



**Some Thoughts  
on the Mediation Process:**  
A Defendant's and Insurer's  
Counsel's Perspective



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Although prepared with due care, this paper and accompanying presentation are presented for purposes of education and discussion. They should not be construed as legal advice, particularly with respect to highly fact-dependent issues such as privilege and waiver, which are ultimately subject to abundant judicial discretion and variation among different court systems.

The mediation process - mandated by local court rules in some jurisdictions, and a practical alternative to a full-blown trial in any jurisdiction - has become an institution in dispute resolution in the U.S. Many court “settlement conferences” are, in fact, mediations featuring many of the dynamics discussed here. This short commentary reflects some of my experiences and thoughts handling mediations as defense and insurance counsel over the past seventeen years. The views are purely my own, and I hope perhaps a few kernels of useful information follow.

### When is a case “ripe” for mediation?

I know no simple answer to this very basic question. In fact, I can think of only a few truly essential [and largely self-evident] prerequisites to mediation:

1. The parties have not settled the case directly.
2. The parties agree that the case can benefit from mediation.
3. The parties know enough about their dispute to make effective presentations to the mediator.

With respect to item one, I certainly think some level of an impasse is appropriate before proceeding to mediation. I settle far more cases through direct negotiation with opposing counsel than in a formal mediation process. I do not mean to suggest that negotiations need to have broken down and bad blood effused. Rather, the parties need only have agreed that they are no longer making progress and that (No. 2), a neutral third-party would be helpful in resolving the case.

With respect to item three, the role of the mediator will be to weigh the facts and the law, and to facilitate a series of demands and offers that will, ideally, result in the settlement of the dispute. Accordingly, the lawyer plays a critical role as the primary conduit for the client’s synthesized presentation of the facts and the law. Through either formal discovery, or less formal exchanges of information, the lawyer must bring to the mediation enough knowledge about his client’s dispute to provide informed and competent representation. She must prepare for the mediation and prepare the attending client as well. Although mediation is a far better place to be surprised than at trial, it is a less-than-pleasant experience for a lawyer to be caught off guard in the middle of mediation, and to be forced to reevaluate the strategy and strength of their case.

While these may be the only three absolute prerequisites to mediation, there are a few other pre-mediation issues that may be worth taking into consideration before proceeding to the bargaining table:

*Are the parties themselves ready?* While mediation may be an opportunity for a client to vent steam, some prior cooling off period may be appropriate. The case/client may simply not be ready to settle. However, like so many of the other “rules” to mediation, this is not without exception. A skilled mediator [with the cooperation of the parties and counsel] can help to set the type of conciliatory tone and dialogue that will facilitate dispute resolution even in the face of elevated acrimony.

*Are there complex legal issues that need to be weighed in order to reach a settlement?* Multiple legal defenses and theories generally make a case difficult to settle. The general formula for the settlement of a simple case in which liability is at issue goes something like this:

$$S = R_V \times L_D \times S_D \pm T_S$$

S=Settlement value  
R<sub>V</sub>= actual damages or “quantum”  
L<sub>D</sub> = Liability Discount  
S<sub>D</sub>=Settlement Discount  
T<sub>S</sub>=Trial Savings

Obviously, this formula is a bit of a simplification. However, in some form, each of these variables has played a role and been considered in all of the mediations in which I have participated. And each one of them is potentially the subject of discussion and disagreement. If liability is not at issue, disregard the liability discount. Similarly, an interminably long pretrial process may preclude any real “settlement discount”. The last item, trial savings, tends to be more fluid than the others and, depending on a number of factors, may cancel out. In most cases, one party is more prepared and better able to afford (and risk) a trial than the other. The trial cost leverage will lie with that party.

These variables impact even the simple case. But most cases will present their own unique and distinct challenges or variables, such as an abundance of motions or potential motions, additional and questionable elements of damages (e.g., punitive damages and treble damages), and the number of parties involved. Each party will have his own view on the particular mix of factors. Sorting through the myriad of complex variables is a task well suited to the skilled mediator – a daunting task that might otherwise render the case impossible to settle directly between the parties.

