

A Lawyer's Guide to Mediation Preparation

**John C. Shea
Marks & Harrison, P. C.
1512 Willow Lawn Drive
Post Office Box 6569
Richmond, Virginia 23230
(804) 282-0999
(800) 283-2202
e-mail: jshea@marksandharrison.com
web page: www.marksandharrison.com**

A LAWYER'S GUIDE TO MEDIATION PREPARATION

If you come at me with your fists doubled, I think I can promise you that mine will double as fast as yours; but if you come to me and say,

“Let us sit down and take counsel together; and if we differ from one another, let us understand why it is that we differ from one another and understand just what the points at issue are,”

we will presently find that we are not so far apart after all, that the points on which we differ are few and that if we only have the patience and the candor and the desire to get together, we will get together.

Woodrow Wilson

With courtroom congestion and jury pollution the bane of plaintiff's attorneys and their clients, “mediation” has become the mantra of the 90s. Perhaps five years ago it may have been understandable for a practicing lawyer to be unfamiliar with the concept of mediation, but these days any practicing attorney will be subject to criticism, if not malpractice exposure, for failing to identify the benefits of mediation to a firm's clients.

A. Preliminary Considerations

■ *Evaluate the Lawyer's Ability to Participate in Mediation*

The first hard reality to face is whether or not you are able to participate in the mediation process effectively. The worst mediation lawyers often are the best trial attorneys. The two approaches are vastly different. If the attorney has the ability to be objective and look at the process as finding a mutually fair solution, as opposed to being an opportunity to “win,” he will represent his client well in mediation.

Some trial lawyers will not prepare themselves or their client for good mediation advocacy. Many are so arrogant that they can persuade a jury of anything and are so militant of personality that they cannot be objective in looking at the importance of resolving the case. They can smell a “win” in the court room and that is what drives them.

■ **Understand the Process**

Too often lawyers misunderstand the uniqueness of mediation and attempt to approach it in the same way they approach trial. Mediation is a problem-solving approach centered on the parties. In trial the process is adversarial and centered on the lawyers. A very different approach is required in mediation. The process belongs to the parties. Plan to utilize the process to conclude the case on terms favorable to your client and not just as another hoop to jump through prior to trial.

Mediation Values	Adjudication Values
Much compromise	Very little compromise
Help from the mediator in communication, in mood and tone, in reality checks, etc.	Adjudicator decides rules.
Party-to-party communications.	Lawyer to tribunal communication.
Party control, nothing happens without party consent.	All control given away to a stranger; a stranger rules.
Preservation of relationships.	Injury to relationships is irrelevant.
Focus on future and future relationships.	Focus backward, on application of the rule of law only to past acts.
Value misunderstandings are massaged out.	Stranger determines values.
Process flexibility.	“One size” of rules tends to be force-fit upon all disputes.
The law is determined, applied or disregarded by the parties.	The law is determined and applied by a stranger.
The facts are determined, compromised or disregarded by the parties.	The facts are found by stranger(s).

Although cases must be prepared for trial, early detection of cases that are ripe for resolution can reduce a heavy case load:

Mediation is appropriate in any case in which you and your client are interested in controlling the outcome.

□ Mediation is especially useful in the following situations:

- Other side is non-responsive
- Other side is not evaluating case realistically
- Client control problems exist

- Confidentiality is a concern of your client
- Your client wants to avoid setting a legal precedent
- The number of parties and/or complexity of issues makes direct negotiation difficult
- Your client wants to avoid the delay/cost of trial.

■ ***Is the Client a Good Choice for Mediation?***

After deciding which cases are appropriate for mediation consideration, it is essential to evaluate the client. A client who is overly aggressive, mouthy, etc., is not a good client to take to mediation. This type of personality will make mediation difficult. If, however, the client can show sympathy, can remain unemotional, can listen intently, and can be open minded and fairly consider the opposition's side and any offers/counter-offers, this client would benefit from mediation. Remember that mediation is not so much a search for truth or justice as for party accommodation. If your client will only accept destruction of the enemy, this process is not for him.

■ ***Consult the Client***

It is essential to discuss the possibility of mediation with clients early in the process. Some clients should be given basic information to read on mediation to acquaint them with the process. Hit on these key points in your discussion:

- A. The mediation process usually consists of:
 1. An introduction by the mediator
 2. Opening statements by plaintiff and defendant
 3. Caucus - done with mediator and each side separately
 4. Closing - both sides meet for a final agreement

- B. The mediator is not a decider of the issues/case, he is only a conduit/facilitator of communication between the parties. He is not counsel or advisor to either side. The mediator does not know all the relevant facts.

