

TOP TEN SPECIOUS REASONS WHY LAWYERS WON'T MEDIATE

By Philip S. Cottone, CRE

Experienced mediators and counsel who participate regularly in ADR (alternative dispute resolution) hear lots of reasons to justify not mediating. Some lawyers are simply reluctant to try something that is new to them. Others don't want to settle cases but want to win them in a courtroom, a forum that is familiar. Yet, in a growing number of industries throughout the country, mediation is a proven process that is being used by litigators to save time and money and avoid the risk of trial, whether in court or arbitration. What are the top ten specious reasons often given for not mediating?

1. Saying I want to mediate will show weakness to the other side and telegraph I think I have a weak case.

First of all, the statement is not true. Mediation is now so widely accepted that many practitioners recognize it as being almost always in their client's best interests, weak case or strong. The only thing you can attribute to someone who wants to settle in advance of trial is wisdom, not weakness. Mediation is a voluntary, confidential process in which the parties are in charge, and it avoids the risk of some third party (whether judge or arbitration panel) making a decision that the parties cannot control, and sometimes cannot comprehend.

Moreover, a reluctant lawyer can sound out the other side's willingness to mediate by having an administrator for the ADR program make discreet inquiry. Case administrators for the program, such as the Dispute Resolution Program of The Counselors of Real Estate, routinely pitch mediation to both sides, often without a commitment from either. Where they do have one side expressing interest, it is not told to the other until both agree. Expressing an interest in mediation does not at all signal a weak case.

2. I have a slam dunk case and there is no point in mediating.

Lawyers are trained to be advocates of their client's point of view, and, in most instances, identify with their cases. This can result in an overestimation of what is truly a "slam dunk" case. In the experience of most mediators, they are rare indeed. Even if it is a "slam dunk," why not mediate? If you can get the other side to believe you have a strong case, even privately without acknowledging that to you, he or she will undoubtedly want to avoid the risk of trial and may well propose a resolution that is acceptable. If that results you avoid the additional expense and time delay of a trial, and at least the theoretical risk that something could go awry when you put on your case. You do not have to accept a settlement at mediation if you don't like it, and you might learn something that will cause you to conclude it is not such a "slam dunk" after all. Even very strong cases should be mediated unless there is some other compelling reason for going to trial, like the need for a legal precedent.

3. I don't want to show my case to the other side before trial.

Why keep your case in your briefcase if you can use it to get a settlement on your terms without the cost, time delay, and risk of a trial? Lawyers in their zeal usually overestimate the impact that their “smoking gun” or bombshell information will have at trial. Sometimes there is a simple explanation, and the information is disclosed before the tribunal with what turns out to be a whimper, not a bang, anyway. Usually that information can be more effectively used in a mediation session. Perhaps the mediator can obtain a more generous settlement using the bombshell information because he can impress the other side with its possibly devastating effect at trial. Or he can tell you why he does not think it will make the impression you intend. Mediators will sometimes ask parties who give them such information to authorize disclosure to the other side because, if it holds up, it may induce a quick settlement. But the tactical decision on whether to disclose it or not always remains with the lawyer.

Both sides remain in control of what they disclose and what they keep to themselves, and what is said and when is up to them. You only have to show the part of your case you want to show, although it is usually helpful to get the mediator’s judgment on your entire case without holding back. Trial by ambush is increasingly looked on with disdain by tribunals, whether in court or arbitration, and the lawyer who withholds information runs the risk of it backfiring if the trier of fact thinks it should have been disclosed earlier.

4. The case is too complex.

This might have been a reasonable position years ago when mediation was just becoming accepted. It surely is not today. Huge cases, in both dollars claimed and number of parties involved, have been successfully resolved in mediation in many different industries. Occasionally more than one mediator is used, or sessions are spread out over a number of days, and issues are separated so they can be treated seriatim. Experienced mediators are not troubled by complexity because the process is eminently flexible. It is a tried and true method for settling both simple and complicated cases.

5. The parties (or the lawyers) are too emotionally involved to sit down together.

This is another red herring because the mediation process is designed to help people deal with their emotions. An experienced mediator will let the parties vent and thereafter help them develop some objectivity about their case, and will help the lawyers work with their clients. They all have to understand what is going to decide the case is not what happened, or even what is necessarily fair and just, but what the proof shows. The key is what the trier of fact is likely to believe happened, and the legal and equitable conclusions that he or they believe flow from that.

From time to time mediators run into situations where the lawyers have been entrenched in their positions for so long that they cannot be objective and keep their own emotions in check. Mediators can deal with that as well. While rare, I have personally handled situations where I

have excluded the lawyers and resolved the matter dealing with the parties themselves, subject to the eventual approval of their counsel. Strong emotions are a usual part of most mediations, and the experienced mediator can diffuse them and redirect the energies of the parties toward a constructive outcome.

