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Representing Agricultural Clients in Mediation

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I. WHAT IS MEDIATION?

Mediation is generally defined as a process in which an impartial third party intervenes in a dispute to assist the disputing parties in reaching some mutually agreeable resolution to their dispute. However, as interest in this alternative dispute resolution (ADR) process has grown over the past few years, many states have developed legal definitions of mediation which are more specific. The definition of mediation in the Texas statute set forth below is representative of definitions in many of the state statutes.

> Mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them. A mediator may not impose his own judgment on the issues for that of the parties .... A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement .... [A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.[1]

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1. TEX. CIV. PRAC. & REM. CODE ANN. § 154 (West Supp. 1994).

While there is a tendency to think of mediation in the context of a "meeting," it is important to recognize that mediation is more than just a meeting. Not only is it a process which usually includes one or more mediation meetings, but it is, in fact, an alternative forum. Understandably, it is difficult for attorneys and their clients to recognize mediation as an alternative forum because it does not have a "home." For example, the courthouse is the home for the litigation alternative; the place where the litigation dispute resolution process normally takes place. In contrast, mediation meetings may take place in any neutral location, and administration of the process may be carried out by the mediator, an ADR center or organization, or a court (in the case of court-referred mediation). Thus, despite its lack of a statutorily designated home, mediation is no less a forum in which differences can be resolved than the litigation alternative.

As stated above, the mediation process usually involves at least one meeting of the disputing parties. However, it is not uncommon to have more than one meeting in the process of seeking to resolve the dispute. By the same token, it is not uncommon to encounter the use of "shuttle" diplomacy in which the mediator goes back and forth between the parties in an effort to craft a workable solution to the problem. The meetings may be face-to-face meetings of the parties, caucus meetings in which the parties are placed in separate rooms, or some combination of the face-to-face and caucus meetings. It is not important for purposes of this Article to evaluate these approaches, but instead to realize that the mediation process is an informal process which provides the flexibility to tailor the approach to the needs of a particular dispute. But the reader should note that the important elements of the mediation process remain—an impartial third party, confidentiality, and the sovereignty of the disputing parties in deciding whether and how to settle their dispute.

II. WHAT ARE THE STAGES IN THE MEDIATION PROCESS?

The mediation process in its most simplistic form includes an opening and explanation of the process, bargaining and negotiation between the parties with mediator facilitation, and closure.[2] However, it is more helpful to examine a detailed list of the steps, or stages, of the mediation process, which include: (1) initial contacts with the disputing parties, (2) selecting a strategy to guide mediation, (3) collecting and analyzing background information, (4) designing a detailed plan for mediation, (5) building trust and cooperation, (6) beginning the mediation session, (7) defining issues and setting an agenda, (8) uncovering hidden interests of the disputing parties, (9) generating

2. Marsha Lynn Merrill, *Mediation, in* HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 37, 47 (Amy L. Greenspan ed., 2d ed. 1990).

options for settlement, (10) assessing options for settlement, (11) final bargaining, and (12) achieving formal settlement.[3]

III. WHAT IS THE ROLE OF THE MEDIATOR?

The mediator may assume a variety of roles in the dispute resolution process including: (1) opener of communications channels between the parties; (2) legitimizer of the rights of others to be involved in negotiations; (3) process facilitator; (4) trainer of unskilled or unprepared negotiators; (5) resource expander, to link the parties with outside resources; (6) problem explorer, to assist in defining issues, interests, and options; (7) agent of reality, to challenge unrealistic goals and settlements; (8) scapegoat, to take the responsibility for unpopular decisions; and (9) leader, to take the initiative to move negotiations forward.[4]

The mediator's participation may vary, depending on the individual mediator's style and the nature of the dispute, from a "mediator who refuses to state an opinion or get involved in the decision-making process to those who gleefully twist arms until the closing documents are signed."[5] The important point for the advocate to remember about the role of the mediator is that the mediator is not a judge and will not be rendering a binding opinion. While the mediator can greatly assist the parties in reaching some mutually agreeable solution, the advocate's attention should be focused on negotiation with the other parties, not convincing the mediator of the righteousness of his or her client's position.

