

Making the Most of Mediation:
10 Top Tips for Maximizing Results in the Process

Sheldon J. Stark
Mediator and Arbitrator
2531 Jackson Ave., Suite 102
Ann Arbor, MI 48103
www.starkmediator.com

Executive Summary

- 1. Select the right mediator:** Every case is different; as is every mediator. A mediator may be stronger in some areas than in others. Before defaulting to your current favorite or accepting the first name suggested by opposing counsel, identify a mediator with precisely the right skill set matched to your particular dispute.
- 2. Involve yourself in process design:** Michigan litigators are most comfortable with an all-caucus-all-the-time model managed by an evaluative mediator who shuttles back and forth between rooms. In analyzing your case for mediation, consider tailoring the process to the dispute, not vice versa. There are many factors warranting employment of joint sessions for at least part of the process.
- 3. Educate your client about the mediation process:** Disputes belong to the parties; yet parties are often unfamiliar with mediation and the unique opportunities presented by the process. Educated clients make better decisions, understand the role of the mediator, know what their case is worth, sit at the table with realistic expectations and recognize the importance of communicating their arguments and points to the other side.
- 4. Evaluate the case and reach agreement on goals and objectives:** A critical aspect of advanced preparation is identification of a client's non-economic goals and agreement on economic valuation. Joint planning in advance is key. Management of client expectations is rarely productive when it takes place for the first time in the midst of negotiations.
- 5. Prepare clients to be *flexible*:** A good mediator helps the parties share new information, gain fresh insight and achieve a fuller appreciation of their risks. Accordingly, if the process is working as it should, the valuation with which a party started is likely to change as more is learned and risks are better understood. Parties who recognize the importance of flexibility are more likely to achieve their goals than those who believe their "bottom line" is set in stone.
- 6. Identify the proper audience for your written submission and arguments:** In litigation, each side focuses their persuasive powers on influencing the decision maker, whether judge or jury. In mediation, because the mediator has no authority to impose a settlement, the case resolves only when both

sides agree. Accordingly, disputants should shape their arguments to persuade the other side that the risks of proceeding are too great and resolution is in their best interest.

- 7. Develop an offer/concession strategy:** Strategic negotiators on the plaintiff side rarely leave money on the table; and strategic negotiators on the defense side rarely overpay. That means preparing a specific opening offer mindful of client goals together with a step-by-step analysis of how they anticipate the negotiation will unfold. With an offer/concession plan in hand predicting multiple moves and counter-moves down the board, counsel is free to be “in the moment”, limiting the corrosive effects of emotional reaction.
- 8. Make use of your mediator:** Having carefully selected the mediator, take full advantage of the opportunity to employ his experience and skill. Find out what the mediator knows and is at liberty to share; use the mediator as a sounding board; consider the mediator’s reaction to arguments and claims; make use of the mediator as a resource.
- 9. Replace zealous advocacy with mediation advocacy:** Because mediation is a dispute resolution process not a justice process, prudent advocates replace the tactics of zealous advocacy with a joint problem solver mentality. The “truth” will not be established in mediation. Accordingly, the strategies, arguments and tactics of joint problem solvers are very different from a traditional courtroom approach.
- 10. If the case does not settle at the table, keep the mediator engaged:** Even where the dispute does not settle on the date set for mediation, most cases resolve without trial. Additional discovery, a judicial ruling or the passage of time to process hard truths may result in a change of heart. If the mediator is kept in the loop, the parties may save time and cost in returning to the table.

Introduction

In an age when less than 1.5% of all cases result in a trial, alternative dispute resolution is the new normal. Of the various dispute resolution processes available, mediation is one of the most popular. Some lawyers propose mediation prior to or in lieu of negotiating directly with the other side. Because mediation is a significant departure from traditional stages in the judicial process, strategic adjustments in planning and advocacy are necessary to take full advantage of the unique opportunities mediation offers. In my experience – both when I was an advocate representing parties in mediation and as a mediator – litigators are generally not making those adjustments. As a result, plaintiffs may leave money on the table; defendants may overpay; and non-economic client objectives may be forgotten. What follows are my top ten recommendations to litigators for mediation strategies to maximize their results.

1. **Select the right mediator**

Every case is different: different claims, different parties, different opposing counsel, different injuries and losses, different risks and, significantly, different group and individual dynamics. Before accepting the first mediator proposed by opposing counsel, or urging the other side to accept your "favorite" mediator of the moment, consider which characteristics, qualities, expertise and skill set might work best for the precise collection of parties, claims, litigators and decision makers presented. Even the best, most versatile mediators are not as strong in some areas as others.

