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Mediation Procedure

1. What is the typical mediation procedure in your country?

Mediation may be initiated either by the parties themselves as a purely voluntary exercise or by a court ordering the parties to mediate, perhaps as standard practice at a certain stage of proceedings or as a special direction given by the presiding judge. Whether voluntary or court-ordered, to qualify as "mediation" in United States practice, the decision of whether to agree to settle a matter remains entirely that of the parties involved. In mediation, no one can be forced into a settlement.

Written mediation statements given by the parties to the mediator before the actual mediation session are nearly universal. They typically cover the factual background of the dispute, the salient legal points or arguments, the procedural history and posture of the litigation, the outstanding factual issues remaining to be decided, the history of settlement negotiations, an assessment of the obstacles to settlement, and sometimes the basis on which the party would be willing to settle. Key documents or exhibits may be included with the mediation statement. The parties usually have power to determine whether the mediator may share the mediation statement with the other side, and authors should always state the party's expectation about sharing. Of course, mediation statements to be shared will be written differently than those intended for the mediator's confidential consideration. Most parties use mediation statements as their opportunity to get the mediator leaning their way, because a mediator inclined toward one side on the merits inevitably steers settlement discussions in a particular direction. The mediator typically reviews the statements a few days before the mediation session

and frequently arranges a private conference call with counsel in advance of the mediation session, during which a further candid discussion of the issues and prospects for settlement is had and the party gets the first glimpse of the mediator's take on the case.

The actual mediation session usually involves a single neutral mediator facilitating settlement negotiations between parties by conducting "shuttle diplomacy." Mediations are typically scheduled for a single day, but half-day mediations are common in straightforward cases and multi-day mediations are sometimes held when a significant number of different parties need to find common ground in order to settle a large web of disputes (such as in a bankruptcy).

The mediation session typically begins with a plenary session involving all the parties and their counsel. Depending on the mediator's style, this might be an informal get-to-know-one-another-as-people introductory chat or a more formal series of presentations by the sides. The mediator almost always gives introductory remarks on the mediation process, such as confidentiality and inadmissibility ground rules, and often advises the parties of the mediator's practice for knowing what information to share with the other side (e.g., the default is that all information is kept secret by the mediator unless the party expressly authorizes sharing with the other side, or the default is that everything may be shared unless a party instructs the mediator not to divulge something). The mediator will confirm any special rules or processes to be followed, such as settlement brackets previously agreed to or a system for making best and final offers at the end of the session. The mediator may foreshadow expected later events, such as the inevitable time when the mediator asks the parties to take less or pay more than their "bottom line." The mediator may also set expectations, or have the parties themselves clarify expectations, for what should be output of the mediation if negotiations are successful: a binding agreement, or a non-binding term sheet subject to further negotiations.

Opening statements by counsel during the plenary session are controversial. Many mediators don't like them because it gets parties in a confrontational mood rather than a settlement mindset. Some lawyers may try to insist on opening statements and may come armed with a PowerPoint, blown-up exhibits, charts, or a notebook of key documents, events, and issues. Equally, some lawyers argue against opening statements and might even say something to the mediator before the session begins, such as "If the other guy gets up to give an opening statement during the plenary session, this mediation will be doomed to fail from the outset." If the parties do not agree on the propriety of opening statements, the mediator would usually be invited to decide whether to have opening statements, though most mediators will work to develop consensus on the point.

After the plenary session, the parties are usually separated and put in their own break-out rooms. The mediator will then decide which side to start with, considering which side moved last, whether a current demand or offer is on the table, or any particular issues that need to be resolved or made negotiable. A

series of private meetings between the mediator and the sides ensues, and at some point the mediator will begin presenting settlement offers or terms of deal points for response. Further plenary sessions are uncommon until a deal has been reached. At some point, the mediator may decide to separate a party from its counsel, or deal with an aligned party separately (e.g., an insurer may caucus with a defendant for much of the day but may be separated when the insurer's contribution becomes an important issue).

