

# Mediation

## Mediation

### **SCHEDULE A MEDIATION**

In mediation, parties engage a neutral to facilitate a negotiated resolution of either some or all issues in dispute. The two key elements of mediation are party control and confidentiality.

- **Party Control**

In mediation, the parties retain the ultimate control of whether and on what terms their dispute is negotiated and resolved. While the parties select a neutral to assist them in mediation, that neutral is only a facilitator, not a decision maker.

- **Confidentiality**

In mediation, each party has the opportunity to have private, confidential, ex parte exchanges with the neutral serving as mediator, confident that the mediator may not disclose any information shared without the party's express direction to do so. And, as in early neutral evaluation, nothing shared or discussed in a mediation is admissible at trial and the mediator may not be compelled to testify. This individual confidentiality fosters the type of candid communication necessary for the mediator to effectively assist the parties with their individual assessments and negotiating strategy.

While mediation is perhaps most often looked upon as a last gasp effort at settlement undertaken late in the life of a dispute or immediately before a pressing trial date, Miles encourages its clients to consider the benefits that can be realized by considering mediation at any point in the dispute process.

- **Case Management Mediation**

*Offering parties the opportunity to consider engaging a mediator at the beginning of a suit to serve as a ready resource for case management.*

As mediators, we routinely promote the benefits of pre-suit mediation, encouraging parties to consider the advantages of working toward a resolution without surrendering control of their dispute to an outside agency, whether court, jury, arbitrator or special master. However, we are well aware that there are frequently contingencies, such as statutory limitations periods, that dictate the timing of filing of a suit, even in situations where the parties are in ongoing resolution mode.

In such situations, or even in "first notice" or other situations when a dispute is reduced to suit before resolution efforts have had a chance to mature, case management mediation can offer the parties a valuable, efficient mechanism allowing the parties to retain to themselves as much control of their dispute as possible in the context of ongoing litigation.

In case management mediation, the mediator is confidentially available to both parties, or the parties together, to assist the parties with any number of early or ongoing issues, including:

1. Negotiation of the scope of litigation holds
2. Negotiation of the scope of discovery, including e-discovery issues
3. Negotiation of discovery disputes
4. Negotiation of a case management plan, perhaps in explicit contemplation of case settlement mediation and the timing of same
5. Necessary renegotiation of any of the above

In addition, in specific regard to federal court mediation, the parties' indication of their engagement of a case management mediator in their, separate or joint, Rule 26(f) reports will likely be well received by the court as an indication of the parties' commitment to proceed thoughtfully and efficiently and not to overburden the court with discovery and other interim disputes unless absolutely necessary.

While it may be true that from a cost standpoint case management mediation is more ideally appropriate for larger value litigated disputes, parties to such disputes of smaller value should consider whether even a modest investment in case management mediation may pay dividends in efficiency and speed of resolution

- **Interim or Discovery Mediation**

Parties can also make effective use of mediation in the [interim](#) portion of the dispute process when interim disputes, often related to discovery or other information exchange, need to be resolved in order to allow the parties to move forward toward later settlement mediation or trial. Engaging a mediator in this context can keep interim disputes from adding significantly to dispute carrying costs and can allow parties in suit to avoid trying the patience and time resources of the court.

- **Settlement Mediation**

Mediation is perhaps most frequently undertaken later in a dispute, after discovery or other information exchange, in an effort to reach a full and final settlement of all issues. In this context, the parties and the mediator typically have the benefit of considerable information about the dispute and party positions that have matured through the discovery or information exchange process. In addition, for disputes that are in litigation, mediation at a later stage is often causes

the parties to be more focuses by trial schedules and dispute carrying costs.