation of the merits of the dispute becomes difficult. Participation in a non-binding ADR proceeding can serve as a "reality check." The parties have available to them a neutral assessment of their positions, and any subsequent reevaluation of their litigation risks in light of this neutral assessment can promote settlement of the lawsuit.

- **Multiple parties:** Disputes involving several parties can be difficult to resolve. There are not only the many competing interests and agendas of the parties, but logistical difficulties can impede the settlement process as well. A formal, comprehensive ADR procedure can be an effective mechanism for resolving complex, multiparty disputes because it focuses all of the parties for a concentrated, intensive period on settlement issues.

- **Party participation:** Litigation is conducted by lawyers. For the most part, the client stands back while a lawsuit is pursued. In ADR, by contrast, the client has a much more substantial role. Active participation by the parties, desirable in most ADR procedures, gives the parties a greater sense of control over the dispute resolution process.

Although ADR offers numerous benefits, in some cases the parties may prefer to postpone an ADR proceeding until later in the litigation process; or they may choose to litigate their dispute without attempting resolution through ADR. Listed below are various criteria and considerations which may indicate that a dispute should be litigated rather than resolved through ADR or that ADR should be temporarily deferred until later in the litigation process.

CRITERIA FAVORING LITIGATION:

- **Issues requiring judicial determination:** Sometimes a dispute may involve issues which require judicial determination as a guide to the future conduct of the parties and others. Such disputes may involve:
  - novel or undecided legal issues
  - public policy issues

- constitutional claims
- issues of statutory interpretation

- **Res judicata/collateral estoppel:** In some disputes the parties prefer litigation for the preclusive effect a judicial decision provides.
- **Early dispositive motion:** In lawsuits that could be dismissed though an early dispositive motion, the moving party may wish to defer ADR efforts until after the motion has been decided by the court.
- **Provisional remedies:** A party will prefer litigation, at least at the outset, where a temporary restraining order or preliminary injunction is sought.
- **Ease of enforcement:** Unless a settlement is embodied in a consent decree, breach of a settlement agreement requires the commencement of a new lawsuit to enforce its terms. A judgment, however, can be more easily enforced, generally by application to the court which rendered it. Therefore, a party with doubts that a settlement agreement will be honored may prefer to obtain a litigated judgment.
- **Lack of discovery:** It may be difficult to assess the merits of a dispute if there has been minimal or no discovery. Parties may thus decide to defer efforts to resolve the dispute through ADR until sufficient discovery has been conducted. This is particularly true when one party believes that a "smoking gun" may exist which, if found, could significantly increase the likelihood of prevailing at trial.

WHICH TYPE OF ADR?

Lastly, the parties must decide which type of ADR process to engage in. Each type has advantages and disadvantages:

DIRECT NEGOTIATION:

Direct negotiation, the least expensive form of ADR, can produce a quick resolution of the dispute. One disadvantage is the absence of a neutral party who can provide an independent view of the merits, as well as a fresh look at possible resolutions to the dispute.

- **Advantages**
  - speed
  - less expense

- early resolution of the dispute
- control over the process
- preserves ongoing business relationships
- more party involvement
- not adversarial

- **Disadvantages**
  - no neutral for independent assessment or for assistance in the negotiation process
  - more difficult to conduct when there are multiple parties
  - no decision on the merits
  - lack of finality or certainty

MEDIATION:

Other than direct negotiation, mediation is generally the quickest and least expensive of the ADR alternatives, and may be engaged in at an earlier stage of the dispute than most other forms of ADR. On the other hand, because of its voluntary nature, there is no guarantee that a final and binding resolution will be achieved.

- **Advantages**
  - speed
  - less expense
  - early resolution of the dispute
  - control over the process
  - preserves ongoing business relationships
  - more party involvement
  - not adversarial
  - independent assessment by a neutral
  - suitable for multiple parties
- **Disadvantages**
  - no decision on the merits
  - no guarantee of final and certain resolution

MINITRIAL:

A chief advantage of the mini-trial is that senior party representatives have an opportunity to be educated in a trial setting about the merits of the dispute and the factual and legal issues involved. This can result in a more accurate assessment of litigation risk and thereby promotes the settlement process. The principal disadvantage is that a minitrial is generally conducted later in the course of litigation, after substantial legal expenses have been incurred.