How long a mediation is expected to last may affect negotiating strategy. If the venue will close at a certain time, that could be a hindrance or a tool used by the parties or the mediator. By the same token, mediations running late into the night are not uncommon, particularly in commercial cases, and the stamina of parties, counsel, and the mediator could well affect the course of the negotiations, as could the parties' and mediator's availability to reconvene for another day.

Individual parties are expected to attend the mediation session in person. So is a representative of a corporate party or other organization, it being essential that the representative has full authority to settle the case without having to consult someone not present. Other interested parties (such as an insurer) may also be expected or even required to attend in person (usually with their own counsel), but may be permitted to participate by telephone if the party's expected involvement in the settlement is limited. Outside counsel almost always participate in person, especially for individuals; for corporate parties or other organizations, sometimes litigators may be excluded in favor in-house personnel.

The venue may be neutral grounds, such as a facility maintained by the mediator's organization, but offices of one law firm or another are commonly used, as are court facilities if a current or former court official acts as the mediator. Choice of the city will vary with the needs of a case and schedules of the participants; it may well not be the city where the court handling the lawsuit is based.

2. Is mediation popular in your country? Why? Why not?

Yes. Many, if not most, significant commercial disputes headed toward or already in litigation wind up getting mediated at one stage or another, some multiple times. Mediation is also popular in class actions and personal injury cases. Parties often like the indirect nature of negotiations facilitated by a mediator, and the format may be viewed as necessary to getting bitterly opposed foes to a deal. Parties and counsel also like the non-committal nature of proposing mediation as a way to get negotiations started or back on track. Parties and counsel may consider a mediator likely to help overcome obstacles encountered in direct settlement negotiations, such as an intractable adversary or an opposing lawyer who seems to be giving "bad advice" to a party. Parties and counsel may consider it helpful to have a neutral person, especially one with a certain kind of gravitas, evaluate a case and advise an opponent (or one's own client) of the risks and likelihood of success, or even just listen to an aggrieved party's story. Mediations focus minds on settlement; in this way they draw attention away from the adversarial process and often get people invested in

settling, sometimes intensely focused on settling on the very day of the mediation. Mediations often comes at little cost compared to the alternative, just a day of counsel's time for the session, half the mediator's fees, whatever expense is incurred for preparing the mediation statement, any out-of-pocket costs, and the party's personal commitment of time to the process.

3. How does mediation differ from arbitration/state court proceedings in your country?

Technically, mediation is non-binding, while arbitration and state court proceedings are binding. A mediator cannot force any side to accept any particular terms. An arbitrator or a judge or jury can and will be expected to impose their will on the parties based upon their judgment as to the facts and the law; imposing terms is their role. No doubt as a reflection of the differing natures of the processes, lawyers and parties approach mediations in a very different way from arbitral or judicial proceedings.

Mediation in the United States is, fundamentally, a negotiation, with the parties' common objective being to reach mutually acceptable terms for resolving a dispute or number of interconnected disputes. Arbitration and state court proceedings in the United States are fundamentally adversarial. While certain aspects of the process, such as discovery, require some degree of cooperation, with opposing counsel working together to clarify facts or legal points, the parties' objectives are usually the opposite: for a plaintiff, to prove entitlement to money or injunctive relief; for a defendant, to avoid monetary liability or imposition of an injunction. The adversarial process in the United States has been likened to conducting open-heart surgery on a patient with another doctor in the room trying to murder the same patient. Mediations are nothing like that, at least in terms of the objective. At a mediation, the lawyers and the parties are all expected to work on the patient with the common goal of achieving settlement.

That said, mediations still have plenty of adversarial aspects within the framework of the common goal. Particularly if discussion of the merits of the dispute is allowed, lawyers will be expected to advocate and parties will be expected to state their positions. And because mediations in the United States are like negotiations, albeit mostly conducted through the mediator as intermediary, all the usual rules and expectations of negotiating apply. Knowing when to hold and when to give on a deal point, knowing what to propose and when, knowing how to interpret the signals sent by proposals you are making and receiving, indeed knowing the signals being sent by the mediator through the topics the mediator chooses to discuss and how they get discussed, are all very important skills for a lawyer, and ideally a party, to have in negotiating with the other side to achieve not just any deal but a good deal or a better deal for your side. Deploying those skills well may fairly be viewed as adverse to the interests and objectives of an opponent, but lawyers should also sense the limits of such adversariality so as to remain within the common objective of achieving a settlement, lest the lawyer run the risk (or let the client run the risk) of causing the mediation to fail.

