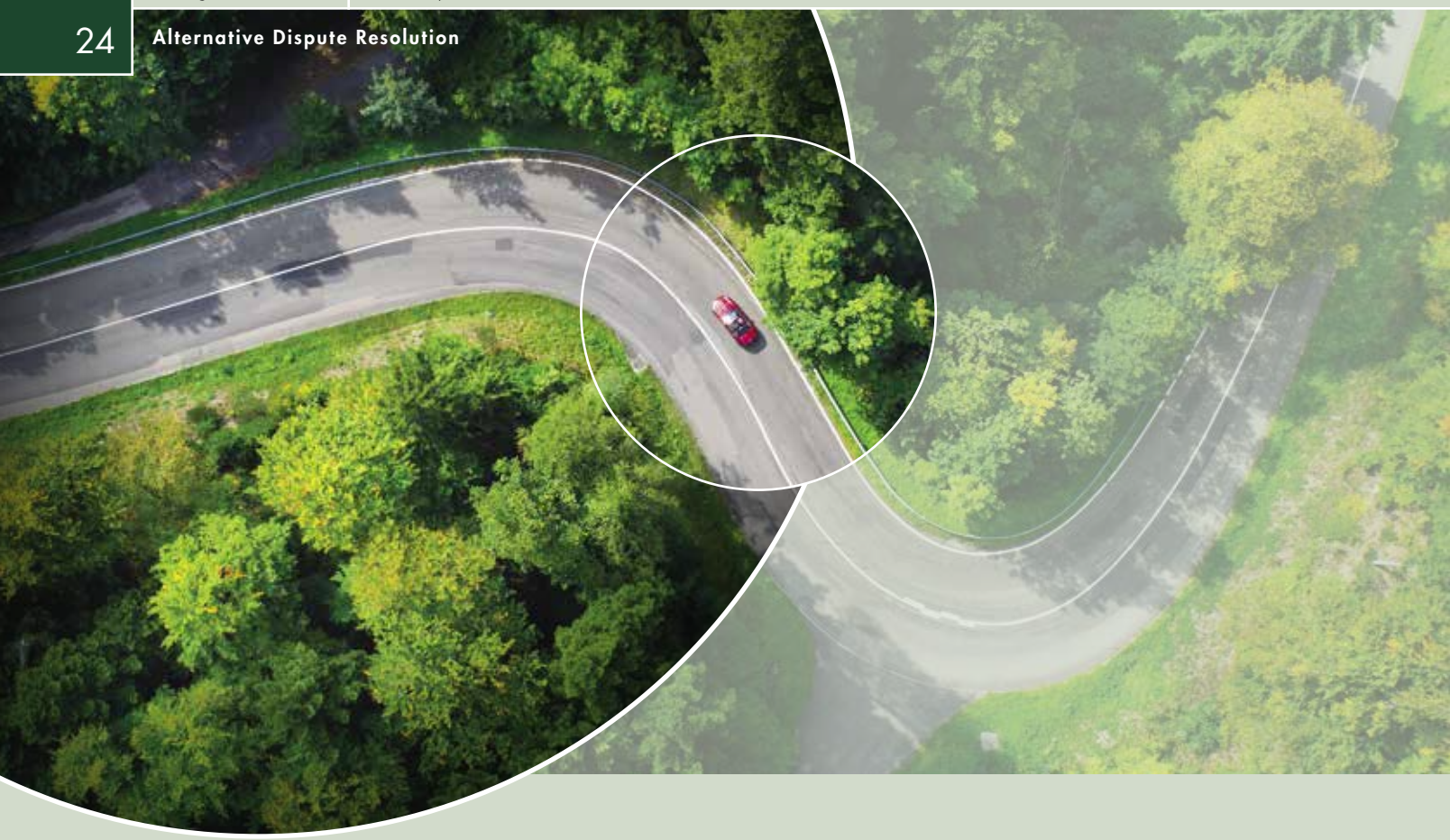

Practical Tips for Taking the Mediation Road to the Intended Destination

By Sheldon J. Stark and Shon A. Cook

In today's world of the vanishing American trial, mediation has become *the* best traveled road for achieving client goals and objectives. Generally, litigation is not the best means to a livable solution or mutually beneficial outcome. Rather, litigation entails risk, expense, emotional turmoil, exposure, collateral consequences, and often two-dimensional outcomes imposed by third parties. A court filing today has a less-than-one percent chance of trial,[1] yet many litigators treat mediation as one more stop on the litigation highway, not an opportunity for party self-determination, reduced costs, relationship repair, improved communication, tailor-made resolutions, and closure. Based on our experience, the suggestions below offer valuable practical considerations to ensure mediation is the final destination and not just a pit stop.