With respect to the detailed stages of the mediation process which were listed above, any mediator, regardless of his or her style and the nature of the dispute, has some fairly well-defined responsibilities. In stages one and two, the mediator should make contact with the parties to secure an agreement to mediate and to assist the parties in selecting an approach to resolution of the dispute. Stage three, the collection and analysis of background information, is usually critical in agricultural disputes because these disputes tend to be very complex and fact driven. The mediator is responsible for coordinating the collection and analysis to ensure that the necessary information is available for meaningful settlement discussions. The mediator is primarily responsible for designing the mediation plan in stage four, including the timing and location of meetings, deadlines for exchange of information, and meeting format. In stages five, six, and seven, the mediator should be working to create an environment which is conducive to

3. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 32-33 (1986).
4. AMERICAN ARBITRATION ASSOCIATION, AN OVERVIEW OF MEDIATION (n.d.).
5. Charles Burdell, *The Role of the Advocate in Mediation*, WASHINGTON STATE BAR NEWS, Apr. 1993, at 44, 45.

settlement negotiations and assisting the parties in moving toward settlement. Uncovering hidden interests of the disputing parties, stage eight, is an area where the mediator can be invaluable to the parties. Often, even the parties themselves do not realize that the stated dispute is not the real dispute. An effective mediator can help identify the real dispute and what each party really wants—which is frequently different from that which has been stated in pleadings or otherwise. The mediator can often provide a fresh viewpoint to help the parties generate and assess options for settlement in stages nine and ten. And finally, in stages eleven and twelve, the mediator should assist the parties in focusing negotiations on final resolution of the dispute and reducing the mutually agreeable solution to an enforceable settlement agreement.

IV. WHY SHOULD AN ATTORNEY CONSIDER MEDIATION?

Attorneys should consider mediation for a number of reasons. First, it is generally accepted that mediation allows a dispute to be resolved more rapidly than litigation. Second, the mediation process is usually a less expensive method for resolving disputes than the litigation process. Third, and perhaps more importantly, the mediation process is better suited for resolving disputes without destroying the relationship between the disputants.[6] And finally, between ninety and ninety-five percent of all cases filed are disposed of without trial, the overwhelming majority by settlement.[7] Therefore, it is only reasonable to expect that any attorney should be interested in finding more efficient and effective ways to settle cases than traditional lawyer-to-lawyer negotiation.

A number of advantages which mediation may have over traditional negotiation have been identified. First, the responsibility for convening settlement discussions and initiating compromise can be shifted to the mediator, thus avoiding any appearance of weakness by either party and taking a burden off the attorney who has a client who is reluctant to accept the attorney's assessment of the case. Second, the mediator may be able to assist the parties in crafting compromises because information can be furnished in confidence to the mediator by both sides. In other words, parties may be able to reveal to the mediator reasons a particular offer is not acceptable, or potential ranges for settlement. Third, mediation allows an opportunity to discuss feelings and legally extraneous matters. While this may not be particularly important to the attorney, these issues may actually be the driving

6. Gary D. Condra, *Agricultural Loan Mediation: Who Benefits?*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM, Fall 1990, at 9.

7. LINDA R. SINGER, SETTLING DISPUTES at 4 (1990).

force in many disputes. Even if these issues are not the driving force in the dispute, they are often the obstacle to settlement.

Additionally, the mediation process encourages the participation of the principals in the negotiation process. This is particularly important because the principals are in position to directly communicate their needs from a settlement. The opposing attorneys are frequently surprised to find that they really did not know what their clients required from a settlement. However, this should not be surprising because the clients themselves often do not know what they would require in a settlement before the mediation process begins. Moreover, agreements reached in the mediation process generally have an extremely high rate of compliance because the parties actually participate in the crafting of the settlement agreement, as opposed to most other processes or forums which either impose a solution on the parties, or which include very little participation by the parties. Finally, the mediation process tends to leave the parties with a greater sense of satisfaction. This tends to be true, even when the outcome is unfavorable—probably because the process is designed to increase the understanding of all of the parties.[8]

In addition to the reasons listed above for considering mediation, in many states, it is becoming increasingly clear that an attorney has an affirmative duty to his or her client to not only be aware of alternative dispute resolution procedures, such as mediation, but also to counsel the client on the advisability of these processes to resolve the client's dispute, and to represent the client in the alternative dispute resolution process, if the client so desires, or the court so orders.[9]

V. WHAT IS THE ROLE OF THE ATTORNEY IN MEDIATION?

There are varying levels of involvement for the attorney/negotiator in the mediation process, which may range from that of an "active participant" to an "observer/advisor."[10] The extent of the involvement of the attorney should be dependent upon (1) the nature and complexity of the dispute, (2) the relationship of the parties, and (3) the relative sophistication of the client and the other party.[11] Of course, deciding on the appropriate level of involvement is a judgment call on the part of the attorney and the mediator. But the attorney should strive for a

8. NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY, PRACTICE § 3.3 (1989).
9. Jewel Arrington, *Alternative Dispute Resolution and A Lawyer's Duties to the Client and the Judicial System*, PROCEEDINGS OF THE FIFTH ANNUAL ADR INSTITUTE OF THE STATE BAR OF TEXAS G-1 (1993).
10. Merrill, *supra* note 2, at 51.
11. Kimberlee K. Kovach & Marsha Lynn Merrill, *Community Dispute Resolution Centers*, *in* HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 291, 302-03 (Amy L. Greenspan ed., 2d ed. 1990).

balance which both protects the client's interests and encourages participation by the client.

