Twelve Steps to Successful Mediation

By Thomas G. Heintzman, O.C.,Q.C.¹

“He never wants anything but what's right and fair; only when you come to settle what's right and fair, it’s everything that he wants and nothing that you want. And that’s his idea of compromise.”

Tom Brown’s Schooldays by Thomas Hughes

Overview

At the April 2008 Session of this Program, I delivered a paper entitled ‘Preparing to “Win” at Mediation’. In that paper, I set forth all my ideas about how to prepare and participate in mediations. This paper incorporates the advice that I gave at that time, and probes deeper into three elements to which lawyers participating in mediations should pay particular attention: preparing the client for mediation; preparing a mediation brief; and preparing the opening statement at the mediation.

The common feature of litigation and mediation is persuasion. However, the skill of persuasion is deployed differently in a mediation than in a trial. In litigation, the trial lawyer is trying to persuade the judge, juror or arbitrator, not the adversary. Persuading the adversary is the task in mediation. That task may be more or less difficult, but is certainly a different exercise, than convincing the judge, who is a neutral third party.²

Furthermore, a principal objective in mediation is to convert the mediator into an advocate for your side of the debate, not a decision-maker about the dispute. During the mediation, the mediator will devote considerable time in private discussions with the other party. In that

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setting, the lawyer’s objective is to convince the mediator of the strong merits of his client’s case, and to arm the mediator with the tools to persuade the other side to this view.³

Finally, the lawyer who engages in the mediation process understands that compromise is an inherent element in that process. The lawyer’s task is to prepare the client to accept the process and reality of compromise.

This paper sets forth twelve steps to properly prepare for and participate in mediation:

1. **Understand what the Client Wants**

The lawyer must make the best effort to understand what the client really wants from the litigation, and from the mediation. This seems obvious, but sometimes this step is never undertaken, or not effectively undertaken, for a number of reasons.

First, the lawyer may be thinking only about the kind of results that can be achieved at trial. The lawyer may not realize that mediation can result in any solution that the parties want, even if that solution could not be produced at a trial. As I say in the next section, some “lateral thinking” is necessary if the lawyer is to understand what results the client really wants that could not be achieved at a trial.

Second, the client may not want what the lawyer thinks the client should want. The client may want something very much more modest, but certain. This may particularly be the case when parties are tied to a future long term relationship, or when the client wants to terminate a long term relationship. Whatever the reason, lawyer’s job is to find out what the client really wants, and that may be obtainable in mediation and not at a trial.

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All aspects of the mediation should be designed to accomplish the client’s objective, including opening statements, the opening offer and the negotiation strategy between the opening offer and the conclusion of the mediation. Before the mediation commences, the risk analysis and any proposed solutions will be influenced by that objective.

In this process, the client may have a strong view about that strategy which must be listened to by the lawyer. The client may have an important insight about the attitude or personality of the opposing party. That view may provide an insight into what opening statement or opening offer should be made, and how large successive offers should be made during the mediation.

The client’s objective and a “bottom line” is not the same thing. The client should not be encouraged to set a “bottom line”. Nor should the lawyer take that “bottom line” as the real one. The client may have an overly confident view of what can be achieved in mediation, or may be reluctant to tell a lawyer how far he or she is really willing to go. The client should be encouraged to keep an open mind and be prepared to consider another range of settlement if, after all is said and done, a compromise in that range is preferable than a failed mediation.

2.  **Look for a Creative Solution**

Creative solutions for dispute resolution cannot be found while the mediation is actually under way. They have to be found beforehand.

The creative solutions may give an advantage, or minimize the disadvantage of settlement, to the opposing party. The solution may be based on tax considerations; it may be the acceptance of fault, or a public statement, or an apology. Whatever it is, mediation offers scope for “thinking outside the box” that a trial does not offer, since the parties can craft their own consensual solution to their problem.
3. **Prepare a Risk Analysis**

Obviously, it is absolutely essential that the lawyer understand the facts and law to the same extent as if he or she was about to commence a trial. But the process goes much farther and deeper than that. The lawyer must develop a risk analysis which addresses the various ways in which the facts may develop at trial.

