William H. Lemons

MEDIATOR • ARBITRATOR

4040 Broadway, Suite 616
San Antonio, Texas 78209
Phone (210) 224-5079 • Fax (210) 930-5082
whlemons@satexlaw.com

PRACTICE POINTERS FOR THE LAWYER - ADVISING CLIENTS IN MEDIATION - - A MEDIATOR'S PERSPECTIVE -

Mediation is an art, not a science. But there is also an art to advocacy in mediation. The following "pointers" came to me over 30 years as a trial lawyer in complex commercial and business disputes, and after nearly 10 years serving as a mediator in such cases. While reflecting my personal experiences as lawyer and mediator in commercial cases, these essential learning points cut across practice lines.

Develop a Settlement Strategy

Only 3-5% of filed cases proceed to trial. Less than 1% are decided by a jury. The remainder whither away — some with the help of a judge — or settle. As you develop your discovery and trial strategy, plan a ***settlement strategy*** which tracks with those strategies. Identify up front the amount and sequence of discovery that you realistically need to evaluate your client's legal case. Analyze settlement options from both your client's perspective and from the perspective of your opponent. Do not let cases drift to the point where they cannot be settled because of pending dispositive motions or because your client has incurred an excessive expenditure of fees and costs in litigation that now needs to be rationalized or somehow justified.

Talk to your client frequently about the client's goals in the litigation. Have your client distinguish between ***needs*** and ***wants*** - and try to identify the other party's *needs* (this often differs from what the other side *wants*). Revisit that notion often as the case progresses. Remember that clients unsophisticated in litigation may not fully appreciate the emotional and financial drain of litigation, particularly the discovery process. Take a client's "damn the torpedoes, full speed ahead" demand with a grain of salt and remind the client - often - of the risks of continued litigation — including the demands litigation will place on the client.

Mediation is not a panacea. Not all cases should or will settle. There are disputes of such dimension that trial is the only real way to resolve them. Wise counsel, however, will distinguish those rare cases and press for mediation or settlement in virtually all other cases.

Use Mediation at the Earliest Practicable Time

Consider using mediation as early as possible. It is the unusual case where counsel needs to conduct every last scrap of discovery in order to effectively mediate a case. While many lawyers, when asked when mediation should be undertaken, respond, "After the close of discovery," that is frequently ***not*** the best time to mediate. Counsel's responsibility is to resolve their clients' disputes ***effectively*** and ***efficiently***. Discovery is generally the most expensive phase of the litigation process. Develop a discovery plan that focuses first on what you and opposing counsel need to evaluate the case and set the stage for a successful mediation or other settlement dialogue. Only by encouraging clients to participate in an earlier, neutral evaluation of their cases will lawyers prevent the litigants from saying, after the conclusion of the case, "only the attorneys won."

Know Your Mediator

Just as mediation is an art, and not a science, all mediators are not cut from the same cloth. Know your mediator's personality. Discern his familiarity with the litigation process in general and as applied to your case. Find his familiarity with the substantive legal issues presented by your case (if familiarity with such issues is important to you or your client). Learn, perhaps most importantly, how your mediator generally conducts a mediation. Business disputes frequently require a mediator who is very savvy in the ways of the business world, where the finer points of legal "positions" often take a back seat to practicality.

Counsel should be aware of at least broad styles of mediator performance. While conventional wisdom categorizes mediation styles as either *evaluative* (sometimes referred to as "directive") or *facilitative*, in reality there is a much broader spectrum of mediator performance. Many mediators use a hybrid approach combining various styles, and often vary these styles at different times in the mediation process.

Some mediators are activists and conduct mediations much like a judicial settlement conference. They most assuredly will get involved in the details of the case. They will tell the parties their assessment of settlement value - and will actively try to assist the parties in understanding their strengths and weaknesses - all with a view toward provoking a settlement. Other mediators are more passive and view their role as primarily a relayer of settlement offers. They do not view it as their duty — and think it not even appropriate — to provide an assessment either of the merits of a case or of disputed legal points.

