



# MEDIATION ADVOCACY

THE ROLE OF LAWYERS  
IN MEDIATION

*By Dwight Golann*

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## THE PROJECT BEHIND THE BOOK

The present e-book, written by Professor Dwight Golann for ADR Center, is published in the context of the EU funded project “Lawyers in ADR”, implemented by ADR Center in cooperation with Utrecht University (Netherlands), University of Deusto (Spain), UEAPME (Belgium), ACB Group B.V. (Netherlands) and ECLA (Belgium) in order to promote mediation in the EU Member States.

“Lawyers in ADR,” which is part of the Specific Programme “Civil Justice” 2007-2013, is the shared name of three connected EU funded projects whose main purpose is the promotion of knowledge and use of the *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*.

More generally, “Civil Justice” aims to promote judicial cooperation among the 27 EU Member States. The activities funded under this programme are meant to contribute to the creation of a genuine European area of justice in civil matters based on mutual recognition and confidence; encourage the elimination of obstacles to the functioning of cross-border civil proceedings in the Member States; improve the daily life of individuals and businesses by enabling them to assert their rights throughout the European Union, notably by fostering access to justice; and improve the exchange of information, contacts, and network between judicial and administrative authorities and the legal profession. Additional information on ADR Center projects within the Civil Justice Programme is available at [www.adrcenter.com/civil-justice](http://www.adrcenter.com/civil-justice).

In particular, the above-mentioned projects aim to remove impediments to mediation for EU lawyers, set common standards for mediation advocacy, especially for cross-border cases, and facilitate cooperation and sharing of know-how among lawyers from EU countries in the field of Alternative Dispute Resolution (ADR).

This e-book is for lawyers whose goal is to represent their clients effectively in mediation. It helps lawyers to achieve this goal by explaining how they can use the special format and characteristics of the mediation process, and the unique skills of mediators. The essential message is that a lawyer should be an active, rather than a passive, participant in the process, shaping it and taking advantage of the mediator’s assistance to achieve the client’s goals.

In addition to publishing this e-book, which focuses on the role of outside counsel at the mediation table, ADR Center has implemented a wide series of ADR-related activities such as training courses on civil and commercial mediation for lawyers throughout Europe; a video on cross-border mediation translated into 23 official EU languages; a survey on data gathered to quantify the cost of not using mediation; a website containing the abovementioned project results and many other ADR tools.

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# INTRODUCTION

This book is intended for lawyers who represent parties in mediation. It explains how attorneys can use the structure of the process and the special powers of mediators to achieve their bargaining goals.

Lawyers have traditionally seen mediation as a method to facilitate competitive bargaining. In this view, a mediator's primary role is to carry offers back and forth between the parties and shield them from the impact of each other's hard tactics—a combination of “telephone” and “boxing glove.” When such bargaining breaks down, the mediator is expected to give each side a “dose of reality” in the form of an opinion about their legal arguments, and perhaps also suggest terms of settlement. Many lawyers still favor this approach, but it does not take full advantage of what a mediator can do.

Mediators have power. They cannot compel parties to settle, but they influence the process of bargaining. Wise lawyers take advantage of this. As one mediator remarked about a litigator, a note of admiration in his voice, “He moved me around like a chess piece!” Indeed good mediators are like chessboard knights; they have many capabilities, and attorneys can use them to advance their bargaining strategies.

Mediators can enhance a lawyer's ability to negotiate in many ways. A mediator can, for example, improve communication between parties by conveying messages or explaining what an offer means (“Tell them we are at €25,000, but are prepared to talk seriously once they drop their claim to future profits.”) Mediators can also provide information about the attitude of an opponent (“Has the plaintiff become any calmer since we met this morning?”) and can arrange informal discussions (“I think it would be helpful if we set up a private discussion between the two CFOs.”)

Advocates can use mediation to pursue both competitive and cooperative negotiation strategies. Thus, for example, a lawyer can make an extreme opening offer in mediation with less risk than if she used the same tactic in direct bargaining, because she can rely on the mediator to cushion the impact of the tactic (“scrape the other side off the ceiling”). Lawyers can also use mediation to support creative approaches, for example by pressing a claim for money while privately asking the mediator to explore whether the other side is open to repairing a business relationship.

Particularly toward the end of the process, a lawyer is likely to find himself in a three-sided negotiation, bargaining not only with the other party but also with the mediator. Advocates can negotiate, for example, about whether the mediator uses a specific technique (“Before you give your own view about liability, I'd appreciate it if you would let each side make another offer”) or can request that the mediator use a tactic (“Why don't you suggest to both sides that they...?). Attorneys cannot expect a mediator to take sides in a dispute, but if a tactic is neutral the mediator may well follow a lawyer's suggestion to use it.

The key lesson is not to approach the process passively, but instead to use the mediation process in an active way to advance your clients' interests. Based on the author's experience as a mediator with attorneys from Europe, Asia and North America, this book offers suggestions about how a lawyer can “borrow” a mediator's powers to achieve an optimal outcome.

## 1. THRESHOLD DECISIONS

### a. Should you mediate?

The first issue is whether to mediate at all. You should recommend mediation to a client if the following conditions are met:

- There is a reasonable chance that the client can obtain a more valuable result by negotiating than by litigating, considering the risk and cost of continuing the conflict,
- It is difficult or impossible for the parties to negotiate directly, and
- It appears likely that mediation can help the parties overcome the obstacles that are frustrating the bargaining process.

Potential obstacles include:

- Process issues, such as the absence of a key decision maker or the use of hard bargaining tactics by a negotiator.
- Strong emotions that are distorting the judgment of one or more bargainers.
- A lack of information that prevents parties from accurately assessing their legal case.

*Reasons not to mediate.* In some situations mediation may not be appropriate. For example a party may:

- Need a judicial decision to use as a standard to settle other claims.
- Fear that a settlement will stimulate additional “copycat” claims.
- Require a court order to control an adversary’s conduct.
- Wish to use the judicial process to gather information.

Mediation may also be ineffective if:

- A crucial stakeholder refuses to join the process.
- One party is benefiting from the existence of the controversy, for example to inflict competitive harm on an adversary (such a tactic may, however, be unethical).
- One of the parties is not able to make decisions effectively because he is psychologically impaired.

## **b. If so, when?**

Assuming that mediation is appropriate, when is the right time to enter the process? There may be no choice, because your client is required to mediate by a contract or a court order. If you have a choice, however, the issue of timing depends on your goals. If your primary objective is to solve a problem or repair the parties’ relationship, it is usually best to mediate quickly. If not the parties’ positions are likely to harden, and one party may replace the relationship with a new one, making a repair much more difficult.

If, however, your client’s priority is to obtain the best possible monetary outcome, then the issue of timing is more complex. By delaying mediation a lawyer may be able to improve a client’s bargaining position, for instance by winning a decision in court. But litigating is expensive and the opponent may adopt the same strategy, increasing costs for both sides and making a settlement even more difficult.

Disputants tend to enter legal mediation at particular points, often when they face an increase in cost or a serious risk of loss. Natural points to discuss settlement are before a formal legal action is filed, after initial proceedings are complete, and in the shadow of a trial or court ruling.

- *Before a legal action is filed.* Parties may decide to mediate before entering litigation. By doing so each side accepts a trade-off: It has less information, but avoids the cost and disruption of legal proceedings. In recent years parties have become increasingly willing to mediate before filing a legal action.
- *After initial proceedings.* Another option is to file a court action and take the initial steps needed to protect one’s position, gather information and frame the issues. Once this is accomplished, however, the parties may elect to mediate. In doing so they follow what is known as the “80-20 rule”: 80 percent of the relevant information in a case is usually obtained in the first 20 percent of time and money spent on it. Given this reality, lawyers may decide to take preliminary steps to determine the strength of a case, then enter mediation to see if it can be resolved.

■ *In the shadow of a significant ruling.* Lawyers traditionally have waited until just before trial or another significant litigation event to pursue settlement discussions. They do so because as trial approaches attorneys must prepare intensively, imposing major costs on both lawyers and clients. Trial also represents the ultimate win-or-lose event, posing a serious risk for both sides. Finally, the period just before trial is often viewed as the “right” time to talk about settlement without showing weakness.

## 2. INITIATING THE PROCESS

### a. Convincing Clients or Opponents to Mediate

The biggest single obstacle to entering mediation is probably the concern of many parties and lawyers that their opponent will interpret an expression of interest in settlement as a signal that a party does not believe in its legal case. There are ways to avoid or lessen this concern, however.

■ *Point out that settlement discussions are inevitable.* You might note that you like to litigate—it is your profession, after all. But since very few cases go to trial, it is very likely that the parties will talk settlement at some point. Why not explore it now and save everyone cost and delay?

■ *Rely on a policy.* A corporation or law firm can adopt a policy of exploring settlement early in every dispute. Lawyers can then avoid the implication that they are suggesting mediation only because their legal position is weak.

■ *Ask a provider organization to take the initiative.* Another option is to ask a mediator or a provider organization to suggest mediation to an adversary. Your opponent will probably know that you initiated the approach, but using a third party allows you to avoid having to “sell” mediation yourself.

■ *Cite a rule.* Some courts require lawyers to negotiate or mediate before filing a case or going to trial. If so, an attorney can suggest that the parties design their own process rather than be pushed into a rigid judicial program. Even if a court does not have such a requirement, a lawyer might privately ask a court official to suggest mediation to the parties.

These suggestions assume that the challenge is to persuade the opponent to mediate. Often, however, the barrier is a lawyer’s own client. In the words of litigator David Stern:

*There are no hard and fast rules as to when that perfect moment has arrived to mediate, but one point is clear. Before you begin, recognize that the first obstacle to starting the dialogue early may well be your own client, particularly if you have not represented him in the past. He may wonder if you lack confidence in yourself or the case if you push for settlement too early. On the other hand, if you don’t mention settlement to the more sophisticated client, he may well wonder whether you are looking to “milk” a case that will likely never be tried. Begin with the adversary only after you have reached a consensus with your own client. (Stern 1998)*

### b. Drafting an effective contract to mediate

There are two basic situations in which a lawyer must deal with contracts concerning mediation:

■ A dispute exists and the parties have agreed to mediate, but they need to decide how the process will be conducted.

■ The parties have no present dispute, but wish to commit to mediate any controversy that may arise in the future.

#### (1) Agreements to mediate an existing dispute

If parties have agreed to mediate an existing dispute they can benefit by entering into an agreement that covers the following issues:

- What rules of confidentiality will apply to the process?
  - Can a statement or document used in the mediation be used in a later judicial proceeding?
  - Can information provided in mediation be disclosed to anyone outside the process or the media?
- Who will pay the cost of mediation?
- How can a party terminate its participation in the process?
- What rules will apply? For example can the mediator offer an opinion about the legal merits without the parties' consent?
- Will litigation be suspended or legal claims preserved while mediation occurs?

