Alternatives

TO THE HIGH COST OF LITIGATION

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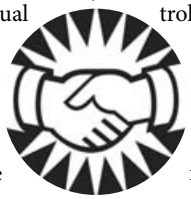
ADR Practice

Ten Pillars to a Productive Mediation: An Attorney's Guide

BY ERIC W. WIECHMANN

Mediation of disputes is growing, as more courts looking to clear congested dockets suggest or command mediation during the course of a litigation, and more parties wary of the cost, time, uncertainty, and often publicity of a lawsuit seek a quicker and less expensive alternative.

At the same time, parties who engage in mediation are too often disappointed or even upset with the exercise. While some disputes just cannot be settled, the frustration with the mediation is more often caused by the parties' lack of understanding of the process, or appropriate preparation for the actual mediation.



Too many times the parties or their attorneys treat the mediation as a reactive exercise. Once a judge or one party suggests mediation, the sides frequently decide on a mediator and date, exchange memos focusing on the strengths of their case, and show up expecting the mediator to help the other side appreciate the strength of their case—or otherwise work his or her magic to create a settlement.

When no settlement is reached, the parties believe the hours spent have been a waste of time. They lose faith in the whole process.

What they forget—or may not have understood—is that mediation is an exercise that they control. Experienced advocates often hear their mediator open by noting that the mediation is the one time in the litigation where the parties and their attorneys can control the process.

And the mediator doesn't control the session. The neutral is there to assist the parties, not direct them. The parties decide the outcome—not a judge, jury or arbitrator. They can do it expeditiously, privately, and at less expense than going to trial or even by striking a settlement on the courthouse steps.

But if the client and his attorney are going to control the mediation effectively, they must determine their goals, appreciate the other side's position and objectives, and understand the mediator's role and the dynamics of the mediation session.

To do this, the attorney and party must prepare effectively. No less effort should be used in approaching a mediation than in preparing for trial or deposition.

To execute these goals, this author proposes that the parties and attorneys consider the following Ten Pillars of a Productive Mediation.

The author, a former managing partner of McCarter & English LLP, is based in the firm's Hartford, Conn., office. In addition to his litigation practice, he handles mediations and arbitrations throughout Connecticut, New York and New England. He is on the national panel for the American Arbitration Association, the AAA's International Centre for Dispute Resolution, and *Alternatives*' publisher, the International Institute for Conflict Prevention and Resolution. He is a special settlement master for Connecticut federal courts, and is an attorney trial referee and arbitrator for Connecticut state courts. This article is adapted and expanded from an earlier version in the *Connecticut Law Tribune* on Dec. 15.

INCREASING YOUR CHANCES

The Ten Pillars are a checklist of the many factors that go into and produce a successful

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Briggs Type Indicator Instrument as an Aid to Mediation," 9 *Harvard Negotiation L.R.* 115-186 (Spring 2004). People may make choices in a "non-rational" or other manner inconsistent with classical economic theory that people act to maximize their own self-interest.

11) The number of participants, stakeholders and constituents on each side are uneven.

12) One or more parties may represent public interests, while others act as purely private persons. People may make decisions in a holistic manner. Participants have different levels of authority and power to bring closure.

13) The law may provide additional protections or restrictions on some of the parties based upon their age, competency or other factors.

14) Confidentiality and privacy interests vary among the participants.

15) Counsel and advocates for different parties are compensated pursuant to different methods such as contingency, flat fee, salary, hourly, per diem, and incentives.

16) There almost always is diversity of culture, age, income and other demographics among the participants. This almost always extends to the mediators who may share some, but never all of the demographics with some of the participants.

17) Participants each have their own relationship to time and pacing, especially the mediator.

18) The mediator has different experience with different participants, meeting some for the first time, while others are repeat players.

19) The participants have asymmetrical experiences with negotiation and mediation.

20) The mediator may have misaligned or asymmetrical goals with one or more of the participants.

21) Participants submit pre-mediation information and prepare in an asymmetrical manner.

22) Participants communicate at the mediation in an asymmetrical manner.

23) Mediators also communicate in an asymmetrical manner.

24) Mediators use different tools with different participants at different times in the process.

