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Understanding mediation

Mediation myths revealed

Robert A Harris

Myth number one: I'm a capable lawyer and I don't need to pay for a third party mediator because I'm a reasonable and capable negotiator who can interact with my adversary without outside help.

That may be true — but you are only one of at least four individuals involved. Your client is probably feeling very emotional about the event or dispute for which they are seeking a remedy, so if you try to share the potential weaknesses of his or her case early on in the relationship she or he may feel you are not the best lawyer for him. A mediator can deliver the same message and do so constructively.

More importantly, the principals are not likely at this juncture to resolve anything until they each have a chance to tell their story. A mediator will enable them to vent and perhaps overcome the emotional underpinnings of the dispute so that they can begin to address the appropriate business resolution. They may not have an accurate perception of the strengths of their positions. A case that seems sound when described by a client in the privacy of a lawyer's office may not be so healthy when exposed in a conference room to the scrutiny of an adversary. Mediation provides an early and inexpensive opportunity for a party to hear the other side's version and to receive feedback from a neutral and capable mediator. An effective mediator bringing perspective and creativity can serve you and your client well.

Myth number two: mediating a case too early will be a waste of time and money.

Separate yourself from the world of litigation. Just because you're used to seeing cases take years doesn't mean that the parties in dispute think that way. They want this dispute to be over quickly because they have businesses to take care of. Sometimes they cannot afford the luxury of delay.

A mediator will help the parties get to the

heart of the matter in a matter of hours rather than weeks or even months. Even if the case does not settle, mediation frequently serves to eliminate sufficient distrust so that the parties avoid costly and unproductive motion practice and discovery fights. It also helps set the tone for more productive and effective negotiations by signalling that your client and you are more interested in doing business than doing battle.

Myth number three: I can't mediate until discovery is over, because I might miss something important.

Face it, in most cases truly unknown material information is limited or non-existent. (For instance, this is particularly true in construction disputes where project documentation is readily available and daily, weekly and other periodic reports have been distributed to all parties as a matter of project administration. The results of the building process are also visible for all to see.)

Lawyers may insist on discovery overkill due to fear more than a real need for the information. How often in a routine commercial dispute does the cost of the discovery justify the information that is uncovered?

If information is needed, a mediator can help the parties structure a discovery mechanism and schedule with far less delay and expense than would result from following the standard practice procedures. That's good business.

Myth number four: mediation offers nothing I can't get from a judicial pre-trial.

We are fortunate to have many judges with the ability and desire to help parties resolve disputes. However, the judicial case volume is such that a busy court cannot routinely devote the hours of attention that often are needed to effect a resolution.

The beauty of mediation is that the parties control the timing and the agenda, as ►

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► well as the outcome. A mediator can devote one or more days to the parties to provide ample opportunity to work through issues, to provide parties an ample opportunity to tell their stories, and to help craft the resolution to their dispute. Mediation provides a nurturing environment that the courts rarely are able to replicate. (This aspect applies equally to the arbitration setting.) In a business setting, this can prove instrumental in helping to preserve business relationships, or, at least, in minimising any further deterioration. Again, that's good business.

Myth number five: my adversary will perceive an invitation to mediate as a sign of weakness.

If you have credible evidence and skills, you can invite an adversary to mediate because it makes sense to mediate. How about advising a client to include in its next commercial contract a provision that requires mediation as a precondition to

suit? The US construction industry has now adopted this approach in the majority of contract form documents available from industry associations.

When a dispute arises, the contract provision takes the issue of 'weakness' off the table.

Myth number six: by mediating, I won't earn the substantial fees the litigation will generate.

Perhaps by resolving a specific case through mediation, you won't generate fees totalling tens of thousands of dollars. However, you also won't incur a substantial uncollectible account receivable.

What you will generate is a client's trust and gratitude, which may well lead to an ongoing client relationship that will pay substantial dividends over the years. Your satisfied client also will be more likely to refer you to others if you resolve his or her dispute quickly and economically. Successful practices come from satisfied clients, not

unhappy former clients who have suffered lengthy, costly and unproductive litigation.

Let's face it. With the number of cases that we try, commercial litigators need negotiation and settlement skills perhaps more than trial skills. Give mediation a try. It's voluntary, it's confidential and it makes sense — business sense. ●

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