

MEDIATION AS AN ALTERNATIVE DISPUTES RESOLUTION PROCESS

In the past and as recent as the January issue of this publication, I have written about alternative disputes resolution processes, particularly arbitration. The arbitrator's decision is binding, and subject to court review under very limited circumstances as explained in my article of January, 2007. However, a non-binding process is also available called mediation. Mediation may be used as an alternative to arbitration or as an initial step in attempting to resolve disputes with the intention of following an unsuccessful mediation with a binding arbitration.

Mediation requires the appointment of a knowledgeable neutral party who will act as mediator and generally the expenses incurred in furnishing the mediator is shared by the parties. Although the mediator is truly neutral, a person experienced in the subject matter of the dispute will have insight into the issues arising in the dispute. Those insights will provide the parties with an opportunity to discuss both their strong points and their weak points with the mediator. The mechanism of testing the cogency of one's position by discussing it with a knowledgeable neutral party is the essence of using mediation to resolve disputes.

The legislature has recognized the importance of mediation and has protected the communications which occur during mediation. In § 904.85 of the Wisconsin Statutes, the legislature has expressly provided that oral or written communications made in mediation by any party are inadmissible in evidence in any judicial or administrative proceeding, and not subject to discovery or subpoena in judicial and administrative proceedings. This protective privilege provided by the legislature not only protects the parties to the mediation, but also protects the neutral mediator, none of whom may be brought before a court or administrative body to testify as to what occurred during mediation. While there are a few exceptions under the statute to this protective privilege, they are not important for purposes of this article.

Mediation as a method of resolving disputes has also been embraced by the courts. The legislature has expressly authorized the courts to order mediation to help the parties reach an agreement. The statute expressly states that the purpose of mediation is to focus on the key issues in the case and to exchange information between the parties in the course of exploring options for settlement. While the statute empowering the court to order mediation permits a party to object to the mediation process, as a practical matter, few objections are interposed by parties because the intrinsic value of engaging in a pretrial settlement effort is apparent.

When the court orders mediation the parties are given an opportunity to agree on the identity of the mediator, and if they cannot reach an agreement, the court will appoint a mediator. Where parties reach an agreement, they may select anyone who is available to act as a mediator or seek the assistance of a mediation organization such as the American Arbitration Association and various private organizations consisting of retired judges and lawyers interested and skilled in providing mediation services.

A review of the Construction Industry Mediation Procedures published by the American Arbitration Association may be helpful in further understanding the concepts of mediation. AAA does not act as mediator but will administer the mediation process. AAA expects the parties to agree on the identity of the neutral mediator but will appoint one if the parties cannot agree.

AAA suggests the following mediation clause:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

The clause may be tailored to provide for the administration of the mediation through any other organization or group providing mediation services.

If the parties have not provided in their contract for mediation they may nonetheless refer an issue between them to mediation by entering into the following agreement offered by AAA:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures. (The clause may also provide for the qualifications of the mediators), method of payment, locale of meetings, and any other item of concern to the parties.)

Under Rule M-2 of the AAA Construction Industry Mediation Rules any party may initiate mediation by filing a submission with AAA for mediation, together with a \$325.00 non-refundable case setup fee. Other organizations may or may not charge a setup fee. However, all organizations will expect the parties to pay for the fees and expenses of the mediator and will facilitate the remittance of those expenses to the mediator.

Rule M-4 of the AAA rules provides that normally a single mediator will be appointed unless the parties agree otherwise. Rule M-5 covering the qualifications of a mediator exclude any person from acting as a neutral mediator who has any financial or personal interest in the result of the mediation, except by the written consent of all parties. Prior to accepting a mediation appointment, the prospective mediator must disclose any circumstances likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, the AAA must replace the mediator or immediately communicate the information to the parties for their comments and consideration.

Under Rule M-7 of the AAA rules, any party may be represented by persons of the party's choices. Under Rule M-8 the mediator fixes the date and time of each mediation session and the mediator will usually choose a convenient location for the mediation but will seek the agreement of the parties. By agreement of the parties mediation may be conducted by telephone or other electric means.

Under Rule M-9 of the AAA rules, each party is to provide the mediator with a brief memorandum of that party's position at least ten calendar days prior to the first scheduled mediation session. The brief memorandum need not be exchanged with the other parties without their consent. The purpose of the brief memorandum is to inform the mediator of the issues to be presented, but in complex design and construction cases it is often necessary to provide the mediator with material and relevant design and construction documents. The devil is always in the details, and the details are not likely to be overlooked by a talented and knowledgeable neutral mediator.

Since this is a non-binding procedure the mediator does not have authority to impose any settlement on the parties. As provided in Rule M-10 of the AAA rules, the mediator is authorized to conduct both joint and separate meeting with the parties and to make recommendations for settlement. As a practical matter, the mediator will probably listen to both parties make a joint statement and then will meet privately with both sides in an effort to bring the parties closer to a settlement. Naturally the methodology of each mediator may vary, but an experienced and knowledgeable mediator will attempt to employ a method that appears to have the best chance of success given the nature of the dispute and the identity of the parties.

Rule M-12 of the AAA rules recognizes the confidentiality of all communications made during mediation. As the parties acknowledge their weak points, the mediator will not normally discuss those weak points with the opposing party unless the party admitting to those weak points consents. An ethical mediator will not breach the request of a party for confidentiality of any admission.

Mediation will continue until the parties agree that mediation is unsuccessful or until the mediator concludes that there is no hope for settlement in the course of that mediation.

Rule M-15 of the AAA rules expressly provides that neither AAA nor any mediator is a necessary party in any judicial proceeding relating to the mediation and neither AAA nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under AAA procedures. Most private mediation services require similar assurances.

Mediation is often a valuable step in the process of resolving disputes, whether those disputes are headed for arbitration or for court. All too often, the parties remain in a state of denial or are buoyed by unsupportable optimism. A talented and knowledgeable mediator will look carefully for realistic opportunities to promote a settlement by the parties by speaking candidly to the parties about their strengths and weaknesses. Many mediations are successful even in the most complex disputes and when the parties mediate by sincerely pursuing settlement, they are often pleased to find that the claimant's minimum settlement point coincides with the respondent's maximum settlement point, and the dispute comes to an end.