Timing

Timing in mediation is critical. Anecdotally, business court judges from various counties, including Kent and Oakland, report that early mediation is cost-effective, successful, and satisfying. In our experience, these cases come to us with little more than exchange of documents. In other types of litigation—employment, commercial, and tort—parties may need more extensive discovery. Even away from the business court, however, we often see lawyers mediating early to save transaction costs. Mediation might be most effective following a particularly good deposition or decision on an important motion. Sometimes, parties must experience the sting of attorney fees or an intrusive cross-examination before they're ready to mediate. Every case is different. Every dispute is unique. One size does *not* fit all. Strategic litigators give careful consideration to when mediation will be most productive.

In family law, there may be issues of infidelity, emotional assessment of children, distrust of financial reporting, or deep-seated hurt over the marriage ending. If mediation is held too early, one party may not be ready to actively negotiate or have the ability to think through options and decisions. In high-asset cases, there may be a need to get business valuations,

track bank accounts, or have other appraisals. Parties may need discovery and time to grieve before they can exercise good judgment about their futures.

Mediator selection

No two disputes are alike; neither are two mediators. Mediator selection warrants careful consideration of the dynamics of each conflict and identification of the right professional for the engagement.[2] Strategic litigators select mediators individually, matching a mediator's skill set to the dynamics of each unique dispute. Thought should be given to who might be best for the specific parties involved. Who, for example, can build a relationship of trust? To whom are the parties likely to listen? Whose skill set and background are most likely to assist the parties in finding a resolution?

Setting expectations

Expectations are resentments under construction. By managing expectations with attorneys and helping attorneys manage expectations with clients, successful mediators set the stage for a productive process. Clients rarely understand that mediation is simply an assisted negotiation. Further, clients need to be advised that mediation is not the time to try the case or attack the other parties, but rather to look at underlying interests to suggest options and solutions. Some mediators provide educational resources and materials to facilitate a better understanding of how to maximize results.

Process design

The first rule of mediation is there are no rules. The process can be tailored to meet the individual dynamics of each dispute. Many litigators prefer shuttle diplomacy, fearing dire consequences from joint sessions with opening presentations by parties and counsel. They may well be correct. Opening presentations safely managed by an experienced mediator, however, can provide enormous and often overlooked benefits. When parties are in a room together, conversations are held and options offered that might never have been considered by one party alone. Keeping everyone separated means the source of communication is the mediator, not the parties, which often results in the parties missing key gives, apologies, or body language that can result in resolution. Mediation offers parties and counsel a unique opportunity to communicate directly. Even if the parties start in separate rooms, joint sessions later in the day to hammer out specific issues or enhance communication should be considered.

AT A GLANCE

Mediation is the parties' process. When we shut down recitations of history and experiences, we are literally shutting down their process.

Time and time again, mediation statements antagonize, attack, or pit clients against one another. This is destructive to the mediation process, which is designed to bring parties together, not further distance them with insults, exaggerated conclusions, aggressive factual recitations, or disclosure of often very personal information.

Preparation, preparation, preparation

In the immortal words of Louis Nizer, "Preparation makes the dull lawyer bright; the bright lawyer brilliant; and the brilliant lawyer steady."[3] If litigators are to approach the process strategically, they must prepare for mediation as thoroughly and methodically and with the same zeal and passion they bring to trial preparation. In addition to preparing themselves, they should prepare their clients for every facet of the mediation. Strategic litigators leave nothing to chance. Following are our recommendations for enhancing preparation.

