From Courtroom to Conference Room: Reflections on Mediation

by Gregory J. Haley and Scott C. Ford

Every lawyer with a litigation practice must master mediation. The skills of an effective courtroom advocate are very different from the skills of an effective lawyer at mediation. This article analyzes, from the perspective of trial lawyers, how to approach and manage a mediation to achieve the best results for your client.

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What Is Mediation?

In mediation, parties agree to try to settle a dispute using a neutral third party to facilitate, manage, and preside over a structured negotiation. The mediator is often a retired judge, a sitting judge, or a seasoned litigation attorney.

At a mediation conference, all parties participate in a joint session with the lawyers and the mediator present and then split into separate groups. The mediator then shuttles between the groups with messages, analysis, and persuasive or evaluative commentary until the dispute is settled or the negotiations end.

The Rise of Mediation

As the number of cases brought to trial has decreased, the use of mediation has increased. Mediation has become popular because it can settle litigation. An intriguing question is why mediation is so popular and so effective. The analysis of this question is critical in developing mediation practice skills.

Mediation is effective because:

- The parties have more control over the outcome, as compared to the win-lose result that often occurs in litigation. There is also more flexibility in structuring an outcome.
- It is sometimes difficult to predict how a jury or judge will decide a case.
- A settlement ends the cost, stress, and inconvenience of continued litigation.
- The mediation process leads to settlement by incorporating important emotional and psychological effects, such as a party's opportunity to be heard by the other side. Unlike litigation, mediation allows the parties to talk directly to each other. A good mediator will allow each side that opportunity. Further, most parties that devote substantial time to a mediation become invested in the process and desire to reach a compromise if possible.
- The mediator's comments can serve as an important reality check to the parties.
- Preparing for mediation forces the parties to take a critical and realistic look at their positions.

There also is significant value in considering why mediation efforts fail and the case does not settle, or your client agrees to bad settlement terms. Mediations fail because:

- The necessary parties with settlement authority are not present to personally experience the give-and-take of the negotiation process.
- The lawyer has not properly prepared for the mediation.
- There is anger, hostile presentation, pride, and tricks or surprises. United States Magistrate Judge Michael F. Urbanski of the U.S. District Court—Western District of Virginia observed wryly that "the tricks never work."
- The mediator makes mistakes.

- A party does not participate with the good faith intent to reach a resolution.

- A party succumbs to litigation fatigue and just wants to end the litigation on any terms and at any cost.

Before Mediation

Good lawyers know that the best way to settle a case is by getting ready for the trial. In every communication with the opposing side, the lawyer must demonstrate competence and readiness to try the case. Proper mediation preparation is also good trial preparation.

Evaluation of the case includes its strengths and weaknesses, the facts, and the law. The lawyer should share the case evaluation with the client. These steps will avoid surprises and establish realistic expectations.

The litigation then proceeds through pleading, discovery, and motions phases until the facts and legal issues identified in the evaluation are confirmed or adjusted. The timing of mediation depends on the case. It is generally helpful to have at least some discovery done to fill out the fact issues. It also helps if some event is imminent, such as a summary judgment, an important motions ruling, or trial. If the dollar dispute is relatively low, early mediation is advisable before both sides have reached the point that neither side can afford to settle.

The Psychology of Mediation

Mediation is effective in part because of the time invested by the parties with the goal of resolution in mind and because of the role of the neutral third party to highlight the strengths and weaknesses of each case.

The lawyer should try to make certain that the client understands the following:

- The mediator represents only the settlement of the case. Some mediators settle a dispute on any terms the parties agree to. They may not be interested in justice or fairness. Other mediators — particularly judicially appointed mediators — will consider and argue interests of justice and fairness. The lawyers have to consider and adjust to the mediators' styles.

- The mediator will identify and emphasize every weakness in each case. You should prepare your client for this.

- Negotiation involves incremental movements by each side. The client must be patient.

- The lawyer must prepare the client for the possibility that mediation will not end litigation. The client should be prepared to walk away if the mediation result is not acceptable.

Mediation offers an excellent opportunity to change the other side's perception of the case, because the lawyer can talk to the opposing party without the filter of opposing counsel

Independent Negotiation

It is essential for each party to exchange offers and demands before the mediation session, to minimize the possibility of a wasted mediation effort and reduce the temptation for gamesmanship. The exchange also gives at least a framework for analyzing competing expectations. The exchange requires the lawyers to take an updated look at the case, plan a settlement strategy, and involve the client. A lawyer should not use mediation as a substitute for talking with the other side and trying to negotiate a settlement.

Choosing the Mediator

Picking the right mediator depends on the characteristics of the case and the parties involved. What problems are holding up settlement? Does the client have unrealistic expectations? Is he or she too emotional or naive about the uncertainties if the case goes to trial? Examine the other side as well. Is opposing party too zealous or unable to analyze the facts or law? A lawyer can identify the obstacles to the mediator.

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Training and experience are essential to be an effective mediator. A retired judge brings authority and credibility that are important in reaching a settlement or convincing a recalcitrant lawyer or client. If the lawyer anticipates that the mediator will have to assert an independent evaluative role to make the other side more realistic, then pick an assertive mediator. Cases such as construction or patent law may need a specialized mediator.

The Mediation Agreement
The parties should enter into a mediation agreement that addresses cost sharing, confidentiality, and other matters.

Preparation

- Prepare your client, develop settlement arguments that include the organization of themes and the opponent's weak points. Identify nonmonetary factors that can be used as "bargaining chips" at the mediation. This allows for concessions on significant but relatively painless points.

