

# ***WINNING AT MEDIATION***

## ***GETTING THE BEST OUTCOMES FROM MEDIATION***





# CONTENTS

<b>INTRODUCTION</b>	<b>3</b>
<b>CRITICAL EVOLUTION</b>	<b>4</b>
<b>MEDIATION STANDARDS</b>	<b>4</b>
<b>THE PURPOSE OF MEDIATION</b>	<b>5</b>
<b>PLAYING THE SYSTEM</b>	<b>5</b>
<b>KEY DIFFERENCES IN APPROACH: LITIGATION VS. MEDIATION</b>	<b>6</b>
<b>GOOD ADVOCACY</b>	<b>7</b>
<b>WHAT TO MEDIATE</b>	<b>7</b>
<b>WHEN TO MEDIATE</b>	<b>7</b>
<b>WHERE TO MEDIATE</b>	<b>8</b>
<b>THE MEDIATOR: TACTICAL SELECTION</b>	<b>9</b>
<b>SQUAD SELECTION: PICKING A TEAM THAT WORKS</b>	<b>10</b>
<b>PREPARATION: 'THE PROFESSIONAL GAMBLER'</b>	<b>11</b>
<b>RISK ASSESSMENT</b>	<b>11</b>
<b>COST</b>	<b>12</b>
<b>TIME</b>	<b>12</b>
<b>OTHER FACTORS</b>	<b>12</b>
<b>HAVING A PLAN</b>	<b>13</b>
<b>PLANNING A LIE</b>	<b>13</b>
<b>THE BOTTOM LINE</b>	<b>13</b>
<b>PSYCHOLOGICAL ASCENDANCY</b>	<b>14</b>
<b>THE OPENING</b>	<b>14</b>
<b>STYLE</b>	<b>15</b>
<b>THE APOLOGY</b>	<b>15</b>
<b>NEGOTIATING STANCES: INTRODUCTION</b>	<b>15</b>
<b>SETTING THE TONE</b>	<b>16</b>
<b>COUNTERING POSITIONAL BARGAINING</b>	<b>16</b>
<b>SUMMARY</b>	<b>17</b>
<b>CONCLUSION</b>	<b>17</b>



# INTRODUCTION

**T**he notion of winning at mediation is, of course, antithetical to much that the process stands for; mediation, conventionally, is about win-win outcomes. And while it is no reflection on the process, or the indeed the mediator, it remains a fact that some parties are better negotiators than others. Unavoidably, better negotiators do better deals.

An anecdote from UK mediator Bill Wood QC succinctly illustrates the prosaic reality of being outmanoeuvred:

“Towards the end of a long day’s mediation the two principals met together and managed to agree a settlement.

As they emerged from their meeting one of them took me to one side and told me how unhappy he was with the deal. I sympathised but resorted of course to the old platitude: ‘Well a good mediation always ends with both parties unhappy to some degree’.

At that point we both heard the sound of wild cheering breaking out in the room where the other principal was announcing the result of his discussions to his team.”

A classic win-lose mediation. When it’s just about the money, lose-lose is another common scenario: the defendant pays more than they wanted, and the claimant takes less than they feel the case is worth.

This eBook is for those wanting the best deal for their clients, and sets out what leading mediators have observed to be effective negotiating tactics in thousands of mediations. I hope that you find value in its contents, and that you, too, can avoid being on the receiving end of cheers when your opponents greet your settlement offer.

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# CRITICAL EVOLUTION



**OVER THE LAST FIVE YEARS MEDIATION HAS MADE SOME CRITICAL EVOLUTIONARY ADVANCES. THE HOPE THAT DISPUTING PARTIES WILL BE OPEN, TRUSTING AND REASONABLE WITH EACH OTHER IS FADING AS EXPERIENCE HAS SHOWN THIS IS NEITHER REALISTIC NOR NECESSARY.**

Nowadays it is widely accepted that even if both sides are acting on a principled basis and come to the mediation with a problem-solving mindset, they are still going to want the best deal for their clients. An issue that faces every party representative in mediation, particularly lawyers, is how to balance problem solving with tough negotiation. The various ways in which lawyers manage this tension, this conflict between getting a deal done and getting the best result for the client, is the subject of this eBook.

Techniques for getting the best out of mediation are as diverse as the characters involved. Negotiation remains an intuitive art: there's no 12-step programme to turn an ineffective advocate into an indispensable adviser. Becoming indispensable, or at least effective in mediation, requires a working understanding, intuitive or otherwise, of the techniques and psychology involved.

**“WHEN PROBLEMS ARISE, ACCORDING TO THE MEDIATORS CONSULTED, THEY ARE NOT COMMON TO ONE SIDE OF THE PROFESSION OR THE OTHER; THEY ARE TO DO WITH APPROACH.”**

This report has been written with the co-operation and support of a dozen or so of the UK's leading mediators. As such it draws on the experience gained and observations made in hundreds of mediations over a period of 20 years. The comments and reflections of some experienced mediation advocates are also included.

We refer throughout to 'mediation advocacy.' A number of mediators took issue with the term, first because it implies partiality, and secondly because of associations with an adversarial approach to resolving disputes. Advocacy, according to the OED, is, 'The function of an advocate; the work of advocating; pleading for or supporting.' We have retained the term 'advocacy' partly because of the lack of suitable alternatives, but more significantly to reflect the fact that in practice, lawyers will be partisan, and will fight above all for their clients' best interests.

## **MEDIATION STANDARDS**

As might be expected, standards of mediation advocacy at present vary widely. When pushed, one leading mediator says 30% of lawyers do not help their clients; 50% perform brilliantly and 20% are neutral. Significantly for the Bar, the established perception that mediation is so alien to barristers' experience and practice that they should be excluded from the process is finally receding.