- **Review the file from top to bottom.** Go over the facts, reread documents, check pleadings for admissions or concessions, and outline deposition transcripts. Consider how quotations or citations might be put to use most persuasively. Anticipate the other side's factual recitations and pull together impeachment materials. Involve clients, and solicit their input on materials reviewed and the best way to tell their story.
- **Research key claims and defenses.** Who has the burden of proof? What elements must be proven for each? Is there evidentiary support for each claim and defense?
- **Identify strengths and weaknesses.** What are the risks to both parties? How will you explain weaknesses to the mediator and opposing counsel? What will best sow doubt and encourage flexibility once bargaining starts?
- **Be realistic with your client before the mediation.** Estimate the likelihood that the suit will survive a dispositive motion before your trial judge. Identify the documents or testimony that might be excluded in limine. What are the losses and damages? Are they persuasive? How do the witnesses come across? Consider your best and worst alternatives to a negotiated agreement.
- **Identify next steps if the case does not settle.** Is there a path for return to the bargaining table in short order?

- **Assess the costs of non-agreement.** What additional attorney fees and costs are likely if the litigation proceeds?
- **If dealing in the realm of family law, ensure business valuations, budgets, debt amounts, and valuations of personal property are complete.** Make sure your client is familiar with the information in advance. Be ready for demonstrations of emotion. This may be the first time since the divorce began that the parties have been in the same room or the same building, or mediation may occur on the heels of a big argument within the family. Don't underestimate the power of catharsis through tears, some anger, or even strange laughter or humor.
- **Understand client goals and objectives.** If your client is unrealistic or dogmatic, consider involving the mediator to assist in risk assessment, exploration of fees and costs, and recognition of potential collateral consequences of non-agreement. As Daniel Patrick Moynihan noted, "Everyone is entitled to their own opinions but not their own facts."[4] If parties wish to roll the dice after exposure to the risks and costs, they are entitled to do so.
- **Determine if there are non-economic concerns such as confidentiality, relationship repair, continuing employment, etc.** Opposing counsel should not learn about these for the first time at the table.
- **Educate the parties about the mediation process.** Encourage flexibility. Give parties materials to read and consider. Individuals new to litigation may not be expecting hardball negotiation tactics that can cause destructive and emotional reactions. They may become agitated and self-destructive upon hearing unexpected and unrealistic—often insulting—early-round offers. Parties should be encouraged to listen and pay attention. If the case doesn't settle, there can be great value in learning where the other side is coming from.
- **Preview opening presentations.** If a party is to make an opening presentation, counsel should preview it and make suggestions to improve the message, eliminate antagonizing language, and increase the likelihood it will be heard and understood by the other side.

Written submissions

Many litigators draft their mediation submissions for the mediator or their own clients. Time and time again, mediation statements antagonize, attack, or pit clients against one another. This is destructive to the mediation process, which is designed to bring parties together and not further distance them with insults, exaggerated conclusions, aggressive factual recitations, or disclosure of personal information. Mediation summaries should be written to persuade *the other side* of their risks, couched in language they will actually think about. Written submissions should be exchanged in sufficient time to be considered and processed. A well-crafted mediation summary provides opposing parties and counsel with something to consider, discouraging a decision to roll the dice and risk a trial.[5]

Be strategic

Plan the negotiation process from start to finish. If the mediator will present offers and counteroffers ex parte, plan how best to use his or her services. Predict as many rounds or steps as possible. Many litigators prepare by reaching agreement with clients on a top or bottom line or range, and craft an opening number to give themselves enough room to reach the goal. The middle steps are left to instinct. Strategic litigators anticipate the response to each offer and concession and plan the next steps well in advance. When negotiators and advocates operate by the seat of their pants to get what they can, their judgment can become clouded by emotions. A client's best interests can be lost in a desire to reciprocate or respond in kind.

Partner with the mediator

Mediation is nothing more than an assisted negotiation. Strategic litigators engage with the mediator and take advantage of the mediator's role as a negotiation coach by asking for suggestions and listening carefully to messages brought over from the other room. When parties complain they don't want to hear what the other side has to say, they should remember that before they can move the other side to a new place, they must know where the other side started. The mediator is the only unvested participant and the only person working in both rooms. Mediators can often hear and see moments of agreement or compromise that are otherwise missed. The mediator is an asset and should be employed as such.