Most mediation providers have standard forms that deal with these issues, and attorneys ordinarily execute such forms without changes. An example of a form mediation agreement appears in the Appendix.

The most common area of disagreement about terms of mediation concerns how the parties will share the cost of the process. If, for instance, a plaintiff sues three related corporations represented by one law firm, should the plaintiff bear one-half and the defendants the other half, or should the defendants pay three-quarters of the cost? Mediators are usually reluctant to become involved in such disputes, but they may be willing to facilitate a discussion about allocation of the cost if the total amount is not in dispute—that is, if they do not have a personal interest in the outcome.

## ***(2) Agreements to mediate future disputes***

Parties entering into contracts may include a provision that commits them to mediate any future dispute in their relationship. Businesses entering into cross-border agreements, for example, are likely to encounter unforeseen changes and benefit if they have a process to resolve such problems quickly and amicably. Examples of a mediation clause and a “multi-step” clause that calls for negotiation followed by mediation and arbitration appear in the Appendix.

Once a dispute arises, one of the parties to an agreement may wish to mediate while the other does not. The party favoring mediation may decide not to seek to enforce the obligation to mediate, reasoning that it is useless to force someone to engage in mediation against their will. Alternatively, a party that does not want to mediate may decide that it is easier to go through a mediation session than to argue about it.

If, however, one party demands to mediate and the other refuses, a court may be asked to enforce the obligation. At first courts refused to enforce mediation clauses, concluding that it would be impossible or burdensome to determine whether a party had participated in mediation in good faith. Recently, however, courts have become more willing to enforce such obligations, at least where a party has refused to participate at all. Among the sanctions courts may impose are:

- If a plaintiff fails to mediate, dismiss or suspend the legal case until the plaintiff carries out its obligation.
- If a party fails to appear at a mediation session, require the offender to pay the mediation costs and perhaps also the legal fee of the other side's attorney.
- If a party refuses to mediate and later prevails in court, deny it costs or attorneys' fees it would otherwise be awarded.

To be enforceable an agreement to mediate must be clear. To accomplish this:

- Use simple language and set clear timeframes,



- Avoid ambiguity: In particular, keep the commitment to mediate separate from any obligation to arbitrate,
- Describe specifically what remedies or penalties a party may recover if the other side violates the agreement, and
- Provide a mediation process that is fair in light of the nature of the underlying transaction. (Katz 2008)

### c. Dealing with obligations created by law or judicial order

Your client may be required to go into mediation by a law, court rule, or judicial order. If so, consider the following points:

- Will you have a role in choosing the neutral? Some programs designate a specific person, while others require parties to select a mediator from a list of candidates.
- Who will be required to attend? Some programs require parties to send representatives with “full settlement authority,” which can create problems for large organizations with cases pending in several court systems.
- Will you be permitted to provide a statement of your case or documents to the mediator in advance?
- Will you be required to pay for the process? If so, how much?
- Will you be required to mediate in any specific manner or time period?
- Will statements and documents used in the mediation be confidential and not admissible in later court proceedings?

If you are not satisfied with the court’s program, consider whether you can modify the process, either by agreement with the other side or through a request to the court. If you do not want to engage in court mediation at all, ask:

- Is it possible to decline to participate, or to apply for an exemption from the program?
- What is the minimum you must do to comply with the program rules?
- What penalties are likely if you do not comply?

## 3. SHAPING THE PROCESS

### a. Select a Mediator

#### *(1) Identify the best person*

The most important issue in designing a mediation, apart from obtaining the presence of the right party representatives, is to select the right mediator. In many cities there is a pool of potential mediators who vary greatly in experience, background and style of mediation. You will want to find the person whose qualities best match the needs of your case.

Begin by thinking about what is preventing the parties from negotiating effectively. If, for example, the problem is that your opponent (or your own client) has an abrasive personality, then you will want a mediator with strong process skills. If the major obstacle to agreement is that your opponent has misjudged the strength of its legal case, a former judge may be most effective. If a party is willing to settle, but needs to justify a difficult compromise, someone with a strong reputation who can endorse the decision may be the best choice. Often more than a single barrier exists, calling for a mediator with a blend of qualities.

Recently researchers asked the lawyers who hire some of America's most successful business mediators what qualities they value in a neutral. The central conclusion of the study was that "a—if not *the*—core element in mediator success is the mediator's ability to establish a relationship of trust and confidence with the disputing parties." (Goldberg and Shaw 2007) The single most important factor in choosing among qualified mediators is thus how well they will be able to relate to the parties, including your own client. Will your client feel more confidence in a former business executive or an experienced litigator? Will the key decision maker on the other side defer to an ex-judge? How effective will a candidate be at establishing rapport with strangers quickly?

To decide whether a candidate possesses the necessary qualities, you and the opposing attorney may wish to interview him by telephone. Some mediators refuse to talk with lawyers in advance, but many neutrals are willing to do so, feeling more freedom to discuss a case as a potential mediator than as an arbitrator.

## ***(2) Bargain for your choice***

Bargaining for a mediator is like other negotiations, except that finding the right neutral can be a "win" for both sides. Commonly each of the lawyers prepares a list of candidates and they exchange names; sometimes a name appears on both lists, but if not the lawyers discuss which of the listed candidates to choose or add names to the pool.

Another option is to suggest that the opposing lawyer prepare a list of candidates. If the lawyer suggests someone whom you also would nominate, you can obtain a good mediator who already enjoys the confidence of the other side. If you respect the opposing lawyer, you might even allow her to select the mediator, while you retain only the right to veto a choice. Allowing an opponent to choose your mediator may seem strange, but if your goal is to persuade the other party, the most effective mediator may be someone they themselves have chosen.

## ***(3) Select an individual mediator or use a provider organization?***

The discussion to this point has assumed that attorneys are selecting an individual to serve as mediator. Another option is to agree with opposing counsel to have a provider organization propose a list of candidates from a panel of neutrals it maintains, or even select a mediator itself.

Using a provider organization to administer your mediation has advantages. When a neutral entity is involved, candidates are less likely to be viewed with suspicion because the list of nominees is not "owned" by either side. Organizations can also usually provide offices at which to hold a mediation; individual mediators may not have access to a neutral setting. An organization can also arrange for payment of mediation costs and exchanges of documents, allowing the mediator to avoid becoming involved in administrative matters.

Engaging an organization is nearly essential when businesses entering into a contract agree to mediate any disputes that arise under the contract in the future. One can name a specific individual as the neutral in such a contract, but there is no way to be certain that the individual will be available if a dispute arises. An organization, by contrast, is able to substitute one mediator for another to deal with retirements, illnesses, scheduling problems, and other unforeseen events.

## **b. Shape the field**

### ***(1) Insure the presence of necessary participants***

The presence of the right persons at the mediation table is crucial to the success of the process; indeed the identity of the bargainers is often more important than the identity of the mediator. We have placed this issue after selecting a mediator, however, because once you have selected a mediator, you may be able to call on her help to get the right people at the table. Who the right people are in a particular case will depend again on your objectives. They may include:

■ *Principals.* If the primary goal is to repair a personal relationship, then the presence of the principals, to talk through their problems and regain the ability to relate with each other, is usually essential. The same may be true when the outcome is intensely important to a party, as in a “bet the company” case.

■ *Experts.* If the objective is to work out an imaginative solution, it is necessary to have people who are capable of thinking imaginatively, as well as experts who know enough to develop and assess options. Restructuring a contract, for example, may require the participation of financial, production or marketing executives.

■ *Persons with authority.* If the parties no longer have a relationship and there are no serious emotional issues, as occurs for instance when a company makes a routine claim against its insurance policy, then the primary concern is usually to be sure that each side’s bargainer have the authority to agree to a substantial compromise.

Lawyers must sometimes bargain to insure that the other side, or even their own client, has someone at mediation with the knowledge and authority to make difficult decisions. A mediator can help with this task.

*A German company bought a shipping line from a Spanish corporation. It later sued the accounting firm that had performed audits for the seller, arguing that the firm had concealed misconduct by the shipping line’s executives and overstated its profitability, leading the buyer to pay too much.*

*The lawyer for the buyer called the mediator ahead of time and told him that it was crucial his client, the CEO of the German buyer, attend the mediation. However the CEO would not come unless the managing partner of the accounting firm also attended the mediation personally and the CEO, who the lawyer said had a strong ego, would not be the first to commit to attend, for fear of seeming too eager to settle. The mediator called the defense attorney, who agreed that it would be very helpful if the principals attended, but said his client also did not want to be the first to agree to come.*

*The neutral decided to ask each side to tell her privately whether its principal would attend if the other did so. They both answered positively; she then announced that both decision-makers would attend.*

This example illustrates how good lawyers can use a mediator to “shape the field of bargaining” to their client’s advantage. Mediators, however, usually do not know about these kinds of non-legal issues until after the process begins, which makes it important for attorneys to warn them.

When you ask a mediator for assistance in setting up the process you benefit from several factors. First, having agreed to mediate your opponent will feel an interest in maintaining a good relationship with the neutral. In addition, mediators are likely to show a bias toward inclusion: Better, the neutral will think, to bring in someone who later proves unnecessary than to lack a key decision-maker at an important moment.

*A software company sued a former employee in the Italian courts, arguing that he had violated a non-competition agreement by recruiting his former development team to join her at her new company. The parties agreed to mediate.*

*The competitor company, a Polish entity, was not a party to the litigation, but its participation was essential to any settlement because it had agreed to indemnify the employee for any liability arising from his activities in recruiting employees. However, its chief executive refused to attend the mediation, saying that Rome was too far to travel and that in any event his company was not a party to the case.*

*The plaintiff’s lawyer asked the mediator to persuade the executive to come. He stressed how important his presence would be to the success of “our” case. The mediator responded to the challenge and contacted the competitor’s CEO repeatedly. Although the executive refused to attend in person he agreed to join all sessions by video, and his participation proved crucial to reaching agreement.*

## **(2) Agree on a format**

*Timing.* You and your opponent must agree on a time period for the mediation. Should it be scheduled for a few hours, one day, several days, or a series of sessions over a longer period? The tension here is between allowing enough time for the process to work and not encouraging the parties to put off tough decisions. In general:

- One day is usually appropriate for a contract dispute, although the process may continue into the evening and the party representatives should plan for this.
- Two days or more are sometimes necessary for construction cases, because they usually include several parties and present “mini-cases” over various aspects of a project.
- Exceptionally complex disputes, either in terms of the number of parties or the nature of the issues, may require several meetings over a period of weeks or months. Examples may include antitrust cases, public controversies, and environmental contamination claims.
- When in doubt err on the side of allowing more time. You will always have the option to finish early, but reassembling the parties for another session can be difficult.

