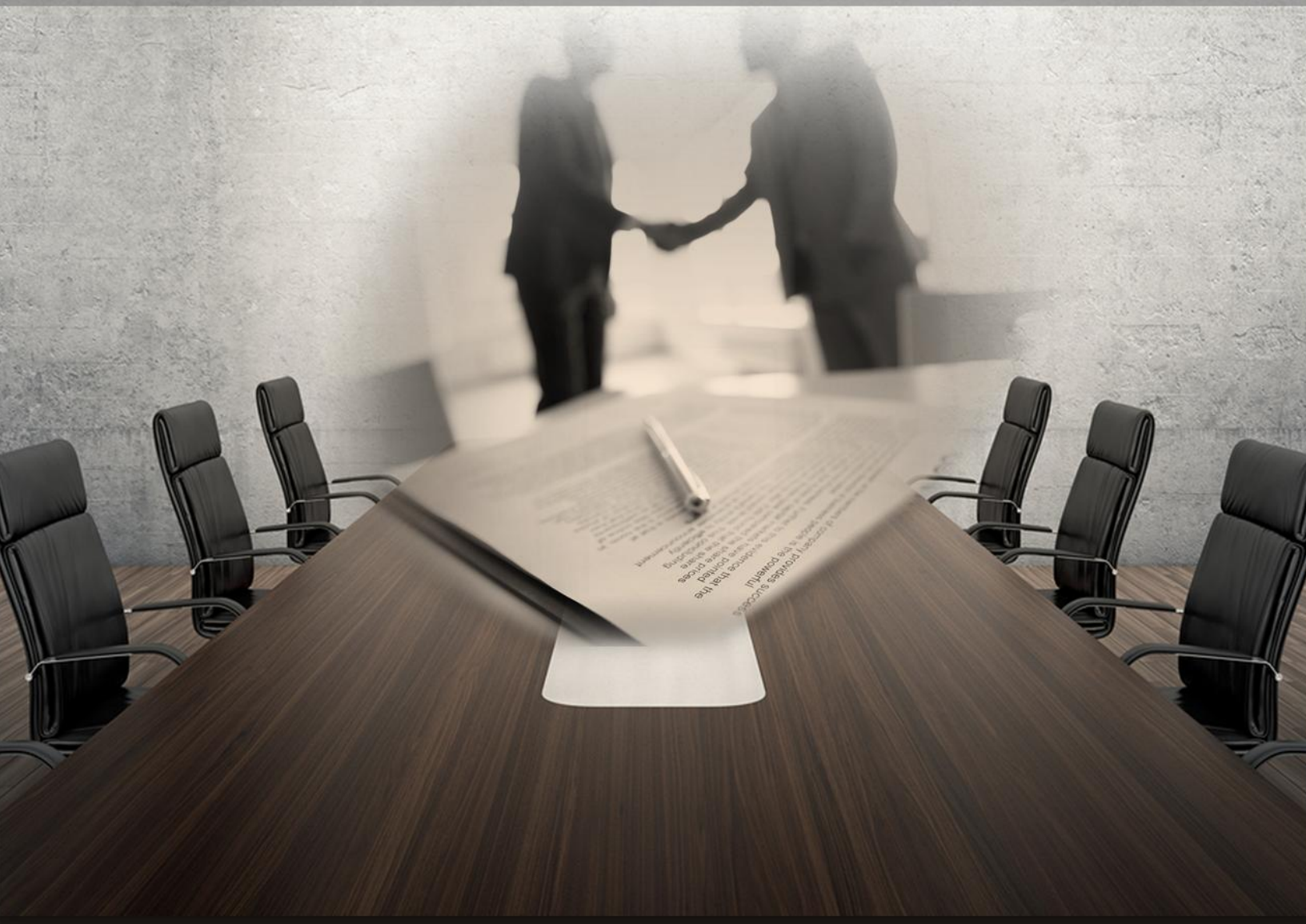
MEDIATION MYTHS



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WELCOME

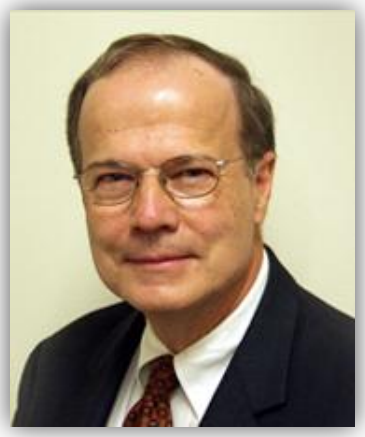
Welcome to a brief glimpse of mediation from my point of view.

