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ALTERNATIVE DISPUTE RESOLUTION

Guided Choice Mediation: Controlling the High Cost of Arbitration, Litigation

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Special to the Legal

WHAT IS GUIDED CHOICE MEDIATION?

Paul M. Lurie, a partner in the Chicago office of Schiff Hardin, has lectured and written extensively on the topic of guided choice mediation, giving a name, form and substance to what was once an amorphous process. Where guided choice mediation is utilized, the parties agree on the selection of a mediator whose role it is to assist them, in the early stages of a dispute, in achieving a timely resolution of that dispute. Typically, the guided choice mediator meets with the parties to educate herself or himself on the nature of the dispute and the factual and legal issues in contention. Of course, any discussions that take place are in confidence, as they are held in furtherance of settlement discussions.

The guided choice mediator will recommend to the parties what information should be exchanged and what additional discovery should be undertaken to enable them, at the earliest possible date, to engage in meaningful settlement discussions. The goal is to



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have the parties engage in the minimum amount of discovery necessary to enable the decision-makers to have information sufficient to participate in settlement discussions before the mediator. Most importantly, the parties, not a court or arbitrator, work with the mediator to design a cost-effective process which in turn will lead to an early resolution of the dispute.

IS GUIDED CHOICE MEDIATION A FAD?

The business community has pushed back against the heavy cost of litigation and arbitration, and the length of time it takes to resolve disputes. Why, they ask, should our counsel recommend mediation only when the case is on the verge of being tried or being heard by an

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arbitration panel, after we have already incurred the heavy expense of document exchange, email discovery, depositions, motion practice, etc.? Isn't there a better way to resolve disputes, they ask? Many question the motives of their counsel in recommending mediation only after they have already incurred the expense of exhaustive discovery and motion practice. Has counsel recommended mediation in order to avoid the possibility of an unfavorable award or verdict, they ask? If, through limited discovery, one can secure enough information to make a sound business decision regarding settlement strategy, what is the justification for engaging in extensive discovery with the

elusive goal of finding damning evidence that will turn the dispute conclusively in their favor? These are profound questions, and the answer is that in most cases little is gained by incurring the cost of exhaustive discovery when discovery, limited to the factual and legal issues in contention, usually develops sufficient information upon which to make sound business decisions regarding settlement.

WHAT QUALIFICATION SHOULD A GUIDED CHOICE MEDIATOR POSSESS?

Of course, the guided choice mediator should have expertise in the subject matter of the dispute. He or she should have litigation experience so that once the factual and legal issues are identified, the mediator can recommend to the parties the scope of limited discovery that should be undertaken, focused on those issues in contention. The guided choice mediator has no authority to order the parties to engage in limited discovery but rather uses her or his power of persuasion to secure the agreement of the parties to engage in limited, cost-effective discovery. By working with the parties, together and separately, the goal of the guided choice mediator is to establish a framework for the parties to commence meaningful settlement discussions, at the earliest possible date. Often, that includes addressing with the parties factual issues requiring the opinion of experts, and securing the agreement of the parties as to the role of experts at the mediation. To gain the confidence of the parties, the guided choice mediator must be an established, well-respected attorney known for her or his mediation skill and high ethical standards.

IF THE CONTRACT CALLS FOR ARBITRATION, IS THERE A ROLE FOR GUIDED CHOICE MEDIATION?

Ideally, the parties will engage a guided choice mediator before suit or a demand

for arbitration is filed. Some contracts, including many construction contracts, require that the parties engage first in mediation as a condition precedent to litigation or arbitration. If a contract requires mediation as the first step in the dispute resolution process, all too often counsel for the parties agree—perhaps unwisely—that it is too soon to mediate and waive the requirement or pre-arbitration or pre-litigation mediation.

The requirement of mediation, before arbitrating or litigation, presents an excellent opportunity for the parties to engage a guided choice mediator who will work with the parties in streamlining discovery. Mediation, instead of becoming an avoidable expense, becomes an important settlement tool if the guided choice mediator has diligently fulfilled his or her role of creating a settlement environment. Since arbitration, all too often, has morphed into litigation, with many arbitrators allowing extensive discovery, including electronic discovery, guided choice mediation is a cost-effective way of resolving disputes.

If the dispute is subject to arbitration, the parties can work with the arbitrator or arbitration panel in designing a scheduling order that will accommodate the work of the guided choice mediator. Even if the initial efforts of the mediator do not resolve the dispute, the guided choice mediator, rather than declare an impasse, can continue to work with the parties, with their agreement, to achieve a resolution through mediation before an award is rendered.

IS GUIDED CHOICE MEDIATION EFFECTIVE IF THE DISPUTE IS LITIGATED?

Admittedly, the role as guided choice mediator becomes more difficult once litigation is commenced. That said, most judges favor mediation as a way to settle cases, and if all parties agree to use the services of a guided choice

mediator, most judges will, in turn, agree to extend discovery cut-off dates as well as trial dates to accommodate a mediation. At the federal level, certain judges may agree to place the case in suspense status to accommodate guided choice mediation but will require counsel to submit progress reports on a periodic basis. Courts with “rocket dockets” tend to be the least flexible in extending deadlines, however.

CONCLUSION

Guided choice mediation is not a one-size-fits-all solution. Because of the cost associated with employing a guided choice mediator, this approach makes economic sense only if the claims are monetarily or substantively significant.

Litigators, increasingly, are employing mediators at the early stages of a dispute, mindful that it is in the best interest of a client for them to achieve a prompt, cost-effective resolution of a dispute. Many lawyers and their clients are unaware of guided choice mediation, which allows the parties to customize the dispute resolution process. More often than not, this leads to an early resolution of a dispute, which in turn will result in significant cost savings for the client. ●