The same is true with the law. In addition, a risk analysis of the likely damage award must be undertaken. Only after these steps have been conducted can the lawyer understand the range within which a reasonable settlement ought to be made, and explain that range to the client.

This process is even more important before mediation than before trial. Before trial, unless an offer is made by the other side, there is little opportunity to utilize the risk assessment, other than to decide to go ahead with or abandon the proceeding. But the whole purpose of the mediation is to use that assessment. Indeed, if the assessment is not made, an opportunity may be lost to settle at an amount which, on a proper analysis, was reasonable. There is nothing worse, after a mediation, to tell the client that the last offer made by the other side which the client turned down was actually a good one, having regard to the risks.

A risk analysis allows the client to ask the right question during mediation: Is the opposing party’s last proposal better or worse than not settling?\(^4\)

In “mediation – speak”, this alternative to settling is called the “Best Alternative to a Negotiated Agreement”, or “BATNA”. This best alternative will have to take into account the likely chance of success, the cost of litigation, the time that the client will have to devote to the litigation, the amount that can be expected to be recovered and the time value of money has been included.

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\(^4\) Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, pp. 98 and 102
The client and lawyer should also determine the Worst Alternative To a Negotiated Agreement ("WATNA"). That may well be a complete loss, but it may not.

These sorts of mediation formulas cannot be applied in a mechanical fashion. Nor should a “bottom line” be unnecessarily set which thereby shows that a potential agreement within a certain range will not be made.

4. **Explain the Mediation Process to the Client**

The lawyer must explain the procedure of the mediation to the client. Every mediator works differently, so the lawyer should check with the mediator about how the mediator intends to run the mediation.

Generally speaking, the mediation will commence with opening statements by either side, or by an opening statement by the mediator based upon the mediation briefs, followed by private sessions between the mediator and each side, one after the other. Those private sessions may be very long, indeed hours long. Offers may not be exchanged until very late in the game. The mediator will come into the private room in which the lawyer and the client are isolated, and the client must understand the dynamic that will then unfold between the mediator and the client.

The client must also understand that there is a “string to be let out”. The beginning of the string is the opening offer. The end of the string is the ultimate settlement amount, if there is one. Deciding how to let that string out, little bits or large bits at a time, is one key to a successful mediation.

Thus, if a client wants to settle at $50,000.00, a starting offer of $50,000.00 is obviously not wise. If a starting offer of $100,000.00 is made, and the opposing party comes back at
$10,000.00, the client’s second offer will be a signal to the other party. A second offer at $90,000.00 may, by dividing the two numbers in half ($90,000.00 and $10,000.00) send the signal that your client is thinking of $50,000.00. A second offer of $75,000.00 may send the signal that your client is willing to settle at $42,500.00 ($75,000.00 plus $10,000.00 divided in two). This may not be the case with the initial counter-offer, but if several offers and counter-offers have a medium point well which is very different from where your client wishes to settle, there will be a greater challenge to “hold the line” later in the mediation.

The “back and forth” dynamic of the mediation must be fully explained to the client before entering the mediation room, so that the client is not surprised about how the process unfolds.

5. Selecting the mediator.

No two mediations, and no two mediators, are the same. That being said, there is a spectrum of mediations and mediators, and it will be important to select the right mediator for the dispute.

On the one hand, there is a spectrum between “rights-based” mediators and “resolution-based” mediators. The rights-based mediator is most adept at telling the parties what the likely result will be at trial. The solution-based mediator will be most concerned about achieving an agreement between the parties. Deciding which kind of mediation, and which kind of mediator, is best for your dispute is a key decision.

Also, some mediators are interventionists, and other mediators are less interventionist. Again, counsel will have to decide whether he or she needs a “hard-nosed” mediator or a gentler mediator.
6. Preparing the Opening Statement

A. Should an Opening Statement be Made?

There is much controversy in mediation circles about whether an opening statement is a good idea. Some mediators favour opening statements, while others discourage clients and lawyers from making opening statements because of the negative effect it can have on the dynamic of settlement. However, the mediator cannot prohibit a party from making an opening statement if the party wants to make one, or compel a party to make an opening statement if a party does not wish to make one. The exercise is, after all, a consensual one. So if both parties are content that one or both make an opening statement, then the mediation will allow that to occur.

