WILLIAM H. LEMONS

MEDIATOR • ARBITRATOR

4040 Broadway, Suite 616
San Antonio, Texas 78209
Phone (210) 224-5079 • Fax (210) 930-5082
whlemons@satexlaw.com

TO: Party Representatives

FROM: **WILLIAM H. LEMONS**, Mediator

RE: Information Concerning our Upcoming Mediation

WHAT IS MEDIATION?

Mediation is a *process*. As your mediator, I will attempt to facilitate an out-of-court settlement between the parties by building on areas of common agreement and by challenging the parties to think critically about the case, potential outcomes, and the business and other risks which will naturally and inevitably result from continued pursuit of the lawsuit.

WHY ENGAGE IN MEDIATION?

Litigation is an expensive process. It is costly to the parties and participants — not only directly, in terms of the money expended on lawyers' fees and litigation costs — but also indirectly: you, or your management team or family, must devote significant time and energy to prosecution (or defense) of the case. In a business context, this diversion of effort from "the business" of the business is expensive and often lethal. In all contexts, litigation is often emotionally draining as the parties must relive the dispute, even tedious details of it, with unrelenting frequency. The really bad thing is that what a judge (or arbitrator) or jury may do with your dispute is often uncertain: you may win, but you also may lose — or not "win" as much as you hoped for. You may battle to a draw. Moreover, court proceedings, and their outcomes, are public. While arbitrations are less public, the arbitrator's award becomes a matter of public record when the winning party seeks to enforce it by court judgment. ***Litigation is usually an unsatisfactory way to resolve a dispute and achieve closure to it.***

On the other hand, mediation is an effort to settle a dispute — privately and outside the glare of the publicity which attends public court proceedings. Most importantly, the parties retain *control* of the manner in which the dispute is resolved. If the dispute goes to arbitration or trial, the parties surrender control to the arbitrator or judge, who will decide the dispute for them and impose whatever result he or she deems appropriate under the evidence presented and the law as applied.

In mediation, there are no losers, only winners. If the mediation results in a settlement of the dispute, both sides save the expense, uncertainty and disruption of continued litigation and trial. Even if the mediation fails to produce a settlement, both sides have the satisfaction of having at least tried to resolve the dispute out-of-court and have had many of the fundamental premises of their ease tested by an independent third party.

MEDIATION IS DIFFERENT FROM ARBITRATION

Both mediation and arbitration are forms of "Alternative Dispute Resolution" — what has become known as "ADR." However, the purpose of mediation is very different from arbitration. So, too, is the function of the independent neutral who is involved in each process.

Mediation

In mediation, the services of an independent neutral . . . the mediator . . . are employed to assist the parties in *negotiating and reaching settlement of a dispute.*

* The mediation process is confidential — no information disclosed to the mediator during the mediation process may be revealed outside the mediation setting (or even to the opposing side without consent).

* Although all parties are expected to come to the mediation prepared to negotiate in good faith, mediation is an entirely voluntary undertaking — no party is required to agree to a settlement. The terms of any settlement that is reached are decided and agreed-upon by the parties, not the mediator. Indeed, they or their legal counsel actually draft the Settlement Agreement.

* The mediator is not a judge and does not function like a judge. The mediator is also not your lawyer. While the mediator may, if asked in the course of the mediation, give the parties and their lawyers his or her opinion or best judgment, based on experience, as to some aspect of a matter or issue in dispute, the mediator does not decide who is right and who is wrong, or for that matter any of the issues in the dispute. There is no "loser" in a mediation.

* If a settlement of the dispute results, it is because the parties decide that a settlement on *acceptable* terms is more advantageous, overall, than the continued expense and uncertainty of litigation. Unless the parties decide to publicize the terms of the settlement, those terms remain confidential.

Arbitration

The purpose of arbitration is to *decide a dispute* privately using the services of an independent, neutral decision-maker . . . the Arbitrator.

* While arbitration is voluntary in the sense that parties must have agreed at some point to submit a dispute to arbitration, once arbitration has been selected as the dispute resolution mechanism, no party may unilaterally withdraw from the process without consequence. You have anteed and are in the game.
* Although the arbitrator is technically not a judge, he or she functions in much the same manner as a judge does, and determines whether or not a claim should be allowed and, if so, in what amount or under what circumstances. The arbitrator receives evidence and decides the facts and the law, ultimately making an "award." There is a "winner" and there is a "loser." It is usual that there are oftentimes attendant publicity about, and financial or other consequences to, who won and who lost. The arbitrator's award is very much final and binding.

* The arbitration process is more confidential than a court proceeding because the arbitration hearing is "closed" (members of the public are not admitted and there is no public record). But the arbitration award, once filed, becomes a matter of public record. The winner (or his lawyer) normally goes to the press.