When problems arise, according to the mediators consulted, they are not common to one side of the profession or the other; they are to do with approach. One mediator said that in 30% of mediations, clients had asked them to intervene to rein in the lawyers; not just the opponents' lawyers, but often their own. Though 30% seems unusually high, the perception that lawyers can frustrate rather than facilitate progress in mediations is one all mediators recognise.

While mediation is a personality-driven process, clients should be aware of potential systemic failings within the firms themselves. Firms with a genuine client focus, even among major law firms, remain a distinct minority.

'Lawyers are paid fees on process,' says one mediator, 'the client walks through the door and there's a system: engagement letters, preliminary assessment of the case et cetera.' Outcomes and client satisfaction are too often a secondary consideration. 'Some are good at it, and of course all of them talk it,' he warns.

## THE PURPOSE OF MEDIATION

Honing techniques to realise clients' goals in mediation first requires a clear understanding of what the process is about. 'Too often lawyers are driven by what they think the result ought to be; mediation is about what the result can be,' one mediator says. The process is about settling a dispute on a basis with which both sides can be content.

It is not a trial, and therefore requires a different mindset. 'Many people still come to mediation thinking its purpose is to reach an answer that precisely reflects the legal merits of the dispute, and on which both sides agree,' says one mediator. He adds, 'that's a pipe dream.'

In practice agreement on the legal merits is rare. It is unrealistic to expect to change the other side's view of their arguments in the course of a single day. 'All you can do,' offers another mediator, 'is enable them to understand your arguments.'

It seems obvious, but a frequently over-looked fact is that disputes end up before the courts because good lawyers are, not unreasonably, giving different advice. Mediation therefore is about finding an intelligent, pragmatic and commercial basis for resolving the dispute above and beyond the minutiae of legal argument. If in the course of a mediation the 'right' legal answer is found, that should be seen as a fortunate by-product, and not the object of the exercise.

## PLAYING THE SYSTEM

Within the mediation process the opportunity exists to engineer a settlement more favourable than might be achievable through the courts. Few like to admit it, but the conclusion is inescapable. Even the keenest mediation proponents suggest a win-win outcome is achievable in only two-thirds of settlements. Win-lose scenarios are therefore only fractionally less probable than the win-win ideal.

Many find this troubling. Chief among complaints from mediation sceptics, or those culturally opposed to mediation, is the suggestion that mediation is a compromised form of justice. The laws of the land, studiously built up over hundreds of years, are dangerously circumvented through mediation, so the argument goes. The result is that one that side will not be afforded the fullest protection of the law, and the other side will escape the fullest punishment that the law dictates. Mediation proponents, of course, will dismiss this argument as overly-idealistic: the end - swift resolution of the dispute and a return to a productive working relationship - justifies the (marginally compromised) means, they say.

There is no reason to suppose that mediation is fatally flawed because of this issue, indeed for experienced advocates it offers an additional avenue of opportunity. One solicitor went so far as to say that mediation is always the preferable option when defending a client with a weak case: 'We pay out less money, costs are kept down and clients are spared the public stigma of having lost at trial.'

Exploiting these perceived weaknesses in the system therefore can reap tangible advantages.





**“LITIGATION IS LIKE FIGHTING  
A FORMAL DUEL... MEDIATION  
IS MORE AKIN TO WRESTLING.”**

### **KEY DIFFERENCES IN APPROACH: LITIGATION VS. MEDIATION**

A sophisticated minority of lawyers at present recognise the above and have adapted their skills accordingly. Training and process in law firms on the whole remains geared towards settling disputes through litigation, and critical differences in approach can often be over-looked.

Litigation is like fighting a formal duel: a process regulated by customs and rules where opponents attack each other directly in an attempt to secure an outright victory. In litigation the dispute is decided on the evidence and arguments presented, and the adversarial system means attempts to reconcile or accommodate the parties' interests are ruled out. The result therefore is a 'binary outcome': a winner and a loser.

Mediation is more akin to wrestling: opponents embrace each other at close quarters in a less formal, more improvised and more intense form of combat.

Rather than an all-out assault, judicious probing of the opponent's strengths and weaknesses, working them to your advantage where possible, is where good wrestlers and mediation advocates score. One American attorney described this as the 'Jujitsu of negotiation.' He continued:

'It's a question of finding out where the other side is coming in with force and using it to help get what you want.' The emotional intensity of mediation, clients should note, can be as great if not greater than the more sanitised and formal processes of litigation.

In short, successful mediation advocacy requires greater subtlety. 'It's turning everything from being an attack on the other side to a justification of your position. It's making the other side understand your position without pushing them into a corner at the same time,' concludes one mediator.

This requires a sea-change in approach for litigation lawyers steeped in the warrior culture that has been part of UK litigation for several hundred years.

'Classically [in litigation] one starts with an *a fortiori* contention, and builds up a case with a flow of rhetoric. It works supremely well in tribunals of any kind,' says one mediator, 'but it is supremely useless in mediation.'

'[Mediation requires] a form of quasi- advocacy that we lawyers aren't used to. We're used to the more straightforward knockabout stuff – you look the adjudicator in the eye and say, "the law's on our side, the facts are on our side, so it's patently clear you've got to find for us for the following reasons...." And that just doesn't work in a face-to-face scenario.' So, what does work?

## GOOD ADVOCACY



In addition to robust legal skills, tactical mediation draws on a range of disciplines, including psychology, game theory and economics. A successful advocate will be attuned to the other side's message.

They will note - consciously or otherwise - whether the opposition is confident, defensive, angry, or a mixture of these feelings. From this analysis it will be possible to judge what the other side needs as opposed to what they would like.