*Structure.* Commercial mediation usually occurs in the following format:

- *An “opening” or “joint” session.* At the start of the process the participants and the mediator usually meet together. The disputants introduce themselves and the mediator makes opening comments. Each side then makes an opening statement and may also respond to what the other has said. The mediator may then suggest that the parties discuss the case or ask questions herself. The opening session may last from only twenty minutes, if the mediator simply introduces the process, to several hours if there are lengthy presentations followed by discussion.
- *“Caucusing.”* Once the opening session reaches a point of limited productivity, for example because parties are repeating themselves, the mediator will usually suggest that they adjourn to separate rooms for “caucusing.” Caucusing allows the mediator to talk with each party privately, carrying information, arguments and offers back and forth between them.
- *Meetings and sub-meetings.* The parties or their representatives may also meet again as a group, or informally in smaller groups. Sub-meetings can occur between principals, experts, lawyers, or other participants in the process. The mediator is usually but not always present at such meetings to moderate the discussion.

The format set out above is customary in commercial mediation, but nothing prevents parties and the mediator from adopting a different format by agreement, either before the mediation session or on an ad hoc basis.

One question to consider ahead of time is whether you prefer to start with an opening session in which the parties discuss the case, or to go directly into caucusing. If you want to change the usual format you should discuss this with the mediator in advance if possible.

## **(3) Impose, or deal with, preconditions**

Lawyers sometimes attempt to take advantage of an adversary’s wish to mediate by imposing preconditions on participating in the process. The conditions can involve procedural or substantive issues.

A typical process precondition concerns attendance: A party may say, for example, that if unless a certain person attends they will not mediate (“We won’t come unless they bring their CFO”). Disputants sometimes impose preconditions on the bargaining process itself, for instance by refusing to mediate unless the other side first makes a concession (“We won’t mediate unless they drop their demand to €500,000 to show good faith”). Alternatively, a party may retract a past concession (“We were at €1 million last year, but we offered that to avoid the cost of litigation. Since then we have spent large amounts of time and money on the case; as a result, our offer now is €700,000.”)

In general it is less risky to impose preconditions in mediation than in direct negotiation, because a mediator can cushion the impact of such tactics and deal with the anger they generate. A procedural precondition is also less likely to offend an opponent than one that relates to bargaining, because procedural demands can often be characterized as neutral—merely an effort to insure that the process is productive (“They want your CEO because they’re serious about seeking a deal.”) Demands for concessions as a precondition to mediating, or decisions to withdraw earlier concessions, by contrast, often infuriate opposing parties, who see them (correctly) as efforts to gain a bargaining advantage.

### **c. Educate the mediator and the parties**

You will ordinarily have the opportunity to communicate with the mediator before you meet to mediate and should take advantage of it. Communications can take the form of written statements, conversations and meetings.

#### ***(1) Brief the neutral***

In commercial cases parties almost always file written statements and documents with mediators in advance. As you plan for this, think about these issues:

- Do you prefer to prepare a customized statement of your case, or use an existing document or pleading? A customized document has obvious advantages, but particularly in small cases or when mediation is scheduled on short notice it may be preferable to use an existing document. Mediators may also be willing to receive statements in less formal letter or memorandum formats.
- Should you submit a statement to the mediator privately or exchange statements with opposing counsel? Mediators usually prefer that lawyers exchange statements, so they are free to discuss one side’s arguments with the other. Even if you exchange statements, you may be able to discuss a sensitive issue confidentially with the mediator through a private letter or telephone call.
- Should you work with your opponent to compile a common set of documents, especially in complex cases? A single set of documents is easier for the mediator to manage, but using separate documents allows you to highlight the passages in each document which are most important to your arguments.
- What should be in your mediation statement? The mediator is likely to be interested in knowing:
  - How did the dispute arise?
  - Who are the important actors in it?
  - What are the key factual and legal issues and important points of agreement and disagreement?
  - Without reciting every event, what has occurred in the legal proceedings?
  - Have the parties held any direct negotiations? If so, what was the last offer on each side and who made the last concession?
  - What, in your opinion, has made it difficult to settle the dispute through direct bargaining? Are there non-legal concerns in the case?
  - Is there any possibility of settlement terms that go beyond a simple monetary payment?
  - Does either side need more information to mediate productively?
  - What documents should the mediator review in advance? If the documents are lengthy, what parts are most relevant to your arguments?

If you do not wish to provide this information to the other side, you may be able to communicate it through a private conversation with or letter to the mediator.

In cases that involve complex facts or law you may want to arrange for the mediator to receive a briefing from each side before the mediation session. It may also be important to provide the mediator

with reports from experts or to have the mediator meet with experts in advance. If the condition of land or buildings is at issue, it may be useful for the mediator to visit the site.

## **(2) Exchange information**

A key aspect of any negotiation is exchanging information, and part of mediation's value is its ability to enhance the flow of data between bargainers. What information is relevant in a case will depend again on your goal in the process. If bargaining turns on a money claim, then legal evidence and arguments are likely to be important. If your goal is to repair a relationship, knowing the "why" behind a disputed action will be significant. If the objective is to restructure a business arrangement, financial data may be useful. As a rule, negotiations that focus on creative options require a broader range of information than discussions that revolve solely around money.

A great deal of information exchange can occur during the process itself. Especially if parties mediate early in a dispute, one or both sides may not yet have the information they need to settle. An insurance representative, for example, may not be able to obtain the authority needed to resolve a claim without documents to verify the plaintiff's expenses, while a plaintiff lawyer might be unable to accept a compromise settlement until he is satisfied there is no "smoking gun" in the defendant's files.

Some of this information is most useful if it can be analyzed in advance. To identify what information needs to be exchanged before mediation occurs, ask yourself two questions:

- What information does my client need to make a good settlement decision?
- What information will persuade my opponent to agree to the terms I want?

It is important to bear in mind that you can enlist a mediator's help to obtain data from an adversary or even to explain to your own client why it may be useful to give an opponent "free information" in the case.

*A computer manufacturer asserted a claim against its chip supplier, arguing that the chips had an unreasonably high rate of failure, which required the manufacturer to make expensive repairs to servers located around the world. The parties agreed that the problem was caused by a defective compound the chip maker had bought from a leading Asian supplier, and that the chipmaker could not have foreseen the problem. Still, the computer manufacturer argued that the chipmaker was required to pay its expenses, which it estimated would total €36 million.*

*The two companies agreed to mediate before entering litigation, but when they exchanged briefs the chipmaker realized that the manufacturer's claim was unclear—it could not understand how losses had reached such a level. The claim was also impossible to satisfy—the chipmaker would go bankrupt if it had to pay even a fraction of the claimed damages.*

*With the mediator's assistance the parties agreed to postpone the mediation session for one month and exchange data. The manufacturer supplied documents explaining its damage estimate and the chip maker provided information about its financial situation. The chip maker also furnished data about new products under development and suggested the manufacturer take part of a settlement in discounts on future purchases.*

## **(3) Private discussions**

Depending on local rules and customs, you may have the option of talking with the mediator privately before the mediation begins. Such discussions can be very useful, because they allow lawyers to give a mediator their perspective on the dispute while the neutral is still trying to understand the problem.

Attorneys usually devote such pre-mediation calls primarily to arguments about the legal case. This is usually a mistake. Mediators will find it difficult to remember a long oral discussion, and your arguments will usually be set out clearly in your mediation statement. Instead, think about giving the mediator only a quick outline of the legal case and then focus on non-legal obstacles and personal

dynamics that are frustrating negotiations. Remember that you are ordinarily free to designate some or all of what you say in such a conversation as confidential.

You may also want the mediator to meet with you and your client before the process begins. In a case in which a client is intensely emotional, for example, a meeting may allow the party to begin dealing with his feelings and to develop rapport with the neutral. Keep in mind, however, that the mediator will probably ask the opposing counsel's permission to hold this kind of meeting, however, and that local rules or customs in some jurisdictions may forbid them.

#### **d. Plan strategy and orient the client**

Mediation is a process of assisted bargaining. For this reason, preparing to mediate is in many respects no different from planning for any serious negotiation. Mediation differs from direct bargaining, however, in several important ways.

One is in intensity. Ordinary bargaining may occur intermittently over a period of months or years, without any clear structure and often over the telephone or by email. Mediation, by contrast, is usually set up as a "settlement event": Parties agree to meet on a certain date in the presence of a third party and to bargain continuously to a resolution. While mediations may be temporarily adjourned, parties usually enter the process assuming that it will be a one-time event, and that if they do not settle or at least make progress at the first session, the mediation will not continue.

It is perhaps for these reasons that seventy-five percent or more of all legal mediations result in settlements. As a result you should plan thoroughly, covering everything from your first offer to final terms of settlement. You should impress on your client that it is very likely entering the culminating event of the case and should prepare accordingly.

In addition, unlike direct negotiation, which is often conducted through telephones or by email, participants in mediation almost always meet in person. As a result, the decision-makers will observe and interact with—and be open to observation by—the opponent and the mediator.

The most important difference between mediation and direct negotiation, however, is the mediator. The presence of the neutral means that the process at times sometimes resembles a two-party facilitated negotiation and at times a three-sided interaction among the parties and the mediator. As a lawyer in mediation, you will bargain with your opponent over settlement terms, but may also negotiate with the mediator about how the process will be conducted.

*Preparing the client.* The special nature of mediation requires an attorney to cover the following topics with a client, in addition to the issues involved in preparing for an ordinary negotiation.

- How the format of mediation differs from that of a typical negotiation, including:
  - The procedure: for example will there be an opening session?
  - The confidentiality rules that apply and any exceptions.
- How the client should interact with the mediator and the opposing party, including:
  - The mediator's background, personality and style. Alert the client that the mediator may change style as the process moves forward, for example by changing from an empathic listener to legal evaluator.
  - The allocation of roles between you and your client. For instance will the client have a speaking role in the opening session? In private discussions, will you talk while the client listens, waiting to confer until the mediator leaves the room? Will the client play "good policeman" while you play a tough one?

- The role you will play in the process. Explain that your overall goal, getting the best possible outcome for the client, remains the same, but that you must adapt your tactics to the fact that you are in a bargaining session involving a neutral facilitator.
  - You may act more conciliatory in mediation than you would in a court.
  - You may not mention favorable evidence, so as not to alert your adversary
- How the client should respond to questions.
  - Note that the client is free to decline to answer questions posed by the opponent or even the mediator.
  - Warn the client that you may argue politely with the mediator.
  - Explain that you can ask the mediator to leave the room so that you and the client can talk privately.
  - Explain that the client may be invited to meet privately with the other party and the mediator outside your presence, and that she should talk with you before agreeing to this.

## 4. STAGES OF MEDIATION

### a. The Opening Session

Once mediation begins your opportunities to influence the process continue. As noted, most commercial mediations begin with an opening, or joint, session. Lawyers sometimes avoid the opening session, preferring to go directly into caucusing, or treat it as a mere prelude to the “real” settlement process, the caucus discussions. Both approaches are usually a mistake. An effective opening session can help a lawyer and client achieve their goals.

