# Anatomy of a Mediation:
# What to Expect, How to Prepare & How to Win

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Mediation is a tool designed to be used at strategic times and for specific purposes. It is a process designed to facilitate a negotiated solution to a dispute. Mediation allows the parties to retain control of the outcome rather than relinquishing the power of decision to a judge, jury, or panel of arbitrators. The following is a summary of a Caucus-based model of mediation.

## PRE-MEDIATION

Selecting a mediator with the right process skills is an important step. There are as many different "styles" of mediation as there are mediators. Some mediators are more facilitative, viewing their role as a facilitator of negotiations. Others more directive, preferring to direct the negotiations with a view toward evaluating the value of the claim for the parties.

Find out about your mediator. What kind of experience does he/she have? What kind of training have they received? How will the mediation be conducted? Will the mediator use joint meetings, private caucuses, or a combination of both? Think about what you want in a mediator. How much does the mediator know about securities matters? More importantly, is the neutral skilled in applying mediation techniques? Learn as much as you can about the environment and the mediator in advance of the mediation.

Have a private conversation with your mediator. Start to inform her about the case. Begin to work on your communication skills. Are you worried about having private conversations with the mediator? Unlike judicial or arbitration procedures where ex parte contact is prohibited, the essence of mediation (what helps a mediator work his magic) is the ability to speak with one party outside the presence of the other. The mediator, as a shuttle diplomat, can help the parties barter both information and settlement offers. A conversation with the mediator before the formal session can be very valuable in setting the stage for a successful negotiating session. Always be sure to confirm confidentiality of your communications from the beginning of the first conversation.

## PREPARATION IS KEY

Spend time analyzing the case from different perspectives using the following suggested outline. A seasoned mediator will be exploring these areas during the mediation.

- Prepare a ten minute summary of your case:

  Facts—Undisputed and disputed

  Law—Undisputed and disputed

  Key witnesses and other proof

  Damages

- Summarize your opponent's case as noted above. A good advocate can argue both sides!
- Describe the strengths and weaknesses of your case. Do not pull any punches.
- Describe the strengths and weaknesses of your opponent's case.

- Identify your client's interests (expressed or, as unexpressed): *i.e.,* what does the client need; what are motivating factors that underlie the dispute; why settle the case at all?
- Identify the interests, expressed and unexpressed, of the other party.
- Review the alternatives to reaching an agreement (i.e., assuming there is no settlement and the matter must go to trial or arbitration). Ask yourself:
  - What is the likely outcome (assess some numerical probability)?
  - What are the expected fees and costs (and the value of lost opportunity time)?
  - How long must they wait until final disposition?
  - Do some "reality testing" with your client.
- Are there any unresolved procedural matters that would be dispositive of the case? If so, how does this impact your desire or willingness to settle?
- What is the relationship between the parties? Has there been any past or current business dealing? Is there any desire for a future relationship? Can anything be done to improve or preserve the relationship?
- What is the relationship between the advocates? Can anything be done to improve that relationship? How effective is the line of communication between the parties and between the counsel?
- What is the history of settlement negotiations? What obstacles to settlement have you observed?
  Does your client have authority to settle the dispute? Does the opposing party representative have similar authority? Are there other factors affecting the negotiations, such as a spouse or supervisor "leaning" on the party, the precedential value of the case, the publicity factor, etc.?
- What are some creative options for settlement? Don't be concerned with whether the other party would find them acceptable. Do some brainstorming. A resolution is not confined to the sort of "relief" available in court or arbitration. Be creative and expansive.
- What external standards could be applied to the options to frame them as fair and legitimate in the eyes of all concerned parties? If the settlement is objectively "fair," it is more likely to be acceptable.
- What proposals for settlement do you think your client would be willing to make? What proposals do you think the other side would be willing to make? How do you think the other will react to your negotiating strategy?

At this point, you have organized your thoughts and can now focus on your presentation and strategy.

- Prepare a confidential mediation booklet, (5 to 15 pages) similar to a settlement brochure. Make copies for you, your client, and the mediator, tabbed with sections to show:
  - ✓ summary of the case
  - ✓ liability analysis
  - ✓ summary of damages
  - ✓ operative live pleading, dispositive
  - ✓ pending motions & most pertinent case law, if applicable (highlighted for ease of reference)
  - ✓ representative sample of key documents (highlighted) or photographs excerpts of pivotal testimony, etc.

- You may want to send a separate settlement brochure (without confidential information) to the other party in advance of the mediation. If you do so, do not draw "lines in the sand" by making intractable and unyielding demands.
- Send materials for mediator to review at least ten (10) days before session.
- Be sure that your party or party representative will be present for the entire mediation (reserve the full day) and that the part has FULL authority to settle the case (not just a "bottom line"). Make certain that others who may influence the decision are available, even if by telephone, on the day of the mediation.

