

A Litigator's Guide to Mediation Advocacy:
Reflections on Effectively Achieving Client Goals at the Mediation Table

By
Sheldon J. Stark
Mediator and Arbitrator

I. Introduction

Litigators too often approach the mediation process with the same tool they employ in every other aspect of the litigation process. We call that tool traditional zealous advocacy. Zealous advocacy is expected of lawyers and does the job well in almost every aspect of our civil justice system. Because mediation offers a unique opportunity to take a step back from the conflict and search for mutually beneficial solutions, however, a very different tool is necessary if client goals and objectives are to be achieved. This paper will explore how mediation advocacy differs from traditional principles of zealous advocacy; and suggest an approach to mediation advocacy designed to maximize the opportunity for resolution afforded by mediation.

II. Mediation is an Assisted Negotiation

What is “mediation?” Plugging the word “mediation” into an internet search engine brings up over 155,000,000 results. When boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. As we know, a negotiation is completely voluntary. Negotiations result in resolution, therefore, if but only if both sides voluntarily decide to manage their risk, recognizing that the available terms of settlement are better than spending the money and risking a dispositive motion or trial. Unlike a trial, arbitration or dispositive motion, no judge, jury, or arbitrator decides the outcome. No one determines who is or is not telling the truth, who is right and who is wrong, and no one imposes a result on the parties. The parties are totally free to decide for themselves whether to settle and on what terms.¹

Since parties to a dispute may readily negotiate on their own, what is the assistance offered by a mediator? In my view, mediators are most helpful when they manage the exchange of information and perspective, making certain each party has all the information available so as exercise good judgment about settlement.

Specifically, mediators explore, *inter alia*:

- What is the other side’s story and is it plausible? If the other side’s story is plausible, of course, there is risk the court, decision-maker, or jury will be persuaded and rule in their favor. When parties hear the story as spun by a zealous advocate, however, they are often antagonized. They perceive themselves under attack, they escalate, experience

¹ Indeed, Standard I of Michigan’s Mediator Standards of Conduct is party “Self Determination.”
<https://www.courts.michigan.gov/4aa077/siteassets/court-administration/standardsguidelines/dispute-resolution/med-soc.pdf>

consternation. In other words, they respond emotionally, perhaps even lashing out or responding in kind. They do not process what they hear. Mediators help parties process important information and all the consideration due by reframing in neutral language.

- Where is the other side coming from; what is their perspective? Knowing how each side is viewing the conflict increases the likelihood proposed offers and counteroffers can be tailored to meet a party's underlying needs and interests. If a party's underlying needs and interests are met, the likelihood of a favorable response to a settlement proposal increases significantly.
- Are the parties assessing their strengths and weaknesses realistically? In my experience, parties (and their lawyers) fall in love with their claims and defenses. What happens when we are in love?² We focus only on our strengths and downplay or ignore the warts, challenges and risks, sweeping them under the rug where they are easy to minimize. Parties are often stubbornly convinced there is only one way to look at the salient facts. They strenuously resist seeing even the possibility of good faith alternative perspectives. A major role for mediators, therefore, is to sow the seeds of doubt by bringing out the risks presented and weighing the magnitude of such risks realistically.
- Are the parties aware of the economic costs of continuing the litigation? In my experience, parties rarely arrive at the mediation table fully informed with a detailed written litigation budget. If provided with any range of numbers, they have been given only a rough estimate, discussed mostly at the time the litigation began. In fact, a realistic and timely cost estimate is essential. Why? Business judgment is typically a choice between various available options. Good judgment requires a cost/benefit analysis to determine which option best serves a party's interest. Assume a party can settle for \$25,000, for example, while the price tag on continuing the litigation is likely to be \$50,000 or more with no guarantee of a positive result. Sound business judgment might dictate acceptance of a \$25,000 settlement regardless of liability or risk.³
- Have the parties considered potential collateral consequences? Will the litigation disrupt management's focus on business operations and contributing to the bottom line? Alternatively, does continuing the litigation risk exposure of confidential, sensitive, private facts? Litigation today is intrusive and may result in disclosure of embarrassing allegations of sexual harassment, corporate mismanagement, flawed engineering, medical malpractice, incompetence and the like. Customers, suppliers, lenders and vendors important to the success of a business enterprise may potentially retreat from a continuing business relationship if they find themselves and their employees sucked into the vortex of someone else's litigation. Key employees of the enterprise may feel forced to take sides. Members of the leadership team may resign rather than become

² In "The Merchant of Venice," Shakespeare reminds us of an important truth: "love is blind."