Some mediators believe that the best way to provoke a settlement is to fully understand and discuss the merits of a case, providing the litigants with their "day in court" or at least an opportunity to "vent." This recognizes that in order for the litigants to settle, they will have to be satisfied that their position has been fully understood, and otherwise to have "closure" on the personal issues which they brought to the dispute. This mediation style believes that monetary offers and ultimately settlement follow an understanding of the merits (or at least the parties' view of the merits).

Other mediators are more interested in immediately proceeding to an exchange of monetary offers. These mediators tend to believe that a detailed discussion of the merits is somewhat counterproductive and virtually immaterial to the ultimate result.

All of the above styles — and they are by no means an exhaustive list, as each style has nuances — have their pluses and minuses. Counsel needs to carefully investigate prior performance and style of the mediator. The best trial attorneys are not always the best mediators. Judges are seldom very good mediators. Although the best mediators adapt their approach to the needs of the case, mediators are human after all and a particular mediator may be extremely well-suited to handle one type of case (or parties with one set of characteristics), but be absolutely the wrong choice for another type of case or involving different client dynamics.

- Consult fellow trial lawyers and lawyers in your own firm for their recommendations.
- Consult other sources for mediator candidates.
- Most mediators have an "ADR Profile" which outlines their substantive law practice, mediation training and experience, and other information of interest to counsel in selecting a mediator. Ask for a copy.
- All institutional ADR provider organizations (such as the AAA, JAMS) have similar profiles available for their mediators. Ask for one.
- If your court system has a court-annexed ADR program, consult the director for available information about mediators on the court's roster.
- Most state bar associations, and some local bar associations, have a dispute resolution section. Consult the section leadership for available information about mediators practicing in your area.

The bottom line: if you don't know about your mediator, ask.

Finally, consider whether substantive law knowledge is an important consideration in selecting a mediator. Most often, it is. If it is, be sure to select mediator candidates with that skill-set in mind.

Mediation is Most Often not Free

Most mediators are good because they mediate often. Mediations *rarely* take only a few hours. Most take a full day, plus several hours of preparation time. Not many mediators can afford to spend the equivalent of a business month — or more — without compensation. Don't expect yours to. Although nearly all mediators (regardless of the forum through which they are selected) will serve without compensation in an appropriate case, the reality today is that parties are expected to compensate the mediator for the skills he brings to the dispute resolution table. Recognize this and prepare your client for it.

As clients are entitled to know the basis on which their lawyers are charging them, so too you and your client are entitled to know the basis on which the mediator is going to be compensated and how his fees are going to be shared. While mediators' charges vary, in most major metropolitan areas a typical day-long mediation can cost in the neighborhood of $3500 - $4000; in simple two-party disputes, each side winds up paying about half that, $1750 - $2000. Ask your mediator about his charges and the mediator's estimate of mediation costs for your case. Be sure you understand what share of the mediator's fees are going to be charged to you and your client.

Are mediation costs "worth it?" It's impossible to generalize. If the case settles — saving all parties the aggravation, uncertainty and cost of a trial — they most always are. The analysis is more difficult if the case doesn't settle, but even in those instances both clients and their lawyers generally learn more about their case (and their opponent's) than they knew before the mediation. If you don't think the cost of mediation is worth it, you always have the option of negotiating a settlement directly with opposing counsel.

Help Your Mediator Understand Your Client's Perspective on the Dispute

Your mediator can be most effective if he knows something about your client and your client's perspective on the dispute. What drove your client to sue (or to defend the case so vigorously)? What is motivating your client to continue the case? What your client ***wants*** from a resolution of the dispute is important, but what the mediator (and you!) really needs to know is what your client ***needs***. What facts or issues are motivating a settlement, or would motivate your client or the other party to settle? Ordinarily, these considerations are set forth in a separate, confidential, "mediator's-eyes-only" memo. Even if your mediator doesn't ask for such a memo, consider submitting one.

Consider sitting down (and *always* confer by telephone) with your mediator before the mediation to share with him your and your client's perspective on the dispute and what is important (and not important) to your client — and, if you know, what is important to the other side.

If your client's trial or settlement position is unrealistic — you need the mediator to go through a reality-checking exercise with your client — get the client's permission to share your difference of opinion ***before*** telling the mediator. If you fail to do so, you may violate the Rules of Professional Conduct by disclosing a client confidence.

