Do's and Don'ts for Mediation Practice

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Do's and Don'ts for Mediation Practice
BY MARJORIE CORMAN AARON

This is practical advice for mediators, gleaned from years of experience—and too many mistakes.

In preliminary meetings and telephone conferences
A preliminary meeting or telephone conference with the parties or counsel is your opportunity to introduce yourself and set the stage for what's to come.

**DO**
Explore process options and interests. Often, the parties or counsel say they want arbitration when they mean mediation, or vice versa. They might not be aware that mediation may or may not have an evaluative component, and may be set to go forward with an arbitration—without focusing on the fact that it will not resolve all of the disputes between them.

Probe the issue of authority.
Meet privately with the parties and counsel representing them before a final mediation session if the case is complex, highly emotional or has very high stakes. Unlike a trial or an arbitration, there is no prohibition against calling one or both parties separately to discuss any question or issue.

Listen and build trust. People love to talk about themselves and their lives. Being a successful mediator sometimes means having the nose and ears of a psychologist. You are also making a personal connection with the people involved. At some point in the process, you may be asking them to go along with your suggestion on a particular point—which is a lot more likely if they have grown to like and trust you.

**DON'T**
Accept the attorneys’ or parties’ suggestions regarding the process they prefer and the time it will take before asking basic questions about the status of the dispute, the complexity of the issues and what is at stake.

Accept the attorneys’ assurances that they will have authority at the mediation session. Probe further, particularly when an insurance company holds the purse strings, to ensure that someone with true authority will be present.

Use legal jargon. When discussing legal issues, explain the problem and its relevance to the parties, or ask counsel to provide an explanation to their clients.

Offer any opinion, skepticism or favor regarding the claims or defenses in the case.

Suggest to the parties or counsel that your role is merely to provide evaluations that they can accept or reject. Instead, emphasize that the parties are responsible for the outcome of the process.

In joint sessions
At the joint mediation session, the mediator plays many roles: moderator, master of ceremonies, questioner, alter ego, persuader, dealmaker.

**DO**
Set the appropriate tone with an opening statement. The degree of formality or informality should vary, depending on the parties and the chemistry of the dispute.

Remind the parties and counsel of the confidentiality of the mediation process.

Remind the parties that they own the mediation and its outcome is theirs to determine. You might point out that although a certain structure has been set out for the process, there are no real rules to which the parties can be bound. Anyone can terminate the proceeding. Even if the process proceeds as planned, the parties are the ones who will decide whether to reach agreement or not; the mediator does not have the power to hand down a decision.

Ask the parties and counsel to try to listen objectively to the other side’s opening presentation. Suggest that, rather than scribbling responses, they try to imagine how jurors listening for the first and only time would view the dispute.

**Being a successful mediator sometimes means having the nose and ears of a psychologist.**

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testing, so that they can decide whether a proposed settlement makes sense.

Develop an opening "patter" that fits your personality and your philosophy and covers general process issues and questions. But be prepared to alter it to fit the parties, the chemistry and the tone of the case.

Listen and take notes during the presentations—even if you have heard it all before. Be proactive and eager about examining architects' plans and photographs, medical reports, loan agreements and other original critical documents in the case.

By the end of the presentations, strive to have a real and detailed understanding of all parties' legal and factual arguments, as well as their interests outside of the litigation. With reasonable subtlety, let the parties see that you have such an understanding.

Ensure that the issue of damages is addressed. Some of the finest counsel give short shrift to damages. They fail to quantify, forget about the need for supportive evidence—and leave logical and factual holes large enough for two mediators to dance in. Get the parties' theories of damages and supporting evidence out on the table. Ask questions to focus the issues. You might probe to demonstrate where the parties agree on the facts or the law and identify the sources of disagreement.

Ask questions gracefully, without indicating bias. Ask as if simply trying to understand the situation better. Make some effort to balance the questions directed at each side. If you are going to ask a particularly difficult question, soften it by saying that you are playing devil's advocate. Provide a graceful exit route, such as: "Of course, if you were preparing for trial, you would have developed this issue further."

Ask questions and make comments that anticipate the reactions or feelings of the side listening to the presentation. If a lawyer or party has said something terribly outrageous or insulting, you might want to reframe or note that you understand this is a disputed issue and that the other party would most likely disagree. You might say, for example: "I take it this is an important point of contention in the dispute, on which the parties do not see eye-to-eye at all."

Reframe negative comments toward the more positive, if possible.

Use active listening techniques from time to time, restating your understanding of the parties' perspectives, as expressed, but maintain neutrality in the process.

Make sure that all parties and counsel feel they have been given an opportunity to make all of their arguments and say their pieces.

**DON'T**

- Act like a judge or permit the parties or counsel to treat you like one.
- Allow cross-examination or disruptive interruptions or objections.
- Lose control of the proceeding unless the parties have "taken over" to engage in real dialogue and problem solving.
- Indicate that counsel could have done a better job of analyzing the case, advising a client, or preparing for the mediation. This can be very difficult, especially when one or both counsel have been intentional or unintentional barriers to settlement. However, highlighting this during the mediation process will only create an adversary in counsel—and diminish the chances of settlement.
- Quit a joint session focused on the parties' perspectives or on what gives rise to the dispute, except in very unusual circumstances. Remember that the real audience is the parties and counsel. Moreover, if you are called upon to provide an evaluation, it is important for both sides to have seen and heard the presentation upon which it is based.

Interrupt the presentations too much. This is a judgment call. In some mediations, the presentations are less formal, counsel are more relaxed. Asking questions during the presentation period may not be a problem, and may even help focus the issues and demonstrate to the parties and counsel that you are keyed into the importance of critical elements of their case. In other mediations, the opposite is true. If you perceive that counsel or the parties are becoming frustrated by your questioning, save your queries until after the presentations are delivered.