6. It will be a waste of time.

This comment usually results from inexperience with the process. In most industries, where the parties come to the table voluntarily, mediations result in settlements in about 80% of the cases. Individual mediators have much higher records of success than that. So the probability is you will not waste your time. In the relatively rare instances where the case in chief does not settle, the mediation helps refine the issues and resolve some matters, avoiding the necessity of spending time and money on them later at trial. It also helps make the parties themselves more comfortable with the process, and more familiar with the strengths and weaknesses of their case, making the lawyer's job easier when preparing for and conducting the trial. In those few cases that do not settle, the lawyers and the parties usually think it was worth the time and effort.

7. The case will not settle because the other side is unreasonable and will not listen until we get to the courthouse steps.

This comment is usually offered without knowing where the other side really stands on the matter. In most cases the parties and their counsel have not sat across the table for a full exchange of views, but have just exchanged curt phone calls. They certainly have not had the skills of an experienced mediator working in their behalf to get them together. If you haven't tried the mediation process you can't come to any reasonable conclusions as to the possible outcome. The mere fact that the other side may talk tough doesn't mean anything if they are willing to participate in a voluntary mediation. Despite their rhetoric, attendance at mediation speaks volumes about their desire to get the matter resolved. But, as we have seen, it does not mean they necessarily think they have a weak case.

There is always the theoretical possibility that the other side will go through the motions in bad faith, just to try to find out more about your case. In the experience of most mediators, this is rare indeed. Once a mediator finds out that the modus operandi of a particular lawyer or client firm is to agree to mediation just to size the number at which they might be able to settle on the courthouse steps, most professional mediators will not work for them again. Most parties and counsel approach mediation in good faith and not with an intention to suborn the process. Statistics show a settlement is reached in the large majority of the cases, well before getting to the courthouse steps.

8. My client doesn't want to mediate.

You have a responsibility to convince your clients that it is in their interest to mediate. In most cases when they are hesitant, it is because they are unfamiliar with the process and are unwilling to pay you for your time and the mediator's time to prepare for and attend a mediation. This is not as much of a problem where counsel is being compensated on a contingency basis. It is up to you to show them it will be time well spent, that success is usual, and that even if the case is not

entirely resolved, it will be a good use of the time and money to make the effort. You should point out that in a mediation a creative solution that meets the needs of the parties is possible, while a tribunal is limited in most cases to an award expressed in dollars and cents. In mediation, the imaginations of the parties and the mediator are the only barriers to resolution, and money may only be part of an ultimate settlement. The mediation process can dig beneath and go well beyond the issues on the table to fashion a result that both sides will accept, without something unreasonable to either being imposed by a court or panel.

9. I have to spend the time preparing for trial, and at trial I have the best chance of getting a good award for my client and maximizing my billable hours.

Preparation for mediation is almost identical to preparation for trial. Advocates can do the best job for their clients in mediation if they know as much about the case as if they were going to trial the following day. The issues are identical, and it is a great dry run. It will ultimately save time in getting ready for trial in the rare instance where it does not resolve in mediation.

You will have more clients and be able to do more productive work in your office if you get a reputation as a lawyer who effectively employs mediation as a resource. The results might not be much different from what you would have gotten in court, but without the time delay, trial cost, and risk of an unacceptable result. It is better for both your clients and you, and you will have more billable time available if you are able to clear your calendar of cases that do not have to be tried to get the best results for your client. You will be freed from the burdens of a trial, where you are subject to the whims of a tribunal as to time commitments and procedure.

WHAT IS THE TOP REASON FOR NOT MEDIATING?

10. I can do it better myself.

We lawyers are a proud bunch, and we fancy ourselves to be astute negotiators under any and all circumstances. Why do you have to pay a mediator to do what you can do yourself? The easy answer is because you cannot do it as effectively as a neutral mediator who has no stake in the outcome, and commands the trust and respect of both parties. While you may not be as close to your case as your client, if you have lived with it for a while, it is difficult being truly objective. We learn to be advocates in law school and because of that, whether we want to recognize it or not, we tend to develop a position that is tough to change. The old saw that a lawyer who represents himself has a fool for a client applies here to some degree. A trained mediator will help your client and you see the strengths and weaknesses of your case, and will help you both be more realistic as to the probable outcome if it goes to trial. Also, a trained mediator acting as go between can take a “devil’s advocate” position with both sides and present your arguments more effectively than you can, because he will not be perceived, as you will, as an adversary who is positioning to sell a point of view. You cannot do it better yourself!

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