5 MEDIATION MYTHS, DEBUNKED

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Given the statistical reality that the vast majority of all civil lawsuits are resolved through some form of settlement before court adjudication, it should not be surprising that mediation has become increasingly relevant for parties and counsel in the landscape of dispute resolution. While mediation is frequently used at certain stages of litigation for settling legal claims, the mediation process seems to be still largely underutilized in regard to its scope, function and capabilities. It is not uncommon to hear parties, and lawyers, express reluctance to the use of mediation for reasons that are really misconceptions regarding the mediation process rather than elements stemming from rational analysis. Here are a few frequent misconceptions that often prevent litigants from achieving the full benefits of using the highly effective and flexible dispute resolution process that is mediation.

1. Mediation can fruitfully happen only after substantial discovery occurred in litigation.

Mediation can productively and effectively be conducted at virtually any stage in the lifecycle of a dispute. Parties, with the assistance of ADR-savvy lawyers and an experienced mediator, can design a mediation process that allows for informal discovery and exchange of information in a less adversarial and more efficient fashion than in litigation. Mediation has been successfully adopted in many instances before, and instead of, litigation, including in complex disputes requiring conspicuous exchange of information, technical expertise and structured proceedings to conduct settlement discussions. Too often the mediation process is erroneously conceived as just an isolated event involving settlement negotiations. Rather, mediation is a flexible process founded on the agreement of the parties, that can have a much broader scope than to exchange settlement demands and offers, and it

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can be efficiently adapted to the needs of the case and to those of the parties involved.

2. Joint sessions have limited value in the mediation process and increase animosity, friction and adversarial posture between the parties.

The use of joint sessions in mediation is a frequently debated topic among scholars and practitioners alike. It is undeniable that putting opposing parties together in the same room, across a table from each other in a legal process relating to their dispute, is an inherently challenging proposition. If not handled properly, joint sessions can lead to disruptive escalation of the dispute. However, it can be argued that the main reason why disputants seek the assistance of a mediator is precisely to help them address a delicate situation that they cannot resolve peacefully on their own.

A joint session represents an unparalleled opportunity in the mediation process. Joint sessions are useful for numerous reasons, including setting the tone and preparing the stage for the discussion to come, allowing the parties to once again explore direct communication (after likely having been shielded by their attorneys from doing so), developing understanding, asking for or offering an apology, assessing the other side's story and, ultimately, engaging in a collaborative process. At the very minimum, a joint session at the beginning of the process will allow the parties to give and receive mutual acknowledgment of the existence of different opinions and perspectives. In my experience, the one most important factor in the effectiveness of a joint session is the accurate preparation and the involvement of the parties themselves in such preliminary work. The mediator should assure that the parties: 1) are well informed on how the joint session will be conducted, 2) have a say on what should or should not happen in a joint session, and 3) have a clear understanding of the scope of the session, to avoid surprises. Understandably, any party who is "thrown into the ring" together with the opposing side without knowing what to expect, in a circumstance in which they may fear to be attacked, threatened or disrespected by the other side, would be primed for adopting defensive mechanisms and reactions likely to further conflict escalation. On the contrary, a disputant adequately prepared for mediation, and specifically for a joint session, will more likely be enabled to use that opportunity to express her or his views, concerns and feelings in relation to the dispute. Allowing for disputants to feel heard is probably one of the most effective components

in a collaborative process such as mediation, which enables the parties to broaden their perspective and adopt a more constructive and effective approach towards exploring options for resolution.

3. The parties should rely on the mediator to tell them how much the case should settle for.

Evaluative and Facilitative mediation models, or styles, have been a subject of debate, particularly among scholars, for quite some time. Many practitioners, including myself, agree that a good mediator is capable to adapt her style and techniques to the case, the parties, and the stage of the resolution process. In general, one very important tool that mediators have to assist the parties in assessing resolution options is to give them feedback in regard to what they hear and observe in the course of the mediation. Feedback could indicate a wide range of information, including someone's opinion on certain aspects of the case. The mediator's feedback can be very valuable for the parties because it can help them assess, in a confidential setting, how their arguments and their stories could be received by a neutral third party. However, using the mediator to hear from her or him how much a case should settle for represents a limited use of the resource that a mediator represents, and it could be ineffective or counterproductive, and arguably wrong.

