

## MEDIATION: AN EFFECTIVE MEANS OF RESOLUTION OF DISPUTES

### **The Mediation Process**

Mediation is a form of dispute resolution conducted and assisted by an impartial attorney trained in the art of resolving disputes. Unlike arbitration and other kinds of alternative dispute resolution, mediation is non-adjudicatory. The Mediator makes no findings of fact or law, whether binding or non-binding.

I use both a facilitative and directive approach to mediation. Facilitative mediation is where the Mediator facilitates discussion and resolution between the parties. Directive mediation is where the Mediator, being in a unique position to evaluate each party's strengths and weaknesses, may suggest ways to reach an amicable resolution. Regardless of the approach, a Mediator may not force or compel a party to resolve the dispute.

The entire proceeding is privileged and confidential. Indeed, the law prohibits the Mediator or any party from telling the Court anything said during the mediation, other than the Mediator may report to the Court that the case did or did not settle. See Tex. Civ. Prac. & Rem. Code 154; Tex. R. Evid. 604.

### **Effectiveness of Mediation**

Mediation works. Statistics show at least 75% of cases referred to mediation have settled as a result of the mediation, and I have enjoyed a success rate. Several reasons account for this success:

1. The Mediator neutralizes hostility and emotion inherent in many cases. During the caucus sessions, the parties do not see or communicate directly with each other. All communications are communicated through the Mediator.
2. The mediation process causes parties and/or counsel to undertake a realistic risk/benefit analysis of continued litigation. Often, unrealistic expectations impede resolution of disputes. The Mediator serves as a catalyst for attention to reality.
3. Because the Mediator serves as a communication bridge between the parties, the Mediator has knowledge of each party's interest and goals extending beyond the knowledge of any one party. Thus, the Mediator is in a unique position to suggest solutions and explore settlement possibilities.
4. The Mediator serves as a neutral advocate of resolution.

## Cost

The cost of mediation varies from case to case, depending on the number of parties, whether the mediation is a half day or full day, and the complexity of the case. Lunch will be provided for full-day mediations.

## RULES FOR MEDIATION

1. **Definition of Mediation.** Mediation is a process under which an impartial person, the Mediator, facilitates communication between the parties to promote reconciliation, resolution, or understanding among them. The Mediator may suggest ways of resolving the dispute, but may not impose his/her own judgment on the issues for that of the parties.
2. **Agreement of Parties.** Whenever the parties have been ordered to mediation, or have agreed to and appear for mediation they shall be deemed to have agreed to these rules, as amended and in effect as of the date of the submission of the dispute, as part of their agreement to mediate, unless a written objection is made to the mediator prior to the start of the mediation.
3. **Consent to Mediator.** The parties consent to the appointment of the individual named as Mediator in their case. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable resolution of disputes.
4. **Conditions Precedent to Serving as Mediator.** The Mediator shall not serve as a Mediator in any dispute in which he has any financial or personal interest in the result of the mediation. Prior to accepting an appointment, the Mediator shall disclose any circumstance likely to create a presumption of bias or other impediments to acting as an impartial facilitator of dispute resolution. In the event that the parties disagree as to whether the Mediator shall serve, the Mediator shall not serve.
5. **Authority of Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties in achieving settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator as the Mediator shall determine, with the consent of the parties. The Mediator may use both a facilitative and directive approach to mediation to resolve this dispute.

6. **Commitment to Participate in Good Faith.** While no one is asked to commit to resolve their dispute in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to resolve it, if at all possible.
7. **Parties Responsible for Negotiating Their Own Resolution.** The parties understand that the Mediator will not and cannot impose a resolution in their case and agree that they are responsible for negotiating an agreement acceptable to them. The Mediator, as an advocate for resolution, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that resolution will result from the mediation process.
8. **Authority of Representatives.** PARTY REPRESENTATIVES MUST HAVE AUTHORITY TO SETTLE AND ALL PERSONS NECESSARY TO THE DECISION TO SETTLE SHALL BE PRESENT OR AVAILABLE. Telephone numbers and e-mail addresses of such persons should be provided in writing to the Mediator.
9. **Time and Place of Mediation.** The Mediator shall fix the time of each mediation session. The mediation shall be held at the office of the Mediator, or at any other convenient location agreeable to the Mediator and the parties, as the Mediator shall determine.
10. **Identification of Matters in Dispute.** Prior to the first scheduled mediation session, each party shall provide the Mediator with an Information Sheet and Request For Mediation on the form provided by the Mediator, setting forth its position with regard to the issues that need to be resolved.
11. **Privacy.** Mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission and consent of the Mediator.
12. **Confidentiality.** Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the Mediator, unless permission is given. All records, reports, or other documents received by a Mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable attorneys' fees incurred in opposing the efforts to compel testimony or records from the Mediator. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitration, judicial, or other proceeding: (a) views expressed or suggestions made by another party with respect to a possible resolution of the dispute; (b) admissions made by another party in the course of the mediation proceedings; (c) proposals made

or views expressed by the Mediator; or (d) the fact that another party had or had not indicated willingness to accept a proposal for resolution made by the Mediator.

13. **No Stenographic Record.** There shall be no stenographic record of the mediation process and no person shall tape record any portion of the mediation session.
14. **No Service of Process at or Near the Site of the Mediation Session.** No subpoenas, summons, complaints, citations, writs, or other process may be served upon any person at or near the site of any mediation session upon any person entering, attending, or leaving the session.
15. **Termination of Mediation.** The mediation shall be terminated: (a) by the execution of a settlement agreement by the parties; (b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile; or (c) after the completion of the session, by a written declaration by the Mediator to the effect that the mediation proceedings are terminated.
16. **Exclusion of Liability.** The Mediator shall not be liable to any party for any act or omission in connection with any mediation conducted under these rules.
17. **Interpretation and Application of Rules:** The Mediator shall interpret and apply these rules.
18. **Fees and Expenses.** The Mediator's daily fee shall be agreed upon prior to mediation and shall be paid in advance of each mediation day. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including fees and expenses of the Mediator, and the expenses of any witness and the cost of my proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise. Agreement and/or appearance at the mediation shall be deemed to have agreed to the fee schedule and hourly rate of compensation for mediation in excess of the scheduled time, unless written objection is made prior to the start of the mediation.