



Proposed advancements in mediation practices: Placing clients at the center of mediation

BY TOM McNEILL

Our group of 11 experienced commercial litigation mediators and trial lawyers¹ commenced a project to envision mediation enhancements, innovations, and creative strategies. From a blank slate, we gravitated to a conclusion that commercial litigation mediations benefit from mediators engaging more directly with client decision makers supported by increased mediator-facilitated direct communication between opposing counsel.

Applicable to mediation in a wide range of litigation disciplines and subject matters, our proposals are outlined here for consideration, comment, and adoption by mediators and lawyers. Our goal is promoting a more efficient mediation process with an increased focus on client participants, thereby increasing fre-

quency of resolution on objectively reasonable terms earlier in the mediation process.

A CRUCIAL FORUM FOR RESOLUTION

Based on our experiences and anecdotal evidence from colleagues and peers, mediation is increasing in prevalence due to a variety of factors. Among them:

- With post-pandemic court dockets still backlogged, judicial officers are more frequently directing parties to mediate and making that recommendation earlier in cases.
- We have observed that there seems to be fewer and/or less

opportunities for trials, and many practitioners in commercial litigation/business do not have extensive trial experience. Counsel's self-evaluative concerns in this regard may make settlement more attractive.

- The frequency and quality of counsel-to-counsel negotiations seems to be decreasing. Communication between lawyers is dominated by email with settlement discussions in person or by phone on the wane.
- Bilateral settlement discussions are becoming a lost art: counsel-to-counsel negotiations often reflect the well-documented decline in civility. Negotiations are often premised solely upon arguing merits ad nauseum without finding common ground upon which compromise and resolution can be achieved.

Mediators meet client and practitioner needs created by these factors, underscoring that mediation is a key forum for resolution.

BASELINE: THE TRADITIONAL MEDIATION FORMAT

There exists a wealth of publications describing variations on the mediation process and mediator and party strategies. Even before selecting a mediator, counsel should discuss with clients the mediation process and begin developing goals and objectives to be achieved in a mediated resolution.

Generally, the traditional mediation format for commercial/business litigation and prelitigation disputes encompasses the following elements:

- Selecting the mediator.
- The initial conference with counsel and the mediator to discuss the case generally and familiarize the mediator with key issues.
- Mediation statements, where each side submits to the mediator (and typically exchanges with opposing counsel) an advocacy statement of the merits of their positions including procedural history/status and factual, legal, and practical issues that drive adjudication risk and provide impetus for a resolution. Statement advocacy forms the bedrock of mediation.
- On mediation day, the mediator convenes the party's counsel (external and in-house counsel), clients/business decision makers, and sometimes liability and damages experts and financial or business advisors. This takes place in person, via technology (Zoom, Teams, etc.), or a combination of both. The mediator may start with a joint meet-and-greet session for an

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overview of the process or begin with each side in separate conference or Zoom rooms.

- The mediator works back and forth between parties to discuss positions, merits, risks, and opportunities (also referred to as caucus sessions or shuttle diplomacy.) The mediator advances the process by guiding the parties in making a series of settlement offers and counteroffers.
- A resolution is set forth in a signed document in the form of a term sheet or full-blown settlement agreement with provisions making it final, binding, and enforceable.
- If the parties do not reach resolution on mediation day, mediators typically follow up to advance the cause of settlement. Mediator practices in this phase vary greatly.

This format largely depends on the mediator discussing the dispute with the lawyers, which tends to leave clients observing the discussion. When the mediator leaves the room, counsel and client discuss the meaning and import of what just occurred and develop strategies for the next mediator visit and settlement move.

Within each element of the traditional format, we see immense opportunities for the mediator to engage directly with the client (after all, it is *their* case) and moderate interactions between opposing counsel and even experts — with clients observing as the mediator sees fit. And sometimes, it is wise for the mediator to moderate direct client-to-client negotiations with the lawyers observing.

The following observations and proposals are presented with the goal of encouraging mediators and party counsel to put clients more clearly and definitively at the center of the experience.

