



The Secrets to a Successful Mediation

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OVERVIEW

1. When to Mediate
2. Choice of Mediator
3. Pre-session Communication with Mediator
4. Written Mediation Statement
5. Mediation Session
6. Dealing with Impasse and Closing the Deal

When to Mediate: Timing is everything

- The optimal time to conduct a mediation depends on the facts, law, and people involved in a case.
- Key factors to consider:
 1. Costs
 2. Knowledge
 3. Discovery
 4. Messaging
 5. Clients
 6. The Opposition
 7. Case Specific Issues
 8. Need/interest to resolve before public filing of a complaint



Timing is everything (Continued)

1. Costs

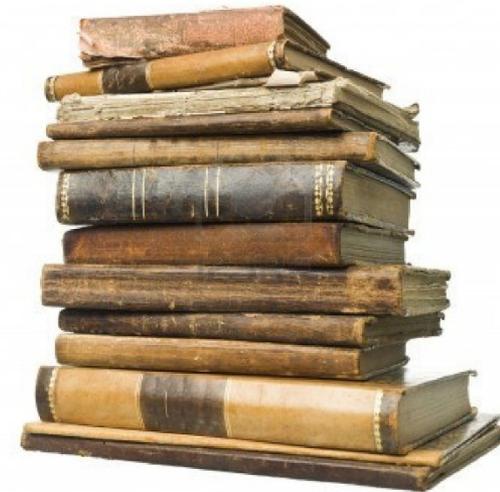
- What are the anticipated litigation costs?
- Will the Litigation be harder to settle after substantial costs are incurred?
- Is there a fee-shifting statute involved?



Timing is everything (Continued)

2. Knowledge

- How well do you understand the risk/value of the case?
- Are you aware of a “smoking gun” in terms of documents or a witness?
- If pre-litigation or pre-discovery, how much is each side willing to share in informal discovery?



Timing is everything (Continued)

3. Status of Discovery (Knowledge Part II)

- How much discovery has taken place?
- What's the discovery schedule?
- If expert discovery will likely determine the case, can counsel agree to informal exchange of expert reports?



Timing is everything (Continued)



4. Messaging

- What signal will an early mediation request send?
- Is there a benefit to suggesting early mediation in every case, to avoid being seen as suggesting it only in certain cases?
- Is it a sign of weakness?
- How do you mitigate potentially negative messages?



Timing is everything (Continued)

5. Key Legal Issues

- Is there a threshold or important legal issue that will substantially impact the value of the case (e.g., possible statute of limitations)?
- Should mediation await an early dispositive motion?
- How do parties evaluate the legal issue?
- Can parties/court agree to await an early motion before litigating case?
- Will an adverse decision make the case significantly more difficult to settle?

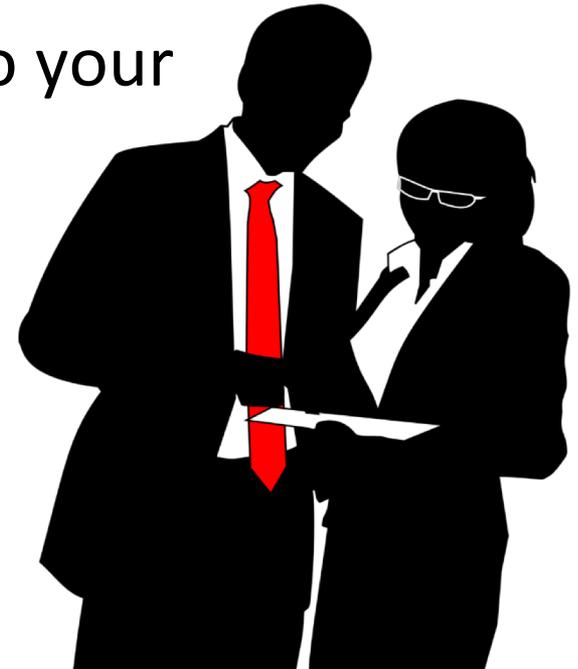


Timing is everything (Continued)



6. Your Client

- Do you need the help of a mediator in dealing with the client - as both a spokesperson for reality and to avoid counsel appearing less zealous to your own client?
- Will mediation help focus client attention on resolving case?



Timing is everything (Continued)

7. Opposing Party -- Counsel & Client

- Do you need help getting opposing party to focus on settlement?
- Is opposing counsel/client appropriately valuing case?
- Are there useful facts/issues that could help resolve the matter if discussed with other party?



Timing is everything (Continued)

- CONCLUSION

- While timing of mediation is an important question, the answer is very fact specific to each case
- Sometimes mediation (early or otherwise) makes sense, sometimes it does not
- Inside and outside counsel should continually assess whether mediation may be productive and lead to a positive result

Choosing your mediator – Who will be best for your case?

- A successful mediation will often depend on finding the right mediator for the job
- Key factors to consider
 1. Judge or lawyer?
 2. Subject matter expertise
 3. Experience with parties/counsel
 4. Style
 5. Price

Choosing your mediator (Continued)



1. Former judge or not?

- Does your client -- or do you -- think the other client needs their “day in court” before someone who wore a robe?
- Does your client -- or do you -- think the other client needs to have the case evaluated by someone who can say “if I were ruling...”
- Is counsel concerned that a judge will be too evaluative? Some lawyers believe -- opinions differ here -- that all former judges are inherently evaluative and opinionated.
- Does counsel believe that their client or the other client needs someone to read the “riot act”?

