CANADA LEWIS MEDIATIONS

UNDERSTANDING MEDIATION

1. What is Mediation in Texas?

Mediation is a flexible, non-binding process where a skilled impartial third party facilitates negotiations to help participants reach their own mutually acceptable solutions. Unlike a judge, a mediator does not impose decisions, obligations, or judgments on either side.

- **The Facilitator's Role:** The mediator does not hear testimony or decide the outcome of the dispute. The mediator asks questions and reframes issues to help parties understand each other's perspectives. Sometimes mediators challenge your legal position or damages model to identify risks at trial that might lean in favor of settlement.
- **Voluntary Resolution:** Cases resolve only if all parties agree to the outcome. Since every party holds an "effective veto," you can participate without fear of being forced into a settlement.
- **Limitation on Mediator Authority:** Under **Tex. Civ. Prac. & Rem. Code § 154.023**, a mediator is specifically tasked with encouraging reconciliation and settlement, but may not impose their own judgment on the parties.

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2. Strict Confidentiality Protections

Texas law and the Fourth Circuit rules both emphasize "strict confidentiality" to encourage frank discussions.

- **Non-Disclosure:** Statements, documents, and electronic information generated during mediation are generally excluded from court files.
- **Participant Conduct:** All participants—including the mediator and attorneys—are prohibited from disclosing discussions to the judge or outside parties regarding discussions in mediation without specific approval.
- **Texas Privilege:** Under **Tex. Civ. Prac. & Rem. Code § 154.073**, any communication made by a participant in an alternative dispute resolution (ADR) procedure is confidential and is not subject to disclosure or admissible as evidence.

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3. Preparing Your Strategy

Preparation involves shifting focus from "winning an argument" to "solving a problem".

- **Analyze the Risks:** Consider the "disruption of further litigation". Ask yourself: What is the risk of losing? Could the case be appealed? Could the other party file for bankruptcy?
- **Identify Broader Interests:** Look beyond the legal claims to your core values or commercial interests.
- **Avoid Fixed "Bottom Lines":** While you have limits, setting absolute boundaries in advance can prevent you from profiting from creative solutions that arise during the session.
- **Texas "Good Faith" Expectations:** While Texas law does not strictly mandate that you *must* settle, many local court rules (like those in Harris or Dallas County) require parties to participate in "good faith" and remain for the duration of the scheduled session.

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4. Maximizing Success on the Day

To get the most out of the process, keep these principles in mind:

- **Decision-Makers:** Appropriate decision-makers with full authority to settle must be present and available to actively participate.
- **Active Listening:** Be willing to understand—though not necessarily agree with—the other side's concerns and legal arguments in their favor.
- **Realistic Assessment:** Evaluate your litigation costs and your likelihood of success realistically before the session begins; and re-evaluate as you learn more throughout the mediation process.
- **Be Creative:** In court, judges can only award money for damages or injuries, but in mediation other options are available. Be willing to consider non-monetary solutions that get you more of what you actually wanted or needed from this situation.
- **Consider Broader Issues:** What would a fair resolution look like, and how would it feel to have the dispute finally over? What could you do with the time and money you have currently allocated to this litigation?

- **Flexible Formatting:** Be prepared for **"joint sessions"** (everyone together) or **"caucuses"** (private meetings with the mediator).