**HOW WILL YOU NEGOTIATE?**

Plan a negotiating strategy with your client. Think about appropriate parameters for settlement and the kind of information you need to influence your decisions. A mediation session may uncover new information and reveal different perspectives. Therefore, come with an open mind and a willingness to be flexible. At the same time, it is good practice to think about a negotiating strategy for your moves.

The mediator is condensing weeks or months of negotiation into a single day (mediation is sometimes called "Turbocharged Negotiation"). Do not set your negotiating plan in concrete. Avoid setting absolute "bottom lines" with your client or "saving face" later can be a real obstacle to settlement. Remain flexible with the process. Never let the mediator control your side of the negotiation. You and your client are in charge. However, it is always helpful to consider an integrative or collaborative approach to the negotiation.

A great deal of the mediation training curriculum is negotiation theory and practice. Utilizing the paradigm of mediator as a "guest" at a negotiation, mediators must know about the process of negotiation to aid the parties.

We use an acronym, CAIROS, to demonstrate essential principles of interest-based negotiation.

"C" stands for "Communication." Good negotiators ask themselves "what do we want to learn from the other side" and "what messages do we want to send to the other side." Negotiators appreciate the importance of asking questions – both to obtain essential information as well as to persuade the other side to "come about" in their thinking.

"A" stands for "Alternatives." Good negotiators always focus on the alternative to reaching an agreement, or the consequences of a failed negotiation. What are the risks of the trial or arbitration? What might happen? Consider the whole array of possibilities and not just the "best case" scenario. What are the real and imagined costs?

"I" stands for "Interests." Good negotiators look at the interests and needs of all participants in a negotiation. Collaborative negotiators avoid the tendency to focus on positions, which are invariably at opposite ends of the spectrum. Most people erroneously assume that there are only opposing interests at stake. In fact, there is often a great deal of commonality between the interests of the parties, starting with a common interest to negotiate a settlement and avoid the alternative. Negotiators build on common ground. Interest analysis leads to creative problem solving.

Everyone acts to some degree out of a sense of self-interest. How are the needs of the participants going to be satisfied? To the extent that an agreement addresses such interests, it is more likely to be acceptable and honored in the long run.

"R" stands for "Relationship." Good working relationships are the key to productive interactions in negotiations, business, family and personal life. Negotiators ask themselves what can be done to improve the relationship? How can we create a positive working environment?

"O" stands for "Options." Options generation is a creative process. True brainstorming involves a suspension of judgment. It requires abandonment of positional thinking, the "either or" dilemma. We assume the pie is expandable, that we can create value.

"S" stands for "Standards." Good negotiators look for objective external standards as a formula or rationale for their proposals. On what basis shall we decide? A search for standards is attempting to apply objectivity and fairness to a proposal, making it more palatable to the other side.

Of course not all elements of interest-based negotiation are present in every engagement. Experience has shown that a successful integrative solution is more likely to be achieved when these six factors are present.

**AT THE MEDIATION SESSION: JOINT SESSION**

The mediator's opening statement is designed to set a specific tone and is likely to include the following:

- Introductions by the persons present
- A summary of the mediator's background and experience
- A discussion of the mediator's role as distinguished from a judge, arbitrator, neutral case evaluator, or fact-finder
- A presentation on the voluntary and confidential nature of the process
- An outline of how the day is likely to proceed and a summary of the ground rules
- A solicitation of the participants to negotiate in good faith and the signing of the Mediation Agreement
- Opportunity for opening statements

**GIVING YOUR OPENING STATEMENT**

The target of persuasion is not the mediator. The one who must find your arguments convincing is the party who must compromise their claim (or defense). It makes sense to address your remarks, with due respect, to the other party. Politely demonstrate that you mean business, that you will take this "all the way" if you must, but let them know that you are here in good faith to negotiate a fair settlement. This is not the place or grandstanding but it is an opportunity to communicate. Keep your objective in mind – to negotiate in a manner that will ultimately lead to both parties agreeing upon a resolution. Be direct, concise, and clear.

When the opposing party or counsel has completed their presentation, ask open-ended questions to clarify any matters. Communicate to the other side that you understand their interests. There is a difference between understanding and agreeing. If you can articulate their perspective (and do so in their presence), you are closer to achieving a meaningful settlement.

- Cover only key points do not be distracted by subsidiary issues that, in all likelihood, will never be resolved. The whole is greater than the sum of its parts.
- Be courteous, and persuasive
- Practice active listening skills (an excellent beginning is to restate what the other said to show you fully understand–although not necessarily agree—with the other's point of view).
- Consider allowing your party to speak on his/her own behalf
  Showcase the ability of the party to tell their story.
- It is a cathartic experience to relate your story to the other side – without filters or interruptions.
- Involve the party in the mediation process and thereby create "ownership" of the dispute and ultimate resolution.

