How ADR Works

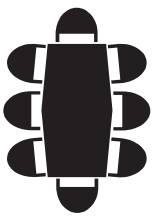
Norman Brand
Editor

Chapter 8

How Mediators Operate: A Mediator's View

Anthony C. Piazza

Committee on ADR in Labor & Employment Law



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Chapter 8

How Mediators Operate: A Mediator's View

*Anthony C. Piazza**

I. Introduction

Our approach to mediation is active and direct. We assist the parties in their efforts to reach a resolution by engaging them in a spirited discussion of the factual and legal issues of their case. We encourage frank communication of potential problems

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and constraints. And we focus unrelentingly on the realistic options for settlement.

II. FEES

To remove any incentive to protract the process and to give participants certainty as to the costs of the mediation, we encourage single-day mediations, for which we charge a daily rate. It encompasses administration, preparation, travel, and a "full day" of mediated negotiations. Our "full day" is defined only by the time it takes to reach resolution or impasse. If there is any chance to forge a resolution, we will work late into the night.

III. BRIEFS

Briefing is optional, but encouraged. Briefs are useful to expedite the early stages of the process and allow us to begin our analysis and delineation of issues to be addressed in caucus. In more complicated cases, briefs accelerate our learning curve. We suggest that previously communicated settlement positions be disclosed, because the range for negotiation during the mediation is generally defined by the parties' last stated positions. Even if a party intends to depart from its last stated position, that fact will play an important role in the decisions of the opposing party and is thus quite relevant to our work.

There is an important distinction between asking parties to disclose their prior settlement discussions and asking for their settlement positions at the inception of the mediation. Statements of "bottom lines" at the outset are generally counterproductive. Drawing a line in the sand is a demand for capitulation, not a step in negotiation.

A related point is deciding whether to require a demand or offer before engaging in the process. It is admittedly easier to analyze the situation with a number from the other side in hand. Such a request, however, may be counterproductive. For this reason, we offer to assist parties when an agreement to mediate is initially made contingent on the communication of a settlement position. Frequently, when one side requires a number from the other in advance of the mediation, the number received is posturing at its extreme. The requested number is usually dramatically inflated in an effort to stake out a strong negotiating position. The problem is compounded because, once stated, the number becomes an artificial barrier that wasn't present before

the initial request. In discussing these issues, we hope to ensure that, if a party insists on a demand or offer, they are mindful of the benefits and ramifications for the process.

IV. CASE MANAGEMENT

A. Initial Contact

When a matter first comes to our office we go beyond simple logistics. Our staff engage in a detailed discussion about the matter for which mediation is being considered. We feel it is appropriate and useful to initiate substantive communication before mediation, because most of the work we do in the mediation itself is through confidential caucuses. We simply begin that process at an early stage.

These pre-mediation discussions allow us to evaluate who needs to participate in order for the mediation to be productive. A few well-chosen questions may uncover additional parties or insurers whose participation may improve the odds of settling. An inquiry into the case details and potential participants will help prevent learning too late that an essential player is missing.

For example, when a party brings a case to our office, we might inquire as to any potential cross-claims involving parties not yet part of the lawsuit, previous efforts at mediation, or what, if any, impediments to settlement exist.

B. Obtaining the Other Party's Agreement to Mediate

One service our firm provides is to contact the other party to discuss its amenability to mediation or to a particular mediator. There are benefits to this approach. We can help overcome any perception that the party seeking mediation is confessing weakness or is anxious to settle. Absent a contractual agreement, someone has to broach the alternative of mediation. Some fear that taking this initiative may be misinterpreted as being anxious to settle. Although a willingness to solicit the views of a third party is more reasonably construed as a measure of confidence in one's position, any inference of weakness can be mitigated by having us contact opposing counsel to discuss the process. When opposing counsel suspects that any mediator proposed by a party will be biased, we provide references to overcome that fear of partiality. We also communicate this simple logic: "If your opponent will need to move to settle the matter, who best to create

that movement than a mediator in whom they have placed a degree of trust?"

Our involvement in these preliminary negotiations is not only convenient for the parties, but also flags problems that can either be cured in advance of the mediation or signify that investing in mediation may not be worthwhile. When we become aware of potential issues, we can help to ensure that things run smoothly. Recently, both sides to a conflict contacted our office 2 weeks before the scheduled mediation. They called to cancel because they were unable to agree to discovery details. As is not uncommon among disputants, counsel had lost the ability to communicate effectively with one another. We salvaged the mediation by talking confidentially with each side, determining what the actual conflict was, and suggesting a way to resolve it. The conflicts were not complicated, and we spent a total of 30 minutes resolving them. That is why we engage in attentive case management.