Not all cases should settle, but most will benefit from mediation. It focuses the attention of both parties on the real disputes in the case, and it provides an opportunity for a reality check about what may well happen if a matter proceeds to trial. The presence of an impartial and experienced mediator introduces an objectivity to the evaluation testing process that is otherwise sometimes hard to find in committed advocates and interested parties.

Persons selecting a mediator may wish insight into a mediator's approach and understanding of the process, beyond that inherent in academic and experience credentials. The following paragraphs address some of the observations about mediation which I have garnered over forty years of litigation experience, the last seven of which have been as an impartial mediator and arbitrator.

I will be happy to discuss these observations or any other questions you may have, as you try to find the right mediator for your current case.

Respectfully submitted,



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1 Who chooses the mediator?

When I was handling cases for defendants, I preferred to have my opponent(s) choose the mediator. My client always retained the checkbook power, and if we were being "reasonable," a mediator trusted by the other side might recognize it more readily than an interested plaintiff or an advocate with his or her game face on. I now believe the same analysis works from the plaintiff's side, with the decision to go forward to trial substituting for that discretionary checkbook, if a defendant is being unreasonable. Of course, whether the parties were being "reasonable" was frequently what the mediation was testing in the first place.

2 Credible Objectivity – for Lawyers and especially for Clients

Some lawyers believe a "strong" mediator is necessary to force a case to conclusion, and this may be true in some cases. Some lawyers believe a more malleable mediator is desirable to help them reach a particular result, and this may also be true in some cases. In most cases, however, effectiveness in a mediator results from the persuasive force inherent in bringing credible objectivity to bear on the respective parties' positions. That is, in order for a mediator to be effective, both the lawyers and their clients must come to believe that the mediator is both impartial and informed about the case, its forum, the needs of the respective parties, and the strengths of the respective advocates. This confidence in the mediator helps the participants in the mediation to have confidence in their own decisions, including the decision whether to settle their dispute in the mediation.

3 Bidding Against Oneself

In many negotiations, a party would not wish to change its position (either lower a demand or increase an offer) unless its opponent had made at least a gesture toward compromise by moving its own position in the correct direction. This generalization is sometimes petrified into a rule forbidding bidding against oneself. This "rule" will occasionally betray you, however, if it prevents a defendant from getting enough of its intended offer on the table to make plaintiff aware that an eventual compromise might be possible, however distasteful that compromise might be to either party. Similarly, if a plaintiff hangs the meat too high, the dogs won't jump (to borrow a graphic image from experienced plaintiff's attorneys). Both sides in a mediation are sending unexpressed messages by the positions they take in negotiation – neither should permit a rigid rule to block the message that a compromise might eventually be possible, unless that rigidity is in fact the intended message.

4 Pre-planned Negotiation Limits

Discipline or dogmatism? Planning for a negotiation, whether or not mediated by a neutral third-party, frequently involves evaluating the dispute for available jurisdictions, potential recoveries, potential exposures, potential or actual problems on parties, liability, damages, witness or other evidence availability, costs, solvency, timing of possible recovery, and many other factors. Choosing a target to achieve or a limit which is not intended to be exceeded can be part of that planning. Having the discipline to adhere to those targets or limits is a good thing. Being dogmatically constrained by those pre-determined goals can cause missed opportunities for dispute resolution, which is a bad thing and in retrospect can be sorely missed indeed.

Experienced negotiators try to keep those pre-planned goals in mind while preserving the flexibility to recognize and seize an opportunity for compromise (however distasteful from the point of view of the planned objectives), which in the long run achieves the benefits of dispute resolution, even if not exactly foreseeable before the negotiation.

