
A Mediator's Perspective: Getting the Best Result for your Client

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Presented by:

Michael John Aloï, Esq.
MANCHIN & ALOI
Attorneys At Law - P.L.L.C.
Manchin Professional Building
1543 Fairmont Ave., Suite 203
Fairmont, WV 26554-2100
(304) 367-1862
maloi@manchin-aloi.com

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“Lawyer as Peacemaker”

“Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is often the real loser . . . as a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough.”

-Abraham Lincoln

“Most Creative Social Experiment of Our Time”

Former Harvard President and Law School Dean, Derek Bok, predicts that society's greatest opportunities in the next generation “will be in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms which allow it to flourish, they will not be at the center of one of the most creative social experiments of our time.”

“Healers of Conflict”

“The entire legal profession – lawyers, judges, law teachers – has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflict. For many claims, trials by adversarial contest must in time go the way of the trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”

-Former Chief Justice Warren Burger

I. MEDIATION DEFINED

Mediation is an informal, non-adversarial process whereby a neutral third person, the mediator, assists parties to a dispute to resolve by agreement some or all of the differences between them. In mediation, decision-making authority remains with the parties; the mediator has no authority to render a judgment on any issue of the dispute. The role of the mediator is to encourage and assist the parties to reach their own mutually-acceptable settlement by facilitating communication, helping to clarify issues and interests, identifying what additional information should be collected or exchanged, fostering joint problem-solving, exploring settlement alternatives and other similar means. The procedures for mediation are extremely flexible, and may be tailored to fit the needs of the parties to a particular dispute.

-Rule 25.02 of the West Virginia Trial Court Rules

II. REASONS TO MEDIATE

- A. Get all parties/decision-makers together at the same time and place to focus on one case.
- B. It gives your client their “day in court.”
- C. It is a more humane process that creates an opportunity for healing, forgiveness, and growth.
- D. Have the benefit of a third-party facilitator/observer.

III. SELECTION OF A MEDIATOR

- A. The mediation process and outcome will depend, in large part, on who the participants are. So, it is important to select a mediator appropriate to the psychodynamics of:
 - 1. The case
 - 2. The parties
 - 3. The issues
 - 4. Counsel involved
- B. Subject matter – Do you want an expert, or an expert mediator?
- C. Philosophy
 - a. Facilitative
 - b. Evaluative
 - c. Transformative
 - d. Directive
 - e. All of the above
- D. Credibility – A mediator’s ability to quickly establish credibility with a wide variety of parties is critical. Experience and early research seem to indicate that the only reliable preliminary indicator of the success of mediation is the parties’ judgment early in the mediation process as to the mediator’s capability.

IV. WHO SHOULD BE PRESENT AT THE MEDIATION – OR WHO NEEDS TO BE PRESENT TO GIVE THE MEDIATION ITS BEST CHANCE FOR SUCCESS

- A. Counsel
- B. Plaintiff (spouse, family members, friend)
- C. Defendant
- D. Adjuster
- E. Expert
- F. Other witnesses

V. PREPARE FOR MEDIATION AND KNOW YOUR CLIENT'S EXPECTATIONS – EDUCATE YOUR CLIENT ABOUT THE PROCESS

- A. Prepare and plan the mediation as if you were preparing for trial. Show confidence, commitment, and professionalism at every stage of the process. Remember, the opposing party is evaluating all aspects of the mediation.
- B. Prepare your client
1. Know their expectations and educate them about the expectations of the process.
 2. Clients who are well informed are more relaxed and make a better impression.
 3. Ensure that the client knows the purpose of mediation, the gamesmanship involved, and the likely goals and strategies of the other party.
 4. Clients need to know that they are an integral part of an effective presentation.
 5. Make counter-offers that consider the client's expectations and the negotiation process, the appropriateness of the last offer discussed, as well as the history of the mediation's give and take.
 6. Since a plaintiff at mediation may not have his or her day in court, the process itself will have to play a large part in the overall healing process. But that healing can only occur if the plaintiff is directly involved and feels a sense of satisfaction in the outcome.



