

# MEDIATION STARTS FROM THE FIRST PHONE CALL—PRACTICE POINTERS AND HELPFUL HINTS FOR LAWYERS GOING TO MEDIATION

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Mediation has changed. The cases being mediated are larger and more complex, and the lawyers are more sophisticated and experienced in the mediation process. The authors of this article attempt to summarize some of the practice pointers and helpful hints they have gleaned from mediating thousands of complex commercial disputes.

We sort our comments chronologically: before, during and after the mediation. While by no means exhaustive, our thoughts should provide both the new and experienced practitioner with some insights into the mediation process.

## I. BEFORE THE MEDIATION

Perhaps the best place to start is to address what disputes are right and ripe for mediation. To understand the answer, it is important to make sure one is asking the right question. The right question is not whether any dispute can be settled at any time, but whether a dispute can benefit from the involvement of a mediator at any given time. A mediator who understands his or her role can bring value to even those disputes that are not ripe for settlement by assisting the parties in designing a process that helps to get the

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case ready for future settlement in the most efficient and speedy way possible.

Once the lawyers in a dispute agree that the matter is ripe for mediation, the first question they must ask is: what are the challenges of the case? Put another way, why have the parties been unable to resolve the case on their own? Have difficult legal issues been the roadblock? Or is it combative personalities or a lack of follow-through by a previous mediator that caused impasse in the case? The next question is what kind of mediator can best meet those challenges?

Unlike judge shopping (something we are taught in law school to avoid), we start with the fundamental proposition that lawyers should mediator shop. In order to shop wisely, a lawyer needs to take numerous things into consideration. Perhaps the most important factor is to think seriously about accepting the mediator proposed by the other side.

One experienced mediator tells a story about a young associate who brought his senior partner to court with him on the morning he was supposed to argue a case for the first time. The young associate saw the opposing lawyer in the hallway of the courthouse and introduced him to his partner, "This is my adversary, Mr. Jones." The young associate's partner politely shook the opposing lawyer's hand and then took the associate, arm over his shoulder, down the hall and said, "Let me explain one thing. That lawyer is your partner, your client is your adversary."

The point is that when you agree with opposing counsel to explore settlement efforts, you are by necessity partnering with that person in an effort to see whether there is a mutually agreeable resolution. A mediator recommended by your adversary is likely a person the other side has worked with before and trusts. While a lawyer should obviously do homework before agreeing to a mediator, such agreement may be the key to achieving a mutually agreeable resolution.

Above all else, you want to look for a mediator who has several fundamental qualities. First, you want an honest broker. Second, you want someone with enough sophistication to use your information wisely and read your signals astutely. Third, you want someone who will smooth over the bumps and keep everyone "in the game." Fourth, you want someone who can recognize when the day's progress has been made and has the sense to call a break and design a follow-up process that keeps people working toward the goal of settlement. In other words, you want someone who is

going to pursue the matter competently and tenaciously until it is settled.

Additionally, there are several broad categories of mediator traits that the parties might consider when choosing a mediator. These include personality, process expertise (experience) and subject matter expertise (substantive knowledge). For example, the parties may decide they need a “hammer” who will be evaluative and aggressively advocate a settlement. Or, the parties might want a charismatic leader who can help “herd the cats” when there are multiple parties. Experience is clearly a consideration in certain kinds of complex matters such as securities class actions, where the mediator is called on to understand the interplay between various plaintiffs (class, derivative, and “opt outs”), multiple defendants (directors and officers, company, auditor, underwriters) and “towers” of insurance that may involve literally dozens of insurance companies. Substance expertise may be a relevant consideration if the dispute focuses on a unique area of the law or on a specific aspect of a given industry. Disputes with highly charged emotional issues require a mediator with the requisite people-skills. Looking for a mediator with specific expertise reduces the pool of potentially acceptable mediators, but the benefits may nonetheless outweigh the drawbacks.

## II. THE FIRST CALL STARTS THE PROCESS

Mediation does not “start” on the morning of the first face-to-face meeting. To the contrary, mediation is a continuing process that starts at the time of the first preliminary phone call between the mediator and the parties. A skilled mediator begins to mediate and to craft a process designed to lead to settlement when he or she handles the early phases of the case. The first few phone calls and the design of a process to get the parties ready for their first meeting are critical challenges for the mediator.

