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ESSENTIALS OF MEDIATION

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Mediation—The Big Picture

A. Introduction

1. The Process of Mediation

a. What Is Mediation?

Mediation is a process of assisted negotiation in which a neutral person helps people to reach agreement. The process varies depending on the style of the mediator, the nature of the dispute, and the wishes of the participants. Mediation differs from direct negotiation in that it involves the participation of an impartial third party. The process also differs from adjudication in that it is consensual, informal, and usually private. The participants need not reach agreement, and the mediator, who is usually selected by the participants, has no power to impose an outcome.

In some contexts you may find that this definition does not fully apply. The process is sometimes not voluntary, as when a judge requires litigants to participate in mediation as a precondition to trial. In addition, mediators are not always entirely neutral; a corporate lawyer, for instance, can apply mediative techniques to help colleagues resolve an internal dispute, despite the fact that he is in favor of a particular outcome. Occasionally mediation is required to be open to the public, as when a controversy involves governmental entities subject to ‘‘open meeting’’ laws. Finally, a mediator’s goal is not always to settle a specific legal dispute; the neutral may focus instead on helping disputants improve their relationship or complete a transaction.

There is an ongoing debate within the field about what mediation should be. To some degree this results from the different goals that participants have for the process: Some focus only on settlement of a claim and seek to obtain the best possible monetary terms, whereas others seek to solve a problem and still other participants enter mediation to improve a difficult relationship. The increasing application of mediation to areas such as family and criminal law also raises serious questions of policy. This text focuses on ‘‘civil’’ mediation, involving legal disputes outside the area of collective bargaining, because this is what you are most likely to encounter in lawpractice. However, to give you a sense of the flexibility of mediation, we also present other perspectives on the process.

b. What Do Mediators Do?

Mediators apply a wide variety of techniques. Depending on the situation, a settlement-oriented mediator may use one or more of the following approaches, among others:

- Help litigants design a process that ensures the presence of key participants and focuses their attention on finding a constructive solution to a dispute.

- Allow the principals and their attorneys to present legal arguments, raise underlying concerns, and express their feelings directly to their opponents, as well as hear the other side's perspective firsthand.
- Help the participants focus on their interests and identify imaginative settlement options.
- Moderate negotiations, coaching bargainers in effective techniques, translating communications, and reframing the disputants' positions and perceptions.
- Assist each side to assess the likely outcome if the case is litigated, and to consider the full costs of continuing the conflict.
- Work with the disputants to draft a durable agreement and, if necessary, to implement it.

c. What Is the Structure of Mediation?

Because mediation is informal, lawyers and clients have a great deal of freedom to modify the process to meet their needs. In practice, good neutrals and advocates vary their approach significantly to respond to the circumstances of particular cases. That said, a typical mediation of a legal dispute is likely to proceed through a series of stages.

Premediation

Before the disputants meet to mediate, the neutral often has conversations with the lawyers, and sometimes also with the parties, to deal with issues such as who will attend the mediation and to address emotional and other issues. Lawyers can use these contacts to start to build a working relationship with the mediator and educate him about their client's perspective on the dispute and obstacles that have made direct negotiations difficult.

The Opening Session

Many mediations begin with a session in which the parties, counsel, and mediator meet together. The content and structure of such a session varies considerably, depending on the participants' wishes and the goals of the process. When mediation is focused on reaching a monetary settlement, the joint session is likely to be dominated by arguments of lawyers, perhaps followed by questions from the neutral. If the goal of the process is to find an interest-based solution or to repair a ruptured relationship, then a mediator is much more likely to encourage the parties themselves to speak and to attempt to draw out underlying issues and emotions.

Private Caucusing

After disputants have exchanged perspectives, arguments, and questions and obtained a ''read'' on one another, most commercial mediators adjourn the joint session to meet with each side individually in private ''caucuses.'' The purpose of caucusing is to permit disputants, counsel, and the mediator to talk candidly together. Keeping the parties separated, with communications channeled through the mediator, also allows the neutral to shape the disputants' dialogue in productive ways.

When the mediation process is focused on monetary bargaining, the participants usually spend most of their time separated, with the mediator shuttling back and forth between them. If,

however, parties are interested in exploring an interest-based resolution or repairing a broken relationship, then the mediator is more likely to encourage disputants to meet together extensively so that they can work through emotions and learn to relate productively with each other.

Joint Discussions

Even when a mediation is conducted primarily through private caucusing, neutrals sometimes ask disputants to meet with each other for a specific purpose. This might be to examine tax issues in a business breakup, explore a licensing agreement to resolve a patent claim, or deal with a difficult emotional issue in a tort case. In most mediations, whether or not conducted through caucusing, the lawyers and perhaps also the parties meet at the end of the process to sign a memorandum of agreement or decide on future steps.

Follow-Up Contacts

Increasingly the mediation process is not limited to the occasions on which the mediator and disputants meet together. If a dispute is not resolved at a mediation session, then the neutral is likely to follow up with the lawyers or parties, and may facilitate telephone or e-mail negotiations or convene additional face-to-face sessions if the parties wish.