- **Advantages**
  - education about the merits of the dispute
  - control over the process
  - preserves ongoing business relationships
  - extensive party involvement
  - not adversarial
- **Disadvantages**
  - no decision on the merits
  - lack of finality or certainty
  - takes place later in a dispute
  - more expensive than direct negotiation or mediation

SUMMARY JURY TRIAL:

A summary jury trial is especially useful where, because of sharply disputed factual issues, the parties have markedly different views of the risks they run at trial. In a summary jury trial the parties can obtain a preliminary assessment of a jury's reaction to their cases. Summary jury trials, however, generally do not take place until shortly before the actual trial; therefore, this form of ADR does not yield the savings in time and legal expense that are produced by early resolution of a dispute through other forms of ADR.

- **Advantages**
  - produces a more accurate assessment of litigation risk
  - provides control over the process

- **Disadvantages**
  - takes place much later in a dispute
  - is most expensive form of non binding ADR

ARBITRATION:

Arbitration is the most expensive and lengthy form of ADR. Because arbitration is usually conducted by counsel, there is much less direct participation by the parties themselves. Its principal advantages are the ability to obtain a binding decision on the merits, and the certainty and finality that are produced by the prospect of securing that binding decision. Additionally, an arbitration decision is more easily enforced than a settlement reached through a non-binding process.

- **Advantages**
  - decision on the merits
  - finality and certainty
  - more easily enforced
- **Disadvantages**
  - greater expense
  - more lengthier process
  - no control over the result
  - less party involvement
  - adversarial nature can jeopardize ongoing business relationships

"HYBRID" ADR:

Hybrid forms of ADR that combine both mediation and arbitration offer some advantages of both processes. The major benefit is that the parties have an opportunity to reach a consensual resolution during the mediation period that follows the presentation of the parties' cases at the arbitration hearing. Therefore, to some extent, the parties can choose to exercise some degree of control over the result without sacrificing the certainty and finality offered by arbitration.

- **Advantages**
  - ability to obtain decision on the merits if no settlement is achieved
  - opportunity to exercise control over the result
  - finality and certainty
- **Disadvantages**
  - greater expense
  - lengthier process

SELECTING AND USING A NEUTRAL

Once the decision to use ADR has been made, a key issue is the selection of the neutral. Ideally, the parties will settle upon a mutually satisfactory neutral, but mechanisms exist for designating one where the parties are unable to do so. In selecting a neutral, various factors should be considered in determining what individual might be the most appropriate neutral for a particular dispute. The selection itself is not the only key issue, however. Equally important is making effective use of the neutral aggressively during the ADR itself in order to achieve maximum benefit in the ADR process.

SELECTION OF THE NEUTRAL: THE PROCESS

When the parties are already in litigation, a court interested in encouraging settlement may recommend a particular person or entity to serve as a court-appointed settlement master. In most cases, the court's recommendation will be accepted by the parties to the dispute. In other instances, a party to the dispute may propose that the services of a particular neutral be utilized to help resolve the dispute, and the other parties will agree. If the parties agree to employ an ADR process but are unable to settle on a particular neutral, several mechanisms can be employed:

1. **Arbitration Panels:** If the ADR mechanism involves an arbitration panel, each side should select one person to serve on the panel and the two persons selected should choose the third person without input from the parties. A set of criteria might be agreed upon in advance by the parties to give some uniformity (in terms of experience, areas of expertise, etc.) to the selection of the third neutral.
2. **Nonbinding ADR:** In nonbinding ADR, each side can submit to the other a short list of proposed mediators. If the parties cannot agree on

one of the mediators on the lists, the lists can be submitted to the court or other neutral for a binding selection.

3. **Umbrella Organizations:** If the parties are unable to agree upon the selection of a neutral, and do not desire the assistance of a court, they may seek the help of private organizations, e.g., JAMS, the American Arbitration Association or Center for Public Resources, to provide them either with a list of acceptable neutrals, or the name of a neutral chosen by the organization itself.

SELECTION OF THE NEUTRAL: THE CRITERIA

There are two principal issues to consider in selecting a neutral. One issue is whether the neutral should have specialized knowledge or expertise concerning the subject matter of the dispute. The other is the style of the neutral and his or her approach to the ADR process.