The initial contacts are also extremely important for counsel. For example, picture the mediator sitting at a desk with a stack of briefs, a binder of exhibits, a full calendar and a substantial number of calls to return—then think about what your goals/strategy as counsel should be when you first reach out to the mediator. While there are fundamental differences between mediation and more formal court processes, the basic keys to persuasive advocacy are the same. At the outset, the lawyer needs to think about how best

to educate the mediator. This article does not presume to teach a course in advocacy, but suffice it to say, calling your mediator without thinking about how best to grab his or her attention and how best to hone in on the themes of the case is a mistake.

Typically, a lawyer walking into court is painfully aware that the effectiveness of his or her presentation depends on the first few words designed to capture the attention of the judge before the judge loses interest and politely cuts the presentation short, or worse, simply bangs the gavel. The fact that the mediator is hired by the parties and typically holds no formal power should not lead to complacency, since as long as a neutral serves as mediator, they are critical to the process that will potentially lead to settlement, and by extension, the settlement value of the case.

An effective advocate both tests and analyzes a mediator's early reactions to key points and arguments in the case. The opportunity for counsel to speak with the mediator *ex parte*—both ahead of time and at the mediation—is one of the fundamental differences between mediation and other court processes, and it presents an opportunity for the advocate. Perhaps the most important, albeit subtle, thing that an effective advocate should do from the beginning of a mediation is to work with the mediator to set expectations. Although parties likely come to a mediation with their own analyses of how the case should settle, they are frequently willing to adjust their initial judgments when they are satisfied that they have fully explored the limits of what the other side is prepared to do. For that reason, counsel should assume that the mediator is talking to all of the parties ahead of time and should use that fact as an opportunity to communicate through the mediator what realistically might be the “universe” of potential settlement.

At this point, it is important to distinguish expectation setting from setting “pre-conditions.” The quickest path to undermining a mediation is allowing the parties to engage in “pre-conditions.” For example, a plaintiff may demand that the defendants “put \$10,000 on the table” before the plaintiff will agree to come to a meeting. If the defendants are willing to settle the case for \$10,000, but not more, they will certainly reject the demand to put that \$10,000 on the table as a “pre-condition” to a meeting. This is very different from the plaintiff's sending a message through the mediator that it views the case as a “5 figure,” not a “4 figure” case. Sending this message and allowing the message to set expectations

is very different from demanding that the other party put a specific number on the table.

In addition to designing the process, the mediator has several challenges during the early stages of the process. One of the most important of these challenges is that the mediator must keep an open mind and remain neutral as counsel tries to use early discussions to sway the mediator into buying into his or her side. If a party perceives a mediator as buying its "side" at an early stage, it may become entrenched in its position and unwilling to participate in the normal give and take of negotiation.

Another important function of the mediator is to narrow the issues and build a process around the keys to a given dispute. In other words, before the mediation, the mediator must attempt to understand what has led to impasse and how it can be broken. Mediators do not ask for briefing because they like plenty of bedtime reading; they do not make sure that people with authority are coming because they like a bigger audience; and they do not involve neutral experts or research assistants because they are lonely in their role of neutral. Mediators do all these things because they are trying to design a process that will identify and move past impasse.

### III. INVITE THE RIGHT PEOPLE

One of the key jobs of the mediator is to make sure in advance that the right people are coming to the mediation. By "right," we mean people with authority who can make the hard decisions about a final settlement position.

There is no doubt that sending a party representative (such as a risk manager) with a limited level of authority can lead to missed opportunities. A fruitful process may reveal new information, timing constraints, or expiring offers that require speedy decisions. The presence of an experienced, fully authorized party representative may allow one side or the other to seize the moment. Momentum, progress, and pressure may lead to moments that, if not quickly pursued, may not be available the next day or the next week or even the next hour.