Variations in Format

The model we have just discussed represents a ''default'' model for legal mediation, but you will encounter significant variations in the field. Mediators who handle family disputes, for example, often remain in joint session during the entire process, and some mediators are experimenting with no-caucus formats in other kinds of civil cases.

At the same time, in several states the practice of holding an opening session in legal mediations is declining. Some legal mediators, acting at the request of litigators, often begin the process with only a cursory opening session or none at all, and spend virtually all their time in private caucusing. Others meet with each side before the opening session. The advantages and disadvantages of these and other formats are discussed later.

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c. Is It Right for Every Dispute? Is It Fair?

Few would argue that mediation is appropriate for every controversy. Even those who generally favor its use agree that the process might not be effective in the following situations, among others:

- A disputant is not capable of negotiating effectively. This may occur, for example, because the person lacks legal counsel or is suffering from a personal impairment.
- One side in the controversy wants a judicial decision to use as a benchmark to settle or discourage similar cases.

- A party fears a settlement that may stimulate ''copycat'' claims.
- A litigant requires a court order to control an adversary's conduct.
- One of the disputants is benefiting from the existence of the controversy, for example, to inflict pain or delay making a payment.
- A party needs formal discovery to evaluate the strength of its legal case.
- A crucial stakeholder refuses to join the process.

Some commentators also see mediation as inherently unjust, arguing that the very informality of the process allows the intrusion of prejudice that is suppressed by more formal procedures. Mediation, it is argued, also facilitates case-by-case resolutions that siphon off pressure for law reform (although nothing prevents parties from mediating the content of a consent decree).

Other critics concede that ADR may be useful generally, but object to its application to specific areas such as spousal abuse cases. By suggesting that legal standards are only one point of reference, they say, ADR opens the way for the exploitation of unsophisticated parties. Such criticism is particularly strong in situations in which participation in mediation is mandatory, as when parents litigating over child custody are required to go through ADR as a precondition to obtaining a court hearing. Other writers have suggested that minorities tend to do less well in certain forms of mediation. Still another issue is whether ADR gives an advantage to ''repeat players'' such as corporations and insurers. Some studies have also called into question a basic premise of court-related mediation programs—that they reduce the duration of cases. All of these critiques raise significant policy issues that are discussed in more depth in Chapter 14.

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4. The Evolution of Legal Mediation

The public thinks of dispute resolution primarily in terms of court trials. Court access to remedy wrongs and enforce legal rights is central to American democracy and we have fashioned a system of rules to ensure fair trials and provide a finely tuned system of public justice. However, litigation, with all of its procedural protections, is slow, costly, and relatively inflexible. The process is also centered on lawyers, restricting the roles and options for the disputing parties. Finally, the remedies available through adjudication are limited to what can be enforced through courts; most commonly, judicial resolutions consist of money judgments.

In part because of these limitations, alternatives to adjudication have long existed. Mediation has probably existed for nearly as long as humans have lived together—think, for example, of a village elder assisting members of a tribe or village to settle a quarrel. History offers many examples of the use of mediative processes. Thousands of years ago, Chinese villagers were accustomed to resolving disputes through the assistance of respected leaders, and commercial disputes were mediated in England before the Norman invasion.

Modern American mediation began in response to the rise of organized labor. Following initiatives in several states, Congress in 1898 authorized railroads and their unions to invoke mediation and in 1913 created a Board of Mediation and Conciliation to deal with such cases. Labor mediation expanded greatly in the first half of the twentieth century, and the process began

to be applied to other legal disputes. By the early 1920s, for example, mediation programs for civil cases existed in courts in New York, Minneapolis, Cleveland, and other cities. Following World War II legal reformers began to promote the use of mediation in other subject areas, with special emphasis on using mediation to lower the frequency of divorce.

Civil mediation received a powerful boost during the late 1970s from prominent jurists who believed that the justice system was in crisis. Although some have argued that this concern was overstated (Galanter, 1983), it led judges, academics, and bar leaders to advocate increased use of ADR. During the same period, leaders at the local level argued for using mediation to deal with neighborhood disputes, and support continued to grow for applying mediation in family cases (Folberg and Taylor, 1984).

During the 1980s courts and litigators experimented with the use of mediation to resolve civil disputes outside the divorce arena. At first lawyers approached the process cautiously, concerned that their willingness to mediate would be interpreted by opponents as weakness. Bar leaders and judges, however, continued to voice support for the process and, equally important, corporations began to throw their weight behind the use of ADR to reduce the cost of litigation and the risk of uncertain verdicts. Some 4,000 companies, for example, have signed a formal pledge undertaking to consider ADR before resorting to traditional litigation, and more than 1,500 law firms have signed a similar pledge; the corporate version of the pledge appears in Chapter 20.

In 1990 Congress mandated that every federal district court create a plan that incorporated ADR to control litigation delay, and in 1998 it reaffirmed that requirement. By the mid-1990s most state and federal courts had established court-connected ADR programs for a wide variety of civil disputes, and mediation quickly became by far the most popular process used in such programs (Stienstra et al., 1996). The 1990s also saw federal and state government agencies using mediation more frequently to resolve public disputes. As one measure of the growth of the process, by the end of the decade states had enacted more than 2,000 statutes that mentioned mediation (Cole et al., 2008).

