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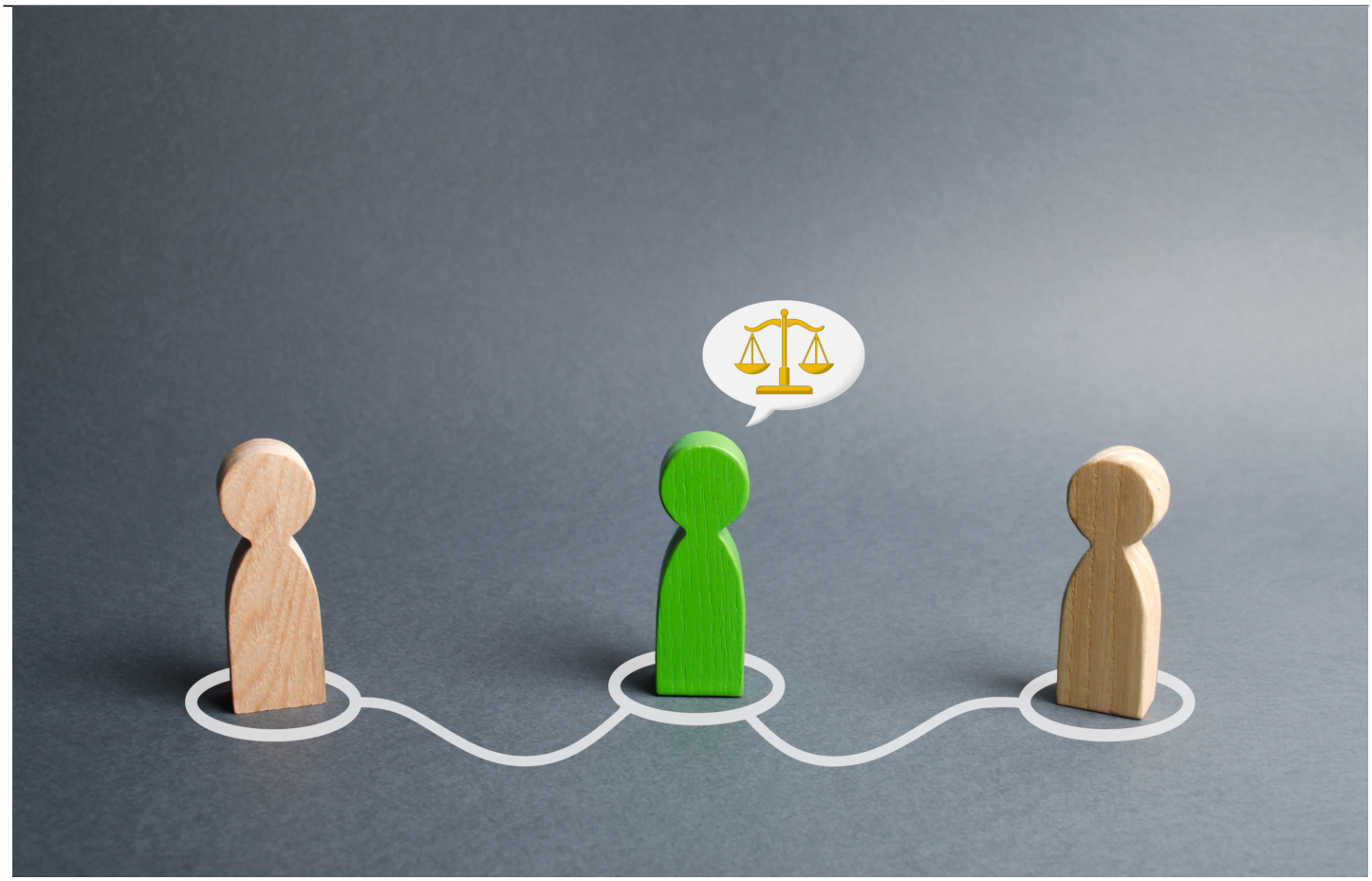
Overcoming Client Misconceptions About Mediation

Litigation and Dispute Resolution



Cheat Sheet

- **Benefits of mediation.** Apart from saving money, mediation can help parties eliminate the drain on internal resources and salvage ongoing business relationships.
- **Not one-size fits all.** To select the best mediator, consider the specific issues and needs for the case — not just the popularity of the mediator.
- **Mediation is not litigation.** Skilled lawyers realize that mediation requires a different strategy and approach than litigation.
- **Be candid.** Trust the mediator to act as an ally to help the parties find a resolution.

When I reflect on the mediations I participated in as an advocate or party representative, I realize now as a mediator that there is often a disconnect between what mediators and the end-users, often in-house counsel or business executives, expect from mediation and from each other. These assumptions can potentially limit the chances of a successful negotiated resolution. In hindsight, I

wish I better understood the benefits of mediation and how to use it more effectively as a dispute resolution tool while I was in-house counsel.