Above all, the attorney should avoid playing the role that he or she would play in litigation. In litigation the focus is on a battle with the other side, whereas in mediation the focus is on resolution. The attorney representing a client in mediation needs to realize that he or she is a negotiator, not a gladiator. Thus, it is the job of the attorney to assist the mediator in reaching a settlement, not to slay the opposing counsel.[12]

VI. HOW CAN THE ATTORNEY BE MORE EFFECTIVE IN THE MEDIATION PROCESS?

The attorney must approach the mediation process as a private negotiation, supervised by an impartial third party, the mediator, who will "be honest with the parties and will let them decide whether to settle."[13] The traditional assumption that all disputants are adversaries (if one wins, the other must lose) must be replaced with the assumption underlying the mediation process that all parties can benefit through a creative solution to which each agrees. The traditional assumption that all disputes must be resolved through application, by a third party, of some general rule of law must also be replaced by the assumption that the situation is unique and therefore not to be governed by any general principle, except to the extent that the parties accept such a principle.[14]

Resisting the tendency to become adversarial requires a negotiating strategy based upon "interest-based" bargaining ("win-win" negotiation), instead of "positional" bargaining ("win-lose" negotiation). Therefore, the attorney needs to focus on development of the type of negotiating skills described by Roger Fisher and William Ury.[15] The attorney should help the client focus on a realistic set of expectations. One way to approach this problem is to identify the client's "Best Alternative To A Negotiated Agreement," referred to by Fisher and Ury as a BATNA.[16] By the same token, it is important for the attorney and the client to consider the BATNA's of each of the other parties. Another party is no more likely to accept less than his or her BATNA in the negotiation than the attorney's client.

The attorney also must anticipate the following aspects of the mediation process. First, while the mediator will press the parties aggressively to participate in the negotiation process, the mediator will

12. Burdell, *supra* note 5, at 45.
13. ROGERS & MCEWEN, *supra* note 8, at § 10.2.
14. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 41-60 (1982).
15. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).
16. *Id.* at 101-11.

not continue the mediation process when it is evident that one party has no intention of participating in the negotiations. Second, preparation must go beyond organizing and analyzing the substantive issues in the dispute, to the development of a negotiating strategy which includes the mediator as a integral part of the overall strategy. Third, each party should be prepared to make an opening settlement offer. And fourth, the mediation process provides an excellent opportunity to find out whether the other party really has an interest in settling the dispute.[17]

Every case has its problems, so the attorney should not interfere with the mediator's attempts to discuss the weaknesses in the case with the client in caucus.[18] The mediator can frequently be helpful to the attorney in convincing the client that "the proposed settlement is the best available under the circumstances."[19]

The attorney should use the opening statement in the joint session to give a "well-reasoned business-like presentation and impress the other side with the veracity of the client's position."[20] An effective opening statement should be objectively given without overstating the party's case. It should be factually supported and should not misstate the evidence. The statement should simplify and address the critical issues, taking into account both strengths and weaknesses. And finally, the opening statement should be brief.[21]

The attorney should always try to use the mediator to his or her client's advantage. However, this cannot be accomplished if the attorney fights with the mediator for control of the process. Nor can the attorney make effective use of the mediator if the attorney, or the client, insists upon playing games. To make effective use of the mediator the attorney should recognize that (1) the mediator is supposed to be in charge of the process, (2) the mediator owes each party a duty of impartiality, and (3) the mediator has feelings just like anyone else at the table. If the attorney concentrates on providing support to the mediator in carrying out those responsibilities described above, the attorney will find his or her effectiveness in the mediation process greatly enhanced.