OPPORTUNITIES AND BEST PRACTICES FOR MEDIATION ENHANCEMENT

Selecting a mediator

There are many factors to consider in choosing a mediator — the business, the clients, and the subject matter are just a few. We recommend counsel fully involve clients in the due diligence and selection process rather than counsel selecting the mediator for the client.

Initial conference

Mediators typically convene an initial conference with litigation counsel a few weeks before mediation day to learn the basics of the case — key factual and legal issues, procedural posture, status of discovery, potential dispositive motion practice, and future dates, including trial.

The initial conference is an excellent opportunity for counsel to engage with the mediator and one another. Opportunities for expanding and enhancing the initial conference should include submission of operative pleadings, joint submission for the pretrial conference, the scheduling order, initial disclosures, and pending discovery or summary disposition briefing. Avoid attaching exhibits other than perhaps excerpts of the contract or an email admission. At this juncture, less is more.

In advance of the initial conference, we recommend counsel submit a two- to three-page summary of the key factual, legal, and practical issues impacting resolution (with subtle advocacy to advance your client's cause.) A more detailed summary comes later.

In our experience, the initial conference discussion only involves the mediator and litigation/trial counsel. In the right circumstances, we favor including clients/business decision makers and/or in-house counsel to provide the opportunity for further familiarity and rapport with the mediator very early in the process. Presently in commercial cases, it is rare for mediators to include clients in the initial conference; we think it should become common practice.

Prepping for mediation day

Preparing for mediation day may be the most critical step for clients and for the prospects of resolution.

It is crucial that counsel meets with their clients to review all submitted materials and prepare for negotiating a resolution. Counsel and clients must work together to set goals and objectives and develop strategies for achieving them, and clients must review and understand mediation statements submitted by opposing parties.

In our experience, there are varying levels of counsel and client preparation for mediation day. Clients frequently are well-versed in their own positions but less apprised of the opposing party's positions and strengths. A client's first full and accurate appreciation of the risk in their own position often occurs when the mediator explains the other side's position, which makes it exceedingly difficult to reach a resolution on mediation day.

Premediation day session with mediator and client/counsel team

This is a centerpiece proposal. It is rarely used by mediators in commercial cases/disputes but is effective in mediating disputes in other subject matters, particularly family law. Convened a few days before mediation day, these sessions provide an important, even critical, opportunity for clients, counsel, and mediators.

Our recommendation is that between submission of mediation statements and mediation day, mediators meet separately with each side (lawyers and clients). Ideally, these sessions are held in person but can occur via Zoom. The mediator should apply confidentiality to these sessions, creating a safe environment for clients to discuss their perspective on the case and share their vision for resolution.

The mediator does not push risk buttons, cross-examine, or play devil's advocate. That will change on mediation day when the mediator tests the client's positions and becomes a purveyor of risk.

A premediation session with each side:

- Provides an opportunity for clients to talk directly with the mediator and for counsel to discuss key points in a way they may not have during mediation statement advocacy;
- Allows clients/counsel and the mediator to develop rapport and trust;
- Gives participants a head start on mediation day by replacing the first set of caucus sessions;
- Accelerates discussion of core issues that embody risk and drive resolution; and
- Results in earlier exchanges of initial positions. Under the traditional mediation format, the first set of offers and counters typically are exchanged mid-afternoon on mediation day; by the third round, clients are often worn out and frustrated.

Premediation sessions present an excellent opportunity for the mediator to make sure clients understand all aspects of the case and for the client/counsel team to gently evaluate whether the mediator knows and understands their team's strengths and the other side's weaknesses.

Counsel-only sessions

Many mediators conduct counsel-only sessions for direct interaction without the need for performance art in the client's presence. These may occur before mediation day, on mediation day before clients arrive, or from time to time during mediation day.

These sessions create a forum for discussing factual, legal, damage, or practical issues that drive the case and create common ground for settlement framework, elements, cash consideration, non-monetary provisions, and creative solutions. Counsel then reports back to clients on progress.

We added these sessions as best practice so counsel can prepare for them and inform clients that they may occur.