25) Participants have different interests.

26) There is a difference between "retributive" and "restorative" interests and goals of participants, mediators and process. Mediators tend to pressure participants toward choosing restorative interests and goals over retribution.

27) Mediators are not neutral in the sense of an intervener who stands outside the process without permanent impact on the dispute or disputants. Mediators have their own point of view and interests.

* * *

Mediation provides a forum for a wide range of problems to be resolved in a manner not limited to the parameters of decisions permitted by the judicial system. It focuses on the reality that people and entities have problems that they wish to resolve in a principled and cost-effective way that empowers them, and respects their ability to engage in self-determination.

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mediation. They will help the party be prepared to actively and productively participate in the exercise.

The Pillars can't guarantee a settlement by the end of the mediation session, but will increase the chances of follow-up discussions leading to a settlement if the mediation doesn't settle the case. At worst, participants will learn more about the other side's case, and clients will be less frustrated with the process.

Each Pillar lists a number of questions to answer and issues to consider. Not every one of these points will be relevant to all mediations. But at least considering whether any issue is applicable to a particular settlement process will give the client and attorney a better appreciation of the important subjects that should be addressed and obstacles that need to be overcome.

1. PREPARATION PILLAR: CONTINUING COMMITMENT

Preparation is a continuing commitment that continues throughout the Ten Pillars process.

The first step is to decide when to seek mediation. This is where a little effort can bear a lot of fruit. From the moment a dispute arises, clients and their attorneys should be considering whether mediation is an effective dispute resolution tool.

Many times, engaging in early settlement negotiations will avoid the expense and inconvenience of pretrial discovery and preparation, and minimize the chance of the parties' enmity for each other growing as a result of the lawsuit. It can be difficult for a seasoned trial attorney to suggest such a path early in a litigation, as it might be perceived by the client as a sign of weakness.

But times are changing. Increasing numbers of clients appreciate, even demand, from their advocates at least a discussion of when mediation might be helpful. Such a dialogue, even if it does not lead to an early mediation, better prepares both the attorney and client for mediation at a later time. In fact, more and more contracts contain ADR clauses that require a mediation effort even before the initiation of arbitration.

Some will argue that mediation will not be effective until both parties have pursued enough discovery to fully evaluate the case. Unfortunately, for the clients this means many months of time and effort and significant sums of money to learn who might have a better factual case. This in many ways might defeat the purpose of the mediation. A mediation should focus on the parties' goals or objectives in resolving the dispute, and not the respective strength of each side's case.

As the mediator will remind advocates and parties, even if either side believes it has a strong position, you never know how a judge might rule on a legal issue. A litigant also cannot know how a judge or jury will react to witness testimony, or why a jury will

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rule the way it does.

That is why mediators are reluctant to evaluate who has the better case. As the outcome of any suit or arbitration is fraught with uncertainty, mediation will focus on how to obtain a negotiated result that eliminates the risk of the unknown. Therefore, exhausting pretrial discovery or motion practice might not be needed.

Usually, if the clients and their attorneys undertake early dispute evaluation, they can derive a good, even if undeveloped, understanding of many of the strengths and weaknesses of the case.

If certain material facts are unknown, a good mediator can frequently convince both sides to exchange some core relevant documents or other salient information, which most likely will be produced anyway after many months and considerable effort. Why not turn it over now if it aids in the mediation, and which, even if it is unsuccessful, allows the parties to better focus their pretrial preparation efforts?

So from the beginning of a suit, an attorney should consider when to discuss with the client the mediation process, the various mediation options that can be explored, and the best time to explore a mediation effort.

Once it has been decided to undertake mediation, the attorney will consider who to use. Often, advocates seek recommendations from clients, partners or attorney acquaintances, or they select from a list maintained by an ADR provider organization like the American Arbitration Association, the CPR Institute, JAMS, or National Arbitration and Mediation. Attorney-advocates look for mediators with prominence and prestige that is often found in ex-judges, former government officials, or senior or retired trial attorneys. The assumption is that this gives the mediator the credibility necessary for the parties to trust the neutral and seriously consider his or her evaluations, suggestions or requests. Party representatives also would check the neutral's experience and fees before making a decision.