We recognize that party representatives are sent to mediations with limited levels of authority for a variety of reasons. Typically a party will have analyzed a matter as having a certain settlement value and instructed its representative to adhere to that level of

authority. Alternatively, a party may be hampered by outside constraints such as the impact of settlements at certain values on the publicly reported financial statements, or the limitations on insurance as a result of coverage defenses. The authors of this article have all spent afternoons with settlements potentially within reach but stymied by the instructions given to the party representative in the room, as well as the unavailability (even by telephone) of higher level decision-makers. While we are respectful of the settlement value that a party may place on a given case, and understand the strategic considerations of sending representatives with limited, rather than unlimited authority, we would strongly urge parties to have a process set up so that the party representatives at the mediation are able to reach decision-makers at the company on a moment's notice during the course of the mediation. Should a window open in which new information changes the settlement dynamic of a case, it is good business to make sure that the company is prepared to take advantage of that window.

A good example of dealing with questions of authority is with insurance carriers, especially when there is a "tower" or multiple layers of insurance. One must confront questions of authority anew as negotiations touch each new layer. This is not merely the problem of the mediator—the insured and plaintiffs' counsel must also make sure they understand this dynamic. Obviously, defense counsel needs to understand their client's insurance and how to work with the carriers in a difficult negotiation. Plaintiffs must ensure that when a mediator explains the limitations of available resources, they are prepared to analyze the coverage issues and come to their own conclusions as well as potentially make strategic decisions based on the structure of the insurance that might change the dynamic in the negotiations.

#### IV. PARTICIPANTS—OTHER CONSIDERATIONS— THE RIGHT PEOPLE

Mediation may be the only chance between the initiation of litigation and the start of trial for each side to talk directly to the decision-makers on the other side. Thus, who each side chooses as its principal or representative at the mediation is critically important for at least three reasons. First, each side must feel that it has had the opportunity to talk directly to an appropriate decision-maker on the other side. Until a party has had the opportunity to

vent and to try to convince the “right” people on the other side, it is unlikely to believe that any offers or demands are truly the best that the other side has to offer. Second, if the party representative for each side is experienced and effective, that person may well hear something unexpected or come to a conclusion about the value of the case that differs from preconceived perceptions. Third, who a party chooses to send to a mediation speaks volumes about that party’s posture in the mediation and commitment to the process, and the choice will (and should) be carefully scrutinized by the other side.

## V. PARTICIPANTS–CARRIERS

In cases that involve insurance, the role of insurance carriers and their representatives is one of the most commonly mishandled aspects of the mediation process by both mediators and lawyers. One of the more important pieces of advice this article will try to impart is to encourage mediators and lawyers to understand how insurance works in a given case and to implore all involved to treat the insurance representative as a participant in the mediation and not a check book. It is the responsibility of the parties—both sides—to understand how insurance works in a specific case and to do everything necessary to bring the carriers up to speed.

While it may not be practical in all cases to have a carrier representative at the mediation, the defendants should, at a minimum, ensure that a carrier representative is available by phone. The plaintiff should not simply rely on the defense to make these arrangements but should seek to confirm the availability and hopefully the attendance of the insurance carrier and, if necessary, take the matter up in advance with the mediator.

We understand that at times there is a perception on the defense side that bringing the insurance carrier—or some portion of an insurance tower—will send signals to the plaintiff about the availability of some level of insurance to settle the case. There is a similar perception at times that just sharing the relevant information about insurance with a plaintiff (i.e., how much insurance there is in a given case) will raise the plaintiff’s expectations. Our experience is that sharing this kind of information, accompanied by an appropriate message to limit expectations, is far better than leaving the issue open and leaving the plaintiff with unanswered questions.

A defendant should openly share information with its carrier from the outset. In addition to making sure that the carrier is in the loop and prepped, a defendant should also engage in a dialogue with its insurer about the defendant's view of the merits of the case and the importance to them of getting the case settled. Similarly, the exercise should give the carrier an opportunity to understand the case and the views of the insured and to provide feedback to the insured as to how the carrier would like to approach the mediation. Carriers, particularly their claims and coverage lawyers, are often skilled and experienced negotiators as they are likely to handle the resolution of numerous cases during the course of a year. Getting on the same page and working with a common strategy is much more likely to work to everyone's advantage in the long run, as opposed to when the insured and the insurer are at war. Another reason why advance work between insurer and insured is helpful is that it ensures that a coordinated defense team is prepared and ready if a window suddenly opens for the resolution of the matter on satisfactory terms.