It requires a great range of aptitudes and characteristics: consistently successful advocates need to be confident, firm, courteous, flexible and realistic. It is not enough to be a good forensic lawyer, and moving beyond the purely mechanical is not a leap all personalities are adept at making.

With this in mind, the following issues are those identified by leading mediators to be the key ingredients to securing a favourable outcome for the client.

**“REALISTICALLY, SOLICITORS CONCEDE THAT THEY LOOK MORE FAVOURABLY UPON MEDIATION IF THEY BELIEVE THEIR CASE MAY FAIL IN COURT.”**

### WHAT TO MEDIATE

The consensus among mediators is that almost all disputes are mediatable. Recent successes in areas such as civil fraud, where previously mediation was thought inappropriate, are testament to the flexibility and robustness of the process. Even mediation's strongest proponents however are prepared to accept that litigation is necessary to resolve pure legal questions or matters of public policy.

The characteristics of a dispute that is classically suited to mediation are said to include some or all of the following: a moderate level of conflict; a continuing relationship between the parties; a preference for privacy; and cases where the dispute is broader than can be defined in legal terms. Realistically, solicitors concede that they look more favourably upon mediation if they believe their case may fail in court. In that scenario mediation may offer not just the opportunity to climb down gracefully, but the prospect of negotiating a settlement of greater value than a court judgment.

### WHEN TO MEDIATE

Given the success of mediation across all manner of disputes, identifying that a dispute is suitable for the process is straightforward: there must be clear and pressing reasons for unsuitability, otherwise the focus should be on when it would be tactically advantageous to call a mediation.

Mediators have noted a trend in mediations taking place earlier and earlier. Significant cost savings can be achieved in doing so and contracts often have clauses that require mediation prior to arbitration or litigation. Mediators however have noted that it is seldom worth trying to mediate unless parties feel the points in issue are sufficiently articulated. 'It may be too big a leap of faith for the parties to do a deal until they have much greater precision as to what in fact is in issue,' one mediator says.

Some mediators are adopting techniques to circumvent this issue. It is worth considering the benefits of a fuller exchange of position papers, making it more like pleadings, and leaving scope for the other side to reply. Starting a process whereby some minor discovery takes place may also be worthwhile.

Not all solicitors endorse such an approach: 'It's a balancing act,' says one. 'In my experience, the further down the line you leave it [mediation], the more entrenched parties tend to become. Disclosure can help, but the cost implications can outweigh its usefulness. It's just more pressure on the parties. Clients think that once they've forked out for disclosure they might as well go take the last step and hope for a resounding victory on damages and costs at trial.'

With mediations becoming more common in complex disputes of the type outlined above, limiting mediation to a single day can be detrimental to achieving a result. Often it's the case that two days or more would be more appropriate, even if ultimately all the allotted time is not required. It is usually easier for parties with long distances to travel to go home early than it is to find a date convenient for all parties to reconvene.

At the same time as mediations have become more complex, anecdotal evidence suggests that the proportion of cases that reach settlement on the day has fallen sharply. 'The one-day wonder is now much less frequent,' notes one mediator.

There are a number of theories as to why this might be the case. One suggests that in the light of various court decisions over the last eighteen months or two years, lawyers who have been culturally opposed to mediation now find themselves forced into the process as part of their professional obligation to the client. Previously only trailblazers, innovators, or those naturally sympathetic to mediation got involved. A wider, and generally less sympathetic cross-section of lawyers, the theory goes, makes it more difficult to bring cases to a close.

Another theory suggests lawyers are increasingly using mediation as part of a wider process. Cases that don't settle on the day often do so a week or so later. Where appropriate lawyers are deliberately deciding to end the mediation unsuccessfully because they feel a more advantageous settlement will be achieved when the opposing side has had more time to think. And often this is preferable to working on into the night. In support of this theory, mediators have observed in family-law mediations, which take place for a couple of hours every two or so weeks, that the shift in position comes between meetings: people think differently about offers once they've had time to reflect on them.

The strategic advantages of deliberately stringing out mediations are debatable. 'It's a possible strategy,' says one mediator.

'You don't have to settle on the day, but there's a risk factor in letting the other side stew. After all, they might not accept the offer. It's a judgment call: will they stew, or will they bake [ie. harden their position]?'

Mediation in the UK has been geared towards a one or two-day intense battle. Until now, it's a model that has proved very successful, but the mere fact that outcomes can be achieved, does not necessarily mean other models might be more appropriate. 'Conceptually there's no reason why someone who's spent 20 years building a case should be expected to shift completely within five or six hours,' says one mediator. 'Why do we always think it has to be done over a single day? Because that's the model we set up. Increasingly we need to think: if we mediators don't come up with a model that's more flexible, users, becoming more sophisticated, will manipulate it the best way they can to get results.'

## WHERE TO MEDIATE

Mediations are usually arranged, for obvious reasons, on neutral territory. Neutrality, however, comes in many shades, and parties should be alive to potential pitfalls and advantages associated with the choice of location. The natural tendency of course is to stay close to home, drawing on the psychological advantages of familiarity with the surroundings, language and culture. There may be instances, however, when it can be advantageous to forego these comforts and negotiate in hostile territory.

The potential benefits of doing so are recalled by one solicitor: 'We thought we had no prospect of resolving the matter through mediation, not least because we didn't have a very good case. We were having trouble advancing in any way because the documents weren't available, and although we made great play of the fact we were willing to settle in the run up to the mediation, all we actually wanted was to see the documents.' In this instance, the defendants were headquartered in Scotland, and agreed to mediate there for their own convenience.



