BUILDING DURABLE MEDIATED SETTLEMENTS

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Resumo

Apesar do recente interesse na mediação em todo o mundo, muitas pessoas não estão familiarizados com as implicações legais e de negócios do processo, bem como com o acordo. A imagem global que emerge é que a mediação é voluntária, assim como o acordo. Este artigo explora alguns dos problemas relacionados com a construção de um acordo. Num acordo mediado, nenhuma das partes anseia por comparecer em tribunal ou voltar à mesa de negociações para fazer cumprir o compromisso. Este artigo pretende explorar o papel dos mediadores no sentido de incentivar as partes a honrar as suas obrigações, tanto durante a sessão de mediação como na configuração do acordo resultante. A revisão do acordo de mediação com clientes envolve explorar as implicações do acordo no contexto da lei aplicável e compreender as razões pessoais dos clientes para aceitarem o acordo. Assim, torna-se importante que o mediador verifique se os clientes estão satisfeitos com seus acordos.

Palavras-chave:
acordo mediado, confiável, sessão de mediação, a elaboração do acordo, a resolução.

Abstract

Despite the recent interest in mediation throughout the world, many people are unfamiliar with the legal and business ramifications of the process, as well as the agreement. The overall image that emerges is that mediation is voluntary, and so is the agreement. This article explores some of the issues involved with building an agreement. No party to a mediated settlement agreement yearns to appear in court or return to the negotiating table to enforce the compromise. We explore the mediators' role in encouraging parties to honor their obligations, both during the mediation session and in the configuration of the resulting accord. Reviewing the mediation agreement with clients involves exploring the implications of the agreement in the context of applicable law and understanding the clients' personal reasons for accepting the agreement. It is important for the mediator to ascertain if clients are satisfied with their agreements.

Keywords:
mediated agreement, trustworthy, mediation session, drafting the agreement, resolution, settlement.

Remain Veracious

Ensure that the process is trustworthy, as parties are more likely to comply with an agreement that they feel was the result of an even-handed process.[1] Mediators should be free from favoritism, bias, or prejudice.[2] Do not take sides and avoid even the appearance of partiality.[3] A keystone of fairness is mediator impartiality, one of the core principles of mediation.[4] An indifferent process is one in which all parties are accorded the same level of consideration and where both parties have the liberty to tell their story without any interruptions.

Advocate Active Participation

Propose that all participants engage in the concept-generating process. Parties are more likely to comply with an agreement that they took part in developing.[5] During the mediation session, allow the parties to analyze concepts for a final resolution, encouraging them to create as many possible solutions as possible. None of the ideas should be evaluated; brainstorming time is for idea generation only.[6] Inspire them that submitting an idea does not mean that one supports it or would necessarily effectuate. The intent is merely to get as many suggestions—feasible or not—generated. The longer the list of ideas, the more options the parties have from which to choose, and the more likely it is that some combination of them will be acceptable to everyone at the table.[7]

Allow the Parties to Direct

When the compurgators attempt to establish the framework of a binding agreement, abstain from steering or endorsing any particular resolution. Parties are more likely to comply with agreements if they did not feel coerced into accepting them,[8] thus, be explicitly clear to avoid any perception of menace. A facilitative, rather than evaluative, style of mediation would be best suited for situations in which agreements are not enforceable.[9] Facilitative mediators focus on helping parties come to an agreement on their own, whereas evaluative mediators may come up with or recommend particular solutions.[10] In order to keep the degree of coerciveness leveled, persist on using the facilitative style and simply guide the process by which parties cultivate and refine their own elucidations.

Emphasize the Parties' Affiliation

Parties are more likely to respect the agreement if they value their relationship with each other.[11] Therefore, during the mediation, you should focus on their correlation, placing it directly as one of the issues in the mediation. Inquire from the actors—either in a joint session or, if it would be more comfortable for the parties, in a private caucus—how they each value their relationship with the other party, and how they would like to see it change or progress as a result of the mediation. They will then consider the consanguinity an integral part of the concluding solution. If the mediation serves to improve the rapport between the co jurors, they may be more likely to accede to the agreement as a way to bypass damaging the relationship and dissipating the momentum that was accomplished during the mediation.