5 In Good Faith

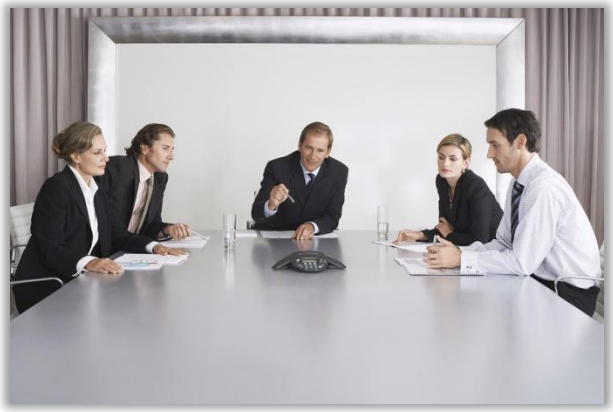
This is the standard by which one party evaluates another party's participation in a negotiation. Mere hard-headedness in decision-making is not bad faith, but willful refusal even to participate may well be. Does good faith mean not establishing a bottom line or a top line, before entering negotiation? No indeed, but lack of access to a decision maker with flexible authority may well be.

Case law suggests that merely failing to reach an agreement at mediation is not evidence of bad faith. It has been added that while a party is free to adopt a no-pay position, participation in mediation means that a person with authority to revise that position must be present for that party to be in good faith.

Mediation is not a venue in which to attempt to extort financial or other concessions from one's opponent in exchange for unrelated trade-offs or forbearances, and an attempt so to use mediation has been held to be bad faith. However, bad faith amounts to more than bad judgment or negligence; rather it implies the conscious doing of wrong because of dishonest purpose or moral obliquity . . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will. Mere stonewall attendance will not meet the requirement of good faith, but formal objection to going forward with mediation is not in itself bad faith. Good faith may be prescribed on a case-by-case basis by the mediator's own ground rules for conducting the mediation, rather than on a general or state-wide standard for participation. [Authority has been drawn from several jurisdictions and citations can be available on request.]

6 Authority – Attending by Phone – Creating Deadlines for Decision

These are aspects of some mediations which arise when theory interacts with practice, when philosophy meets practicality, when opinion comes up against reality. It is generally far better for the decision-maker (the person who holds the authority to make a settlement) to be physically present at mediation, to participate in the interaction between the parties. If the case is ready for mediation, however, but scheduling, weather, or cost does not permit a decision-maker to be present, the practical solution may be to go forward with telephonic participation by some interests.



Another circumstance in which decisions are made away from the mediation venue is when a plaintiff requests an opportunity to "think about" a late day proposal, or when a defendant's authority is exceeded by a settlement opportunity, but the participants believe additional authority might be extended, if time or access were available to seek that authority. In some ways this is a routine continuation of the mediation by telephone, but when trial or preparation deadlines are looming, sometimes a proposal expiration time is a useful way to bring the parties to the point of decision. In both cases, pragmatism is usually more useful than pressure in reaching an agreed settlement. The pressure comes from the court's calendar and the realities of trial resources, and not so much from artificial deadlines imposed arbitrarily by counsel or client.

7 Co-party Positions – The Relevance of Relativity

The adversary system – as a description of litigation – is in many respects a summarizing euphemism for "every man for himself." [Gender neutrality is sacrificed for brevity of expression – no offense intended]. When it comes to co-defendants, however, many a party defendant will contribute only in lock-step with some other

defendant alleged to have the same or similar "exposure" to plaintiff's claims. While the details of Chapter 33, TCPRC, or of joint and several liability, clearly come in to play, the misery loves company, I'm not doing any worse than the other guy, mentality frequently seems more important in a multi-party negotiation. Thus, we are reminded in yet another way that human nature frequently trumps reason and analysis.

In fact, however, each co-defendant's position is almost always unique, whether factually, financially, evidentially, whatever. While mediation cannot force any party to abandon the safety-from-criticism security of lockstep contributions, it is sometimes worth remembering that a final contribution toward closure may break the lock-step paralysis, if there are reasons to distinguish the defendants and if closure can be achieved.

Learn More

If you are considering mediation to resolve your disputes, feel free to call Robins Brice at 713-823-5424 or email robins.brice@bricemediation.com.

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