MYTHBUSTERS

Debunking the PRACTICAL myths of the mediation process for mediators, attorneys and participants

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THINK DIFFERENT
“What some people fail to grasp, Larry, is the difference between ‘thinking outside of the box’ and just being a weirdo.”
MYTH 1: Mediation is a waste of time

- Waste of time and money
- No one can tell me how to settle my case
- I want my opportunity to tell my side of the story to a jury
- It’s not about the money, it’s about the principle.
MYTH 1: **BUSTED!**

- Experience has shown that indeed mediation DOES work
- Vast majority of case referred to mediation are resolved
- Rule 10.350
  - Requires the mediator to show respect and professionalism to all participants in the mediation process
  - Encourages the notion of “self determination”, not adversarial confrontation.

- Depending upon where you look, statistics for mediation related settlements ranges somewhere between 60% and 80%.
What are some of the ways to view mediation outcomes or results?

• Win - win vs. Lose – Lose
• Settlement of some, but not all issues
• Clarification of Issues
  • Helping parties understand how issues are prioritized
  • Removing impediments to agreement, i.e., misunderstandings of critical needs
• Compromise is NOT a dirty word
Far from being a waste of time and money

• Mediation often results in:
  • Narrowing the issues
    • Ultimately may lead to resolution at a later date.
  • Litigation is expensive, a cost often overlooked by participants.
MYTH 2: Mediator Opening Statement

- The mediator’s opening statement is very important.
  - Lengthy
  - Great deal of information regarding qualifications
  - His or her knowledge of the mediation process
  - How intelligent he or she is about litigation
  - His or her biography regarding important mediation outcomes.
  - Everyone needs to know the successes of the mediator
  - THE LONGER, THE BETTER
“That’s enough about me, now let’s concentrate on you. What did you think of my performance?”
MYTH 2: BUSTED!

• Rule 10.420:
  • Opening statement must contain information outlining the mediation process, i.e., the process is consensual, collaborative and confidential

• Openings that routinely take an extraordinary length of time can be harmful to the process.
  • You don’t need to sell yourself!
  • You already got the job!
BUT every case is unique

Every mediation opening by the mediator should be tailored to the issues in the case and the extent or degree of the conflict.
High Intensity conflict:

• Longer more involved opening addressing a multitude of issues that are relevant to the mediation process and outcomes that can be avoided if mediation is successful.

• Also permits parties to take a deep breath, get comfortable and engage in the “process” of mediation.
Low Intensity conflict:

• Shorter less detailed opening that focuses the mediation in the direction of the specific issues that are at issue.
When emotions are running high

• A longer opening serves a very beneficial purpose in allowing everyone to “settle in” and become accustomed to the environment.
  • Lawyers have been through mediation before; most parties have not
  • Parties can be completely overwhelmed by process
  • Focus needs to be on the parties.
  • Speak directly to the parties.
  • Try to develop rapport with each side both during informal time prior to the mediation as well as in the opening, but engaging them in the process and focusing on this being their mediation.
During the mediation

• Come back to your opening and try and remind the parties of things you said during your opening
  • Compromise
  • Self-determination
  • Expense of litigation
  • Emotional issues
  • Uncertainty
  • Frustration
  • Lengthy litigation process
• Try to help everyone see the big picture.
MYTH 3: Parties’ Opening Statements

• Mediator is experienced and knowledgeable
• Mediator has heard it all before
• It’s not important that the mediator pays close attention to the statements by the parties and/or their attorneys
  • There will be plenty of time in private caucus.
  • Be efficient and make good use of your time--check your iPhone for emails and messages while the parties or attorneys are making their opening statements.
Why listening is important

https://www.youtube.com/watch?v=PlwABx0ktmU
YOU'RE SO EASY TO TALK TO--NOT EVERYONE IS SUCH A GOOD LISTENER.

NOTHING IS WORSE THAN HARD BUTTER... NOTHING.
WILL YOU... OOPS... JUST A MOMENT... THIS MIGHT BE AN IMPORTANT TEXT.
MYTH 3: **BUSTED!**

- Not carefully listening to the statements by the parties and/or their attorneys can be disastrous.
- What parties say, HOW they say it and what they DON’T say can be extremely important in resolution.
- The WAY the case is presented will give a great amount of insight into where the parties are hung up on issues.
  - “Reading the tea leaves” is very important.
  - We must “actively listen”
"It's not what you say, John, it's how you say it."
WATCH for non-verbal communications during the opening session.

For example:

- Unwillingness of parties to make eye contact
- Emotional reactions to arguments of counsel or parties
- Crossing of arms in response to various statements and arguments
- Refusal of parties/attorneys to shake hands at the initiation of the mediation
- Lack of “engagement” during the opening statements
- Reading of emails on the iPhone during openings
LEANING AWAY FROM SOMEONE:
Means we dislike or disagree with them.

LEANING TOWARD SOMEONE:
Means we like or agree with them.
YOUR BODY LANGUAGE SAYS YOU'VE LOST INTEREST.
• Make a mental note of these behaviors
• Address them in private caucuses.
• Ask what is behind the actions and why were they not engaged
• Leads to insight about what is really driving the litigation and what might be needed to get the matter resolved
MYTH 4: Length of Mediation

A mediation, if done properly, should never last more than 3 or 4 hours. If it takes longer than this, you as the mediator are just padding your bill.
MYTH 4: BUSTED!