Draft the Agreement in Their Words

A scribed document serves as evidence that the participants engaged in mediation and attained a settlement. The agreement should be finalized in written, rather than oral, form, even if the parties are illiterate.[12] It also helps parties work out details that might not be contained in an oral agreement.[13] If permitted by law, you should draft the final agreement, so that neither party has a chance to influence it at the last minute with biased wording, and so that neither party even suspects

that their counterpart may do so.[14] Amid the method of drafting, include all parties by inquiring for their recommendation and input. Be certain to attribute various provisions to each party, so that they discern that their ideas made it into the final abstract. It should be drafted as much as possible in the words of the parties who have generated the solutions.[15] Their ownership of the agreement will be maximized and, thereby, amplify the possibilities for acquiescence.

Sign and Date

All parties should sign the agreement. Their indication serves as an affirmation that they will achieve the terms they have promised to fulfill. Although not legally binding, a signature can have symbolic significance.[16] Formalities such as signatures serve a cautionary function, requiring parties to reflect on the agreement into which they are about to enter and deliberate on its wisdom.[17] You may even want to consider asking both parties to take an oath to uphold the terms of the agreement. Although there is no legal significance to this, it imparts to the parties the seriousness of the agreement and may cause them to think twice before violating it.[18] It will serve to "awaken the [party's] conscience and impress the [party's] mind with the duty to [follow through with their promises.]"[19] The final agreement should also include a review date, a mutually agreeable date by which the terms of the agreement must be fulfilled.[20] They can agree to return to mediation or take other steps if the agreement has not been executed. This accords parties a tangible end date by which to satisfy with the contract and gives an aggrieved party some recourse for lack of compliance.

Include Interdependent Obligations

The mediation agreement should include reciprocal promises.[21] This serves two purposes. First, parties are more likely to accede to the contract that they acknowledge is impartial, and an agreement may seem fairer if both parties are promising to do something. Second, if each party is relying on the other to fulfill a commitment, this provides an additional layer of encouragement. If one party does not achieve, the other party will not accomplish their obligation, thereby causing the first party not to benefit from the agreement. In a sense, each party can hold their part of the performance until they feel satisfied that the other party will execute. This is a type of a self-enforcement mechanism.

Enumerate the Repercussions of Noncompliance

The final contract can also contain contingency provisions explaining what will arise if a party does not comply. Each party can envision consequences that they would incline to circumvent, and then permit the other party to effect those consequences if the party fails to perform. This signals to all parties that they are austere about their promises. When each party establishes whether or not to satisfy the accord, this will consider what the other party is likely to execute as a result. If the first party can make a credible commitment, the second party will take this into account when deciding whether to comply.[22] Interdependent promises with negative consequences for lack of compliance give the parties a way to make credible commitments to each other.

Mediating Durable Resolutions

These are just some of the techniques that are likely to increase the chances that parties to a mediated settlement will stay true to their terms. Inspiring their fidelity to these agreements can go a long way toward achieving lasting success in resolving disputes through mediation.

Bibliographic References

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2 *See, e.g.*, Model Standards of Conduct for Mediators Standard II (2005).

3 *Id.*

4 *Id.*

5 Harvard Mediation Program, *Drafting Small Claims Settlements,* Harvard Mediation Program Basic Training Manual (Spring 2009).

6 *Id.*

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8 Marc Galanter & Mia Cahill, *Symposium on Civil Justice Reform: Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1382 (1994).

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10 *Id.*

11 Edith Brown Weiss, *Understanding Compliance iwth International Environmental Agreements: The Baker's Dozen Myths,* 32 U.Rich.L.Rev. 1555, 1570 (1999).

12 Insight Collaborative, *supra* note 8, at 40.

13 John D. Calamari & Joseph M. Perillo, Contracts 294 (3d ed. 1987).

14 Some jurisdictions regulate the ability of mediators to draft settlements.For non-lawyer mediators, drafting may constitute the unauthorized practice of law.This is the case in New York, for example.Suzanne L. Brunstring, *Taking the Collaborative Approach*, New York Family Law Strategies,*15 (2009).For mediators who are also lawyers, drafting may be in violation of the restriction not to represent opposing parties on the same matter.O. Russel Murray & Stephen A. Bailey, *Ethics in Negotiation and Mediation for the Florida Attorney*, Florida Bar Journal *18 (May 2008).

15 Harvard Mediation Program, *supra* note 6.

16 3-10 Corbin on Contracts § 10.2

17 Lon Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

18 This same idea is behind the U.S. Federal Rules of Evidence's requirement that parties swear or affirm to tell the truth before being admitted as witnesses. Fed. R. Evid. 603.

19 *Id.*

20 Insight Collaborative, *supra* note 8, at 40.

21 Harvard Mediation Program, *supra* note 6.

22 Luis M. B. Cabral, Introduction to Industrial Organization 48 (2000).