MEDIATION: INSIGHTS FROM U.S. PRACTICE

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Mediation is very popular in the U.S.

- Litigation is very expensive in the U.S.
- Jury trials make the outcome highly uncertain.
- Courts are overburdened and look for ways to reduce their dockets.
Example of How Costs Motivate Settlement

• Suppose case where damages = $500k and likelihood P will win is 60%.
• If costs are $100 k each, P should accept any amount over $200k.
• D should be willing to pay up to $400k.
• Thus there is a settlement range of $200k to $400k.
But suppose parties do not agree on likelihood of success

- If P thinks he has an 80% chance, he will now insist on $300k.
- If D thinks P has only a 40% chance, he will only pay $300k.
- Thus, no margin of error.
- This level of disagreement is probably very common indeed.
Mediation Can Help With Process

• Reluctance of Parties to Broach Settlement.
• Give parties a chance to vent feelings.
• Gets the mediator, rather than the lawyer to tell the client the weaknesses of his case.
• Help especially with multiple party cases.
• Help find win-win solutions.
Mediation Can Help with Valuing Case

- Hearing the Other Side present its case forces parties to confront other arguments.
- Mediator can help by engaging in reality testing or perhaps even opine on parties’ chances.
- But parties may be unreasonable or even negotiate in bad faith.
- Should mediator be able to report this to the court?
Not all cases are suitable

- General arguments against settlement
- Some cases are strong and parties should be able to stand by their rights.
- Some cases are mainly about legal questions and need the court to tell the parties their rights.
- But, not everyone who thinks he has a strong case is right. Carleton Case.
Insurance Issues

• Insurers’ and insureds’ interests not always aligned, especially if excess exposure.
• Example: $100k insurance policy where damages are $500k, and case can be settled for $100k.
• Insurer motivated to reject, but insured may want to accept.
• US doctrine of bad faith. Mediation may establish reasonable settlement value.
Steps in a Typical US Mediation

• Pre-mediation written submissions
• Meeting attended by clients with authority to settle.
• Opening statement by mediator
• Opening Statements by parties
• Caucuses/ shuttle diplomacy
• Bring parties together to brainstorm and/or conclude settlement agreement.
E.U. Directive

- Generally a very positive step.
- Handles issue of inviting compelling mediation very well.
- No mention of authority.
- Need exception to confidentiality to deal with bad faith negotiation.