ADR: The 10 Greatest Myths About Mediation

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1. *"If The Other Side Suggests A Certain Mediator, I Don't Want Him."*

Some counsel and parties still adhere to the belief that if the other side suggests a certain mediator, he must be biased or otherwise unacceptable. Both sides should recognize that in order for mediation to be effective, the mediator must have the confidence and respect of both parties. While mediator bias may indeed exist at some levels, any mediator concerned with his long-term reputation would never risk an accusation of bias.

Rather than being a negative, the opponent's familiarity with the mediator may instead work to your advantage. At a Mediation Advocacy program co-sponsored by the NASDR, a panelist who is senior litigation counsel for a major broker-dealer was asked what is the most important thing he looks for in a mediator. His succinct reply: "I want someone that the other side will respect." Sophisticated mediation practitioners recognize that the most important part of mediation is often having someone the other side will listen to. If the mediator has their respect and a good track record of achieving settlements with your opposition, chances are he has the ability to help you settle your dispute with them as well.

2. *"Suggesting Mediation Is A Sign of Weakness."*

As mediation has gained in acceptance and popularity, the so-called "wimp factor" has become less significant. Still, a segment of the population clings to the old school belief that anyone who suggests mediation must lack confidence in their case. For this reason, many attorneys still prefer that a mediator or mediation administrator approach the other side to "broker" the mediation. In order to avoid a perception of weakness, you may hear corporate counsel represent that it is "company policy" to either mediate or at least discuss settlement at a certain stage of the proceedings.

The simple fact of the matter is that while mediation necessarily entails some level of compromise, parties will play their negotiating cards as aggressively as the case merits. As a result, cases settled at mediation generally resolve for a number very close to their maximum settlement value. By suggesting mediation, the only necessarily correct presumptions one can draw is that the initiating party perceives a benefit to using a neutral party to facilitate settlement discussions and realizes that suggesting mediation does not reflect negatively on their case.

3. *"Mediation is a Waste of Time Because We're too Far Apart."*

One of the explanations most commonly provided for not mediating a case is the parties' perception that settlement is unachieveable. If mediators took seriously the opening demands or offers bandied about by many litigants, most cases would never get settled. While it sometimes takes a sharp knife to cut the fat off of the parties' initially unrealistic positions, once done, most cases settle despite the posturing and big talk. If most settlements were not confidential you would be amazed how little correlation often exists between the parties' initial positions and the ultimate settlement figure reached.

4. *"I Have A Strong Case, So There's Nothing to Gain by Mediating."*

According to LeDona Withaar, Mediation Administrator for the NASDR, Western Region, this is one of the main reasons given by counsel for rejecting mediation. Often, out of curiosity, the Administrator will follow up to ascertain the outcome of such a rock solid case at arbitration or trial. "I can think of a number of cases," reports Ms. Withaar, "when that 'slam dunk' case ended in a poor result for the 'sure winner.' Cases are rarely as clear cut as some people think."

The revised list system of securities arbitrator selection has thrown a monkey wrench into many an experienced practitioner's ability to accurately predict the outcome of a case. Moreover, experience tells us there are few "sure things" when it comes to litigation. Many a fine lawyer has been surprised at trial by what his client failed to tell him. While you may accept a little less at mediation, you will also avoid the bad loss and the accusations that often go with it.

5. *"The Other Side Isn't Interested in Negotiating in Good Faith."*

People and companies have a lot of different reasons for settling cases, many of which are never made known to either the mediator or opposing counsel. I once had a claimant's counsel very candidly tell me that he wanted to mediate a certain case because "it's a 'dog.'" Meanwhile, that same attorney had been busy telling opposing counsel how he was going to cream them if the case went to hearing. As a result, the opposing counsel thought mediating would be fruitless. After the case settled at mediation, respondent's counsel expressed his surprise at the "reasonableness" of the settlement figure. Simultaneously, claimant's counsel was expressing his delight that he had gotten a decent sum from a case he desperately wished to dump.

Conversely, I've had broker-dealer's counsel confide in me that they "need to settle" a certain case because of regulatory or supervisory issues, perhaps entirely unrelated to the merits of the particular customer's claim. The opposing attorney had no idea this might be an issue affecting his case. Respondent's Counsel feared correctly that any sign of weakness would put blood in the water. At the mediation, claimant's counsel was surprised by the broker-dealer's flexibility and the case promptly settled. For the broker-dealer's counsel, what he most needed was a safe and confidential environment in which to get the other side to the table. Both sides achieved their objectives.