Prepare Yourself Thoroughly for the Mediation

Prepare thoroughly for your mediation and take it very seriously. Given the fact that a large percentage of cases which are mediated will settle, mediation represents one of your best opportunities for resolving your client's dispute. No self-respecting business lawyer or business-person would go to a negotiating session without thoroughly preparing for it. Prepare yourself and your client the same way.

Most knowledgeable mediators require a memo from each side, summarizing the salient facts and addressing both liability and damages issues. You need to prepare an excellent and ***concise*** mediation memo. Attach pleadings and exhibits only if your mediator asks for them or if you feel that reading them prior to the mediation will help the mediator better understand the issues in your case. While your mediation memo should be an advocacy piece, it ought to be more analytical than rhetorical.

Many mediators like to see a confidential, "mediator's-eyes-only" submission from each side. Your confidential letter to the mediator needs to be candid and should identify all impediments to — and motivators for — settlement. Think creatively. Remember that the mediator is relying on you to assist him or her in developing and communicating a settlement offer that realistically meets the needs of all parties.

Select an Appropriate Client Representative

Where your client is a business entity, selection of the appropriate client representative is of vital importance. Obviously, your client representative needs to have authority to evaluate and develop settlement proposals and to ultimately execute a settlement agreement. Ideally, your client representative should also be someone detached enough from the dispute to be able to objectively evaluate settlement options but high enough in the organizational structure to have an appreciation for how settlement issues might relate to other parts of the organization. Encourage opposing counsel to select a client representative with the same characteristics.

Know your opponent's client representative. Try to ensure that your and your opponent's client representatives are counterparts. Don't hesitate to suggest to opposing counsel (or suggest to the mediator that the mediator suggest to your opponent) that a particular individual in your opponent's organization would be a desirable (or an undesirable) counterpart.

Where your client is an individual, make sure that if the client needs a support group — or needs a trusted advisor, friend, or spouse to "bless" a settlement — that those persons are either present in the mediation room or at least available by telephone.

Whoever is the client representative, that person must have true settlement authority. Because mediation is a dynamic process, where bottom lines often become fuzzy or irrelevant, and always move, the client representative must also have authority to modify pre-existing settlement authority.

Client Representatives and Lead Counsel must Attend in Person

Under all rules for mediation, state or federal — client representatives must attend the mediation in person. Just as important is the in-person attendance of the lead lawyer from each side — the lawyer who will actually try the case if it is not settled. Mediation is dynamic, not static. Information is communicated not only by words but by body language as well. Your client is most likely paying a significant amount of money for the mediator's services. Your client representative must actively participate in the mediation and deserves to hear first-hand the mediator's questions, comments and observations, and to see how the mediator communicates those matters. A telephone connection is a poor substitute for in-person attendance. Your client needs the advice and counsel of the lawyer who will try the case — and the mediator needs to be able to communicate, directly and in-person, with that lawyer.

Prepare Your Client for the Mediation

Mediation most often is a poker game. Despite decisions reached prior to the mediation regarding who on your side will be the principal spokesperson during settlement discussions, a good mediator will ask ***both*** counsel and his client direct and important questions in an effort to remove impediments to settlement. Assume that your client will be required (or will want) to talk during these private sessions with the mediator. Your client should be prepared to anticipate and correctly answer questions from the mediator concerning ranges of acceptable settlement results. You do not want to be negotiating with the mediator. Be ready. Your client should not hear things for the first time from the mediator.

Consequently, ***thoroughly*** prepare your client for the mediation. Share a draft of your mediation memo with your client and share the opposing side's mediation memo as well. Explain your legal theories and damages rationale. Explain your opponent's defenses. Share with your client your assessment of the other side's needs. Have the client start thinking about how both sides' needs can be met in a settlement. Be candid with the client about the risks of trying the case and the vulnerabilities of the client's position. Explain the mediation process and why you are engaged in it. Tell the client what you know about your mediator's "style" and how he or she is likely to conduct the mediation.

