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What Mediators Want

Litigation and Dispute Resolution

Cheat Sheet

- **Bad peace over good war.** Mediation is not to persuade the other side that you are right and they are wrong. Use litigation and arbitration for that.
- **Forget the past**. Mediators seek to reach a reasonable accommodation of interests for the future.
- **Disclosure.** Mediators have no motive use disclosure to your disadvantage, making it less risky.
- **ZOPA.** The mediator can identify unreasonable positions, reasonable negotiating positions, and a zone of potential agreement (ZOPA) for both sides.

Five years ago, I became a full time neutral, acting as an arbitrator and mediator. A few months ago, I shared my view of "What Arbitrators Want." I now turn to what mediators want.

My training and experience as a mediator in many diverse business disputes, and participation in

meetings of professional mediation organizations, have produced a new understanding of mediation. It differs from the perspective I had when I was an in-house counsel.

What do mediators want (or perhaps “need”)? In short, mediators want litigators and litigants to change their mindset in at least three important (and related) ways in order to reach a deal

Most importantly, mediators seek to fix the problem. Litigants and litigators tend to want to fix the blame. Who messed up or acted with ill intent? Mediators only want to find a solution and hope to have the parties adopt that mindset.

Second, while litigants are concerned with the past — “they did harm to me” — mediators seek to focus on the future. From where we are, how can we make it better going forward?

Third, litigants are often concerned with “justice” when meditators are concerned with the reasonable interests of both sides.

Mediators hope you will consider how to make the best use of them. The mediator does not have a “dog in fight” and possesses training and experience. Using them just as a messenger neither maximizes your investment in the mediator’s expense nor promotes settlement. Mediators want you to be direct in telling them about your goals and to solicit their advice in negotiation strategy.

This article develops these points so that in-house counsel can more effectively represent — and advocate — for their clients in mediation. Mediators cover a range in how that weigh these factors. I speak for myself, and I think, many mediators.

Fix the problem, not the blame

By the time a mediator is involved the parties often have either started a lawsuit (or arbitration) or have tried direct negotiation and failed. Since we all believe we are good people, the problem must be the other side’s past conduct. And sometimes it is. But because we all like to think well of ourselves, it is unlikely the other side will acknowledge that. They think you’re the malefactors.

Using mediation to persuade the other side we’re right and they’re wrong is unlikely to produce a deal. That’s why litigation and arbitration exist. Mediators know that understanding the problem and how it affects each side’s legitimate business interest is more productive.

Every business is subject to constraints, whether fiscal, legal, regulatory, ESG, precedential, personal or something else. Understanding how those constraints affect each side takes them out of the blame game and into the commercial context. Both sides can then assess, with less emotion, whether some agreement can be reached that improves on the status quo.

This is not to say the merits are entirely irrelevant. In deciding whether to do a deal, each side is likely to consider their BATNA, Best Alternative To a Negotiated Agreement, and its cousins, Most Likely Alternative and Worst Alternative.

> This is not an effort to persuade the other side that you are right and they are wrong. The goal is to share with the other side any relevant information about the risk that a neutral might be led into believing the other side is right, and the economic consequences of that result.

Most mediators do form impressions of who is more or less likely to prevail in court or arbitration. Mediators have different styles affecting how much they will share those views. Often, they will tell each side the weaknesses in their case without reciting the strengths, to promote flexibility leading to settlement. There isn't anything wrong with a party coming back with its answers to the mediator's perceived weaknesses.

Assessing these alternatives requires realism. Realism includes the high cost of dispute resolution — not just in counsel and expert fees (and arbitrators' fees), but in management distraction from running the business. A solid prediction should include not just the probabilities of the outcome of litigation or arbitration (the likelihood and size of expected loss or recovery) but also the cost of achieving that result.

My rule of thumb in computing the costs is to treat diverted business resources and time as a cost equal to counsel fees. Is the time of the lawyer defending a several hours-long deposition really more valuable or longer than the time of the executive being deposed? Risk tolerance for the worst possible outcome also needs to be assessed. Is the client willing to accept a one percent chance that the company could be ruined? A 10 percent chance?