Although seldom expressly stated, some parties settle to avoid scheduling conflicts, to avoid dealing further with an abrasive or difficult client, or because they suspect the client is being dishonest with them. There may be corporate shake-ups, internal strife, or a company retreat interfering with the trial date. As mediators, we may never know what truly motivates a certain party to seek a settlement. Often, we are just the facilitators of unknown objectives.

6. *"I'm Afraid the Mediator will Try to Ram his Number Down my Client's Throat."*

This simply falls into the category of choosing the right mediator for your particular case, interests, and style. Because of the very fact that we mediators often do not know what motivations may exist under the surface, (and because my ego is not large enough to presume I can foresee the precise outcome of a case) I seldom interfere with the parties' ability to control the amount or terms of the settlement. Bottom line, you don't have to accept anything you and your client are not comfortable with. Be strong. If you fear the overbearing mediator, check references carefully and make sure you select a mediator who allows you to maintain ultimate control over the negotiations.

7. *"If the Mediation Isn't Successful, I've Wasted Time and Money"*

There are many valid reasons to consider a mediation successful even if it does not result in a settlement: Among these: (1) Your client knows you put his/its interests first, and tried to resolve the case short of trial, (2) You may learn something valuable about your case and/or that of your opponent, (3) You may benefit from a neutral source of evaluation you presumably value and trust, (4) You may be forced to evaluate and prepare your case earlier rather than later, which may in turn result in a better prepared case. Rarely is mediation a failure or a waste of time, even if a settlement is not the direct result of the process.

8. *"Mediation Is Only Effective On the Eve of Trial/Arbitration."*

Many cases do in fact only settle on the eve of trial, but this is primarily due to both sides' lack of preparation or the belief that the looming trial is the only pressure point that will bring the opponent to the table. When confronted with the hard reality that the opponent is not going to blink, and having focused more fully on the actual risks and costs of trial, parties often get down to meaningful settlement discussions. Only then do they find that the case could probably have been settled much earlier.

Of course, you as counsel must determine what is the best and most opportune time to mediate a case. It may in fact be just before trial. Very often, however, the case can and should be resolved well before it gets to that stage.

Situations in which mediated settlements occur early in the case often seem to follow certain patterns: (1) the value of the case is such that protracted litigation is not warranted: (2) The parties are familiar with the claims and/or opponents, and are comfortable with their ability to evaluate the case early, (3) One party or both has an alternative motivation to settle (e.g., multiple claims pending, potential insolvency of a party, regulatory concerns, etc.), or (4) A pressure point occurs or is created which motivates the parties to settle.

Trial or arbitration is not the only meaningful pressure point for settlement discussions. For the same reasons that cases settle just prior to trial, many cases can be successfully resolved right before dispositive motions are heard or major discovery is conducted. My advice: try to maximize your negotiation leverage by timing your mediation to coincide with a pressure point in your case. Once trial is looming, both sides are faced with the same risk and preparatory concerns and your advantage may have dissipated.

9. *"Mediation Is Little More than an Opportunity for My Opponent to Obtain Free Discovery."*

The exchange of information at mediation is, of course, a double-edged sword. Don't forget that you have the control over how much information is disseminated in the mediation process. If this is truly a concern, instruct your mediator to keep certain matters in confidence. Such a wish must be obeyed. In most instances, however, there is really very little that is secret between capable counsel and intelligent parties. If you are concerned about disclosure of sensitive information, confirm with the mediator before he leaves the room that such matters will not be communicated to the opposition without your express authorization.

10. *"My Client won't be happy unless he gets his day in court"*

Occasionally this is true. Sadly, these litigants need and require a decision, whether good or bad. These are clients you would typically reject unless you were being paid on an hourly basis.

For the more rational client mediation often acts as a substitute for the trial process. It has been said that in certain cases, mediators must wear the hats of both psychotherapist and settlement referee. In that an effective mediation often deprives the litigants of the opportunity to air their grievances to a judge or jury, the mediator who recognizes this need should provide the forum for this catharsis to occur. In short, a sympathetic ear is often as important to the individual party as sound analysis is to his attorney. Shortcutting this process can undermine the basis for many an otherwise achievable settlement.