Mediation: Not If, But When and How[†]

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I.
Introduction

Statistically, 95% of all cases settle before trial.[1] Civil litigation has become an increasingly expensive and exhaustive prospect for all defendants with the rising demands of pre-trial discovery, onerous electronic discovery, and e-document production.[2] Strike suits by individual plaintiffs and class actions by a small number of class representatives can impose enormous defense costs on a company and its insurers, while plaintiffs often have little risk or personal expense themselves and very little to produce on discovery. Waiting until just before trial to settle such cases exposes defendants and their insurance carriers to enormous defense costs, much of which will be incurred after the strengths and weaknesses of all parties' respective positions can be reliably evaluated.

[†] Submitted by the authors on behalf of the Employment Practices and Workplace Liability section.

[1] ABA Coalition for Justice, *How-to Series to Help the Community, the Bench and the Bar Implement Change in the Justice System: Roadmap to Alternative Dispute Resolution, Alternatives to Litigation* (Mar. 2008), http://www.abanet.org/justice/pdf/ADR_Covered%20_Final.pdf.

[2] *See, e.g.,* F.R.C.P. 26(a)1(B).

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While no defendant wants to settle a case too early and pay more than a case is worth, sophisticated corporate officers, in-house counsel, and insurance claims representatives must nonetheless answer to their respective shareholders for ever-increasing defense budgets. The mandate from the board room is clear: reduce defense costs without increasing corporate exposure to liability.

Over the last decade, a variety of alternative dispute resolution ("ADR") procedures have come into vogue as methods to reduce litigation costs while maintaining reasonable limits on exposure to liability. Non-binding mediation, the most popular ADR technique, has been warmly embraced not only by corporate boards and in-house counsel, but also by their insurers, outside counsel, and even the courts. Indeed, most state and federal courts now routinely order cases to non-binding mediation and frequently have rosters of trained neutral mediators who will mediate a case at no cost or at a reduced rate.[3] Mediation is also mandated by most circuit courts of appeal, where appropriate.

As the demand for mediation has grown, so too have the ranks of qualified mediators. Most ADR providers devote much of their time and energy to mediation, as evidenced by the robust membership growth of the American Arbitration Association, JAMS, and The Center for Dispute Resolution. In addition to the national ADR providers, experienced litigators and retired judges form a veritable army of qualified mediators. Mediation has, indeed, become a cottage industry.

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[3] *See, e.g.,* N.J. L.Civ.R. 301 (2009).

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Given the demand to lower defense costs by resolving disputes early, the pressure from courts to relieve crowded dockets by sending cases to mediation, and the likelihood that a case will settle before trial, mediation of significant civil disputes has become virtually inevitable. Whether mediation will be successful depends not only on the choice of a skilled mediator but also on the sound judgment of respective counsel in planning for mediation, including when to attempt it and what protocols or ground rules to agree upon in advance. Advocates must bring to bear their wisdom and skill long before they walk into a conference room and shake hands with a mediator.

II.
Identifying When Mediation Will Be Most Fruitful

Just as a farmer must gauge the optimal time to harvest fruit from an orchard, an advocate must determine when each case is ripe for mediation. Fruit picked too early or too late will be inedible and worthless. Likewise, premature mediation often leads to unnecessary posturing and failure because the parties cannot properly evaluate the strengths and weaknesses of the various claims, counterclaims and defenses. Conversely, mediation attempted too late, after "scorched earth" discovery, may result in a settled case that avoids risks of trial but also fails to keep a lid on enormous defense costs incurred during discovery.

When is the right time to discuss mediation, and when should advocates mediate? Answering these questions necessarily relies on counsel's judgment and experience, but the following general guidelines are useful considerations.

A. *Use Mediation to Preserve Ongoing Business Relationships*

If the parties have been doing business together and will likely continue their relationship, early mediation is advantageous because it prevents parties from hardening their positions and generating ill will that could damage their business relationship. Creative business solutions are likely to be palatable to both parties and will enable them to look together toward future transactions that could result in a "win-win" for everyone.

B. *Initiate Mediation When the Facts Are Sufficiently Known*

In some cases, the parties know many of the facts before the complaint is filed. Although they may have to fill in gaps, much information is already available from past dealings or from the public record. If the parties can fairly assess the merits of their dispute and potential resolutions without much discovery, early mediation is encouraged. Alternatively, if information gaps must be filled before mediation begins, counsel can either agree to a limited exchange of information for mediation or agree to stay all but very limited and targeted discovery to produce documents or testimony needed for effective mediation.