In describing the other side's conduct at a mediation (or any settlement negotiation for that matter) word choice can matter in how they react. To say the other side did not repay a loan is one thing. To say they willfully and wantonly failed and refused to pay it back is quite another. Neither goes so far as to say they fraudulently induced the loan, never intending to pay it back. Whatever your belief, the first does not prejudice your legal position and is more likely to continue discussions about the possibility of payment (although, perhaps, less emotionally satisfying).

Focusing on inanimate objects ("the letter says…") is less likely to produce an emotional response than focusing on the author ("you said…"), and harder to contradict. Saying someone is "lying" is guaranteed to produce a type 1 emotional reaction: fast and instinctive. Suggesting that it may be hard to find evidence to persuade a jury of something, may permit the slow and reasoned type 2. Type 2 reasoning is more likely to promote settlement than a type 1 "flight or fight" response.

These are factors on which a mediator will appreciate advocacy more than on questions of fault.

To paraphrase Benjamin Franklin, a bad peace is better than a good war. This is not an effort to persuade the other side that you are right and they are wrong. The goal is to share with the other side any relevant information about the risk that a neutral might be led into believing the other side is right, and the economic consequences of that result.

The dispute is the past; the settlement is the future

One of the principal virtues of a mediated settlement is that the parties in the dispute decide the outcome, not a third-party judge, jury, or arbitrator. The parties in mediation are not limited by the remedies the law offers — usually one side paying the other money.

For example, usually a court or arbitrators won't order one side to provide goods or services for a fixed period at a defined price to the other. Yet the spread between wholesale and retail (the cost to the provider compared with the benefit or price to the recipient) offers parties the chance to leverage that difference to make a deal attractive to both.

An agreement can also be structured to achieve a result in a way that is more tax efficient to at least

one and perhaps both sides than a judgment. For example, in employment cases until 2018, a settlement causing the employer to pay a portion of the settlement directly to counsel, which a judgment cannot order, may have offered the employee a tax advantage. Perhaps the agreement can be structured to allow capital gains or other favored tax treatment.

The accounting treatment of refunding money received differs from the accounting treatment of discounting the price of future sales. This may matter. Allowing a credit against future purchases also encourages the other side to use your business, as opposed to a competitor. These possibilities open the door to not just resolving the existing dispute but reaching a deal that creates or fortifies a future continuing relationship. Treating someone fairly in a dispute may open the door to a long-term relationship.

Courts can do none of this. This does not require forgiving the past, only forgetting it during the mediation.

The goal? Accommodating reasonable interests

Harvard-MIT's Program on Negotiation tells the story of a negotiation:

> The parties came to terms on price, but the European supplier refused to grant Chris's firm exclusive use of the product. Chris was called overseas to try to solve the problem, which he did by asking a simple question: Why wouldn't the supplier grant exclusivity? The supplier explained that he had promised to sell his cousin a very small amount of the product annually. Armed with this information, Chris proposed a solution that allowed the two firms to quickly wrap up an agreement: the American firm would gain exclusivity except for a few hundred pounds of the product each year, which would go to the supplier's cousin.

Although this story didn't involve resolving a post-contract dispute, it makes the point: accommodation of reasonable business interests is the key to reaching a deal.

Mediators are taught that when a person enters the room, three people actually enter: the person they are, the person they think they are, and the person the other side thinks they are. What is seen as fair may well turn depending on whose perspective is looking at the situation.

An example: A partner at a law firm was disappointed by his compensation. One of his fellow partners visited and said:

> I understand your disappointment. I, too, think your compensation is too low. But you and I have a "zero-based" view of the world; we think of compensation as being based on recent performance-what are you worth now. The Compensation Committee chair has an "incremental view": based on multiple prior years compensation and performance, what should be adjusted?
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> You got the biggest percentage increase and biggest bonus, but not the highest total comp. From an incremental view that's about as much respect as one can get. Don't misinterpret your compensation as not respecting your contribution: the chair's view on zero-based v. incremental should guide how you interpret the result. From an incremental view, the compensation was a complement; from a zero-based, not so.

Mediators don’t try to achieve justice for the past. They seek to reach a reasonable accommodation of interests for the future.