Is subject matter expertise essential? In a highly technical patent infringement suit, for example, an otherwise effective tort mediator may not be right. In a probate suit arising out of a complicated estate plan with multiple properties and claimants, an experienced commercial mediator focused on cost savings and the bottom line may not be the best choice. If the dispute presents complex business issues with serious financial implications and tax consequences, a mediator with a CPA or tax expertise might better assist the parties to identify attractive options for resolution. Do the parties more or less agree on liability, but are hopelessly deadlocked on valuation? If so, the right mediator may be someone with extensive trial experience. A seasoned litigator could be the perfect sounding board for testing damage theories and defenses.

Are creativity and the ability to think "outside the box" essential? Perhaps the parties hope to put their dispute behind them, but lack the imagination to think of creative options to achieve their goals. Selecting an imaginative mediator – even one lacking in subject matter expertise - might be precisely the right choice.

Are the parties – or their counsel – the problem? Perhaps people skills and process expertise are needed. Would the dispute benefit from a mediator with keen psychological insight to lead the litigants to a better understanding of what is driving their conflict? In such cases, a mediator who digs down to uncover needs and interests is often preferable to one skilled at managing distributive bargaining. Is lack of trust between the parties undermining efforts at resolution? A mediator in whom both sides have confidence and who understands how to build trust could be the key to bridging differences. Even where trust issues exist on only one side, both parties have a stake in selecting a mediator who can help a distrustful opponent feel safe enough to engage in the search for closure. In a case where difficult and troubled personalities are the major impediment to settlement, the situation probably would not benefit from another big ego – this time, the mediator's – in the mix. Instead, thoughtful selection of a mediator with ability to bring "peace" into the room could make all the difference.

A corollary benefit of selecting the right mediator in high conflict, complex, or hyper-technical disputes, of course, is that it can save time, effort and transactional costs.

Recommendation: Analyze the dispute carefully. Seek to better understand and identify the unique characteristics and barriers hindering resolution. Make a list of the mediator qualities and characteristics needed for the job. If a favorite mediator lacks the qualities identified, recruit someone new. The appropriate mediator is most likely to lead to an enduring and satisfactory result.

2. *Involve yourself in process design*

It is a revelation for many attorneys when they discover they can play a part in process design. They have not done it; they have not thought of it. They do not realize the process can be modified and shaped in whatever ways best serve the litigants and their counsel. Few lawyers tailor the process to the dispute. Most prefer the standard evaluative model which features a subject matter mediator or former judge who shuttles back and forth between caucus rooms carrying offers and counter-offers while pointing out the weaknesses and shortcomings in each side's position. The evaluative model is time tested and familiar, but it is **not** necessarily best in every single dispute.

What are the alternatives? In contrast to the traditional evaluative model, the facilitative model is characterized by joint sessions with everyone together in the same room. Caucus and shuttle diplomacy are used when warranted as a tool to accomplish a specific end. In the facilitative model, the parties themselves share what is on their minds, for example, by making opening presentations and participating directly in group discussion. The emphasis is on party self-determination. The facilitative mediator asks questions to explore risk, but generally refrains from expressing opinions on the merits or predicting what a judge or jury might do.

The facilitative model is less common because Michigan lawyers are uncomfortable with joint sessions for fear their clients will inadvertently blurt out damaging admissions or antagonize one another, thereby undermining chances for settlement. Such discomfort is understandable but overstated. In fact, well-trained mediators skilled in use of the facilitative model know how to manage the process and keep the discussion productive and safe.

Good mediators are equally comfortable using either model or a blend of each. With input from the parties, a process can be designed to fit each dispute precisely. The mediator could, for example, start using one approach and morph to the other as the mediation unfolds. It is not uncommon for the mediator to begin in a facilitative, non-judgmental mode using joint sessions, but move to a more evaluative style in caucus mode as the day plays out. The parties could design a hybrid process before arriving at the table incorporating the best features of each model. The parties could, for example, select a caucus-style mediation, but reserve a limited time for a carefully delimited joint session. Most mediators are willing to make whatever adjustments best serve the needs of the lawyers and their clients.

One compelling advantage of the facilitative model often overlooked by those who favor a traditional approach is the opportunity to communicate directly with a key decision-maker on the other side. In joint sessions each side is able to size up the other, to communicate personal messages in their own words, and to hear the claims and defenses unfiltered by lawyer spin. An insurance adjustor or corporate executive at the table might never have seen the plaintiff in action. If the plaintiff makes a good presentation, her counsel should consider creating an opportunity to showcase some of her strengths. Mediation is an opportunity for a skilled trial lawyer to demonstrate the qualities that make her a success at trial, thereby changing the calculation of risk on the other side. The quality of advocacy makes a difference.

Frequent consumers of mediation services understand the importance of giving the other side an opportunity to vent or directly communicate. They know that venting can result in a breakthrough. In cases where a party is prepared to acknowledge that “mistakes were made,” the power of an apology is lost if delivered by the third-party mediator, rather than an executive with decision-making authority.