### Choosing a Mediator

The ideal mediator is one *chosen by your adversary* in whom you have absolute faith and confidence. While such a selection is not always possible, there are ways of manipulating the choice so that, arguably, your adversary has made it. When later pressed to accept a settlement that you find satisfactory, your adversary can be reminded that he “chose the mediator.” Short of adopting your adversary’s first choice (which

certainly does happen), methods of creating an “illusion of choice” include, asking your adversary for a list of proposed mediators or providing your adversary with such a list so that she can “pick” the mediator. In either case, your adversary’s active role in choosing the neutral may dampen his ability to distance himself from the mediator or his recommendations at a critical point in the negotiations.

There are so many personality types and variables that go in to the mixture of making a good mediator; I would be hard pressed to present an all inclusive list. While the mediator should have a good reputation for fairness and objectivity, a background in the subject area of your dispute, though helpful, is by no means essential. Similarly, factors such as age and experience are more matters of party preference rather than indicators of the mediator’s abilities. Mediators come in all shapes, sizes, ages, and genders and there is no prototypical mediator. The wise, gray, retired judge is just the tip of the ADR iceberg.

In the final analysis, most major cities have a known select group of elite mediators. The lawyers know who they are, and indeed these mediators *are* often chosen by both sides. Most attorneys that engage in regular mediations will have developed relationships with such mediators and, hopefully, established reputations of competence and candor with them. Actual experience and word-of-mouth are typically the best sources for the best mediators.

### Preparing for the Mediation

Long before the mediation begins, preparation is essential. The client, not just counsel, should be an active participant in this process, particularly if they will be attending the mediation itself. Counsel should involve the client in the selection of the mediator and apprise them of the mediator’s approach to mediation, style, and procedures. Does he require pre-mediation written submissions? Are these submissions shared with adversaries or submitted *ex parte* to the mediator? How should the case be postured before the mediation? Do you have an offer on the table? Should it be adjusted before the mediation (perhaps to gain additional credibility with the mediator) or should you “hold pat” rather than surrender additional ground? These are just a few of the possible pre-mediation considerations.

Ideally, before the mediation, the client should review and comment on any written submissions, be briefed on the anticipated dynamics of the mediation process, and be consulted on strategy. In addition to the usual, “bottom line”, other topics for discussion may include the conduct of the opening statement (will the client participate?), the approach to be taken by the lawyer/client team (are there confidential matters to be shared with the mediator only, or not at all?), and mediation tactics (e.g., a “good cop/bad cop” approach with the client and counsel).

Because the client will bring unique perspectives to the process, just having the client “turn up” at the mediation is a mistake. The client’s active participation is likely to draw the attention of the other parties and to demonstrate the client’s genuine interest in resolving the dispute. At minimum, every client, before joining counsel at mediation, should know what to expect. The client should have agreed on the mediation strategy, and have a clear understanding of her important role in the process.

There may very often be more than one client representative in the mediation – frequently a representative of the insured and one of the insurer. In such a situation, the role of this triumvirate should be discussed in advance. All too often, as the negotiations continue and offers and demands are exchanged, the insured’s participation all but vanishes. This need not be so. The insured can be an invaluable source of business solutions to help resolve the dispute. The insured also can send critical messages to the other side, such as empathy and reason. This may be the insureds first opportunity to present a human face to the dispute.

One other critical factor that I cannot overstate is the importance that the true decision-makers attend the mediation. **The presence of an attorney who represents that his client has given him “full authority” is no substitute for the client’s attendance. The client must be there.** Anything less, including the oft-cited “available-by-phone” alternative, undermines the mediation process and perhaps the most critical power of the mediator – her ability to speak and reason directly with the plaintiff. The plaintiff may in fact have interests not fully appreciated by his counsel – closure for one. The client needs to be there for all aspects of the mediation; he needs to be affected by the opening presentation of the adversary; he needs to observe the dynamic of the mediation process; he needs to hear the mediator challenge his attorney on certain aspects of his case; he needs to feel the kind of pressure and incentive that can only set in by virtue of full participation in the day’s events. Lastly, he or she needs to be worn down by the mediation process – just like everyone else in the room. Although there are *rare* exceptions, attending a mediation without the client is likely to be a complete waste of time - and an expensive one at that.