Mediation is not the place for threats, name-calling, or other verbal abuse. Mediation is a conciliatory process. Thus, it requires the use of persuasion.[22] But, since there is no judge or jury to persuade, the per-

17. Joseph B. Stulberg, *Tactics of the Mediator, in* DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK § 8.11 (John H. Wilkinson ed., 1990).
18. Burdell, *supra* note 5, at 45.
19. Stulberg, *supra* note 17, at § 8.11.
20. Burdell, *supra* note 5, at 45.
21. Jim M. Perdue, *How to Make an Effective Plaintiff's ADR Presentation*, PROCEEDINGS OF THE FIFTH ANNUAL ADR INSTITUTE OF THE STATE BAR OF TEXAS F-1, F-2 (1993)
22. Burdell, *supra* note 5, at 45.

suasion must be directed toward the other party. This is again one of those areas where it is difficult for the attorney to remember that personal attacks may win trials, but such tactics seldom encourage negotiation.

VII. WHICH AGRICULTURAL DISPUTES LEND THEMSELVES TO RESOLUTION THROUGH MEDIATION?

By far the most significant application of the mediation process in agricultural disputes has been in the area of the mediation of distressed or delinquent agricultural loans.[23] However, there are many other types of agricultural disputes which have been mediated, including disputes under livestock care and feeding contracts and noise/odor nuisance cases.[24] The mediation process also should be well-suited for resolution of seed, pesticide, and real property disputes in agriculture, as well as disputes which are certain to grow in numbers in the area of environmental concerns, as they affect farmers and ranchers.

Currently, there is pending federal legislation, House Bill 4153, the Agricultural Mediation Improvement Act of 1994,[25] which would extend the mediation process to the resolution of almost any dispute between any applicant or borrower and any United States Department of Agriculture (USDA) agency. Passage of this legislation would mean that the right to mediation would be extended to conservation compliance disputes, payment limitation disputes, and a myriad of other situations in which the farmer or rancher finds himself or herself in a disagreement with the USDA.

VIII. WHAT IS THE DOWN-SIDE TO PARTICIPATION IN MEDIATION?

One of the most often expressed concerns is that participation in mediation will impede preparation for litigation, leaving the party ill-prepared if a settlement is not reached prior to trial. However, this concern can be alleviated by using a two-track system.

> [O]ne [track] is geared toward litigation and another [track] is focused on settlement. This approach is particularly helpful in cases in which it may not be feasible to abandon litigation while settlement-oriented efforts are explored or where, as a practical matter, the threat of litigation is necessary for the opposing party to consider or agree to the use of an alternative mechanism.[26]

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23. *See generally* Gary D. Condra, Agricultural Loan Mediation, *in* HANDBOOK OF ALTERNATIVE DISPUTE RESOLUTION 181 (Amy L. Greenspan ed., 2d ed. 1990).
24. William Mueller, *Expanding Uses of Farm Mediation*, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION FORUM, Fall 1990, at 14.
25. H.R. 4153 103d Cong. 2d Sess. (1994).
26. Holly Bakke, *The Attorney's Role in the ADR Process*, N.J.L.J., Aug. 16, 1993, at 10.

Some have taken the position that there is no down-side to participation in mediation because "[e]ven if the dispute does not settle, something good usually happens. The parties have a better understanding of the other side's point of view, or the gap in their settlement position has narrowed."[27] Others, while not taking the position that there is no down-side, have limited the risks to the following:

1. Additional expense: While many attorneys fear that expenses will be even higher if no settlement is reached, this is usually not the case because of the advantages gained by the parties in the process.
2. Strategic damage: This is a real concern because it is difficult for the attorney and client to participate in the mediation process and play their cards close to their vest. In other words, if any element of surprise has escaped the discovery process, it probably will not escape the mediation process.
3. Bad deal: When the client is extremely averse to conflict or a poor negotiator, the mediation process can produce an unfavorable settlement.[28]

Without agreeing completely that there is no down-side to participation in the mediation process, it seems reasonable to conclude that the potential benefits from participation in the mediation process greatly outweigh the risks. The additional expense of participation in mediation probably will not exceed the costs of a couple of depositions; and most attorneys would prefer not to decline to take critical depositions, just to keep the expenses down. There is little doubt that some strategic edge may be lost from open discussions which include both the attorneys and the parties. However, in most cases, both sides gain as much as they lose from this exchange. In other words, the loss in strategic advantage works in both directions. While bad deals do sometimes result from the mediation process, bad deals also result from clients who run out of money to pursue litigation and clients who lose their resolve on the court house steps. The important point for the attorney to remember is that proper preparation with the client for mediation can minimize the risks of a bad deal.

27. Burdell, *supra* note 5, at 44.
28. ROGERS & MCEWEN, *supra* note 8, at § 3.3.