4. In your country, what are the typical disputes where mediation works? When does mediation not work?

Mediations are commonplace in complex commercial disputes, particularly those involving multiple parties or stakeholders (such as insurers), and other disputes with high stakes. Parties to class action litigation often elect to mediate, especially if more than one group of parties or lawyers is involved on either side. In fact, mediation would be suitable for almost any high-stakes dispute, in part because it can be an ice-breaker for getting bitterly opposed parties with a lot at risk to change from a litigation mindset to a negotiation mindset. That is so because a party who suggests mediation usually loses no face as a result of making the suggestion. Sometimes the suggestion of mediation can signal exasperation with the other side's recalcitrance, rather than the nervousness or weakness sometimes conveyed by making a new settlement offer. Mediations also focus the mind on settlement for all involved, so they can be particularly useful in cases where the litigation activity is especially high and the people involved need a reason to put down the levers of litigation and pick up the tools of negotiating. That said, almost any dispute is suitable, in principle, for mediation.

Mediation does not work when the parties are not genuinely ready and willing to settle. That can be so for a limitless variety of reasons, from a party's mind not being in the right place, to a lawyer not advising a client well, to a client not having buy-in from all interested stakeholders on its side, to unrelated issues or objectives that remain unresolved standing in the way of a settlement, to market pressures, to unrealistic expectations, to a desire to use this mediation—including potentially its failure—to send messages to an opponent or others. Mediations might also fail because one party has not laid the groundwork to achieve settlement on its desired terms or has sent the wrong signals in advance of the mediation.

5. What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?

As mentioned above, all the usual rules of negotiations apply, just with the added complexity of the mediator acting as a go-between who might be filtering the messages parties are trying to send during the negotiations. Being that filter, and choosing which points to negotiate first and which to save for later discussion, are key roles and critical contributions of the mediator to the process. Merely walking from room to room with numbers adds little value. A mediator using experience, skill, and judgment to choose how to get the ball rolling on an agreement by finding common ground on one issue before moving to another—especially in a complex commercial case where a business or competitive relationship between the parties may be expected to continue after the dispute—is essential to a productive process. By the same token, a mediator should exercise judgment on what not to share with the other side, which messages not to deliver, which grounds not to stake out. For a successful mediation, the parties should be

willing to put themselves in the mediator's hands and trust the mediator's judgment.

That has its limits, of course. If one participant in a mediation senses that its position is being sidelined until the end, perhaps with the other parties' or the mediator's intention of railroading that participant into a deal for the sake of making or saving a deal already agreed by the others, then that participant's lawyer would be best served by making its concerns known to the mediator.

Parties should contribute their views of the psychological and personality dynamics among the parties and counsel in advance of the mediation. Especially in commercial disputes, clients have probably had a fairly longstanding business or competitive relationship, so should know each other well and should know the business at issue well (and if one doesn't, that can be exploited). Lawyers have likely been living and fighting the dispute for a long time before referring it to mediation, certainly longer than the mediator. So lawyers should use mediation statements (particularly if confidential) or the private pre-mediation consultations with the mediator to identify important psychological or personality dynamics (e.g., he's a stubborn old man; she built this business from scratch; that lawyer is a pain; that lawyer takes intractable positions but does eventually give in; this party is someone we can do business with; that party can't be trusted; that lawyer doesn't know what he's doing; these clients shouldn't be in the same room together; the other side will do a deal if you get the party away from the lawyer who's riding the gravy train of litigation). These insights into how you or your client perceive your opponent or opposing counsel can be some of the most valuable tools to give a mediator. A skillful mediator will gather these insights from both sides, evaluate how they compare, and use that information to craft a strategy for building consensus toward a deal.