Prepared and managed properly by a skilled mediator, such opportunities are productive, not destructive. A face-to-face presentation, received with respect and patience, can have a profound impact advancing resolution. Studies reveal that party satisfaction grows exponentially. Similar results are less likely when the unvarnished, evaluative model is used because most of the talking is done by the lawyers and the parties hear only the mediator’s translation of what is said in the other room.

Accordingly, when thinking about process design, counsel should ask: Does a party have a need to vent and explain her actions directly before she can be expected to discuss resolution in a reasonable dollar range? Can the dispute be characterized in the immortal words of Strother Martin in the film *Cool Hand Luke*: “What we’ve got here is a failure to communicate.” If so, would a dialogue, where the parties - - perhaps two CEOs - - can politely question each other in a safe, controlled environment be helpful? If communication, personal assessment, or relationship repair with parties who must continue to work together are issues, the dispute probably warrants a process where joint sessions, controlled dialogue, and party participation is allowed.

Lawyers who ignore process design, or let the mediator make all the decisions, are missing an important opportunity to lay the foundation for win/win resolution.

Some of the options for process design include:

- Caucus vs. joint sessions
- An evaluative vs. a facilitative mediator
- Party participation, including opening statements by parties, the lawyers or both
- Exhibits and visual aides

- Lawyer-only meetings with the mediator
- Client and mediator meetings without the lawyers and/or the mediator
- Client-client meetings without the lawyers
- Brainstorming sessions to identify options
- Face-to-face negotiations where the mediator facilitates offers and counter offers.

Recommendation: Do not default to a comfort zone. Get involved in process design. Involve the client. Interview potential mediators. Seek mediator input. Discuss the issue with opposing counsel. Agree on a mediator who will provide the process everyone agrees will be best. A well-thought-out process tailored to the individual needs of a particular dispute will enhance the likelihood of resolution.

3. Educate your client about the mediation process

Clients are the decision makers. It's their case. Whether and how the case settles are client decisions. In practice, nonetheless, clients often are either ignored or their involvement limited. Many times parties – most especially the plaintiff - are unfamiliar with the litigation process. What they know about litigation is often distorted by mass media and the world of entertainment. From Perry Mason and *Boston Legal* to *Damages* and *Intolerable Cruelty*, parties often believe their rights will be vindicated and justice achieved. Sometimes they are correct. Few are familiar with Voltaire's lament: "I was never ruined but twice; once when I lost a lawsuit and once when I won one."

As uninformed as parties are about **litigation**, they know even less about **mediation**. The parties should understand that mediation is not simply one more place to prove their case, the mediator one more person to persuade. Parties ought not view mediation as an obstacle on the path to achieving their litigation goals. Instead, parties should understand mediation as a chance to step back from litigation; an opportunity to facilitate achievement of their goals. In mediation, parties can articulate their goals to the mediator and each other. They can, if they choose, control their own fate and shape the outcome. They have the power to bring about a desirable resolution personalized to their needs and interests. If clients are to make good decisions about potential mediation outcomes, they should understand the process and how they best can participate in it.

By contrast, in litigation, a judge or jury will determine the end result. Someone will win; someone will lose. The final judgment is out of their hands. Judicial determinations are rarely win/win. Both sides could be dissatisfied, especially if the verdict is a compromise; or financial and collateral costs were too high.

From my perspective, the mediator's primary duties are to educate the lawyers and assist the lawyers in educating their clients. The better everyone understands the process, how it works and what will maximize results, the greater the likelihood the

result will be satisfactory. There are many fine treatises and articles to help clients better understand mediation. Some mediators post explanatory and helpful material on their websites. This article is intended to assist lawyers in making good decisions. Feel free to share it with your client.

What should parties know? Parties should expect the mediator to be neutral, and remain neutral throughout, no matter how much they hope to win the mediator over. Parties should expect the mediator to ask difficult questions designed to force re-examination of strengths, encourage realistic appreciation of weaknesses, and pay due respect for risk and potential consequences. The mediator is non-partisan. The asking of tough questions is symmetrical. It happens in both caucus rooms. The questions are designed to assist the parties in understanding each other, appreciating their risks, and influencing their valuation.

Mediators also facilitate the exchange of information and perspective, so each side gains the knowledge necessary to make informed decisions. Through better understanding of underlying needs and interests, the parties are encouraged to offer settlement proposals which meet the other side's needs as well as their own. Doing so leads to "win/win" results.

Clients should not expect the mediator to make rulings, determine the facts, or direct settlement terms. The mediator is not a decision-maker. Persuading the mediator is not especially helpful. Instead, the mediator facilitates the negotiation process, reduces barriers to movement, and translates messages to insure they are heard and understood. The mediator does not take sides.

