Mediation: Thoughts from an Advocate's Perspective

Adapted by
Daniel Preston Dozier, Esq.
Press, Potter & Dozier, LLC
ddozier@presspotterlaw.com

From an outline by
J. Steven Rogers, Esq.
Environmental Defense Section
US Department of Justice

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Determining if and When to Engage in Mediation:

- Don't just assume mediation or another ADR process is always the "right" approach;
    - Even if it is the best course for a particular dispute, timing is always critical
    - Before you propose or agree to mediate make sure the timing is right for you, your client, and the dispute

- Analyze the dispute to look at what issues are involved; determine whether there are:
    - Data conflicts (lack of, or asymmetric access to, information; misinformation; differing views on relevancy; differing technical or scientific interpretations of data
    - Interest conflicts (competitive; substantive; procedural; psychological)
    - Structural conflicts (destructive behavior; unequal control or power; geographic, environmental, or other physical factors hindering cooperation; time constraints
    - Value conflicts (differing criteria; differing goals, agenda, or cultures)
    - Relationship conflicts (strong emotions; misperceptions; animosity; or stereotypes;

- Determine if enough critical issues are negotiable and parties are willing to negotiate; consider whether:
    - There are sufficient diverse issues to provide for overlapping interests and trade-offs among issues
    - There is a realistic timeframe and deadline
    - A period of unassisted negotiations should precede mediation to "ripen" or narrow issues;
    - Critical issues exist that require *adjudicative* resolution by administrative or judicial process:
    - Legal interpretations; the right of an important stakeholder to participate; obstructionist legal tactics that need to be curtailed; a critical party will not negotiate unless the strength of its perceived options are altered externally; critical ongoing actions must be unilaterally "frozen" or enjoined to maintain the status quo

- If addressing a dispute settlement negotiation and there is not litigation yet, consider whether you need a "standstill" or tolling agreement

- If already in Court, consider using Injunctions, Summary Judgment, Discovery Motions, etc.

- Your Decision Maker or one or more of the principals is willing or psychologically /

emotionally able to engage in fruitful negotiations

- Disputes that are *generally* more appropriate for mediation include those where:
    - The issues *DON'T* need "precedential" determination by a judicial or administrative authority or are not easily resolved by Court
    - The issues are procedurally or factually complex and can be better developed and understood by using a mediator or arbitrator with expertise
    - The dispute involves more than just $$
    - Valuable options to meet significant party interests cannot be awarded by a court or other tribunal
    - There is some form of continuing relationship between critical parties
    - Unreasonable or unrealistic clients or representatives are making unassisted negotiations difficult
    - Important stakeholders are not or cannot be a "party" to the dispute, or are presently excluded from the table
    - Critical parties or stakeholders need additional "Respect", "Apology", or "Air time" to achieve legitimacy or otherwise brought to a settlement posture

- Mediation can be particularly helpful in
    - Setting agendas
    - Reality testing perceptions, expectations and assumptions
    - Moderating inflated expectations
    - Framing or reframing Issues
    - Generating and assessing Options
    - Establishing or narrowing a Settlement Range setting targets, aspiration levels, "Best Alternative to a Negotiated Agreement (BATNA)" (Fisher & Ury) or transmitting offers and controlling patterns of "concession"
    - Caucusing or building coalitions
    - Controlling manipulation by a powerful party
    - Overcoming cognitive barriers to settlement (e.g.: reactive devaluation, risk or loss aversion, etc.)