Before going to mediation, lawyers should advise clients, particularly those not terribly experienced with mediation, to bear in mind a psychological point about the mediator. The parties have just hired the mediator to put together a deal. The engagement will likely be brief. The mediator doesn't stand to win or lose anything if the dispute settles or it doesn't, not in the way that the parties and the lawyers involved do. But the mediator's assigned task, and the mediator's interest in having a good reputation as a mediator or in doing good service for a fellow or superior judge, make the mediator strongly disposed to do whatever it takes to achieve a deal. Good or bad, achieving a deal—any deal—is all that matters to the mediator. So parties need to be wary and keep their wits about them, especially if the mediator decides to separate the client from counsel.

And of course, counsel should remind clients of how they assess their opponent and opposing counsel, though this is likely familiar to the client if the client has been involved in the dispute long.

6. Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary

between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?

The facilitative and evaluative styles are both common, and some mediators use both in a single mediation. Many mediators start with the facilitative style and resort to the evaluative style as necessary to keep parties talking or to get one to yield on a point. The evaluative style is usually best used for raising doubts in a client's mind, be it about their prospects for success in continued litigation or the soundness of counsel's advice. The evaluative style is often most effective when it comes not from a professional mediator but from someone with an authoritative perspective, such as a former judge or a senior lawyer who frequently represented clients in similar positions. Choosing a mediator who can shift into the evaluative style and speak authoritatively to your opponent is an important tactical aspect lawyers should bear in mind when setting up a mediation.

The mediator's penchant for adopting an aggressive approach is also an important tactical consideration when choosing a mediator. In many cases, a lawyer will choose a mediator likely to "get in your face" (preferably the other guy's face) to settle the case, or will avoid an aggressive mediator if it would disadvantage one's own client. Having good insights on a prospective mediator's style is essential groundwork to lay before putting a client's case in the hands of a mediator. Picking a mediator's name from a list without any personal or local knowledge of the mediator's style and experience with particular kinds of cases would be very risky. Mediators who typically settle car-wreck cases or medical-malpractice cases (even high-dollar ones) or employment cases may not be well suited to mediating a complex commercial case.

Mediator

7. How is the mediator chosen/appointed in your country? Is there a list?

In voluntary mediations, and sometimes in court-ordered ones, the parties choose the mediator, with the selection usually tailored to the particular needs of the case, bearing in mind the considerations referenced in answer #6.

8. Who is an eligible mediator? What hinders a mediator from accepting a mediation?

In most United States jurisdictions, mediators must be accredited as a certified neutral by a regulatory body, such as a State Bar Association or an arm of the judicial branch. This certification is not altogether difficult to obtain and usually requires a small amount of formal training. Mediators need not have been judges, nor (in most states) must mediators have a given number of years' experience as lawyers. And mediators need not have any significant exposure to a given field of the law or industry. That said, the best choice of a mediator will often be someone with extensive experience in the legal field at issue or the underlying business. Mediators should have a certain gravitas, and having the sort of gravitas (and sometimes empathy too) necessary to prevail on the lawyers or clients involved in a dispute is an important consideration when selecting a mediator.

A lawyer who has prior exposure to a matter (other than as a mediator in a prior mediation) would usually disqualify himself, even if the prior exposure does not qualify as an ethical conflict of interest. Certainly any mediator who himself or through his firm has an ethical conflict with any participant in the mediation should disqualify himself or obtain knowing and informed waivers of the conflict from all involved. (To avoid such conflicts, many mediators dissociated themselves from major law firms, either joining a boutique or small firm, setting up solo practice, or working exclusively as a mediator through an association of neutrals, such as JAMS.) Prior exposure of this sort and ethical conflicts are fairly rare.

Prior professional or personal associations between the mediator and a lawyer (or, more unusually, a client) do not necessarily disqualify a prospective mediator. Even in major cities in the United States with large bars, most major commercial litigators will be familiar with the mediators who mediate such disputes, and most likely have mediated with a given mediator in the past. This, and any other professional or personal associations generally should be disclosed to counsel during the mediator selection process, if only to make sure that one's opponent goes into the mediation viewing the mediator as a genuine neutral.