* An arbitration award may generally be filed in court and, once approved by the court, becomes a judgment with the same force and effect as a judgment which results from a trial.

What we are doing is a Mediation

The proceeding that you have retained me for is a ***mediation***. My job is to assist you in negotiating an agreeable settlement of the dispute in which you are involved. You have not hired me to "decide" the case. And so I won't.

MORE INFORMATION ABOUT OUR MEDIATION CONFERENCE

It is important to have a clear understanding about what will happen in our mediation conference. Here are some things to bear in mind as you prepare for it:

1. As indicated above, a mediation is really a settlement conference, albeit a more structured conference than one involving only the parties. While the parties are expected to come to the mediation prepared to negotiate in good faith, no settlement will be unilaterally imposed by me, and no party will be required to agree to a settlement. If a settlement results from our mediation, it will be because you (the client representatives) concluded that the terms of the settlement agreed upon are preferable to continuing the litigation. It's because you want to settle.

2. Our mediation proceedings are confidential, both as a matter of state law and of local court rule. I reproduce the Bexar County rules, or the federal court rules, as an appendix to our Agreement for Mediation. Neither I, as the mediator, nor the parties, or others present at the mediation conference (such as expert witnesses, insurance company representatives, etc.), are ordinarily permitted to divulge to others — including the judge or arbitrator assigned to the case — what goes on in our mediation sessions. Matters that are divulged to me in our confidential mediation sessions will remain confidential and I shall not disclose such matters without consent except as permitted or required by statute. To have it any other way would run counter to the purposes of mediation, which can only be achieved if the parties can speak, to me and to each other, candidly and freely. To reinforce the concept of mediation confidentiality, I will ask all persons present at our mediation conference to sign an Agreement for Mediation that I use.

3. I have asked you to provide me with a mediation memo that contains two parts:

   * The first part is a distillation of the essence of the facts which underlie your dispute and a recap of applicable legal principles. It will also include a section dealing with damages and other relief requested. This memo is not shared with your opponent.

   * The second part is a confidential analysis, again for my eyes only, that gives me the history of settlement negotiations in this case and your current settlement position. Of course, it also is not shared with the other side. I have asked you to also give me in this confidential memo (i) an estimate of the legal fees and costs incurred by you to date and a good faith estimate of the amount of trial time and additional expense required to try this case to conclusion if the case is not settled, (ii) the "other" consequences to you (and your opponent) if a settlement is not negotiated in the near future, and (iii) any particular business or settlement concerns or objectives which would assist me in helping craft a settlement of your dispute. It is strictly for my benefit as I prepare for the mediation.

   None of this is shared with the judge or arbitrator (if any) assigned to this case. Ever.

4. Unless there are compelling reasons not to, in my judgment, I will always begin a mediation with a joint session at which all parties are present. With the ground-rules and settlement and legal positions firmly in mind, I usually then separate the parties into different rooms, meet privately with each side, and begin what former U.S. Secretary of State Henry Kissinger popularized as "shuttle diplomacy".

5. If by good fortune, happenstance, my skill, the way the stars are lined up or your willingness to compromise, we reach a settlement at the mediation, I will require that counsel reduce at least the main points of the agreement to a writing which I will expect all parties and the attending client representatives to sign. I never have allowed parties who have reached agreement to leave without a signed settlement

agreement. While this mediation settlement agreement is a binding memorialization of the terms of settlement, and is entirely enforceable, I will leave it to the parties to draft more formal settlement documents if they want/need to do that, and will remain available after the mediation to resolve any disputes which might arise. In Bexar County, around 85% to 90% of the cases settle at mediation. Why should yours be different?

6. If the initial mediation session does not result in settlement, I generally will continue the mediation for a time to allow all concerned to sort out their opponent's position or rethink their own positions. We may or may not reconvene. Alternatively, if I think that another form of dispute resolution might be beneficial to the settlement process, or if I have particular settlement ideas, I may make suggestions to the parties as to where they go from here. But I stay in the loop and ask that you call me if there is another approach, if something changes or if you just want to re-think everything. I suppose the longest I was in the loop was 11 ½ months in a federal court matter involving a city and over 350 plaintiffs. It settled.

7. Lastly, if you have any questions or concerns about our mediation, I encourage you to share them with a lawyer of your choice — and I encourage your lawyer to bring them to my attention, if appropriate, so that I may address them.

8. I thank you in advance for your cooperation and sincerely thank you for this engagement. I will do everything possible to facilitate the settlement of this case on terms that are acceptable to you and/or your company. At times I may be more pro-active and perhaps more evaluative than some mediators you may have used in the past. If you feel this may present a problem or if you feel this becomes a problem during the mediation session, please call me, or pull me aside during the mediation, and discuss these concerns with me.