- Consider also whether other approaches might be appropriate, such as:
    - A facilitator to get unassisted negotiation on track, OR to bring the parties to the table
    - Arbitration to resolve an "adjudicatory" issue that doesn't need judicial precedent
    - Early Neutral Evaluation to help decision makers get a better grip on reality

Generally

Mediate when	**Don't Mediate When**:
There is an ongoing or future relationship	Judicial Precedent is important
Both parties share some responsibility for the dispute	"Principles" are involved
Confidentiality is required	Relationship interests are minimal
Brainstorming is required	Money is the ONLY issue
There are highly complex and/or technical issues	
There are critical non-party stakeholders	
There are multiple parties	

- Consider why you may want to mediate and what value is added.
    - Unassisted negotiations can be perceived to "fail" not only where impasse is reached, but also where an agreement is reached at excessive bargaining costs (such as too much time, injured relationships, lost opportunities, lost joint gains), or where an unrealistic resolution is reached that cannot be successfully implemented

    - Bush and Mnookin suggest there are at least two kinds of "barriers" to settlement that can arise:
        1. **Strategic Barriers**: fears of being exploited and lack of trust lead parties to withhold relevant, but possibly damaging information, or to mislead about the information (such as their true interests, options, "bottom line"/BATNA, *etc*.). Even where a settlement is reached the result can be sub-optimal since the parties are often suspicious of each other and devalue information that is put forth in negotiations, and thus lose opportunities to brainstorm creative options, diminishing the potential for creating options and achieving joint gains

        2. **Cognitive Barriers**: cognitive distortion of value (*e.g.*: risk aversion because of overemphasis on the potential costs of an option that has a strong likelihood of a significant gain; Loss aversion because of overemphasis on potential costs that would be locked-in by a settlement option where there is a moderate-to-small alternative that would result in less costs. Hence even the useable information revealed can get distorted leading to missed opportunities. Other cognitive barriers: framing (*i.e.*: mis-perceived bargaining contexts, "ceilings," and "floors"); "revenge" considerations (not merely gains based on the current dispute, but gains proportional to perceived past grievances); reactive devaluation (devaluing offers or information merely because offered by the adversary); mis-attributional error (attributing

others' actions or positions to evil intent, while assessing self as innocent); judgmental overconfidence (overly optimistic assessment of one's own case)

- Mediation can often lower or overcome these barriers to settlement:
    - Mediators can help parties put more information on the table and ensure it is more reliable. Mediators can also help parties more accurately perceive each others' views and interests.
    - Lax & Sebenious suggest that mediators can add value to the process by (1) facilitating better information flow and communications by acting as a selective conduit of information, and pacing the communication flow and the "work" that must be done by the parties; (2) helping negotiators understand interests; (3) fostering greater negotiator creativity by guaranteeing confidentiality and enhancing the possibility for brainstorming options; (4) reducing a party's vulnerability to perceived power imbalances; (5) blunting conflict escalators by enhancing trust

- Other Advantages:

    ✓ Mediation allows each side an opportunity (generally in the initial joint session) to address other principals or decision makers and present proposals in an organized uninterrupted form; often the ONLY time a principal or decision maker may hear their opponents' views *unfiltered* by their own representative

    ✓ Mediation allows for greater consideration and protection of relationships between the parties

    ✓ Mediation allows for confidential "reality testing" with an impartial third party who is also simultaneously reality testing the other parties; this allows unrealistic expectations, or mistaken notions of fact or law, to be addressed and corrected. The attorney/representative can still act as an advocate, while the mediator can point out weaknesses and problems in the case.

    ✓ Mediation helps elicit each party's true interests, as opposed to merely their positions (*i.e.*: their demands or wants); knowing a party's interests increases the chances of inventing new and additional options to meet those interests that are more acceptable to the other side, and can even lead to creative solutions that result in *mutual* gains.

    ✓ As compared to litigation or binding arbitration, mediation keeps the parties in control (as opposed to the judge or jury)

    ✓ Mediation can *potentially* reduce time and expenses when compared to full-blown litigation. *Caveat* that costs may equal or exceed alternatives where fact discovery is

critical to resolution, mediation occurs close to trial, or substantial time/resources must be expended to resolve relationship issues. On the other hand, mediation increases the chances of obtaining a better resolution, so any additional time or costs may be justified by the increased value of the agreement

- ✓ Mediation helps contain emotions; it helps separate "the people from the problem" (Fisher/Ury) to allow more objective and realistic problem solving.