'We pushed for the mediation to be in Scotland because figured it would be very difficult for them to say "well, we haven't got the documents – they're miles away.'" Finding no reasonable grounds to resist, at the mediator's prompting, the defendants handed over a substantial tranche of documents. 'Due to a bizarre contractual arrangement,' and admittedly the amazement of all concerned, the documents entirely undermined the defendants' case; they collapsed, and the claimants walked away with £20m.

Although the circumstances of this mediation are unique and the result a surprise to everyone, it is doubtful that the outcome would have been achieved had the claimants not had the foresight to set aside convention and do battle in enemy territory; likewise, the defendants might have achieved a better result had they thought to distance themselves from their documents.

### **THE MEDIATOR: TACTICAL SELECTION**

Another manifestation of more sophisticated strategic thinking in mediation is evident in the selection of a mediator. While much has been written about the qualities parties should seek in a mediator, shrewd advocates aim to match the mediator's aptitudes to the requirements of the case, not just on the area of the law concerned, but also with regard to the personalities and positions of the parties involved.

Accomplishing this is critical to securing a settlement. One solicitor, a noted mediation skeptic, reinforces the message:

'Whether mediation is successful or not, or whether there's really any value in it, is dependent very much on the quality of the mediator and the quality of their involvement in the process.'

In an ideal world your mediator will be patient, friendly and humorous, possessed of good organisation skills, empathy and experience, while somehow being a trustworthy soul who can conjure up deals from nowhere. But too few, if any, mediators can match this profile. Even experienced mediators admit, at their worst, to being angry, irascible, frustrated, bored, over-worked and under-prepared.

'Mediators are not magicians,' says one. Their theories and approaches are calculated and therefore to a degree predictable. 'I have this theory,' says another, 'that the number you're going to settle at is out there already: there's nothing you as claimant can do to haul it up and nothing you as defendant can do to haul it down by being difficult.'

This approach will clearly favour some cases more than others. Knowing beforehand that the mediator believes a settlement is contingent on the defendant paying more than they want to and claimant accepting less, will inevitably colour their approach. Being aware of this and preparing counter-strategies can only work to your advantage.

**“WHETHER MEDIATION IS SUCCESSFUL OR NOT, OR WHETHER THERE'S REALLY ANY VALUE IN IT, IS DEPENDENT VERY MUCH ON THE QUALITY OF THE MEDIATOR AND THE QUALITY OF THEIR INVOLVEMENT IN THE PROCESS.”**

Levels of competence and approaches vary: a complete spectrum exists from the highly intuitive to the entirely predictable. Mediators who work frequently with the same pool of lawyers are under constant pressure not to become stale and predictable. Some achieve it; others don't, but anticipating their moves can only be beneficial. Most mediators are aware that at some point or other they have been 'sent on a mission,' whether they realised it at the time or not.

'Lawyers should give thought to how they are going to be steering the mediator to work as an adjunct to their negotiating team, getting them to run points – possibly even thinking they're his own points, when in fact they've been subtly primed,' suggests one mediator.

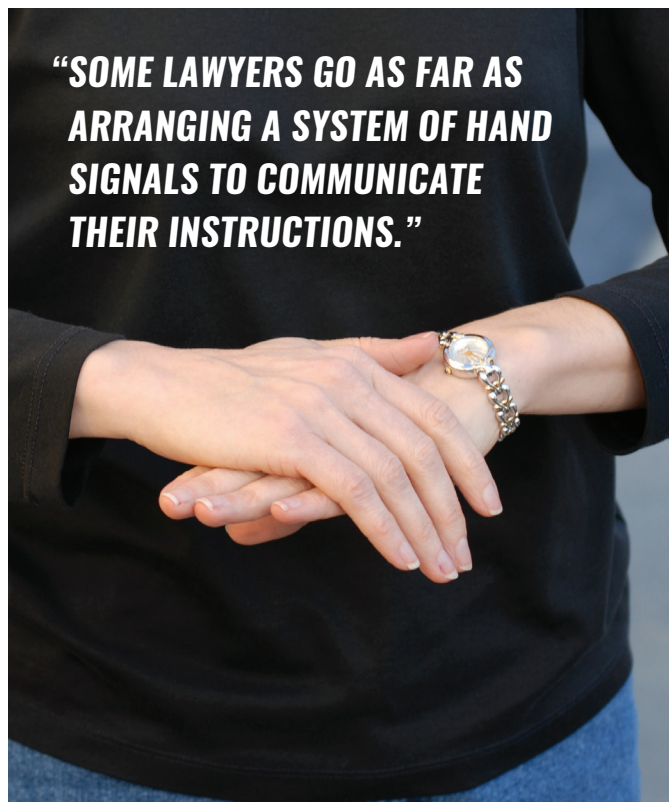
Ultimately, concludes one solicitor, 'the best approach is to appoint a mediator you have used before and that you trust.' Experienced solicitors will know which mediators' approaches and personalities will gel with which clients in a productive way, and make their selection accordingly. It is important therefore that clients scrutinise their instructed firm's track record in mediation.

## **SQUAD SELECTION: PICKING A TEAM THAT WORKS**

Prior to a mediation, careful consideration should be given to the likely human dynamics at play and let that determine who attends and in what capacity. 'The reality is,' says one solicitor, 'that you're stuck with whoever you are taking instructions from: some are great, others are not.'

Advocates therefore need to look hard at what that person needs in order to reach a favourable settlement. Bringing people from the operational side of the business into the team – whether or not they are familiar with the matter in dispute – can prove effective. One solicitor describes a mediation where the instructing in-house lawyer was both a poor negotiator and had drafted the agreement that was the subject of the litigation. The drafting was weak and this would inevitably be exposed in the course of the mediation; furthermore the in- houser was implacably opposed to settling the case.

