The Advocate's Mediation Checklist

"What works . . . what doesn't!"

By
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Initiating settlement discussions and mediation are tools to be used by counsel at strategic times and for specific purposes. Mediation is considered the most effective of all ADR options because the parties maintain control of the controversy and because of its flexibility. The following is a summary of negotiation issues in a caucus-based mediation model. The process begins with an evaluation of the appropriateness of settlement. Beginning in 1968, Neil Rackham of Huthwaite Research Group collected and quantified data through direct observation of negotiations to show how the skilled negotiator behaves. Rackham selected and studied forty-eight negotiators during 102 negotiations who met the following criteria for "the successful negotiator:" a) the successful negotiator is rated as effective by both sides, b) the successful negotiator has a track record of significant success, and c) he successful negotiator has a low incidence of implementation failure. The italicized findings below are findings from that survey.

A. "TO SETTLE OR NOT TO SETTLE. . . THAT IS THE QUESTION!"

1. The following list of factors often help determine if settlement is appropriate:

A.	**Factors Favoring Settlement**	**YES**	**NO**
	(a) A business or personal relationship could continue or be resumed		
	(b) It is desirable to better control the dispute process		
	(c) The position of each side has merit, and a trial could well result in either side prevailing		
	(d) Further litigation preparation and the litigation would be too costly and protracted		
	(e) A speedy resolution is important		
	(f) The dispute raises highly technical or other complex factual or legal issues		
	(g) A jury trial should be avoided because of the "sympathy" factor for one side		
	(h) The law on the determinative legal issues is well settled		
	(i) Need to avoid an adverse precedent		
	(j) Publicity about the case or its outcome should be avoided		
	(k) No further discovery is required C or limited expedited discovery will suffice C for each side to assess its strengths and weaknesses		
	(l) The client wants to be meaningfully involved at every step		
	(m) A candid presentation by each side of its best case will help promote a better understanding of the issues		
	(n) A strong presentation will give one side or the other a more realistic attitude about the case		
	(o) A neutral could help diffuse the emotion or hostility which may bar a settlement of the dispute		
	(p) The neutral's evaluation could help break the stalemate		

	(q) There is a potential for a runaway result		
	(r) A creative or unique remedy is needed		
	(s) Fear of attorney fees and costs awarded on de novo trial of mandatory arbitration award		
B.	**Factors Weighing Against Settlement**		
	(a) The case can most probably be disposed of on a motion		
	(b) At least one side requires a judicial decision for its precedential value		
	(c) There is no bona fide dispute; the other side=s case is without merit		
	(d) The advantages of delay run heavily in favor of one side		
	(e) There is nothing to lose		
	(f) The other side has no motivation to settle		
	(g) More time must elapse before each side=s positions and the settlement possibilities can all be evaluated		
	(h) One side is refusing to settle so as to send a message to others who are not parties to the case		
	(i) There is a need for continuing court supervision of one of the parties		

2. When to initiate discussions re: settlement or mediation? Some common opportune points include:

   a. Pre-filing
   b. Just after filing
   c. Post key “depos”
   d. Upon completion of discovery
   e. Post-filing/Pre-argument of dispositive motions
   f. Just before trial/arbitration
   g. During trial/arbitration
   h. Post-trial/arbitration

3. If you decide to initiate settlement/mediation discussions, how can you convince the other side if they are reluctant?

4. If you decide to mediate you will need to agree on:

a. Confidentiality issues
b. Model of mediation ("evaluative" or "facilitative")
c. Mediation time and location (neutral site?)
d. Mediator compensation: Who pays under what circumstances
e. Position papers: confidential, full exchange or partial exchange

B. SELECTING A MEDIATOR WITH "THE RIGHT STUFF!"

Mediators have been trained in different styles and it is important to understand their approach. What kind of experience? What kind of training? What is the style or school of mediation to which the mediator ascribes? How will the mediation be conducted? How much use of joint meetings or private caucuses? Will the mediator ever separate you from your client? Will the mediator assess the situation and express an opinion regarding an outcome?

