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Alternative Dispute Resolution Settlements and Negotiations

*Leading Lawyers on Winning Legal Strategies for
ADR, Mediation, Arbitration, and Litigation*



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Alternative Dispute
Resolution: The Importance of
Preparation in Mediation
Proceedings

Thomas R. Kline

Partner

Andrews Kurth LLP



Thinking About Mediation

Clichéd though it may be, the best advice I can give to practitioners and their clients headed into the deceptively relaxed trenches of mediation is also the most conventional: preparation drives everything. Like “location, location and location” in real estate or even “buy low, sell high” in investing, this advice appears too mundane or even self-evident to be worthy of a book chapter. Yet, any mediator can tell a well-prepared side from one that is merely hoping for a favorable outcome. And most mediators, I submit without benefit of survey, would connect level of preparation to likelihood of success in mediation.

What are the Distinguishing Characteristics of Mediation?

Mediation is assisted negotiation; it is a nominally voluntary, generally nonbinding alternative dispute-resolution process in which a third party guides the parties towards an agreement that would end some or all of their dispute. This third party may be an ADR professional hired by the parties, a judge or magistrate judge, or a volunteer provided by a court program. I say “nominally voluntary” because there are often contexts in which parties are required to mediate either by court rule or practice or when a judge orders mediation because of the characteristics of a case (such as an unusually high level of contentiousness or excessive litigation activity that is not proportionate to the amount in controversy). Throughout the thirty years I have practiced in the Washington, D.C. area, mediation conducted by trained neutrals has gradually—if not completely—come to replace “skull-crushing,” the not-so-delicate judicial practice of trying to force a settlement on the eve of trial.

Mediation follows no particular script, but generally includes as its most basic elements: one, but possibly more, neutrals; and two, but possibly more, contending parties. Typically, the parties agree to some ground rules, which may be included in an agreement to mediate. The parties generally provide the neutral with written submissions, which may emphasize the merits of the case or the economic issues involved. These submissions can be exchanged by the parties or submitted to the mediator in confidence. If exchanged, the submissions can be sequential or simultaneous.

Once the mediation begins, the mediator may communicate with counsel or directly with the parties. There is usually at least one mediation session in which counsel and a client representative are required to be present. At this session, there may be a combination of private and joint meetings with discussions covering any aspect of the background and underlying facts of the dispute, governing law, related dealings between and among the parties, if any, and intangible aspects of a dispute, such as publicity. The negotiations may continue through several sessions until the parties reach agreement or impasse, and, if broken off, can be and often are resumed at a later stage of the formal proceedings. If the parties reach a settlement, the mediation ends in a written agreement between the parties.

Mediation can occur outside the context of litigation; it can precede initiation of a lawsuit or arbitration proceeding; or it can occur mid-stream, including during pending appeals. The most distinctive aspects of mediation are the generally voluntary and nonbinding character of the process and the confidentiality of discussions. Here, confidential means not only that anything said in the mediation may not be repeated in the litigation but also that mediators often solicit statements from one side that will not be repeated to the other side. Such confidential information could begin with a party's honest evaluation of the strengths and weaknesses of its own case and can extend to the party's reserve number (final, honest-to-god, drop-dead settlement position), if the mediator believes having that information will assist with the process.

To achieve the level of confidence needed to make the process work, mediators must be genuinely neutral about the dispute and must disclose any potential sources of conflict of interest, bias, or prejudice. Mediators generally strive to create an informal and relaxed atmosphere in which party representatives, as well as counsel, feel comfortable and free to speak. The heart of any mediation—and the source of such magic as it may generate—is the engagement of the parties themselves (individuals or corporate representatives) in frank discussion of the dispute and its possible resolution. To encourage candor, mediators may not be subpoenaed to testify in the dispute.

Lawyers are accustomed to stating and defending their client's position, and to jousting with opposing counsel. This process is unlikely to produce a healthy settlement dynamic unless handled carefully. In mediation, party representatives may listen to the lawyers' presentations, giving them the opportunity to judge for themselves how relatively strong or weak the two positions sound. Likewise, a mediator can test the parties on weaknesses in the facts or even on the legal implications, for example saying: "I am sure your lawyer has advised you that if the other side succeeds in proving such-and-such, you would not be entitled to any damages." The neutral may meet with individual parties and party representatives, separately or together, with or without counsel present, creating the possibility of a free-form, creative process that can break the sides out of the traditional point-counterpoint gridlock of attorney back-and-forth.

The United States District Court for the District of Columbia, where I serve as a volunteer mediator, used to maintain an Early Neutral Evaluation program but has discontinued the practice due to lack of interest. Still, parties are always free to ask a mediator to evaluate the relative merits of their positions as part of the mediation process and may even—in a rare case—ask a mediator to propose or dictate a settlement figure, such as by choosing a final number within a range agreed to by the parties. Surprisingly often, parties may, because of the sensitivity, importance, or intractability of a dispute, use two mediators with complimentary attributes: one judge and one active practitioner, one plaintiff-oriented and one who generally represents defendants, or one with litigation experience and one with substantive expertise.