Choosing your mediator (Continued)

2. Subject matter expert?

- Is there a danger that a SME will use their knowledge and experience to urge for a particular outcome?
- Is counsel prepared to deal with a situation where a SME mediator concludes that the other side's position is stronger?
- If a case goes to court, the judge and/or jury will be educated by the SMEs. Wouldn't it be possible for a non-SME mediator similarly to be educated?

Choosing your mediator (Continued)

3. Should you select someone who knows counsel/parties?

- What is counsel's experience with the mediator?
- What is opposing counsel's experience?
- How important is trust for the mediation?
- How well does the mediator fit the particular matter to be mediated?

Choosing your mediator (Continued)

4. What style is best?

- Given the nature of the case and the disposition of the clients/decision-makers, is there a clear reason to focus on a single style mediator?
- How aggressive should the mediator be?
- Is it better to have a mediator who can shift styles when and as required?



Choosing your mediator (Continued)

5. Does Price Matter?

- Does the cost of the mediator make a difference?
- What is your case worth?
- How likely is a resolution with a good mediator?
- How much will you spend if you don't settle?
- Benefits of free court mediation programs – D.D.C., Superior Court Multi-Door



Communicating effectively with the mediator before the session

- Communicating with the mediator early in the process can help the mediator help you. If mediator does not suggest pre-mediation call with each counsel alone (and without clients), you should suggest it – this is the time to be able to communicate candidly with mediator about case and issues with clients (both sides), and perhaps also counsel
- Key factors to consider/talk to the mediator about:
 1. Format of the mediation
 2. Written submissions
 3. The Mediator’s style and approach
 4. “Hot Button” issues



Communicating effectively with the mediator before the session (Continued)

1. Ask about the format of the mediation
 - Opening statements?
 - Joint session or not?
 - Experience of mediator and counsel with joint session?
 - If joint session, how will it be conducted?
 - If joint session, any time limits?
 - Time/Availability?

Communicating effectively with the mediator before the session (Continued)

2. Discuss what written submissions would be helpful
 - How familiar is mediator with the subject matter?
 - What information would be useful for your presentation?
 - What do you want to see from the other side?

Communicating effectively with the mediator before the session (Continued)

3. Ask about the mediator's approach/style
 - How will mediator approach the mediation?
 - How hard are they willing to push?
 - What are your expectations for how the mediator will handle issues that are expected to arise?

Communicating effectively with the mediator before the session (Continued)

4. Talk about any “hot button” issues

- How close are the parties to settling?
- What are the key impediments to getting a deal done?
- Are there party dynamics that the mediator should be aware of?

5. Advantage/disadvantage of exchanging demands and offers pre-mediation

Using written submissions effectively

- The value of effective written submissions are often overlooked. An effective written submission can arm the mediator with the tools to facilitate a successful mediation
- Key factors to consider
 1. What key information does the mediator need to know to understand the case?
 2. What should you provide to the other side?
 3. How much should you save for the in-person session?
 4. Should you make concessions?
 5. Your level of candor and confidence in mediator is very important.

Using written submissions effectively (Continued)

1. Arm the mediator with information needed to help the mediation succeed. Consider including:

- Factual background
- Legal position of each party – including legal authorities
- Strengths and weaknesses of each party's case
- Settlement positions, including prior discussions and suggestions about creative remedies.
- Impediments/obstacles to resolution
- Possible additional future litigation costs



Using written submissions effectively (Continued)

2. What should you provide to the other side?

- Consider whether to exchange redacted/modified versions of a pre-mediation statement with opposing counsel
- Often a good way to educate other side (lawyers and clients) as to what is coming, especially pre-litigation or pre-discovery
- If certain facts/legal issues will undoubtedly be advanced if the case goes forward, little downside to revealing them early
- BUT, this does not apply to impeachment material or information that will compromise future tactical or strategic decisions – consider (a) whether information ultimately will come out and (b) anticipated impact of knowing such information on the ability to achieve a resolution.

Using written submissions effectively (Continued)

3. How much should you save for the in-person mediation?
 - Give opposing party time to consider issues raised in the written submission before the mediation
 - Springing some important facts or legal theories on the other side on the day of mediation may be counter productive
 - Remember that sensitive information may be shared with mediator in the pre-mediation call

Using written submissions effectively (Continued)

4. Should you make concessions?

- Consider credibility with the mediator and opposing party
- But, remember that a mediation is a negotiation

The mediation session

- Now that you've submitted your pre-mediation statement, its time to prepare for the actual session
- Key factors to consider
 1. Who should attend?
 2. Should there be a joint opening session and, if so, what should it include?
 3. How should you use the sessions effectively?

The mediation session (Continued)

1. Who should attend the mediation, and how to leverage?

- Insurance representative – may be required; usually preferable
- Using attendees to send a message – senior vs less senior representative
- Relationship with parties
- Authority/Expertise
- Who has a poker face?

The mediation session (Continued)

2. Should there be a joint opening session?

- If so, tone for opening statements?
- Use of visuals – excerpt from deposition, charts, etc.
- Length of opening?

The mediation session (Continued)

3. How to use the private sessions effectively

- Educating the client
- Opening bids
- Fall-back positions
- Flexibility

Effective strategies to avoid or get past impasse

- How effectively to close the deal?
- Non-monetary issues
- Mediator proposal
- Term sheet or draft settlement agreement?