### The Mediation Format

Mediation is typically a flexible and fluid process. Although there are rules, the format of the mediation can be adjusted to the needs of the case, the parties, and the parties’ temperament. Typically, the mediation will begin with opening statements and presentations with all parties and their counsel present, along with the mediator.

The opening statement is a critical opportunity to create a first impression and to begin the process of resolving the dispute. A different brand of advocacy (as compared to a trial) is appropriate. The right mixture will vary with the given case and the objective

strength of your position. The approach is generally conciliatory, but still appropriately forceful.

Utilizing the example of an aviation wrongful death case, let's assume that we are dealing with a relatively simple case in which the plaintiff has barely budged from an initial and inflated demand. Further assume that liability is not really an issue. The opening statement is the defendant airline's first opportunity to address the plaintiff (often a spouse or close family member of the decedent). This may be an excellent time for the airline representative's involvement. Typical "can't hurt" statements from the airline include a sincere expression of regret and sympathy, an affirmation that they are here for the express reason of resolving the case (and that they hope such a resolution will help the decedent's family put this accident behind them), and a expression of gratitude to the plaintiff for agreeing to this voluntary process. The impact of these remarks on the tone and tenor of the mediation can be significant.

Continuing with our death case, the lawyer can be more forceful in his presentations but should also be guided by the dynamics specific to the case. I would typically include in my opening statement an acknowledgement that we recognize that no money is a substitute for the loss of a loved one, but the practical realities leave us with only such a remedy. Remember, you are addressing the other side as much, and probably more, than you are addressing the mediator. Include some basics that may not have been explained to the plaintiff by her own counsel - elements of damages for example. If you are in an economic loss-only jurisdiction, explain the import of this and that the law does not recognize a recovery for grief. Address candidly where you believe that the other side has inflated or miscalculated damages. The content of an appropriate opening statement will vary with the case. In general, I like to conclude, even if repetitious, that although we have different views from the other side, we are here with an open mind and a sincere intention to reasonably resolve the dispute.

#### "Caucus Sessions" and "Cooling Heels"

After the opening statements, the parties will then break up into "caucus sessions." The mediator will visit separately with the parties and engage in "shuttle diplomacy" bringing messages, questions, and numbers(!) to either side. These sessions typically get shorter throughout the process and each party must "cool their heels" waiting for the latest response or proposal from the other. These caucuses are the sessions in which the mediator earns his paycheck and during which the parties can discuss their positions most candidly and aggressively.

The innumerable approaches and dynamics to the caucus session are beyond the scope of this short paper. A few thoughts for counsel and client are:

- Be prepared for tough questions from the mediator.