³ Coming from the world of litigating and mediating employment disputes where plaintiff is typically represented on a contingency fee basis, I welcome commercial disputes because both parties are paying their counsel by the hour. Somehow writing monthly checks for attorney fees helps parties better focus the mind at the mediation table.

embroiled in the litigation process. Sometimes collateral consequences can be more costly than direct economic ones.

- What do the parties expect to happen if the case doesn't settle? How likely is the court to grant a dispositive motion? What is the judge's track record in similar disputes? Are there other parties whose interests might be affected if a precedent is set?
- Has everyone examined their Best Alternative to a Negotiated Agreement (BATNA) or Worst Alternative to a Negotiated Agreement (WATNA)?⁴
- What evidence – documents, testimony, exemplars - are the litigators relying on to support their claims and defenses; and what are the risks a court will grant a motion to exclude? How does the value of a dispute change if key evidence is excluded? If the evidence comes in? How does an evidentiary ruling impact the chances of success if an appeal is taken?
- Do the parties know what to expect from the trial process? Many lay persons and individuals unaccustomed to litigation have a distorted view of trials – in part because we try so few cases today⁵. Sometimes painting the courtroom picture can remove impediments to resolution: What are the chances of getting a realistic trial date and keeping it? How many times might they need to prepare for a trial only to be adjourned long enough that preparation must be started over each time virtually from scratch? What does a real trial look like as contrasted with the dramas they see on TV or in the movies? A party cannot simply turn to the jury and tell their story. That is not allowed. The story can only be developed through plain, non-leading questions often painstakingly prepared and rehearsed. After direct examination, parties then face relentless, sometimes withering cross examination. If they thought they'd been "beaten up" and abused in their discovery deposition, their discomfort at trial is likely to be worse. What rational actor wants to go through that experience again?
- How likely is a losing party to seek an appeal? What are the chances of overturning an adverse decision on appeal? How much will it cost, and how long will an appeal take? What are the risks the decision of an appellate court will be made public establishing a precedent and perhaps, stirring up additional litigation?
- What are the party's goals and objectives for the mediation process? What do they hope to gain from engagement in an assisted negotiation? Are their goals and objectives realistic? Have the parties considered what might be required of them in the back-and-forth of a negotiation to achieve their goals? Parties must make reasonable proposals to settle in order to receive reasonable counterproposals in return. Parties are often surprised at the competitive/reciprocal nature of negotiations. Unreasonable demands are inevitably met with equally unreasonable replies; productive proposals often stimulate productive counterproposals in response.

As the answers to these kinds of concerns are heard, considered, weighed, and processed, the parties – with the advice and recommendations of counsel – are ready to make good, business-

⁴ See "Getting to Yes," by Roger Fisher and William Ury.

⁵ In both state and federal court, no more than 1% of cases result in a trial on the merits.

like judgments concerning resolution. Whether to settle and on what terms is *their* decision to make, not the mediators, not counsel.

III. *Distinguishing Features of Mediation Advocacy*

a. *Persuade the Decision-maker on the Other Side*

The single most important distinction between the mediation process and litigation is that the decision-maker in litigation is a third-party neutral. The decision-makers in mediation are the parties themselves. It only makes sense, therefore, that all efforts to persuade should be directed to the decision maker on the other side. The goal is to persuade the other side to manage their risk and settle, rather than roll the dice. Again, this is because mediation is a voluntary process, even if court ordered⁶. The mediator cannot impose a resolution. Only the parties make that decision. While obvious, too many advocates nonetheless draft their written materials and tailor their oral advocacy to moving the mediator into their corner not the decisionmaker.