- C. Confidentiality - most of what is said in mediation is confidential, but not everything. It is key to understand what is and is not confidential.

- D. There is no requirement to reach an agreement. If no agreement is met, nothing is binding.
- E. Any agreement reached and placed in writing is a final solution and not appealable.
- F. The risks of going to trial - costs, win/lose possibilities, etc.
- G. Surprises can occur in mediation, just as in trial. The mediator may discover new information by playing devil's advocate.
- H. The mediator is neutral but will have his own style of moving the communication between parties forward.
- I. The benefits of mediation: control, participation, speed, low cost, party-to-party communication, feeling of being heard, low risk, confidentiality.
- J. Where and when the mediation will take place.
- K. Timing of each mediation stage.
- L. The client's role in the process:
 - To be sympathetic and respectful, refraining from threats, attacks or angry comments.
 - To make part of the opening statement.
 - To listen closely
 - To re-evaluate the case with an open mind, making use of the lawyer's advice.
 - To participate in the negotiations.
 - To answer questions from the mediator and explain goals, feelings, etc.
 - To never engage in theatrics
 - To never insult or criticize the mediation.
 - To never discuss money in the presence of the other party. Communicate offers through the mediator.
- M. The lawyer's role in the process:
 - To advise the client
 - May do part or all of the opening statement

To listen and re-evaluate the case as new information is learned.

To be open and truthful in caucus.

To be sympathetic and respectful of the other side, concentrating on issues not the parties.

To make sure the client is well-informed on the process.

To emphasize your belief that a resolution will be in everyone's best interest

To be firm but diplomatic

To avoid showboating for your client or the other side.

To prevent your client from being cross-examined

To emphasize that you and your client are present in good faith

N. The mediator's role in the process:

He is not a judge and does not make decisions.

He is impartial, even though he will do reality checks for both sides and at times play devil's advocate to move the parties towards settlement.

Delivers offers and counter-offers between the parties.

Facilitates open communication between the parties.

Establishes ground rules for the sessions.

Identifies strengths and weaknesses of each party's case.

■ ***Establish the Client's BATNA - Best Alternative to Negotiated Agreement***

Determine with the client, if not mediation, what form of settlement would be pursued and what is the best possible outcome of that alternative process? It is important to establish this before making a decision on whether to use mediation because it will be a yardstick to which you measure any offer or counter-offer during mediation, and even more important, whether mediation would be worthwhile in light of this BATNA.

■ ***Establish the Client's WATNA - Worst Alternative to Negotiation Agreement***

If the client pursues another form of resolution, what is the worst possible outcome? This will also be a major deciding factor in whether or not to use mediation. It will also be part of the yardstick to which you measure offers and counter-offers during mediation.

■ ***Convince the Other Party to Mediate***

This is tricky since many lawyers are hesitant to suggest mediation, for fear of the opposition thinking he has a weak case and is trying to avoid trial. Approach the opposition with the attitude that both sides believe they have a strong case and both could benefit from mediation. If opposing counsel is still hesitant, consider offering to pay for the mediation until a settlement is made, in which case the sides would agree to split costs. If no settlement is made, the opposing side has not lost the mediation fees.

B. Upon the Decision to Mediate

■ ***Select a Mediator***

Know before whom you speak. Just as you would before trial, get as much information as you can about the potential mediator. If it is possible, use a mediator who comes recommended from other attorneys you respect. If this is not possible, it is perfectly acceptable to contact the potential mediator directly to inquire as to that mediator's style and experience with the type of case you are handling.

Some mediators bring little to the table but the loan of their conference room. Some arrogantly determine their view of the case and urge the parties to accept that view without exploring likely win-win alternatives.

There is a continuum of mediation styles, from the mediator focusing only on narrowly defined issues, to those who are totally facilitative, to those whose imagination brings in a broad scope of party interests, to those who fully evaluate the case and become directive of the parties rather than merely facilitative.

It is tough to know and evaluate a mediator and fit the choice of mediator to your case. It may be impossible. But the wrong mediator may fail to get a settlement another mediator might have effectively contributed to.

What do the parties want from the mediator?