There is no one or right answer to this question. The right approach is the one that the client feels most comfortable with, and which in all the circumstances seems most likely to increase the likelihood of a reasonable settlement.

In order that the choice is made after due consideration, the following questions should be asked.

i. Will the Opposing Party make an Opening Statement?

Discuss with the client whether the other side should be asked if it intends to make an opening statement. The client may be upset if the other side makes an opening statement but the client is not prepared to do so. On the other hand, the client may prefer not to make an opening statement even if the other side intends to do so, so as not to “dignify” the opposing parties’ position or slow up the real negotiation in private sessions. Indeed, the client may not even want to ask the
opposing party if it intends to make an opening statement for these same reasons. But the issue should be discussed with the client.

ii. **Does the Mediator expect an Opening Statement?**

Discuss with the client about consulting with the mediator whether opening statements are to be made. Again, the client may be surprised if the mediator invites and encourages opening statements and the client has not been prepared for such a process, or if the mediator discourages opening statements when the client is prepared for one to be delivered. But again, the client may not wish to consult the mediator about this matter, and may decide to make or not make an opening statement, whatever the mediator wants. Unless there is some tactical reason, this is probably not a wise approach as the client will want to have the mediator’s good will throughout the mediation. The client will likely want to start the mediation off on a footing that conforms to the mediator’s expectations.

**B: Who should make the Opening Statement?**

Either the client or the lawyer may make an opening statement in mediation. If the client and the lawyer decide that the lawyer should make an opening statement, then the nature of that opening statement, and who should deliver it, will be important. There will likely be two reasons why the lawyer may advise the client that the lawyer should make such a statement.

First, it may be critical for the legal or factual principles of the client’s position to be clearly stated. If so, a “legal opening” by the lawyer may be advisable even if it risks driving the parties apart in the initial state of the mediation.
Second, a lawyer may make an opening statement because he believes that the opposing lawyer has not really brought the facts or law of the case to the attention of the opposing party. In this circumstance, it may be necessary for the lawyer to “rattle the cage” of the opposing party, not just to undermine the opposing party’s confidence in its case but to bring his own client’s case out in the open.

These considerations generally lead to the following conclusion: the person who can most persuasively deliver the opening statement should do so. If the opening statement will deliver a message about the feelings or views of the client (“We want to settle” or “We will never settle” or “Why don’t we search for other solutions to settle” or “Why don’t we preserve our ongoing relationship and settle”), then the client may be the most appropriate person to make the opening statement. If the opening statement concentrates on the factual or legal strengths of the client’s case, then the lawyer may be best positioned to most persuasively present the opening.

7. **Decide on the Opening Offer**

The lawyer must ensure that the client has decided what the opening offer will be. The client may say that it will make no opening offer, unless the other side makes an offer. If the client adopts this position, the mediation may be very short. At the very least, the client must have thought this matter through and, in most cases, decided on the opening offer.

The lawyer must also ensure that the client has a rationale for the opening offer. In the first closed session, the mediator will ask the client: “Why is that your opening bid? How did you get to that number?” If the client does not have a persuasive response, the mediation will start off on a bad footing.
This point is particularly important if an offer has previously been made by the client, especially if the present offer is less than the prior offer. That sort of opening bid will make the mediator impatient unless there is a very good rationale for it. And there may be: “I have spent $100,000 in legal fees since that offer was made. Our position is much stronger now (for whatever reason) than it was then.” Whatever the explanation, it must be ready and it must be persuasive.

8. **Prepare a Mediation Brief**

Preparing a good brief for the mediator and the opposing party is just as important in the mediation as it is at trial. It may be more important, because the mediation brief must accomplish the objectives set forth in this paper’s Overview. First, it must create the basis to persuade the opposing party to settle. It is possible that the opposing party is not listening to his or her own lawyer. A good mediation brief can give the opposing lawyer the basis to move the opposing party into the settlement zone.

