

How to Succeed in Mediation

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Trends in Dispute Resolution

Twenty-five years ago Alternative Dispute Resolution (“ADR”) was virtually synonymous with arbitration. Although many people still contract to resolve disputes in the arbitral forum, mediation has become increasingly popular. Indeed, today it seems that every case gets mediated at some point either voluntarily, usually through private mediation services, or involuntarily, pursuant to court order. Mediation offers parties a consensual resolution of their dispute at a relatively modest cost as compared to litigating in court or before an arbitrator. In fact, mediation has proven to be so effective that most courts have adopted mediation programs—and for other courts, judges endorse and encourage litigants to pursue private mediation. Many organizations such as the AAA and JAMS that traditionally offered only arbitration services, now offer mediation both as an adjunct to arbitration and as an independent process to resolve disputes. Litigants should welcome mediation and take it seriously as an opportunity to avoid the cost, burden and uncertainty inherent in litigation. Many lawyers and clients, however, miss this golden opportunity by mishandling mediations. With attention to basic rules, the parties can increase the odds of success.

Should I provide for mediation as part of the dispute resolution procedure in my contract?

Flexibility. With certain caveats, the answer is “No.” Providing for mediation alone or providing that mediation take place before arbitration can thwart a party’s ability to go to court to seek preliminary relief if necessary. Contracts may provide for mediation and also permit the parties to go to court on an emergency basis, but at least in New York, provisions such as these have not been tested. To provide flexibility, the parties may agree contractually that notwithstanding their chosen dispute resolution mechanism, they

will, at the beginning of a dispute, hire a mediator who will be with them for the duration of the matter. Often a mediator can forestall actual litigation or help the parties settle before significant litigation expenses are incurred. Rather than name an individual as a mediator, the parties are well advised to select a mediator from a specific dispute resolution organization. If a mediator follows the case from the beginning, he or she may be able to initiate settlement talks early and/or take advantage of bringing the parties together at various opportune times.

When is the right time to mediate?

Timing strategies. There is no formulaic “right” time to mediate. Much depends on the nature of the litigation, the parties and whether the mediation is voluntary or court ordered. Some courts order parties to mandatory mediation without regard to the procedural posture of the case. For example, in the Southern District of New York, the Court sends employment disputes to mediation immediately after the filing of an Answer and before any discovery takes place. If the parties believe that mediation is premature, they can write to the Judge expressing a desire to mediate but explaining that it is too early in the life of the case for mediation to be meaningful. Some judges may postpone the mediation, but others order it to proceed and hope that the court-appointed mediator will remain available to assist the parties when a mediation appears worthwhile. Lawyers who serve as mediators are more likely to be willing to continue with a case than Magistrates, Special Masters or Judicial Hearing Officers.

Impact of discovery. Voluntary mediations are usually most successful after some discovery has taken place and the lawyers have assessed the relative merits of their respective positions. Pointing out relevant documents and/or excerpts from deposition testimony during

a mediator can show the case in a different light and help the mediator broker a rational settlement. Picking numbers out of a hat rarely results in a settlement. If a party is willing to end a lawsuit for nuisance value and a plaintiff is willing to accept that offer, a settlement would have been reached early in the case before the intervention of a mediator.

Pre-trial opportunities. After the parties have completed discovery, they may decline to mediate. However, right before a case goes to trial is a good time to involve a mediator. At this point the lawyers and parties are all a bit uncertain of how the case will play out. This uncertainty generally helps to encourage settlements.

How do I choose an appropriate mediator?

Qualities of an effective mediator. Although some believe that a mediator should be versed in the substantive subject matter of the litigation, choosing a successful mediator rests primarily on the four “p”s. The parties should look for a mediator who has the right personality and is patient, willing to persevere and practical.

Personality. The personality of the mediator can determine the odds of success. Some cases require the mediator to act more like a psychiatrist, willing to listen and empathize with the parties; others require a hammer. Generally, the lawyers will agree on the temperament that best fits the case and offers the best chance of a settlement. The best way to determine if a mediator is right for the case is to conduct an interview and check references.

Patience. Patience on the part of the mediator is more than a virtue: It is essential. Whether a one-day mediation or one that lasts several days sequentially or sporadically over time, mediation is a slow process. The mediator needs to maintain harmony during the process and not to express frustration if the parties backtrack or become

intransigent. A patient mediator assures the parties that the process can be frustrating, so that the mediation is not derailed or prematurely terminated.

Perseverance. The mediator must persevere and adhere to the procedures set in advance. Changing the rules midstream can cause the parties to lose faith in the mediator and the process. A mediator must not give up until he or she is convinced that the parties have reached an impasse. Even then, an effective mediator suggests ways for the parties to continue to move forward. Moving ahead may mean breaking for some period of time or forcing the parties to stay together, depending on the circumstances.

Practicality. Most importantly, the mediator should be practical and look for non-monetary ways to resolve disputes. Sometimes parties want an apology. Sometimes, a letter of recommendation can settle a case. Sometimes the litigants may be able to continue working together notwithstanding the lawsuit, and in that case non-monetary concessions may take on added value. In a mediation the parties can get relief that a court cannot award, and a practical mediator uses this valuable flexibility to achieve a resolution.

Selection process. A party should resist the knee-jerk reaction of not consenting to a mediator proposed by the other side. Of course, in some circumstances an adversary selects a mediator who is so patently biased that consent would be foolhardy. However, after researching the mediator, a party should give careful thought to accepting the adversary's selection. The adversary no doubt respects the chosen person and may tend to listen to that person's recommendation on settlement. If the parties cannot agree on one person, they may interview a number of people as potential mediators. These interviews can be either ex parte or joint. Because the client will be spending significant time with the mediator, it is a good idea to have the client participate in the interviews along with counsel.