- ✓ Mediation provides more flexibility for both fact-development and brainstorming creative solutions. Informality allows questions and discussion that cannot occur in an adversarial litigation atmosphere or process.

Picking the Mediator

- Consider which mediator functions are most useful to resolving the dispute
  - ✓ Legitimizer
  - ✓ Process facilitator
  - ✓ Substantive evaluator
  - ✓ Trainer
  - ✓ Problem Explorer
  - ✓ Reality Tester
  - ✓ Coach
  - ✓ The "heavy" or "scapegoat"
  - ✓ Group "leader," organizer, or taskmaster
  - ✓ Judicial authority (magistrate or special master)
  - ✓ Lawyer, non-lawyer, or technical professional

- Ways for the Parties to make the Selection
  - ✓ Informal suggestion of names
  - ✓ Each side proposing a set number of suggested names
  - ✓ Group interviews and consensus
  - ✓ Submission of names to an impartial 3rd party (such as a judge)

- Criteria to consider:
  - ✓ Training
  - ✓ Experience
  - ✓ Style
  - ✓ Availability
  - ✓ Cost
  - ✓ Conflicts
  - ▪ Orientation / Mediation Style
    - o "Evaluative": the mediator assesses the strengths and weaknesses of each party, opines (generally in private sessions) on fairness or likely judicial or administrative outcomes, develops and proposes settlement options, and

actively pushes the parties toward settlement

- "Facilitative": the mediator focuses mainly on process to ensure adequate communication and appropriately contains emotions.

- A particular mediator's orientation towards being evaluative or facilitative varies, and good mediators possess both skills. One school of thought says the mediator should assist the parties on merits of issues in the interests of settlement; other school of thought is that the mediator should be facilitative and only affect process, and not express views on the merits;

- Determine how the mediator understands and implements being "neutral" or "impartial." Do they have an "active" or "passive" style; that is, do they see themselves as assisting in achieving *any* agreement (even if unfair to one or more parties) or helping reach the *optimal* most *elegant* agreement that meets as many interests of as many parties as possible

- A Good Mediator:
  - Is a good communicator
  - Is a good negotiator
  - Provides neutral ground by consistently being impartial and fair
  - Has good analytical skills
  - Has good persuasive skills
  - Must have the trust and confidence of *all* parties

Preparing Yourself and Your Client for Mediation*:*

THE KEY: ***Preparation, Preparation, Preparation***

- YOU are still in control and RESPONSIBLE for making the process work and

- THE ONLY RULES ARE THE ONES YOU CHOOSE TO NEGOTIATE

  - Exception **may be** Court appointed mediation using judicial officers who may exert more process control

  - A neutral is a contractor who provides valuable service to the parties; ***However, do not assume that the neutral will take any weight of preparation off the shoulders of negotiators***.

Manage the People, the Process, and the Time

- Prepare a Negotiation Plan to address how you plan to proceed, how you think issues should be sequenced, who are the participants from your side and what are their roles, and what are the options if the ADR process does not resolve all issues in dispute

- Prepare the Clients/Decision-Makers

- Decide the level of Authority to bring to the table and who should attend the mediation--Should Decision-Makers be present or only Representatives

- It's obvious but often lost in a too-busy schedule; just as you cannot win a trial or negotiate without adequate preparation, you cannot mediate effectively without doing the same preparation you would do for a negotiation

- In mediation you have an additional participant— the mediator — whose professional impartiality does *not* mean they lack interests and biases that have to be investigated and anticipated.

