Why Mediation Works...And Why It Doesn’t: One Mediator’s Perspective
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My 36 years of practicing law have included both civil and criminal litigation and engagements across many practice areas including: corporate, bankruptcy, probate, real estate, tax, intellectual property and family law. I have used that experience of late to act in a wide variety of matters as a mediator.

Looking back over those years and the matters that I have been privileged to mediate, I noted that when a matter settled in the course of a mediation I spent little time to analyze why it settled. I was just happy that it did. However, when a matter did not settle in mediation I struggled with why I could not get the parties to come to an agreement. What did I do, or fail to do as the mediator?

I have published several articles on mediation. After the recent publication of “Meltdown Mediation,”¹ a reader asked why some cases settle and others don’t. Fortunately, more of my mediated matters settled than didn’t. In attempting to answer that question, I came up with my own personal laundry list of “why” and “why not.”

When Mediation Works: the “Why It Does” Factors
Preparation: Clients who have not been properly introduced to the mediation process in most instances cannot know what to expect when attending the mediation conference. Some think it will be a court proceeding complete with someone in a black robe and a court reporter sitting in front of a shorthand machine. Others think they might be called upon to testify, as in a deposition. Still others are unnecessarily nervous and intimidated by the process.

Attorneys unfamiliar with the process, to some degree, often feel as their clients do. They either have not had the opportunity to participate in a mediation, or have had a bad experience with an untrained and inexperienced mediator.

One of the most important aspects of a successful mediation is the pre-mediation preparation of both attorney and client. An attorney with little or no mediation experience is wise to consult with a colleague with such experience, read an article or two on the process, and speak with a friend who serves as a mediator. A pre-mediation meeting with the client is essential. The client needs to be briefed on the mediator’s instructions, the presentation that will be made by the attorney—and possibly the client—and the approach to settlement that the mediator is likely to take.

Mediation is the exploration of settlement options. Both client and attorney should feel free to set forth and explore as many options as can be created. Options should not be limited to payment of money or turning over property. Solutions that are outside of the box often compel settlement. These may be an apology printed in a newspaper, a gift to the other side’s favorite charity, the purchase of goods at a special discount in contemplation of future business—anything one might imagine. Developing options for settlement requires preparation by both the client and the attorney.

Experience: The level of experience of the selected mediator is also an important factor. With all due respect to mediators fresh from judicial retirement who have not had mediation training, one should carefully select the mediator who has had a degree of formal mediation training and a track record of experience. Mediation is not an arbitration in which the arbitrator makes a decision. Nor is mediation a judicial settlement conference in which a judge often makes a settlement recommendation and attempts to force the parties to agree. The ideal mediator has formal mediation training and experience as a mediator. The mediator need not have experience regarding the particular dispute nor be an expert on the law involved. Mediation skills apply to all disputes because the goal is to reach a settlement; not to decide on who is right or wrong under the law.

Attitude & Motivation: When both client and counsel participate in mediation with the idea of reaching an agreement that resolves the dispute, the chances of a resolution are far greater than when they approach the mediation with the proverbial “chip” on their shoulders. Often a court will recommend, or, in some cases, order the parties to mediation. If the mediation is approached as merely attending in compliance with such a recommendation or order, the mediation session is over before it begins. Focusing on the legal issues to the exclusion of the practicalities of achieving a settlement can cloud the vision of the participants.

A positive attitude that a settlement will be achieved, with both client and counsel motivated to accomplish that goal, will go a long way toward reaching it.
Risk Analysis: An important aspect of litigation is the cost involved. Beyond real costs for attorneys, expert witnesses, court reporters, court fees, jury fees and the other costs involved with litigation, are the human costs involved as well. The time involved by the parties, the emotional attributes of litigation, and the effect on family members and friends, should all be considered.

Clients who take these parameters into consideration and weigh the costs of continuing litigation against the costs of settlement will achieve an appropriate result in mediation.

Forgive & Forget: Louis Smedes, a theologian, wrote a book titled, “Forgive & Forget,” in which he presented numerous illustrations about the advantages of getting past the disputes that one faces in life. Clients who understand the advantage of getting on with their lives and getting the litigation behind them are able to approach mediation with an attitude that leads to a resolution of the matter at hand. I often recommend the book to parties to mediation that I believe need the impetus the book provides.

Clients who are willing to approach mediation with the idea of forgiving their adversaries and getting on with their lives will have a much better chance of resolving the dispute than those who are unable to make forgiveness a part of their mediation preparation.