C. Authority

One of the fundamental realities of mediation is that parties have to experience a fundamental change in their evaluation of the case in order to reach a resolution. The single greatest reason for failed mediations is the absence of the ultimate decisionmaker who has to experience that change. Many potential participants interpret "decisionmaker" as someone who has the authority to bind the relevant entity to a settlement. While that is necessary, we require more. We require that the person in whom decisionmaking authority has been vested have the ability and clout to make an independent decision to settle. This includes the possibility that the decision is outside the parameters discussed "in-house" before engaging in the mediation. New information or a new way of viewing existing facts that comes to light during mediation may merit a reevaluation. By having the final decisionmaker personally present, we can ensure that if an opportunity for resolution presents itself, it can be acted on.

Obtaining the desired level of authority at the mediation will often take some diligent work before its commencement. In order to get the right person there, we ask a series of questions of potential participants.

(1) Who will be attending with *full and final* decisionmaking authority?

(2) Does that individual have the ability to make a decision that may be different from what internal discussions had authorized?
(3) Will the person in attendance need to contact anyone outside the mediation for approval?
(4) Is there anyone not in attendance whose input is required in order to reach a decision?
(5) In the event that a decision outside established parameters appears reasonable, will those in attendance have the ability to make it?
(6) Will the person with authority be operating with any caps or limits to his authority?

We often find it useful to explain the tangible negotiating benefit of bringing a party operating with unlimited authority. For example, we might say that a party would only make its best settlement efforts if it sees a corresponding effort across the table. If one side perceives that its opponent sent someone with limited authority, it is difficult to ask them for meaningful movement from their desired range if they know that a similar move is not possible by the other side.

We frequently mediate with governmental entities that are constrained by law from investing a single individual with authority to make a binding decision. The relevant public board must approve any settlement. In these circumstances, we ensure that the persons whose recommendations to the board will most likely be followed attend—for example, a department head whose role encompasses budgetary allocations within an organization or a leading member of a governing board. With enough clout personally present, it is rare that a recommended resolution fails to gain approval.

V. MEDIATION

A. Joint Session

On the day of the mediation when the appropriate people are present, we begin with a joint session. Our joint session is intended to be rather brief. It is primarily an opportunity for the mediator to set the tone, lay the ground rules, establish credibility and knowledge, and give each party the opportunity to state its position.

We begin with a brief explanation of the process, describing the elements of our approach to mediation so that all present have a road map to follow. Our purpose is to clearly and confidently communicate an approach that has worked effectively in a wide range of previous disputes.

We explain that each side will be invited to make an opening presentation that is not the equivalent of putting on a case in court. It is an opportunity for the parties, in a summary fashion, to outline the primary facts and legal arguments in support of their position. We find that the most effective presentations are succinct and addressed to the mediator, while indirectly but clearly informing—rather than bludgeoning—the decisionmaker on the other side with the merits of a position. This may be the first and last opportunity in a lawsuit for counsel to speak to the other side's decisionmaker without a lawyer to filter the information. To avoid diluting its impact and to make the most of that opportunity, the presentation should focus on a few key points. Though it may seem self evident, we have seen many make the mistake of a vitriolic opening, making the mediator's job more difficult. Strong advocacy is fine; attacking the person from whom you ultimately need a "yes" is counterproductive.

Next, we explain the most important part of our process: the private caucus. We explain that caucusing has three functions. First, we invite discussion of any information or concern that a party prefers not to broach in the joint session. Next, we adopt the role of devil's advocate, discussing the weak links of the matter with the goal of balancing the risk evaluations of all parties. Finally, we explore realistic options for settlement. Thus, without having to jeopardize the parties' stated negotiating position, we explore the parameters of resolution in a confidential setting. We shuttle back and forth between the parties until an agreement is hashed out that everyone can live with.

We follow this explanation with two ministerial details and a confirmation of some critical assumptions. We sign and circulate a copy of our confidentiality agreement. It is designed to underscore that anything discussed in confidence will remain in confidence. We also ask the parties to sign our roster in the event we need to reach someone after the day has concluded. We confirm that the ultimate decisionmakers are present and that they are not bound by any time constraints. We explain that we do our best to handle each dispute over the course of a normal workday but are prepared to work into the evening if it seems productive.