Second, the mediation brief must give the tools to the mediator to be an advocate for the client. When the mediator is preparing for the mediation, the mediator will develop a view from the mediation briefs about which side has the stronger case. That view will influence the mediator’s whole approach. Moreover, when the mediator is in the opposing party’s room in private session, the mediator can use your mediation brief to point out the weaknesses in the opposing party’s case. Without a good mediation brief, the mediator will not have the ammunition to do so.

The mediation brief will likely contain a written statement of the client’s position and some documents to support that position. The following are three rules that I believe apply to a mediation brief:
i. **Set the Message and Tone**

Persuading the opposing party to settle is the whole essence of mediation. So the “message” and “tone” of the mediation brief is important. Generally, there will be one of three messages: The opposing party should: Cave in; or Compromise; or Construct something new.

It is very hard, and likely unpersuasive, to mix up these messages. If the client’s credibility is to be preserved before the mediator, then that message and tone has to be consistent and believable. If the client is intent on one of these approaches, then that message must be delivered.

Yes, there are times when the client will be bluffing and will want to tell the opposing party to Cave in when that position can’t be sustained during the mediation, but that is a difficult exercise to pull off.

ii. **Keep the written Mediation Brief Short and Punchy**

This approach is generally true of all litigation documents, but it is even truer for the mediation brief, for two reasons. The opposing client has to understand it. And the mediator must read and understand it in a very short period of time. So the brief should be no more than 20 or 30 pages. Anything longer is counter productive to your message that there are clear reasons for the opposing party to Cave in, Compromise or Construct.

iii. **Attach only a few documents to the Mediation Brief**

Remember, you are not trying the case in front of the mediator. But you do want to give the mediator the tools to be your advocate. So give the mediator the “killer documents” that prove that the client’s case is strong, or that the opposing party should compromise. Don’t burden the
mediator with many documents. If necessary, bring other documents to the mediation to demonstrate that the ones in your mediation brief are “just the tip of the iceberg.

9. Prepare the Client for the Mediation
The process of preparing the client for the mediation involves understanding the client’s objective, and developing a risk analysis of the lawsuit and a mediation strategy to suit that objective. But, in addition, the client has to be mentally prepared for the mediation process. Otherwise, the client will be at sea during the mediation and, potentially, may harm any chances of a successful outcome. There are three steps to prepare the client for the mediation process:

   i. Prepare the Client to Play an Active Role
The client must understand that he or she may play an active participant in the mediation. Obviously, the client will have a choice in that decision.

The active role may occur at two stages of the mediation. First, the client may make an opening statement. Second, the client may have to speak to the mediator on each occasion that the mediator comes into a private session with the client and lawyer. The client may be able to avoid making an opening statement, but he or she will not be able to avoid dealing with the mediator when the mediator has a private session with the client and lawyer.

   ii. Prepare the Client to make an Opening Statement, if advisable
The best approach may be for the client to make the opening statement. Indeed, some mediators will ask or suggest that any opening statements be made by the client, not the lawyer. Those mediators believe that it is the client who is at risk, and accordingly it is the client who should be immediately engaged in the process from the very opening statement. Those mediators also believe that lawyers tend to drive the parties apart, rather than bringing them together.
An opening statement by the client may be useful for a variety of reasons. It may show the client’s willingness and openness to “let bygones be bygones” and to undertake an honest effort to settle the litigation. On the other hand, it may be an opportunity to do exactly the reverse, that is, show that the client is resolute and believes firmly in his or her position. The lawyer may wish to speak to the mediator about the advisability of the client making an opening statement. If the client does makes an opening statement (with or without an opening statement by the lawyer as well), that statement must be well scripted beforehand.

iii. Prepare the Client for the Private Sessions with the Mediator

The client must understand how the conversation with the mediator will proceed in the private sessions. The client must be alert to the fact that the mediator is trying to get an agreement, any agreement, and is not looking out for the client’s best interest other than achieving an agreement. The client must appreciate that the mediator may be a “wolf in sheep’s clothing” in the sense that the mediator will try to befriend the client and cajole the client into settlement; but on the other hand, the mediator is using the “snowballs” given to him by the other side in order to undermine the client’s confidence in his or her position.