The obvious question is “why?” Advocates believe persuading the mediator will cause them to take their side and be their advocate in the other caucus room. Depending on the mediator, their belief may be well-founded. However, mediators are trained to resist such efforts. Most of the mediators I know at least try to maintain the appearance of neutrality if not neutrality itself. Mediators are trained to make one side’s arguments in the other room, but translated or reframed into more neutral terms, while maintaining their distance at the same time. “As I understand the argument they’re making” Perversely, the very arguments made to influence the mediator cause resentment and escalate emotions in the other room, making the mediator’s job that much more difficult. Parties on the receiving end of overly aggressive written advocacy, for example, often start the mediation by threatening to leave.⁷

Mediation is a dispute resolution process, not a justice process where right and wrong are adjudicated, where a decision-maker determines the truth. The emphasis, therefore, needs to be on the 1) benefits of resolution; and 2) the risks of litigation. Parties will rarely agree on the facts or the inferences to be drawn from those facts. They might very well agree, however, on what the risks are. Risk assessment creates doubt. Doubt creates fertile soil to plant the seeds of resolution. When the risks and perspective are presented with civility and respect in a rational dialog, parties are better able to incorporate important concerns and make rational decisions.

In my practice to lay the foundation for a civil and respectful exchange, I ask parties and counsel to set aside their zealous advocacy and approach the mediation process as “joint problem

⁶ Parties may be ordered by a court to participate in mediation, but no court can force a party to settle if they choose not to do so.

⁷ For advice on drafting an effective written mediation summary, see <https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/>

solvers,” recognizing that everyone has precisely the same challenge: is there an off ramp to the present dispute? Joint problem solvers agree to make reasonable concessions, don’t try to score every point, listen respectfully, attempt to understand the other side’s perspective, and employ the language of diplomacy.

For instance, accusing the other side of lying will generally antagonize the accused, causing a reaction and a likely counterattack in kind, charges of “mudslinging” or both. By contrast, far more effective is the advocate who calmly pulls together the impeachment evidence and presents it this way: “Most cases are won or lost based on who the jury believes is most credible. Here’s the evidence we expect to present to demonstrate that (our client) is more likely to be believed than yours.” A respectful presentation highlighting the risk to good name and reputation can move the needle. On the receiving end, good trial lawyers welcome the opportunity to hear such a presentation in order to learn what they’re up against. Even if mediation doesn’t resolve the dispute, the parties receive value in being better able to prosecute and defend the claims. That said, most disputes do settle at mediation. The very process of a respectful exchange of views plants the seeds of doubt leading to recognition that a good settlement is better than a good case: you can always lose a good case.

b. Exercise the Option of Speaking Directly to the Other Side

Michigan litigators rarely agree to joint sessions. Most prefer an all caucus/shuttle diplomacy model where the parties may never actually ever see one another. Missed is a rare opportunity to advance client goals and gain valuable insight. Mediation is the only stage in the process where the parties and counsel are permitted – indeed encouraged – to communicate directly with one another. There are many things the parties might say directly to one another, given the chance, which could give them satisfaction *and* move the dispute closer to resolution.

Regarding advocates, who have the most input into process design, it never ceases to surprise when experienced counsel passes up a chance to make the case or plead their cause and the benefits of settlement directly to opposing parties. With advance planning, they have ample time to prepare their remarks select the most effective language and marshal their points in the most compelling and persuasive order. More significantly, they will have the undivided attention of opposing counsel and client alike. In joint session, talented advocates can reveal how compelling a case they might make to a jury; demonstrate their ability to tell a good story persuasively; and showcase their skills as effective and compelling communicators. In the hands of a mediator trained to manage joint sessions, the environment will be a safe one.

For tips preparing a *party* to make a joint session “pitch” at mediation, see <https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf>

When advocates are asked for an explanation of their aversion to joint sessions, typical answers include: 1) “We will only antagonize each other and get everyone’s back out of joint.” True enough where aggressive zealous advocacy is employed. As noted *supra*, however, mediation

advocacy tailored to persuading the decision maker will rarely cause a mediation to go sideways. 2) “We already know their version of the facts.” Perhaps, but rarely put together as a compelling narrative story in a party’s own words previewing what the jury will ultimately be told. Prudent participants in the joint session will listen carefully to see if there is anything new; and to determine how effectively the speaker can communicate their thinking. 3) “My client might slip and make a mistake.” Lawyers who prepare their clients for the mediation process anticipate potential mistakes their clients might make and prepare them to avoid doing so. I’ve presided over scores of joint sessions. I have yet to see a slip of the tongue that made a difference. See, <https://www.starkmediator.com/wp-content/uploads/sites/4/2022/01/Why-You-Should-Consider-Joint-Sessions.pdf>

c. Search for Common Ground

No matter how deep their differences, no matter how entrenched in their positions, no matter how escalated their emotions, parties often share common ground, areas of agreement overlooked or drowned out by the dispute. Before the termination, for example, the former employee may have loved working for the company; and the company may well have valued the employee’s service. The two businesses now litigating the quality of machine parts were always satisfied with price and delivery in the past. The CEOs of each enterprise, in charge of businesses founded by their grandfathers, have more in common than they might have thought. When the founding partners first came together to establish the enterprise now imploding, they enjoyed each other’s company and respected one another’s ability.