If the goal is not to persuade the mediator, to whom should the parties direct their efforts to persuade? The dispute will be resolved only if both sides reach agreement. That means the focus of persuasion should be on the parties and lawyers on the other side. This truth is often overlooked. Motivating the other side to settle requires careful consideration of each argument and exchange. Harsh words, aggressive comments, refusal to concede obvious weaknesses, and overzealous spinning of facts are rarely effective. They often trigger similar unproductive behavior in return.

Of course, no one should expect to persuade the other side about the facts. Nor is one party likely to persuade the other about how judges will rule or juries decide. This is because no one can predict outcome with certainty. We've all had "winning hands" turn bad; we've all made cogent arguments that somehow failed to persuade a fact-finder. Where both sides are well-represented, however, the disputants may be able to agree on risks and possible consequences if the matter does **not** settle. A discussion of interests and needs is also likely to be more productive than whether a claim or defense is meritorious.

Recommendation: Prepare clients by explaining how mediation works, what to expect from the mediator, and who they must persuade if there is to be a settlement and closure. Provide reading materials to enhance party understanding. If there is something useful in this paper, for example, keep it for future use. An important element of preparation is insuring the parties understand how the process can assist them in achieving their goals.

4. *Evaluate the case and reach agreement on goals and objectives*

When I was a trial lawyer, I had great faith in the power of preparation. Louis Nizer famously said, "preparation makes the dull lawyer bright, the bright lawyer brilliant and the brilliant lawyer steady." The same principle applies to mediation. In a world where only a tiny percentage of cases go to trial, mediation is likely to be as close to their "day in court" as clients will experience. Therefore, I encourage lawyers to prepare for mediation as thoroughly as they prepare for trial. One critical aspect of preparation is reaching agreement with clients on a "bottom line" or settlement range, and a list of non-economic goals.

Sitting down with clients to identify non-economic objectives can be eye opening for counsel and client alike. Counsel may never have explored what is truly important to the client; and the client may be clueless about what is possible in mediation. Relief in the judicial process is generally limited to "vindication," dollars, or both. While judges may have the power to fashion equitable, non-economic relief, they rarely do so. By contrast, potential relief in the mediation process is generally limited only by the creativity and imagination of the participants. Mediation truly offers the promise of "win/win" resolution. Accordingly, identification of non-economic goals should not be left for the last minute.

Non-economic terms can be critical. In employment litigation, for example, management generally arrives at the table armed with a well-developed list of non-economic terms, most of which appear in separate paragraphs in their draft "Settlement Agreement and Release of All Claims." Management wants the settlement terms cloaked in confidentiality, a promise of non-disparagement, no admission of liability, refusal to cooperate with other plaintiffs absent a subpoena, indemnification in the event the allocation of dollars is challenged by taxing authorities, and more. Recognizing the power of apology in the appropriate case, management may be prepared to express remorse for the manner in which the termination was handled. Identified in advance, defendant's non-economic goals rarely fall through the cracks.

For plaintiffs, who often have parallel interests in confidentiality and non-disparagement, advance preparation is less common. Concerned that management may pursue claims against him, plaintiff may want mutual releases. Plaintiffs often have an interest in reputation repair. A plaintiff's goals might include a letter of recommendation or introduction, clean up of a personnel file, and neutral references for

prospective employers. If an apology is forthcoming, plaintiff want it in writing. For tax reasons, payment of settlement dollars spread over different tax years might be of interest. Sometimes an ongoing relationship is sought to continue fringe benefits such as healthcare. Though **not** available in litigation, mediation opens the door to potential options invaluable to the client. Plaintiffs who identify non-economic goals before the mediation are more likely to achieve them than those who wait until the final agreement is being prepared.

As well-prepared for mediation as lawyers sometimes are, they too often reach the mediation table without having performed a proper valuation. A proper valuation requires thorough analysis of strengths **and** weaknesses, careful calculation of economic losses, a hard-eyed review of emotional damages, and an honest assessment of risk. Parties do not want to begin mediation without having developed a range against which to measure success. Occasionally, lawyers have done the analysis, but have not shared it with clients. Whether this is intentional due to concern about losing trust; or inadvertent due to overwork or neglect, failure to do so can easily derail the process. Sometimes this is a party's strategy. They arrive at mediation with a "let's see what we can get" attitude; which means no bottom line. This approach is surprising. What is not surprising is that the result is disappointment. As that wise sage Yogi Berra taught, "You've got to be very careful if you don't know where you're going, because you might not get there."

Lawyers who get what they want from mediation start deciding on objectives well in advance. They outline "success" **before** the mediation begins. They determine a "bottom line" or range with clients. When the bottom line or range is reached, resolution follows.