Perseverance: One element that frustrates mediators in many instances is the unwillingness of clients and attorneys to press on even though settlement appears to be impossible. After several hours of private and group discussions when everyone is starting to feel that no resolution is possible, those participants who want to give it one more chance are more likely to come to a resolution than those who want to pack up and go home. Taking a break, going for a walk, having a bite to eat, or even a cold beer, can change the atmosphere.

The parties who persevere and continue to explore ways to resolve the dispute find their efforts rewarded. Pursuing every avenue that can lead to a resolution takes time and effort, but it pays off in achieving a solution to the matter.

When Mediation Doesn’t Work: the “Why Not” Factors
As a starting point, if the foregoing elements are missing—the parties are not prepared, they have selected an inexperienced mediator, they have a negative attitude or lack motivation to settle, have not done a risk analysis, they are unwilling to forgive and forget, or lack the desire to persevere—the mediation is doomed at the outset. Even when some “Why” factors are present there are other reasons a mediation may not be successful. The five “Why Not” factors that I believe result in a failed mediation are:

1. Ego,
2. Misunderstanding of the facts,
3. Misunderstanding of the law,
4. There being no incentive for settlement, and
5. Telephonic and video conferences

Ego: A significant “Why Not” factor for achieving resolution in mediation is the ego of the parties. Sometimes it is one party, or one lawyer. Other times, it is everyone in the room. Even when every element of the “Why” factors points toward resolution, when ego comes into play, the settlement prospects become severely diminished. When a party thinks that she will not allow her opponent to get the best of her or that a settlement might make her look foolish to her peers or she has a fixation on getting the matter to trial so a jury can decide that she is right and her opponent is wrong, mediation will not work. One of the tasks that attorneys must undertake is to detect the ego factor early on, and take steps to eliminate it, if mediation is to be successful.

Misunderstanding of the Facts or the Law: Attorneys who represent clients in mediation sometimes have a disconnect between what the attorney understands to be the facts and the law and the understanding of the client. On occasion, in the initial mediation conference when each side makes an opening presentation, a client will turn to his attorney and whisper, “I never knew about that!” Or on other occasions, the mediation briefs of the parties will discuss a case as being controlling when the case was recently overruled. There may have been reliance by a party that the case was not only controlling but good law.

The lesson here is that clients need to spend some time with their attorneys to review the facts and be certain that both the client and the attorney know all of the facts and that every effort has been made to determine the facts known to the opponent.

Knowing the controlling law is helpful as well. However, one of the unique advantages of mediation is that settlements are often made notwithstanding the law and who is right or who is wrong. The attorney needs to be certain that the advice being given to the client as to the applicable law is not “off-the-cuff,” but is well researched so that embarrassment can be avoided.

No Incentive to Settle: There are occasions when the parties have been “encouraged” by a judge to go to mediation, or mediation is a contractual pre-requisite to litigation. Since mediation is not binding unless a signed agreement is achieved, some clients and their attorneys will go through the motions of
attending a mediation conference with no interest in working toward a resolution. In many court-sponsored programs the mediators are unpaid volunteers. The participants have no financial investment in getting their money’s worth. When the mediator is paid, normally in advance, there is a financial investment in the activity and a greater incentive in seeing that the investment pays off by moving toward a settlement. There are those mediations sessions when the client and her counsel sit and stare out the window, having no interest in what is being said; they are there to demonstrate that they have participated in the mediation to satisfy the court or a mediation clause in a contract. No matter how hard a mediator may try to motivate the parties, when one or both parties has no incentive to participate and reach an agreement, the mediation simply ends with a frustrated mediator lying awake that night trying to analyze what could have been done to incentivize the parties.

Telephonic and Videoconference Issues: When the mediation is set for a location that is at a great distance from one of the parties and a request is made to conduct the mediation by telephone conference call or by videoconference the chances of success are greatly diminished. Face-to-face mediations work best because the mediator can caucus individually with the parties, look at them in the eye and use all manner and means of persuasion to achieve a settlement. That is not to say that long-distance mediations never work, but they present a significant roadblock to negotiations when the mediator cannot take a participant aside for a confidential discussion, or take the lawyers into an adjacent room and explain the facts of life in a persuasive manner.

Conclusion
There are certainly other factors that might influence why a particular mediation doesn’t result in an agreement: the mediation took place too early in the litigation when the facts had not been fully ascertained, or it took place too late when positions had hardened to the point of no compromise, or the room was too hot, or it was too cold, or it started too early in the day or too late. Many factors influence the outcome of any dispute. However, the “Why” and “Why Not” factors discussed above play a significant part in whether or not any mediation will be successful.


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