BEFORE THE MEDIATION:

  - Determine if parties will be represented by counsel and whether principals or decision makers will participate directly

  - Determine whether Decision Makers should attend, be available by phone, or must be subsequently consulted with to ratify proposed consensus

  - Exchange as much relevant information as reasonably possible with *both* the mediator and opposing parties to facilitate the process, consistent with concerns for pacing of information flow and confidentiality

  - Submit short, written "briefs" or position papers to the mediator, and where appropriate to the opposing parties, addressing the relevant issues

DURING THE MEDIATION:

  - For the Joint Session, carefully prepare a concise, persuasive, convincing summary of your facts and position, including using expert witnesses, charts, multi-media, or presentations by principals. Consider what if any interests to reveal. This is your chance to have the opposing sides' principals hear your case in its best light, presented by you and not "filtered" by their counsel.

  - If your principals will be attending, prepare them to hear the opposing parties' positions presented in their most favorable manner. Get

- Use private caucuses to do reality testing on your principals; often they more readily listen to "bad news" or reality testing from the mediator than from you, their "advocate". Ideally, you will have prepared your side and the mediator so they are informed of the facts and objective criteria for why your preferred options are reasonable and supportable. Help the mediator with ideas for reality testing and brainstorming with the *opponent*, to the extent you can anticipate or determine their unrealistic assumptions or expectations. Determine how best to use the mediator's reality testing and persuasive brainstorming abilities for both your client and the other side. Be sure to get comfortable with the mediator's style and understand their approach *before* revealing critical confidential information. *Remember*, mediators can have drastically different styles, effectiveness, and interests.

- Pace the flow of information shared with the mediator; find out how the mediator will handle confidential information (i.e.: obviously, a mediator with integrity will not directly reveal confidential information, BUT find out how they will use it with the other side). What is said during a private caucus is confidential, but information is critical to the mediator's job. Be prepared for a mediator to ask ***"is there anything you* don't *want me to share with the other side"*** at the end of a private session. Make sure you are comfortable with the mediator's judgment about how to use and share such information before you agree to waive confidentiality.

- Adjustments for the Litigator:
  - Seek to develop a working relationship; don't seek to "grind them into the ground"
  - Become a problem solver
  - Keep communication open
  - Get a better understanding of BOTH the other side's, and the client's, *real* interests, goals, and objectives; this allows for better creative options creation

Negotiating the Mediation Agreement and Process

- Negotiate a Mediation Agreement with *BOTH* the other participants *AND* the mediator.
- At a minimum the Agreement should address:
    - what issues are on the table;
    - what is the process the parties are committing to (*i.e.:* early neutral evaluation, facilitation, mediation, arbitration, combinations, etc.)
    - is there a need for co-mediators
    - who is involved in choosing the mediator and what is the process;
    - how will the costs of the mediator and the process be paid for;
    - what will be considered confidential, and how will confidentiality be guaranteed;
    - what will happen to litigation while in ADR;
    - what, if any, discovery is needed prior to or as part of ADR;
    - what is the timetable for negotiation;
    - are the participants bound to a minimum timetable, and what happens if a party wants out early;
    - how is the ADR agreement to be enforced and disputes about the Agreement itself resolved;
    - will additional participants be allowed to join, and if so how will they participate and pay for a share of the process
    - how much, if any, authority will be given to the mediator, and how do you get it back
    - What are the process ground rules
    - how will decisions be made about
        - Process
        - Experts for the neutral
        - Timing
        - Physical location

- Information exchange (Particularly timing of concessions)
- Participants
- Documents & confidentiality
- Billing

What Happens if Mediation Does Not Resolve all Disputes

- Determine whether the other parties, or perhaps your decision makers, need a "time out" either to let litigation (or other alternatives) or time change perceptions, circumstances, or personnel
- Leave open the possibility of further ADR and/or bilateral negotiations if circumstances change as case progresses
- You may wish to use the mediator later in the case or other government attorneys may wish to use the mediator, and thus a professional termination of the mediation is desirable.
- Burning your bridges is often detrimental to the dynamics of your case. Your case may take an unexpected turn for the worse as it develops, and you may wish to re-initiate ADR or unassisted negotiations.
- The other side may subsequently perceive your case as stronger – or their case to be weaker -- and may be persuaded to return to ADR if you leave the door open for further ADR.