Identifying common ground is sometimes a revelation to the parties and often serves to build trust and establish momentum toward future agreements and resolution.

d. Prepare an Offer/Concession Strategy in Advance

The best negotiators are strategic. They develop an offer/concession approach with their clients long before they reach the mediation table, a strategy which anticipates each move and countermove likely to occur round after round until settlement is reached. Strategic advocates plan out the negotiation in their head, anticipating how each offer will be received, predicting the other side’s response, and carefully working the negotiation through step-by-step until their settlement goal is achieved. Fortified with a plan, they are not buffeted by emotions in the moment and at the table by misbehavior or overly aggressive advocacy from their opponent. A well-conceived plan smooths out an otherwise emotional roller coaster ride. They have a plan and they implement their plan, ignoring distractions. 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 all 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.

An offer/concession strategy is a prediction. Predictions about the future are fraught with peril. Mistakes will be made. Should unanticipated risks be identified, for example, the value of the claim or defense is impacted accordingly, which, in turn, effects the overall settlement value of the dispute. Accordingly, strategic negotiators must also be flexible. Adjustments in the strategy may be necessary.

In any event, with an offer/concession strategy, party expectations are better managed, and the negotiator retains tighter control of the process. Clients are less frustrated, less likely to become discouraged, and less likely to grow impatient. Parties who are frustrated, angry or impatient are more likely to make mistakes, offering too much, leaving money on the table, 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 settlement “landing zone”, it could be a sign that one or both parties are not ready to settle; or someone’s evaluation is in error. In either case, counsel can learn a great deal 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 a little 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. Perhaps the parties weren’t as ready for mediation as initially thought. The top or bottom line a party brings to the mediation table is the end product of a careful calculation as to risks, a weighing of strengths and weaknesses, an assessment of the judge, the legal foundation of claims and defenses, economic and non-economic loss, the potential jury pool, the state of the law, and more. If participants are paying attention to the information exchanged during the mediation process, their final evaluation *should* change to incorporate the fresh insights learned.

e. Have a rationale for each proposal or counterproposal

Effective negotiators combine their dollar proposals with a rationale or explanation, so the other side doesn’t conclude the offer is totally arbitrary. In an employment case, for example, how much is allocated for lost wages to date minus interim earnings? Is there money allocated for future lost wages, emotional distress, and attorney fees? Have the numbers been reduced to present value? What interest rate was used? If a party is claiming lost profits, how are they measured and what assumptions are they based upon? Unexplained numbers typically irritate the recipient and lead to counterproposals that are generally unproductive, resulting in equal consternation on the other side and a poisoned negotiation atmosphere. Unexplained numbers are rarely productive. By contrast, a rationale generally leads to a robust and constructive discussion of the assumptions and bases rather than simply complaints about the numbers themselves.

Whatever the explanation for a proposal, any settlement number communicated will be the loudest message heard by the recipient. Accordingly, I present the rationale for the numbers before presenting the numbers themselves. Once the number is presented, parties may stop listening. Because I *want* the participants to understand where the number came from, how it was derived, and what the offeror was thinking, it only makes sense to save the numbers for last.

f. Make Use of the Mediator

Mediators *want* to assist the parties in making good judgments about settlement. Typically, they are the only participant in the process who will have been in both rooms with exposure to how litigants are participating. There are many issues about which a mediator might be helpful:

- i) Can the mediator share the temperature, mood and thinking in the other room?
- ii) Will the mediator serve as a negotiation coach? Ask for suggestions in formulating the most effective proposals to communicate.
- iii) Use the mediator as a “sounding board”. Run your questions, concerns and proposals by the mediator for input.
- iv) Ask if the mediator can share what seems to be causing the most consternation “next door” and how to move forward.
- v) What is the mediator’s reaction to the rationale employed to justify each proposal?
- vi) If the mediator has trial or subject matter expertise, seek input as to risk and the magnitude of risk.
- vii) As the negotiation process moves forward, request input as to where the negotiation might be leading.