The most likely hindrance to a mediator accepting an appointment is scheduling. The best mediators are in high demand. Many also serve as arbitrators, which are more likely to absorb large blocks of time in a neutral's schedule. Some are semi-retired from the practice of law or the bench, so do not work the same kind of schedule as many active litigators. Starting with the probably limited availability in a mediator's schedule, the limited availability of lawyers and clients (and third parties, such as insurers) must be layered on, then the time pressures created by the litigation itself—such as significant case deadlines—or the pressures bearing on the business all conspire to make scheduling a mediation difficult and sometimes force parties to resort to a second choice of mediator.

9. Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?

Yes. See comments in answer #8.

10. Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?

Yes. Retired judges quite commonly serve as mediators. Active judges do too sometimes, provided they are not presiding over the case being mediated. It is almost unheard of for the judge presiding over a matter to act as mediator, and many participants and outsiders alike would call into question the propriety of the judge taking on this role because it necessarily involves *ex parte* communications with parties or counsel. Active judges, including more often than not a judge on the same court as the judge presiding over a matter, might act as mediator as a favor to a presiding judge who wants to see a case settled. More commonly, judges refer a case to a subordinate judge or quasi-judge for mediation (or parties ask for the case to be so referred). This practice always carries the risk of shop

talk in chambers between the mediating judge and the one presiding over the case (e.g., the plaintiff wanted way too much money, the defendant believes it will win on a certain legal point, the lawyer is getting in the way in the interest of earning a bigger fee), though running this risk is sometimes desirable; strictly speaking, though, the mediating judge should not disclose anything about the mediation to the presiding judge other than the single ultimate fact of whether the case settled. Mediation before a judge is technically viewed as a separate voluntary exercise not part of the court process, even if it was ordered by the court; but of course the mediation will be taking place within the context of the state court proceedings.

Mediation legislation / Relationship between State Courts and Mediation

11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?

Generally, yes. Because, as mentioned above, there are usually certification processes for mediators in many federal and state courts throughout the United States, these courts have implemented at least basic rules or guidelines governing the behavior of mediators. In a nutshell, the driving force for implementing guidelines for mediators is to ensure that mediation is conducted professionally, impartially, competently, and confidentially. The rules regulating the mediation process may differ slightly from jurisdiction to jurisdiction within the United States, but most have at least one form of mediation regulation, and may have more than one, if said mediator is also an attorney and thus bound by his or her ethical obligations as an attorney as well. For instance, Florida has a certification process for mediators and maintains the Florida Rules for Certified and Court-Appointed Mediators. Those rules provide minimum requirements to be met before a person may be deemed a county court, circuit court, family court, dependency court, or appellate court mediator. These rules set forth education and experience requirements on a points system. The rules also set forth standards of professional conduct and a disciplinary procedure. Those rules have been adopted by federal courts sitting in Florida too, which means that individuals who are certified mediators in federal court are held to the standards set forth in those Florida state rules.

12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?

Most courts in the United States actively encourage mediation, and in many jurisdictions, courts require the parties to mediate before their case can proceed to trial, and even go so far as to appoint a mediator for the case if the parties cannot themselves agree upon a mediator. Most federal courts in the United States require the parties to hold a scheduling conference early in the case in order to propose a timeframe for the case, and those jurisdictions require the parties to agree upon a deadline by which mediation must have taken place and been concluded. Upon the parties' submission, federal courts will issue scheduling orders that include a deadline for completion of mediation. Similarly, in many state courts, mediation is required before cases can proceed to trial. Therefore,

although the parties retain much control as to the choice of the mediator, the timing of when to conduct mediation, and how the mediation itself will progress, mediation has evolved in the United States from a purely voluntary process to one that is very much intertwined and part of the litigation process itself.

Courts usually do not enter monetary or other sanctions for failure to have mediated (unless a party has been proven to be particularly obstreperous or otherwise intentionally trying to avoid mediation), but the "sanction" is often a court's refusal to allow the parties to proceed to trial without having first mediated. Therefore, it behooves parties eager to move their cases along to willingly work to schedule a mediation.