Mediation day checklist

- Should your damages expert attend mediation? Increasingly, practitioners say yes. An expert presentation or rebuttal — to the mediator, the opposing side, or the opposing expert — helps sharpen risk issues for reaching an agreement.
- Ensure that insurance coverage is addressed. The mediator will want to know coverage issues and whether an insurer may be the source of settlement funding, even in part. Will the claims representative and/or insurer's counsel participate? If not accomplished previously, counsel should obtain an applicable policy and, if there is one and the insurer and insured are willing, the reservation of rights letter. In the event of a coverage dispute that could derail resolution, counsel may request that the mediator engage with the insurer's counsel and representative.
- Explore tax advantages and disadvantages. The gap between settlement positions can be narrowed if a party payor or payee can construct a tax advantage or avoid a tax disadvantage while achieving at least tax neutrality for the other party. Prior to mediation day, clients and/or counsel should consult with a qualified tax advisor to explore minimization. Doing so on mediation day is often too late.
- For mediation day, prepare a draft term sheet and/or full settlement agreement. Surprisingly, few lawyers do this. The golden rule is that parties sign an enforceable resolution document, but hours can elapse between reaching a verbal agreement in principle and drafting and negotiating the final document. Client patience wanes, frustrations rise, closing the deal becomes more difficult, and the threat of a client walking out grows. Arming yourself with a beginning term sheet/settlement agreement can avoid protracted settlement papering from scratch in a limited timeframe.
- Direct counsel debate of key issues in which the mediator moderates and clients observe. This can be effective later in the day when tightly moderated by the mediator and directed to discrete settlement fulcrum issues.
- Direct client negotiations moderated by the mediator. Business clients are comfortable negotiating their own deals; that can be employed in mediation. In our experience, this approach is most frequently applied in cases in which an existing business is modified or where there are prospects for future or additional business, but it can be used in a broader context.
- "Hot tubbing" experts while counsel and clients observe. This is an emerging best practice where opposing experts debate their opinions and, typically, ask one another questions, crystallizing risk in a very practical way.
- Counsel's mock argument of key issues in a pending summary disposition motion where clients observe. This is rarely employed but effective in helping clients understand the risk of not prevailing on an issue central to their litigation and settlement positions.

Mediator opportunities during mediation day

Under the traditional format, the key mediation day players are the mediator and party counsel, who engage in debate and dialogue as clients observe. When the mediator leaves the room, counsel and clients discuss what just happened and what that means for movement in their settlement position.

We encourage mediators to be creative and bring clients into the center of the process. Steps can include:

- Frequent mediator drop-in visits to the other conference rooms during shuttle diplomacy. Clients become worried, frustrated, bored, and angry while the mediator is working in other rooms. Stopping by with updates and encouragement is a best practice.

Post-mediation day opportunities

Mediation is no longer a one-day event; it is a process. If a case is not resolved on mediation day, it is critical that mediators apply specialized skills and approaches in the ensuing days and weeks. The dedicated persistence in continuing dialogue sustains momentum for clients and counsel to find a resolution.

CONCLUSION

Mediation is a critical forum for parties to resolve litigation disputes, and there are tremendous opportunities to ensure clients are fully engaged and central in making the decision to resolve or litigate. From experience, a client-centric mediation process materially improves efficiency, efficacy, and resolution outcomes and generates a more stable peace post-mediation.

To contribute to the group's goals of developing and adopting mediation practice enhancements, please offer your experiences, proposals thoughts, comments and ideas at www.MediationEnhancements.com or contact any of the group members directly.

Tom McNeill has spent 40 years as a litigation and trial advocate and litigation practice director for Dickinson Wright and has served as a business litigation mediator since 2017. In 2023, he established Tom McNeill ADR, which is exclusively dedicated to mediation resolution.

ENDNOTE

1. In addition to the author, the group is comprised of Brian Akkashian of Paesano Akkashian; Lisa Brown of Dykema Gossett; David Devine of Butzel Long; Pat Hickey of Hickey, Hauck, Bishoff, Jeffers & Seabolt; Angela Jackson of Hooper Hathaway; Anthony Kochis of Wolfson Bolton Kochis; E. Powell Miller of the Miller Law Firm; Matt Mrkonjic of Honigman, Miller, Schwartz & Cohn; Arthur O'Reilly of Jones Day; and Doug Toering of Mantese Honigman.