The following are five areas where in-house counsel or their client representatives may have misconceptions about mediation. By helping to bridge this information gap, lawyers can help their companies more efficiently and effectively resolve outstanding conflicts.

The benefits of mediation beyond cost-savings

I am a strong believer that if clients better understood the benefits of mediation and regularly contemplated it as a routine dispute resolution option, they could save themselves significant time and money. The reality is, however, that among many in-house counsel and business executives, mediation has a negative connotation. Clients often view mediation as something they are forced to do, not something they should proactively choose to do.

This is due in part to the negative framing lawyers have historically used when discussing mediation. Statements such as “a sign of a good settlement is when everyone leaves equally unhappy” have contributed to mediation’s bad rap. Even the words “settlement” and “compromise” raise feelings of inadequacy and sacrifice.

The obvious and most discussed benefit of mediation is the avoidance of legal fees, but that alone may not be enough to motivate parties to the negotiation table. It is indisputable that the overwhelming majority of litigation settles before a judge or jury verdict. Instead of considering early mediation, parties often negotiate an agreement after years of litigation and thousands of dollars of legal expenses. In other words, avoiding the cost of lawyers is not enough to make mediation preferable to litigation. This is due in part to the fact that many plaintiffs retain lawyers on contingency and many defendants, out of principle, would rather pay their attorneys than pay the plaintiff. Thus, the clients need more incentives to choose mediation.

There needs to be a greater dialogue relating to the several other benefits of mediation. For example, clients are often frustrated with the drain that litigation has on internal personnel and other business resources. However, they do not stop to put a numeric value on how an early resolution means eliminating the distraction, thereby allowing them to get back to business.

Similarly, companies do not often consider how mediation enables them to be creative in their resolutions, such as finding non-binary solutions that a judge or jury won’t offer or the ability to explore non-economic alternative currencies.

Likewise, if there is the potential for an ongoing business relationship between the parties, protracted litigation that results in a verdict in favor of one party over the other can result in tension that impedes the parties from working together in the future. Mediation offers the parties an opportunity to avoid such complications.

Lawyers trained in mediation recognize these benefits. If we make a conscious effort to proactively discuss these with our companies, in time, they will readily recognize the value of mediation as an effective tool to resolving conflict.

Selecting the right type of mediator

Companies do not necessarily recognize the importance of choosing the right mediator for their case. In-house counsel often rely extensively on recommendations from their outside counsel in mediator selection. In many instances, those law firm recommendations are based on not much more than some attorney at the law firm having previously used certain mediators.

Mediator selection, however, is unfortunately not one-size fits all. To avoid ending up with a mediator who is not the best fit for the case, parties must consider the specific issues and needs for the case at hand, and not just the popularity of the mediator.

Ask these questions to find the best mediator:

- Would the parties benefit from receiving a third-party evaluation of the merits of the case?
- Does the mediator need to manage a contentious relationship?
- Would the parties benefit from a mediator who can help brainstorm creative and complex alternatives to monetary settlements?
- Does the mediator need to have expertise in a specific industry or area of law in order to understand the issues separating the parties?

Before I (an experienced litigator) had mediation training, I did not know there were different mediation philosophies. Most in-house counsel don't know either. Choosing a mediator with the wrong philosophy could have detrimental consequences. For example, some mediators consider themselves merely facilitators and will not offer a third-party opinion on the legal issues at hand or the third party's realistic chances of success in court.

Other mediators are willing to take a more evaluative approach where the parties' perspectives on the legal issues are so far apart that they present an impasse to any negotiated resolution. If parties are expecting and require a third-party opinion on gating issues in the negotiations, but engage a facilitative mediator, the parties will likely leave mediation disappointed and without a negotiated agreement.

In a case involving a contentious relationship between the parties where emotions are high, it is critical to find a patient mediator with strong emotional intelligence to diffuse tensions and help foster a more collaborative environment. Whereas, in other cases, the most important attribute for a mediator may be concentrated expertise in a certain industry.

In-house counsel will benefit by taking the time at the outset to evaluate what the obstacles to settlement are for their particular case, and then considering the qualifications of a mediator that can best help them achieve a negotiated resolution. If the wrong mediator is selected, parties often leave with a negative opinion about mediation. Overcoming this becomes an uphill battle, but it may have been entirely avoidable.

The difference between mediation and litigation

In-house counsel's view on what should occur in mediation is often informed by their outside counsel. They follow their outside counsel's lead in terms of how to behave, the proper strategy, and what offers to make. Unfortunately, the past conduct of litigation counsel, untrained in mediation, may have contributed to the inability to reach a negotiated agreement at a prior mediation.