Clients not actively part of the process contribute little to reaching a successful result. Often they arrive at the mediation table with unrealistic expectations. As a result, they are can be shocked, dismayed, or outraged by the numbers discussed - - particularly in the early stages of negotiation. They have not been counseled to be patient, or warned to expect hard bargaining. They never dreamed their million-dollar demand might be met with derision and a \$5,000 counter-offer. After much back-and-forth, should their counsel eventually recommend acceptance of a proposal below their target number, their reaction can be emotional and destructive. If not properly prepared, clients experience frustration or become emotional or despondent. The result can be stubborn resistance to reasonable settlement proposals which would have been acceptable had the proper groundwork been laid. Concluding their attorney is afraid or selling them out, they may disengage – and sometimes seek new counsel. If they make the deal, they may later experience buyer's remorse and try to overturn the agreement. Well-prepared clients, by contrast, ask good questions, remain in the moment, and participate with enthusiasm.

Recommendation: It is crucial that agreement be reached with clients on a "bottom line" or range and non-economic goals **before** mediation begins. It is too late to manage client expectations for the first time in the heat of a negotiation as monetary offers are exchanged. By waiting until the last minute, it is too easy for non-economic objectives to fall through the cracks. Good preparation includes proper warnings about the challenges likely to be experienced at the bargaining table.

5. ***Prepare clients to be flexible***

As important as it is to agree with clients on goals before arriving at the table, it is more important to be **flexible**, prepared to make adjustments based on what is learned during the process.

The valuation of a litigation claim is a finely honed analysis based, among other things, on the facts of the case, the risks presented, and an assessment of the parties and skill of the lawyers. Valuation also includes consideration of the judge, her inclination to grant or deny a dispositive motion, and the way she is expected to rule on evidentiary issues at trial. Valuation also includes consideration of the jury pool where venue lies.

In my judgment, among the most important considerations are the risk factors. What is the likelihood the case will survive a dispositive motion, in whole or in part? What are the strengths of the case, and how will the other side try to trump them? Where is the case weak, and how will each weakness be addressed? Will a missing witness be found? If found, will the witness be favorable? What risks are presented without the witness? If called, can the witness be expected to help the other side, as well? How do the parties come across? How credible are their claims or defenses? How receptive are jurors likely to be to them? In an employment case, for example, will jurors size up the plaintiff and think "that could have been me" or will they think, "if I'd been his boss, I would have fired him, too?!"

Mediation is an excellent vehicle for the transfer of information. If the process is operating properly, participants will gain insight and knowledge. They might learn new things, or see things in a new light. They might better understand the other side. They might be compelled to reassess opposing counsel, his passion, his oratorical power, or his commitment and level of preparation. If their claims or defenses are scrutinized, questioned, and/or tested, the valuation or bottom line may change. In a case, for example, where plaintiff was fired for theft, his counsel may have a solid evidentiary basis to assert pretext, but will the jury side with a thief? Perhaps not.

It is a rare case, indeed, where every risk and problem was given its due before arrival at the table. On the contrary, trial lawyers tend to "fall in love" with their theories, claims, or defenses. They focus on their strengths and turn a blind eye to their weaknesses. A good mediator makes certain that does not happen. Clients should be

prepared to consider a new figure when the assessment of risk has changed. They should be cautioned: valuation is not fixed. It is not scientifically grounded. There is no computer program that calculates fair value. Their "bottom line" in the morning may change by the late afternoon. Clients who have been educated and understand the need for flexibility are more likely to move when realistic offers and counter-offers are put on the table for consideration.

How does risk assessment factor into valuation? In a case that turns on a credibility dispute, for example, the ultimate issue is which of two participants will the fact finder believe. Where the case would be worth \$100,000 with no risk, what is the settlement value if the case presents a "he said/she said" dispute where both participants are equally credible? Neither side can be sure of the outcome. There are no guarantees. A 50-50 tie, therefore, may suggest \$50,000 as a reasonable settlement objective. However, a tie favors the defense because plaintiff has the burden of proof. Accordingly, defendant might attend mediation prepared to pay and plaintiff should attend prepared to accept between \$40,000 and \$50,000 as reasonable. Why? Because, if the case is tried 10 times, plaintiff can expect to win it no more than 4 or 5 times, recovering \$100,000 each time; but lose it 5 or 6, recovering nothing each time.

Assume, however, that during the mediation plaintiff's counsel calls attention to contemporaneous documents supporting plaintiff. Both sides had copies of these documents going into mediation, but defendant had not previously considered their impact on the credibility issue. The documents change assessment of the risk because they increase the chances plaintiff will prevail. The odds of recovering a plaintiff's verdict improve from 40-50% to 50-60%. As a result, defendant should be flexible enough to increase its offer and plaintiff should be flexible enough to accept \$50,000 or \$60,000.

Recommendation: Prepare a bottom line or range and reach agreement with your clients on their goals and objectives, but be prepared to make adjustments -- up or down -- based on fresh information and new insight gained through the mediation process.

