

Five Indicators Mediation Is at a Tipping Point

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Fundamentally, mediation is about two (or more) parties exploring potential resolutions (i.e., agreements or settlements) for a pending dispute or issue. It is a voluntary process involving a neutral third party—the mediator—who may or may not be a lawyer or legally trained. The mediator helps parties discuss potential settlement terms, and hopefully reach an agreement. Usually, if the matter settles in mediation, the parties will leave with a legally enforceable agreement/contract.

More and more, countries, courts and states are turning to mediation to solve more complex disputes due to its collaborative, cost-effective, and confidential process. It allows all parties greater control over the outcome and greater speed to resolution. Mediation is proven to help courts decrease case backlogs and help businesses resolve legal disputes quickly and efficiently.

Mediation Is Gaining Ground in Business

The International Institute for Conflict Prevention & Resolution (CPR) found that 58% of surveyed companies reported using mediation to resolve disputes, up from 49% in 2017 and 42% in 2015. The survey also found that 77% of surveyed companies are using mediation clauses in their contracts, up from 69% in 2017. Sixty percent of companies reported using a standing alternative dispute resolution



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(ADR) program that allows for the use of mediation on an ongoing basis. Interest in mediation has increased sharply, in part, because of the delays and costs associated with traditional litigation.

Mediation also allows parties to retain greater control of the outcomes and be more creative than a court. In a study, “Creativity in Court-Connected Mediation: Myth or Reality,” researchers found that 65% of mediated settlements contained creative elements, meaning a substantial element of the settlement was not part of the original demands filed in the court. Further, 52% had two or more creative elements and 26% had five or more creative elements.

For businesses, mediation also offers confidentiality, safeguarding companies from public scrutiny. Unlike litigation, mediation can remain private and confidential—safe from public exposure. Parties can participate in mediation freely, without worrying about the release of sensitive proprietary information. Major companies, including Uber, Facebook (Meta), United Airlines, Tiffany, Amazon, and Chevron all use mediation to resolve

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a wide range of high-profile and complex commercial disputes.

Most recently, Fox News pulled back from an embarrassing and contentious defamation lawsuit with Dominion Voting Systems, using mediation that ended in a \$787.5 million settlement agreement. Mediation saved Fox from having to divulge sensitive information to the public that could have had further reputational consequences.

As the popularity of mediation grows, more specialty firms are forming to handle complex, cross-border disputes through mediation. For example, Equanim, a recently established international mediation organization based in France, differentiated themselves by employing former C-suite officers who can offer their international business lens. These executives serve as a neutral

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party and mediate complex and cross-border disputes between large multi-national companies, helping them achieve resolution while preserving confidentiality and important business relationships.

Courts Encourage ADR

Courts themselves are also pushing for more mediation as part of the pre-trial process. More than 40 years after the federal district courts started experimenting with ADR, the federal court system is now replete with various forms of ADR. The New York County Supreme Court, in its commitment to finding less costly ways of resolving matters encourages mediation for most pending cases.

Other states, including New Jersey, mandate that mediation be conducted at the outset of each case. As a result, about a quarter of all New Jersey lawsuits are resolved shortly after the initial filings.

Five Reasons Why We've Reached the Mediation Tipping Point

According to Gitnux, mediation boasts a 70-80% success rate, and its use in the workplace increased by 22% between 2014 and 2016. Issues were resolved efficiently within an average of 45 days, compared to litigation's 18 months (prior to the pandemic-fueled backlog). Five major forces contribute to the global rise of mediation as an effective means to resolve complex disputes:

International Recognition of Mediated Settlement Agreements

In August 2019, the signing of The Singapore Convention demonstrated the international community's commitment to resolving disputes through mediation. The Singapore Convention requires its signatories to recognize and enforce agreements made in mediation during international disputes. Prior to the Convention, a settlement reached during mediation might not be recognized or enforced. Today, 55 signatories support the convention, including the world's two largest economies—the United States and China. The Singapore Convention is to Mediation what The New York Convention was for Arbitration in 1958.

Advancements in Technology

Mediation is almost a strictly human process. However, technological advancements have greatly increased its availability. Virtual platforms that confer the necessary security and confidentiality have expanded global mediation possibilities and the option to access case-specific SMEs. These advancements further reduce costs and logistical challenges. It's important to note that COVID-19 compelled courts globally to embrace legal technology, and the benefits of virtual platforms proved undeniable. Consequently, this accelerated the use of mediation.

Courts Are Overwhelmed

"The backlog will not be solved by trying more cases," said Louisiana Judge Scott Schlegel, "it will be solved

by getting cases out of that pipeline that could be better served by ADR; probably more than 40% of our cases could be solved using mediation.”

It’s blatantly clear that courts throughout the country are overwhelmed by the number of cases being filed, resulting in a growing backlog. In Nassau County alone, around 2,000 trial-ready cases were queued toward the end of the pandemic. If each case took a week, with limited courtroom capacity, they’d barely put a dent in the backlog as new cases were being filed faster than old cases could be resolved. Both the courts and the participants have come to understand if some cases can be resolved through mediation, all parties benefit. Participants achieve quicker resolutions, while courts can effectively manage their backlog.

Courts Need Help Meeting Their Access to Justice Obligation

Scheduling in-person mediations pre-COVID was already extremely challenging. Getting all parties in the same room at the same time was difficult: the mediator, attorneys, participants, insurance representatives, and other experts. Online platforms simplified participation, allowing flexibility for parties to participate without significant disruption to their schedules. This increased access to justice for all—regardless of wealth or status, an important objective of the court system. Remote mediation has proved to be highly effective, exceeding all expectations.

In the report, “How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations,” researchers from The Pew Charitable Trusts found that digital tools significantly improved participation rates in court hearings and helped users resolve disputes more efficiently. This certainly applies to mediation, as well. One example from the study explained that Arizona civil courts “saw an eight percent drop year-over-year in the rate of default, or automatic, judgment—which results when defendants fail to appear in court—indicating an

increase in participation. Although national and other state data is limited, court officials across the country, including judges, administrators, and attorneys, report increases in civil court appearance rates.” The boost in our ability to meaningfully engage in the judicial process is due in part to how effective virtual hearings are in reducing the burden of traveling, securing childcare, and taking off work.

Attorneys Are Embracing Mediation

One may argue that attorneys earn less fees when cases are resolved early (through mediation or otherwise), but clients are not satisfied with drawn-out, stressful, and expensive processes, particularly where the outcome is outside the parties’ control. Mediation has proven to be a better alternative to litigation—most clients, attorneys, and courts agree. As clients experience a more effective and efficient mechanism for resolving disputes, they will seek out the attorneys best suited to navigate that process. Since mediation is an important tool for resolving disputes, attorneys who fail to embrace mediation will be at a great disadvantage (i.e., having less tools than other lawyers). Attorneys who embrace mediation will accumulate better outcomes and more satisfied clients, leading to increased business (i.e., more fees).

There Is a Bright Future for Mediation

The acceptance and benefits of mediation solidify its rising importance in the legal landscape, with the expectation that it will grow exponentially. Online mediation can help resolve court backlogs and enhance accessibility. Parties involved in mediation often retain greater control of outcomes and are more creative than courts. Major companies embrace mediation for confidential and quick resolutions. Courts are endorsing mediation to help lighten impossible caseloads. With ongoing advancements in technology and increasing adoption, this heyday indicates a bright future for mediation.