Your client should have a thorough and realistic expectation of the attorneys' fees and costs necessary to take the case through trial, and a good grasp of all potential trial outcomes and the consequences which flow from each. Clients — particularly individuals — tend to think about litigation in simplistic terms. Remind the client (again) that there are "costs" of continued litigation far beyond the out-of-pocket expenses for depositions, experts and your fees. Not only will your client have to "live" with you during the trial and the trial preparation period, but your client will have to relive — again and again — the events surrounding the dispute. Unless you've concluded (and advised the client in writing) that the case is a "slam-dunk winner" for your side, remind the client that a trial might produce not only a less desirable result than hoped-for, but your client might actually recover nothing (or be required to pay more money than the client has ever dreamed of). Where there is a fee-shifting statute or contract, make sure the client understands that the client might not only lose the case but be required to pay for the privilege, not once but twice — by paying not only your fees but also the attorney's fees of the opposing side. Make sure the client understands that if there's a basis for an award of attorneys' fees and the client prevails at trial, trial judges don't automatically just award the "winner" all of the attorneys' fees incurred. The touchstone almost always is this: "What is a reasonable attorneys' fee, under the circumstances, to shift to the loser?"

To Begin with a Substantive Joint Session . . . or not?

Mediations historically have begun with a ***substantive*** joint session, where the lawyers (and sometimes their clients) speak directly to the other party about the presenter's view of the case or dispute. While a substantive joint session is an unparalleled opportunity for lawyers and clients to speak directly to their opposite numbers, it can unfortunately set the stage for positional bargaining, which is usually not a productive beginning. Now, mediators commonly convene a joint session, but often limit it to discussing the mediation process in general and the ground rules for the upcoming mediation, moving then to separate caucus sessions. Think carefully about whether a substantive joint session is likely to be productive, and if so, how. Discuss your views with the mediator before the mediation. Solicit the mediator's advice on what to cover in joint session and how to best convey your side’s message. Here, talk with the mediator.

In a substantive joint session, keep the end-game — a settlement — in mind and focus less on communicating how wronged your client feels and your client's intent to secure its legal rights and more on the client's sincere interest in resolving the case. Bombast and stirring rhetoric may be appropriate for your closing argument, but please resist the temptation to do a dry run in your substantive joint session. Remember, though, that unless the other party is aware of your "smoking gun" document, "killer witness" or right-on-point-new-case, your having them won't do much to motivate the other party to consider settling on your terms.

Be Prepared to Invest Time in Mediation

It is the unusual business case that proceeds in mediation to a rapid exchange of settlement offers or settles in a matter of a few hours. Recognize (and brief your client) that mediation is a complex dynamic ordinarily requiring a substantial commitment of time. You've enlisted the aid of a mediator to facilitate negotiations, and no mediator can do so without an understanding not only of the legal and factual issues but of the dynamics driving the dispute. No matter how skilled your mediator, he is unlikely to wake up with that "understanding" on the day of the mediation.

The mediator's initial private caucuses with you and the other party play an important role: the mediator is not only expanding his knowledge about the case and the factors that each side deems important

but is also building a level of trust with both counsel and their clients. Your client is counting on the mediator to accurately (and energetically) communicate your side's view of the case and settlement position to the opposing side. While you may know the mediator well, your client probably does not. Your client needs to feel confident that the mediator is not only informed, but also empathetic to the client's position.

Remember, too, that the mediator is the best judge of when impasse is reached. While mediation is a party-driven, consensual process, abruptly terminating your client's participation in a mediation is most often ill-advised — and almost always results in a step backward. In caucus mediations, only the mediator has heard the other side's expressions of settlement possibilities and has evaluated the body language that accompanies those expressions. Let your mediator decide when further mediation efforts would likely be unproductive. He is the only one who has been in both rooms.

The mediator will be spending substantial time with both you and your opponent. Use the time the mediator is spending with your opponent wisely — talk with your client about what you just learned from the mediator about your opponent's settlement views. Consider whether anything you've learned alters, or should alter, your view of the case or settlement parameters. If the mediator gives you "homework," do it. Be prepared for the mediator's next visit to your side. Stay actively involved.

Understand the Human Dimension; Listen Actively

As the mediation proceeds, *remember your audience*. Your goal is not to convince a decision-maker of the correctness of your client's cause. Rather, it is to convince your client's opponent of your client's interest in negotiating a settlement that results in a mutually beneficial resolution of the dispute at hand.