Listen, listen, listen

Mediators do not decide cases. Yet many attorneys operate as though they do by dogmatically arguing factual and legal positions or claiming to know what the judge will do, thus losing sight of the role of mediation. When parties and their attorneys are too focused on their own version of the facts and strengths, they don't listen carefully, miss a significant learning opportunity, and fail to take full advantage of the process. Mediation provides options outside of what the law and judges can do. Mediation is nothing if not a powerful mechanism for the transfer of information. Even if the parties do not reach an agreement on the day of mediation, a great deal of valuable information and insight can be learned and

the process moved forward. A skilled litigator will ask why a party wants a certain resolution. Questions often provoke additional options and solutions or even the opportunity for a party to see that a proposed resolution will have unintended consequences. When a skilled mediator manages the process, each side learns a great deal about opposing perspectives, risk analysis, damage models, arguments, and factual presentations. Mediation is an opportunity for disputants to evaluate their respective cases and make good judgments about whether to settle and at what level. If the dispute does *not* settle, the process nonetheless provides value.

Client involvement

In general, mediation is more efficient than deciding contested issues in the courtroom. However, it can be tedious and slow as documents are discussed and parties' positions are stated—and sometimes restated—over and over. For instance, in family law matters, a simple question about whether the house will be listed can result in long and detailed exchanges about when it was bought, accusations that one spouse was never home, or that one party put in more money. Too often, mediators and attorneys are quick to dismiss uncomfortable conversations and don't view them as productive. When parties share their history or "lance the boil," however, a workable agreement can result.

Mediation is the parties' process. When we shut down recitations of history and experience, we are literally shutting down their process. The courtroom is meant to be limiting. There are only questions asked and corresponding answers given. Not so in mediation. Often, a party's explanation is necessary to understand emotional impediments: why someone won't let go of an otherwise valueless asset or be unwilling to respond when the other side makes a proposal that should stimulate a productive reaction. Sometimes, until that history is discussed or voiced, parties can't move forward to an agreement.

Agreement drafting

No one should leave the table without a written and signed document once an agreement is reached. In civil cases, defense counsel might consider providing boilerplate language in advance to facilitate signing a final document immediately. Often, however, the parties draft a memorandum of understanding, putting off final language until later. If mediation resolved all issues, the memorandum of understanding should state: "This is the complete agreement of the parties and resolves all issues." When a partial agreement is reached, the agreement should be clear regarding what is agreed to and what remains at issue, or clients may mistakenly believe all issues are resolved. For instance, in a divorce, if a pension plan is neither mentioned nor reserved, parties may believe it belongs to the owner, which is not the case. If spousal support is not specifically waived in the mediated agreement, it is reserved by statute, again causing confusion for litigants. When the mediated agreement is not clear and specific as to scope or is silent as to outstanding issues subject to appeal, the ambiguity can lead to buyers' remorse and further litigation.

Conclusion

Mediation is a venue to learn, achieve client goals and objectives, save time and money, resolve disputes constructively, repair relationships, manage risk, open channels of communication, and achieve closure. When mediation is used to end the litigation roller-coaster ride, it leads to better outcomes, more satisfied parties, and stable resolutions. Mediation is not just a mystery stop in the process; rather, it should be the final destination to end litigation and reach resolution. ■

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ENDNOTES

1. Michigan Courts, Statistics, *Statewide Circuit Court Summary: 2017 Court Caseload Report* <https://courts.michigan.gov/education/stats/Caseload/reports/statewide.pdf>. All websites cited in this article were accessed December 28, 2018.
2. See, for example, Freund, *Anatomy of a Mediation* (New York: Practicing Law Institute, 2013) and Stark, *Making the Most of Mediation: 10 Top Tips for Maximizing Results in the Process* <https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013_Article_Making_the_Most_of_Mediation.pdf>.
3. Nizer, *My Life in Court* (New York: Doubleday & Co, 1961).
4. Moynihan & Weisman, *Daniel Patrick Moynihan: A Portrait in Letters of an American Visionary* (New York: Public Affairs, 2010), p 2.
5. Stark, *Crafting an Effective Mediation Summary: Tips for Written Mediation Advocacy* <https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/>.