How Does a Mediator Approach a Mediation?

Mediators in this country are generally schooled in interest- or merits-oriented approaches to mediation. Interest-oriented mediators (my initial training) emphasize the search for a win-win approach to settlement that tries to enlarge the pot by increasing the number of issues that can be settled. A mediator following an interest-oriented approach might ask: "Can the parties go back to doing business together?" or "Can a terminated employee be rehired?"—either of which would add future benefits to both sides.

The greatest challenge to interest-oriented mediation occurs in a zero-sum negotiation where the only question under discussion is how much one side will pay the other. Then, of course, future litigation costs can be put on the table (including such quantifiable items as the time that will be required of employees to support the litigation), as can the intangible costs in the marketplace or within the company of airing facts that may be unappealing or show the company in a poor light. Uncertainty caused by delays in resolving the dispute might also be significant. Merits are not irrelevant in a predominantly interest-oriented approach, but the emphasis here is on the benefits to both sides from putting the dispute behind them compared with the costs and risks each side faces in going forward through litigation or arbitration.

In a primarily merits-oriented approach, the mediator strives to learn as much of the case as the parties will share, pressing counsel to present the facts and arguments underlying the perceived strengths and, particularly, the vulnerabilities and weaknesses of each side. The merits-oriented mediator then uses each side's weaknesses to encourage reasonableness and willingness to settle.

These two approaches merely represent different ways of thinking about the mediation process that are not incompatible. In fact, most mediators probably pay attention to both aspects of every case, varying the emphasis in any particular mediation as appropriate to maximize the likelihood of achieving a settlement. For this reason, written submissions to mediators should emphasize both aspects of a dispute, but I always encourage special attention to the economic aspects of the controversy, the history of negotiation, and barriers to settlement in order to break the pattern of contentiousness over the merits and challenge the parties to begin to think about possible settlement terms.

Mediators, myself included, tend to measure their own success by how many of their cases actually settle. But this approach tends to miss the point. Not every case can or should settle. The goal of mediation is most appropriately stated as providing the parties the best possible opportunity to settle the dispute amicably thus avoiding the risks, costs, delays, and uncertainties that would attend litigation or a similar nonvoluntary process.

The job of the mediator is to hold the mirror up to the parties so that each can consider and weigh potential settlement terms that may be available through mediation against the alternative of pursuing an adjudicative process and living with a result dictated by a judge or arbitrator.

Reaching an Amicable Agreement

“Anyone can settle a case by giving in,” it is often said. The goal of a mediator, therefore, is not merely to have the parties reach agreement after a period of sustained pressure to compromise but rather to guide them to a settlement that reflects the realities of the parties and the dispute. But, what does this mean?

“Most cases settle near the mid-point of the two opening positions.” “No one wants to present the opening number in a negotiation, or make the first departure from entrenched positions, because the side that moves first gets to make the third and fifth moves.” These clichés do not govern the outcome of a mediation but merely serve as barriers to negotiation. By dominating the mind, homilies such as these displace more thoughtful approaches that could increase the likelihood of a mediated solution. Mediators ask the parties rather than obsessing about negotiation tactics, to focus on the best and worst potential outcomes if there is no settlement.

Three points form the core considerations in any mediation process: Parties must look at the best alternative to a negotiated arrangement and assess the possible terms and the likelihood of achieving that result. Mediators also ask the parties to consider the worst alternative to a settlement and the likelihood of suffering that outcome. Parties then weigh the likely potential rewards of a successful lawsuit and the risk and consequences of defeat against the potential outcome that can be achieved through an assisted settlement process. Defining a successful negotiated outcome is, therefore, the first step in preparing for mediation.

Thinking About the Merits Last

I subscribe to the old saw that more can be accomplished in a successful mediation than in the underlying litigation. Examples abound and include

parties agreeing to a joint press release, a non-disparagement agreement, or a contract for future business. Of course, many mediations cannot or will not move out of the zero-sum rut, but practitioners and clients should, in preparing to mediate, try to think as broadly as possible about potential outcomes. This process is, to me, the basic preparation step that practitioners most commonly bypass.

The mediated result I am most proud of from my work as a practitioner came when my client—whom I was confident I had thoroughly prepared—revealed midstride in the mediation session that the plaintiff and defendant shared percentage interests in broadcast stations in adjoining markets. These percentage interests could be traded, like Monopoly game properties, to create value to one side or the other. The interests were far removed from the center of the litigation, but once they were mentioned, it quickly became apparent that one side saw much greater market value than did the other in combining the partial interests, thus making them an ideal medium of exchange in a prototypical win-win settlement: The side combining the interests believed itself to be receiving something of greater value than the other side thought it was giving up.