The next phase features the opening statements themselves. We usually begin with a presentation on behalf of the party first advancing a claim. During each statement, we may interject questions or clarifications. If a representation is made as to a disputed fact, we may inquire as to the basis for the assertion. For this reason, we recommend that parties have readily available at the joint session copies of all documents supporting their contentions on critical facts.

After each statement, we summarize the party's presentation to ensure, as well as to demonstrate, our understanding. This summary also allows the opposing party a second opportunity to assimilate the position of its opponent, expressed by the neutral in an objective tone.

We conclude the joint session with an outline of how the rest of the day will proceed, a suggestion regarding communication, and a reminder of our jobs as mediators. We give the participants estimated time frames for the private caucuses, typically 30 to 45 minutes per party depending on the complexity and number of parties present and issues involved. We inform the participants that we do not schedule a lunch break and that they should eat while we are meeting with others.

While the parties are still together, we ask them not to negotiate with us in caucus. We explain that mediation is a negotiation and that there is nothing wrong with negotiating hard with one another; they should take care, however, not to negotiate with the mediator by unnecessarily concealing their positions. The risk quite simply is that they may fool us into terminating the process when settlement might have been possible had we only known what their true position was.

Finally, we remind our participants that our job is not to dazzle the participants by covering every conceivable point. Rather, it is to focus the parties on the critical areas of dispute, and to bring them something they do not have at this point: the objective view of an informed neutral who is seeing the case for the very first time.

B. The First Caucus

We begin the confidential caucuses with a more detailed explanation of the process and our style for attorneys and litigants with whom we have not worked before. We ensure that each participant understands what is about to transpire, and we establish the protocol by which we hope to operate. We explain

that "blunt and direct" works best—we would hate to miss a critical point because, in an effort to be tactful, we were less than clear. Naturally, we encourage our participants to emulate our direct approach. In sum, we exchange broad reciprocal licenses to be blunt and direct.

Next, we give counsel and client the opportunity to add any information, even if it is to be kept confidential. The purpose of confidential disclosures is to ensure that we understand all factors that the client must take into account in evaluating settlement options. With this information we can help to focus settlement discussions on the most realistic options. This is the venue for both education and catharsis. It is frequently necessary for an aggrieved party to have the opportunity to explain to a neutral how wrong they believe the other to be. We draw a delicate balance between allowing a party to vent and preventing their emotional fervor from translating into an ardent settlement position that is outside the realm of possible resolution. While providing the opportunity for honest expression, we maintain a focus on the pitfalls that may lie ahead. If, for example, a participant has just given a version of events filled with emotion, we might follow with a discussion of how that emotion can color perception and use a simple example to illustrate the point. If the person were a sports fan, an analogy might be how fans of one team see a foul on the same play that fans of another team do not.

The next step in the caucus is devil's advocacy. We believe this is the most important role we play in the mediation process. Effective devil's advocacy may be uncomfortable to hear. Although we tell the clients that we will adopt this role with equal vigor with all parties, they are about to hear only one side. It may sound as though we are biased in our evaluation.

We explain that devil's advocacy serves a dual function. First, it is intended to counterbalance overconfidence in how the case may turn out at trial. Second, we pay careful attention to each party's responses and use their arguments to augment our understanding of the issues as the day unfolds. We find that the most efficient method of gaining relevant information is to ask questions about what we don't understand, rather than ask a party to tell us everything they know. Furthermore, responses to our legal or factual devil's advocacy equip us to be more effective devil's advocates with the other parties.

After directly exploring the perils of litigation, we are faced with a decision: Should we request a confidential disclosure of the plaintiff's settlement expectations? On the one hand, it is

unwise to progress too far without having heard what each party feels they are willing to do. One risk is that a truly hopeless negotiation may be needlessly prolonged. Another risk is that, without a sense of the realistic range of settlement, the remaining caucuses will lack focus. On the other hand, if a "bottom line" is requested and articulated, there will subsequently be a formidable psychological barrier to crossing that line. We typically forebear asking and explain that realistic settlement possibilities will be evaluated when the initial round of caucuses is completed. We can then offer more realistic feedback on settlement expectations without divulging confidential information.

C. Subsequent Caucuses

Following the initial round, caucuses become briefer and more focused on the clients' decisionmaking process. At this stage, the mediation becomes less structured. The essential three elements (information, devil's advocacy, and options) remain in play, but their sequence and emphasis is more fluid. Typically, we attempt to shift the focus to realistic options for settlement. We try to avoid becoming caught up in arguing about disputed facts, because many participants have trouble setting aside their emotional attachment to the matter. It is important to overcome this dynamic and move toward constructive discourse.