6. *Identify the proper audience for your written submissions and arguments*

When counsel view mediation as one more hurdle rather than a unique opportunity to try something new, their mediation summaries tend to look like summary disposition briefs. They write to persuade the mediator. Too many advocates prepare their summaries either to influence the mediator or to impress their own clients with their zeal and grasp of the issues. A skilled, experienced and neutral mediator, of course, expects that. Mediators are trained to see through such efforts and retain their neutrality. An advocate's own client should not **need** persuading!

If not the mediator, who is the right “audience?” The opposition, of course: the parties on the other side of the mediation table! Mediation is a voluntary process. There is no settlement unless everyone agrees. Writing to persuade the other side is crucial. The other side’s signature must appear on a final agreement, not the mediator’s. Counsel’s mediation summary is an extraordinary opportunity to communicate directly with the other side, an opportunity too often overlooked.

Realistically, even the best-written and most cogent summary is not likely to change anyone’s mind about the facts. Opposing parties have their own version of what happened and will resist any contrary view. I wholeheartedly concur with litigators who say mediation is not going to lead to agreement about what happened. In fact, by the time the parties are in mediation, they are probably too committed to their own version to bring an open mind to the table. While the parties may never agree on the facts, however, they may reach agreement concerning the risks, the challenges, and the turning points. Mediation summaries that focus on these practical issues are likely to be more persuasive than one-sided summaries.

Similarly, language matters. As our proverbial grandmothers taught us: “We catch more flies with honey than with vinegar.” This means discarding antagonistic language and vitriol. Rather than suggesting plaintiff is “a bald-faced liar,” for example, defense counsel is better served setting out the factual basis on which to argue plaintiff faces a serious risk of being disbelieved. In employment cases, mediation advocacy suggests management counsel pull together evidence of just cause, rather than accuse plaintiff of incompetence and sloth. For plaintiff, it means setting forth the factual basis on which his complaints were based, instead of accusing management of being “chauvinists” or “racists.”

Thinking carefully about how to diplomatically frame comments is equally important **at** the mediation table when facing the other side and presenting arguments orally.

I’m not suggesting advocates should suppress their passion, or that clients tamp down their emotions. Mediation is **not** unilateral disarmament. By all means, counsel should underscore any “smoking guns.” A party need not hold back on honest and heartfelt perspectives. Not in the least. Such factors warrant consideration when assessing risk and determining whether settlement is appropriate. What I am suggesting, instead, is that presentations be crafted to persuade the other side that their risks are greater than previously understood; that another look is warranted; that serious danger warrants serious appraisal; and that settlement *today* is worth more than a verdict tomorrow.

Recommendation: Mediation is voluntary. The mediator has no power to impose a settlement. The case will resolve only if both parties agree. Mediation advocacy, therefore, dictates writing mediation summaries and making oral presentations to

persuade the other side, inviting due consideration rather than retaliation and counterattack.

7. *Develop an offer/concession strategy*

The best negotiators are strategic. They develop an offer/concession strategy before they reach the mediation table, a strategy which anticipates each move and counter-move until settlement is reached. Strategic negotiators play out the negotiation in their head, predicting how each offer will be received, anticipating the other side's response and carefully working the negotiation through until their settlement goal is achieved. Strategic negotiators generally get what they're after. Regrettably, strategic negotiators are rare. Too many advocates limit their planning to an opening number and a bottom line, relying on their gut instinct and experience for the moves in between. Some advocates do not prepare even that much. Seat-of-the-pants negotiation may work in some cases, but it is not a strategy to maximize results over time.

Central to effective negotiation is offer/concession strategy. What does offer/concession strategy look like?

From the plaintiff's perspective: If the goal is \$100,000, plaintiff must decide where to start, leaving enough room to fall back without discouraging the other side from responding. Concerned she might appear too aggressive, counsel might start the negotiation process at \$235,000. To flesh out the strategy, she must anticipate the likely response. Different lawyers will answer differently depending on their negotiation style and experience. For purposes of our example, plaintiff assumes \$235,000 will be within the range expected. Accordingly, plaintiff can anticipate an opening counter-offer of \$25,000 rather than an insulting "nuisance" number. In response, assuming her assumptions are right, she plans to reduce her demand to \$175,000, a \$60,000 move to signal appreciation and respect. Seeing a good faith move by plaintiff, she can expect a response in kind, an increase to \$50,000. If the second move is \$50,000, plaintiff might drop to \$150,000. At this point, she can anticipate the defense will move to \$65,000. In response to that proposal, plaintiff plans to lower her demand to \$145,000. It does not take a great deal of imagination to see that plaintiff has planned a strategy that will achieve her goal and perhaps a little more.