Mediators cannot necessarily ferret out these nuggets, so lawyers and clients must look for them in advance of the mediation session if the process is to work. Lawyers and clients do this by approaching the mediation first on an interest-oriented basis, asking the questions: what would each side potentially want and what priority would it attach to each potential benefit, keeping in mind the business and economic realities of the situation. For this reason, when I prepare for mediation, I encourage parties and counsel to consider first their own objectives and the likely goals of the other side, giving particular attention to new value that can be put on the table by either side and then turning to the weighing of the relative merits of the two sides.

So, What About the Merits?

In my experience, lawyers on each side of a dispute generally have a similar understanding of the facts and the same reading of the law. Disclosure requirements, discovery proceedings, and the efficiency of computer-

assisted research serve to level the playing field, giving both sides access to the critical tools needed to evaluate their cases. Of course, cases are not handled in the ideal world by lawyers with unlimited time and infinite patience. Some lawyers and their clients believe that however bad the odds, they will find themselves in that small percentage that wins. These folks place themselves among the most challenging parties a mediator will see, since, in my experience, unrealistic expectations sink more mediations than anything else.

I place in the category of excessive optimism: the badly injured plaintiff who treats his claim like a lottery ticket; the lawyer who does not tell the client that the claim or defense on the merits lies at the margin of the law or that the damages expectation is well outside the norm for the jurisdiction; and the individual defendant or high-level employee who, feeling defensive about being implicated in the decision-making that led to the dispute, cannot accept the legal vulnerability of the position. Since it is the responsibility of the neutral to deflate unreasonable positions and bring the parties down to earth, I am confessing my own limitations here.

It is difficult for a mediator to dramatically reshape a party's thinking about a case if counsel has not plowed the ground beforehand. Only slowly does the mind absorb and process new and difficult information. I now expect to hold more than one mediation session in almost every case, if the parties will indulge me. Sometimes, after pondering an unproductive mediation session, I go back to one side or the other with additional suggestions that have dislodged the parties and put the negotiations back on track. In preparing for the mediation, lawyers can assist the mediation process by encouraging clients to be balanced in thinking about the dispute and to see it in the broadest possible context.

A true merits-oriented mediator challenges the thinking of both sides, but does not drive a case into settling in the middle if that is not where it belongs. Typically, the mediator asks all parties to be realistic, but if one side negotiates seriously while the other builds castles in the air, the mediator must lean more heavily on the second. The merits approach, therefore, places the demands of a mini-trial on all concerned. Mediators must study the case to be familiar with its twists and turns; counsel must be

in top form so as not to be embarrassed by questions they cannot answer; and the party representative must be prepared to state the party's case and defend the reasonableness of the party's position in a common sense way or from a business perspective. Only by being thoroughly prepared can a party or counsel approaching a merits-oriented mediation know that it will establish credibility with the mediator.

I do not favor starting mediation with opening statements in a joint session, as has been the traditional approach. Especially in cases with an individual on one side and a company or government agency on the other, such as in employment discrimination cases, I am cautious about reopening wounds. Shuttle diplomacy in which the mediator moves back and forth between separate meetings with each party generally works best, especially in more heated disputes. Sometimes, as issues clarify and particular aspects become critical during the course of mediation, I may bring the parties together to answer each other's questions or address specific issues. This approach provides the best opportunity for the sides to discuss the merits, not at the beginning of the process, but in reality testing each other in a joint meeting if I am not making sufficient progress in separate sessions. If one side gets to hear and to question the other about the merits, party representatives can learn surprising, if unpleasant, truths about the strengths of the other side's case and the weaknesses of their own. Even this approach to the merits carries the risk of re-introducing emotionality, and the mediator, parties, and counsel must be prepared to return to the serious business of weighing potential benefits of settling against the risks and uncertainties of litigation to give shape to an agreement.

Conclusion

A skilled mediator can provide a valuable service to disputants, giving them every opportunity to consider potential sources of value in the settlement, to see their dispute in a different light, and to find their way out of contentiousness. The neutral cannot do this alone and the parties and their counsel must, themselves, bring the necessary tools to the mediation process. Thorough preparation, giving a mediation session the dignity of any other proceeding in a case, maximizes the likelihood of reaching a

settlement that allows each party to achieve a substantial portion of its goals.

Thomas R. Kline is head of the Litigation Section in the Washington, D.C. office of Andrews Kurth LLP and office managing partner. Mr. Kline graduated from Columbia Law School in 1975 where he was a Kent Scholar, a Stone Scholar, and an editor of the Law Review. He has been practicing law in Washington since completing a judicial clerkship with the Honorable Robert L. Carter in the U.S. District Court for the Southern District of New York in 1976. Mr. Kline has spent most of his thirty years in Washington in private practice and also served from 1979-81 as Trial Attorney in the U.S. Department of Justice, Civil Division, Federal Programs Branch.



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