Often during mediations, lawyers for one or both parties refuse to budge from their courtroom arguments and conduct themselves as though they're presenting their case to a judge or jury. Although the litigation had been proceeding for years and both sides were familiar with the other's positions, some lawyers continue their same speeches about why they're right, and the other side is wrong. And in many of these cases, the parties — not surprisingly — reach an impasse.

Unlike in litigation, however, a mediator is not a judge and will not dictate the outcome of the case. The parties, not the mediator, control the result. As such, the attorneys do not need to convince the mediator of their rightness or their adversary's wrongness. Instead, they need to find ways to communicate with their adversary in a way that is collaborative, constructive, and ultimately enables them to achieve what they desire in order to resolve the dispute. A mediator helps foster that dialogue.

Accordingly, mediation requires lawyers to advocate differently than they would in court. Simply put, the role of the lawyer is different and to some extent, less pronounced, in mediation where clients can and should take a more active role in the dialogue.

When lawyers treat mediation as a trial — giving adversarial opening statements, using argumentative tones, and presenting with stubborn confidence — they quickly frustrate the mediation process. Similarly, getting bogged down in who is right and who is wrong is not likely to be collaborative or productive. To the extent that it may be necessary to explain any demand or counteroffer by referencing litigation arguments, a mediator can help with the messaging.

Lawyers trained in mediation recognize that mediation and litigation are different and require distinct forms of advocacy. Client representatives, not all of whom are lawyers or litigators trained in mediation, do not readily know these differences. They may not understand that to maximize the chance of reaching a negotiated agreement in mediation, they should leave their pit bull litigators in the courtroom and come to mediation with more collaborative and open-minded attorneys and representatives.

Trusting the mediator and sharing important information

In-house counsel and party representatives often worry about jeopardizing the litigation in mediation by showing their hand to the mediator. They don't necessarily consider the mediator as their ally who can help them achieve their desired outcome.

Similarly, many outside counsel untrained in mediation are under the misconception that if they acknowledge to the mediator any weakness in their case or make any concession, they will have compromised the litigation.

Negotiating and acting collaboratively in mediation, however, does not act as a waiver to your ability to present your strongest case in court if the case does not resolve. On the other hand, putting on your aggressive litigator hat may create an insurmountable barrier to a productive mediation.

To overcome this misconception, remember that one of the most fundamental canons of mediation is confidentiality. Generally speaking, statements made in mediation are confidential and cannot be used in the litigation. If there is something significant, but sensitive that is influencing your negotiations and bottom-line, you can and should disclose it to the mediator and ask them to keep it confidential.

The mediator is there to assist you and explore whether there is common ground between the parties. The mediator often has more information about the other side, enabling them to see the bigger picture and potential areas for agreement.

When both sides do nothing but posture, however, they are inhibiting the mediator and may be limiting the chances of success. In-house counsel maximize their chances of resolving their dispute in mediation when they are candid with the mediator. It is key that in-house counsel trust the mediator to keep conversations confidential while they actively work to bridge understanding between the parties.

Redefining a successful mediation

Many parties assume that if they are not able to settle the case at the mediation, then the mediation failed. This is simply untrue. Mediation is a learning opportunity.

Regardless of whether a mediation leads to a negotiated resolution, it is still a chance to evaluate one’s own case, consider what is needed or required in order to reach agreement, and learn how your adversary is thinking about these issues. A constructive and active dialogue during a mediation helps foster an understanding between the parties, which is necessary for them to reach a resolution.

In some cases, parties who had previously been unable to negotiate on their own develop a communication channel during the mediation that enables them to subsequently finalize an agreement without a mediator. Thus, when both parties are open-minded and come to mediation willing to negotiate in good faith, mediation can be a success even if the parties do not reach an agreement.

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Rachel Gupta is an experienced mediator, arbitrator and former in-house attorney in New York City, specializing in complex commercial, securities, financial, and employment litigation. She served as in-house counsel for nearly a decade, first as assistant general counsel for Ambac Assurance Corporation, where she managed billion-dollar bet-the-company and other high-profile litigation, and most recently as senior counsel and chief compliance officer for Amaiya Management LP, a privately held investment management firm. She now has her own ADR practice, Gupta Dispute Resolutions LLC, where she is a mediator, arbitrator, and outside general counsel to small businesses, helping companies and individuals resolve disputes outside of litigation. In addition to her private practice, Gupta is currently a mediator for New York state and federal court ADR panels, and is an arbitrator and panelist for the AAA, CPR, and FINRA. She is also a 2021 JAMS Diversity Fellowship recipient. Prior to her time as in-house counsel, Gupta worked as a litigation associate at New York law firms DLA Piper LLP and Seward & Kissel LLP.