From the defendant's perspective: Assume defense counsel also believes the case should settle for \$100,000. He anticipates plaintiff's initial demand – because he knows plaintiff's counsel as an aggressive bargainer - to start at \$300,000. To signal that plaintiff is too high, defense counsel plans to offer no more than \$5,000. Because \$5,000 is "nuisance" value, he can expect plaintiff will be disappointed. What response can he anticipate from an unhappy plaintiff? The response could be a threat to withdraw from the process. Defense counsel is willing to take that risk because he knows he can rely on the mediator to keep the process going. An unhappy plaintiff willing to continue the process, however, is unlikely to move far. Defense counsel can

expect the next demand to be \$290,000 - \$295,000, a move that “equals” or “doubles” defendant’s opening proposal. At this point, defense counsel could demand a more “serious” proposal, in essence asking plaintiff to “negotiate against himself.” As no self-respecting plaintiff’s advocate is going to do that, matching an unrealistic demand with an unrealistic response often results in impasse. To avoid this frustrating scenario, defense counsel decides to open with \$20,000, pointing out that \$300,000 is out of line and expressly inviting a significant reduction in the next round. Assume defense counsel anticipates plaintiff to respond with \$240,000, which is still unacceptably high. As a result, he plans to increase his offer by only \$5,000 to \$25,000. Realistically, he can anticipate a number of additional small, painful moves thereafter. At some point, however, defense counsel hopes to break the logjam by inviting the mediator’s help. He asks the mediator to soften plaintiff up by focusing in caucus on plaintiff’s risks and by offering to make a significant upward adjustment if plaintiff will reduce his next demand significantly. If the parties remain far apart, defendant might offer to “move to \$50,000, if plaintiff will move to \$150,000.” Again, it takes little imagination to work out the next few moves for each side to reach its goal.

An offer/concession strategy is a prediction. Predictions about the future are fraught with peril. Mistakes will be made. The other side will exceed expectations as often as it meets them. Accordingly, strategic negotiators must be flexible. Adjustments will be necessary. It may turn out the parties reach a predicted point, but in fewer or a greater number of moves than predicted.

In any event, with an offer/concession strategy, client expectations are better managed and the negotiator retains tighter control of the process. With tighter control of the process, the likelihood of achieving the client’s aims is greatly enhanced. Armed with a strategy, the emotional roller coaster ride can be smoothed out. Clients are less frustrated, less likely to become discouraged. Parties who are frustrated, angry, or depressed are more likely to make mistakes, offering too much or giving up too soon. With an offer/concession strategy, even disappointing moves are anticipated in advance and planned for. By focusing on process, both parties remain in the negotiation. The danger of one party or the other withdrawing is diminished. Indeed, by developing an offer/concession strategy, counsel reduces the risk of error and reading or sending the wrong signal.

If the strategy fails to bring the parties within the “landing zone,” it could be a sign that one or both parties are not ready to settle; or someone is in error. In either case, counsel can learn from failure. It could be that one side or the other has underestimated the risks and a fresh assessment is necessary. It could be the problem can be resolved by additional discovery – the parties disagree, for example, about how a witness will testify. If so, the mediation can be adjourned until the witness is deposed.

Recommendation: Once a range is agreed upon, counsel should develop an offer/concession strategy to anticipate movement likely to occur during bargaining. With such a strategy, counsel is better prepared to manage client expectations and achieve client goals.

8. *Make use of your mediator*

The mediator is a tool, not an adversary. **Use** the mediator. Enlist the mediator's assistance - often. Confiding in the mediator helps him select the right intervention. If there is concern that a confidence might be revealed to the other side, ask that it not be shared. Experienced mediators know how to enforce confidentiality.

Here are several examples of how you can make better use of the mediator:

- Having trouble with your client? Share your concerns with the mediator and help him build trust with your client. A good mediator often will be able to improve client confidence in counsel's skills and reinforce the attorney-client relationship.
- Is there an impediment to settlement on your own side? Share it with the mediator and enlist his help in finding ways to address it. The mediator may have had experience with a similar issue. Where reinstatement is under consideration in a wrongful discharge case, for example, the employee may fear management will fire him again. The fear is understandable, but misplaced. I have been involved in dozens of reinstatements both as counsel and as mediator and I have seen only one case where that happened. My experience with this issue may help your client overcome their hesitation.
- Perhaps counsel has been unable to read where the other side is coming from. In a caucus mediation, the mediator is the only person who knows what is going on in both rooms. Ask the mediator to share his perception. Within the limits of confidentiality, the mediator may be able to provide important insight.
- Unsure about framing an opening offer or how the next move might be received? Employ the mediator as a negotiation coach. Ask the mediator for strategic advice. The mediator can be a neutral sounding board to help shape a more productive move.
- Having trouble generating ideas to move the case forward? Ask the mediator to convene a brainstorming process.
- Has the mediation reached a plateau? Has progress slowed to a halt? Inform the mediator so he can try something else to get the process back on track.
- Is there an impasse? Has all possible progress been made, but the parties remain far apart? Ask the mediator to consider using the "mediator number" technique. In the mediator number technique, sometimes called the "disappearing number" or the "double jump", the mediator suggests a dollar figure somewhere between the last two offers, and shares his rationale with both sides privately. If both sides accept, the case settles. If a party rejects, that party is never told what the other

side did, thus protecting everyone in future negotiations. The mediator number technique can be effective as a last resort in settling intractable disputes.