The solicitor was therefore forced to tread carefully: 'What I did was to say to him that I thought it was a good idea to bring someone from the operating side along, and also the FD. There were three of them, and they ended up settling on quite good terms despite not wanting to settle when we went in.'



The solicitor concludes that, 'if you think the parties are going to be stubborn or weak, you've got to persuade them to bring someone else along. The FD in this instance had not been involved and brought a fresh pair of eyes to the dispute.'

Most solicitors interviewed for this report favoured keeping the number of lawyers present to a minimum. One solicitor concludes that, 'the more people there are yapping, the less effective the process becomes.' Co-ordinating and managing the involvement of team members therefore become all the more important. It is often the case that the client will be in a better position to persuade the other side of their position. The skilled advocate will know instinctively when it's appropriate to take a back seat; when clients prefer their lawyers to speak for them, some go as far as arranging a system of hand-signals to communicate their instructions.

Again, the majority of solicitors and mediators interviewed for this report were in favour of letting clients speak- up, in effect reversing the traditional roles favoured in litigation. But that's not universally the case, as one mediator observed: 'At the beginning of the mediation, clients are often much more clued up than barristers and solicitors allow them to be – they can be very paternalistic.'

Using the client to make points is often a shrewd move, but shouldn't diminish the role of the lawyer: 'I think the best advocates are those that quickly work out the best one to put forward – whether it's the lawyer or the client. If it's the client, it doesn't mean that the lawyer's advocacy skills are wasted because they're going to pass them onto the client,' says one mediator.

Outlining a typical approach, one solicitor says, 'My advocacy begins once we're in the break-out rooms. What you manage to do in those meetings is to put your case forward for your client but in a less formal environment – you're actually steering the client quite a lot without your client realising you're doing it.'

Whatever the composition of the team, communication between its members should be such that everyone knows what role they are there to play while retaining the ability to improvise according to circumstances.

## **PREPARATION: ‘THE PROFESSIONAL GAMBLER’**

Clients have a right to expect a high level of technical expertise from lawyers at major firms. Beyond this, what distinguishes the excellent from the merely acceptable is often the quality of prior preparation.

One salutary tale is that of the mediator who, while practising as a solicitor, acted for one of the world's leading professional gamblers. The gambler concerned made a living taking on all-comers at Blackjack. She became involved in a rights dispute and sought advice on her prospects of succeeding in a legal claim. The solicitor gave his standard line: you've got a 70% chance of succeeding with the claim, your costs will be X if you win and X if you lose. 'Is that it?' she asked. 'What kind of a risk assessment is that? I need to know about my opponent – what advice are they getting? What's their personality? Are they gamblers? Will they see this thing through to the end? How do they cope with stress? Will they break under cross-examination?

**“CLIENTS HAVE A RIGHT TO EXPECT A HIGH LEVEL OF TECHNICAL EXPERTISE FROM ALL LAWYERS AT MAJOR FIRMS. BEYOND THIS, WHAT DISTINGUISHES THE EXCELLENT FROM THE MERELY ACCEPTABLE IS OFTEN THE QUALITY OF PRIOR PREPARATION.”**

Is their house on the line?' In short, she wanted a full risk assessment of all the relevant circumstances. Litigation was not a gamble she was about to undertake lightly.

The message is: the better informed you are of all the circumstances that might potentially affect the outcome, the better able you are to take advantageous decisions.

## **RISK ASSESSMENT**

Mediators all agree that realistic and comprehensive risk assessment is critical in preparing for mediation. Mediators might force parties to complete a decision- tree analysis, getting each side to attach a percentage value to their prospects of success in each phase of the dispute. Opinion is divided as to whether decision- tree analyses produce mathematically sound results. 'They are,' concedes one mediator, 'pseudo science, but it's better to have them than not have them.' Others will resort to them only when desperate.

Part of what this process achieves is the breaking down of partisan perceptions. Research shows that it is natural to view one's own side as 'more talented, honest and morally upright,' while simultaneously vilifying the opposition. The result is that exaggerated perceptions of the other side's position lead to overestimates of the substantive conflict.

Risk assessment and reality testing help counter this tendency; being aware that either side's arguments are coloured merely by the roles adopted in a conflict situation helps broaden one's perspective.

At a minimum therefore, lawyers should consider, and have in writing answers to the following:

- The sum claimed
- A list of unquantifiable elements: injunction, accounting, rectification, declaration
- The sum counterclaimed (if applicable)
- A list of unquantifiable elements of the counterclaim: injunction, accounting, rectification, declaration
- A comprehensive list of each aspect of the claim and percentage prospect of success
- The percentage prospect of the main claim succeeding, and the sum payable or receivable
- The percentage prospect of a significant part of the claim succeeding, and the sum payable or receivable
- The percentage prospect of the counterclaim succeeding, and the sum payable or receivable
- The percentage prospect of a significant part of the counterclaim succeeding, and the sum payable or receivable



## **COST**

- Are you fully indemnified for your own costs to trial?
- Are you fully indemnified for your opponent's costs to trial?
- If you settle before trial will your opponent's costs be indemnified?
- If not, estimate your opponent's costs to date of settlement for their costs.
- What are your total costs and expenses to date?
- What are your estimated legal costs to the end of a trial, including witness expenses, expert costs, counsel's costs and all other items?
- If you succeed, how much of your costs are you likely to recover?
- If you succeed, how much of your costs will not be recoverable?
- If you do not succeed, how much of your opponent's costs are you likely to pay?
- If it goes to trial, estimate the time taken by management, staff and others in preparing, seeing lawyers and attending court. Put a value on this
- Estimate the resulting loss of business/income
- If you succeed at trial, what interest, if any, are you likely to receive?
- If you do not succeed at trial, what interest, if any, are you likely to pay?
- If either side appeal the judgment, estimate what extra costs you might incur.