An experienced mediator will determine early in the mediation process whether the various parties have sufficient information to allow their respective decision-makers to make an informed settlement decision. If he or she senses such information is absent, the mediator can supervise the exchange of information as part of the mediation process or temporarily suspend mediation until certain documents are produced, interrogatories are answered, or key deponents are deposed.

C. *Ensure Everyone Is at the Table*

Judges frequently attempt to send cases to mediation before all third- and fourth-party defendants have been joined. This practice is inadvisable. Everyone who will likely share in shouldering liability or who must help resolve the case must have a seat at the mediation table. Even foreign manufacturers or distributors over whom there is no jurisdiction should be invited to participate in the mediation (even if only informally, to help reach a global solution and – from their perspective – to minimize liability from a future indemnification or contribution suit). Even if it takes somewhat longer to initiate mediation and have all parties participate, nothing can sabotage an otherwise potentially successful mediation more than the empty chair of a potentially responsible party.

D. *Never Give Up on Mediation Until the Case Is Resolved*

If your client has a business interest in settlement, never give up on mediation and walk away from further communications with the mediator. Some cases cannot settle in a few days and instead require repeated sessions to attack different aspects of the issue. Some require a hiatus for cooling off or more discovery to let events outside of the litigation play out. In such cases, do not discharge the mediator; rather, encourage him or her to stay in touch, follow up, and urge future sessions. Sooner or later the mediation will work. Why? Because almost all cases settle, and mediation is the safest and soundest way to negotiate

that settlement without giving away your negotiating position. Never give up this advantage by closing the door on the mediator.

E. *Trade In a "Lemon" Mediator*

Not everyone who holds him or herself out as a mediator is qualified or adept at mediating, and not every mediator is right for every case. Be willing to change mediators, if necessary, to advance the mediation process; not only will it take less time than waiting for trial, but getting the right mediator for the job will best ensure an acceptable outcome.

III.
Choosing the Right Mediator

Being a successful mediator requires special skills. Being a skilled advocate, or a trial or appellate judge, doesn't necessarily equate with being an effective mediator. Mediators do not decide cases, and sometimes they do not even evaluate the strengths and weaknesses of a party's position. They are neutral. They are listeners, facilitators, and observers. A good mediator must be eminently flexible so that he or she can adjust his or her style to resolve the dispute at hand, reflecting the different issues, factual complexities, and personalities involved in each case.

The best mediators engage the parties, as well as counsel, in animated discussion during private sessions. They read between the lines, watch body language closely, and search for hidden agendas. They look for ways to bring the parties together, one issue at a time, gauging how flexible each party may be on different aspects of the issue. Keen insight and extensive experience help them judge which way a party will move and how far a party is willing to go. A good mediator knows when to push harder and when to back off, and when a demand or a response by a party is reasonable or grossly out of line.

While a mediator may not need specialized knowledge or subject matter expertise for a particular case, it is frequently desirable. Some mediators offer years of experience in a particular industry, adding to the respect they and their observations are accorded by the parties. Certain mediators have a reputation for being successful in mediating pharmaceutical patent disputes, for example, or for mediating claims in the construction industry. If a case involves facts that are highly industry-specific, using a mediator with extensive experience in that industry can facilitate the mediation process.

How do you select an appropriate mediator for your case? Ask a lot of people (both counsel and industry principals) about the reputations of, and their experience with, various mediators. Clearly, fair, smart, and knowledgeable mediators are desirable. But most importantly, mediators should possess the unique mediation skills described above, which cannot be ascertained from a cold resume or presumed based on the mediator's successful judicial career. Ask any prospective mediator for a list of cases that he or she has resolved, as well as a list of cases that he or she was unable to resolve, with the caption and counsel list for each. Call those people and ask them for their unvarnished comments about the

mediator's skills. In addition, ask friends, partners, and colleagues for their experience as well. Finally, do not make the common mistake of objecting to a good mediator just because the opposing party has proposed him.

IV.
Shaping the Mediation

Successful mediation is a collaborative process. All parties must believe that settlement is preferable to the risks, uncertainties, and costs of trial, which is the first step toward achieving a settlement. The next step is for the counsel to work collaboratively with each other, and often with the mediator as well, to structure a protocol for the mediation. If the parties really want the case to settle, they must communicate openly about subjects addressed by the protocol to give mediation the best chance of success.