Recommendation: The mediator was hired in the belief he can help resolve the dispute. Make the most of the opportunity. Trust the mediator. Put him to use. Ask for the mediator's input.

9. *Replace zealous advocacy with mediation advocacy*

An old mediation truism holds that "If litigation is a search for justice, mediation is a search for solutions." Mediation is not a justice process. It very well may not right a wrong from any perspective. On the contrary, mediation is a process designed to find a resolution satisfactory to all sides. In mediation, the lawyers serve as joint problem solvers not zealous advocates. Everyone is focused on the same goal: a settlement that works for all sides. Mediation is the one place in the litigation process where everyone should take a step back from the "battle" and cooperate in seeking resolution. If mediation does not work, nothing is lost, the disputants can return to zealous advocacy the next day.

Here are some ways advocates might adjust their advocacy:

- Remove that zealous advocate hat and replace it with a joint problem-solver hat. Ask opposing counsel to do the same. Instead of trying to win every point, join together cooperatively to address their common problem: how do we resolve this lawsuit? In fact, a concession of weakness, rather than being a cause for concern, demonstrates to the other side that a party is realistic.
- As mentioned above, mediation provides the advocates and parties with the opportunity to communicate directly with each other. Participants are encouraged to fashion their arguments and present their claims and defenses so as to persuade the other side that resolution is in their best interest.
- The focus of mediation should be on risk analysis and how risk impacts valuation, rather than on "winning".
- In business, probate, or employment cases, the parties may know each other well. With good preparation and proper management of the process, a productive dialogue can be fostered allowing the parties to work out their own solutions.
- In mediation, advocates "check" invective and harsh language at the door. Accusations, charges, and personal attacks create the wrong atmosphere. Toxic charges ("liar," "thief," "incompetent," "fraud") stimulate equally ugly counter charges ("cover up," "pretext," "dishonest," "phoney").
- "Interest based" bargaining techniques predominate over traditional "positional" or "distributive" bargaining. The parties are encouraged to identify their own interests and needs, and develop proposals and counter-proposals directed at interests and needs wherever possible. Negotiators should become acquainted with the techniques in the book *Getting to Yes* by Fisher and Ury. "*Getting to Yes*," is the

seminal work in dispute resolution, addressing the concepts of "win/win" resolution; interest based bargaining; and BATNA/WATNA analysis (the best and worst alternatives to a negotiated settlement).

- Do not overlook the value to parties of closure and resolution "today". There is often value to a party in resolving a case sooner rather than later. A plaintiff who says she is willing to take her chances before a jury can be reminded that the trial is months away and a favorable verdict may be at risk for years while the appeal is processed. A defendant who stands on principle can be reminded that resolution ends business disruption, hostile outside scrutiny and the pain of continued attorney fees.

Recommendation: Zealous advocacy makes for effective litigators in the courtroom, but not so much in the mediation room. In mediation, the most effective advocacy is directed at communicating productively with the other side, focusing on interests over positions and encouraging assessment of risk.

10. If the case does not settle at the table, keep the mediator engaged

While many mediators experience an 80% or better settlement rate, cases do not always settle at the mediation table. Sometimes parties are not ready. Additional discovery may be necessary, especially where mediation is attempted early. It may take time to digest and recognize the significance of new information learned at the mediation table. Several days may pass before a party is ready to talk further. Sometimes emotions cloud judgment, preventing a party from conceding a weakness or adjusting their objectives. A party may need time to process the information. Accordingly, if the mediation does not result in prompt resolution, parties should not give up.

Yogi Berra taught us "it ain't over till it's over." Even if the mediator does not request it, parties should leave their last offers on the table, at least for a reasonable time to reconsider. Given 48 hours to reflect away from the pressure of the mediation table, a plaintiff may become more comfortable with the last offer, a defendant may decide a few more dollars is not a hardship. Sometimes a limited delay can remove an impediment to resolution as when a key witness - not yet deposed – must be questioned. If the parties disagree on whether a certain piece of evidence will be admitted, an adjournment while a legal ruling is sought might be in order. Most mediators are willing to continue the process as long as needed.

Recommendation: Do not give up just because the case did not settle on the appointed day of mediation. It often takes time and a dose of reality for a party to realize that negotiated resolution is often better than continuing litigation. Keep the mediator involved.

Conclusion

Mediation is **not** just another stop on the Litigation Express. It is an opportunity to try another approach. By engaging in a thoughtful collaboration with clients to select the right mediator, tailor the mediation process to an individual dispute, and replace zealous advocacy with joint problem solving techniques, litigators can make the most of the process resulting in lasting, satisfying, and successful resolutions that maximize results.