Mediation Myths: Barriers to the Use of Mediation

By Steven C. Bennett

Surveys of mediation participants and their counsel routinely report satisfaction with the process, reflecting appreciation of the ability of parties, with the assistance of capable mediators, to maintain control over resolution of their dispute, avoid the delays and expense of arbitration or litigation, and adapt the process with great flexibility to meet their needs. Yet, despite a record of success, in some quarters mediation continues to receive skeptical treatment as an unnecessary step in dispute resolution. This article briefly addresses some common myths that may explain why mediation has not, to date, reached its full potential.

Myth: Skilled Lawyers Don't Need Mediation

Lawyers are natural negotiators, and litigation lawyers are generally familiar with negotiation and settlement of disputes. So, why bother with mediation? Let the lawyers work it out. That common-sense instinct ignores the qualities and processes that an experienced mediator can bring to dispute resolution. The mediator is an independent neutral, with "no dog in the fight." A mediator's assessment of the strengths and weaknesses of a case thus may prove especially effective in getting parties to think hard about their settlement positions and about the costs, burdens, and delays of pursuing litigation. An experienced neutral, moreover, is adept at finding creative options for settlement of a dispute, which parties might not consider on their own. Perhaps most important, a never-say-die mediator can also push the parties to consider settlement, even in circumstances where prior negotiations have produced an impasse and even hostility. The ability of a mediator to facilitate simultaneous negotiations with multiple parties in a complex dispute is also a particularly valuable tool, which is not generally available to individual lawyers acting on their own.

Myth: Only "Elite" Mediators Are Worth the Money

Experienced lawyers and clients often have their "go-to" preferred list of mediators, and the less-experienced may sometimes assume that anyone not on such an "elite," recommended-by-name list are somehow incapable of handling complex or difficult disputes. As a result, elite mediators are in demand and can command quite high rates, reinforcing the view that only expensive mediators are worth engaging. A related form of the myth is that well-known ex-judges are "best" for mediation of stubborn problems because they are used to commanding parties and counsel in the courtroom, and they provide special gravitas when delivering evaluations of the likelihood of success of claims and defenses. These assumptions ignore the fact that most disputes, even sizable commercial and financial disputes, can be mediated successfully by any number of qualified, experienced practitioners, many of whom offer quite reasonable rates. And more, since there is in many jurisdictions, especially large metropolitan areas, often an abundant supply of highly qualified mediators, parties and their counsel generally have a great array of choices. The internet has facilitated greater access to information about the qualifications and experience of mediators, making it easier for parties and their counsel to find the "right" mediator for their particular dispute. Further, many jurisdictions have adopted mandatory training and experience requirements, at least for mediators serving on court-annexed ADR rosters, giving parties even greater assurance that the rank-and-file of mediators can provide excellent service.

Myth: Court-Mandated Mediation Doesn't Work

Objections to court-mandated mediation often question the wisdom of mediation at early stages in a dispute. Counsel and their clients may claim that they have not conducted sufficient discovery, a key motion is under consideration, or the parties have not had a chance to discuss settlement among themselves. Other objections proceed from the assumption that parties have little choice in court-annexed mediator selection, or that it is unfair to impose the costs of appearance before a mediator on unwilling participants. These objections ignore the fact that court-sponsored mediation has developed, and grown, over the past decades, and that experience with these programs has demonstrated significant ability to resolve disputes, to reduce burdens on the courts, and to offer parties a relatively simple means of access to mediation resources. Recent statistics from around the country suggest that in an array of cases, and with a wide variety of program features, court-annexed mediation can achieve settlements in 50 percent of cases or more. For most courts, local rules permit parties to "opt out" of mandatory mediation for good cause or to defer mediation when parties are not ready to participate. The rosters of available neutrals in many courts, moreover, are extensive, providing parties with a range of choices. Most courts also impose significant training and experience requirements for court-annexed mediators.

