

20 Questions re Mediation

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1. Why 20 Questions? So much has been written about the mediation process; what participants can expect; what participants should do to prepare; what participants should do to negotiate successfully, etc. I thought it was time to offer a mediator's perspective about the process, and I thought it would be fun to do so in a conversation format.

2. Why do you like mediation? After 20+ years as a litigator, working within the strict / rigid formalities of the court system, I like mediation because it is a process that is neither strict nor rigid. It is malleable and gives the participants authority to chart their own course: When do they want to meet? What do they want to talk about? What information do they want to exchange? What information do they want to hold private? Do they want to prioritize issues for discussion? Do they want to set benchmarks to be met before moving to the next stage of a negotiation? Do they want to settle all or only part of a dispute? It is also a flexible process that can be adjusted to respond to new information, changed circumstances, new parties, new developments, etc.

3. What do you think is the most under rated or under appreciated aspect of mediation? Its efficiency and economy as a dispute resolution process. In a matter of hours, parties can work through their dispute(s) and walk out the door with a binding solution. It's an intense process that brings everyone to the table, closes the door to the outside world, and focuses full attention on the dispute at hand. It encourages direct dialogue between the parties which is generally more efficient and clear than speaking through letters, pleadings, phone calls and emails over the course of many weeks or months. At a variety of levels, I think parties get more bang for their buck in mediation.

4. Are there any benefits to mediation when a settlement is not achieved? I think so. Even if the parties are unable to agree on a negotiated resolution during the mediation, most participants exit the mediation with a better understanding of: the dispute, their settlement options, their litigation strategy, the costs and risks associated with litigation, and the general parameters of what it will take to resolve the dispute privately if they want to continue negotiations at some later point in time.

5. What do you think is the most over rated aspect of litigation? The value of obtaining a judgment. It's just a piece of paper and frequently leads to further legal proceedings in the form of an appeal or enforcement pro-

ceedings. For the plaintiff who prevails, it's not a negotiable instrument that can be taken to the bank and cashed. (In cases where there is insurance, that may not be a problem, *provided* that there is coverage and sufficient policy limits.) For the defendant who prevails, litigation is a very expensive (and certainly risky) way to resolve problems.

6. What do you think is the most overlooked aspect of litigation? That there are two (or more) sides to every story *and* that the court will hear both (all) sides if the matter proceeds to trial. Parties engaged in litigation are keenly tuned in to their case and don't always consider that their version of the story is not the only one the judge / jury will hear, nor do they anticipate that the judge / jury may perceive "the facts" much differently than they do. As such, parties are often times surprised when the case unfolds at trial. This highlights a very important feature of mediation: namely, that the parties have an opportunity to hear the other side's story and consider (in private) how a judge and / or jury might perceive, understand and decide the dispute.

7. What do you think is the most misunderstood aspect of mediation? Party autonomy and party control. These are core concepts of mediation and, in my experience, are under utilized / under appreciated by the parties. At the beginning of the mediation, parties sometimes confuse my responsibility for administering the process as also carrying with it some level of authority or power over them and the other side. While I have responsibility for shepherding the parties' discussions in a way that will hopefully be constructive and lead to a negotiated resolution, I have no power to tell either side what to do or accept in the way of settlement. That being said, I have found that once parties understand the limits of my power and the breadth of their own, they are quick to seize the day and take responsibility for the substantive aspects of their negotiations.

8. What do you think the primary role of the mediator is in a mediation? There are many hats a mediator wears during the course of a mediation: host; shepherd;



Experience and expertise at finding solutions

agent of reality; coach; etc. That being said, I would say that, first and foremost, the mediator is responsible for administering the process in a way that is fair, considerate and respectful of all participants and provides a forum to speak openly, candidly, and without jeopardy.

9. What do you think a mediator's primary responsibility is during the course of a mediation? Overall: to stay neutral and not become an advocate for either side. In the private caucus setting: to communicate messages between the parties fully and clearly. In the joint caucus setting: to facilitate dialogue without attribution, judgment or accusation.