1. **Specialized Expertise:** Whether a neutral should have specialized knowledge or expertise relevant to the issues in dispute depends on the nature of the dispute and, to some extent, on the type of ADR process that is being employed. As a general rule, special expertise is unnecessary. The parties can and will educate the neutral, with respect to both factual issues as well as governing law. Nonetheless, where a dispute involves complex and highly technical scientific or medical issues — for example in patent disputes — or some specialized area of industry practice, the parties may prefer a neutral who is experienced in the field and familiar with underlying standards and principles. This may be especially true in binding forms of ADR, where the neutral is required to fashion an answer to the disputed issues which will be imposed upon the parties. A disadvantage to using a neutral with specialized expertise, however, is that he or she might have biases or particular preconceived notions concerning issues in dispute. Sometimes such an expert focuses more on who the expert believes is "right," rather than listening to the parties and helping them fashion a settlement which benefits all sides and conclusively resolves their dispute. When the use of an expert neutral is contemplated by the parties, therefore, they should take care to ensure that whoever is ultimately selected comes to the ADR with an open mind, notwithstanding expertise concerning standards or principles which may govern the disputed issues.

2. **Mediation Styles:** In mediation, more than arbitration or other types of ADR, the style and approach of the mediator can have a significant effect on the mediation process. At one end of the spectrum is the "facilitator." This type of mediator regards the process as one of facilitating a dialogue between the parties aimed at resolving the dispute. A facilitator identifies issues, fosters a constructive environment, outlines a discussion agenda, and generally encourages the parties to devise their own resolution of the disputed issues. At the other end of the spectrum is the "activist" mediator. This type of mediator is much more involved in the actual process of devising possible resolutions to the dispute. An activist will help the parties face facts, assess relative bargaining leverage, and examine the alternatives if no resolution is achieved. An activist may give his or her own views of the merits of disputed issues and, finally, may help each party formulate a reasonable basis for settlement and encourage the parties to adopt it.

   a. Facilitator or Activist? It will often be the case, especially when litigation has already been commenced, that mediation with a neutral who employs a more activist approach will have a greater chance of successfully resolving the dispute. This is because the parties will generally have already tried direct negotiation; the escalation of the dispute and commencement of litigation crystallize differences and engender animosity and an adversarial posture. In such circumstances simple agenda setting and issue prioritization in a constructive environment probably will not be successful in moving the parties off positions which have hardened. A more interventionist approach will be necessary, in the form of a neutral who will evaluate the dispute through dispassionate eyes and provide a dose of reality to each of the parties, and who will actively attempt to move the parties closer to a common ground.

3. **Mediator as Negotiator:** In the course of selecting a mediator, the parties would do well to remember that a mediation is essentially a negotiation and often the parties will be doing their negotiating through the mediator. An important role of the mediator is explaining the negotiating/litigation position of each party in discussions with the other. The success of these discussions will often depend on the skills of the mediator, and more particularly on the mediator's abilities as a negotiator. This factor, therefore, should be considered by the parties in the process of selecting a neutral.

4. **<u>Other Considerations</u>:** In some disputes a retired judge is the ideal choice, particularly where one party is reluctant to engage in ADR. Retired judges can add prestige and authority to the proceeding, and their stature and knowledge of litigation outcomes can inspire trust and reassure a hesitant ADR participant. Sometimes, however, a former judge may tend simply to announce his or her views of the merits of the dispute and expect the parties to acquiesce in these views. In such circumstances, the former judge might not be as willing or patient in helping the parties creatively devise possible resolutions to the dispute that are less linked to the simple merits.

<u>USING THE NEUTRAL EFFECTIVELY</u>:

1. **<u>Objective Viewpoint</u>:** The neutral has an objective viewpoint of the merits of the dispute. A party can therefore use the neutral to some extent as a "reality check." This is an important role of the neutral and can be valuable to parties who, with their lawyers, may have become so swept up in the litigation struggle that they may have lost some degree of objectivity concerning the strengths and weaknesses of their positions. The neutral can not only provide an objective view of the merits, but also provide insights into the costs and benefits of settlement versus continued litigation.
2. **<u>Negotiating through the Neutral</u>:** As noted above, the neutral can serve to relay the position of each party in discussions with the other parties, and to help each party understand the strengths and weaknesses of their own and their opponents positions. The neutral can, therefore, be asked for an assessment of how the other side might react to a particular proposal. If a party wants to float a particular proposal to the other side, the mediator can be used to convey it as a "mediator's suggestion," thus protecting the party from perhaps appearing too ready to compromise on particular issues. In the final analysis, a party should use the neutral aggressively in the negotiation process.