Understand the human dimension of your case. Don't demonize your opponent or opposing counsel. Remember that in almost every case there are (at least) two sides to the story. While you may have legal or factual arguments to counter those of your opponent, the only way to be sure who's right is to go to trial — and even then, the judge or jury may not give as much shrift to one side's evidence as they should. Mediation isn't about "winning" or "losing" — it's about evaluating risk and making a mutually acceptable level of compromise. While you may disagree with the efficacy of your opponent's legal arguments, or the spin the other party puts on the facts, your opponent almost always has legal arguments — and a story to tell — that are every bit as objectively valid as yours.

Listen actively during the mediation and advise your client representative to do the same. Achieving success in mediation depends heavily on being a good listener. Understand the signals — from your client, from the mediator, from your opponent — which often are implied but not explicit. If the parties are from different cultures (business or otherwise), consider the impact these cultural differences may have on settlement dynamics and the flow of the mediation — and prepare for them.

Above all, be prepared to acknowledge legitimate points made by the opposing party and to modify your original assessment of the case or its settlement value. The *bottom line* will change, and sticking blindly by a position in the face of new information is a sure recipe for disaster — and will lead to impasse.

Think Several Steps Ahead

It is crucial that you and your client representative think several steps ahead. Identify your opponent's likely responses to your settlement initiatives and, with the assistance of your client, develop appropriate responses. Use the mediator as a sounding board.

Put yourself in the opposing party's shoes. How would you and your client react if the opposing party made you the settlement offer you just asked the mediator to convey? What message are you trying to send? What message will the opposing side get? Does your settlement offer give you the necessary flexibility to continue to negotiate? Are the parties' settlement offers moving at the right speed? Is it time for a dramatic "move?" What signal would a dramatic move send? Is it time to revisit your client's bottom line?

Give Careful Thought to Your Opening Offer

Lawyers tend to forget, or discount, the importance of the opening offer in mediation. Be mindful of the history of your settlement discussions with opposing counsel. Even if you haven't formally communicated an offer, if you've mentioned in passing that a settlement in a particular range or at a particular number might be possible, opposing counsel is going to remember that discussion. If your opening offer is outside those parameters, your mediation day is going to be either quite long or very short. If you do choose to make an opening offer significantly more advantageous to your client than what your prior discussions with opposing counsel fairly indicated, consider what impact doing so will have on mediation dynamics. At the very least, consider articulating an understandable rationale for your departing from what your opponent would reasonably expect. But above all, explain your thoughts and rationale to the mediator.

Obviously, if you are the plaintiff, your opening offer needs to be high enough to give you and your client some flexibility to move lower. If your client is the defendant, of course, your opening offer needs to be low enough to allow you some flexibility in going higher. Whoever you represent, the opening offer must telegraph to the opposing party that you and your client are sincerely interested in settling the case. Think about how you and your client would react if you were on the other side and heard the mediator communicate your offer. Remind your client of these facts, and emphasize that mediation is nothing more than a structured negotiation — movement up or down is a requirement.

Evaluate Settlement Offers Realistically

Evaluate (and encourage your client to evaluate) settlement offers based on what's good for your client, not on whether the settlement is painful enough for the opposing party. This isn't to say that you should accept what you and your client regard as an inadequate settlement proposal. But you and your client shouldn't reject an offer merely because, on some subjective basis, the other party isn't paying enough or is asking for too much.

Settlement is all about compromise. Cases settle because clients, with the advice and counsel of their lawyers, conclude that a settlement on the terms identified is, on the whole, a better alternative to trial. Always keep possible trial outcomes in mind, and remind your client during the mediation of the range of those outcomes. Remember, too, if you are counsel for the plaintiff, that a court judgment is merely a piece of paper. It does not guarantee payment. When the solvency of the defendant or the defendant's ability to pay is in question, immediate payment of a somewhat smaller settlement may be more attractive to your client than assuming the risk of collecting a larger amount. If representing the defendant, and insolvency enters into the picture, don’t wait until late in the evening to broach that subject with the mediator.