## **TIME**

- What is the date of the trial? Estimate the length of the trial.
- If either side appeals, estimate the further time involved
- Is there any prospect that your opponent will not have the resources to meet a judgment, immediately or at all? If so, estimate the time, prospects and costs of enforcing a judgment.

## **OTHER FACTORS**

- If the other side has made a Part 36 offer, what are your percentage chances of beating that offer?
- If you have made a Part 36 offer, what are the other side's chances of beating that offer?
- How damaging would an adverse decision at trial be for your business? Put a value on that.
- How damaging would an adverse decision at trial be for your opponent's business? Put a value on that.
- Might there be any indirect benefits from a settlement, like restoring or preventing further damage to goodwill, or trading opportunities?

## HAVING A PLAN

Plotting your moves and strategy prior to a mediation is critical: 'Don't plan so much that you're trapped by it,' warns one mediator, 'but if you want to go from no settlement to settlement at a figure which is acceptable, without a plan of how to get there, you won't. If you don't think it through everything will be a surprise.'

One should, as far as possible, anticipate the other side's moves. Have a clear idea of what points the other side are going to home in on, and plan a response.

'You have to think: what are we going to say when the mediator comes in and asks about issue A?' offers one mediator.

If it's a money case, you need to plan how early you want to start talking about money. 'It's something that the parties have considerable control over,' says one mediator, 'you have to pick your moment.'

Can you browbeat the other side? Will you get a better settlement by drawing the process out into the early hours? You need a plan, even if it's a wholly imperfect plan, which it will be,' he says.

Planning is one thing, but being able to improvise is quite another. It is said that a truly great football manager is not the one who coasts to victory in a cup final, rather it is the one who finds his team two goals down at halftime, abandons the tactics that have brought success and glory all season, and devises a new strategy to secure victory in the second half. The same might be said of great mediation advocates.

One solicitor recalls a mediation where all their plans were frustrated by a single lawyer on the opposing side. Circumstances changed dramatically on day two, however, when the opposing lawyer announced that he was leaving to catch a plane at 4pm and wanted the matter resolved by then. It left an open goal: 'We thought marvelous – we'll kill time until then and get it settled once you're out of the way. We didn't do much to advance the case; he grew furious and stormed off at 4pm expecting it to come to an end. We suggested to our clients that it might be an idea to see if we could resolve it over a drink in the pub. It worked and our clients recovered around half of the sum claimed.'

Although the opposing lawyer had made a disastrous tactical mistake in making it known he had to leave at a certain time, the claimants showed initiative and flexibility in being able to adapt. 'We altered all our plans for the mediation to concentrate solely on getting him out of the door and getting the parties to talk to each other. I don't think we ever would have resolved if he'd stayed.'

## PLANNING A LIE

Mediation is fraught with ethical dilemmas: among them is how frank to be with the mediator and how to maintain that position over a period of time. While few solicitors would plan their strategy around deliberate deception, it is, says one mediator, 'part of the game to lie.'

The parties therefore have to decide, when challenged, whether to begin making concessions right away, or simply re-state their position. The strength of your case, the opposition's approach to negotiation, and how much the parties feel able trust the mediator will, in part, determine the approach. Mediators generally, however, caution against posturing tough as a negotiating tactic: 'I think the lawyers who don't do very well in mediation, as judged by a mediator, are those that exaggerate, don't tell the truth, hide things, and don't respond to the other sides' points,' says one mediator. In doing so, 'they build the client's expectations, and all it achieves, with a skilled mediator, is make the process last longer.'

## THE BOTTOM LINE

One view of mediation is that both sides should tell the mediator their bottom line, and, armed with that information the mediator will work to construct a deal around those parameters. Few mediators, however, believe that acting in this manner will benefit the client, and consequently they will not ask for a bottom line, or best position. One mediator cautions, 'My experience is that in truth, if you give your maximum position away, the chances are the deal will be more in the territory your opponents want if he doesn't do the same.'

## **PSYCHOLOGICAL ASCENDANCY**

'In terms of negotiating tactics, the more experienced advocates are aware of the psychological aspects of negotiation: for them mediation is just a forum they can use to get their result,' says one mediator.

This starts early on in the process, and tends to feature more strongly when the sides are unevenly matched in terms of legal resource. It is a matter of initiating and maintaining superiority in all tangible aspects of the process. Mediators have noted an increasing tendency for the sides to become embroiled in a 'war on documents.'

'I'm getting the impression that firms are using mediation as a way of displaying their plumage on documents,' says one.

'In the run-up to mediating if one party is ostensibly more organised, ostensibly stronger, ostensibly pushing for this that and the other, it can have an effect. Psychological ascendancy is something parties will fight for.'