#### ***(1) What is special about an opening session?***

An opening session resembles a court hearing in that attorneys engage in advocacy in the presence of a neutral moderator. Mediation is, however, a “cooler” medium than a court. It usually takes place in a conference room with the parties seated at a table and the mediator sets an informal tone similar to that of a serious business negotiation. As a result a subdued style of advocacy is usually more effective in mediation than courtroom theatrics.

A cooler, less formal presentation also makes sense because of the nature of the audience. Unlike a court hearing, the primary audience in mediation is ordinarily the opposing party; only the opponent, after all, has the power to agree to the terms you seek. Unfortunately your opponent is not neutral and is probably unwilling to listen to strident advocacy. The opening session of mediation may be the only point in the entire litigation process when you have the opportunity to talk directly to the principal decision-maker on the other side. Use this to advantage by employing the arguments and tone most likely to influence your opponent.

#### ***(2) Structuring the session for maximum impact***

When thinking about what to say during an opening session, consider the following issues:

*What tone should I project?* Your tone should again be consistent with your client's goals. If your client wants to repair a relationship, adopt a relatively cooperative tone and focus on personal or business issues rather than legal points. If your client wants to focus on getting the best possible monetary outcome, it may be appropriate to emphasize the strength of your legal case and your determination to persevere until you obtain a satisfactory result.



The nature of the dispute is also important: A claim that a company was negligent in carrying out a contract, for instance, is very different from an allegation that it misrepresented the truth. The nature of the audience also matters: You will want to speak differently to an opposing executive than to a widow.

*How to frame the presentation?* The informal nature of mediation gives you great freedom to customize your presentation. You can:

- Restrict yourself to legal issues or cover other topics.
- Rely on a spoken presentation, documents or computer images.
- Have a client or expert speak or use a mix of persons.
- Within broad limits, take as much time as you need.

If you plan to say nothing or to take an unusual length of time, need special equipment, or have unexpected elements in your presentation, alert the mediator to this in advance so that he can facilitate your approach and warn you of any obstacles.

Exhibits can have a greater impact in mediation than in court, because documents can stay “on the table” for hours. Evidence also cannot be excluded; if a document is inadmissible in court your opponent will probably point this out, but something that would not be accepted into evidence can still have an effect, especially on non-lawyers.

*A plaintiff's lawyer identified an embarrassing email sent by the defendant's CEO. She had it enlarged on a one-meter-high board and set it up behind her as she talked. The words seemed to fill the conference room, to the discomfort of the defendant team.*

*When she finished she left it leaning against the whiteboard. The defendants' lawyer took the board with the email down and put it facing the wall. When the plaintiff attorney began her reply she put the quotation back up, emphasizing that the words would return to bedevil the defense.*

Persons or items physically present in the mediation room have more impact than witnesses or documents that are merely described. This is because mediation is subject to:

- A “primacy” effect: Evidence that people can see or touch has much more impact than information they merely hear about.
- A “melding” effect: If a party or mediator cannot see a witness, he must put the witness into a general category such as “accountant” or “nurse” and apply his general image of what such a person is like. If, however, a party or mediator observes a person directly he is much more likely to appreciate their individual qualities.

These effects are especially important because the mediation session will be the first opportunity for the mediator and perhaps also the representative of the other side to observe a witness.

The situation as to documents is different. The mediator will usually have reviewed the key documents in the case in advance, but the decision-maker on the other side may not have seen the document or understand why it is significant.

If you have a witness or a document that strongly supports your case, therefore, consider bringing the person or item into the mediation room and focus attention on it during the opening session. The impressions the mediator or an opposing party receives at the outset of the process may influence them later.

Keep in mind also that once the mediation session begins the mediator will usually not have a large amount of free time to read through a document. If you are presenting a document for the first time, or if you wish to emphasize a particular section or aspect of it, highlight the important words or pages with colored markers or tags. If a document is lengthy, for example a thick contract, make a separate copy of the important sections.

*Who should speak?* There is no fixed format for opening statements in mediation, and as a result they can include several people—lawyers, parties, experts or witnesses. Take advantage of this freedom to involve whoever seems most likely to have a useful impact on the opposing party and the neutral.

Consider in particular giving your client a role in the opening session. Your opponent will listen much more carefully to your client than to you (you, after all, are only a hired advocate, while your client is the decision maker and perhaps also a key witness). One option is for you to summarize the legal arguments, while asking your client describe the financial effects of events on her company or other facts. Alternatively the client can focus on non-legal factors in the case, such as the impact of the defendant's actions on her family or business.

If you want the opposing party to speak during the opening session, discuss this with the mediator in advance, ask him to encourage both principals to speak. If, on the other hand, you want your client to remain silent, warn the mediator about this so the neutral does not push the client to talk. If your client is inarticulate, shy, or not an attractive witness, you have no obligation to put him on display.

*An elderly tourist was on a tour of Europe organized by a German company when she fell on a castle stairway and struck her head. As her family watched, the tourist was carried off to the local hospital, where she died that night. The family sued the tour operator, arguing that it had promised to provide special protective services for older clients, and the guide had gone off to smoke rather than standing at the foot of the wet stone stairway to protect his clients.*

*The parties went to mediation. Two days before the mediation session the plaintiff lawyer announced that the dead tourist's daughter, who was in charge of the legal case for the family, would not attend the session because she found it too distressing. The plaintiff lawyer said that the daughter would accept his recommendations about settlement, but was likely to go "out of control" if she had to listen to the tour company make excuses for her mother's death.*

*The mediator checked with the defendant's attorney, who said that the real reason why the daughter was absent was that she was very irritating— "a whiner"—and that her presence would hurt the plaintiff's case. He questioned whether the process could be successful if she were not present.*

*After trying without success to convince the daughter to attend, the mediator decided to go ahead without the daughter. He convinced the tour company to mediate with the lawyer representing the family. After two months of discussion the case was resolved.*

- Go over with your client in advance what he will say and how to present it, just as you would with a witness at trial.
- Remind the client that he is free to take a recess at any time. Work out an understanding about how you and the client will interact, for example how the client should signal that she needs a break in the process or wants to talk with you.
- Alert the client that the mediator or the other party may ask questions or invite her to speak, but that she has no obligation to do so.
- If you don't want your client to answer a question, answer it yourself or say that you would prefer to discuss the issue with the client or the mediator privately.

*Gathering information.* If you want to gather information during the opening session, ask the mediator to raise the issue or suggest the parties ask questions or discuss the case.

*A contractor was sued by a building owner who alleged that the contractor had poured a concrete foundation negligently. Before mediation the lawyer told the mediator, "We cannot determine how the owner got its figure of €650,000 to fix the problem—our experts have estimated repair costs at only €300,000. This difference is the key factor in the parties' disagreement about what the case is worth. Can you ask them to provide backup data for their estimate, or suggest we have a discussion about how they calculated the cost?"*

*Lessening adversarial reactions.* A mediator can explain your role as an advocate to the parties, lessening their inclination to reject whatever you say. If, for example, you need to accuse the other side of misconduct, ask the mediator to explain your role.

*A Danish pharmaceutical company terminated its Indian distributor, alleging that its sales were disappointing and asserting that the company had a legal right to cancel the contract. The distributor filed suit in the Danish courts, alleging that the company had allowed it to invest two years of effort to obtain state approval of its products and promote the products to local hospitals. Then, just as the distributor was beginning to enjoy success, the pharmaceutical company hired away the distributor's chief salesman and assigned him to solicit the Indian company's clients, in violation of a non-competition agreement.*

*The lawyer for the Indian distributor told the mediator his client had emails showing that the Danish company's executives had begun talking with its salesman a full two months before he left, in effect conspiring with the salesman to steal the Indian company's clients. Recognizing that the Danish executives might take offense if they were accused of conspiracy, the distributor's lawyers asked the mediator to help frame the discussion.*

*In his opening comments the mediator said, "I've asked each lawyer to state their case as clearly as possible. The parties may find what they say upsetting, but I've asked for this because we have to be aware of what will happen if this case does not settle. I will request both sides to listen politely and make notes of the points on which you disagree, and I will make sure that each side has a full opportunity to respond."*

## **b. Caucusing**

In most business mediations the parties spend a large majority of their time separated in private caucuses. An advocate can enlist a mediator's help in many different ways during the caucusing phase of the process. We begin by describing the differences between early and later phases of caucusing.

### **(1) Early caucusing**

During a first caucus meeting a mediator is likely to:

- Focus on listening and asking questions rather than giving advice, trying to help each side understand the opponent's perspective and also lay a basis for later questioning about legal arguments. At this stage an advocate can make the mediator more effective with his opponent by providing the mediator with "ammunition" to use in the other caucus.
- Use a principled bargaining style. The neutral will seek to persuade the parties to avoid taking hard positions, out of concern that doing so will provoke animosity. The neutral will expect you to offer reasons for your position, to show at least some cooperation, and if the other side made the last offer, will probably ask you for a concession to start the bargaining process. If you are not willing to make a concession, consider at least giving the mediator a private signal that you are willing to be flexible once the other side shows readiness to compromise, and explain why making a concession at this point is not appropriate. The following are some common questions advocates ask about the early caucusing phase of mediation.

- If I have confidential information that could sway the mediator's view of the strength of my case, should I disclose it early or wait until later in the process?

*Comment:* It is usually better to offer evidence early, while the mediator is focused on gathering information. In the Indian distributorship case described above, for example, the lawyer for the distributor might say, "We've identified another salesman whom they also tried to solicit in violation of his contract with us. They don't know that we know this, but it will hurt them at trial. Given that, we really can't justify a major concession."

If you wait until late in the process to provide evidence, the mediator may not give it proper weight because he is focused on managing the bargaining process, and may think you are mentioning the evidence simply to justify your refusal to compromise.

- Should I make an offer during the first caucus meeting?

*Comment:* Making an offer at this point may or may not be the best strategy, depending on the case. If you don't think making an offer is wise, don't be pushed into doing so. Say instead that you would prefer to wait, for example because you want to talk about the issues before making decisions about bargaining.

- If I direct the mediator to communicate an extreme position to the other side, should I tell him privately that we are willing to compromise at some point?

*Comment:* It is usually a good idea to tell the mediator your strategy in general terms, so that he can warn you if he sees any problems and can think about how to present your position to the other side.

- Will the mediator be offended if I ask her to leave, so that I can talk privately with my client?

*Comment:* Don't be embarrassed to ask a mediator to leave the room. Mediators expect lawyers to talk confidentially with their clients. You might say, "You have given us some new ideas to think about. Can we have a few minutes to talk?"

- Will the mediator be offended if I don't disclose my final bargaining goal or my strategy?