In a simple case, the mediation protocol can also be simple and may address such topics as which issues will be discussed, whether each party will present its version of the facts to the other parties in a joint session, whether demonstrative aids will be used, and whether experts will participate.

Complex cases may call for a more sophisticated protocol that identifies which of many parties are necessary to resolve discrete sub-issues and whether mediation should be segmented, involving only those parties necessary to resolve a specific issue at any given time. When difficult coverage issues are involved, the mediation protocol should address whether the coverage issues should be simultaneously mediated or resolved separately from the underlying liability issues.

Mediation protocols should also identify how mediation expenses will be borne among the participants and where the mediation sessions will take place, especially in national cases involving parties and counsel from many jurisdictions.

In unique cases, mediation protocols sometimes give the mediator the power to arbitrate certain issues if those issues cannot be successfully settled or the power to resolve any disputes about the scope and terms of any settlement reached before the mediator.

V.
Advocating Effectively in Mediation

Great trial lawyers are not necessarily effective advocates in mediation. While some requisite skills overlap, many do not. For example, if the mediation protocol calls for each party to make an opening statement, trial advocacy skills will be useful. Increasingly, however, mediators shy away from permitting opening statements for fear of polarizing the parties and pushing them further away from a potential settlement. An advocate's ability to portray her party to the mediator as an earnest negotiator, as well as her flexibility and creativity, are qualities required in most mediations, though those skills are perhaps underutilized in a typical trial setting.

A. *Positioning Yourself with the Mediator*

Ultimately, an advocate's success in the mediation process may depend as heavily on how well she is positioned with the mediator as on skills transferred from the courtroom setting. Just as trial lawyers must sell themselves and their version of the facts to the jury, so, too, must mediation advocates sell themselves and their clients to the mediator. In mediation, however, the sales pitch differs significantly. While advocates are certainly selling their version of the facts and interpretation of the law, more importantly, advocates must sell themselves and their clients as the mediator's ally in reaching the mediator's only goal: achieving a settlement. The mediator's perception of an advocate's reasonableness and flexibility in considering creative settlement proposals, as well as that of the advocate's client, will support the mediator's conclusion that an advocate and his client are working with the mediator to reach a settlement, rather than thwarting a settlement by being obstinate or unreasonable.

A skillful advocate will appear to be flexible and reasonable without giving away the store, which requires a tremendous amount of thought, analysis, and work with the client well before mediation begins. An effective advocate must propose a starting negotiating position that demonstrates not only a realistic understanding of the facts and the law (*i.e.*, the client's likely exposure), but also an intent to be reasonable and to strive for a settlement. Yet a successful advocate must leave sufficient negotiating room to allow judicious movement during the mediation to satisfy the mediator. If a mediator concludes that an advocate is both realistic and candid, when the advocate subsequently communicates that he has little additional room to give, the mediator will likely lean heavily on the opposing party to close the gap.

B. *Reaching a Settlement Through Creativity*

A successful advocate communicates his or her alliance with the mediator not only by judiciously shifting positions during mediation, but also by suggesting creative non-monetary settlement terms or creative monetary structures. Ask the mediator to discern whether the other party would value certain non-monetary benefits, such as favorable publicity, a contract extension, or a letter of apology, and how those benefits would affect potential settlement terms. Additionally, consider whether making some promise to a third party, or refraining from doing business with a third party, would benefit the other side and facilitate the settlement. Undertaking a joint venture with the adverse side on another project may also facilitate a settlement.

Business proposals that can create common ground and generate goodwill between opposing parties are limited only by an advocate's creativity. An effective advocate in mediation will spend significant time identifying creative possibilities and sharing them with the mediator. Even when a suggestion is not accepted by the other side, merely proposing it demonstrates to the mediator a client's commitment to the settlement process, making the advocate the mediator's ally. By aligning with the mediator's objective of reaching a settlement, an advocate is more likely to come away with a favorable settlement.

VI.
Conclusion

Mediation of civil cases is a virtual certainty for most litigants. By embracing mediation and using it to your advantage by recognizing the best time to mediate, choosing the right mediator, and honing your skills as a mediation advocate, you are more likely to deliver an optimal outcome for your client.