For example, we often hear different versions of the same events from opposing litigants. The parties are naturally reticent to acknowledge that their version of the facts may not be accurate. Our task is to help them refocus their thinking from what they "know" is true to appreciating how things will play out before a judge or jury. It is a fundamental change in perspective—from their own subjective beliefs to an objective evaluation. This is critical—we can rarely change a party's notion of fairness as it relates to them, but we may be able to help them see that a neutral fact finder might determine fairness based on different factual assumptions.

We are also mindful of the perspective that lawyers bring to the mediation, especially when litigation has been particularly contentious. We remind lawyers that zealous advocacy carries with it the danger of underestimating potential weak points, even when counsel attempts to analyze the facts from every angle. Advocacy colors perception. We tell lawyers that we are trying to provide the insight of an informed neutral looking at a set of facts for the first time, much as the judge or jury may eventually do.

By demonstrating our grasp of the essential facts and issues, we help counsel and client move beyond advocacy. We sometimes demonstrate this understanding by accurately making the same arguments they might before a trier of fact. Our purpose is to send the message that if the mediator can articulate your case well, there is no longer any need to rehash factual or legal issues.

An understanding of the emotional component is equally important. Each mediator demonstrates empathy in her own way. We try to remain receptive to each litigant's unique issues and to remember that this work we do every day is often a major life or corporate event for a party. We do not tell parties "I know how you feel"—that is rarely true and usually sounds hollow. We do try to be real, and present, and let what we say and how we conduct ourselves reflect our understanding of their feelings.

After we have discussed the facts of the case, performed our role of devil's advocate, and established the common goal of finding a resolution, we help move the parties toward a discussion of realistic settlement options. After the first or second round of caucuses, we are usually in a position to share with the parties our estimate as to where, or on what terms, a settlement is possible. We emphasize that we do not determine the merits of the case but evaluate where the case may settle at the end of the day. We further explain that our range of what is possible at this stage is *not* an indication of the actual negotiating positions of the parties; it is, instead, an indication of what we think may result from a difficult day of facilitated negotiation.

The parties' reaction to our assessment determines the next course of action. If a participant feels the range indicated is something he can work with, the remainder of the day is spent fine tuning settlement positions and sharing our advice on how to move the negotiations forward. If the range is rejected, it may mean that a settlement is not possible, and we so inform the party. We then make a concerted effort to evaluate why the party is outside the range. We pay special attention to emotional, informational, and legal issues. To the extent that there is fundamental disagreement over the law or facts, we seek to answer it from the available documentation or legal resources.

D. Creating Movement

One of the most useful tools in our effort to bring about a change of position is documentary evidence that shows a contradiction or missed fact. One cannot overestimate the power of this

information. Often a previously undisclosed memo or letter will surface and call into question an underlying assumption of the case. For this reason, we strongly suggest to the parties with whom we work that they have at their disposal all relevant documents. In a complex case, even a document previously disclosed in discovery may have been lost in the shuffle.

We also focus on legal issues on which there are sharp differences of opinion. While such differences drive divergent settlement positions, they can also provide a basis for creative resolutions. We have, for example, mediated settlements in which the parties agreed to let the greatly reduced but still significant gap in settlement positions remaining at the end of the day be resolved by an abbreviated private trial on a single issue.

There is no single approach to overcoming emotional resistance to settling. Our approach ranges from directly confronting the problem ("Do you want to be making a major investment decision driven by anger?") to a more passive listening mode, allowing a party to vent her hurt or frustration until she is ready to look at the issues more objectively. Our ultimate goal is to shift the participant's focus from "right and wrong" to realistic options and objective evaluations.

E. Confidential Discussions With Attorney or Client

To help prevent parties from ending a negotiation when positions seem too far apart, we may speak with counsel or client separately. There are several issues that may be better addressed outside the client's presence: legal analysis, evidence of falsehood, economics of litigation, the type of witness the client will make, and client control. Because of time pressures, we may talk with counsel separately to accelerate through complex legal issues. Counsel can later explain them to the client while we meet with the other side.

If we discover that the client has failed to disclose a material fact to his counsel or appears to be misrepresenting the facts, we will often communicate our findings to counsel privately. The client may have trouble admitting even a glaring error, and he is quite likely to be defensive about his own veracity. Therefore, to communicate the prospective impact of a client's departure from the truth, separate discussions with counsel may be necessary.