*Comment:* Mediators also understand that lawyers usually do not disclose their entire strategy to them, because the advocate and the neutral do not have the same goals. Mediators expect that if an attorney makes statement of fact it will be accurate, but not that lawyers will confide in them completely.

## **(2) Later caucusing**

As caucuses progress, a mediator is likely to become more active in expressing viewpoints and to emphasize the costs and risks of litigation and reasons to compromise. Keep in mind the following points:

- Be prepared for difficult "reality testing." Warn your client that the mediator may ask hard questions about the case and disagree with or express doubt about some of your arguments. Assure the client that this is a normal part of the process, and that the neutral is presenting your arguments and raising the same kinds of questions about the opponent's case in the other caucus room.
- If your client becomes discouraged, consider asking the mediator to give an assessment of how the process is going. If your client becomes tired or irritable or feels pushed too hard, ask the mediator for a break or adjournment of the process.
- If the mediation appears to be moving toward an impasse, be ready to bargain with the mediator over whether and when she will use particular tactics to break it. If the mediator seems discouraged or lacks ideas, make suggestions. How to do this is discussed below.

## **(3) Sub-meetings**

Although business mediation tends to use a caucus format, there is no rule that requires this. Ask yourself whether you are content with the usual structure or would prefer a variation on it. If so, suggest the format you prefer.

The most common variation is for the mediator to convene a sub-group of participants. For example two executives might meet privately to discuss the business aspects of a dispute, or experts from each side might talk over a technical question, or lawyers might confer about what process to follow. Such meetings can occur at any point, can last for as little or as long a time as participants find useful, and can be repeated if necessary.

When principal decision-makers meet without their lawyers, the attorneys often insist that the mediator be present to moderate the discussion and confirm that the discussion is part of the confidential process, but it is not essential that a mediator be present at all times.

*A Hungarian manufacturer and a Czech trucking company had a productive relationship for more than a decade, with the trucker distributing the manufacturer's products throughout the southern EU. Then their relationship deteriorated. The manufacturer sued the trucking company, claiming that it had fraudulently inflated its costs by overstating the distance its trucks traveled and exaggerating charges for repairs. After two years of litigation the parties agreed to mediate.*

*The process began in an unusual way: The plaintiff's lawyer telephoned the mediator ahead of time to suggest that the parties skip the usual opening statements by lawyers and instead have the two CEOs meet privately. The mediator raised the issue with defense counsel, who agreed subject to the neutral being present during the conversation.*

*The two executives and the mediator retired to a room leaving the lawyers behind. The plaintiff's CEO opened the discussion by retracing the companies' longtime good relationship and recent problems. He suggested the breakdown had been provoked in part by a manager whom he had hired away from the trucking company. He said that he had recently terminated the manager for ethical violations.*

*The plaintiff CEO said that he had serious damages from errors in the trucking company's bills, however, and needed to reach a reasonable settlement of the dispute. He then made an offer. The defendant's CEO thanked him and said he needed to discuss the proposal with his lawyers.*

*The parties then went into separate caucuses and bargained intensely for hours, reducing an initial €900,000 gap to €30,000—a demand of €300K against an offer of €270K. At that point, however, the defense refused to make any more offers, expressing frustration at the plaintiff's unreasonableness.*

*As the mediator searched for ways to break the impasse, the defendant's CEO suddenly pulled a coin out of his pocket. "See this?" he asked. "You check; it's an honest coin. I'll flip him for it!" "For what?" "The 30," he replied. "Let's see if he has the \*\*\*\*s to flip for it!"*

*The mediator looked at the CEO's lawyer: Was this serious? The attorney shrugged his shoulders; "It's OK with me. Why don't you take Pavel down and present it to them? But you should do the talking; he is feeling really frustrated by all this." Why not, the mediator thought; it was better than anything he had to suggest.*

*The mediator led the defendant's CEO into the plaintiff's conference room and, with a smile, said, "Tomaj has an idea to break the deadlock. It is somewhat... unusual, but you might want to listen to it." In a calm voice and without anatomical references, the CEO repeated his coin-toss offer.*

*The plaintiff executive smiled. "Alright," he said, "But you didn't answer my last offer, so the real difference is 50, between my 320 (his last offer before dropping to 300,000) and your 270." They argued over what should be the terms for the coin toss, showing some exasperation but also bits of humor. When the discussion stalled the mediator made suggestions ("Why not give the 20 to charity?"), but in the end they could not agree, both became exasperated, and the defendant's CEO walked out.*

*As they walked down the hallway the mediator asked, "Suppose I could get him to drop to a flat 290," he asked. "Would that do it?" As it turned out, it did.*

In this mediation the initiatives taken by each of the two attorneys contributed in important ways to settlement. The suggestion of the plaintiff's lawyer that the process begin with a meeting between the two executives created an informal connection between them that smoothed their later bargaining. And the defendant CEO's "spontaneous" suggestion for a coin toss (a tactic the mediator later learned had been proposed by his lawyer) was key to shaking the parties out of their stalemate.

Still another option is to arrange for a party to meet with an outside advisor to an opponent. If you think this would be helpful, ask the mediator to arrange such a meeting.

*A municipality in Brittany refused to pay a contractor for its work on a new school building, claiming that the construction was defective. The contractor sued for payment and the case went to mediation. The parties made some progress but eventually reached a stalemate and had to adjourn.*

*The contractor's lawyer suspected that the municipality's negotiating team had been unable to make a decision because of internal conflicts provoked by a local official. The contractor said that he had developed a good relationship with the mayor of the municipality during another project, and thought if they could talk privately he could resolve the "personality problem" and reopen negotiations.*

*The lawyer requested the mediator to ask defense counsel if the contractor could have breakfast with the mayor. The defense agreed, the breakfast took place, and the troublesome official withdrew his objections.*

To summarize:

- *Ask a mediator to vary the traditional structure of mediation.*
- *Suggest that one person, or part of a team, meet with their counterpart on the opposing side.*
- *To facilitate discussion and assure confidentiality, ask the neutral to attend such meetings.*

## 5. INFLUENCE THE PROCESS

### (a) Manage the flow of information

#### (1) Focus discussion on specific issues

One important skill of a good negotiator is the ability to influence how issues are discussed. To accomplish this lawyers can tell a mediator what they want stressed to an opponent, and in what manner.

*A construction company sued a supplier, alleging that the supplier had sold it defective antifreeze that severely damaged the cooling systems of its vehicles. The plaintiff could not identify any contaminant in the antifreeze, but argued that the supplier's responsibility was obvious: The company had put the antifreeze into 70 of its fleet of 150 vehicles, and within days the cooling systems of several of the treated trucks were destroyed by corrosion. Only those parts of the engines that came into contact with the defendant's antifreeze showed corrosion, and trucks that did not receive the antifreeze had no problems.*

*The defendant replied that a scientist at a respected university had tested the antifreeze and found nothing wrong with it. In addition, none of the defendant's other customers complained about damage from the antifreeze. The defendant was sure the cause lay in the trucks, not its product.*

*The defense attorney thought the fact the plaintiff could not find any contaminant in the antifreeze or explain what had caused the injury would be fatal to its claim, and used the mediator to press the issue with the other side.*

*Defendant's lawyer: We hope you'll raise with them that we see the crux of this case as hinging on the fact that we don't see any evidence to support their case on causation.*

*Mediator: But if they have evidence, that might influence your bargaining position?*

*Lawyer (smiling): Yes, and if they don't, we hope it influences them to reduce their claim.*

*The mediator raised the issue during his caucus meeting with the plaintiff team:*

*Mediator: Suppose an outside expert reports there is no foreign substance in the antifreeze and the expert is credible... How does that affect the case?*

*Plaintiff attorney: Well, it's a problem, no question about it. We recognize that it's the weakest part of our case.*

*Mediator: What percentage chance would you place on your client winning?*

*Attorney: Fifty per cent.*

*At the conclusion of the caucus discussion the plaintiff team privately agreed that its chance of success on liability was only 30 to 40 percent.*

*In this example, the defense lawyer persuaded the mediator to focus his with the plaintiff on her issue, and by doing so was able to take advantage of the fact that the plaintiff was more willing to listen to the mediator than it would have been if the defense had argued the issue directly.*

At times you may want to avoid a topic entirely. This is very difficult if the other side is determined to pursue the issue, but if you can convince a mediator that discussing a matter will frustrate agreement, he may agree to delay the discussion or handle it so as to minimize the impact.

Assume, for instance, that your client is outraged at the other side's alleged fraud. You see the evidence as weak but your client refuses to abandon the fraud claim; even discussing the issue makes him angry. You might make a pre-mediation call to the mediator, alerting her that discussing this claim will inflame your client and frustrate progress on other issues. You could ask her to discourage the other side from discussing the fraud issue until later in the day, when your client may be calmer.

To summarize:

- *Harness a mediator's ability to influence the discussion agenda.*
- *Ask the mediator to focus discussion on a key issue, or avoid a sensitive one.*

## **(2) Gather and convey information**

*Gathering data.* In the antifreeze case the defense lawyer had a dual purpose: She used the mediator to press an issue favorable to her client, and at the same time asked him to “fish” for information: If the plaintiffs had data proving causation, she wanted to learn about it.

Parties are usually more willing to provide information in mediation than in negotiation. They know that they are likely to achieve a settlement through mediation, and therefore can expect to get something in return. They are also likely to trust the mediator to protect them from being exploited. If a party does object to providing “free data” to the other side, the mediator can suggest that it may be to the party's benefit to provide it (“My experience is that to get the authority to pay what you need, the insurance company representative will need documents to show her supervisor. I think it's in your interest to give her the information.”)

Information problems arise most often between opposing parties, but this is not always the case; lawyers sometimes have difficulty getting data from their own client, for example because someone in the organization feels that they may be blamed for the problem. Co-defendants also sometimes hide data from each other in an effort to minimize their share of responsibility for a loss. Mediators can sometimes help an attorney persuade his own client to provide data, or one defendant to share information with another.

*Conveying information.* It is also possible to use mediation to convey data more effectively. Suppose, for example, you have strong evidence that an opposing witness is lying, but are concerned that if you raise the issue directly with your opponent he will become angry. One option is to give the evidence to the mediator and ask him to discuss it with the other party. Evidence presented in this way is less apt to be summarily rejected, and even if the information has no impact on the other side, the fact that you provide it will focus the mediator's attention on the issue.

Another form of information concerns a party's bargaining intentions. Imagine, for instance, that a plaintiff has decided to make its final offer. It is concerned, however, that its opponent will take offense, feeling that the offer amounts to an ultimatum. The attorney may be able to convey the offer more effectively through a mediator ("Tell them we've thought it over and 900 is our last and final offer.") At a minimum the mediator can cushion the message, making it less likely the other side will react with anger ("They agreed to make one more concession—they say they've gone as far as they can go...") If the neutral believes that the offer is truly final she can say so, assuring the recipient that it is not merely a bluff ("I've been talking to them for hours. You can never be sure, but my sense is they really can't go below 900.")