PREPARING FOR SETTLEMENT DISCUSSIONS

Thorough preparation is critical to any effort to settle a dispute, be it through direct negotiation or some other form of ADR. Before sitting down at the table with the other party and any neutral third party, the risks and benefits of litigation versus settlement must be thoroughly analyzed,

potential problems must be identified and prepared for, and mediation strategy and goals must be formulated.

1. Assess your position in the litigation.
    a. Do the legal issues favor you or the other side?
    b. Do the factual issues favor you or the other side?
    c. Does the court have any discernible biases, for you or against you?
        i. as evidenced in the course of this litigation.
        ii. as evidenced by prior decisions in similar disputes.
    d. What is the likelihood of prevailing?
        i. completely?
        ii. partially?
    e. What amount of dollars are at issue?
        i. how much would litigation defeat cost you?
        ii. how much would litigation victory gain you?
        iii. how would these numbers change if the litigation result were a partial victory/defeat?
        iv. what affect would an early settlement, and the resulting savings in litigation and other transaction costs, have on these numbers?
2. Are there extrinsic considerations which affect your decision of how aggressively to pursue either litigation or settlement?
    a. Factual considerations.
        i. There may be factual issues which would be damaging in a wider context — i.e.:
            (1) that might negatively affect relationships with other companies/individuals;
            (2) that might have a negative impact in other disputes/litigations.
    b. Legal considerations.
        i. What is the likelihood that the case might create legal precedent which:

(1) would be unfavorable to the company or the industry at large?

(2) would be favorable to the company or the industry at large?

(3) might be inconsistent with past positions taken by the company, or with positions the company might wish to take in the future.

c. Relationship with adversary.

i. Do you have an ongoing relationship with the adversary?

(i) If so, is there a danger that the litigation might jeopardize this relationship?

3. Assess the dispute from the adversary's perspective.

a. Gather information to determine how much and what kind of leverage you may possess in the settlement negotiations.

i. As much as possible, the goal is to obtain an idea of the adversary's concerns, expectations, motivations and goals.

b. Specifically assess:

i. Factual considerations.

(1) Are there facts in the dispute that the adversary would prefer not to have aired in a public litigation?

ii. Legal considerations.

(1) Does the litigation present the possibility of adverse or beneficial legal precedents for the adversary?

iii. Relationship.

(1) If there is an ongoing relationship between you and the adversary, how valuable is it from the adversary's perspective?

iv. Dollars.

(1) What is the adversary's financial situation?

(a) Is the adversary facing financial pressures that might make it more inclined to agree to a relatively modest settlement?

v. Timing.

(1) Does the adversary face time pressures, which would make it less inclined to pursue a lengthy litigation.

4. Formulate your settlement objectives.

a. What is your bottom line in the settlement negotiations?

i. For a dispute solely about dollars to be paid/received, what is the least amount you will accept or most that you will pay?

ii. In a dispute that presents additional issues, which issues do you have flexibility on, and which are potential deal breakers if the other side does not yield?

b. Are there any open issues with the other side which are unrelated to the particular dispute under negotiation, but which might be folded into this negotiation in the event of an impasse?

i. Sometimes an otherwise intractable dispute can be resolved by broadening the scope of the negotiation.

5. Determine who will participate and take the lead in the settlement efforts:

a. Who participates will depend on a variety of factors:

i. dollar value of the dispute;

ii. complexity of the dispute:

(1) the negotiators may want to divide up responsibility for negotiating different issues in a complex dispute;

iii. whether highly technical matters are at issue:

(1) it may be necessary to have experts or specialists on the negotiating team, or close at hand for support;

iv. the stage of the negotiation:

(1) it may be preferable to let outside counsel negotiate at the early stages, so as to retain maneuverability;

(2) even in early stages, however, it may be preferable to have specific outside settlement counsel do the negotiating rather than the litigators;

v. the identity of the other side;

vi. what individuals will be negotiating for the other side.

6. If possible, decide to whom on the other side the negotiation should be directed, i.e., who is the target of persuasion?

   a. As a general matter, the target of persuasion is the individual who either has the authority to approve a possible settlement, or who will make the recommendation which will likely be adopted.

      i. whether this individual is in-house counsel, a business person, or even perhaps trusted outside counsel, will vary from company to company and from dispute to dispute;

      ii. sometimes it will not be apparent who the particular individual may be.

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