As the use of mediation became more widespread, some commentators questioned whether the process, particularly as applied in court-connected programs, might stifle law reform, condemn low-income groups to a second-class form of justice, prejudice abused women and children, or disadvantage the powerless. At the same time new data called into question some of the premises of the mediation movement, for example that court ADR programs sped the processing of cases (Kakalik et al., 1996), although other studies found that mediation did generate significant savings of time and money (Stienstra et al., 1997; Stipanowich, 2003). We explore these policy issues more deeply in Chapter 14. Although the recognition of these complex issues has shaped mediation debate and practice, none has prevented mediation from growing rapidly in popularity.

B. Goals and Mediator Styles

1. Goals for the Process

When you participate in mediation as an advocate, what will be your goal for the process? The answer may seem simple: to settle a legal dispute as favorably as possible. But the question is often more complex. Parties' goals in the process vary widely. For example, an organization that advocates ADR in business disputes stresses that ''Mediation provides a framework for parties to…achieve remedies that may be outside the scope of the judicial process…maintain privacy…preserve or minimize damage to relationships and reduce the costs and delay of dispute resolution'' (CPR Institute, 1999). By contrast, a prominent personal injury lawyer has described the process as

an opportunity—a time for you, as the legal representative of your client, to avoid putting your client through the litigation ''mill'' …and get results….It is a means of essentially ''selling'' your client's lawsuit to a buyer, who buys off the expense and exposure of an ongoing lawsuit. The client has the money to begin the life restructuring process and has avoided the pressures and uncertainties of litigation…. (Kornblum, 2004)

The goals you pursue in mediation may change greatly from one situation to another, and should influence your choices about structuring the process. As a lawyer representing clients you might have one or more of the following purposes for electing to mediate.

a. Resolve a Legal Claim on the Best Possible Monetary Terms

When litigators enter mediation, their goal is usually to settle a legal dispute. Most trial lawyers take a narrow approach to the process, discussing only legally relevant facts and issues and setting a goal of obtaining the best possible monetary payment in return for ending the case. When litigators talk about mediation they often reflect this perspective. One lawyer, for example, has said, ''The effective advocate approaches mediation as if it were a trial…the overwhelming benefit of mediation is that it can reduce the cost of litigation'' (Weinstein, 1996).

Perhaps in response, commercial mediators often see their primary role as facilitating distributive bargaining over money. One neutral, for example, wrote that, ''In the typical civil mediation, money is the primary (if not the only) issue'' (Contuzzi, 2000), and another has said, ''The goal of resolution is always the same: allowing the parties to negotiate to a 'reasonable ballpark,' in which they, with the help of the mediator, identify 'home plate' based on what a jury will consider 'a reasonable verdict range''' (Max, 1999).

In the typical commercial dispute, then, litigants and counsel are likely to enter the process assuming that it will focus primarily on legal arguments and positional bargaining over money. Although this kind of negotiation often produces less-than-optimal results, a mediator can do a great deal to assist parties even when money is the only issue over which the disputants are willing to bargain.

Example: An inexperienced plaintiff's lawyer was representing an automobile accident victim in

negotiations with the defendant's insurer. The victim had suffered broken bones and had out-of-pocket damages totaling $6,000. Requested by the defendant's adjuster to make a settlement demand, the plaintiff counsel asked for $1.2 million. The adjuster was incredulous: In her experience, plaintiff lawyers rarely demanded more than ten times the ''out-of-pockets.'' She refused to ''dignify'' the plaintiff's ''wild number'' with a response, and the result was a complete breakdown of talks.

The case went to mediation. In a private meeting with the plaintiff and his counsel, the mediator asked about their goals in the negotiation. The lawyer said that he was willing to be flexible and the client indicated that he was seeking a much more modest amount than the $1.2 million demand might suggest. The neutral asked the plaintiff lawyer to make a new offer at a much lower level. She offered to tell the adjuster that the plaintiff had done this only to accommodate the mediator's request that both sides ''cut to the chase,'' and that the plaintiff expected the defendant to respond in a similar vein. Three hours later the case settled at $27,500.

b. Develop a Broad, Interest-Based Resolution

As we have seen, parties to legal disputes often have interests that go far beyond money, and settlements that respond to these concerns can provide greater value to disputants than a purely monetary outcome. Some lawyers employ mediation to facilitate interest-based bargaining and obtain creative resolutions. One text for corporate attorneys, for example, emphasizes that ''The process creates an opportunity to explore underlying business interests [and] offers the potential for a 'win-win' solution…' (Picker, 2003), while another describes the process as providing ''a framework for parties to…privately reveal to the mediator in caucus sensitive interests that may assist the mediator to facilitate broad solutions'' (CPR Institute, 1999).