This process can be both second-hand and passive. It limits the client and attorney from using their judgment and instincts to find the neutral who would give the mediation the greatest chance for success. Parties need to be actively engaged in neutral selection.

As more fully discussed in the latter Pillars, you want a mediator who will facilitate the parties and their attorneys in reaching a settlement. This takes more than expressing whose case is stronger or how much it might be worth. No two mediations are alike. Each one presents unique intrapersonal, legal and procedural challenges.

Get Ready

The goal: Entering mediation fully prepared.

The problem: Practitioners have long understood the importance of setting up for effective negotiations, and the need to stage ADR. But essential parts of the prep still fall through the cracks.

The help: The author here provides Ten Pillars to a Productive Mediation. Wrap your pre-game around them, thoroughly, before you proceed.

While a mediator must have credibility, his or her past position is usually not enough. Obviously, mediation experience generally is important. But looking for someone with knowledge or expertise in the industry, technology or type of case can be of great help. ADR organizations often maintain specific panels of substantive expertise for this reason.

You should also check the potential mediator's resume closely. Credibility is not just important to your client—you want the other side to buy into the process. You want someone the other side can trust too. You want a neutral who will be considered fair and who will not be perceived as biased toward one side or the other in, for example, a plaintiff v. defendant, or employer v. employee, dispute.

Because many mediations take more than one session to reach a successful conclusion, you also should check on the mediator's schedule, and the neutral's history of following up with the parties after an unsuccessful mediation to continue to focus on settlement options. Some mediators still treat the exercise as a half day or shorter "settlement conference," which inhibits the chances of a settlement.

Look for someone who will be attentive during the session, not just discussing the legal issues, but also focusing on the parties involved and their interests and objectives. The neutral should have good people skills, be patient with everyone, be flexible and be a problem-solver.

In selecting a mediator, do not hesitate to ask the neutral what his or her approach is to a mediation. Listen to the type of information that he or she would like from you and your client other than the claims and defenses in the underlying action.

For example, does the mediator ask about your client's business? Does the neutral analyze the parties' emotional relationships? The relationships of counsel? Consider what third parties are needed for the mediation?

Does the mediator have the ability to examine and contribute ideas to the relief, other than money, that the parties seek? Can he or she analyze the technical or scientific issues pertinent to the dispute?

Finally, does the mediator have a history of suggesting individual telephone conferences with the attorneys or clients (or both) before the mediation as a way to better understand the dynamics of the dispute?

All of this information is helpful in determining whether a mediator will be effective.

2. PLANNING PILLAR: STRUCTURE IT!

In setting up a mediation, there are many issues that should be considered other than just when and what information should be sent to the mediator. This includes identifying all people or parties with authority to settle that need to be involved, including the insurance representatives and the parent company.

Are there related actions or governmental investigations that will affect or be affected by the mediation? Do you inform these parties of the mediation, or get them involved?

You should check the potential mediator's resume closely. Credibility is not just important to your client—you want the other side to buy into the process. You want someone the other side can trust too.

How will the mediation be structured? While most mediators will discuss how they prefer to proceed, are there reasons why a joint session with the parties involved should be curtailed or eliminated?

Other than the standard joint pre-mediation telephone conference call with the lawyers to discuss timing and logistics, advocates should consider whether it would be helpful to have an individual phone interview with the attorney and his or her client. The purpose of the call is to educate the mediator about issues involving the disputes' emotional level; the relationship between the parties or attorneys; issues with third parties that could affect a settlement, or anything else that does not involve the suit's legal or factual merits.

Most mediators will make inquiries on these subjects, but it is helpful to consider them in advance of the initial joint call.

Similar consideration should be addressed as to what should be given to the mediator, and whether it should be exchanged with the other party. As to facts or arguments that underlie the client's claims or defenses and that the advocate knows ultimately will be turned over during discovery, attorney-representatives should evaluate whether to exchange it now, as it always helps for each party to appreciate the strengths and weaknesses of the side's position.

If you or your client are concerned about unveiling weaknesses in your case that might be raised during mediation, consider presenting it to the mediator in a separate ex parte memo. Include any sensitive personal or confidential information that should not at least initially be revealed to the other side.

