

MEDIATION WORKSHOP

DONALD F. PETERS JR.
PETERS & LYONS, LTD.

© Peters & Lyons, Ltd. 2011

What *IS* Mediation?

- Consensual process* of conflict resolution with assistance of a neutral, third party (the mediator)
- A meeting to see whether an agreed resolution can be reached

What Mediation is *NOT*:

Third party imposition of a decision

- Litigation/Trial (where the judge or jury *decides*)
- Arbitration (where the arbitrator *decides*)

ADVANTAGES OF MEDIATION OVER LITIGATION OR ARBITRATION:

- Quicker
- More streamlined
- Less expensive
- Gives both sides opportunity to understand other side's position—factually, legally, emotionally---and to realistically evaluate what might happen if mediation fails and the dispute goes to litigation or arbitration.
- Stronger possibility for a "*win-win*" outcome and thus (perhaps) healing of the rift that led to the dispute

DISADVANTAGES OF MEDIATION OVER LITIGATION/ARBITRATION:

- Can be a waste of time and resources *IF* :
 - under the circumstances, it is very likely that mediation won't result in agreement..., but who's to say?
 - or because of the nature and track record of the particular employee or union on the other side
 - or because the employer is taking a very hard line in the matter
- Can give the other side a "free-look" at your facts which can be harmful if your facts are weak and it may whet the appetite of the other side to proceed with litigation for big bucks
- Like any interaction, if handled badly it can be counterproductive

MEDIATION IS USED IN DISPUTES SUCH AS:

- Commercial* disputes (e.g. construction, securities, etc.)
(sometimes courts will insist the parties try mediation before trial)

- Divorce* (sometimes a step mandated by the divorce court)

-AND *EMPLOYMENT*

- Labor-Management disputes over:

 - a new labor contract

 - as a step before going to arbitration under the contract
(sometimes formalized in some labor agreements)

- Employee claims of discrimination, overtime pay, etc.
(brought before EEOC, IDHR, USDOL, etc.)

- Employee discrimination or other claims that are
already in litigation

- Institutionalized mediation within an employer's policies

WHO IS *PRESENT* AT MEDIATION?

- The mediator (the neutral party)
- The employer representative
 - Attorney, and/or HR rep, and/or hotel manager
- The employee and (sometimes) his/her attorney or other representative

[In the case of a mediation between a company and a union, the union representative(s) and perhaps union attorney]

HOW ARE MEDIATORS FOR EMPLOYMENT MATTERS *CHOSEN*?

Always by the *AGREEMENT* of the parties

[and *not* by striking names from a list, etc., as in an arbitration]

Sources:

- Federal Mediation and Conciliation Service (FMCS),
a free(!) service of the federal government providing
mediators to parties
- Mediators assigned to the EEOC, IDHR, who make themselves
available to parties who wish to mediate
- Professional mediators (often retired judges) from established
mediation companies \$\$\$\$
- Any third party, *agreeable to both sides*, such as:
 - an attorney, HR professional (retired or not) or almost anyone
trusted by the parties to be neutral and has mediation skills

HOW DOES ONE *BECOME* A MEDIATOR?

Hopefully, formally trained
(and experienced before they mediate for you!)

But some are just wise, experienced individuals, knowledgeable in an industry, who are recognized as a neutral and effective at getting parties together to resolve their disputes, who may never have been formally trained

WHAT ARE THE *ROLES* OF THE MEDIATION PARTICIPANTS?

-THE MEDIATOR

- To exude "*neutrality*" in the mediator's words, actions, gestures at all times
- To gain the *trust* of the parties
- To be an excellent *listener*, and an active listener
- To scrupulously refrain from being judgmental or forcing a party to do something the party doesn't want
- To not "own" the settlement, but rather let the parties own it
- To keep *order and control* of the proceedings and lay down ground rules for the parties conduct toward one another during the process
- To "write up" the resolution, if one is reached, so that the matter is ended when the parties leave the room
- To recognize when resolution is not possible and to end the mediation by giving the parties the hope that perhaps at a later time they may be able to resolve things

THE ROLE OF THE *PARTIES AND THEIR ADVOCATE* IN MEDIATION

- To be *prepared*, factually and position wise, and be prepared to give (at the mediator's request) a brief *opening statement* of the pertinent facts and articulate the party's position
- To *understand the consensual nature of mediation* and to check at the door your competitive instincts
- To act and speak in a *conciliatory* way and to listen with respect to the other side to avoid giving off negative vibes or the the impression that it's your way or the highway
- To *really listen* to the other side---understand the feelings and attitudes being expressed---they may be important keys to resolution possibilities
- To enter the mediation with a reasonably clear idea as to what modifications of your position you can live with, AND be open to consider some other possibilities you may not yet have thought about

WHERE DOES MEDIATION TAKE PLACE?

Anywhere-

- Offices of FMCS or EEOC, IDHR etc.
- At a company's offices
- At a neutral site, such as a hotel meeting room
- At the private mediator's conference room
- In a judge's chambers or conference room
- Any convenient, mutually acceptable site

OK, WE'RE HERE AT MEDIATION. *NOW WHAT HAPPENS?*

It's the mediator's "show", but *typically*:

-The mediator gives a well-rehearsed "*opening statement*" to make the parties comfortable with the surroundings, stressing his/her *neutrality*, stressing that he/she is not here to make a decision but to try to *facilitate* the parties' reaching a resolution of their own, and asking the parties if they have any questions as to the process.

-The mediator asks both parties to each give a brief *opening statement* to outline their positions. The mediator will ask and insist that the parties not interrupt each other.

-The mediator might ask neutral, soft-ball questions of either or both parties to flesh out their facts and positions, listening for obvious and underlying agendas, feelings, etc. that may be operating here.

(continued)

(continued- What *happens* at mediation?)

-Depending on the dynamics the mediator might let the discussion morph into the parties talking *directly* with each other, which is very positive *if* they are listening to each other and seemingly open to understand each other.

-Depending on how the discussion is going and the mediator's style, the mediator may *separate* the parties and ask permission of the one for he/she to go talk privately with the other (*called a "caucus"*).

-In "*caucus*," the mediator may ask questions of a party to understand their position and to see how the party thinks the matter might be resolved. *Confidentiality* in the caucus discussion is assured by the mediator, unless a party specifically *asks/authorizes* the mediator to communicate something (e.g. an offer) to the other party.

-In "*caucus*" the mediator may engage in a "*reality check*" so that the party can face the question of "what's next" if mediation fails?

(continued)

(continued)

-The *ART* of mediation is for the mediator to skillfully allow the parties to *come to their own conclusions* about how they may want to modify their original positions to reach a compromise. The mediator avoids telling a party, "*You ought to do this*" or "*Why don't you offer that?*" However the *ART* of mediation is for the mediator to gently *guide* the parties---without directing them. It can be a fine line. Effective mediators have the skill and sensibility to walk that line and maintain their neutrality throughout the process.

-An outcome of mediation where there is no resolution is not "bad." It is part of the reality of the process and a skilled mediator will understand where there will not be a resolution, at least at this point.

PLEASE DIRECT ANY QUESTIONS YOU MAY HAVE REGARDING THIS
PRESENTATION ON MEDIATION

to

DONALD F. PETERS JR (dpeters@peterslyons.com)
OR ANY OF THE ATTORNEYS OF PETERS & LYONS, LTD.
7035 VETERANS BLVD.
BURR RIDGE, IL 60527
630.887.6901

www.peterslyons.com