

For Most Disputes, Mediation Has Significant Advantages over Litigation

A Comparison to Consider,

Published by Ron Friedman Mediations

Sometimes filing suit is a plaintiff's best choice. However, most of the time, parties should consider convening Early Mediation before they expend resources on litigation. There are great savings possible if you don't skip this step, including protecting your relationships. Once started, litigation will eventually lead to Court ordered mediation in most cases anyway. That is one reason why many contracts require Mediation before litigation.

In Mediation

- Mediations are convened for the dedicated purpose of settlement negotiations, under the guidance of a trusted middle-man that attempts to bring both sides together by finding common ground and promoting cost-saving compromises. Attorneys usually can agree on a mediator that is known to have expertise and a mediation style suited to the parties or matter in dispute.
- Successful Mediations guarantee a basic modicum of satisfaction because all settlements require mutual consent, even if they do not assure everyone will be "happy" with the outcome.
- Once agreed, mediated settlements provide finality because everyone signs an appropriate release, usually on the day of mediation, and settlements tend to require no enforcement efforts as they normally are voluntarily performed.
- Once convened, Mediation is a relatively quick and inexpensive dispute resolution process from which each participant can withdraw

In Litigation

- Courtroom trials have a different purpose than settlement, and do not focus significant resources, time or efforts to promote settlement agreements. Participants have much less control over who will be the Judge assigned to their case
- Courtroom trials guarantee at least one side is the "loser" and offer no assurance that any party will be satisfied or happy with the outcome.
- Prevailing parties in a trial still have to collect on their award, but face the prospect of appeals, as well as resistance to collection efforts that commonly can yield pyrrhic victories.
- Once suit is filed, Litigation has a life of its own that can take years, and does not offer

at any time.

- Mediations involve predictable and controllable costs, normally split evenly among the parties, and present limited risks.
 - Mediation hearings involve private and confidential discussions covered by a written Mediation Agreement, held off the record, behind closed doors, with a limited impact if no final settlement is reached.
 - Mediations hearings are usually held serially with parties in separate caucus rooms, as the Mediator performs shuttle diplomacy between them, thereby insulating the parties from direct confrontation, giving them time to think and plan with their attorneys, which is conducive to error avoidance.
 - Mediations can stop and start, result in partial or full settlements, as to certain individuals or issues, and can be continued and reconvened at a convenient later time when the parties are more prepared or willing to engage in follow up negotiations that may resolve the controversy.
 - Mediations are scheduled by the parties (and Mediator) for their convenience, on dates when they are available, at mutually agreed times and places, under agreed “ground rules” (which usually define how mediation costs will be borne, who must attend in person, and any other important pre-conditions). In addition to parties and their attorneys, attendees sometimes include insurance adjusters, experts, consultants, spouses or others, but no one will be under
- convenient stopping points.
 - Trials involve far more resources to conduct, uncontrollable costs, and large risks usually borne by a loser.
 - Court trial involves public, “on the record” hearings, that will generally be outcome determinative, and leave little room for adjustment through negotiation by the parties or their attorneys.
 - Litigation is a “high wire” adversarial proceeding with the Judge presiding in open court over a complicated and serious dual that offers scant relief from mistakes.
 - Trials are all or nothing, “do or die” procedures, that gives the parties basically one bite at the apple.
 - Trials are scheduled to be conducted in courthouses, by the Judge, on a date and time for the Court’s convenience, with witnesses under subpoena that must appear personally to testify under oath, and the entire proceeding must follow Court rules, with insurance adjustments typically occurring only after a verdict is rendered.

subpoena or testify under oath at a mediation.

- In Mediations, parties have a great deal of latitude to limit their costs since no unacceptable outcomes can result, and multiple parties with potential liability to a Plaintiff can meet together and agree on how to split the settlement costs equitably, enabling a matter to settle without any one of them bearing the entire costs.
- Mediation enables the parties to identify common ground, show empathy, and discuss a broad range of issues beyond what is relevant or admissible in Court. For example, the parties' interests and needs, all kinds of possible negotiated compromises, relationship issues, financial capabilities, and terms of payment, are all on the table in Mediation, giving the Mediator a broad array of subjects and tools to work with to shape a fitting and acceptable resolution.
- Mediations are encouraged as a matter of public policy with "confidentiality rules" that normally protect people in mediations from being called as witnesses to testify about the mediation discussions. (But, signed settlements are admissible and enforceable, and there are some other special exceptions to these confidentiality rules.)
- Mediation attractiveness is enhanced because the mediator has no power to make rulings or decide the outcome, leaving the parties in complete control. Thus, Mediation places a premium on cooperation between the disputants, who are often the ones most knowledgeable and suited to
- Trials offer little freedom to limit costs, as they force extensive and costly preparation for a tense courtroom battle that will independently decide the liability of each defendant separately, and any one of them found liable might be forced to bear the entire cost of the judgement.
- Courtroom proceedings generally concentrate on "admissible evidence," "positions," and "arguments" to arrive at a "judgmental" outcome, that leaves the Court to fashion a limited set of legal remedies.
- What is presented in open court is not confidential (with rare exceptions).
- In a court proceeding, the Judge (or jury) ultimately control which side prevails, therefore forcing the parties to try to educate them about the details of the dispute in the hope they will figure out a just result.

decide the outcome.

- Professional Mediators are trained to help the parties, one-on-one in private caucus, to vent, discuss their disagreements, learn more about their cases, deal with their emotions, and bargain with each other empathetically, using proven dispute resolution techniques to achieve a mutually acceptable compromise.
- Mediations can find middle ground without a disparaging or critical attack on an opponent's behavior that an adversarial trial requires, and thereby it often can save your relationship that the dispute otherwise threatens to destroy.
- Successful Mediations usually result in a clear agreement that balances the respective interests of the parties, with the settlement terms carefully written and tailored to meet all the elements the parties have agreed upon and avoid surprises.
- Courtroom proceedings create gut wrenching tensions that usually force parties into settlements by exhausting their patience, courage and financial resources, and by bringing them to new, often surprising, realizations about the risky course of allowing the litigation to proceed through trial.
- Litigation attacks your opponent's character, focuses on judgmental arguments about legal "positions" and "rights" and "wrongs," and leaves few relationships intact.
- Litigation outcomes are notoriously unpredictable, and can surprise even winning parties because judgments are not molded by the court to fit any parties needs or agreements.