Opening presentations are rarely waived. In some cases, where the emotional well being of the client demands or where an incendiary comment may torpedo the resolution process, the mediation may begin in private sessions (called caucuses).

**FIRST CAUCUS PRIVATE SESSION**

This is primarily an "information gathering" session by the mediator and the parties will have the opportunity to "vent," if needed, in this private setting.

- Confirm that the mediator will maintain confidences.
- Be candid and honest with the mediator.
- Be prepared for a thorough analysis of case—from your perspective as well as the perspective of the other party.
- Be ready to analyze the alternative, the consequences of failing to reach agreement. Estimate cost and expenses, likelihood of recovery, range of probable outcomes, and other aspects associated with continued conflict.
- Brainstorm settlement options.
- Begin the negotiation process. It is helpful to start the negotiations with a meaningful proposal. (Note: Some mediators do not request demands/offers until the second caucus.)
- Opening demands/offers are just that—an opening, a beginning. A good proposal is supported by objective criteria or legitimate standards. It can be explained with reference to a rational basis or formula (not just a feeling). With every offer, it is helpful to consider what response you believe the proposal will elicit in the other party, and whether it will further the negotiation.
- OPTIONS "Only Proposals That Include Others' Needs Succeed." Can you articulate a benefit to the other side?

## SECOND (& LATER) CAUCUSES

The mediator will use these sessions to create momentum toward settlement by refocusing the parties on: previous areas of agreement, their underlying interests, the underlying interests of the other party, option analysis, risk analysis and transmittal of reasonable proposals.

Be willing to listen to different points of view.

- Consider the information transmitted from the other side.
- If appropriate, allow new information to influence your risk analysis/settlement parameters.
- Use the mediator as a sounding board for "reality testing" and to "float" settlement proposals.
- Be willing to explore creative solutions to the problem.

The mediator may give you assignments to work on between caucuses. You may be asked to explore the risk analysis in further detail and generate additional options for settlement that have not yet been proposed to the other side. As the caucus sessions continue, the mediator will build the momentum and assist in clarifying the common ground. Sometimes, the mediator will recommend a joint session to hammer out details.

## CLOSURE (POST AGREEMENT)

The mediator may recall the parties to the joint session format if they have been in caucus to summarize essential terms of the agreement. Each participant will be asked if the mediator's summary was accurate and whether they agree that the matter has been settled.

Ask yourself:

- Have all bases been covered—are there any loose ends? Do you have a binding and enforceable settlement?
- Who will prepare the final documents—when & how transmitted?
- What will happen if something breaks down in the postmediation phase?
- How and under what circumstances should the mediator be brought into the discussions?

In order to avoid unanticipated problem occasionally created by "settlement remorse," it I good mediator practice to have the attorneys/representatives and the parties sign a memorandum of essential terms if more detailed memorization is deferred because of the constraints of time or technology. While not always practical, it would be great if the final settlement documents can be executed at the conclusion of the mediation. Sometimes a memorandum of understanding is used to establish the framework for the final papers. Let the mediator stay involved until completion.

Mediation is here to stay. More and more negotiators and advocates recognize the special role that a mediator can play to bridge differences and bring about solutions. As confidante to both sides, the mediator stands in a unique position to assess the likelihood of settlement, and as facilitator of negotiations, the mediator can do more than the parties may be comfortable doing on their own. Mediation works! Effective advocates make the process their own.

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Hesha Abrams, Esq. a nationally acclaimed attorney mediator for over 30 years, is known for crafting highly creative settlements in very difficult cases. She has created settlements worth over $700 million in the past year alone. She specializes in creating innovative solutions for complex or difficult matters in Commercial, Intellectual Property and "Deal Mediation", which is driving a complex business deal to successful signing. She has the unique ability to work with big egos and strong personalities. Hesha has successfully mediated for thousands of parties and was an innovator in the mediation field serving on the legislative task force that drafted the landmark Texas ADR law. She mediates, consults, and negotiates on behalf of private parties throughout the country and internationally. She has worked in London, Hong Kong, Mexico, Thailand and India and with parties from all over the globe in complex patent licensing deals. She taught mediation and negotiation at the 2001 International Symposium on Negotiation and Conflict Resolution in The Hague. She was on the national panel for Dow Corning Implant cases and was the Chair of the Texas Bar Intellectual Property ADR Committee. She has been appointed Delegate to the Fifth Circuit Judicial Conference, 1988, 1990, 2002, speaker 2005, elected as a fellow of the Texas Bar Foundation in 2006 and received the Brutsché Award for Excellence in Mediation from the Association of Attorney Mediators.

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