Courtesy, respect, good listening, empathy, compassion, integrity, trustworthiness, straight talk, wisdom, flexibility, expertise at least to the

extent of being able to use the vocabulary of the dispute, energy and perseverance, patience, availability, neutrality, impartiality, interpersonal skills, feedback.

■ ***When to Mediate***

What is true in politics is often true in mediation - if the right time, place and manner coincide, success will follow.

A case must be ripe before mediation. The plaintiff's lawyer must have complete information on the insurance coverage of the defendants. Essential, necessary discovery usually will have been completed. However, a lawyer should not wait until large amounts of time and money have been spent preparing for trial before he pursues mediation.

You may mediate as soon as you have sufficient information to evaluate your client's case for settlement. You may enlist the assistance of the mediator in obtaining information from the other side on an informal basis as a pre-condition to mediation.

Mediation may even be effective early in the litigation before incurring discovery and deposition costs when you basically know what information formal discovery is going to produce.

■ ***Where to Mediate***

Choose a neutral location - avoid either counsel's offices to insure impartial feelings on both sides and prevent interruptions. Most local mediation groups provide conference rooms for such sessions. Make sure the facilities are comfortable: you and your clients are going to be there awhile.

■ ***What Time of Day to Mediate***

Start somewhat early in the day - 9:00 or 9:30 in the morning. It will allow all participants to relax without thoughts of dinner and rush hour traffic. Sometimes mediation sessions run late so the client should make sure the children are taken care of the entire day, and if necessary, the majority of the evening.

■ ***Decide Who Will Be Present***

In most cases, just the attorney and client are present in a personal injury mediation, but if there are others your client relies upon

make sure they are present. Make sure the defense has someone with full authority present - not just by the phone. This should be made a pre-condition to mediation.

■ ***Exchange Documents on Key Points Prior to Mediation***

This includes a brochure of information with pertinent case law, expert reports and medical documents and statements of *major* witnesses. Mediation documents should be key to the central issues at hand and should be the plaintiff's best points. Nothing that can be disputed or questioned should be brought to light. Important points in all documents and cases should be highlighted. Send a copy of everything you give to the mediator to opposing counsel as well.

Some mediators want to know the last offer made and any trial schedules.

C. At the Mediation

■ ***Arrive Early and Be Friendly***

Most important is showing the opposing side how approachable the plaintiff is and how willing the plaintiff and his counsel are to be open-minded. Once things start on a negative/adversarial note, the entire mediation is colored in a light of distrust. The client should thank the defendant for being there.

Don't poison the well from which you must drink to get a settlement. Humanize yourself to the adversary. You can be firm and strong on your facts and still be a decent human. That means you don't hurt, humiliate or ridicule the other side. Pejorative terms like "malingerer," "fraud," "cheat" and "liar" are not productive.

Essentially all settlements are based in some degree upon trust: lawyer to lawyer trust, client to client trust and client to lawyer trust. If you anger the opposition with ridicule or use terms like "crook," "stealing," "malingerer," if you seek to extort from them with threats, if you attack their integrity, they won't trust you and they won't settle with you. Indeed they are likely to respond by "taking the dare" and determining to "show you" at the courthouse.

■ ***Participate in the Ground Rules***

This is the mediation of the parties so speak up if there are rules that would ease the process. For example, the lawyer should not hesitate to request a time for concluding the session for that day (perhaps offering to reconvene the next day).

Because the mediation process belongs to the parties by definition, don't be shy about asserting a preference concerning logistics such as starting time, lunch breaks and other ground rules. As a rule, the mediation should start as early in the morning as possible while considering travel time. It is far better to start at 9:30 a.m. and be happily surprised to wrap up the mediation by noon, rather than start at 2:00 p.m. and find yourself an hour or two short of resolution at 5:00 p.m. In fact, many sessions grind to a halt when one or more indispensable participants have to pick up children from child care or learn that the "real" authority was on telephone standby on the East Coast but left the office hours ago. To avoid these problems, it should be understood there is no "cap" on the number of hours to be devoted to the mediation - the process inherently seems to take time to simmer and jell, so avoid artificial time limits which in turn set your mediation up for delay at best and failure at worst.

■ ***Don't Fight the Mediator***

The mediator is there to assist the sides in meeting common ground. The mediator is human and will have problems with an attorney who tries to take over. The mediator is the controller of the process and is experienced in these matters. Make it a point to ask the mediator questions and to answer his as openly as possible. Take most, if not all, reasonable suggestions made by the mediator. It will move the process forward.