10. What do you think people would find surprising about mediation practice? That it's a lonely profession. Mediators by nature are people-oriented, congenial and engaging. However, we can't talk about our work. We can't share our thoughts, experiences, trials or tribulations because of the confidentiality that shields the mediation process.

11. What should parties do to take control of the process? Don't leave the agenda to the mediator. When the decision is made to attempt a negotiated resolution through mediation, parties should take an active role in setting and prioritizing the agenda. If the mediator does not initiate this discussion, they should. The agenda can be developed jointly or separately through pre-mediation conferences with the mediator. The whole point of this exercise is to acquaint the parties with their power over the process and make it possible for them to walk into the mediation with some fore knowledge of what is going to be discussed (at least initially).

12. What do you think are the most important characteristics a mediator should have? High energy, passion for the process and stability. High energy and passion for the process tend to go hand in hand and are necessary because mediations can be mentally and physically demanding. Personal well-being or balance because there are a lot of moving parts to a mediation that require the mediator to be 100% present and focused on the parties, the problem and the discussions at hand. If the mediator has problems or is out of balance in his / her life, that "noise" may enter the room with the mediator and, in turn, may influence the process, the outcome and what the participants take away from their mediation experience.

13. How do you measure a mediator's passion for mediation from a CV or biographical sketch? As with any profession, mediators who are passionate about mediation tend to be involved with their peers in the ADR community. They not only belong to ADR groups, they are active participants and contributors in some form or fashion: e.g., writing articles, presenting programs, participating in advanced training.

14. What is the phrase you hear most often in mediation? "This case will never settle."

15. What is your response? "You might be right. It may not be possible to reach a negotiated resolution in this case, but mediation has a very high success rate – about 60% or 6 in 10 – so it might be worthwhile – it's up to you – to spend a couple of hours to see if this case might be one of the 6 in 10 that settles."

16. In preparation for a mediation, is there anything you want or care about in terms of information beyond the factual history of the case? Yes. I routinely ask two questions: What issues or concerns does the party want to make sure are included in our discussions that day? Who or what is the party most concerned about?

17. Why is that information important to you? It gives me some idea as to where the parties are – *present tense*. That information then provides me with the opportunity to prepare for the mediation in a way that – early on – addresses the most pressing issues and concerns the parties have today and then work backwards to the other issues that must be addressed. In application, I've found that "present tense" information often has nothing (directly) to do with the dispute, but is material to paving the way for a successful settlement discussion.

18. Do you care if parties have had settlement discussions prior to coming to mediation? Absolutely! To the extent that offers were exchanged, that circumstance tells me that some effort to evaluate the case and set a settlement value was made, so I'll want to talk about that (privately). To the extent that a party changes its position at mediation from an earlier settlement position, I'll want to talk with that party about what has prompted the increase or decrease in the party's current perception / evaluation of value. Finally, to the extent that parties attempted but failed in their unassisted settlement negotiations, I'll want to know why they think those discussions reached impasse and whether there are any barriers to settlement that I should know about.

19. Do you have any "ground rules" for the mediations you conduct? Just one, which is "don't walk out." The parties can stop whenever they want to. All I ask is that they let me know that they want to stop so that we can talk a little bit about why and make sure that neither side is stopping prematurely. Also, in terms of the participants' post-mediation relationships, I want to leave them in the same – or better – position than when they entered the mediation. I certainly don't want anything in the mediation to serve as an escalating event. So, I ask that parties not storm out the door; that they allow me to close the mediation just as they allowed me to open the mediation.

20. Any final thoughts you'd like to share about mediation? Yes. Be patient with the process, especially at the outset. When parties have been engaged in conflict or litigation for a lengthy period of time, they may need time: to take in new information; to make adjustments to their understanding of the problem and their valuation of the case; to develop a response. It may be too much to expect a resolution in a single mediation session because there is too much distance for both (all) parties to travel in order to move away from their pre-mediation positions enough to support a settlement. In a complicated or long-tenured dispute, I would encourage parties and their counsel to consider staging their discussions and to set goals that they think are reasonably attainable under the circumstances surrounding and contributing to the dispute.