1. To begin, obtain possible candidates from:

   a. Other lawyers
   b. Court's list of mediators
   c. Provider organizations

2. Interview potential mediators:

   a. Obtain their resume and references (both attorneys from last 3 mediations)
   b. Will the other side and your client find them credible when it's time for "reality therapy?"
   c. What is their legal expertise in the subject matter (needed for an "evaluative mediator")? When considering retired judges, determine if their style is adjudicatory such that the mediation would proceed more like a settlement conference. Is this what you want?
   d. Review their Standard Rules of Mediation/Agreement to Mediate.
   e. Note the mediation structure preferred by the mediator (e.g., length of session, caucus, joint session, opening statements by attorneys and/or parties, etc. Ask them to define a "successful" mediation. Do they direct their comments primarily to the attorney or party? When do they declare an "impasse" and how do they handle it).
   f. Ask about "confidentiality" and exceptions. Insist upon a signed Agreement to Mediate.
   g. What is their style ("evaluative" or "facilitative")?
   h. Training: how much/what type?
   i. What mediator ethical codes do they adhere to?
   j. Neutral location and amenities (e.g., computer, phones, fax, espresso!)
   k. Length of typical session: allow for an entire day (9:00 a.m.-9:00 p.m.)

C. SETTLEMENT DISCUSSION/PRE-MEDIATION PREPARATION

Plan a negotiating strategy with your client. While you should always come with an open mind because new perspectives, and often, new information are revealed in the session, you should still think about a strategy for your moves. Remember, if you are using a neutral, s/he is condensing

weeks or months of negotiation into a single day (mediation is sometimes called "Turbo-charged Negotiation"). Do not, in any event, be constrained by your negotiating plan. Remain flexible with the process, but never let the mediator control your side of the negotiation. You and your client are in charge.

1. Be able and willing to try your case if the matter doesn't settle!

2. Confer with your client on:

    a. The advocate's role during the discussions - prepare them for the fact that you will not be stylistically aggressive
    b. The client's role during the discussions
    c. The role of the mediator, the typical mediation process

3. Determine who needs to be there:

    a. Attorney, CPA
    b. Party with full settlement authority
    c. Consider experts and consultants

4. Learn as much as possible about your client's and the opponent's:

    a. Stated facts (depositions not necessarily required but informal discovery exchange may be helpful)
    b. Understanding of the law
    c. Negotiating style
    d. Issues
    e. Perceived business & personal needs
    f. expectations
    g. Perceptions and decision-making style
    h. Outside influences on the negotiation
    i. Openness to creativity
    j. Value of ongoing relationship, if any

5. Do some "reality testing" with your client.

6. Do unresolved legal matters impact your willingness to settle?

7. What is the relationship between the advocates?

8. Summarize the history of settlement negotiations? What obstacles to settlement have you observed? Are there other factors affecting the negotiations, such as a spouse or supervisor "leaning" on the party, precedential value of the case, public visibility, etc.? How can these factors be overcome? *(The skilled negotiator made twice as many comments regarding long-term considerations of issues, with the average negotiator focusing on the short-term.)*

9. What are some creative, non-economic options for settlement? *(The skilled negotiator considered twice as many outcomes and options per issue as the average negotiator.)*

10. What external objective standards of legitimacy could be applied to the settlement options to frame them as reasonable?

11. 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? *(The skilled negotiator made three times as many comments to their clients about areas of anticipated common ground.)*

12. Does your client representative have FULL authority to settle the case (not just a "bottom line")? Does the opposing party representative have similar authority?

13. Ensure that your party or party representative will be present for the entire session. Reserve the full day if you are mediating. Be sure others who may have bearing on the decision are available, even if only by telephone, on the day of the negotiations.

D. PREPARING THE CONFIDENTIAL SETTLEMENT/MEDIATION PAPER:

Prepare a confidential settlement/mediation booklet. (5-10 pages). Make copies for yourself, your client, and the mediator if you are using one. Send the booklet for the mediator to review at least ten (10) days before the session. Seasoned mediators will begin the process even before the parties arrive at the scheduled mediation session.