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- Educate your client about the mediation process, and engage the client's participation in finalizing the settlement strategy. The client should understand that your role at mediation is very different than your role at trial: in mediation, you will be trying to develop a rapport with the other side. The client should understand that anger, sarcasm, or disrespect is likely to result in failure. In some cases, an apology by your client might be appropriate.

- Advise the client about who should attend, what clothes to wear, and that the process may take many hours. The lawyer and the client should identify the party representative. Parties with authority to settle the case must be in attendance. Consider how certain personalities may interact when selecting participants.

- Prepare a mediation submission including a brief memorandum, pleadings, exhibits, and case law. The parties generally exchange these materials. The mediation submission should be concise and address the strengths and weaknesses of your case.

- Have a private discussion to help prepare the mediator and identify problem areas, including problem personalities. Private discussions ensure that the mediator understands relevant legal theories and the facts. It is also an opportunity to identify obstacles to settlement.

- Prepare for success. List agreement points. Bring a draft agreement to the mediation. Carefully analyze the tax consequences of the possible settlement alternatives.

Premediation Conference Call
A premediation conference call among the mediator and the lawyers will address who will attend the mediation, logistical arrangements, and the exchange of submissions. Mediators require that each party be represented by a person with appropriate settlement authority, as well as lead counsel. In cases involving insured parties, a representative of the insurance company is often required. Personal injury cases should be analyzed to determine if any third-party liens are involved. If liens are present, agreements to resolve them should be addressed prior to the mediation. Participants should attend the mediation in person as participation by telephone is seldom effective.

Logistics
The lawyer should make sure that there are adequate facilities for the mediation, including at least two conference rooms and word processing capabilities. Facilities should be comfortable for the participants, as they may be there for several hours. Arrange for necessary computer-enhanced presentations.

Joint Session
Judge Urbanski said that the joint session at the beginning of mediation is most important. He recommended a "soft-spoken, matter-of-fact presentation." John B. McCammon of the McCammon Group said that zealous advocacy is not effective and that mediation requires a collaborative process. Courtroom strategies may fail at mediation, he said. For example, at mediation, listening is just as important as talking; speaking softly is better than speaking loudly; and being open is better than hiding information. It may be more effective to present information in a more neutral manner rather than in a more traditional advocacy style.

The joint session should be conducted in a conciliatory tone. Forcing the other side into a defensive posture may result in the failure of the process. Retired judge Robert L. Harris Sr. said that a bulldog or abusive approach is likely to cause people to let pride prevent a successful mediation. The lawyer with good mediation skills will express appreciation for everyone attending and a desire to resolve the dispute on a fair basis. Each side makes a presentation. Whether the clients participate in these presentations depends on the case and the clients.

This is the lawyer's opportunity to change perceptions of the facts, the merits of the case, the weaknesses in the opposition's case, and the capabilities of the lawyers. The lawyer speaks directly to the other party in a structured setting. Some lawyers effectively use Power Point and other presentation technology in these joint sessions. Computer-assisted presentations, exhibits, and demonstrations can be effective.

The Private Caucus

The private caucus includes opportunities to reevaluate aspects of the case in light of the other side's presentation or the mediator's comments. Waiting for the other side to go through that evaluative process can involve long periods of waiting. The mediator will not acknowledge the strengths of your case, but will emphasize the strengths of the opponent's case. He or she will do the same in the caucus with the other side. The parties can expect the mediator to become more assertive and more evaluative late in the process.

In commercial litigation, there are opportunities for creative negotiations that address the parties' nonmonetary interests. The best mediators will push each party to identify what interests underlie their litigation positions and how an agreement can be crafted to address those interests.

Lawyers should request that the parties and/or the lawyers meet again to discuss certain issues if the mediator's "shuttle diplomacy" is not effective. The client should be told that what is said to the mediator in a private caucus may be repeated. However, the mediator may be given confidential information and asked to keep it so.

The Many Faces of the Mediator

Every mediator has different talents and strengths. It is critical that the lawyer do his or her homework prior to the mediation and talk to others that have worked with the mediator to understand the mediator's style. Urbanski observed that some lawyers want the mediator to negotiate for them. It is, however, the lawyer's job to marshal the positive arguments, disprove and minimize the opposing arguments, and give the mediator the tools to dismantle the other side's position and undermine their confidence in their case.

On the other hand, there is a natural tendency to treat the mediator as an authority figure, with the corresponding desire to hear what this authority figure thinks about the dispute. The lawyer must make sure that the client is not unduly awed or coerced by the mediator. If a client who has not been properly prepared hears a mediator make negative comments about their case, they will be understandably distressed.

Finally, it is an accepted practice that judicially appointed mediators do not tell the trial judge about the mediation proceedings and related communications. If there is doubt or concern about this issue, it should be discussed with the mediator.

Deal or No Deal

If the case is settled, it must be written and signed before the parties leave. A settlement template should be brought that can be edited on a laptop computer.

If there is no settlement, the effort may not have been wasted. Settlement negotiations can continue with or without the mediator. If the parties are dissatisfied with the initial mediator, they can choose another and try again. In any event, the lawyer has had the opportunity to influence the opposing party's analysis. If the case does not settle at mediation, expect the mediator to follow up communications to bring about settlement.

Mediation and negotiation skills are a critical component of a necessary larger skill set for lawyers. Lawyers have trained for centuries in the techniques associated with the battle of litigation. The art of collaboration with the opposing lawyer, the mediator, and the opposing party necessary at mediation is still a relatively recent skill. Good trial techniques are the opposite of good mediation techniques. A settlement will generally follow so long as the lawyer is prepared, understands the issues, and recognizes that advocacy in the courtroom is very different than mediation advocacy. ■

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