“Any mediation can and should be done in 3 to 4 hours. Perhaps with the “low intensity conflicts” this is possible. I have rarely encountered a mediation with any significant issues that could be resolved in such a short period of time.”
HUGE decision

Buying a house
Buying a car
Getting married

= Settling a legal claim
These decisions:

• Difficult
• Emotional
• Gut wrenching
But, WHY??

• Issues in the case
• Controversy
• Litigation ongoing for YEARS
• Part of the litigants’ lives

As we all know, lawsuits take on a life of their own over time
Type of claim has a direct bearing on how long the process may take

• Medical negligence cases or auto cases or product liability cases
  • Death or permanent life altering injury
  • Person serving as the personal representative of the estate or as the guardian of the injured person
    • They will want to know they are not “selling out”
    • Memory of the decedent or achieving too little in compensation for a life changing injury.
• These are tough, tough decisions.
• Lawyers see it as simply a “case”. Get this one resolved and move on to the next.
• Litigants will live with the consequences for the rest of their lives.
By settling a claim

• Litigants often view it as the end of the “movie.”
• Some want the movie to end so that they can move on.
  • But not all
• Some want the movie to continue right into the courtroom.
  • The thought of resolving the claim is not something that happens quickly.
• It takes time. Mediation lasting more than 14 or 15 hours are not uncommon in very difficult cases.
Familiar with 7 Habits of Highly Successful People: Steven Covey?

• Not a mediation book
• Discusses paradigm shifts
• Has application to mediation
• Paradigm shifts take time, and must be allowed to occur.
• Mediation is a Process: Give the process time to work.

• Don’t be in a hurry.

• Allow paradigm shifts to happen!
MYTH 5: Talking **PRIVATELY** with a **CLIENT** who is represented by **COUNSEL**

- If a mediator believes that the legal advice being provided by the party’s counsel is an impediment to a successful mediation, the mediator should try and meet privately with the party, outside the presence of his or her attorney, to see whether the party understands what is going on. After all, even though the mediator is precluded from giving legal advice, he or she knows from experience that this party is being misled and needs to make sure the party understands what is going on.
MYTH 5: BUSTED!

• While pursuant to Rule 10.370(b) a mediator has the obligation to advise an unrepresented party to seek legal advice if the mediator does not believe the party understands the affect an agreement may have on their legal rights, to do so with a represented party likely is potentially disastrous.

• To intervene in the attorney/client relationship in this manner would not only be ill advised, but would likely lead to a significant reduction in the number of mediations being handle by this mediator!
1. Except under exceptional circumstances, do not intervene whatsoever between the attorney and his or her client during the mediation process.
2. If you believe the need exists to speak privately with the represented party, seek permission from his or her attorney outside of the presence of the party before doing it. Many times the attorney may be delighted to have you meet privately with the client.
3. Where there is an insurance adjuster involved in the mediation, be very careful about speaking privately with the adjuster’s attorney and/or party but excluding the adjuster. This can be counter-productive. The adjuster is the one with the checkbook and needs to be included in all discussions.
4. Be very careful about what you say to a party when meeting privately, and be certain to never suggest that his or her attorney is not giving them good advice. This may seem obvious, but is one tip that can be very harmful.
• This is a very sensitive area that mediators often inadvertently cross the line in trying to help the mediation process along. Be sure to tread very lightly when talking to represented clients about their case outside the presence of the attorney.
MYTH 6: Lawyers, not parties, should talk with the mediator in private caucus

• Parties who are represented by counsel should not speak directly with the mediator as they might say something that the lawyer doesn’t want them to say. By being quiet, it moves the process along more quickly and makes for a faster, less expensive mediation. Parties should sit quietly when the mediator is in the room.
Myth 6: BUSTED!

• Perhaps the most effective tool that the mediator has at his or her disposal is the ability to develop a rapport or relationship with the parties. Developing a relationship with the parties and obtaining their trust is absolutely essential to a successful mediation. Parties need to trust you as the mediator if the paradigm shifts that need to happen are going to occur. If the parties believe that you are truly helping them in their efforts to resolve the dispute in a fair and impartial manner, your chances of success will improve. What are some techniques that you can use as the mediator to get the parties to trust you?
Practical Tips:

1. Talk with the parties about what is going on in their life outside of the litigation.
   • Get to know them as REAL PEOPLE.
   • People generally want to talk about themselves.
   • Show genuine interest and listen to them in order to gain some insight.
Practical Tips:

2. Try to find some common areas of interest.
   • Mutual interests, sports, occupations, hobbies, anything that could give you a way to get to know them better. Fireworks has always been my key!
3. Listen, Listen, Listen!

- As mediators, we ask questions but don’t really listen to what the parties are saying.
- Nuggets of information come from some benign conversation that may occur during the course of the mediation.
Be a Whole Body Listener

- Brain thinking
- Ears hearing
- Eyes looking
- Mouth quiet
- Shoulders facing
- Hands still
- Feet calm
Practical Tips:

4. Affirm the feelings of parties regarding ways in which they believe they have been wronged or injured.
   • Whether you agree or disagree—that’s not the point.
   • IF that is how they feel, you must embrace it and affirm it and then work through it with them.
   • Mediator can make headway by acknowledging the hurt a party has experienced and affirm that the pain is real and legitimate.
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