The client must understand that he or she should be willing to “stand up” to the mediator. In doing so, the client must be ready to provide the mediator with good and sympathetic facts, and reasons and a rationale, which support the client’s position, so that the mediator is armed with the “snowballs” to take back into the other room. It is the client’s heartfelt and sincere presentation of his or her case to the mediator in these private sessions that will maximize the likelihood that the client will obtain a favourable result.
In these sessions, the client and lawyer will present “principled” arguments for success in the lawsuit. An emotional argument will likely have little impact on the mediator. The mediator needs objective and independent criteria to take back to the other side: market value, legal precedent, objective analysis of the evidence, scientific judgment, professional standards, etc. Counsel’s role is to ensure that there is a sound and rational basis for the positions taken by the client in each round of private sessions. The opening offer must be based on a rational approach. As importantly, each succeeding offer must point out the irrationality of the opposing party’s position and the rationality of the client’s next offer. In all of this, the client must be prepared to speak cogently and sincerely about its stated position.

Between the sessions with the mediator, the lawyer and the client must work hard to prepare for the next session. All of the preparation that went into the mediation will be of value. The lawyer and client will be able to work on preparing a principled basis to move to a new number, or a new solution, knowing that sticking with the offer just made by the client may not bring the mediation to a successful conclusion.

Having been properly prepared, the client will understand the mediator’s role when the mediator is in the room. While the mediator appears to be a friend of and sympathetic to the client’s position, the client will understand that the mediator only wants to achieve an agreement, nothing more and nothing less. The client will be prepared for the time, and it may come, when the mediator “turns on” the client, is dismissive about the client’s position and tries to bully the client into accepting the other party’s last offer. The client will be ready to be assert his or her own position, and persuasive in doing so.

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If the mediation gets stuck at a particular level, and the opposing party is reluctant to negotiate further, then the lawyer or client will have a good idea of the opposing party’s bottom line, or in “mediation-speak”, the opposing party’s BATNA. The client and lawyer will then utilize the mediator to find out more about why the opposing party has become rigid, and the assumptions upon which that rigidity is based. They will use the next round or so of private sessions to undermine the assumption of the opposing party, and to arm the mediator to perform that exercise in the other room.

Here, charts can be useful, no matter how crudely drawn, so that the mediator can take those charts into the other room. Remember, however, to retrieve those charts made by you or your client and do not let them be taken away by the opposing party.

In this process, the opponent’s arguments will be taken apart one by one, through the mediator’s intercession. The worst position that the opponent could be in, apart from a mediated settlement, will be demonstrated. The cost that will be incurred, the loss of interest, the time involved in the litigation, will be factored into the opponent’s offer in order to adjust the range of settlement proposed by the opposing side. A similar exercise, when the mediator is not in the room, will be performed with the client’s last offer.

Make sure that no discussion of a frank nature, or harmful to the client’s position, is conducted when the mediator is in the room, unless that it absolutely necessary and appropriate. Feel free to ask the mediator to step out for a moment if some discussion with the mediator indicates that an off-the-record discussion with the client, or a reorientation of the discussion with the mediator, is necessary. Once that occurs, then the mediator can be asked back into the room.
The client or the lawyer will be attuned to the degree and speed at which the “string” of the negotiation is let out. It may be necessary and prudent to take a big jump, but that process must be carefully thought out, and the necessity of taking a firmer line thereafter appreciated.

10. Prepare for the Possibility of an Unsuccessful (initial) Mediation

Before the mediation starts, the client must be prepared for the possibility that it may not be successful, at least in the first attempt. Near the end of the appointed time for the mediation, the parties may be very close to settlement. On the other hand, they may be very far apart. The client and the lawyer must make an assessment as to whether it is necessary to, then and there, “bridge the gap”. The amount in dispute, or the time to trial, may be small so that another mediation is not cost-effective or possible. On the other hand, the case may be one of those in which several attempts at mediation must be made before it settles. Large and difficult cases may require several mediations, some of them occurring before the action goes to trial and some during trial. It is true to say that mediation never ends, until a settlement is reached.