Emphasize to your client that a mediation is a confidential process. The mediator cannot discuss or pass on to anyone, including the other side, any information or comments learned from you or your client unless you gave the neutral permission to do so. So sometimes it is helpful to let the mediator digest those issues before the mediation to provide a better understanding of them when they are raised by the other party.

Finally, set a mediation date with enough time to meet with the client to fully prepare for the process. Make sure the client fully understands mediation's benefits, the general procedure the session will follow, and the dispute's history and status. Give the client enough time to evaluate this information and obtain appropriate authority to settle.

3. PARTIES/PRINCIPALS PILLAR: WHO MAKES THE CALL?

While many times the advocate might have little say in the choice of mediation participants, it may be one of the most critical factors for a successful outcome.

It will be hard to reach a settlement if the parties' representative knows little of the underlying dispute, has minimal interest in its outcome, or has little real authority. Advocates must try to determine when their client ultimately will approve a settlement. As a mediator tries to focus the parties on these goals and objectives, and not the parties' legal arguments, the preferable client representative is someone who

- knows the dispute,
- understands options that might settle the case other than focusing exclusively on the transfer of money,
- appreciates the toll in money and executive time the prosecution of the case entails,
- understands the fallout for the company if a trial turns out badly, and, finally,
- is not too emotionally invested in the underlying dispute or litigation.

The mediation's purpose is not a mock-trial exercise to show the mediator and other side that you will win. Instead, it allows the parties to control the outcome through focusing on considerations in addition to the legal merits.

Therefore, the advocate's first important step should be identifying and trying to recruit the right person to attend the mediation. Even if they can't attend, try to get them involved in the preparation for the mediation, the discussion of the settlement parameters, and convince them to be available during the mediation for consultation.

4. PROCEDURE PILLAR: THE HOW/WHEN/WHERE

Before attending the mediation—better make that even before preparing your client—make sure you fully understand the procedure that the mediator will follow, and you are able to explain it to the client.

Will there be a joint session? And, if so, who will speak, the lawyers or the client? How long will the joint session go? Does the mediator expect the parties to exchange demands and offers prior to the mediation? How will the individual caucuses be handled? Will the mediator expect to talk to the lawyers or clients separately? How long will the session go that day—for example, should the parties expect to stay after 5:00 p.m.?

Will the mediator want to talk to your client on the phone before the mediation session? If there are more than two parties, how will the parties be grouped or divided?

These are all questions that can be discussed with the mediator if he or she does not raise it at the first call.

In addition, it is helpful to discuss with the client some of the frustrating idiosyncrasies they might run into during the session. Explain the significant amount of downtime that needs to be endured while the mediator is in caucus with the other side. Discuss how to react to and respond to an insulting demand or offer that could be made. Discuss how not to be frustrated with the slow progress that most settlement negotiations take. Explain that this is not a linear exercise, and that many times the amount of the offers greatly accelerate at the end of the day.

Discuss whether they should expect emotional outbursts from their adversary and how to handle them, or any other actions that might be interpreted as a lack of respect or show of

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distrust. Explain why responding in kind never aids the process.

Finally, explain how mediation generally is not meant to be an evaluative process and that the mediator will usually go to great lengths to avoid giving his or her opinion as to whose case is stronger or weaker.

Still, explain to the client that the mediator will try to have each party appreciate the uncertainties they might have in getting a trier of facts to rule in their favor. This frequently is done through Socratic questions directed toward elements of the parties' positions. Ensure that your client is prepared to answer, for example, how he or she believes a jury would react to the client's position, and proof issues.

5. PROBLEM-SOLVING PILLAR: MAINTAINING FLEXIBILITY

Despite these Pillars, there is no way to anticipate exactly how a mediation will go. Every mediation is unique with relationships between and among the parties and their counsels varying. Parties' interests are hard to anticipate, and will often change. The level of understanding of your client's own case, or your opponent's case, will vary.

Therefore, there is no one way to approach every mediation. A good mediator will try to control the process's dynamic nature by being attentive, creative and flexible. The neutral will try to focus on what the parties are saying, how they are saying it, and how the other side responds in order to get a good understanding of the parties' true positions and intentions.