## VI. MEDIATION DAY

The day of the in-person mediation may be the one chance during the course of litigation for each party to speak directly to the principals or other decision-makers on the other side of the table. A trial lawyer should relish an opportunity to talk directly to the other side. A decision-maker should jump at the chance to hear directly from the other side without the message being filtered by counsel.

We offer a number of recommendations to lawyers with regard to approaching the opening mediation session and the opportunity to speak directly to the other side. First, and foremost, counsel must prepare for this first session and then prepare some more. This may sound self evident, but we often see counsel squander settlement opportunities due to lack of preparation and an underwhelming presentation during an opening session. Although an experienced lawyer would never approach a jury for the first time without carefully honed remarks, too often the same lawyer will enter the first mediation session and waste the opportunity to shape the outcome of the case.

A lawyer should think about several key points in preparing for an opening session. First, show them you would be formidable

at trial (but only a peek). In other words, we are not recommending a dog and pony show or a blistering diatribe, but rather a thoughtful presentation of the case with a few glimpses of your ability to be persuasive, emotional, and eloquent. Keep in mind that tone is everything since the right tone makes it possible to show a command of the facts and the law in a constructive way. Remember that this is a mediation and that it is important for the lawyer to demonstrate that he or she is there to settle and to be reasonable. This means more than simply parroting, "I am here to be reasonable." Significantly, the best and strongest presentations we have seen have usually included a thoughtful acknowledgement of the weaknesses of the presenter's case.

A good mediation presentation focuses on the essential elements of the case without a word for word recitation of what was in the briefs. Most cases turn on two or three main legal or factual disputes; counsel should point these out and address them candidly at the outset. Lawyers should also talk about who the witnesses are, how they will testify, and why they will be credible. Finally, use of a few key charts is often helpful in clarifying some of the more complex elements of the case.

When we talk to parties in a mediation about opening statements we often hear a refrain of three points. First, parties often tell us that "we've been litigating for years and we know what they are going to say." Second, parties tell us "we don't want to show them what we have, we just want to get into separate rooms and find out if they are serious." And third, we often hear that "there are too many raw emotions in this, the session will get ugly." It is true that the mediator must work to structure a process that does not lead to unnecessarily prolonged opening sessions, which can in turn result in a "free for all" and serve only to provide discovery opportunities for parties who are not truly interested in settlement. This is particularly important since the opening session, if crafted correctly, has the potential to bring great value to the process. A good mediator will work with the parties to design an opening session that is tailored to the unique facts and circumstances of the given case, and that takes into consideration the great value that can come from face to face discussion if handled correctly.

VII. OPENING DEMANDS AND OFFERS AND  
HOW THEY RUIN OUR DAY

The authors of this article have collectively handled thousands of complex mediations. No first demand has ever been received with applause, and no first offer has ever been accepted with fist bumps and high fives. The most sophisticated and experienced lawyers and decision-makers handling the biggest cases do not blink, do not shake their heads, and do not grimace or snort: they take the information conveyed in a demand or offer, and work to craft a response that takes control of the negotiation.

Unfortunately, that group of non-head shakers constitutes a relatively small percentage of lawyers and decision-makers. Mediators spend a lot of their time trying to overcome the disappointment of the parties and keep everyone engaged in the process. Parties make high demands and low offers for any number of legitimate reasons, and some illegitimate ones. One of the main reasons may be that until the negotiating process has had a chance to run its course, each side is moving forward cautiously and in small steps. Another reason for slow movement is that parties may not come into a mediation with a pre-determined settlement number but rather, with a more general assessment of the damages and relative merits, and a broad sense of what a fair outcome would be. In such circumstances, it takes time and great patience by all concerned to move to a point where the parties can agree on a mutually acceptable result.