Myth: A Court-Conducted Settlement Conference Is the Same as Mediation

Parties and counsel sometimes opine that if they must conduct settlement discussions at the direction of a court, they should do so with the least expensive neutral available—i.e., a court officer. Yet, a court-conducted settlement conference often differs from facilitative mediation. A

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settlement conference before a sitting judge is often mandatory because it is ordered by the court. Typically, the only parties that appear are those who are formally part of the litigation. For example, in a multi-party dispute, the settlement conference may omit parties who have not been joined in the litigation. Further, a record of the conference is often public, as a docket notation for the case, and the scope of confidentiality attendant to a settlement conference may be less clear than in mediation, where, presumptively, all aspects of mediation are confidential. The conference is generally conducted at the courthouse, using the court's facilities. Often, the conference is held in the chambers of the judge assigned to conduct the conference. The judge often has only a limited amount of time for the conference, and it is relatively rare for conferences to be conducted on more than one day. Many judges apply evaluative techniques, suggesting, in effect. that the parties settle because their "case is not as good as counsel thinks it may be." Significantly, moreover, this is an appearance before a judicial officer. Contending lawyers often treat the conference as the equivalent of a formal hearing rather than as an opportunity for creative, cooperative thinking about alternatives for resolution of the dispute. The imperative for the judicial officer is generally docket-clearing. Some courts use settlement conferences as a screening tool to weed out cases that should not clog the trial docket. Thus, in at least some senses, the "neutral" is not really neutral. Court-conducted settlement conferences can be effective, but they should not wholly supplant the mediation process.

Myth: Mediation Prevents "A Day in Court"

Many disputing parties, convinced that they are "right," and that the other side will be found wrong by a judge, jury or arbitrator, insist that they want their "day in court" to be heard. Yet, the fact is that most civil cases, sooner or later, will settle, even if no mediation occurs. Of the cases that do not settle promptly, many will be resolved through motion practice, often on issues like statute of limitations, or jurisdiction, which have very little to do with the merits of a dispute. If a case finally does make its way through the gauntlet of discovery and pre-trial motions, the actual trial or hearing process often does not permit a party to tell their "story" in the fullest sense. The facts relevant to the legal points at issue may be far less than the total history of the dispute. The cross-examination portion of the process may also focus on credibility issues and other unpleasant distractions from a party's central "story."

By contrast, mediation is flexible. Most mediators encourage the parties themselves to speak (not just their counsel) and encourage them to give a full picture of the dispute in their own words. Indeed, parties often find the mediation process cathartic, reporting satisfaction with a mediator's active listening processes. In the broadest sense, for many disputing parties, mediation offers the best, and sometimes the only, "day in court" they will have.

Myth: Mediation Is Pointless Unless a Settlement Occurs

Parties and their counsel sometimes insist that their dispute is "too complex" to settle or that the other side is "too stubborn" to listen to reason. They worry that a mediation process may waste time and money that could be better spent in preparing the case for trial. Even worse, many fear that mediation will provide the adversary with "free discovery" and make the process of litigation more difficult.

It is true that some cases simply cannot be settled, but they are, by far, the minority of disputes. Parties and counsel are often amazed at how even seemingly intractable disputes can be resolved through a dedicated commitment to the mediation process. Even where parties cannot settle an entire case, they may obtain at least partial settlement of their dispute or settlement of the dispute between one pair of disputing parties. Such partial settlements are much better than nothing. They show that settlement is possible, and they tend to encourage additional efforts at settlement by the remaining group of disputants. Even if there is no settlement at all, parties often can narrow issues for formal proceedings (in arbitration or litigation), and they may also brainstorm about how to separate parts of the larger problem for resolution through continued mediation. Parties may use the mediation process, for example, to agree, without the need for court direction, on the focus of additional discovery, which can perhaps help return the parties to negotiation or at least streamline the process of formal dispute resolution. Thus, mediation, even if "unsuccessful" in the classic sense of a complete settlement, may provide valuable assistance in the dispute resolution process.

Conclusion

It is easy to find fault with the system of mediation available in the United States. One major criticism is simply that there are multiple mediation "systems": private and court-annexed, rule-based, and ad hoc. Requirements for mediator training and qualifications vary. The range of specific applications of mediation systems, from divorce proceedings and commercial disputes to employment matters, and much more, means that there is no one-size-fits-all "best" structure for mediation of every type of dispute. A similar criticism, however, could be launched at most forms of dispute resolution—there simply is no one "best" system for resolving all disputes. The central focus of lawyers, constituent clients and interest groups, academics, policy analysts, lawmakers and judicial personnel should be on development and exchange of competent information that is beyond the myths. They should be focused on what works well in the design of dispute resolution systems, including the various forms of mediation, and what lessons may be learned from systems that are not so effective. Mediation is here to stay. The challenge is to make it better and the best forms more widely available.