How much preparation is required for the mediation?

The mediation statement. In order to have a successful mediation, the attorney and the client must prepare. Most mediators schedule a conference before the mediation with the attorneys to get some background on the case, review the pleadings, if any, and set the parameters for mediation statements. The mediation statement is a critical document, the parties' first opportunity to persuade the mediator of their position. The mediation statement is not a legal brief. Instead, it gives some background, states how the dispute arose and, most importantly, explains why the parties have been unable to resolve the matter on their own. A good mediation statement highlights the history of negotiations and points out the personalities involved in the matter so that the mediator knows the obstacles before the mediation day arrives. The parties can agree to exchange statements or to keep them confidential. Lately, parties have taken a hybrid approach, exchanging facts and arguments with the other side but revealing settlement possibilities in a separate submission for the mediator's eyes only.

Opening statements. In the initial conferences with the mediator, the parties discuss opening statements. For many years it was expected that counsel would make opening statements. Nowadays, opening statements are often waived. Whether or not to make an opening statement depends on the case. If the parties have not met opposing counsel through depositions or court appearances, an opening statement may introduce the temperament of the attorney and presentation style, and set forth in concise fashion the attorney's view of the case. If the parties already know opposing counsel, opening statements may serve a less important function. If opening

statements are made, the mediator should set a time limit for each side for two reasons: (1) opening statements do not settle a case; and (2) opening statements may inflame the other side and set a bad tone.

Demonstratives. It is permissible and indeed advisable to use demonstratives during an opening statement. Putting documents up on a screen or having a PowerPoint to bolster your argument is effective to persuade the mediator of the merits of your position. For example, a chart setting forth the damages, with copies for the mediator, can add a persuasive piece of paper in the room during private sessions with the other side.

Tone at the top. Having the right client representatives present at the mediation can increase the odds of success. Sending a lower level employee signals to the other side that you are not serious about settlement. Having a high level executive present not only sends the right message, but also permits a party to maintain momentum and commit to a settlement on a moment's notice. If insurance is involved, the insurers must participate in the mediation process. Insurers need not physically attend the mediation but need to have committed to a settlement figure and remain available by phone. Sometimes the mediator will call to speak to the insurers if the client explains that he or she has reached the limit on settlement authority.

Pace of mediation. The client should be forewarned that mediation can be quite boring at times. Long periods of time may pass when the mediator meets in private session with the other side without any apparent progress. The client needs to know that the mediator is working to get a deal done. It is fine for the client to work on other matters when the mediator is out of the room, but other work needs to be put aside when the mediator comes back to talk.

How can the parties ensure that progress is made?

Lines of communication. Mediation often rewards the intransigent party. To get beyond that constraint, mediators use various techniques. The mediator may seek to speak to the lawyer for the stubborn party outside of the presence of the client. This kind of communication is potentially dangerous since it interferes with the attorney/client relationship, and the client may become suspicious if the attorney returns to the room urging the client to change his or her position. The mediator may also seek to speak to the client without the lawyer present. If the client is experienced in mediation and sophisticated, direct communication between mediator and client often leads to results. The client may bond with the mediator and reveal his or her true settlement authority.

Range of settlements. The mediator may suggest that the parties consider the case in terms of brackets—that is, that the negotiations will fall within a limited dollar range. Some mediators take an evaluative approach to a case and make recommendations concerning settlement. They openly share their view of the case and put forth a mediator's number. If the parties have agreed to limit a mediation to a finite time period, as opposed to having a mediator as part of the team for the life of the case, the mediator's number may bring the parties closer together. There is a risk, however, that if the mediator sees the case dramatically favoring one side, the other side may lose faith in the mediator and end discussions.

How should the mediation conclude?

Documentation. Assuming there is a settlement, the parties should not leave the room until it is documented. Because the participants are generally exhausted by the time a settlement is reached, final success may depend on preparing a draft settlement agreement in advance. This way, no one will forget issues such as cooperation and confidentiality.

Any settlement agreement should provide that the mediator has continuing jurisdiction over the settlement. Often if the parties just agree to a term sheet, questions arise during the process of documenting the final settlement that the mediator can resolve. If there is no settlement, the parties should discuss next steps and have a clear plan to meet with the mediator again. If the mediation takes place pursuant to court order and the mediator is a Magistrate Judge or Judicial Hearing Officer, the parties may have difficulty keeping him or her interested in the case. However, in the private mediation setting, the mediator will stay involved. Sometimes the parties feel that more discovery is needed before they can structure a settlement. In this case, the mediator should stay on top of the discovery and call the parties together again after it has been completed. Sometimes a mediator suggests that the parties adjourn to consider the respective positions and set a date certain to meet again. The parties should consent to allowing the mediator to speak by phone to each of the plaintiff and defendant ex parte to save time and avoid unnecessary costs.

Conclusion

Mediation offers a relatively inexpensive, flexible and fast alternative to resolving cases. Approached properly, mediation can design a settlement that all parties can live with. The key to success is to take advantage of the process, recognize that mediation is serious and commit time and effort to reach resolution.

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Lynne's litigation experience is very diverse and includes trial and appellate practice in the state and federal courts. She has particular experience in representing financial services firms in matters involving breach of contract, accounting malpractice, class actions, employment matters and bankruptcy-related issues. Lynne received her LL.M. in 1984 from New York University and her J.D. in 1979, *cum laude*, from Brooklyn Law School. She earned her B.A. from New York University in 1976 where she was Phi Beta Kappa.



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