THE FIVE BIGGEST MYTHS ABOUT MEDIATION

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The financial pressures caused by our struggling economy are causing many to reexamine the cost-effectiveness and utility of protracted litigation as a means of resolving their disputes. This reexamination has accelerated the growing momentum forming behind the use of mediation and other forms of alternative dispute resolution ("ADR"). Nevertheless, while mediation is starting to show signs of fulfilling its oft-repeated promise of being the "wave of the future," there are still a number of misplaced concerns that cause it to be greatly underutilized.

Myth #1 – *Discussing or proposing mediation is a sign of weakness.*

This myth stems from the mistaken belief that an offer to mediate demonstrates an uncertainty in one's case, and that mediation requires one party to capitulate or to compromise its positions and interests. Attorneys who regularly take their clients to mediation, however, know this isn't the case. Mediation is designed to facilitate constructive communication, to examine creative solutions to the problem, and to save the disputants a considerable amount of time and money. It is not a process by which one side has to give in, and it does not constrain the parties from touting the strengths of their case. Rather than signaling weakness, an offer to mediate should be seen only as an acknowledgement of the magnitude of the costs that lay ahead for both sides.

Attorneys who want to inquire about mediation but are concerned about the signal it will send can simply inform their counterpart that it is their standard practice to do so in every case given the financial burdens of litigation. Another option is to make mediation a mandatory step in a dispute resolution program or commercial transaction. Either way, standardizing the inquiry helps cut down on any misperceived notion of "weakness."

Myth #2 – *Agreeing to mediation might open the floodgates to more litigation.*

Another common misperception about mediation is that companies who settle their disputes will inevitably encourage future litigation from third parties. These companies seem to fear that word will spread that they are "easy marks," and that the floodgates will then open with people looking for free money. While companies may have a legitimate concern about creating future litigation, agreeing to mediate their current disputes is not likely to do so.

In fact, if anything, seeking to resolve one's disputes through mediation may actually help diminish the likelihood of future lawsuits. Unlike litigation, mediation is a confidential process conducted outside of the public's eye, and settlement agreements reached through mediation often contain a confidentiality provision prohibiting a discussion of the settlement terms. Moreover, an early resolution to the dispute ends the parties' searches for witnesses and documents, which, if prolonged through the discovery process, only lead to more people becoming aware of the allegations.

Myth #3 – *Going to mediation requires the parties to reveal all their evidence.*

Mediation generally works best when there is a free flow of information and ideas among the parties. That being said, there is no requirement that parties come to mediation and present every argument they plan to make if the case does not settle. In fact, attorneys representing parties at mediation often make a mistake when they treat it as an extension of the litigation process and spend their time arguing as though they were in front of a jury.

If the disclosure of certain information is an initial cause for concern, it is important to step back and to examine whether withholding it makes sense in the broader context of trying to reach a resolution. Is this information important enough that you think it might change the other side's view of the case? Or is this information or argument too inflammatory such that revealing it might actually decrease the chances of settlement? The reality of litigation is that discovery and

pre-trial disclosures strip away any real chance of springing a "Perry Mason" surprise; so, if the information is important, why not use it when it can do some good?

Myth #4 – *Mediation won't work because I'm right, and I want my "day in court" to prove it.*

This myth is expressed far too often. Clients frequently express themselves in stark black-and-white terms about who is right and who is wrong and inevitably cast themselves as the former. It does not seem to register with them that the other party is across town meeting with his attorney and simultaneously claiming to be right. While there are certainly times when one party is entirely blameless, it is more often the case that gray areas exist. Here is where a good explanation of the mediation process and the realities of that proverbial "day in court" can do wonders.

First, parties should understand that mediation does not require them to give up the mantle of being "right" – it only asks that they listen and try to seek some resolution to the problem. Second, the disputants need to have an appreciation of what their "day in court" will really look like. Contrary to popular belief, judges and juries do not have unlimited time and resources to examine all the issues between the parties. They often make their decisions based on limited and contradictory information, thereby leaving one or both sides disappointed and dissatisfied. In contrast, mediation allows those same parties to voice their concerns freely and completely and to maintain ownership of the decision-making process.

Myth #5 – *Mediation is a waste of time because this case will never settle.*

Some parties refuse to participate in mediation because they just know the case will never settle. In reality, the vast majority of cases settle at the conclusion of mediation. Many disputes seem intractable on the surface because the initial positions articulated by the parties can often be very far apart. As long as the parties attend in good faith, mediation is helpful at bridging even the widest of chasms

because it promotes constructive dialogue, creative problem solving, an examination of the parties' underlying interests, and a sobering reality check regarding the alternatives to settlement.

Moreover, mediation can play an important and useful role even if the parties fail to reach a global settlement. Generally speaking, each party leaves mediation with a better understanding of the other side's interests and motivations, a better understanding of the strengths and weaknesses of his own case, and a better appreciation of what it might take to resolve the dispute. Mediation also can narrow the issues in a dispute, and place the parties much farther down the path of settlement than they had been before. With all of these potential benefits, mediation is hardly ever a waste of time.

Mediation isn't the answer for every dispute. But, for the vast majority of them, mediation is a less expensive, quicker, more effective, and more satisfying option than protracted litigation. Dispelling some of these common myths can only help the promotion of a process whose time has long since come.

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