Mediating Civil Commercial Disputes

Most commercial disputes are settled without getting the lawyers involved, but some disputes prove to be so intractable that they require legal action. Because lawsuits are often time-consuming and expensive, businesses and their lawyers have used alternative forms of dispute resolution, commonly referred to as "ADR." One form of ADR is mediation. In mediation, a neutral party (the mediator) works with the opposing parties to try to reach a settlement. The mediator's skill and the parties' willingness to negotiate in good faith are critical to a productive mediation.

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Generally speaking, there are three ways a Western New York business can find itself in mediation: (1) the business is a party to a contract which requires that some or all disputes be submitted to mediation; (2) the business is a party to a lawsuit in the United States District Court for the Western District of New York where essentially all civil cases (with limited exceptions) are referred automatically to mediation; or (3) during the course of a lawsuit the opposing parties agree to mediate all or part of their dispute, either privately or through a program in the New York State Supreme Court.

Preparation is the key to "winning" a mediation. First, the client and their lawyer must prepare their mediation presentation, articulating the legal and factual strengths of the client's position and the fairness of the outcome proposed. This presentation is usually detailed in a mediation memorandum submitted to the mediator (and sometimes, by agreement, to the opposing party) in advance of the mediation. The client and their lawyer should also be prepared to expand upon the issues addressed in the mediation memorandum through oral advocacy at the mediation session. Second, the client and their lawyer must make a realistic assessment of the strengths and weaknesses of the client's case, notwithstanding the "best case" arguments made through the mediation memorandum and their oral advocacy. Third, the client should insist that the lawyer provide a well-reasoned estimate of the future cost of litigation. The first task will help convince the mediator of the merits of the client's position, and give her sound reasons why the opposing party should be the one who compromises their position. The second and third tasks put the client in a position to decide whether to accept an offered compromise in light of the known risks, costs and benefits.

Most mediations follow a standard protocol. The parties, their lawyers and the mediator meet at the offices of the mediator or one of the lawyers. The mediator conducts a joint introductory session in which he explains his role and the applicable rules of engagement, and the lawyers make opening statements summarizing their clients' positions. The mediation then usually evolves into a kind of "shuttle diplomacy", in which each side meets separately with the mediator, and the mediator shuttles between the parties, evaluating their positions and looking for opportunities for compromise. A skilled mediator will, as appropriate, show empathy for a party's convictions on the legal and equitable merits, but also play devil's advocate, challenging those convictions (often after being prompted to do so by the opposing party's arguments).

Although mediations are non-binding and a party may reject any proposed resolution, the mediation dynamic can lead to compromises that the parties were unwilling to make on their own. For example, the District Court's ADR program has a settlement rate of over 70%. All settlements are formally confirmed in writing before the parties leave the mediation. Even if the parties do not settle in the mediation, each side comes away with the benefit of a neutral party's pragmatic assessment of its case.

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