1. This summary analysis should cover the following:

    a. Factual summary and procedural status of the case
    b. Identification and bullet-style analysis of the key factual and/or legal issues
    c. History of the settlement discussions including last demand/offer and "whose court you think the ball is in"
    d. Identification of the underlying business and personal interests of both parties (expressed or, as more often the case, unexpressed); i.e., what does the client need? What motivating factors underlie the dispute? Include the underlying interests/needs of both parties from a non-monetary perspective (e.g., are there practical alternatives to a monetary settlement?).
    e. A bullet-style description of the strengths and weaknesses of your case. Don't pull any punches.
    f. A bullet-style description of what you think the other party asserts to be its factual/legal strengths, along with your candid response
    g. Your view as to the past and present barriers to settlement

2. The paper should also include the alternatives to reaching an agreement (e.g., if you proceed to trial, arbitration or appeal):

    a. What is the likely outcome (assess the numerical probability)? (E.g., "If you try this case 100 times, what percentage of the time are you going to win? When you do prevail, what is the likely range of the award?)
        BATNA ---"Best Alternative to a Negotiated Agreement"
        WATNA ---"Worst Alternative to a Negotiated Agreement"

MLATNA ---"Most Likely Alternative to a Negotiated Agreement"

b. What are the expected fees and costs (and the value of lost opportunity time)?
c. How long until the trial or arbitration?
d. Predict the length of the proceeding
e. What is the probability of appeal, cost of appeal, and likely outcome on appeal?

3. Provide or have available this additional information:

   a. Highlighted copies of the key documents and a summary of any other information that will assist the neutral in working with the parties
   b. Copies of the current pleadings
   c. Copies of relevant appellate decisions (highlighted)
   d. Summary of documentary evidence
   e. Summary of damages claim
   f. Accounting of fees and costs to date

4. Consider sending a separate settlement/mediation brochure (without confidential information) to the other party in advance of the session.

5. Stop negotiating if you're going to mediate...save your moves for the session to create momentum toward resolution!

E. AT THE MEDIATION

1. In the initial joint session, the mediator usually makes an opening statement. This is designed to set a specific tone and is likely to include the following:

   a. Introductions by the persons present
   b. Summary of the mediator's background and experience
   c. Discussion of the mediator's role as distinguished from judge, arbitrator or fact-finder
   d. Discussion about impartiality and disclosures surrounding it
   e. Presentation on the voluntary and confidential nature of the process
   f. Outline of how the day is likely to proceed and a summary of the ground rules
   g. Solicitation of the participants to negotiate in good faith and the signing of the Mediation Agreement
   h. Opportunity for opening statements by attorneys and/or parties

F. MEDIATION JOINT SESSION OR FACE TO FACE NEGOTIATIONS WITH OTHER SIDE

Effective representation in mediation involves a unique advocacy style. There are two ways to convince your opponent--directly or indirectly through a mediator during the mediation caucus process. Please consider the following:

1. "Good Stuff:"

    a. Thorough preparation
    b. Visual aides are helpful and show you are willing to try your case
    c. Introduce yourself and your clients to everyone and identify their roles.
    d. Prepare a ten-minute summary of your case for your opening remarks. It should include:
        (1) Facts -- undisputed and disputed
        (2) Key issues *(The skilled negotiator only used an issue sequencing process half as often as the average negotiator, to control the order that events would occur.)*
        (3) Law -- undisputed and disputed
        (4) Key witnesses and other proof
        (5) Damages analysis with back-up documentation
    e. Use a communication style that conveys:
        (1) A willingness to "explore" the problem vs. "debate" the issues
        (2) Empathy, if sincere
        (3) Confidence that settlement will be reached
        (4) You can get further with nice words and a gun than with just a gun!
    f. Direct your remarks to the other party, if present. The target of persuasion is not the neutral. The one who must find your arguments convincing is the party who must compromise their claim or defense. This is not the place for grandstanding. It is an opportunity for direct and concise communication. *(The skilled negotiator tended to give an advance indication of the class of behavior they were about to use six times more often than the average negotiator. For example, instead of merely asking a question, the skilled negotiator prefaced with, "Can I ask you a question," to label their behavior and prepare the other party. This was true for all behaviors except disagreeing, in which the skilled negotiator was only half as likely to label in advance of disagreeing compared to the average one. The skilled negotiator is more likely to begin with the reasons and lead up to the disagreement.)*
    g. Be attentive and actively listen to the neutral and the other side. When the opposing party or counsel has completed their presentation, ask non-argumentative questions to clarify any matters. *(The skilled negotiator asked more than twice as many questions during negotiation as compared to the average negotiator.)* Communicate to the other side that you understand their position. There is a difference between understanding and agreeing. If you can articulate their perspective, you are closer to a meaningful settlement. *(Skilled negotiators tested the other party=s understanding of a previous statement more than twice as often as the average negotiator, and summarized the*