### **(3) Probe an opponent's state of mind**

Advocates can also ask a mediator about the other side's state of mind. If, for example, a party seems agitated during the opening session, the opposing attorney might later ask the mediator, "Has he calmed down yet?" A lawyer could also inquire about the other side's decisionmaking process: "If her lawyer recommends a settlement, do you think she'll listen?" or "Do we need to get the insurance company's vice president here in person?"

Lawyers can also ask a mediator to explore an opponent's reaction to a specific offer or tactic: "Would you try to get a sense of whether they would drop to six figures?" or "Do you think they can go to €125,000?"

Questions to a mediator about what the other side is thinking pose ethical and practical issues for the neutral, because a mediator has two somewhat contradictory roles: She must preserve the confidentiality of what each side says, and at the same time facilitate communication between them. But the fact that a question is difficult for a neutral to answer does not mean a lawyer should not ask it.

Be aware, however, that if you ask a mediator for information about your opponent, the neutral is likely to feel that she has permission to give the other side the same kind of data about you. If you are concerned that information may "leak" to the other caucus room, discuss with your mediator what he will say to the other side about your side. If you are concerned that something sensitive might be disclosed, make it clear what you want withheld. In general it is easier to ask that a fact not be revealed at all, than to control how a mediator presents facts he does discuss. That does not mean, however, that asking questions about the other side is not helpful, and the mediation structure can amplify your ability to do so.

To take advantage of a mediator's ability to manage the flow of information:

- *Ask the mediator to gather information or to convey it to an opponent.*
- *Ask about the other side's state of mind.*
- *Discuss with the mediator what she will say to your opponent about you.*

### **(4) Use confidentiality to manage the flow of data**

Mediation is, of course, a confidential process. For purposes of advocacy it is important to realize that confidentiality is not only a cloak that can protect you, but also a tool to make bargaining more effective. One way to accomplish this is to give the mediator information and either bar him from disclosing it to the other side, or permit disclosure only under conditions.



*Give information to the mediator alone.* The most common tactic is to describe evidence to a mediator but forbid her from disclosing it to one's opponent. In this way a lawyer can reveal evidence to persuade a mediator of the strength of his legal case without revealing the information to the other side ("Look at the data we've turned up about how much money this 'troubled' company has made over the past three years. They are able to pay the full amount we are asking for—but you can't tell them how we know that" or "They didn't send the notice required by our contract before filing suit and in a month it will be too late. If the case doesn't settle today we will knock them out of court.")

For an advocate to provide "decisive" evidence but forbid the mediator from discussing it puts the neutral in a difficult place, forcing him to predict how an adversary might react to the information. For this reason mediators often discount evidence that a party will not allow them to discuss with an opponent. Still there is little disadvantage to providing information "for the mediator's eyes only," provided you trust the mediator to keep it secret.

In addition, the fact that you forbid a mediator from disclosing information at one point in the process does not prevent you from authorizing the mediator to reveal it later. Lawyers sometimes allow information to be disclosed on conditions ("You can show them the affidavit, but only if you think it will tie down a deal").

*Disclose information to an opponent, subject to confidentiality.* Advocates can also authorize evidence to be given to an opponent, but use the special confidentiality rules that apply to mediation to limit how the data can be used if the case does not settle.

*A French consultant sued an American software company for failing to pay for services it had provided. The software company refused to make a substantial offer, claiming that it had almost no cash available. The consultant was skeptical but its lawyer was reluctant to push the issue, because she knew that if the software company filed for bankruptcy her client would recover nothing. She asked the mediator if he could obtain more information about the company's finances.*

*When the defendant's lawyer was asked about this, he told the mediator that the company's CFO, who was present at the mediation, had a financial spreadsheet on his laptop which he had given to private investors two weeks before. The mediator suggested that it would help spur a settlement if the defense would allow a member of the plaintiff team to examine the data.*

*The company attorney agreed on the condition that the visitor could examine the laptop data and ask questions of the CFO, but not make written notes of what he learned. The plaintiff lawyer walked into the software company's meeting room with the mediator, looked at the spreadsheets, asked the CFO questions, and returned to talk with her client. A half-hour later the plaintiff team indicated that it was willing to accept reduced payments over time, provided the payment was secured by the company's intellectual property, and the case settled on that basis.*

*Authorize partial disclosure.* Most lawyers expect a mediator to reveal at least some of what occurs in private caucus discussions. Experienced attorneys know, in other words, that while mediators will not reveal sensitive data, they will usually feel authorized to go beyond simply repeating what a party has said to interpret the message, as long as doing so does not prejudice the party. A plaintiff lawyer might tell a mediator for instance, "800,000 is as low as we'll go at this point. You can tell them 800." The attorney knows the neutral will interpret this to mean that she can tell the other side the plaintiff is reducing his demand to €800,000 and also that the plaintiff will probably be willing to go farther if the defendant makes an appropriate response.

You can ask a mediator to convey an interpretation of your position, presenting it as his assessment of the situation and not attributing his comments specifically to you. Communicating intentions in this way has two advantages. First, the listener is left somewhat unsure about whether you have sent the signal, giving you the freedom either to reinforce it or back away, depending on the response, much in the way government officials float "trial balloons" in the press. Second, the fact that it is the mediator who offers the interpretation makes it appear less manipulative, and therefore less subject to devaluation by the recipient, than if you had sent the signal directly.

## b. Influence the Bargaining Process

Advocates can also use mediation to improve their effectiveness in the give-and-take of bargaining. This can be done whether one is bargaining competitively over money or cooperatively with a focus on creative options. You can take advantage of a mediator's assistance to:

- *Support a competitive bargaining strategy*
- *Explore hidden issues and creative options*
- *Obtain advice about tactics*
- *Take unorthodox steps to overcome barriers*
- *Enhance your offers*

### (1) Support a competitive bargaining strategy

Books about mediation rarely mention one important effect of the process: It allows negotiators to use tougher tactics than they could apply in a direct negotiation. There are several reasons for this. First, while parties can break off negotiations and resume them later, most parties believe that if mediation fails they are unlikely to be able to resume the process. As a result participants in mediation are reluctant to walk out even when their opponent makes an "insulting" offer.

Second, the mediator is present to cushion the impact of abrasive bargaining tactics, by calming a party who is angry at what an opponent has done. Lawyers sometimes take advantage of this to play "bad policeman," knowing that the mediator will instinctively play "good policeman" to keep the process alive.

*A shipper was in a dispute with its insurer over the insurer's refusal to pay nearly a billion euros in costs the shipper had incurred because of a huge oil spill. The parties agreed to go to mediation. The insurer's CEO prepared intensively for the process, intending to engage in a point-by-point discussion of the insurer's defenses to the claim with lawyers for the shipper.*

*When the parties convened and the CEO tried to discuss the case, however, the shipper's attorney said that he wasn't interested. He had listened to his own team's analysis, he said, and saw no point in having a debate with the CEO. The lawyer went on to say that he would not make any concessions at all until the insurer agreed to pay the full amount due under what he called the "incontestable" section of the policy. That amount, the lawyer said, was €135 million.*

*The mediation was held at an airport conference center, and in a direct negotiation the insurer team would very likely have taken the next flight out. The shipper's lawyer was confident, however, that the mediator would respond to his tactic by suggesting, even begging, that the CEO ignore the shipper's obnoxious attitude, look at the "big picture," examine the legal risks, and put up a very large amount of money. And that is exactly what happened.*

*After hours of talking the CEO strode into the shipper's conference room, wrote "100" on the board, and walked out. Now it was the mediator's job to convince the plaintiff side that although one hundred million euros might seem very small in light of its claim, from the insurer's perspective it was a major step forward. The mediator suggested that the way to assess the offer was to count up from zero rather than down from the shipper's original demand. After an hour's discussion the shipper reluctantly agreed to continue the process.*

*The case did not settle until months later. The turning point came when the shipper's attorney (the same lawyer who had refused to discuss issues with the insurer's CEO) asked the mediator to invite the CEO to meet with him alone in the bar of the hotel where the mediation was being held. While the mediator and the lawyers waited in conference rooms wondering what was happening, the two bargainers worked out a deal.*

In this instance the plaintiff lawyer relied on the mediator's presence and the fact that both parties had committed to mediate to impose a high precondition on the other side and combined his bargaining tactic with an impolite gesture—refusing to listen to the CEO's presentation—to emphasize his willingness to walk out if he did not get what he wanted. The lawyer knew however that the mediator would make an effort to smooth over the confrontation, helping his tactic to succeed. At the end of the process, the shipper's attorney reversed his approach, using the mediator to help arrange a private meeting with the same person he had snubbed earlier.

To enhance your strategy in competitive bargaining:

- *Use a mediator to cushion the impact of hard negotiation tactics.*
- *Allow, or ask, a mediator to persuade your own client to give up an unrealistic position.*

## **(2) Explore hidden issues and creative options**

Mediators can also be used to help identify non-legal issues and support creative approaches to bargaining. People often lose their ability to think imaginatively once they are in conflict. Plaintiffs in particular tend to be concerned that if they mention an interest anything other than money, it will imply that they are not committed to their monetary demands. Mediation allows lawyers to have it both ways: they can press their legal arguments and push for the best possible monetary deal, while simultaneously asking their mediator to explore the parties' underlying interests and creative settlement terms. The effect is to have bargaining take place on two levels, one involving an exchange of money and another the parties' other priorities.

*A British investment advisory firm, Continental Advisors, sued a large Parisian financial services company, Continental Financial SA, which had begun to market investment services in London under the name Continental Financial. The British firm argued that the French company's use of the word "Continental" violated the British company's trademark and caused customer confusion, because, it said, the financial community referred informally to both firms as "Continental." The firm asked a court to bar the French company from using the Continental name in Great Britain. The judge sent the matter to mediation.*

*Although the legal case focused on the use of the name in England, the real stakes were much larger. The British firm had made secret plans to expand its services into EU countries where the French company was already active. The plaintiff, in other words, was in danger of winning a victory that the French company would use as a weapon against it where the British firm was the newcomer.*

*In its mediation statement the British firm argued that the only relevant issues were how the name could be used in Britain and the amount of damages it should receive as compensation. The firm's inside counsel called the mediator before the process began, however, to ask her to explore a settlement that would cover use of the Continental name throughout the EU. After three weeks of intensive discussions the parties worked out a broad understanding that avoided conflicts over the name across Europe.*

To enhance your ability to negotiate interest-based solutions, ask a mediator to:

- *Explore business, personal and other non-legal issues as well as legal ones.*
- *Look for imaginative options while you focus on legal arguments and money demands.*

## **(3) Obtain advice about tactics**

Mediators typically spend hours talking with the parties, which gives them a unique perspective on each side's bargaining style and settlement priorities. By using a mediator as a bargaining consultant lawyers can tap into this information.