Before the mediation starts, the client should be aware of this reality, not to discourage the client from taking “the best shot” at settlement but for the possibility that, even having done so, settlement may not have been achieved but may be achieved in the long run.

11. Understand the Barriers to Settlement

The litigation may not settle by mediation for good and valid reasons. The parties may have an honest and reasonable basis for totally divergent views of the prospects of success. There may be principles involved which transcend the litigation. Whatever it is, the problem may not be solvable through mediation.
But in approaching mediation, the lawyer and the client should realize that there are some human inclinations or preconceptions that may interfere with the success of the mediation. If they can be recognized, then the likelihood of a successful mediation may be improved. Robert Mnookin\(^6\) has identified four possible reasons which I have re-titled as follows:

\( (a) \) \textit{The Self-Interest Problem}  
Each party has as self interest to maximize their own settlement. Self-interested parties always respond in kind; that is why there is litigation. To a great extent, pre-trial discovery is a way to force the other side to recognize or acknowledge the weakness in its own case and encourage a settlement agreement. But the costs of that process reduce the “size of the pie”, and can lead the client to insist on recovering those costs.

Overcoming the self-interest of the client in the litigation objective, and showing how valuable the settlement option is in the client’s interest, is one of the major challenges which a mediating lawyer faces.

\( (b) \) \textit{The Lawyer Problem}  
The mediating lawyer has to set aside his or her self-interest in prolonging the litigation. Quite frankly, although commentators sometimes say that lawyers have an interest in keeping litigation going, that is not my experience. The lawyers I meet want the best solution for the client that can be achieved. But the public does believe that lawyers prolong litigation, and the mediator will certainly point out the shared interest of the clients in minimizing legal costs. The mediating

lawyer will have to use this factor in his or her favour, showing the opposing party how much can be saved by a mediated solution.

(c) The Mañana Problem

The litigants want to put the problem off to tomorrow. “Loss aversion” means prolonging a dispute and delaying the day of judgment, even though this approach is a gamble which may result in the client paying more. Here, the mediating lawyer will emphasize the advantages of a present settlement. The certainty that it brings may be better than the alternative.

(d) “Devaluing the Other Party’s Offer” Problem

The offer for the other side may be unacceptable to the client because it comes from the other party. The client may in reality be willing to settle for a certain amount, but when the opposite party makes an offer which is close to that amount, then it is not good enough: “they must know something we don’t.”

Moreover, the client will have difficulty seeing the other client’s offer through the other client’s eyes. This is another challenge of the mediating lawyer: showing the client how great a compromise the other side has made, from its perspective.

12. Reduce the Settlement to Writing

When both parties agree to the settlement, or get close to it, it is crucial to put the settlement agreement in writing. As always, “the devil is in the details”, and when the apparent settlement is written down, the client or the opposing party may say “that’s not what I agreed to”.

So it is imperative to document the settlement, and have the parties sign the document, before they leave the mediation. The dynamic of the emotional moment may be lost if they walk out of
that mediation room without their signature on the settlement agreement. Even the crudest settlement document, signed by the parties, is better than none. A court will bend over backwards to enforce that document.

A symbolic handshake to signal and affirm the parties’ decision to end the dispute is important. This gesture will make the participants feel that they are committed to their agreement and increase their sense of embarrassment if they later fail to implement the agreement.

**Conclusion**

Mediation involves the process whereby, using rational persuasion, each side is convinced that a settlement agreement is better than the alternative. The lawyer’s task is to convince the opposing party to that effect, and place the mediator in the strongest position to do so as well.

This paper has identified twelve steps to prepare for mediation. It has concentrated on three of those steps in which the lawyer plays a key role: the opening statement; the mediation brief; and the client’s participation in the mediation.

Those three steps are at the heart of the mediation process. They call upon two aspects of the litigation lawyer’s role: to understand what the client wants to achieve, and to persuade others in order to achieve that result. If the lawyer competently undertakes these steps during a mediation, it is more likely that the client’s objectives will be achieved, and even if they are not, the client will be satisfied by the process.