Example: A company that processed hazardous chemical waste and one of its residential abutters had been embroiled for years in a series of disputes over the company's applications for licenses to expand its operations. They eventually agreed to mediate. Although the parties at first focused exclusively on the meaning of certain state hazardous waste regulations, the mediator noted that the abutter became most angry when he mentioned the company's practice of parking large trucks filled with waste on the street across from his house. The company insisted that such situations resulted from unpredictable traffic jams at the plant, but the abutter maintained that the problem showed the company's basic callousness about its neighbors' safety.

As he spoke with the parties, the mediator found that the company also wanted to end the practice and could do so if it could widen its driveway to accommodate two trucks at a time. This was impossible because the driveway was wedged against the abutter's land. That land was not, however, being used. As part of a settlement, the mediator convinced the abutter to convey a narrow strip of his unused land to the company. The company in turn agreed to widen its driveway, thus solving the truck parking problem for everyone and increasing the value of the abutter's remaining land.

c. Repair the Parties' Relationship

Parties sometimes enter mediation not so much to obtain specific terms of settlement as to repair their relationship. The act of filing suit is usually understood as a decision to sever any

connection between the parties (Galanter, 1983), but many believe that ‘‘mediation has as its primary goal the repair of the troubled relationship’’ (Fuller, 1971).

Example: An Austrian company that marketed a process to stop soil erosion along river banks and a principal officer of its U.S. affiliate were in a dispute. The plaintiff was the founder of the company, who had trained the other protagonist, a young American woman, to create a subsidiary to sell his process in the United States. The woman modified the process in the belief that the original version would not fit the American market. This triggered a violent disagreement with the founder. Faced with the prospect of resolving the dispute or declaring bankruptcy, the shareholders and executives agreed to meet.

The founder arrived at the mediation and sat rigid and silent as others talked. When the mediator asked him to give his perspective on the situation he refused: His position was stated in a letter that everyone had received. What else needed to be said? Still, the mediator asked if he would read the letter aloud to ensure that everyone heard him clearly. As the founder began to read, feelings began to show under his stolid exterior. The woman responded angrily and they began to argue. It seemed to be a classic daughter/mentee-grows-up-and-challenges-father/mentor situation. Eventually the two went to a corner and talked animatedly for more than an hour.

Afterward, in a calmer atmosphere, the mediator led the principals through a discussion of the challenges facing the firm and how they might solve them. Under the leadership of a new CEO not linked to either protagonist, painful changes were agreed to and the company survived.

d. Change the Parties’ Perspectives

In a still broader view, the purpose of the mediation process is not to obtain a specific outcome but rather to assist parties in transforming their perspectives on the dispute and each other, a change that might or might not lead to an improvement in their relationship. Advocates of this approach, known as ‘‘transformative’’ mediation, believe that the disputants should be allowed to take charge of the mediation process with the mediator serving simply as a resource to facilitate conversations. The transformative approach is described in more detail later.

e. Choices Among Goals

How likely is it in practice that if an attorney seeks a goal, he will be able to achieve it—how often, in other words, can parties in civil or ‘‘commercial’’ mediation expect to leave the process with a purely monetary settlement, an interest-based solution, or a relationship repair?

The answer will be heavily influenced by the nature of the case, the attitudes of clients and counsel, and the skills and goals of the mediator. Relationship repair in mediation is often not feasible; in most automobile tort cases, for example, there is no prior relationship to revive. Even when a dispute does arise in a relationship, the parties often litigate bitterly before mediating, and in such situations repairing the relationship is very difficult. Sometimes, however, both sides recognize that it is in their interest to heal their rupture. This is most common in settings in which the parties’ past connection has been strong and their alternatives to relating are not attractive.

One example is a quarrel between a divorcing couple over parenting their children. Relationships can be important in commercial settings as well; partners in small businesses, like the Austrian-American venture described above, may have a strong interest in seeking a repair of a troubled relationship because neither is able to buy out the other and continued conflict will destroy the enterprise. A study of mediations of civil disputes arising from relationships (excluding unionized labor and divorce cases, and large enough to justify the retention of lawyers) found a pattern of outcomes.

Outcomes of Legal Mediation in ''Relationship'' Cases

Repair of relationship	*Integrative term and money, but no repair*	*Money terms only*	*Impasse*
17%	30%	27%	27%

When parties mediate a legal dispute arising from a significant prior relationship using a professional mediator, about 15 to 20 percent of the time they are able to repair their relationship, roughly 30 percent of the time they achieve a settlement with at least one significant integrative term in addition to money,[1] there is a 25 to 30 percent probability of a simple money settlement, and there is a 25 to 30 percent likelihood of impasse. Interestingly, focusing only on cases that settled, agreements that contained a relationship repair or one integrative term totaled 47 percent, a much higher percentage than pure money settlements, which totaled 27 percent (Golann, 2002). Another study found that nonmonetary terms were included in most settlements of contract disputes, but seldom in personal injury (mainly auto accident) cases (Wissler, 2006).

As a lawyer you are likely to encounter many situations in which a client's only goal is to end a relationship with an adversary on the best possible terms. The data suggest, however, that in cases that arise from a prior relationship, it is feasible more often than not to obtain agreements that include at least one term of significant value to the parties apart from money, and that in a small but appreciable percentage of cases, the parties repair their relationship.