You should do the same. Do not reject out of hand the other side's statements as bluffing or posturing. Do not take umbrage to their responses to your declarations. Try to learn from everything the other side says or does.

Ask the mediator in caucus why the other side said or did what it did. The neutral can't reveal what the other party said in confidence, but the mediator's response usually will help you understand the issues that must be addressed to reach a settlement.

While many lawyers believe their only role is to advocate their position, they also must help the mediator in informing their client as to the other side's goals or objectives, and evaluate responses to them. As this author's grandmother said after I was sworn in to the bar, "God gave us two eyes, two ears and one mouth—and there is a message in that."

Also, during the mediation day, the neutral may devise settlement suggestions. Sometimes those may appear to make little sense, or appear that the mediator is "giving in" to the other side. Your client should appreciate the mediator's creativity, and that the neutral is exploring various avenues to overcome issues he or she likely understands better than the advocates or clients, because a mediator is privy to the other side's concerns and goals.

Counsel clients not to be automatically intractable in their approach to the structure or settlement amount, and how to respond to any offer or counteroffer. The more flexible one is, the better chance a settlement can be reached.

Sometimes presenting the same or similar offer in a different manner can break the log jam. Look for alternative approaches to your position, change the payment terms, consider a future business deal or payment in kind. Many times, a payment with an apology is effective. A structured settlement, or a settlement with a contingent future payout, might help bridge the gap between an offer and a demand.

6. PEOPLE SKILLS PILLAR: MANAGING INTENSITY

As noted earlier, mediation is a process that the parties control. The mediator will use all of his or her skills to create a positive atmosphere to assist the parties in communicating with each other and be open to compromise.

To accomplish this, neutrals need to maintain their credibility by understanding and respecting each party's positions, while at the same time getting them to appreciate the other side's approach.

This is a difficult balancing act where the attorneys can play an important role. Trial attorneys advocate for clients by definition, and that often may require an assertive or even aggressive posture. That intensity, while many times effective in court or pretrial maneuvering, can be counterproductive in mediation.

While advocates must believe in their arguments and should firmly support their client's case, this can be presented confidently but at the same in a respectful manner, with controlled intensity.

It is hard to settle with the other side if an advocate belittles the adversary's position or insults the adversary's intelligence, motives, or morals. As the mediator will remind participants, this type of advocacy will not impress anyone involved, and a cogent presentation of the law and facts will be more effective in settling the case.

If you have had a difficult time dealing with the opposition's attorney during the litigation, you might ask the mediator to suggest eliminating the particularly troublesome issue from the settlement discussions.

Advocates should work with mediators to find ways to minimize the emotion, anger, and ego that are frequent parts of any dispute. Often is it not what you say to each other in mediation but how it is said. This approach greatly increases the chance of settlement.

7. THE PATIENCE PILLAR: DELIBERATE PACING NEEDED

Many clients get frustrated with the pace of the mediation. Why so much down time? Why do responses to demands or answers to factual inquiries take so much time?

It is important to discuss with clients the mediator's role. The neutral is there to help the parties, not order them around. He or she will not be evaluative, at least not initially. The mediator will try to move the parties through persuasion and controlling emotions. This can take some time.

Don't delay a follow-up session or telephone call until after all pretrial efforts have been completed. By then, the parties will have expended much of the time and money that mediation would have saved, and their positions will become more entrenched.

The mediator will know the best time to explore each party's interests, and the best time to focus on demands or offers. The client should appreciate the deliberate pace, often necessary for the result sought.

Advocates should ask their client to focus on the mediator's opening statement, in which the neutral sets out the ground rules, discusses his or her role and approach, and the schedule for the day. Clients and advocates must prepare to show patience by listening to the other side and the mediator without interrupting or immediate emotional response; that's part of moving the process along.

8. PROGRESS PILLAR: MAINTAINING MOMENTUM

You are sitting in your breakout room for a long period of time while the mediator is working with the other side. During this downtime, your client may get frustrated with the inaction or upset at insulting offers or statements made by the other side. Your client may suggest you turn up the heat. Or, in keeping with these times of connectivity, your client will start working on other matters on a laptop or smartphone, losing focus on the mediation.