previous points of the discussion almost twice as often.)

h. Attack the problem, not the person! *(Average negotiators used heated, emotional or value-loaded behaviors to either attack the other party or defend their position more than three times as much as skilled negotiators, leading to "attack/justify/blame.")* Tie any settlement proposal to an external objective standard. *(In counting the number of times a negotiator made statements about what was going on insider his or her mind [e.g., feelings of fairness and motives for proposals] research showed the skilled negotiator offered feelings commentary almost twice as often.)*

2. "Bad Stuff:"

   a. Adversarial banter *(Average negotiators used phrases that are not very persuasive, but cause irritation by implication, five times more often than skilled negotiators. For example, they used "generous offer" instead of "reasonable offer".)*
   b. "Jury" pitch
   c. "Bottom-lining" from the start of the process
   d. "Retreating" from your last settlement position

3. Should you allow your client to speak?

   a. Safe (confidential & privileged subject to exceptions)
   b. "Yes" when:
      (1) Client will be an attractive, compelling, or sympathetic witness.
      (2) To defuse hostilities.
      (3) To give the client their desired "day in court."
   c. "No" when:
      (1) Client talks and talks and talks. . .
      (2) Client cannot control emotions and is looking for revenge.
      (3) Client makes a poor impression.

G. THE FIRST MEDIATION CAUCUS ("I'VE GOT A SECRET & I PROMISE NOT TO TELL!")

This is primarily an "information-gathering" session by the mediator. At the beginning, confirm that the mediator will maintain confidences.

1. It's time for "reality therapy!"

   a. Objectivity
   b. Candor
   c. Open mind

2. Let your client talk with the mediator, particularly about the client's view of the case.

3. Let your client "vent" in the safety of the caucus. The parties have both facts and feelings that impact their decision-making process. Allow time for emotion. Good mediators encourage it.
4. Be prepared to respond to the mediator about:

   a. Strengths: Where are you strong and where is the other side weak?
   b. Weaknesses: Where is the other side strong and where are you weak?
   c. Alternatives: If the conflict is not resolved, what will happen? (BATNA, WATNA, MLATNA) (See section D.2.a., above)
   d. Perspectives:
      (1) Theirs: What is driving the controversy? What do they need to agree on resolution? Why? What new information can you present to the other side that will change their perspective?
      (2) Yours: What is driving the controversy? What do you need to agree on resolution? Why? What new information do you want from the other side to change your perspective?
   e. List Underlying Business and Personal Needs and Interests:
      (1) Yours
      (2) Theirs
      (3) Common
   f. Options: Brainstorm multiple options for resolution. Separate the process of inventing from the process of deciding. Average negotiators made twice as many counter-proposals during negotiations. Counter-proposals immediately introduce an additional option before addressing the one on the table, and decreases the other party=s receptiveness.)
   g. Negotiation: Consider that offers might be tied to legitimate objective standards and let the mediator discuss the standard or formula with the other side. Throwing a number against the wall to see if it sticks is rarely effective.