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3. Mediative Approaches and Techniques

This section examines forms of mediation that you are likely to encounter in practice. As ADR has evolved, a wide variety of approaches have gained acceptance. Most lawyer-mediators focus on civil cases—that is, disputes involving the kinds of tort, contract, property, employment, and statutory claims that you have studied in law school, compared to marital or collective bargaining disputes. These are commonly referred to as ''commercial'' cases and the neutrals who handle them as commercial mediators. Commercial mediators almost all use a caucus-based

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[1] Examples of integrative terms in business disputes included an agreement among parties breaking up a partnership that one partner would have the exclusive use of certain billing software, or that the ex-partners would continue to share office space. In employment cases, companies agreed to terms such as temporarily maintaining the health coverage of a departing employee or changing records to reflect a voluntary resignation rather than a termination, and employees sometimes agreed never to apply for employment with the company again. Releases of liability and confidentiality agreements were not counted as integrative terms in the survey because they were typically assented to as a matter of course.

format, and discussions in such cases tend to focus on what courts would consider legally relevant and on exchanges of money offers.

Mediators who specialize in divorce and other disputes between family members, by contrast, usually avoid caucusing and place more emphasis on the parties' nonmonetary interests. The setting in which mediation occurs—for example, whether it is an all-day affair or a two-hour process—also affects how the process develops. The following readings give a flavor of several models.

a. Commercial Mediation

Mediators who focus their practice on commercial disputes tend to use similar methods to conduct the process. A legal mediator's overall goal is to stimulate constructive negotiations. If mediation is invoked it is usually because parties are unable to negotiate effectively on their own because they are frustrated by barriers. A commercial mediator might therefore begin by seeking answers to two questions:

- What obstacles are preventing the parties from settling this dispute themselves?
- What strategy is most likely to overcome these barriers?

A mediator's understanding of what is keeping the parties apart will deepen over the course of a mediation, and the obstacles themselves may change as the process goes forward. Ideally a mediator's strategy would be attuned to each case. In practice, however, this might not be possible. Many commercial mediators use a similar sequence of techniques to deal with the barriers most likely to be present, customizing their approach as they go along. This section, written in the form of advice to a novice mediator, describes a six-step strategy.

A Basic Commercial Strategy

1 Build a Foundation for Success

The Challenge: Missing Elements—People, Data, Interactions. Negotiations often fail because some essential element is missing. One side may have the wrong people—a key decision maker may be missing, or one of the bargainers may be so emotional he cannot make good decisions. At other times, parties do not have the data they need to settle: Defense counsel may not, for instance, know how the claimed damages were computed and without this information cannot get authority to settle. Such problems are difficult to fix once mediation begins and the clock begins to run.

The Response: Identify Issues and Address Them in Advance. To identify and resolve such problems, it is best to start before the parties meet to mediate. The first step is to ask the lawyers for mediation statements and set up telephone conversations with each of them. Ask each attorney who he plans to bring and who needs to attend from the other party. If a decision maker is absent, work to bring her to the table. If key information is missing, suggest that a party provide it. Mediators can elicit information and persuade people to attend in circumstances in which the same request would be rejected if made by a party.

Example: A company bought a shipping line, and later sued an accounting firm for allegedly overstating the enterprise's profitability and misleading it into overpaying. The buyer's lawyer called the mediator ahead of time to warn that it was crucial for his client, the buyer's CEO, to attend the mediation. However, he said, the CEO would not come unless the managing partner of the defendant did as well, and the plaintiff would not commit to attend first. The mediator called the defense attorney, who agreed that the principals should attend but said that his client also did not want to be the first to agree to come.

The neutral decided to ask each side to tell her privately whether its principal would come if the other did so. When they both answered positively, she announced that both decision makers had agreed to attend.

Alternatively, you might learn that one of the participants needs more time to talk, for instance, because he is in the grip of strong emotions. With the opponent's assent you can meet privately with a disputant ahead of time, allowing people to begin to work through difficult emotions and arrive at mediation more ready to make decisions. Or a lawyer might ask that you use an unusual format for the process itself.

2 Allow Participants to Argue and Express Feelings

*Challenge: Unresolved Process and Emotional Needs.*If parties don't settle, it's often because someone wants something more than particular settlement terms. A litigant might be looking instead for a process: the opportunity to appear before a neutral person, state his grievances, and know he has been heard. Or a party may have a need to express strong feelings directly to an adversary.

People may enter litigation expecting to have this opportunity, only to learn that emotions are relevant only if they serve a strategic purpose, such as supporting a claim for damages. As a result, disputants can remain trapped in feelings of anger and grief for years, never having a chance to speak freely. Until they feel heard out, however, parties are often not ready to settle.