VI. ROLES OF A MEDIATOR

1. The facilitator. The mediator facilitates the mediation process by keeping the discussions moving, by handling conflict so that it becomes an impetus to movement rather than a contribution toward hardened positions, and by phrasing and re-phrasing areas of possible agreement.
2. The opener of communication channels. When the parties are not talking to each other for one reason or another, the mediator intervenes to re-establish communication.
3. The translator and transmitter of information. Sometimes the parties are talking but they are not understanding each other. They might not only be unaware of certain facts, but might also have a different perception of the meaning of these facts. Here the mediator can act as a transmitter as well as a translator of information. Both functions are important.
4. The distinguisher of wants from needs. The mediator knows that the bargaining positions of one person may be expressions of hurt, anger, or a desire to punish, as well as realistic hopes for concessions from the other side. Usually parties cannot

settle a dispute without modifying either the form or content of their original demands. The mediator helps them distinguish their true underlying needs –those things that must take place for the dispute to be settled – from their original desires, and modify their bargaining positions accordingly.

5. The creator of options. The mediator is not always passive. Indeed, as the session progresses the mediator become more involved and at some point may in fact have to propose options to the parties. This is one of the most creative aspects of mediation and should not be overlooked. Remember, it is not the mediator's job to decide on a solution and sell it. You must, however, propose ideas to the parties as a way of assisting them to resolve the dispute.
6. The agent of reality. The mediator is also an agent of reality. This is one of the mediator's most critical roles. As agreement [or its possibility] nears, your job is to increase the awareness by each party of the other party's needs and to build a realistic framework within which the parties can assess the costs and benefits of either continuing or resolving the conflict. In this role, you risk suffering the fate of the king's messenger. This is an unavoidable risk; most times the mediator is the only person in a position to take it.

-Linda Singer, "Settling Disputes", Westview Press 1990

VII. NEGOTIATE A TIME AND PLACE THAT IS ADVANTAGEOUS

- A. Pre-Suit Mediation
- B. Early Mediation
- C. Mature Mediation

VIII. SHARE INFORMATION STRATEGICALLY

- A. Do not disclose any more elements of your position than you have to in order to achieve a satisfactory settlement that is fair to all the parties.
- B. Reserve some information to use later in the mediation. A successful mediation may take hours to resolve. If you allow your opponent to understand your position too early, he or she will make an offer based on that understanding. Withholding some information allows you to reveal your position in stages, and a more satisfactory settlement for all parties is likely to result, based on a better understanding of your client's position.

IX. PREPARE THE MEDIATOR

- A. How much information is necessary. Complaint and Answer, or no information other than the parties to check for conflicts.
- B. Parties' confidential statements for mediation - For example, in a personal injury case, include the client's name, date of the collision, current age and age at the time of the collision, and employment information and earnings on the date of injury. Also provide the facts of the case, counsel's theory of liability and the other side's defense, as well as why those defenses fail or don't materially affect a favorable outcome for your client. In addition, give a detailed description of the client's current damages, including all injuries, the impact on the client's life, the assessments of all treating physicians and other experts, related medical bills, and out-of-pocket and earning losses.
- C. A good mediator should be impartial, which implies a commitment to aid all parties, not any individual party, in moving toward agreement.

Nothing in this obligation, however, precludes the mediator from making a professional determination that the case should be resolved on one party's terms. In fact, any agreement based on the mediator's impartial view of the merits of each side's case will be entirely appropriate from the perspective of the mediator's statutory or ethical obligations, as long as the mediator remains impartial.

If you are comfortable with and respect the mediator, let him or her by your sounding board. When meeting privately with the mediator, be candid when discussing any offers the other side may have. If uncertain, ask the mediator for strategic input as to what the next move in the process should be.