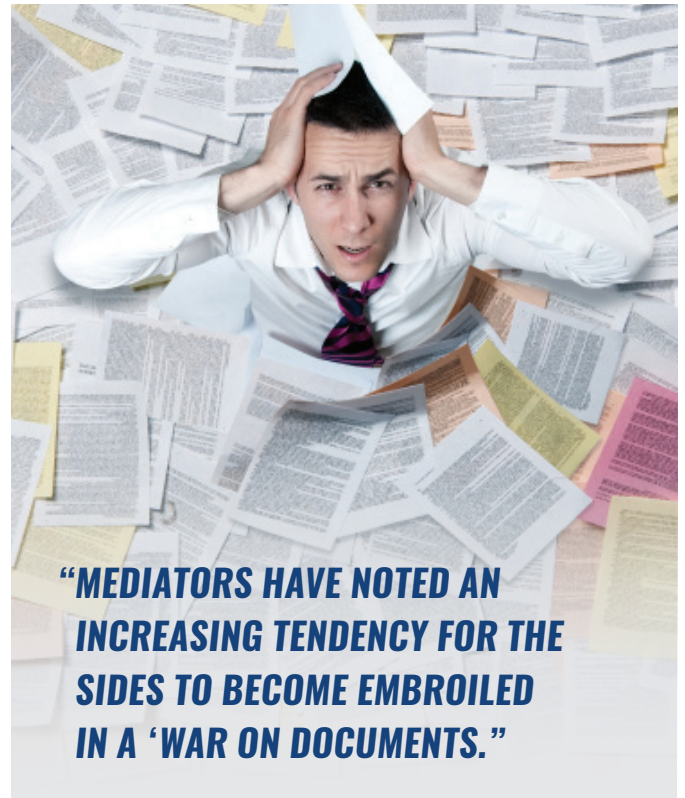
Using it to best effect requires maintaining psychological ascendancy through the negotiating positions, and requires careful planning: 'Good advocates will steer the mediation to suit their plan: they sense and try to concentrate on the dynamics of the team in the other room. Sometimes it's instinctive, sometimes it's expressed.'

## **THE OPENING**

Opening statements are a major opportunity to influence the other side, and highlight the differences in approach between mediation and litigation. From the outset, lawyers must be more than legal advisers. 'Don't just read the position statement again – they've already got that,' says one mediator. 'Don't just talk about the law – consider the wider business context. Concentrate on looking them in the eye and using all of your team.'

'It's not so much about what you say,' says another, 'it's what the other side hears.' Mediators are sensitive to this, and will intervene if they detect lawyers are adopting a litigation-style approach: 'I'm very firm now,' says one. 'I've stopped lawyers going on broadcast.'

Addressing the mediator like a judge or magistrate is the downfall of many an advocate. A reappraisal is called for: 'If the object is to persuade the other side to a position you find acceptable, how are you going to do that?' asks one mediator. 'Is telling them they are a scurrilous ratbag the best way of doing that? It may be how you feel, it may even be justified, but it's better to say no more than we disagree with you.'



A more subtle, but no less rigorous approach is instead what mediators recommend. 'I've seen several thousand opening speeches in mediations,' says one, 'and the most effective is to thank the other side for coming. Thank them for taking time to participate, and sound as though you mean it.'

'Make it clear that you're prepared to compromise, to acknowledge that the result can't be entirely your way. You don't have to concede, you don't have to capitulate, you just have to indicate to the other side that you're there to make a deal.'

Being conciliatory while fighting hard is where good mediation advocates excel. 'It's talking quietly while carrying a big stick,' says one mediator.

## STYLE

It boils down to advocacy style. 'The clever mediation advocate is tough about their case, but they're doing it in a way that makes the other side, they hope, see there is justification for what they are saying,' says one mediator. 'At certain stages it's useful to have the client say, "I'm in a very difficult position: I have a board, I have to justify what I do to the board – of course I have authority to what I do - but if my legal advice is X, it's very difficult for me to justify moving from that figure."

'That is a far more effective way to get the other side to see the strength of your position. It's a clever way of moving the other side; you'd never say that in court, but it's really effective in mediation.

'In that conversation I've said several things: I've said we're not wholly unsympathetic to you, but I myself am in a difficult position because I'm getting legal advice from very good lawyers that (subtext) your claim is crummy. Also, you know the people on the other side are now sympathetic to you because you're in the difficult position of having to justify something to a board; it's a position that any CEO is going to sympathise with.'

## THE APOLOGY

'An apology can be very powerful,' says one mediator. For one thing, a side anticipating conflict and that has prepared accordingly will be thrown by a more conciliatory approach.

'It's particularly powerful in professional negligence claims,' he says. 'To say, "I'm sorry this has occurred, the whole thing from our point of view was unforeseeable, but we can see the damage, disruption and distress it's caused," immediately lowers the temperature; they feel their grievance has been dealt with.'

Negotiation therefore starts on a more favourable footing than otherwise would have been the case.

## NEGOTIATING STANCES: INTRODUCTION

All negotiators face a dilemma: should they be competitive, co-operative, or both? Competitive, positional bargaining, it is thought, can only lead to a win-lose outcome: the parties will focus on getting as much as possible for themselves, and leaving as little as possible for their opponents. Such conflicts are inherently competitive and adversarial: common tactics include trying to gain an advantage by insisting on negotiating on home ground; outnumbering the other side; deceiving the other side into conceding more than you; making threats or issuing ultimatums; trying to overpower or outmanoeuvre.

**“HAVING WORKED TO DEFINE THE PROBLEMS AND EXPLORED WAYS TO CREATE VALUE, NEGOTIATORS STILL SEEK TO INFLUENCE THE OTHER SIDE, NARROWING THEIR OPTIONS SO THEY CHOOSE IS WANT THEY WANT.”**

If both sides are co-operative, the parties focus on creating value – the theory being that a win-win outcome is achievable where both sides share in the outcome. Mediators, while voicing a preference for co-operative, interest-based negotiation, note that features of positional bargaining also arise, particularly when discussing settlement payments.

Having worked to define the problems and explored ways to create value, negotiators still seek to influence the other side, narrowing their options to a range of favourable outcomes. Having set up the game, they seek to change it to maximise the chances of a better result.

One way of keeping the game within parameters you set is by not giving away your best position. 'It's a balance between being reasonably constructive – being able to use the system effectively, making good use of the constructive elements that are there...but do you put your cards on the table straight away? The answer is no, I don't think so.'

Part of the mediator's job is to struggle to find each side's bottom line; it pays to use the mediator to get a feel for how the other side is negotiating.