*Response: An Opportunity to Speak and Feel Heard.*Mediation is not a court session and mediators are not judges, but the process can give parties the experience of receiving a hearing. They can see their lawyer argue their case, or present it themselves, and listen to an opponent's arguments. The mediator will not decide the dispute and might never even express an opinion about the merits, but she can demonstrate she has heard the disputants. The experience of telling one's story and feeling heard out by a neutral person can have a surprising impact on a person's willingness to settle. Arguing the merits also focuses participants on the facts and legal principles relevant to the controversy, and knowing that a neutral person will be listening encourages them to think through their arguments and avoid extremes.

This aspect of the process often has an emotional component as well. The need to express strong feelings to one's adversary is a very human one, felt by executives and mailroom clerks alike. At various points parties can express some of their feelings about the dispute and each other.

Example: A state trooper began a high-speed chase of a drunk driver in a small New England town. The driver ran a stop sign; straining to keep up, the policeman hit a third car that was crossing the intersection. The trooper was unhurt, but the driver of the third vehicle died instantly. He was a 17-year-old boy, only weeks away from his high school graduation.

The driver's family sued the state, arguing the trooper had been negligent in ignoring the stop sign. It was a typical tort case in which a jury would have to decide whether the officer had acted carelessly. Defense counsel investigated, looking for facts to show the victim had been drinking or careless. It seemed, however, that the boy was a model student, in fact the valedictorian of his class, and had left behind a loving family. On the other hand, the trooper was showing initiative in giving chase to a dangerous driver. It was a difficult case, but one the defense thought could be won, and counsel began the usual process of discovery.

Two years later, as trial approached, the defense decided to make a settlement offer. It was rejected. Defense counsel waited a few weeks and then made a more substantial offer. The word came back from the plaintiffs' lawyer that his clients would not settle. Why, the defense counsel asked: Didn't the family understand that juries in the area had been very hard on claimants lately, and the trooper had a reasonable defense? The plaintiffs' lawyer was apologetic, but said the family was adamant and refused even to make a counteroffer. Instead, he suggested they mediate, and emphasized that the family wanted to begin with a meeting with the trooper.

Defense counsel agreed to mediate but resisted the idea of a joint meeting: What was the point of having angry people rehash the facts, given that the evidence was largely undisputed and the state, not the trooper, would pay for any settlement? Eventually, however, they agreed to the process.

The opening session was an extraordinary event. The victim's mother, father, and sisters came; they talked not about the case, but about their lost son and brother. The mother read a poem to the trooper describing the hopes she had had for her dead son, and the life she knew they would never be able to share.

The officer surprised everyone as well. Although he maintained he had not been negligent, he said he felt awful about what had happened. He had three sons, and had thought over and over about how he would feel if one of them were killed. He had asked to be assigned to desk work, he told the family, because he could no longer do high-speed chases.

The parties did not reach an agreement that day, but as the family walked out one of the children turned to the trooper. ''It's been three years since my brother died,'' she said, ''and now I feel he's finally had a funeral.'' Two weeks later the defense settlement offer was accepted.

Emotional discussions are often uncomfortable for people and temporarily make them angrier, but over the course of a process difficult conversations can help disputants let go of feelings and consider settlement. You can achieve a great deal simply by allowing the parties to talk about feelings and disagreements in a controlled setting; Chapter 10 describes techniques for managing this successfully.

3 Moderate the Bargaining

Challenge: Positional Tactics Leading to Impasse. Negotiators often have trouble reaching settlement because they use a positional approach to bargaining, trading monetary concessions until they reach agreement. We have seen that positional bargaining can be successful but that it

often makes negotiators frustrated and angry, for example when one side makes an offer that the other perceives as ''insulting.''

Response: Become the Moderator of the Process. Ideally a mediator could avoid adversarial bargaining over money entirely by convincing parties to focus on principles and interests. In commercial mediation, however, parties usually arrive suspicious of each other, focused on legal issues, and determined to engage in money bargaining. A mediator's only practical option in such cases is often to facilitate the process the parties want while looking for an opportunity to move them toward a more effective approach.

One way to facilitate money negotiations is to act as a coach. You can, for example, ask a bargainer to support its number with an explanation (''I'll communicate it, but if they ask how you got there what should I tell them?''), or help a disputant assess how a planned tactic will work (''What do you think their response will be if you start at $10,000?'').

If coaching is not enough, a mediator can become a moderator, giving bargainers advice about how to keep the process moving (''If you want them to get to $100,000 with the next round, I think your offer to them needs to be in the range of 700 to 800K….''). By using these steps in combination with a continuing discussion of the case, a mediator can often orchestrate a ''dance'' of concessions to move the parties toward settlement.

4 Seek Out and Address Hidden Issues

Challenge: Disregard of Hidden Issues and Missed Opportunities. Negotiations in legal cases are often blocked by hidden psychological obstacles, which could include the following:

Strong feelings. We have talked about the usefulness of drawing out feelings in premediation discussions or the opening session, but this is often not possible. Participants in commercial mediation typically arrive with ''game faces on,'' presenting a businesslike demeanor even as feelings boil beneath the surface. When this occurs, simply giving a disputant the chance to express emotions is often not enough.

Unexploited opportunities for gain. We know that negotiators can often create more valuable outcomes by including nonmoney terms in settlement agreements, but that parties typically enter commercial mediation focused on legal arguments and expecting to bargain solely over money.