Sophisticated procedures, such as litigation and trials, were created for the purpose of providing litigants with a fair opportunity to establish their rights based on proven facts and applied laws. Fact finders determine the value of a case after lengthy presentation of evidence under strict rules of procedures. Mediation is nothing like a trial. The scope of the mediation process is different, and the mediator is not given an opportunity to evaluate the elements necessary for making an accurate evaluative determination of the case. Rather, a mediator has an opportunity to explore a whole different spectrum of the elements involved in a dispute, such as the parties' interests behind their positions, and the intangible or undisclosed elements of value, that are often attributed by disputants to certain events, objects, or possible outcomes. All these elements are not considered in an adjudication process, because they are irrelevant to the determination of the value of the case; however they often turn out to be critical aspects in a negotiated resolution. The parties should consider the peculiar role of the mediator and use the neutral party to explore what can be achieved in the mediation process in order to satisfy their

interests. The facts and the law may be comparable across similar cases, but the interests of the specific parties of each case may vary wildly even among cases that appear identical from a legal standpoint. A good mediator would assure that the process focuses on exploring and satisfying the specific interests of the people and organizations involved to further a resolution, rather than focusing on persuading both sides of what the settlement value should be.

4. Parties and lawyers should focus on persuading the mediator of the strengths of their case to secure a better outcome.

One of the most frequent misconceptions about the mediation process is that by persuading the mediator of their strengths, parties can achieve a better outcome. Unlike in arbitration or litigation, in mediation the neutral third party conducting the process has no decisional power. Rather the power of determining the outcome of the process is shared among the parties. Therefore, trying to persuade the neutral is a far less effective tactic than to focus on persuading the other side, or sides. The distinction is not immaterial.

The 17th century philosopher Blaise Pascal, in his "Pensées", offers a powerful illustration of a critical element in effective persuasion. He says: "*When we wish to correct with advantage, and to show another that he errs, we must notice from what side he views the matter, for on that side it is usually true, and admit that truth to him, but reveal to him the side on which it is false. He is satisfied with that, for he sees that he was not mistaken, and that he only failed to see all sides. Now, no one is offended at not seeing everything; but one does not like to be mistaken, and that perhaps arises from the fact that man naturally cannot see everything, and that naturally he cannot err in the side he looks at, since the perceptions of our senses are always true.*" In mediation, unlike in litigation and arbitration, the parties have a unique opportunity to apply such valuable lesson to persuade and motivate the other side to agree to the desired outcome. While the mediator can assist all parties in analyzing and assessing strengths and weaknesses of the case, the parties can directly further their settlement goals by using the mediation process, and especially the joint session, to apply Pascal's lesson and actively seek to persuade the other decision makers in the mediation room of the validity of their views.

5. If the other side's opening demand, or initial offer, is too unreasonable, a party should not make any meaningful move, or any move at all.

One of the most common things to happen in mediation (based not just on my own experience but according to many well regarded colleagues) is that the initial demand/offer is at best received by the other side as disappointing, normally as insulting, and, occasionally, as outrageous. Welcome to mediation! It is just normal that the parties would start the negotiations from a position on the crossways of maximum self-protectiveness and idealistic aspirations. While sometimes the traditional negotiation "dance" may prove useful in helping the parties move their positions towards each other, it is often the case that such tactics frustrate one or all of the parties, and allow for positions to get entrenched at levels that the parties themselves know have no likelihood of succeeding in terms of settlement negotiations. However, the parties' tendency is frequently that to reciprocate the moves of the other side, offense for offense, till the point one or the other decides that they will not "bid against themselves." If in the context of direct negotiations such a concern is a valid and real issue, because of the dynamic of the one-on-one dialogue and the possible material disadvantage of exposing one's own position further, in mediation the dynamic is different, and the parties should use the mediator to their benefit in overcoming such obstacles. First, by using a neutral mediator the parties can eliminate the risk of triggering a reactive devaluation of their offer or demand by the other side. Second, a neutral mediator is in a better position to effectively deliver a demand or offer together with a message regarding the rational and reasoning supporting a number, as well as a neutral's feedback in relation to how the other side could perceive a certain move. A party, when put in the condition to have to respond to an "outrageous" demand or offer, should consider discussing with the mediator what type of move could be the most effective to validly explore realistic areas, ranges of possible settlement, without exposing themselves beyond what they consider a fair settlement proposition based on their own assessment of the case. Often it is far more effective to structure a demand or offer capable to test the real settlement appetite of the other side, rather than to make a move that protects a broad range of possible negotiation moves that would fall within unrealistic or impossible settlement zones.

CONCLUSION

Mediation is a process that can be adapted to each case based on the specific needs of the parties. It would be limiting for the parties to believe that it can be utilized only in certain ways, following certain structures and at certain specific moments in the litigation process. Parties should thoroughly discuss with their lawyers how a tool such as mediation can be best used to further a desirable resolution of their dispute, and should take the opportunity to interview mediators to inquire about what they can do for them in addition to shuttling demands and offers from one room to another.