We recognize that there are complexities in a negotiation that may render it unwise for a party to unveil its “bottom line” position at or near the outset of a mediation. In our view, a mediator should not force this issue too soon. Parties to a complex mediation are often represented by multiple people; in that situation, there is often a tendency, especially in the early stages, to defer to the negotiating posture of the most aggressive member of the group. Only when that person is satisfied that his or her “hard line” approach has been fully tried and has failed is it possible to move to more constructive approaches. Stated somewhat differently, a party may feel that it needs to “test” certain outer ranges before it is prepared to accept that the other side won’t agree to settle there. So too, a party may want to see a certain level of movement from the other side before it is prepared to make a significant move. It also may be that a party is reluctant to reveal its true area of interest too soon since the other side might simply use

that information as a starting point for further negotiation. All of this means one critically important thing—patience and a willingness to go slow is an essential element of mediation. Without this key ingredient, the process may well fail.

### VIII. THE NUMBERS

If starting high, responding low and moving in “baby steps” toward some middle number worked, then chances are the parties would not have chosen to go to mediation. As it relates to negotiation, perhaps the most important pieces of advice we can give is to not stand on ceremony, not insist on lock-step moves by the other side, and to resist the urge to say, “I won’t bid against myself.” The goal of a negotiation is to get to a number at which the parties are prepared to settle the case. How many moves each side might make, who moves further more quickly, and who makes the last few steps the most painful are not relevant considerations in evaluating the outcome.

This article does not purport to be an exhaustive analysis of negotiation theory and strategy. We do, however, offer a few words of negotiation advice in the context of mediation. First, it is extremely helpful for a party to share with the mediator ahead of time what the history of negotiations and negotiation “signals” has been. When parties arrive at an in person session and learn that the other side has changed its position or that they have misread the other side’s “signals,” it can be a long load before things get back on track. If parties share what they know with the mediator ahead of time, the mediator can help sort through the history and make sure that the parties are on the same page at the start of the first in person mediation session.

Second, we suggest that there are many ways to assist the mediator in a negotiation. Perhaps the most important of these is to give signals about your real area of settlement interest. The mediator is constantly looking for such signals and for flexibility and will sometimes need little more than a small “official” move if it is accompanied by a more flexible signal. For example, consider a hypothetical mediation in which the plaintiffs have demanded 10X and the defendants have offered 1X. The plaintiff may agree to move to 9.5 but tell the mediator (for repetition to the other side) that it is not moving below the “mid-point.” The defendant may be disappointed that it has received so small an “official” move, but it

should have an open mind about the progress of the negotiation since it has been given a signal that the plaintiff would likely go to 5. The defendant may respond with 1.5 and with a message that it is “not prepared to settle the case with a number starting with a 5.” Thus, the plaintiff has received only a small responding move but, much more importantly, it has been given a signal that the defendant may settle the case at a number starting with a 4.

Now that plaintiff has signaled that it is likely “in the 5’s” and defendant has suggested that it is “in the 4’s,” the question is “what next?” Using brackets or conditional offers in this situation can be very productive. For example, the plaintiff may make a conditional offer and suggest that it would move to 6 if the defendant put 4 on the table. Alternatively, the plaintiff might suggest that 4 and 6 serve as brackets and that the negotiation take place between 4 and 6 from that point forward. The defendant, in turn, might like the idea of a bracket, but want to drive the numbers down, thus, it might offer to negotiate between 4 and 5.5. If plaintiff agrees, it will still have protected some territory above 5 (its early signal as to where it wanted to be), and will have succeeded in getting the defendant to put 4 on the table.

The proverbial dance is less a science than an art. The mediator pays close attention to the process, searching for the signals and numbers that might work. When parties seem close but are unable to get there, a mediator might choose to make a “mediator’s proposal” of a number that the mediator believes would work. Putting out a mediator’s number is often a last resort and risks losing one or both of the parties if they believe that the mediator has “ruled against them” with the number he or she has chosen. Also, once a mediator’s proposal has been rejected by one or both of the parties, it may be difficult to engage in further productive mediation.