We are often told by attorneys that how a client will react as a witness during a deposition or trial is an important element to their case—especially in matters where liability hinges on

the credibility of the litigants. As we engage in devil's advocacy throughout the process, we are in a good position to evaluate the quality of the litigants as witnesses. Depending on the personalities involved, it may be more prudent to confer with counsel alone to share our impressions. For example, we might pull counsel aside and suggest that because the client had difficulty remembering critical facts, a jury might conclude that the other party involved was more credible.

Another common refrain we encounter from lawyers is that they were motivated to mediate by the prospect of the mediator dealing with their client's unrealistic expectations. A private discussion with counsel often gives us additional insight to assist in the process. In some cases, we first discuss with the lawyer methods to bring the client into a realistic settlement range. Our next step is often a private meeting with the client.

Once we have developed a positive rapport, we may be able to break a stalemate through a private caucus, with the individual making the ultimate decision. Of course, we only take this step with the express authorization of counsel. What happens in this meeting depends greatly on the interpersonal relationship we have developed with the client. Examples include a discussion of the underlying emotional motivations for the lawsuit, a walk around the block to change the environment, or refocusing on the bigger picture. We might ask: "If you could really drive the other side into the ground and destroy them in court, does that feel right to you?" The common theme is using a higher level of personal contact to help a litigant make a difficult decision based on a realistic assessment of the options.

F. Concluding the Mediation

If the rounds of caucusing raise some hope of settlement, we continue the caucusing process. We eventually request confidential (but firm) commitments as to what each party will agree to in settlement, with the understanding that we will not disclose a party's position without their authorization. That is typically not until all parties have agreed. Depending on the complexity of the issues and the emotional content of the mediation, it can be well past the normal working day before final settlement terms have been agreed on. Our practice is to continue with the mediation until every last avenue for settlement has been vigorously pursued, regardless of the hour.

In the event that the parties are unable to come to a meeting of the minds as to a figure or other settlement term, we may use

a mediator's proposal to help close the gap. It is a final attempt to bring closure to a stalled negotiation. We select a number that neither side has previously considered but that has a chance of acceptance by all parties. We tell parties the number is not an evaluation of where a case *should* settle according to the merits but is our last, best hope, the only number at which this case could possibly settle in this mediation. We then communicate the number to each side and ask for a confidential response within a reasonable time frame. If both sides accept the mediator's proposal, we communicate the agreement. If either side rejects the proposal, then we communicate only that the mediator's proposal has been rejected without disclosing whether any party would have accepted it. An accepting party preserves its bargaining position in the event of a rejection from the other party, and a rejecting party will never learn that its adversary accepted a number.

We find a mediator's proposal effective in two primary circumstances. First, it may be very difficult for litigants to continue making incremental concessions. At some point, a personal limit is reached. A mediator's proposal can be used to reduce the negotiations to one final compromise when further incremental negotiations would not be productive.

Second, the mediator's proposal removes the concern that a bottom-line number will be seen by the other side as the final position. Parties are sometimes unwilling to move significantly from their expressed position without the certainty that the other side is taking similar steps. Our confidential process allows a private compromise that is made public *only* if it is reciprocated.

Once an agreement to settle is achieved, we insist it be reduced to a written summary and executed at the mediation. The written document recites the essential settlement terms, notes that more formal settlement documents will subsequently be prepared and executed, and recites that the terms of the memorandum are binding and may be admitted into evidence in subsequent proceedings. When the parties prepare and sign a settlement memorandum at the mediation, it substantially reduces the chance of the settlement falling apart. It also ensures that the essential terms are clearly understood and tends to bring issues to the surface that may have gone unconsidered in the course of the negotiations. Although it is painful to have such problems arise at the 11th hour, it is much better to deal with them during the mediation, while everyone is focused on settlement, than later, when buyer's or seller's remorse may have set in.

VI. AFTER THE MEDIATION

After the mediation, our office maintains contact with the participants to solicit evaluations, tie up loose ends on settled matters, or continue working with cases that do not settle. There are often new developments that may impact settlement. For example, if one party is reluctant to settle due to an unshakable belief that they will prevail on a motion for summary judgment, we find it productive to contact them after the motion to assess its impact on settlement positions. Our final step is a call to solicit feedback. We encourage our clients to be direct so that we can use their comments and constructive criticism to improve our service.