

Premediation Preparation: A Key Component to Successful Dispute Resolution

By Hon. Stuart A. Nudelman (Ret.) and Jann Johnson

Hon. Stuart A. Nudelman (Ret.) served in the Circuit Court of Cook County, State of Illinois, for 21 years. Since his retirement in 2006, he has concentrated on complex high-profile mediations and arbitrations, specializing in cases involving construction defects, multidistrict litigation, catastrophic torts, commercial contract litigation, and governmental regulatory matters. Judge Nudelman is a senior mediator and arbitrator with ADR Systems of America, LLC, located in Chicago, Illinois. He can be reached at sanmediate@hotmail.com. **Jann Johnson** is the director of business development and marketing at ADR Systems in Chicago. She worked as a business and employment attorney in private practice and a marketing manager at Accenture prior to joining ADR Systems. Johnson can be reached at jjohnson@adrsystems.com.

TIP

Uncomplicate the complex high-profile mediation by preparing, persevering, preparing, having patience, and preparing.

The majority of those who participate in mediation—especially high-value, complex, or high-profile multiparty mediation—are seeking an end to their dispute and closure. They either wish to avoid exposing their difficulties to the public, or are attempting to save time and expense through the mediation process. However, mediation will still require them to invest time, money, and emotional energy in the process. A significant part of the preparation will be in choosing a mediator with the skills necessary to handle what may be a complex or sensitive mediation.

Both the parties and the mediator must work together to set the stage for a successful mediation. The mediator assumes a pivotal leadership role in the preparation process well before the mediation begins. The mediator must choreograph all of the premediation preparation activities, including process planning, premediation meetings, and doing the necessary independent research to fully prepare for the intellectual rigor and complicated dynamics associated with complex cases. This article will briefly examine how effective mediators prepare for mediation—and hopefully a settlement—by examining these critical premediation activities.

The Mediator as Leader

Mediators often deal with powerful people who are accustomed to being in command. The mediator is tasked with coordinating these people and their attorneys toward settlement. Involvement of the decision makers is critical to success, and the mediator must have direct contact with them at almost all junctures of the process. This is no easy task in high-value, complex, or high-profile multiparty media-

tion. Counsel and the decision makers need to understand—right from the beginning—that mediation is facilitated negotiation. The parties need to be actively involved, and the mediator must guide them through the process.

If the mediator is an effective leader, the mediation has a better chance of success. Some commentators have suggested that the skill most necessary in effectively mediating multiparty disputes is leadership.¹ Core leadership competencies may include²:

Dealing with ambiguity. Whether due to active dissemblance by the parties, or simply due to the nature of a complex case, information available to the mediator will often be imperfect or incomplete. The best solution to resolving a case may take time to develop, and may seem unclear at first. A good mediator will work through this ambiguity, try to obtain as much information as possible, and try to direct parties toward an eventual settlement.

Knowledge of the subject matter. Complex cases often require the mediator to have a good understanding of sophisticated, cutting-edge information specific to the business or industry involved. In some cases, this may also require a strong grasp of a specialized or esoteric legal subject matter, or a good basis in mathematics, statistics, or economics. It is crucial to choose a mediator who possesses some depth of knowledge in the subject matter involved, and who is also able and willing to supplement this knowledge with independent research and analysis. If the case is particularly intricate and deeply embedded in subject matter expertise, a comediator who possesses this expertise is often recommended.

Managing and organizing. Depending on the size of the case, the mediator may need to meet with numerous people, at different times prior to the mediation, manage interactions between parties, and maintain communication through rivalries, constituencies, and sensitive issues. Sometimes, a mediator may invoke the almost universal moral standard of “fair play” just to encourage constructive dialogue. To maneuver between all parties and keep abreast of all developing issues, the mediator must have substantial logistical know-how and the organizational skills to get it done.

Communicating. A mediator as a leader must exhibit exceptional communication skills. He or she must attend to all forms of communication—spoken, written, nonspoken, and nonwritten—asking the right questions to better understand and check the mediator’s own assumptions and those of the parties. A mediator, as negotiation facilitator, must be able to forward the conversation between parties, especially when communications appear to be breaking down. A good mediator should not assume what the answers are until he or she asks the right questions.

Patience and perseverance. The more complex the case, the higher the value, the stronger the emotional elements, the more difficult it may be to coordinate all parties toward settlement. Mediator leaders first seek to understand the facts, data, and people before attempting to resolve the dispute. They stay the course, and do not take rejection personally. Sometimes cases settle even after the mediation session(s) ends due to the patience and perseverance of the mediator in following up with the parties.