5. Trust your mediator.

6. Instruct the mediator as to what information is/is not confidential.

7. This First Caucus process will then be done with the other party or parties.

H. THE SECOND (& LATER) MEDIATION CAUCUSES

The mediator will use this session 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 settlement proposals. In additional caucuses, parties should:

1. Be willing to listen to different points of view.

2. Consider the information transmitted from the other side and transmit new information to

them. "Documents are worth a thousand words!"

3. If appropriate, allow new information to impact your risk analysis/settlement parameters.

4. Use the mediator as a sounding board for "reality testing" and to "float" settlement proposals.

5. Be willing to explore creative solutions to the problem. The mediator is likely to give assignments for you to work on while the caucus with the other party takes place. Most likely you will be asked to explore the risk analysis in further detail and generate at least three options for settlement that have not yet been proposed to the other side.

6. As the subsequent caucus sessions continue, the mediator will build the momentum and assist in clarifying the common ground. Often, the mediator will recommend a joint session to hammer out details if the parties are close to a settlement.

I. NEGOTIATION TIPS & TACTICS

1. Seek competitive results in a cooperative manner!

2. It doesn't matter who calls first to invite settlement discussions. It does matter who makes the first offer that puts the dispute on the "playing field." If you need a settlement and they won't open, then put the best principled proposal you can on the table that will keep them negotiating. Present it with your logic and rationale in a confident but not arrogant manner. Do not make a concession until they step onto the "playing field."

3. Develop a rational basis for each item presented in your opening position. This allows the other party to understand the rational reasons behind your demands, and helps explain your entitlement to ultimate goals.

4. Never lead with your "bottom line." You might as well say, "See you in court!" Fully understand your bottom line prior to negotiating, and try to uncover theirs. Recognize there is a point, below which, the negotiations will not go.

5. Start bargaining with less important topics, in order to develop a cooperative mood and make progress. This will pay off later when more significant, but contentious subjects are discussed.

6. Ask the other side about each element of its perceived position. What exactly do they hope to obtain and what is the rational basis? What are the hidden motivational factors influencing their articulated demands? Go behind stated positions to unveil the underlying needs creating their positions.

7. Through patient probing, learn as much as you can about the other side's range of choices, preferences, strengths and weaknesses, without overstating, or underestimating, your own.
8. Ask questions to elicit information from the other side in a non-threatening way. Build relationships whenever possible.

9. Allow them to ask questions of you, but respond as briefly as possible without playing "hide the ball." They are more likely to believe your answer than your unsolicited statement.

10. If they come up with an initial proposal "from the parking lot," very calmly ask them a series of questions that elicit the external, objective standards that support (or likely don't support) their position. Build from the bottom up by dividing their proposal into its component parts and asking for the supporting data for each number.

11. Once they are on the "playing field," your next proposal should be no closer to your goal than their position is from your goal.

12. Any subsequent movement on your part must have an objective rationale or be in response to their objective rationale. Do not move for the sake of movement . . . it is a sign of weakness.

13. Take advantage of the power of factual and legal arguments, appropriate and persuasive emotional appeals, as well as public policy. Rather than surprising the other party, make assertions that bring up points not considered by them before.

14. Offer a rationale. Explain to the other party why they can't get what they asked for. They will feel satisfied even though they didn't get it because they heard reasons for your decision. This makes them feel taken care of.

15. Rather than making negative threats, use affirmative promises to induce a reciprocal change in positions.

16. Your opponent is more likely to move:

    a. Based upon an agreement (e.g., "If you'll do X, I'll do Y");
    b. Then in response to a caution (e.g., "If that happens, then X is likely to do Y");
    c. Then in reaction to intimidation (e.g. "I'll clean your clock in the courtroom").

17. To get past "No!" and beyond impasse:

    a. Avoid emotional reactions and escalation. Refocus on your fundamental interests. Try to separate the "person" from the "problem."
    b. Don't argue. Diffuse their negative emotions, including fear and hostility. Listen to their points and acknowledge their feelings without agreeing. Use "VECS." Try to re-frame their position in order to problem-solve.
    c. Bridge the gap between their interests and your own. Show how it's in their interests to agree to a mutually beneficial solution. Use "Positive Reframing."
    d. Educate them to the consequences of their approach, including potential gains and losses for both sides. Focus on process and objective criteria. Brainstorm options, prioritize needs, gather and share data.