Bear in mind (and remind your client) that the difference between a particular settlement offer and what the client "wants" is really an *insurance premium* — insurance against having to pay more or recovering less after a trial. The *premium* needs to be evaluated against realistic trial outcomes and, from the plaintiff's perspective, prospects for collection.

Be Creative

Be creative. Think "outside the box." Keep your client's — and the opposing party's — ***needs*** in mind. While it's a mathematical certainty that the shortest distance between two points is a straight line, settlement dynamics sometimes require a different approach. Remember that through mediation a settlement can be fashioned to provide a kind and type of relief which your client may never be able to achieve at a trial. Principally, trial results in a monetary judgment. On the other hand, settlements can be structured to take into account mutually advantageous future business relationships, tax advantages, and a variety of other factors. Try and know what each party, including your opponent, really needs to obtain in settlement. Use that knowledge in developing settlement proposals.

Be Open to Different Approaches

Occasionally, the mediator may suggest (or the other side may request) a party-to-party meeting — without lawyers. Particularly with business disputes involving sophisticated clients or disputes between parties for whom an ongoing (or future) business relationship is important, such a meeting — perhaps even a discussion between principals over lunch — is often of immense help in clarifying "needs." Don't dismiss such a suggestion out of hand. Consider how such a meeting could assist resolution of your case.

Understand How to Break Through Impasse

Sometimes, despite the parties' and the mediator's best efforts, impasse is reached. The impasse may be as deep as a chasm — or it may just be a sizeable bump in an otherwise smooth road. Trust your mediator to evaluate the seriousness of the impasse and to suggest ways it might be broken. Understand, however, the array of available ADR methods.

In an *appropriate* case, consider asking the mediator for a "mediator's proposal." A mediator's proposal can take many forms — from a settlement "range" the mediator thinks is appropriate to "a number" to a draft of a detailed settlement agreement comprehensively addressing the issues in dispute. Every mediator has his or her own mediator's proposal procedure, but most often the process is "double-blind" — the party rejecting a mediator's proposal is never aware of whether the opposing party accepted or rejected it, thus preserving all parties' bargaining position in the event a settlement does not result.

Finally, consider asking the mediator to follow up with renewed mediation efforts after all parties have had some time to think about the mediation and to re-evaluate their settlement positions. A good mediator will normally invite this opportunity anyway.

Close the Mediation with a Written Settlement Agreement

A good mediator will *always* reduce your settlement to a written agreement. A good mediation must be finished. Never leave the mediation without a signed written document reflecting the terms of settlement. A handwritten agreement summarizing the key "business points" of the settlement will often do just fine. If you believe that more formal settlement documents are necessary, in order to ensure that the agreement made at the mediation is not later deemed an "agreement to agree," the agreement should provide that the signed settlement agreement memorializes the basic points of the settlement and is a binding agreement even though "the parties contemplate the preparation of more formal documentation to more fully implement this agreement." Consider agreeing with your opponent that disputes over the settlement — and particularly over the "more formal documentation" — will be submitted to the mediator for binding arbitration. If signing a "pretty" comprehensive, type-written agreement at the mediation is important to you or to your client, draft the essential boilerplate of such an agreement before the mediation and come with your lap top, disks, and printer connections. Work on it while the mediator is busy with the other party.

Bill Lemons is engaged in all aspects of ADR, including serving as Arbitrator and Mediator, and counseling on the design and implementation of ADR programs. He is an Arbitrator on the Employment Law, Commercial Dispute and Large Complex Case panels of the American Arbitration Association, is on the Panel of Distinguished Neutrals (Employment and Commercial) of the International Institute for Conflict Prevention & Resolution (CPR) for a four-state region and recently was selected to become a Member (MCIArb) of the Chartered Institute of Arbitrators in London. Bill is a past Chair of the SBOT ADR Section and currently is President of the local chapter of the Association of Attorney-Mediators. He maintains an active mediation practice, and is a Qualified Neutral for the United States District Courts for the Western and Southern Districts of Texas. Bill is a member of the College of the State Bar of Texas, Association of Attorney-Mediators, Texas Association of Mediators, Texas Mediators Credentialing Association, Institute for Responsible Dispute Resolution, and is a Life Fellow of the Texas Bar Foundation.