

Mediation for CEOs



Authored By Jonathan Honig, Attorney at Feder Kaszovitz, LLP. The big change in ADR that is ongoing is the inclusion of outset mediation clauses in commercial contracts. Traditionally, contracts focused on three principal dispute resolution issues. First, they provided for court resolution or arbitration of disputes. Second, they provided for an applicable law. Third, they provided for a place for conflict resolution with either exclusive jurisdiction in the courts of one state or an arbitration forum in one defined place. There were secondary issues such as jury waiver but they did not substantially affect the architecture of dispute resolution. Mediation was not on the radar screen. Accordingly, a change from this paradigm to the paradigm of mediate first, litigate last is revolutionary. It is on the order of the difference between shoot first, ask questions later versus asking questions first and shooting later in a military setting. In both cases there are substantial advantages from the paradigm shift, but potential costs as well. The only general exception to this rule of provision for binding dispute resolution but no provision for mediation was in the government contracting area and in certain construction and insurance contracts, which often provided for mandatory outset mediation. The impetus for this change is four-fold. First, dispute resolution is expensive. Second, the costs of dispute resolution often grow dramatically over time such that matters that could be resolved relatively inexpensively earlier on end up being settled later at a far higher price, often as much as ten-fold. Third, there is a competitiveness issue and increased dispute resolution costs are inconsistent with the lean and mean and cost control focus of commercial entities. Indeed, in numerous circumstances legal expense substantially affects reported profit of public companies. Fourth, there are often reputational impacts of litigation that

counsel in favor of early resolution. As more decision makers have come to appreciate the substantial costs of litigation and the potential for more economical resolution of disputes through early settlement talks and/or mediation, there has been a move to incorporate mandatory upfront mediation (outset mediation) into the process. This has led to a corresponding addition to the conflict resolution clauses in commercial contracts. Traditionally, lawyers if they look to mediate at all have looked to mediate mid or late stage in litigation often after discovery, after motions have been brought or just before trial. My experience is that there are a number of circumstances in which early mediation, outset mediation, can be productive and have taken steps to encourage this evolution in dispute resolution. Below, ten matters relating to outset mediation are discussed. The first two items relate to whether outset mediation is appropriate. The third and fourth items relate to the strategic approach to outset mediation. The balance of the items relates to the negotiation and operational aspects of outset mediation clauses.

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