- D. Confidentiality - Mediation statutes generally provide that, with certain very limited exceptions, nothing is said to a mediator during private caucus may be disclosed to the other party or anyone else without the disclosing party's consent, and the confidentiality of all mediation proceedings, including any disclosure of records or materials, must be maintained. This confidentiality requirement encourages open and honest negotiation by the parties.

X. USE THE MEDIATOR AS A MESSENGER

- A. Certain information cannot be conveyed to the other side without evoking adverse – or even hostile – reactions. For example, a non-negotiable aspect of your position can rarely be brought directly to the other party without causing that party to raise an equally non-negotiable position. This can be unfortunate, because these delicate facts may be the key to a successful negotiation. By express this information to the mediator in private and encouraging the mediator to communicate it to the other side, potentially explosive reactions may then be defused.

- B. Although being candid with a good mediator is important, let the mediator discover all the case facts over time. A mediator who understands the plaintiff's bottom line too soon will spend less time exploring available options and may miss an opportunity to effect a more equitable settlement.

A mediator who arrives at a gradual understanding of the plaintiff's position will be more likely to engage in new methods of problem solving to settle an old and frustrating problem. Remember, mediation is a journey for all the participants, and short-cuts may shortchange the process, possibly to the client's detriment.

For example, there is often a change – however slight – that you could be underestimating the value of your case. In fact, the opponent may be willing to pay more than your client's bottom line. By allowing the mediation process to run its course, both sides may facilitate a creative solution in which the parties reach an unexpected – but mutually agreeable – settlement.

XI. ADVOCACY IN MEDIATION

- A. The big difference between trial and mediation is that the attorney must put aside techniques specifically tuned to persuading a jury. Instead, the target audience during mediation is the decision maker – the opponent, the claims adjuster, or the opponent's attorney.

The key decision maker may vary depending on the type of case:

1. In an automobile case, the claims adjuster usually makes all decisions concerning resolution of the claim. The defense attorney is hired solely to provide evaluations and try the lawsuit.
2. In a medical negligence case, the physician probably has a consent clause in the insuring agreement that allows the physician to refuse consent on offers of settlement.
3. In a business case without insurance, the party is usually the sole decision maker but may have an in-house risk management officer make the final decision.

- B. “Think of the power and control in the hands of the litigating lawyer! You and your clients, not the neutral, determine the ultimate outcome, whether resolution or impasse. If litigating lawyers believe that they best serve their clients by using their talents to help control the outcomes of disputes, then mediation provides you an unparalleled opportunity to furnish your clients with the benefits that your education and training uniquely suit you to provide.” – Jeffrey G. Kichaven

XII. CONCLUSION

A. The promise of mediation

If . . . reform benefits only judges, then it isn't worth pursuing. If it holds out progress only for the legal profession then it isn't worth pursuing. It is worth pursuing only if it helps to redeem the promise of America.

-A. Leon Higginbotham, Jr., *The Priority of Human Rights in Courthouse*, 70 F.R.D. 134, 138 (1976)

B. Our individual challenge

In this crisis of change is to retain our humanity, share the warmth of that humanity, and in general humanize the way we work with clients, the public and each other . . . We need to see ourselves in the roles of peacemakers, bringing justice where it is lacking, tranquility where there is turmoil, freedom where it was deprived, and rewards when they are due.

-Ray Ferrero, Jr., Past President of the Florida Bar
July/August 1987 issue of the Florida Bar Journal

C. Transformational potential of mediation

Mediation's potential effects are that it can strengthen people's capacity to analyze situations and make effective decisions for themselves, and it can strengthen people's capacity to see and consider the perspectives of others. In short, mediation is a process that enables people in conflict to develop a greater degree of both self-determination and responsiveness to others. While they explore solutions to specific issues.

-Mediation Quarterly Volume 13, Number 4, Summer 1996 "Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice", Joseph Folger, Robert A. Baruch Bush The Promise of Mediation, Responding to Conflict through Empowerment and Recognition, Bush and Folger, 1994. Jossey-Bass Publishers