What went wrong is not entirely irrelevant, but it cannot be the focus. Our parents taught us we should learn from our mistakes. In drafting a settlement, care must be taken not to create a repeat of the dispute. Sometimes, as the pandemic demonstrates, what went wrong is not because the other side was evil but because they (or perhaps even both parties) lacked adequate foresight. Focusing on the future should enable the parties to enter a better, more robust, agreement.

How to use a mediator

A mediator has no stake in the outcome of a mediation, other than the professional hope and interest that a settlement is reached. This neutrality, combined with the mediators’ training and practice of confidentiality (only telling the other side what you allow), provide opportunities to use the mediator to do what you might not do directly.

Suppose the dispute involves three issues, A, B, and C. Your side ranks the importance of those issues in that order — A most important, C least. In direct negotiation, disclosing this is a risk. The other side might use it for good or ill, depending on its motive. They might see the importance of A as bargaining leverage or as an opportunity to reach a settlement.

A mediator has no motive to use the disclosure to your disadvantage, making disclosure less risky. If both sides disclose their ranking to the mediator, the mediator will know who to press most on each issue to both be most likely to get a concession and promote the other side seeing the most benefit.

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Most mediators expect a mediation statement in advance of the actual sessions. Parties can use this statement can prepare the mediator. It can describe your view of the strengths and weaknesses of each party’s position on the merits. It also can begin to identify areas that may be fertile sources for a deal.

In many jurisdictions this mediation statement may be protected by a general settlement privilege, a specific mediation privilege or not be relevant to the merits so as not to be discoverable if there is no settlement. The first session or even a pre-mediation ex parte call may also be useful ways to prepare the mediator.

Mediators usually undergo training and have more experience in how parties react at a mediation than counsel. This background, together with having listened to the other side in private session, may enable them to give valuable advice in formulating an offer or demand. Words may matter (e.g., describing the change in dollars or percent).

Small economic differences may matter. If several things are at issue, placing the largest concessions first may help. If the mediation has bogged down, mediators have a tool kit that may help, like bracketing or mediator’s proposals, and the training and experience to judge which to use when.

How should in-house counsel prepare for and approach mediation?

Counsel in a mediation often are litigators, used to winning by persuading a decider that the facts, the law, or both, mean their client is right, the other side wrong, and they should win.

Mediation is more like deal negotiation than it is litigation. In any deal negotiation, including a mediation, there are unreasonable negotiating positions, reasonable negotiating positions, and a zone of potential agreement (ZOPA).

Advocacy in mediation means persuading the other side to enter into an agreement in the ZOPA, and, optimally, within the part of the ZOPA best for your client. That evaluation is less about blame, the past, or justice and more about accommodation of reasonable interests to produce a result more productive than litigation or arbitration.

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Adjusting counsel's view from blame to problem solving may not be easy. There has to be a change from a "soldier mindset" to a "scout mindset," as one author puts it. "Evolution has wired our minds to be soldiers (focused on winning) instead of scouts (focused on ensuring our mental maps accurately reflect the territory of reality)."

Some organizations use outside counsel as the aggressive "bad cop" focused on blame and in-house counsel as the reasonable "good cop." Some businesses hire settlement counsel from the time there is a clear dispute. This enables one set of counsel to be warriors and the other peacemakers, without requiring either to adjust their view.

Even if you don't want to follow that lead, consider adding a transactional lawyer — whether in-house or outside, but one not previously involved in the underlying issue — to the mediation team. At a minimum, counsel, both inside and out, should prepare by adjusting their attitude to the mediation model outlined above.

Likewise, consider how the background, training, and experience of the mediator can best be tapped so the mediator adds value to the process.

Not every contract negotiation produces a contract. Sometimes the price or other conditions needed by the buyer and the seller just don't overlap. When they do overlap, the buyer gets needed goods or services, and the seller gets money. Both should be better off than they were before the contract, but sometimes the terms offered by the one side would leave the other worse off. If that's the case, then no deal should follow. So too in mediation.

Following the proposals above will not just give mediators what they want. It will make a favorable deal more likely.

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