*Recall the case described earlier involving the elderly tourist who fell to her death on a castle stairway. The tour company's insurer made a first offer of €20,000. The plaintiff's attorney replied that until the defendant came up to "six figures or close to it," it would not consider dropping from its opening demand of €650,000. The mediation adjourned with no progress.*

*Defense counsel asked the mediator to participate in a telephone discussion with the representative of the tour company's insurer, who had not been present at the first mediation session. The mediator gave his impressions of the case and explained why he thought it would be sensible for the company to pay more than €100,000 to settle. After several conversations the defense attorney called the mediator and said that he had authority to raise his opening offer and settle in the range of €150,000 to €175,000. He was not sure, however what his next offer should be; he wanted to respond to the plaintiff's demand but did not wish to inflate her expectations.*

*The defense lawyer asked the mediator to participate in a conversation with the representative of his insurance company client and they discussed the issue. The mediator said that he saw two options: Either offer €70,000 to €80,000, on the theory that this would be "close" to €100,000, or offer a flat €100,000 but make the next concession a modest one, so the plaintiff would realize the defense saw it as only a low six-figure case.*

*The mediator suggested going to 100 and offered to say the defense had been inclined to start below that number but had reluctantly agreed to go higher at the request of the mediator. If the offer were lower, he would stress that while the number might be below €100,000, the mediator thought there was significantly more money available if the plaintiff came down in her demand. The lawyer decided to put €100,000 on the table as a sign of good faith and the case settled at €190,000.*

The problem here was that the case had recently been reassigned by the insurance company to a new employee who did not appreciate the legal risk faced by the tour company, or the dynamics of the bargaining situation. The defense lawyer favored raising the company's offer to €100,000, but could not convince his client to authorize him to do so. In a direct negotiation the insurer would probably have refused to make a second offer until the plaintiff made a concession, leading to an impasse. In mediation, however, the lawyer was able to use the neutral's assistance, first to persuade his client to authorize a higher offer and then to frame the new offer in a way that protected the insurer's bargaining position.

#### **(4) Enhance your offers**

*Authorship.* Experienced lawyers instinctively understand "reactive devaluation"—the concept that any offer by an opponent is viewed with suspicion, but the same proposal made by a neutral mediator is likely to be given respectful consideration. To take advantage of this, good attorneys sometimes seek to convince a mediator to "adopt" their offer as the mediator's own, or at least to endorse the lawyer offer as reasonable. Here is one example:

*In the case described earlier involving a construction company's claim that a supplier had harmed its trucks with defective antifreeze, the defense lawyer wished to avoid making a cash offer, and instead proposed that the defendant offer the plaintiff a discount on purchases of diesel fuel for its trucks, arguing that this would be very valuable for the plaintiff.*

*The problem was that the plaintiff had made a demand of €1.5 million, and the defendant was offering no actual payment in response. The mediator pointed out that the plaintiff was very likely to be angry if the defendant made a "no cash" offer.*

*Mediator: I've told you the plaintiff is willing to move significantly from their opening demand. They gave me explicit permission to tell you that...But if I go back now and say, "They're willing to give you a discount but . . . that's it," they are going to be very upset, I think....*

*Outside counsel: I don't think that's the way you should phrase it. Why don't you say that you*

*decided that it wasn't fruitful to talk in terms of how many euros we would pay to settle—that you came up with the suggestion for a discount program?*

*Mediator: Well...I need to think about how I will phrase it....*

In the end the mediator refused to say that he personally had developed the idea for a discount on future fuel purchases, probably out of concern that doing so would damage his credibility with the plaintiff. But the defense lawyer was not afraid to ask the mediator to take responsibility for the offer and later, by adding a small amount of cash to the offer, she obtained an excellent settlement for her client.

*Endorsement.* If you cannot persuade a mediator to take ownership of a proposal, another alternative is to ask him to endorse it. You could, for example, ask the neutral to tell your opponent that he sees your latest offer as “a reasonable step forward.” Alternatively you might offer to make a larger concession if the mediator will endorse its reasonableness and ask the other side to reciprocate (“If I could convince my client to go to ‘X,’ would you be willing to tell the plaintiff you think it is a significant step and ask them to go to ‘Y?’”)

To take advantage of a mediator's neutrality:

- *Ask the mediator to take ownership of an argument or proposal.*
- *Ask the mediator to endorse an idea or offer as worthy of consideration.*
- *Suggest that your client will make a better offer if the mediator will endorse its reasonableness.*

#### **(5) Take advantage of a mediator's flexibility**

Mediators do not need to worry about maintaining a judge's dignity or showing a litigator's toughness. As a result they have more freedom to take unusual steps to achieve a settlement. Mediators do not always know, however, what obstacles are blocking a settlement. When advocates encounter hidden barriers to agreement, they should inform the mediator, and if necessary prod the neutral to take on unusual roles ranging from “ambassador” to “scapegoat.”

*A brother and sister, Silvio and Liana, were fighting over the business empire of a deceased uncle. Silvio frustrated everyone during the first day of mediation by making offers and then, after the mediator had taken them to Liana's representatives, announcing that he had reconsidered and could not make the concession. This enraged his sister and puzzled the mediator.*

*Liana's lawyer thought that what was happening was that Silvio was calling his wife, a bookkeeper at a local store after the mediator left the room, and the wife was telling him he was stupid to make any concessions. After the first day had ended in frustration, Liana's lawyer suggested that the mediator talk with the wife before the process resumed the next day.*

*Early the following morning the mediator visited Silvio's wife in her office. He listened as she tearfully described how she and her husband had been “frozen out” of the family business by her sister-in-law. After the wife became calmer, the mediator noted how important it was that the wife be part of the mediation, which could affect her family deeply. He invited her to drive with him to the mediation center.*

*With his wife present to advise him Silvio became much more decisive. The case settled with a multi-year agreement under which the couple allowed Liana to buy their stock over a period of five years and Liana agreed to secure the payment with stock in the firm.*

*The tentative deal almost foundered, however, because Silvio's wife did not trust Liana to comply with the agreement. To deal with this Silvio's lawyer suggested that if any dispute arose over implementing the agreement, the mediator be appointed to arbitrate it, using his knowledge of what the parties intended. Liana's lawyer agreed and the settlement went forward.*

The mediation of this dispute would almost certainly have failed if Liana’s lawyer had not alerted the mediator to the problem created by the absence of the opposing party’s wife and made an unusual suggestion about how the neutral should deal with it. At the end of the case it was a suggestion by Silvio’s attorney that the mediator take on the role of “arbitrator in reserve” that made the settlement possible.

Mediators can also be asked to take on unattractive roles, for example as the “scapegoat” for difficult decisions.

*A defense lawyer berated a mediator in front of his client for “mistakenly” communicating a concession to the other side. In fact he had privately told the mediator to make the offer, but his client was now upset about it. The neutral apologized for the misunderstanding and agreed to tell the other side that he had communicated the concession in error.*

*By making the offer and then having the mediator withdraw it, however, the defense counsel sent a signal to the other party that his client might be flexible. The move broke the deadlock and the case settled. A few months later, the same lawyer who had criticized the mediator asked him to help with another case.*

Taking blame, even unfairly, is part of a mediator’s job description. To exploit this flexibility:

- Alert the mediator to hidden issues and if necessary suggest that the neutral use unorthodox techniques to deal with them.
- If necessary make the mediator a scapegoat for a difficult compromise.

### c. Overcome blockages

A mediator can also help resolve impasses by:

- *Restarting the bargaining*
- *Educating an unrealistic opponent or client*
- *Taking control of the bargaining process*
- *Proposing a more effective method of adjudication*

#### **(1) Restart the bargaining**

A mediator’s most important quality when faced with a bargaining impasse is simple determination—the willingness to push on. The right mediator will show this quality in the face of discouragement. If a neutral does not then you may have to push him to persevere; suggestions about how to do this appear below. Apart from pure determination, mediators can apply a variety of techniques when parties fall into impasse.

Most impasse-breaking techniques require that both sides agree to participate in them. This allows you to bargain with a mediator for the use of the method that will most benefit your client. We will focus on three tactics a mediator might use: “What if?” questions, a change in format, and “confidential listener.”

*What if?* (“What if I could get them to go to one million?”) is an attractive tactic for a mediator, because it encourages parties to think of compromise and at the same time gives the mediator new information. And if one question fails, the mediator can try again (“If a million won’t do it, what if I could get them to 1.2 million?”) If a mediator poses what-if questions:

- First decide whether you want the mediator to use the technique at all.
- If so, take the initiative to suggest a number favorable to you (“If you can get them to 1.5 we’ll be open to moving...”)
- If the mediator puts forth a number, consider bargaining over it (“1.2 million won’t do it. They’d have to go to at least 1.5”).
- Alternatively, you can probe the mediator about how confident is he that the other side will move—in other words, how hypothetical is the what-if number?

*Change in format.* Faced with an impasse a mediator might declare a temporary recess, adjourn to another day or “hold the parties’ feet to the fire” by asking them to remain late into the evening (parties can of course leave at any time, but if they do they risk having the process end). Alternatively a mediator can change the mix of personalities in the discussion, for example by putting people from each side together (CEO with CEO, etc).

The issue for an advocate to consider is: What is the best process option for my client at this point? Is it to adjourn or press on? Remain separated in caucuses or meet together? If so, who should meet? Advocate for the option you think will most benefit your client, whether or not the mediator has suggested it. If you do not think a tactic will be helpful, make that clear to the mediator as well.

*Estimate the size of the gap.* If parties are stalled because they have taken unrealistic bargaining positions, a mediator can attempt to estimate the real gap through a process called “confidential listener.” A mediator using this technique would say something like this:

“Your offers are a million euros apart, but I think you are in fact considerably closer than that. Let’s try this. I will ask each of you to give me what I will call your ‘next-to-last number’—an offer one step away from the farthest you would go to settle this case.

“I won’t reveal either side’s number to the other side. Instead I will call the lawyers together and give them a verbal assessment of the difference between you—an estimate that does not lock anyone in. I’ll be back in a few minutes to ask for your number.”

If the parties agree to the process, on hearing their numbers the mediator might say for example: “You are closer than the cost of litigating this case, so it is worth continuing to talk” or “You are very far apart. Unless someone changes their view of what the case is worth in court, it will be hard for you to agree.”

Keep in mind when dealing with “confidential listener” that mediators usually do not expect this tactic to settle a case. Instead the goal is to give the parties a better estimate of the real gap between them. What should you tell a mediator playing confidential listener? You will usually want to give a number that is optimistic enough to set up a favorable compromise, but reasonable enough to motivate the other side to continue.

Unless you are in the unusual situation in which the mediator states that he wants your bottom-line number and you believe he truly means it—that is, unless the two numbers touch or cross each other, the mediation will end—do not give the mediator your actual final offer. Doing so will put you at a disadvantage later in the process when parties are asked to compromise further, and may lead your client to dig in prematurely.

