**Mediation: Reduce the Risks of Litigation, by Philip Mulford, J.D.**

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Have you ever had a client come out of court mad at you, the lawyer, because the judge didn’t rule in his or her favor?

Ever had a client who, after the judge rules for the other side, accused you of creating unrealistic expectations about his or her chances in court?

Have you ever spent enormous effort to insure that your client understood the uncontrollable risks of litigation only to be blamed by your client when he or she loses?

Have you ever walked out of court embarrassed because you thought your client’s case would prevail but the judge saw it differently?

Ever had a client blame you for wasting his or her time and money on a losing proposition even when that’s exactly what you had been trying to tell your client all along, but he or she would not listen?

**Have you ever had a client refuse to pay you because you didn’t win?**

The risks of unfavorable litigation results are difficult to assess and impossible to fully contain. In addition to the outcome risk, there is tremendous risk - win or lose - that your client won’t appreciate your professional effort, as expressed in dollars and cents, when you present your bill. The amount of time and expense an attorney must dedicate to prepare a case for trial are extensive - beyond the understanding and expectations of many otherwise reasonable clients. The inherent nature of the adversarial process requires the lawyer to spend considerable and necessary time engaging in the discovery process - interviews, depositions, interrogatories, motions, interviewing and preparing witnesses, researching and writing briefs, etc. Perhaps because a significant portion of a lawyer’s preparation time and effort occurs out of the client’s sight, the client often has a difficult time understanding how their legal fees get so high. I would also suggest that unfulfilled expectations also play a big role in client dissatisfaction with litigation, attorneys and attorneys’ fees.

Consider this. A prospective client walks into your office, describes what has happened in his or her situation and looks to you to do something about it. As you explain how the law works and what your prospective client might expect from his or her case, you do your best to insure clear understanding. You know that your client is probably unfamiliar with some of the legal terms that you might otherwise use to explain and assess the case so you try your best to speak in plain English or at least define terms as you go. In addition, you might feel an internal tension. You want the prospective client to hire you, but you want to avoid creating unrealistic expectations that you’ll have to contend with later. You follow up your discussion by asking your prospective client to read and sign a letter of engagement that may require a retainer. In the end, despite your client’s knowing nods of agreement throughout your interview and in spite of your considered efforts to be clear and reasonable in your assessment (including the caveat that your preliminary assessment is based only on one side of the story), your prospective client has probably just heard the part that he or she wants to hear and disregarded the rest. You’ve just boxed yourself into a potentially impossible situation.

How are you going to ever satisfy your client’s expectations? You may have unintentionally increased those expectations by simply agreeing to take the case. Later, those expectations may interfere with your ability to convince your client to accept a reasonable settlement because it’s less than what your client thinks you originally told him or her the case was worth. Those expectations may result in your client going to court to get what he or she heard you promise, but that which you know the judge will never award. You wonder how your client became so unreasonable. Afterwards, your client may think he or she has been taken for a ride.

Mediation eliminates the risk of unfavorable litigation results. The parties and their attorneys control the outcome. Only mutually satisfactory agreements result from mediation.

Mediation reduces the risk of a client with unfulfilled expectations. Mediation minimizes the role of the lawyer as promise maker by making the client a more active participant. The process affords accountability between the parties. As lawyer and client hear the other side’s story and the lawyer adjusts the preliminary assessment, the client is also in position to adjust his or her expectations. In my experience, mediation results in clients who appreciate the legal expertise and contribution of their lawyers.

Mediation also reduces the risk of a client who is dissatisfied with his or her attorney’s fees. For starters, the inherent nature of the process of mediation saves time and, therefore, money. More importantly, however, mediation connects clients more directly to the time and work involved in resolving their case. That creates a better appreciation for the related professional fees incurred.

Despite the disadvantages of litigation, I am in no way suggesting that mediation replaces the need for legal counsel. Mediation is not a substitute for a lawyer and legal representation. It is, in fact, a substitute for the courtroom battle and the adversarial process. Legal counsel in mediation is important. Effective legal counsel in mediation, however, requires counsel to serve a different, less combative, role. Mediation is neither adversarial nor argumentative, but rather cooperative and collaborative. Mediation tends to minimize and resolve differences rather than exaggerate and inflame them. Mediation maximizes the role of the lawyer as legal professional by putting lawyers in a position to help clients create forward-looking, customized solutions to their issues; support clients’ decision making ability by explaining the legal consequences of various alternatives; explore clients’ needs and assure that those needs are satisfied in any agreement; and assure that agreements comply with the law.

Broadly speaking, the benefits to the Bar of embracing mediation are immeasurable. Think what might happen if instead of arguing the facts and the law most favorable to their client at the other side’s expense (often not realizing the extent of their own and their client’s emotional, physical and financial expense), lawyers put their energy into creating and shaping mutually agreeable solutions. Lawyers might then be more favorably perceived as invaluable resources for their clients. They might become sought after early instead of avoided until the last minute; viewed as positive and helpful instead of negative but necessary; thought of as creative collaborators in shaping and creating solutions to their client’s issues, instead of as inflammatory wedges between parties and obstacles to agreement.

According to *U.S. News & World Report,* dispute resolution will be one of the three fastest-growing professions during the 21st century. Public and market awareness of mediation is growing rapidly. The public is learning that a successful alternative exists to litigation and the adversarial system. Lawyers could easily be perceived as limited only to their role in that process and be deemed inconsistent with a role in mediation. That is not and should not be the case. It should not be the case that clients come to me for mediation because their interviews with lawyers have left them wanting to avoid lawyers as well as litigation. Lawyers need to understand mediation in order to explain its advantages, disadvantages and appropriateness to their clients. Then lawyers must be able to effectively support their client’s mediation efforts, giving legal counsel as needed while encouraging their client to remain in control of the decisions that will affect the rest of his or her life. Those lawyers who do so will be sought after.

**Philip Mulford**, founder and president of **Mulford Mediation**, is one of the few mediators in Virginia that the Supreme Court of Virginia has certified at the highest level for both family and business mediation. Philip is also approved by the National Association of Securities Dealers (the “NASD”) to mediate disputes for the securities industry. He is one of only a handful of mediators in Virginia with a full-time, professional mediation practice. A graduate of Duke University and the University of Virginia Law School, Philip practiced law from 1982 until 1990 when he started **Mulford Mediation** and devoted his efforts exclusively to mediation. Through his VSB approved CLE programs, he teaches lawyers how to effectively represent clients in mediation. In addition, he speaks to business, trade and community organizations about the benefits of mediation. With offices in Fairfax and Warrenton, **Mulford Mediation** provides mediation services to businesses, families, and individuals, as well as to government and community organizations.