One of the challenges faced during mediation is a party's good faith, or willingness to actively participate meaningfully in the process. Because courts have grown tired of having to resolve motions filed by parties accusing each other of not having mediated in good faith or not having sent someone who has proper settlement authority, some courts are now requiring parties to file a "good faith certificate" in which they state affirmatively that they agree to participate in mediation in good faith and are sending a representative with the appropriate decision-making authority to agree to a binding settlement during the mediation. Courts have similarly included language in their rules governing mediation to describe what settlement authority means, which is a helpful tool for lawyers when they are counseling their clients about settlement values and strategy. Even in cases where the facts suggest that the reasonable settlement offer may be zero dollars, the parties must consider whether an offer of zero, or maximum offer of zero, would actually meet the definition of "good faith."

13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?

Agreements reached during mediation are enforceable in principle, and generally such agreements do not have to be confirmed by a court, with some notable exceptions. The overriding factor on enforceability is whether the parties intended to be bound to an enforceable agreement or had merely reached consensus on some deal points while intending to be bound only later when a comprehensive agreement is reduced to writing. As in any negotiated settlement, parties should make clear whether they intend to be bound, and the conclusion of the mediation is the ideal time to make that point very clear. That said, even when parties do intend to be bound by the accord reached at mediation, practitioners may find that only agreements reduced to writing and signed by the parties during the mediation are enforceable. Many litigators have war stories about leaving a mediation late in the evening, thinking the parties had reached an agreement in principle, but being too tired to draft a settlement agreement, only to find out shortly that there was no agreement—or that the other party is using the lack of a written agreement to back out of a deal. Therefore, it is a best practice and strongly suggested by all mediators and seasoned litigators that a written settlement agreement be signed by the parties before they leave a mediation. Of

course, in complex commercial cases, sometimes lengthy settlement agreements are required, so mediators often, at a minimum, require the parties to agree on a list of essential or material terms for the agreement, and sign that list. In such situations, the parties agree to be bound to that list, even as they state that they will endeavor to work together on a more comprehensive settlement agreement.

Circumstances in which court approval of a settlement may be required include settlements reached in cases pending in bankruptcy court, where court approval is mandatory, or class actions, in which a settlement must be approved by a court. There may well be other situations in which court approval may be required in large or complex commercial cases.

The consequences of requiring court approval mean that there is an opportunity for non-settling or affected parties to object to the proposed settlement. This is often the case in bankruptcy court where a debtor or trustee may settle with a creditor or defendant in an adversary proceeding and other creditors or parties affected by the outcome may attempt to object to that settlement. It is also an important factor in class-action litigation. Class-action plaintiffs' lawyers, whose fee often depends on the case settling, must always be mindful of the potential for a class member who is not a named plaintiff appearing in the case to object to the settlement, whereupon litigation over the fairness of the settlement ensues.

Further consequences of requiring court approval or confirmation of a settlement mean that any such settlement will not be confidential, as the terms are required to be disclosed in court filings that are made part of the public record. Therefore, parties mediating in cases where court confirmation is not required need to weigh the benefits of being able to keep settlement terms confidential against obtaining court approval of such a settlement.

14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?

One of the overarching principals of mediation throughout the United States is that mediation is completely confidential. Parties may not disclose anything that was said in a mediation in the court proceedings themselves. What parties disclose to mediators individually are also confidential and cannot be shared with other parties without the disclosing party giving the mediator specific permission to share those disclosures with the other party. The reason behind the strict confidentiality of the mediation process is simple: to encourage frank and open discussions during mediation that may assist in helping the parties reach an agreement.

The only possible exception to this strict confidentiality rule would be when a party has commenced an action seeking discipline of the mediator for improper conduct, at which time it may be necessary to disclose the mediator's actions during the mediation process. However, discipline or sanctions against mediators is highly unusual in the United States; therefore, such disclosures are exceedingly rare.