Confidence and trust. Key to a successful mediation is a mediator who can establish trust with the parties. In the face of impasse, productive problem-solving techniques employed by the mediator are more likely to be supported if the mediator has established a trustworthy rapport. The key elements of trust³ are: (1) belief in the mediator's integrity and competence, (2) belief in the mediation process, and (3) the expectation that parties will deal honestly with each other. A mediator should lead the parties in adhering to a consistent set of core values and acting accordingly.

Gravitas. A mediator leader should reflect a serious and dignified demeanor, yet remain personable, approachable, and understanding of the difficulties that the process may impose on one side or the other. He or she should have the courage and poise to give direct feedback to parties, provide reality checks, and reflect confidence in the process, while helping parties to assess the strengths and weaknesses of their case. As scholar Warren Bennis says: "It is not enough for a leader to do things right, he [or she] must do the right thing."⁴ A mediator leader will reflect confidence in his or her ability to facilitate the negotiation process, yet deviate from the prescribed path when necessary, and not look back.

Mediation Process Planning

Parties and the mediator must prepare for mediation with the same forethought and planning that they would if they were going to trial.⁵ After a review of the various mediation models and techniques, the approaches selected by the mediator, coupled with the mediator's style, will be the driving factors in the mediation. The mediator aims to achieve control over the process, rather than control over the parties. The thorough mediator will assume a leadership role, and use premediation meetings, or telephone calls with various stakeholders, to assess what type of process would give the parties the best chance of success.

The first step in process planning involves defining goals for the mediation and identifying a series of process steps that will guide the discussions.⁶ Second, the mediator must ensure that the parties understand the process and come to agreement on the forum. Third, the mediator must carefully guide the parties through the process steps.

Especially in high-profile cases, confidentiality and privacy may be of utmost concern to the parties and must be included as part of process discussion. Furthermore, the process planning should consider the possible intrusion of the media, and a contingent process should be established for dealing with media inquiries. Often in high-profile cases, the mediator must manage the process with sensitivity to those who are skillful negotiators and those who are not as seasoned.

The mediator will frequently assess the progress of the mediation and the process itself. Mediators who are true leaders will decide when a particular process style or approach works, and when it may be necessary to shift between mediation styles. Three common mediator styles have been identified⁷:

Doubt and dissonance style. Here the mediator helps the parties to be more flexible and evaluate or reexamine their positions. A mediator may cast doubt or uncertainty about a party's position. While this is often used in varying degrees, it may be risky if the mediator has not established rapport with the parties, because they may question the mediator's neutrality or perceive this as destructive or threatening.

Hypothesis generation and testing style. Under this approach, the mediator asks both parties what they perceive to be their most constructive, and the fairest possible, agreement. Through this inquiry process, parties discover areas of agreement. To start, the mediator asks open-ended questions, and later moves to hypotheses testing questions—to test, revise, and refine the mediator’s hypotheses about what it will take for the parties to come to an agreement.

Interest-based option generation style. Using this style,⁸ the mediator guides the parties through a series of discussions that focus not on the issues, but on the interests of the parties. Through exploration of the parties’ interests, options for settlement are generated. It is a positive, constructive process. It is the most widely used framework for facilitated negotiation.

Acting as the director and facilitator of the process, the mediator uses this approach to empower the parties to come up with their own solutions. This style is efficient and the solutions derived from the process result in wise agreements. Wise agreements are those that parties perceive to be fair. These agreements tend to stand the test of time because they satisfy the parties’ interests. There are several steps in the process of generating a wise agreement through the interest-based approach. These include: sharing perspectives, identifying common ground, identifying issues, gathering information and documentation, identifying interests, developing options, evaluating options, and finally, implementation.

Roger Fisher and William Ury refer to this approach as “principled bargaining.”⁹ Their four principles are: (1) separate the people from the problem; (2) focus on interests rather than positions; (3) generate a variety of options before settling on an agreement; and (4) insist that the agreement be based on objective criteria. Generally, their approach plays out in the following manner. The process begins with an analysis of the issue or situation, including the parties’ interests, views of the situation, and existing options. This is followed by planning a way to respond to the situation and the other parties. In the final step, the parties discuss the problem and discover a solution on which they can agree. While this approach is not new, it is still widely employed by successful mediators.

No particular mediation process or style is better than another. The mediator crafts a style to fit the needs of the parties. If the parties are motivated to settle, and have agreed on the process, the chance for settlement is good. However, no mediator can help disputants reach agreement if they do not have the desire to resolve their dispute through negotiations. Successful negotiation is part technique, part choice of the right process.