If you manipulate or otherwise fight him for control, you lose the initial goodwill and stature the mediator brings without accomplishing any movement toward settlement. Get the benefit the mediator's skill and experience by using most of his suggestions on how and when things occur.

■ ***Opening Statements***

The opening statements are made directly to the other side. If the client is well-rehearsed and presentable (dressed well, understands the

process and roles of the parties, is well-mannered and a decent speaker), let him tell his story. The “judge or jury” you want to persuade in a mediation is not the mediator, but the adversary. It is the other *party* you want to persuade to be sympathetic to your cause.

Make sure he explains the way he feels. Make sure that he avoids saying “you” statements (“you” bashed my car) and encourage him to use “I” statements (“I” felt helpless when your car hit mine). Keep focus on the issues not the people.

Don’t discuss money. If asked by the mediator, give as general of an answer as possible and save money talk for negotiations.

Show support for the mediation process and your commitment to it.

Show off your preparation. Advocacy includes the proper use of advocacy tools - exhibits, charts, copies of relevant cases with key phrases highlighted. Prepare your materials for persuasive impact.

It is acceptable to have the client read his opening, but make sure the client has read the statement out loud a few times before the mediation to insure flow.

Avoid the temptation to explain everything your client says. Details can be worked out later and it will make the lawyer look controlling in an open process.

If your client, for whatever reason, would not make a good speaker, do the speaking for him. The lawyers should not show the opposition a client who will be bad on the stand.

Keep statements no longer than fifteen minutes on the average. Allow more time only if the case is extremely complex.

Listen carefully to the other side’s position and do not interrupt.

■ **Caucus**

Do not use harsh language or ridicule the other side
Avoid asking “why” questions and concentrate on specific questions that address your concern. Why questions put the opposition on the defensive.

Try to understand first, then to be understood.

Be patient and persistent. The process takes time. The “dance” takes time. With time people often will change their minds when they will not change it without time.

Understand the negotiation “dance” and explain it to the client. Negotiation inherently involves a dance of steps and responsive steps.

Attorneys erroneously tend to think mostly about whether an offer is reasonable and proper, in itself, and how to support or attack it. But most of the offers are not expected to be accepted. They are made because of the subliminal signals they send.

The best way virtually to assure that you will not close a deal at your target figure is to make one big move to your bottom line very early in the negotiation. Why? Certainly the answer has nothing to do with the reasonableness of the offer. It has to do with signals.

Search for common ground and stress it. Many lawyers and clients come in so loaded with their own arguments that they are incapable of giving open-minded attention to what is being expressed from across the table.

If you hit an impasse, do something to break up the routine. Usually a slight change is all it takes to get both sides refreshed and refocused.

Never threaten or use ultimatums. They are sure killers to the process. Suggest trial balloons or possible solutions.

Listen to both mediator and opposition without emotion, even if it is something unexpected. Entrenchment and self-justification are not helpful.

Seek objective standards, such as statistics on jury verdicts awarded in the area for specific injuries.

Have the client bring something quiet to do during the down times. The attorney should bring all of his documentation and should take the slow times to review those documents. The attorney should also continuously re-evaluate offers and standing with his client.

Use the mediator’s expertise and use the client’s trust in him as a neutral evaluator. If your client has unrealistic expectations - and many do - use the mediator to help deflate them and induce reason and rationality into your client’s position.

Ask the mediator to explain what kinds of things go wrong in court (judge error, jury error, witness error, even lawyer error) and the law of evidence.

■ ***Concluding Session***

Let the client review what he has agreed to with the opposition. Make sure to get everything in writing! It is important to close the agreement before breaking up from the mediation with a written, signed, enforceable contract. Too often, when left to think overnight and draft tomorrow, new ideas occur that preclude finalizing the agreement as discussed before parties went home.

If no agreement can be made, be open to meeting again or following up with phone negotiations or, if appropriate, further investigation. Rather than walking away with an impasse, the parties would be better served by selecting a future date to reconvene, perhaps designating some interim, discovery to help nail down those issues which are impeding resolution.

End the session by thanking the defendant and his counsel, as well as the mediator - no matter what the outcome. A friendly goodbye could still lead to a quick, fair settlement. A nasty goodbye is likely to close the door to further negotiations.