- Be realistic, but more critical of your opposition than you might have been during the opening session. Rely on the mediator to soften messages if appropriate. He wants to keep the mediation going and will “massage” your messages appropriately.
- Make sure the mediator is always clear on what information can and cannot be shared with the other side. Don’t *inadvertently* discharge your big trial gun.
- Respect the settlement dynamic. You may not want to move too quickly. This process requires time, and you may end up raising the bar and the other side’s expectations if you are too quick to increase your offer.
- Do not despair that the mediator is pressuring you; he is doing the same in the other room.
- Try to make the mediator your ally by being candid and reasonable. You want him to eventually bring disproportionate pressure on the other side to accept the logic of your arguments and offers.
- Solicit the mediator’s evaluation of your case and that of your opposition. Lawyers tend to “fall in love with their cases.” This session is your opportunity for a reality check.
- Ask the mediator for information from the other side. If you are convinced that the other side has, for example, a flawed economic analysis, ask the mediator to press them on the issue. This can be done in such an open ended way so as not to divulge the precise flaws and arguments that you have identified.
- Expect good and bad developments. A mediation is a two way street. Ideally, your stellar arguments will drive the value of the case down. Expect also developments that bring pressure on you to reevaluate the case. For example, the mediator may tell you that your “brilliant” summary judgment motion is a loser or that you have underestimated the jury appeal of the case. Not everything will go your way. Roll with the punches, and counterpunch.
- Don’t always expect to leave “happy” even if you have settled. As Judge Michael Dontzin of JAMS is apt to advise the parties, “he never promised us a rose garden.” Mediations typically end with both parties giving more or taking less than they had originally hoped. Such results also tend, like fine wine, to get better with time. For example, I have frequently realized only after later settlements and verdicts that a hard-fought mediation and case we begrudgingly settled at a “high” value had been a far better result than it seemed at the time.

## The Impasse – The Mediator’s Solutions

Mediators take different approaches when the parties do not come to a joint resolution. Some may simply call it a day – an altogether appropriate response if the parties are far apart and additional time may be helpful. Other mediators may propose a settlement. And there is more than one road to such a proposal.

One preliminary step may be for the mediator to solicit last best offers/demands from both sides on a confidential basis. If the offer exceeds the demand, the case will settle at the demand. This approach may be combined with “baseball mediation.”<sup>1</sup> Pursuant to the baseball approach, the mediator will advise the parties that in the event there is no overlap between the offer and the demand, the mediator will adopt the more reasonable of the two. This is a fascinating and gutsy approach that will not leave the dispute unresolved. If the parties consent to this approach before putting in their last best number, they have every incentive to put their best offer forward lest the mediator adopt the number of the other side. I wonder how often the defendant outbids the plaintiff when this “poker-like” approach is undertaken.

The “mediator’s proposal” is, like mediation itself, a voluntary process. The parties may jointly request this proposal. Typically, the mediator will meet with each party, set out his proposal for settlement, and advise that a party rejecting the settlement will not be advised of the other party’s response. Such proposals can be difficult to resist, although it certainly does happen. Hopefully, you have “manipulated” the other party into choosing the mediator and can now use that fact to press them to accept a favorable settlement proposal.

Finally, I have attended several mediations that did not outright settle the case, but nonetheless facilitated proximate settlements. The catharsis of the mediation and the realities of the time and expense of continuing litigation can conspire, with the benefit of a little time, to add some settlement flexibility to both sides. When this happens, in my book, the underlying mediation was a successful one.

## Closing the Deal

It’s been a long day, you settled the case and you want to go home. Wait just a minute! Reduce the essentials to writing. This brief exercise can prevent the entire settlement from unraveling. After all, the deal will not be done until the release is agreed and signed and the money has changed hands. The settlement terms can be dictated to a court reporter and/or a short “settlement memorandum” prepared and signed. Items to address include the settlement amount, that this represents a complete settlement with no hidden additions such as litigation costs and attorney’s fees (don’t forget the consortium claim in

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<sup>1</sup> A name derived, I am told from a style employed in mediating with baseball players, not the sport itself.

an injury case, *even if none has been alleged*), and that the settlement is/is not confidential. Any item either party considers a “deal breaker” should be included. The fine print can await the formal release.

### Conclusion

Mediation has become an increasingly popular method of dispute resolution in the States. It should be approached seriously with all participants prepared. A mediated resolution can offer significant savings of time and expense as a compared to preparing the case for trial. The process benefits significantly by the insurer’s and insured’s attendance. I hope that the next time, as client or insurer, you have a case going toward mediation, you will assist in the preparation and attend the process. The mediation is best experienced in person, and the process can be an exciting and enjoyable one. With a little luck, you will walk away from the process knowing that you can soon “close the book” on the particular loss.

Thank you for attending our mediation program!