g. Consider Remedies Not Available through the Litigation Process

In litigation, judicial remedies are confined to money damages and limited equitable relief from an often-reluctant judge. In mediation, as in any negotiation, by contrast, the only limit on proposed settlement terms is the creativity of the participants. By considering the underlying needs and interests of each party, i.e., recognizing what may be driving the dispute, participants may be able to expand the pie with proposals unavailable through litigation. For example, mediation may result in a business solution where the parties continue to work together. No judge could order that. In a dispute between a franchisee and a franchisor, modification of oppressive enterprise rules can result in a WIN/WIN success for both parties. In an employment case, a plaintiff claiming wrongful discharge may be offered conversion of an otherwise black mark on their resume (“termination for cause”) with a negotiated resignation or letter of recommendation in its place. Disputes made public in the media can be settled by drafting a joint press release that gives each side cover. Settlement agreements can include non-disparagement clauses, confidentiality, and cooperation in future litigation.

h. Learn From the Process

Many mediators describe the exchange of information during the mediation process as a “learning conversation.” If the dispute does not resolve itself, participants have learned something new or better understand something known in a new light. As noted *supra* when parties are truly listening, the numbers they’ve brought to the table – their top and bottom lines - should change. In the relatively rare event that mediation does not result in resolution, the parties are better equipped to prosecute and defend their claims and perspectives going forward.

i. Prepare Clients for the Process

Parties are the ultimate decision-makers. As full participants at the mediation table, they should understand the mediation process inside and out. That requires a good deal of advance preparation and party education. How does the process work? How does this mediator do things? What is the mediator’s role?⁸ How should the party act? When should they speak up? Should they prepare opening remarks? What is expected of them? What can they expect from the other side? What can they say and what should they not say?

If parties are to make the most of the opportunity to learn, and to exercise good judgment unclouded by emotions and distractions, they must be ready. Some of the topics that should be covered include:

- i)** If a party is going to make opening remarks in a joint session, they should know well in advance so they can prepare their comments accordingly. Counsel should work with their clients well before the day of mediation to “preview” party presentations for content, format, and tone. Advocates should not be afraid to critique presentations honestly and constructively to be most effective.
- ii)** Patience is a virtue. No two parties negotiate at the same pace or in the same way. Opening offers and counteroffers do not necessarily reflect where the mediation will end up.⁹ Experienced negotiators on the other side may well take advantage should they get the impression that someone is losing their resolve.
- iii)** One of my favorite quotes: “Expectations are resentments under construction.” Parties unaccustomed to negotiating the resolution of law suits may not be comfortable with the pace of things. It may have taken

⁸ See, for example, <https://www.starkmediator.com/articles-links/i-know-what-your-job-is-reframing-the-role-of-mediator/>

⁹ See my paper on what every client should know about the negotiation process. <https://www.starkmediator.com/practice-tips/2021/05/03/negotiation-101-what-parties-should-know-about-negotiations-at-the-mediation-table/>

months or years to create the dispute. It may take all day to remove impediments to resolution. Some participants need more time to make decisions than others. For parties, this may be their only case whose outcome could have profound impact on their lives. They need extra time to make up their minds. That may require many hours of patient waiting.

- iv) Clients expect their counsel to be zealous advocates. If counsel is observed acting as a joint problem solver who treats the other side respectfully, makes reasonable concessions, and seems to be trying to understand their perspective, parties may fear counsel has lost faith in their claims or defenses. Prudence dictates that parties be given an explanation for the change from zealous advocacy to mediation advocacy.
- v) While the word “compromise” has taken on negative connotations in today’s world, finding an off ramp from a dispute often requires that each side make sacrifices. In “Getting to Yes,” Fisher and Ury taught us the value of interest-based bargaining and the possibility of WIN/WIN resolution. In the mediation of disputes over money damages, however, Winston Churchill’s observation still remains apt: the best settlements are those from which both sides walk away equally unhappy. Prudent counsel will, therefore, include preparing clients to be flexible and open minded about resolution.

IV. Conclusion

Savvy litigators and their clients understand that mediation is a unique opportunity to engage in an effective dispute resolution process: a process designed to save time and money, exchange critical information, reduce consternation, limit disruption, manage risk, and achieve mutually beneficial resolution. When parties proceed as joint problem solvers, properly prepared by advocates who appreciate the power of replacing zealous advocacy with mediation advocacy, their underlying needs and interests are met, and their goals and objectives achieved.