These behaviors, wherever and whenever they occur, are not good for mediation progress.

Keep your client focused. First, advocates must remain focused themselves—not spending time calling or emailing other attorneys, clients or whomever. If an attorney must communicate during a session, caucus or downtime, it must be kept brief. Tell your mediation client you will be back within five minutes and want to discuss a specific issue that was previously raised.

Mediators often will try to maintain momentum by giving "homework" to a party and lawyer who the mediator is about to leave on their own. The mediator will ask "How do you respond to the other side's argument about . . .?" or "Would you consider these options in addition to money to settle this case?"

He or she might ask for an estimate of the time and money that it will take to fully litigate the case, or what the party believes is the best and worst result that might arise from a trial or an appeal, and how it compares to a settlement.

Even if the mediator doesn't dole out such assignments, advocates may want to discuss similar subjects with their clients to keep focused. If nothing else, such efforts will usually speed up the process and allow a more effective response to the other side's subsequent counteroffer or other declared position.

9. PERSISTENCE PILLAR: ENGAGE AND RE-ENGAGE

If at first you do not succeed, try, try again. This could be the motto of many top-notch mediators. Many times, especially in multiparty or complex cases, it takes more than one session to reach a settlement. So do not be surprised if the mediator asks at the end of a frustrating, emotionally draining session when no agreement was reached if another session or a telephone follow-up would be helpful.

Before responding no, at least ask the mediator why a follow-up could be helpful. In fact, it is almost always worth the effort to pursue a telephone follow-up in a week or so. Often, after both sides have had time to digest what was discussed or offered at the first session and any residual emotion has tempered, the parties will be more willing to reengage in mediation talks.

If you or your client believes that a follow-up should wait until after a future event, such as limited focused discovery or a ruling on a specific issue, try to accomplish that quickly. Don't delay it until after all pretrial efforts have been completed. By then, the parties will have expended much of the time and money that mediation would have saved, and their positions will become more entrenched.

Consider whether there is any reason not to keep a dialogue going with the mediator.

10. PRESERVATION PILLAR: MEMORIALIZE NOW!

It is the end of the day, everyone is exhausted. But the good news is that both parties have agreed to a settlement.

Still, it is late, the parties want to go home. They tell the mediator they will work on the points of the agreement . . . tomorrow.

The mediator should say "No, we need to memorialize the settlement right now, right here."

The settlement paper need not be the final detailed document. But it should be a writing covering all of the essential points with both parties signing the document. If this is not done, there is a chance one party may reconsider the deal and want to back out of the agreement or renegotiate certain aspects—the classic buyer's remorse.

Remember most settlements leave one or both parties somewhat disappointed in the outcome, as it is a compromise. Without a signed or otherwise acknowledged agreement, it may be difficult for a party to try to enforce the bargain. Some courts have specifically ruled that they will not enforce a mediated settlement without a writing acknowledged by both sides.

That is why someone should bring a laptop to the mediation to memorialize the settlement terms if the location does not provide staff support, especially after hours.

Remember, the mediator will not draft the terms himself nor should he or she. The neutral by definition does not represent either party.

He or she can comment on the points that need to be recorded as accurately reflecting the agreement, but should not draft it. The advocate should make sure the document covers all necessary points so that nothing remains to be negotiated.

As to getting the document acknowledged, if for some reason there is not a printer available or operational, be creative. Email the agreement to each party and have them reply stating they have read the agreement, reviewed it with their attorney, and agreed to its terms.

And you can always go old school and write it out and sign it. One mediator finalizing an agreement at a vacation resort located a whiteboard and had the parties write the terms on the board and sign it. Then everyone, using their smartphones, photographed the board with the signatures. A little effort at the end of the day may prevent a lot of effort, expense and bad feelings later.

While focusing on these "Ten Pillars to a Productive Mediation" requires more effort from both the client and the attorney, it should increase the chances of a successful mediation and help the client better understand both the litigation and the mediation process.

To paraphrase Thomas Edison, successful mediation is 1% participation and 99% preparation.