One option is to ask the mediator for a candid assessment about what you must do to keep the process going, but you should do this only if you trust the neutral, since it is in a mediator’s interest for each party to make a large concession.

## ***(2) Educate an unrealistic opponent—or client***

Parties may also fall into impasse because one or both is not realistic about the strength of their case. Litigators are usually better able than parties to predict what a court will do, because they are professionals and less likely to be personally involved in the dispute. But even when a lawyer is realistic about a case, she is often reluctant to challenge a client's over-optimistic assessment without seeming disloyal. One way to avoid this is to ask a mediator to evaluate the case.

A mediator can deliver bad news—that a case is not as good as the party thinks it is, or even as the lawyer may have suggested in the past. By having the mediator take on the role of “devil’s advocate,” attorneys can continue to act as the client’s champion, sometimes even arguing against a mediator who they know is correct.

Lawyers can use mediator evaluations as shields to avoid criticism or as scapegoats for difficult decisions (“Once the mediator put damages at that level, it was impossible to convince the defense to go any higher!”) Whenever a lawyer turns to a mediator during a discussion and asks “What’s your view of this case?” or stops a neutral in the hallway to suggest he give her client a perspective on a legal issue, the mediator should know that he is being enlisted in the difficult task of client education and management.

Even when lawyers do not ask for an evaluation, however, commercial mediators may take the initiative to offer one. This can happen at any stage of the process, but if parties fall into impasse a mediator is more likely to give a firm or “global” evaluation. The neutral may put a specific percentage on the chance of success on an issue (“a 50 to 60 per cent chance of proving liability”) or an overall value for a case (“Before this particular arbitration panel, the award is likely to fall between €500,000 and €700,000”).

*Should you get an evaluation?* In dealing with the issue of mediator evaluation, your first challenge is again to decide whether you want one at all. Ask yourself two questions:

- Is the primary obstacle to settling the case a disagreement about the legal merits? Or is the real problem high emotion, lawyer-client disagreements, or something else? If the problem is not legal in nature then evaluation will be useless.
- If the mediator does evaluate, are you confident that it will be helpful? If you are not sure, consider sounding the neutral out privately before he issues an opinion.

Once you have decided to seek an evaluation, the next issue is how to structure the process. The questions to ask are similar to those a mediator must consider, but there are differences that flow from your roles: The mediator is focused on breaking a deadlock, while you want to end the deadlock but also achieve the best possible outcome.

*Use an outside evaluator?* One issue is whether an evaluation should be performed by the mediator or an outsider. In theory there are advantages to having an outsider, but as practical matter lawyers rarely opt to involve anyone other than their mediator except in the largest, most complex cases. In order to obtain an outside opinion, the parties have to adjourn, agree on a person and brief him, involving significantly more time and expense, as well as the risk that the parties will be unable to agree on an evaluator. For these reasons attorneys almost always ask the mediator to perform evaluations.

*What should be evaluated?* Attorneys need to should think about what issues they want to be evaluated. Resist the temptation to say “the case.” It is often not necessary to give a global evaluation (“This claim is worth 500,000 euros”), and there are serious drawbacks to doing so. For one thing, when a mediator says a case is worth “x,” parties are reluctant to offer more or take less than that number, making the evaluation the equivalent of a final offer to both sides.



The purpose of a mediator's evaluation, one must remember, is simply to break a bargaining impasse. If one thinks of an impasse as the bargaining equivalent of driving into a ditch, a mediator's evaluation would be like a truck that pulls the car back onto the road, but not to its final destination. An evaluative "tow" should therefore be as brief as possible. If disagreement on a particular issue is driving the impasse then evaluation of that issue alone is probably enough to put the parties back on the road to settlement.

The question then is: What aspect of the case do you wish evaluated? The answer lies in your diagnosis of what is causing the impasse. It may be, for example, that the disagreement turns on an argument that a lawyer knows she will lose but has made to humor a client. If you are raising an issue for a reason other than the legal merits, you will not normally want to have the issue evaluated and should make that clear to the neutral.

*How specific an opinion?* Good mediators see evaluation as a spectrum of interventions rather than a single event. They rely on their tone of voice and choice of words to convey thoughts as often as explicit statements. You are likely to know better than the mediator what level of specificity and emphasis your client needs at a certain point in the process. If, for instance, the client is not ready to hear the complete truth, ask the mediator to be diplomatic and perhaps avoid certain issues. Alternatively, some litigant may need to be hit with the mediation equivalent of a club; if so, tell the mediator. One might think of getting the right evaluation as similar to ordering a meal. Your chance of getting the right entree is higher if you specify what you want than if you leave the choice to the chef.

*What data should the mediator see?* The next question is what data the mediator should review in conducting the evaluation. Bear in mind that, as mentioned earlier, mediators must formulate their views based on the briefs and documents they read, their observations of people at the mediation, and their general knowledge and experience. As a result the evidence and people a mediator personally observes usually have more impact on her opinions than evidence she only hears about. If you want a mediator to give full weight to a witness or document, give her the document and allow her to observe the person directly.

Take care to insure that the mediator fully considers your key evidence before arriving at a conclusion. A mediator may not read every document that was sent to her by the parties; mediators often receive thick piles of documents in advance of mediation and cannot predict what will prove important as the case proceeds. Busy mediators skim through voluminous materials, waiting for the mediation process to tell them what is important. Mediators are also reluctant to take recesses in middle of a mediation to read long documents for fear of losing momentum.

Organize the evidence you give to a mediator much as you would for a judge. If you have important documents or decisions, bring copies to the mediation and highlight the key language. If you want the mediator to meet a witness, bring the witness to your caucus room. If a neutral is assisted she is less likely to jump to a bad conclusion.

To use evaluation effectively:

- *Before asking for an evaluation, assess whether disagreement about legal issues is a primary cause of impasse.*
- *Identify the issues and level of specificity you want in an evaluation.*
- *Direct the mediator to key evidence and make it easy to digest.*
- *Select a mediator who uses evaluation sparingly, but is willing give specific feedback if necessary.*

### **(3) Prompt a decision**

When the bargaining process has ended and cannot be revived, it may still be possible to obtain agreement through a “last and final” offer. There are two ways an advocate can set up such a scenario. One is to frame the offer herself; the other is to ask the mediator to do it.

*Last-and-final offer by a party.* If either party issues a last-and-final offer it runs the risk that the other will reject it, either out of anger at being “pushed around” or simple devaluation. You can avoid some of the negative reactions to such an offer by asking a mediator to communicate it.

- Ask the mediator to explain that you honestly believe that the offer is reasonable (the opposing party does not have to agree with you; merely the fact that you think it is reasonable will make it seem less of an ultimatum).
- Suggest that the mediator emphasize to the other side that the offer came only after the neutral had pushed you hard to go as far as possible—in other words the offer is not an ultimatum from you, but rather a response to an ultimatum from the mediator.
- Let the mediator set the deadline for consideration of your offer.

*Mediator proposal.* Another option is to allow the neutral to make a “mediator’s proposal” to both sides. In doing so,

- The mediator suggests specific settlement terms.
- Each litigant must tell the mediator privately whether it can agree to the proposal, assuming the other side agrees to it.
- The terms must be accepted unconditionally; parties cannot “nibble” by changing some terms and then accepting. For example, “We will accept but the warranty has to be three years, not two” would be treated as a rejection.
- Each side must answer without knowing the other’s reply.
- If one party rejects the proposal it will never be told whether its opponent would have accepted it.

Mediator proposals have the disadvantage that the neutral, rather than the parties, decides on the terms of settlement. On the other hand such proposals give parties the ability to achieve complete peace with a single concession. They also have the assurance that if the effort fails, the other side will never know they were willing to compromise. A mediator’s proposal also relieves parties of the “water torture” of making one concession after another without knowing whether any move will bring a resolution, and with the fear that their reasonableness will be exploited by their opponent.

Finally, mediator proposals allow parties to place the responsibility for a difficult compromise on an outsider (“This wasn’t our idea, it was the mediator’s!”), again using the mediator as a scapegoat. In the author’s experience mediator proposals are successful at least two-thirds of the time.

Lawyers can sometimes intervene to influence the content of a proposal. Suppose, for instance, an attorney perceives that a mediator is about to make a proposal. She can take the initiative to suggest that if the proposal contains certain terms, her client might agree to it (“We reject their €400,000 offer, but if you made a proposal at €450,000 I would try to convince my client to take it.”) A neutral should not give special influence to either side when formulating a proposal, but the idea of starting with one “yes” vote in one’s pocket can be attractive, and a mediator may be willing to modify a proposal slightly if the lawyer signals that doing so will assure its acceptance by her side.

Even if a mediator proposal fails, it is not the end of the process. Good neutrals simply keep going (“If you won’t take that, what would you take?” or “What data would you have to see in order to change your mind?”) Keep this in mind, whether your answer is a yes or a no.

To make best use of a mediator's impasse-breaking techniques:

- *If a mediator appears ready to stop, encourage him to continue.*
- *Ask a mediator to use, or avoid, specific tactics.*
- *Before responding to a tactic consider how your reply will affect later bargaining.*

#### **(4) Demand further efforts**

Suppose that your case does not settle at a mediation session. A good mediator will contact the parties afterward to attempt to pursue the settlement process. Some neutrals, however, do not take the initiative to do this, either because they do not think it appropriate or because they are distracted by other cases. If your client would benefit from a further effort at settlement and your mediator does not take the lead, prod him to do so.

*An inventor sued a company for patent infringement. The company hired a law firm to represent it, but it was aware that expert fees would impose high litigation costs and in the meantime it would not have clear ownership of the intellectual property. The company's lawyers suggested early mediation, the inventor agreed, and the parties selected a retired judge as the mediator.*

*At the end of the first day the defense offered almost four million euros, but the plaintiff refused to accept the offer. The mediator said that the parties were too far apart and it was time to admit defeat. The company's lawyer suggested a different approach, however. He asked the mediator to propose that the parties adjourn for one week and then reconvene. He also asked the mediator to suggest to the plaintiff that he think about what he would do with €4 million if it were deposited into his bank account.*

*The case settled the next week at a figure close to the company's offer.*

Sometimes settlement is unachievable despite a mediator's best efforts. Even then a mediator can be of use by helping counsel work out a more efficient process of adjudication. The mediator might, for example, facilitate negotiations to set up an efficient litigation plan or arbitration process. To take advantage of a mediator's abilities when settlement does not occur:

- *Suggest that the mediator re-contact the parties and explore whether further progress is possible.*
- *Ask the mediator to facilitate an efficient process of adjudication.*

#### **In conclusion**

Mediation is an active process which is capable of almost infinite variation. Good lawyers know that a mediator can help them bargain more effectively and take the initiative to ask a mediator for help. By doing so, they are able to achieve better outcomes for their clients.