Ask questions that indicate you favor one party's argument or position. If you have spent a great deal of time questioning one side, try to achieve some balance by directing questions at the other side—whether necessary or not. Do not cross-examine counsel or the parties. And do not put them on the spot without allowing them a graceful exit route.

Make one side's case stronger by asking questions or making statements in joint sessions. This will buy you an enemy on the other side. In private sessions, you may point out how the other side's case could be even stronger and note that he or she will probably figure this out before trial.

In private caucuses

The private caucus is often an important opportunity for parties and counsel to regroup after sitting across the joint session table from the perceived enemy.
(Private caucuses, continued)

**DO**

Start the private caucus by asking the parties and counsel what they are thinking, what they might want to say that they were not comfortable saying in the joint session.

Feel free to empathize with each party’s perspective, while maintaining neutrality in the dispute. You can express your understanding of why the other side seems like “the bad guy” given the history or context. Use jokes, war stories, any common ground to indicate that you can see their points of view. Shake your head at the injustice they felt, laugh at their jokes. This is called manipulation—or perhaps the groundwork for effective manipulation—and it is clearly part of the mediation process.

Reiterate that you will not reveal information to the other side unless you are expressly authorized to do so.

Help the parties see that whatever the past perceived injury or wrong, they are now faced with making choices going forward. The task is to find a settlement that serves their interests better than the alternatives. Ask each party how he or she believes the other party sees the dispute, and what the other party would consider a fair settlement.

Ask the parties to begin focusing on solutions, including but not limited to dollars. In some cases, you may suggest a number of options for them to tinker with and ponder. Then it is your job to shuttle back and forth, trying to put a deal together.

Try to get a sense of the settlement numbers the parties have in mind. You might ask them to estimate the chances of a liability finding or of various levels of damages awards. Do a thumbnail risk analysis with the parties and counsel, using their numbers to see what settlement might make sense for them. You may find that the parties analyze the case in the same ballpark, making it unnecessary for you to provide a dollar evaluation.

Find the tiebreaker. As you get down to the last issues, as the number gap narrows and the parties look as if they are drawing a line in the sand over the last dime, suggest a solution and ask both parties to consider it. Explain that you will tell each party if and when he or she agrees to the proposal. The other side will not be able to come back and shave the deal up or down. Make sure your proposed solution is one that the parties can and should accept.

Wait to offer your own evaluation until you see no other way to achieve progress toward settlement. Evaluation carries a great risk—primarily, that the party on the negative side of the evaluation will no longer view you as being neutral or as being very smart. The “winning” party in the evaluation, of course, will think you are brilliant. But this will undermine the mediation and cause you to lose credibility.

Make sure, before you evaluate, that the party would like to hear what you think of the case. Be explicit about what relevant experience and expertise you do or do not have. Provide consistent evaluations to both sides in private sessions.

Provide any evaluation very gently—and in private caucus only. Couch your evaluation in terms of what an average jury might do, how jurors’ sympathies might lie. Encourage dialogue and listen to it. Don’t argue, but explain, from a neutral’s perspective, why you might reach a different solution. If your evaluation is unfavorable to one party, provide a face-saving reason. Try to prevent an unfavorable evaluation from turning a party or counsel against you or the process.

Make sure, before you evaluate, that the rules of all ADR providers, court programs and controlling statutes permit case evaluation.

Pay attention to the bargaining styles of all parties and counsel. Try to identify and assist people in adjusting styles that are not complementary. Be the interpreter between people who operate from vastly different negotiation cultures, styles and assumptions.

Keep the numbers and the options rolling. If people must eat, it’s generally best to order in rather than break the momentum. Hungry people are cranky—and usually have trouble focusing.

Have patience. For example, you might be in the fifth round of shuttle diplomacy and one of the parties will be arguing against your evaluation on the gravel issue. You must listen. You cannot say, “You simpleton. Didn’t you hear what I said? Your gravel isn’t worth beans.” You can say worse that evening when you talk about the simpleton—concealing the name to preserve confidentiality—with your spouse or significant other. In the meanwhile, be patient and try to segue from the gravel issue to the settlement at hand.

**DON’T**

Ask for anyone’s bottom line, at least not until the end of a long day, and certainly not in joint session or in the first round of caucuses. Most of the time, the parties won’t tell you the truth and, as soon as they announce their bottom line—usually, a fake one—they may become entrenched. If you later have to ask them to negotiate past an announced bottom line, it looks as if you didn’t really listen or respect their limits.

Assume that you will be delivering an evaluation. An evaluation on the merits may be unnecessary and unhelpful. Explore all other paths to settlement first.

Deliver an inconsistent evaluation to both sides. It is always tempting to tell both sides they have a terrible
Final agreement
Since a final agreement is mediation’s goal, there are no don’ts to offer—only do’s.

DO
Write up the deal then and there, with the assistance of both counsel, no matter how tired and edgy people are, no matter that they would rather shake hands and go home with assurances that everyone has the same understanding. It is harder for people to walk away from a deal that exists on a piece of paper.

Include a provision stating that the agreement is valid and enforceable, if the parties intend it to be. Obtain signatures of all parties and counsel.

Tackle ambiguities or inconsistencies in the parties understanding of the deal and in the nitty gritty of getting it done. Work them out then and there—or they will come back to haunt you.

Make sure the parties read the agreement aloud, at least to their counsel, before signing it.

Go home and relax. Have a hot fudge sundae. You’ve earned it.