Response: Probe for and Deal with Hidden Issues. Even as you are carrying out other tasks, look for clues to hidden emotions and overly narrow approaches to settlement. Chapter 10 describes ways to promote more valuable settlements and deal with emotional issues.

5 Test the Parties' Alternatives; If Necessary, Evaluate the Adjudication Option

Challenge: Lack of Realism About the Outcome in Adjudication. Participants in legal disputes often justify hard bargaining positions in terms of the merits of the dispute. They are asking for a great deal or offering little, they say, because they have a strong legal case. The problem, however, is that that both parties usually claim that they will win in court.

To some degree parties bluff about litigation options to justify their bargaining positions and do not expect to be taken literally. To a surprising degree, however, disputants actually believe their clashing predictions. Even when a mediator points out to parties that their predictions of success are inherently impossible (one believes that it has a 70 percent chance of winning, for instance, and the other thinks it has a 60 percent chance of prevailing), their confidence remains unshaken: It is the other side, they say, that is being unrealistic. There are two basic causes for disputants' distorted thinking about legal alternatives. One is lack of information; the other, an inability to interpret the data disputants do have accurately.

Response: Foster an Information Exchange. A first response to a disagreement over the legal merits is to help parties exchange information. Modern discovery rules are meant to require each side to disclose key evidence, but it is often surprising how little one party knows about the other's case even after years of litigation.

As a mediator, you can be an effective facilitator of information exchange. If, for example, a plaintiff has explained its theory of liability in detail but has given no explanation for its damage claim, you can suggest it flesh out damages to help the defendant get authority to settle. Parties will often respond cooperatively to a mediator's request, although they would have refused the same inquiry coming from their opponent.

Example: A sales manager who had been fired by a computer software company sued his former employer for violating his contract. The company maintained that the termination was lawful. The case remained in discovery for years and then went to mediation. As the neutral caucused with the parties, it quickly became apparent that a major component of the manager's claims was equity options in the company. The plaintiff, however, had never been able to obtain the internal financial reports needed to value the options. He assumed that the company was concealing its wealth and intended to go public in the near future, an event that would make his options very valuable.

Questioned about this in caucus, the company CEO said that he had ordered the data withheld from the plaintiff because ''It's none of his business!'' In fact, the company was only marginally profitable and everyone's options were ''under water'' —essentially worthless.

The mediator suggested to the CEO that if there really was no pot of gold in the case, he could help settle it by letting the plaintiff know this. The CEO agreed, and the parties reviewed the financial data together. Within an hour the plaintiff was persuaded that his potential damages were much lower than he had thought, and a settlement was worked out that included verification of the company's financial representations and termination of the options.

Response: Reality Test. Even when parties have the relevant information, we have seen that they often do not interpret it accurately. Another way to help to solve merits-based problems is therefore to help disputants analyze their legal case. The least intrusive way is through questions that help parties focus on evidence and issues they have missed. It is important both to ask questions pointed enough to prompt someone to confront a problem and to avoid comments so tough the disputant concludes the mediator as taken sides against her.

Questions and analysis. Begin with open-ended questions asked in a spirit of curiosity; in this mode, you are simply trying to understand the dispute and the parties' arguments. (''Tell me

what you think are the key facts here,'' or ''Can you give me your take on the defendant's contract argument?'') Your questions can progress gradually from open-ended queries (''Have you thought about…?'') to more pointed requests (''They are resisting making a higher offer because they believe you won't be able to prove causation …What should I tell them?''). You might also want to take a party through an analysis of each element in the case, using systematic questions to prevent disputants from skipping over weaknesses.

Discussing the merits can help to narrow litigants' disagreement about the likely outcome in adjudication for several reasons. For one thing it helps counteract disputants' tendency to be overoptimistic. It also assists lawyers who are dealing with an unrealistic client, and can give a disputant a face-saving excuse for a compromise it secretly knows is necessary.

Evaluative feedback. In some cases questions and analysis are not enough; a disputant might be wedded to an unrealistic viewpoint or require support to justify a settlement to a supervisor. In such situations a commercial mediator may go further, and offer an opinion about how a court is likely to decide a key issue or even the entire case. Evaluations can be structured in a wide variety of ways; for example, ''My experience with state court judges is that they usually deny summary judgment in this kind of situation,'' or ''If the plaintiff prevails on liability, what I know of Houston juries suggests they would value damages at somewhere between $125,000 and $150,000.''

Example: A lawyer was pursuing a tort claim on behalf of a baseball coach at a private school who had recently died from unclear causes. The lawyer's theory was that the coach's death was due to ''multiple chemical sensitivity'' triggered by turf treatments. The school's position was that this theory was unfounded, but even if it was true, such a claim was barred by the state worker's compensation law, which prevented employees from suing employers in tort. The school's representatives said, however, they were willing to offer special benefits to the coach's family as a purely voluntary gesture.