**“MEDIATORS TRY HARD TO PREVENT POSITIONAL BARGAINING: MOST BELIEVE IT DESTROYS THE PARTIES’ CREDIBILITY AND MAKES LITIGATION MORE LIKELY.”**

**SETTING THE TONE**

As outlined above, it is to be expected that the opposing side will be making exaggerated or unrealistic claims. One tit-for-tat response mediators have noted is to meet one unrealistic offer head-on with another. ‘I have so often been in mediations where one side was claiming £2m, and the other has offered £50,000. They’re not in the same universe. Were they fibbing or were they posturing? The answer is no. They were setting the tone.’

There was never going to be a deal around £1m. It didn’t mean that in due course they were not prepared to go to £300,000, it meant that at the moment, that’s where they were. They were setting a level.

In this instance, the final settlement was around £300,000; had they put that offer on the table, the mediator concedes he would have expected a deal in the region of £600,000 to £700,000.

One risk involved in this strategy is that the opposing side will view the offer as insulting and derisory and consequently walk out. It is the mediator’s role however to persuade them that walking out at such an early stage is a mistake. At the same time, meeting one derisory offer with another encourages positional bargaining, and the mediator will have to work hard to prevent the rest of the mediation degenerating into a protracted ‘carpet trading’.

**COUNTERING POSITIONAL BARGAINING**

Mediators try hard to prevent positional bargaining: most believe it destroys the parties’ credibility and makes litigation more likely. The parties become committed to their positions, restating and defending them, rather than tackling the underlying issues. It is, however, the technique most familiar to Western lawyers. Received wisdom is that if you want £1m in damages, you ask for £10m as a negotiating position. When one party adopts this approach, it is likely that the other will respond in kind.

The first counter is the so-called Untermeyer Variation, named after its chief exponent, Samuel Untermeyer, a turn-of-the-century New York attorney. He would make what he considered to be a reasonable offer, say \$100,000. When the other side responded with an offer of \$20,000, Untermeyer would double his settlement position to \$200,000. When the other side were prepared to meet his initial offer of \$100,000, he’s say: ‘too late, it’s \$200,000, and if you don’t pay that it’s going to be \$400,000.’

It’s a high-risk strategy and only works when one side has an excellent case and the other is poorly prepared for an imminent trial. Nonetheless, it is a technique that has been used successfully in mediation.

Another more widely used technique is known as Bulwerism, after Lemuel Bulwer, GEC’s chief labour negotiator. He adopted a ‘best and final offer’ approach. At the outset of negotiations, he would make an offer and refuse to budge, ignoring the other side’s list of demands. Only when he ascertained a weakening in the other side’s position would he move his, and then only fractionally. Variations in this approach are widely used in mediation. Commonly one side will make a best and final offer based on objective criteria, and only shift position if the other side can challenge the criteria effectively. Adopting this stance gives the party that initiates it control over the proceedings and also discourages positional bargaining.



## SUMMARY

### Helpful behaviour

Make, or encourage the client to make, on oral presentation that:

- Explains the issues clearly without labouring well-rehearsed arguments
- Explains the client's position and views without being provocative
- Makes it plain that the dispute will be litigated if necessary
- Indicates an intention to find a solution

Recognise that the mediator is there to help, and work clearly with the mediator to try to develop strategies that might be acceptable to both parties:

Try to anticipate what would be favourable for the other party (in return for achieving favourable terms for one's own client): benevolent self-interest

- Privately suggest possible causes of conflict and reasons for the impasse
- Privately suggest mediator interventions that might be helpful
- Use non-inflammatory language, even privately
- Maintain a realistic outcome assessment
- Use communication techniques effectively, especially with the other side
- Recognise the client's inability to shift and help the mediator deal with that
- Adopt a creative approach to dealing an impasse, including examining mutual gains or something that might be meaningful to the other side without necessarily having a cash value
- Involve the client closely in the negotiations and discussions
- Acknowledge concessions made by the other side and respond appropriately
- Privately acknowledge shortcomings in the client's case or position
- Help the client to make a decision
- Manifest a clear aspiration to end the dispute

### Unhelpful behaviour

Making (or allow clients to make) a presentation that:

- Is excessively threatening
- Uses inflammatory language
- Contains inaccuracies that the other party will recognise
- Makes or supports an unrealistic outcome assessment, or fails to review it when appropriate
- Concentrates on legal or factual issues and misses commercial interests
- Scores points against the other side
- Becomes entrapped by the sum invested in the case so far
- Grandstands for the benefit of the client
- Declines to engage in the negotiations effectively or at all: 'they will have to do better than that!'
- Inappropriately fuels the client's doubts and anxieties
- Raises important issues very late in the day

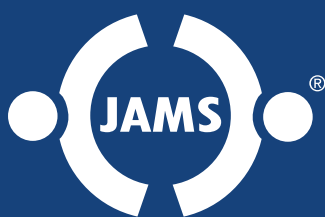
## CONCLUSION

The aptitudes and characteristics of an effective mediation advocate stretch beyond good forensic lawyering. The process is both broader and more subtle. One must plan carefully, but recognise when it is necessary to improvise. One must try to steer the process, but respond appropriately to the other side. One must recognise when it's appropriate to be tough, but reward co-operation from the other side.

Successful advocates come in many guises, and from both sides of the profession. Tough characters and the naturally more co-operative can perform equally well in mediation: it's a question of envisioning the architecture of deal and setting in motion the means to achieve it.

'I'm absolutely sure there isn't one right way. Every negotiator goes in trying to get the best result, and I believe one's got to be absolutely flexible,' says one mediator.

'If you're a pushover, you'll do a bad deal. If you just posture tough, you'll also do a bad deal. I believe that being tough, strategically letting go, is what mediation is all about,' he concludes.



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