Conclusions

15. What are the pros and cons of mediation?

The pros of mediation include the potential for a resolution of a case on the parties' terms without having to submit to a factfinder, whether a judge or jury, for such resolution. Mediation places the parties in charge of the resolution, whereas having a trial takes the control of the outcome from the parties and places it in the hands of a judge or a jury that may not understand the nuances of a parties' position or the law governing the parties' dispute. A mediation often can bring closure to a dispute much faster than taking that dispute all the way to trial. It can be a way of bringing an end to the need to spend money on attorneys' fees and costs, which can become incredibly expensive as a case progresses. Mediation can also be helpful to point out weaknesses in one's case, especially when the mediator uses an evaluative approach and frankly expresses his or her thoughts on a parties' theory of the case or the relative strengths or weaknesses of the parties' position(s). Mediation can also be helpful to perhaps narrow the issues to be tried at trial. For instance, if there are more than two parties mediating, mediation may result in a settlement for at least some of the participants and thus reduce the parties whose claims must be resolved at trial. Or, in more limited instances, mediation can result in a partial settlement, where the parties may agree to narrow the remaining issues for trial.

The cons of mediation are primarily cost, futility, and the impact it may have on a client's emotions or position. Mediation is generally not free, and depending on the type and size of case, the fees charged by a mediator can be quite high. Highly experienced former judges who serve as mediators can command high hourly rates, and if a mediation extends all day or multiple days, those fees add up. Generally, they are shared equally among the parties, but it can still cost a party thousands of additional dollars. Another con is the potential that mediation will not resolve the case and may be simply an effort in futility. A mediator's style or strategy can greatly influence or impact the success of a mediation. If one party could have benefitted from an evaluative mediator who sharply pointed out the shortcomings in the party's position, then a mere number-passing mediator will likely not bring the parties to resolution and the mediation process will not be productive. Lastly, if the parties adopt a very contentious style during opening remarks, or if a lawyer has not adequately managed a client's expectations of the process, there may be a lasting toll on the client's emotions. It has been the author's experience that aggressive approaches during opening statements by parties have a quelling effect on the other party's willingness to negotiate and do not help facilitate a spirit of cooperation and compromise. Also, if a client comes to a mediation with too much confidence that the matter will resolve (and likely, will resolve according to the client's wishes or demands), then that client may end up sorely disappointed when the other party's offers or demands never even come close to approaching where the client hoped the case would resolve.

16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

Generally, no. The United States considers itself one of the leaders in mediation and is likely seen more as a leader or the country doing the influencing, rather than the one being influenced.

17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?

See the answer to #15 above with regard to the costs of mediation. In some instances, where a party can demonstrate a definite hardship, a court may require the other party to fully bear the cost of mediation rather than splitting it evenly between the parties. Some courts offer court-annexed mediation, in which lawyers or former judges volunteer their time as a public service to the justice system and the courts, in which case mediation might actually be free. But the old maxim may apply: you get what you pay for.

18. Are there current mediation trends in your country?

In general, more and more courts are requiring mediation as part of the litigation process, and implementing requirements such as the ones outlined above to ensure that the parties explore mediation. Other trends include the use of mediation in other alternative dispute resolutions like arbitration. In fact, the American Arbitration Association now offers a mediation service, and such service can be used in conjunction with an arbitration.

19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.

Yes. The United States has a very long history in the use of arbitration to resolve disputes. Given the audience for this report, we do not believe it is necessary to explain arbitration beyond the fact that it is an extrajudicial dispute resolution process in which the participating parties select a neutral decision maker to resolve their dispute. Arbitration in the United States can be binding or non-binding, and more often than not, it is binding, although many states may have laws governing non-binding arbitration. Non-binding arbitration is often a very streamlined procedure that results in an award that parties may opt out of, but at their peril, as refusal to accept such an award may result in the imposition of the other party's attorneys' fees at the end of a case if the opting out party does not prevail at trial. Other types of ADR include the use of early neutral evaluation, where the parties hire a neutral to provide an evaluation and assessment of the parties' dispute prior to the filing of an arbitration or litigation. Certain types of contracts, like construction contracts, also include the selection of an initial decision maker, whose role is to resolve disputes during the performance of a contract, in the hopes that such resolution will facilitation the parties' completion of their obligations under the contract.