During the joint session the plaintiff's lawyer played heavily on the ''sympathy'' card and at the same time threatened that the coach's widow was ready to rally alumni to attack the school for its stinginess. In response to the mediator's questions in caucus, the lawyer admitted privately to problems with his legal case. He asked the mediator not to opine about legal issues, however, because he thought as a tactical matter he would do better relying on a mix of threats and sympathy than his legal claim. The school, on the other hand, asked the mediator to point out to the plaintiff how weak the claim really was.

The mediator carried both sides' messages to the other, but did not give either one an explicit opinion about case value. The result was an agreement.

One key point to note is that you should never say how you *personally* would decide the case, but rather should frame your opinion as a *prediction* of the attitude of an *outside decision maker*. Expressing one's personal opinion about what is ''right'' or ''fair'' in a dispute is almost always a bad idea, because it is likely to leave a listener feeling that the mediator has taken sides against him. Properly performed, a neutral evaluation can be helpful in producing an agreement, but a poorly done or badly timed opinion can be quite harmful. This is a controversial issue that is discussed in more depth in Chapter 10.

6 Break Bargaining Impasses

Challenge: Closing the Final Gap. Often barriers to agreement are too high, causing bargaining to stall and provoking an impasse.

Response. A mediator has several options for dealing with a stalled bargaining process.

Persevere and project optimism. The first bit of advice might seem simple but embodies a basic truth: When in doubt, persevere. Parties get stuck at some point during a mediation, often during the late afternoon or early evening, when energy levels decline and each side has made all the compromises it feels it ought to and more. The key thing to remember at this point is that the mediation probably *will* succeed; if you can keep the parties talking, they will find a solution. The disputants will be looking for signals about whether it is worth continuing and it is important to send positive ones if possible within the bounds of reality.

Example: The dispute involved a Silicon Valley executive who sued his company after being fired. The mediator continued to work, even after each attorney told him privately the case could not settle. Finally, at 9 p.m., the parties reached agreement. As the mediator went over the settlement terms the defendant's lawyer exclaimed, ''They kept beating you up and you just kept going. You were like…like…the *Energizer Bunny*!''

At first the mediator found the idea of being compared to a drum-beating pink toy a bit demeaning. But as he thought more about it, the comparison was apt. A commercial mediator's job, he thought, is to advocate settlement until the parties tell him unequivocally to stop, and he sees no plausible way to change their minds.

Return to a prior tactic. Another option is to return to an earlier stage or tactic. You might wonder why, if an approach has not worked once, it would be successful the second time around. Surprisingly often, however, something that was rejected earlier will evoke a positive response later in the process. Peoples' emotional states shift over the course of a mediation as they learn new facts and realize their original strategy is not working. As a result, they often become more open to compromise.

Invite the disputants to take the initiative. Another simple tactic is to ask the disputants to take the initiative. You could say, ''What do you think we should do?'' and then wait quietly. If disputants realize they cannot simply ''hang tough'' and demand that the mediator produce results, they sometimes offer surprising ideas.

Test flexibility privately. Another option is to test the disputants' flexibility in private. Parties may refuse to offer anything more to an opponent, but be willing to give private hints to you. You could, for example, ask ''What if?'' questions (''What if I could get them down to $150,000; would that be acceptable?'') or propose bracketed bargaining (''Could we agree that the parties will negotiate between $100,000 and $150,000?'').

Adjourn and follow up. If the disputants are psychologically spent or have run out of authority, the best response may be to adjourn temporarily. You can follow up with shuttle

diplomacy by telephone, propose a second, shorter mediation session, or set a deadline to prompt parties to make difficult decisions.

A Basic Commercial Strategy

Challenges	*Responses*
1. Missing elements: people, data, emotions	• Contact counsel beforehand to initiate a relationship and learn about the dispute. • Arrange for information to be exchanged and decision makers to attend. • If necessary, meet with participants ahead of time to begin working on difficult issues.
2. Lack of opportunity to present arguments and express feelings	• Provide disputants with a ‘‘day in court’’ to argue their case. • Create a setting in which they can express their feelings. • Encourage participants to listen to each other.
3. Positional tactics leading to impasse	• Encourage principled and interest-based approaches, but support money bargaining if parties want to use it. • Advise bargainers about the likely impact of tactics. • If necessary, coach or moderate the bargaining.
4. Hidden issues	• Probe for emotional obstacles. • Identify personal and business interests. • Treat emotional and cognitive problems. • Encourage the parties to consider imaginative terms.
5. Lack of realism about the outcome in adjudication	• Encourage exchanges of information. • Ask about legal and factual issues. • Point out neglected issues; lead an analysis of the merits. • If necessary, predict the likely court outcome on one or more issues.
6. Inability to reach agreement	• Persevere, remaining optimistic. • Invite the disputants to take the initiative. • Repeat earlier tactics. • Adjourn and follow up.

This six-step strategy will produce success in many situations, particularly when a case is relatively straightforward and the parties have a strong incentive to settle, and provides a solid

foundation on which to premise a mediative effort. No single set of strategies, however, can overcome all obstacles. Experienced mediators use this basic strategy as a foundation, modifying their approach to deal with the specific obstacles they encounter in each dispute.

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