## IX. IT WORKED—NOW WHAT?

The decision as to how to memorialize a settlement at the end of a long day is based on several different factors. While complicated settlements involving difficult parties may cry out for careful, written documentation, it is also true that forcing tired parties to negotiate the language of a settlement agreement when they have already been stretched to their limits both emotionally and financially can spell disaster.

While some parties have a relationship that renders anything more than a handshake unnecessary, a simple, handwritten memorandum of understanding (“MOU”) with three or four key terms is the most common method of proceeding. If there is not time to draw up even a simple MOU, the mediator can email the key terms to the parties following the mediation. If the parties reach an agreement with the help of the mediator, they may consider writing the mediator into the MOU, or otherwise agree to the mediator’s continued “jurisdiction” over the settlement. This gives both parties an agreed mechanism for resolving disputes that may arise in connection with the settlement, and makes it less likely that such disputes will jeopardize the overall settlement.

A mediator’s nightmare when documenting a settlement is hearing, “Oh, by the way,” from one of the parties followed by things such as: “We are not prepared to release the CEO,” or “We meant EUROS not dollars,” or “We want this funded in 24 hours,” or “We are not able to fund until the next calendar year,” or “We need board approval,” or “We don’t want confidentiality” and the list goes on. Although there may be strategic considerations why certain issues are not raised until a number has been reached, it is essential to alert the mediator in advance about potentially problematic issues. This allows the mediator to manage the other party’s expectations. For example, one party may have certain requirements as to the structure of releases, but is not willing to let this become “currency” in the negotiation. In this situation, the mediator may want to alert the other side to prepare to discuss releases once a number is reached. Allowing the mediator to help finesse these kinds of issues is far better than surprising the other side with them.

Above all, have grace at the end. If you have reached an acceptable number, there is nothing wrong with being graceful and courteous. Agreeing to the number is often just the beginning of the settlement process. You may work with the mediator again and with the other parties again, so let them know you appreciate their hard work.

## X. AFTER THE MEDIATION

Absent a settlement, the phrase “after the mediation” has no proper place. Mediation is a process that may incorporate a day of face-to-face negotiations, and there may or may not be a settle-

ment on that day. To suggest, however, that there is such a thing as “after the mediation” is to force mediation into a “one day” paradigm that undermines the true potential of mediation. Rather, a mediation starts the moment the first call comes in, and it should not end until the parties have put the dispute behind them.

The authors’ experience is that disputes increasingly do not settle on the day of the “in person” meeting. One might attribute this to the changing nature of mediation and the way in which parties are using the process. Whatever the explanation, it is important to choose a mediator who will not view the process as a one day event. Mediators who perceive mediation in this way are more likely to try to force a settlement as the sun goes down and may not be interested in doggedly pursuing settlement from that point forward.

The mediator has several overarching challenges at the end of an in person negotiation that appears not to be headed for immediate settlement. First, the mediator must recognize the point at which further pushing on the day of the mediation might damage long term settlement prospects. Second, the mediator must strategically end the day with both parties recognizing the progress made, and appreciate the value in stopping where the mediator suggests. Finally, the mediator must help design a blue print for a successful process going forward.

The job of the mediator in designing the blueprint for the process is to understand what has led to impasse. For example, it may have become apparent that the parties are divided by their respective views on damages. In this case, a mediator might design a process that encourages both the exchange of damage analyses for mediation purposes, and the review of those analyses by a neutral expert engaged by the mediator. Or, it may have become clear that the parties are divided because the defense insists that discovery will prove the allegations in the complaint to be incorrect. In this case, the mediator might help orchestrate a speedy and efficient exchange of some targeted documents, or perhaps a key deposition, to allow the parties to better evaluate what the evidence will show. Or, in one final example, the parties may have a fundamental disagreement over how the court is likely to rule on a key motion, or on a key issue in a series of motions before the court. When parties have authorized mediators to be in contact with the court, we have noticed that most judges are receptive to guidance from mediators on how they might orchestrate the timing and

structure of certain rulings to assist in the facilitation of the settlement process.

We hope that these observations and insights are helpful to practitioners going to mediation and will assist you in preparing wisely and maximizing the effectiveness of mediation for your clients.