Premediation Meetings

Parties and the mediator must prepare for mediation through premediation meetings, a series of meetings suggested by the mediator prior to the hearing. This is of utmost importance in high-value, complex, or high-profile multiparty mediation. These meetings take a variety of forms and serve a variety of purposes. These meetings not only provide the mediator with a wealth of information regarding the case, but also help the mediator assess the parties and the process, so as to make alterations where needed. Astute listening during premediation meetings helps the mediator spot problems ahead of time, and allows the mediator to devise strategies to deal with any issues.

These premediation meetings are essential for several reasons: (1) the mediation will run smoother from the start, validating the mediator and the process; (2) parties tend to move toward settlement faster and in a more organized fashion following premediation meetings; and (3) they may be a good time for the discussion of confidentiality and questions about shielding the process from the media or other interested groups and organizations.

During the initial premediation meetings, conducted separately with the various parties involved, the mediator will ascertain what outcome the parties seek from the mediation. This is not always a given. Possible outcomes may be settlement, partial settlement, narrowing of issues without settlement, or a means to pass messages to the other side confidentially. Confidential communication as part of the mediation process in high-profile cases is frequently used to keep the media at bay.

Premediation meetings with the mediator may involve various combinations of players, depending on the facts and needs of that particular case. Prior to the mediation, these meetings will always be conducted separately, usually with the parties only coming together at the opening session of the mediation, if that is the process that has been chosen. The mediator will ask that different groups come together for premediation discussions. Some groups may consist of the mediator and parties with counsel, or mediator and counsel only, or the mediator, counsel, and only the principals. Or, the mediator can meet independently with the principal or principals with permission of counsel.

It is not unusual in high-profile cases for the principal or principals to want to meet with the mediator alone before mediation. The principal may be a powerful person or a celebrity who is accustomed to special treatment and attention. It takes a well-prepared and experienced mediator to navigate through these meetings with principals due to the pressure, explicit or implied, that the principals may try to impose on the mediator. A focused and experienced mediator takes these meetings in stride and will find them useful in preparing for the mediation.

Principals have varied objectives for meeting with the mediator prior to the mediation. They may want the mediator to “hear” their opinions and have the opportunity to vent without others present. They may also attempt to manipulate the mediator. Further, they may want to start the mediation process with the mediator and begin to bargain, providing the mediator with their ideas. In still other cases, principals may want to tell the mediator how to conduct the mediation. These premediation meetings assist the mediator and the parties to prepare for a productive mediation, but they must be approached with care by the mediator—as a leader who can manage these meetings so they are productive.

Ground rules for the mediation may be explored by the mediator during these meetings. The mediator assesses the negotiating power of each side and assists the parties in developing ground rules for behavior during the mediation, to ensure that everyone is heard. “Guidelines for behavior, established in advance and invoked when necessary, are particularly important when some of the negotiators are not familiar with the basic necessities of constructive dialogue.”¹⁰

The mediator will also try to understand the parties’ underlying values, trust, and power issues during these meetings. These elements will all have an impact on the negotiations. Values shape negotiations because so many disputes are primarily disputes over values.¹¹ The mediator may also create power

maps to better understand the impact of “power” on the impending mediation. Premediation meetings help the mediator define and move parties toward their goals for the mediation. The parties must trust the mediator and trust the process. Mediators must “say what we mean, and mean what we say.”¹²

Conclusion

Mediation requires thoughtful preparation. If the right parties are at the table, and the mediator and parties are well-prepared, agreement and settlement is attainable. The mediator must set the stage for a successful mediation by leading the parties through the steps in preparation, and defining the mediation process with the help of the parties. The mediator must have a firm grasp of the issues through conducting personal research, reading submissions, and planning, organizing, and conducting premediation meetings. Ultimately, given proper premediation preparation, the key to a productive and successful mediation is how effective the mediator is as a leader.

Notes

1. See generally Elizabeth Trachte-Huber, *Mediating Multi-Party Disputes: Reflections on Leadership in Mediation*, 4 PEPP. DISP. RESOL. L.J. 195 (2004).

2. *Id.* at 197.

3. SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES* 209 (1988).

4. WARREN BENNIS, *ON BECOMING A LEADER* 30 (1989).

5. See Joe Epstein, *Effective Mediation of High-Value Cases*, TORTSOURCE, Winter 2007, at 3.

6. CARPENTER & KENNEDY, *supra* note 3, at 192.

7. See Daniel E. Louis, *Challenges in Multiparty Environmental Mediation*, 19 J. NAT’L ASS’N ADMIN. L. JUDGES 77, 84–98 (1999).

8. See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Penguin Books 1983) (1981).

9. *Id.* at 11.

10. CARPENTER & KENNEDY, *supra* note 3, at 234.

11. LAWRENCE SUSSKIND & PATRICK FIELD, *DEALING WITH AN ANGRY PUBLIC* 153 (1996).

12. *Id.* at 40.