18. When you enter the "resolution zone," go slowly. 75% of the work happens in the last 25% of the allocated time. Patience is a virtue!

19. Develop the power to walk away. Don't pass the point where you=re no longer willing to walk away, based on your emotional investment and the time and effort spent negotiating, rather than on your best interests.

20. Your final proposal must entice your opponent to say "yes" from the perspective of their most likely alternative, moderated by their risk-averseness, assuming they have realistically evaluated the matter.

21. Do you want to be right or successful? Sometimes you have to choose. As a result, you may need to create a dynamic where you have to say "yes" to their proposal so they feel they won!

22. Beware of "Oh, by the way!" Get all terms on the table and negotiate the package. Nothing is final until both sides have agreed to all the deal points.

J. WHAT, NO SETTLEMENT?

1. What is the obstacle and how can it be overcome?

    a. Can you obtain factual/legal stipulations or procedural agreements on additional discovery or time lines?
    b. Are court rulings on motions necessary?
    c. Is more time needed ("I will settle no case before its time!")?
    d. Consider hybrid processes: Med-ALOA (Mediation and Last-Offer Arbitration), Neutral Evaluation, and Arbitration.
    e. Discuss bifurcation (settle some issues. . . try others).
    f. Be open to the mediator's suggestions concerning impasse-busting techniques (e.g., Conditional Offer, Confidential Settlement Number, Mediator=s Solution, One-Text Procedure, etc.)

K. YES, WE HAVE A SETTLEMENT!

The mediator will return 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 is settled. In order to avoid unanticipated problems occasionally created by "settlement remorse," and the "Oh, by the way" phenomenon, it is good mediation practice to have the attorneys and the parties sign a memorandum of essential terms if more detailed memorialization must be deferred because of the constraints of time or technology. In a perfect, although not always practical world, the final settlement documents are executed at the conclusion of the mediation or negotiation. At the final joint mediation session:

1. Ask yourself: Have all bases been covered - are there any loose ends? Do we have a binding and enforceable settlement? Remember: "It's not over until it's over." *See*, Kaiser v. Doe, 136 Or. App. 566, 903 P.2d 375 (1995) (settlement agreement valid), *modified on other grounds*, 138 Or. App. 428, 908 P.2d 2850 (1996): *cf.* The Cadle Co. v. Castle, 913 S.W.2d 627 (Tex. Ct. App. 1995) (settlement agreement invalid).

2. Memorandum of Understanding on Essential Terms and Conditions will be prepared. All parties and counsel should sign it before anyone leaves.

3. Mediator can act as a scrivener at the mediation session and/or act as mediator/arbitrator for language disputes in final documents

4. Mediator testifies only as to the authenticity of "Memorandum of Understanding of Essential Terms and Conditions," and nothing more, absent agreement of all parties and the mediator

5. Bring your boilerplate settlement agreement, edited to include language unique to this case, to the mediation session. Bring it on your laptop and/or on disc (saved as Word Perfect, Word and ASCII).

6. In lieu of written agreement, consider putting the settlement on the court record with formal documents to follow.

L. DEBRIEF

After the case is finalized, call your mediator to do a bilateral debrief/post-mortem of the process.

SOURCES

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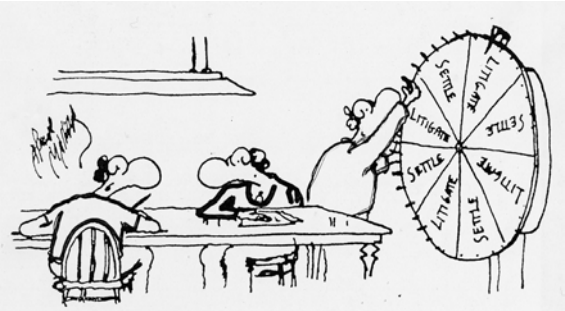

"Where did you get this mediator, anyway?!"