

Advanced Mediation Workshop  
Texas Bar ADR Section  
January 30, 2009, Houston, Texas  
Presented by Randy Lowry and Peter Robinson

This document contains the compilation of suggestions from more than twenty tables of participants at the above one day program. The questions presented for discussion at each table were:

- What does the Mediation Table look like in 2009 compared to 1989?
- How Do Experienced Mediators Facilitate Distributive Bargaining?
- How Do Experienced Mediators Facilitate Integrative Bargaining?
- How Do Experienced Mediators Facilitate the Closing of Mediation?
- What are Intuitive and Counter-Intuitive Approaches for Mediators?

Many of these suggestions were discussed in the large group de-briefings, but obviously, each table could not share all their ideas and suggestions. In addition, limited time did not permit the presentation of the responses for every question from every table. The list below will hopefully remind the experienced mediator of some of the ideas from this program as well as provide some of the ideas from other tables that were not shared in the large group discussions.

What does the Mediation Table look like in 2009 compared to 1989?

- No unsophisticated participants except client
- There is a premium on fresh ideas
- Resistance to opening sessions
- Stale, bored, routine
- Lack of good faith – game the system
- Attys know mediators, attys have expectations about how they handle it and negotiate
- Parties are trying to control mediator. It is important for mediator to take control.
- Both sides have to hear what is going on
- Compromise
- Now need to know more about the background vs just the law; dig deeper into background and dispute
- Now too much of a ritual, art of making a good statement and opening is different
- build rapport
- Check list on judges order; decrease mandate to resolve issue
- Better snacks

- They already are in mediation/negotiation before they come to the table
- Attorneys using an opening statement put us back in solidifying positions and time. Avoid this
- Use of an apology (when meant)
- Addressing feelings, anger, hurt, pain
- Allowing people to tell their side of the story (but not a court room presentation)
- Openings are two edge swords
- Missing parties, on phone to other parties
- Setting precedence or examples
- Mediation more mandated
- Too much reliance on negation
  - Prior discussions are not taking place
  - Wait until mediation to negotiate/talk
- Increase in arbitration but is not affecting mediation
  - Some hybrids being created
- Criminal misdemeanors
  - Mediation used to avoid criminal charges for those who can afford it
- Mediator has to hold the confidence of both parties, to hold things in confidence
- The plaintiff has to feel the they won
- Universal compulsory mediation for family law disputes in TX
- Mediators feel attorneys are often a major problem in mediation
  - Reign them in
  - Advisors not bulldogs
- Increased use of mediation, voluntary and court ordered
- Use of mediation by attorneys (shorter time frames)
- Attorneys knowledgeable of progress
- Attorneys' seek the mediator's help with influencing clients
- When do we get to the mediation proposal?
- Resistance from parties
- We do not have to negotiate because we are going to mediation
- Lawyers do not prepare because mediation will do it
- Unprepared – “oh the mediation is today?”
- More sophisticated now than before
- More ½ day than full day
- More mediation proposals used
- Mediation is how an expected part of litigation process
- Now more usage – regulatory and administrative bodies, agencies
- Broader content basis → environmental areas, labor, etc.
- Driven more by clients – “want to stop the bleeding”
- Access to outside info –laptops, etc has become part of process and mediators must be up to speed
- Big challenge is to keep the process fresh
- Economic climate creates more stake in their disputes
- Fear and anxiety make people more conservative, less flexible
- People increasingly want to mediate – courts are flooded –mediations have become mandatory in some counties for family law disputes

- Fears make people more willing to mediate because they have control over the outcome
- Keep body language open
- Include client in process
- Attorneys are also mediators and can impede the process
- More diverse table, more nationalities, cultures, religion
- Mediation too expensive in some cases
- More sophisticated lawyers
- Lawyers more familiar and accepting of mediation
- Higher expectation of mediator
- More trusting of mediator
- Lawyers less prepared
- Lack of preparation
- Discovery tool
- Cases to settle not at 1<sup>st</sup> but 2<sup>nd</sup> or 3<sup>rd</sup> mediation
- Rats are getting smarter
- Compressing the process
- Lack of preparation
- Practice mediation, 1<sup>st</sup> one is for discovery or see to get it done cheap
- Lawyers don't talk to each other or meet before mediation
- People are aware of the mediation process
- Still a little confusing as to roles for the parties
- More types of law mediated
- Able to resolve issues before lawsuits filed
- Most courts push mediation but don't mandate it
- No unsophisticated participants except clients
- Past court ordered mediation – now –attys select mediation
- Expense of mediation is a concern in a small case
- Past, talk of settlement was a sign of weakness. Now it is not.
- Now – attys need to know their case to match their mediator to their case
- Now more than ever, interest base of parties as opposed to distributive bargaining of attys

## ❖ How Do Experienced Mediators Facilitate Distributive Bargaining?

- Educate client
  - Encourage them to be realistic
- Bring reality to both sides of the table
- Risk – cost benefit
- Brackets
- Odd of prevailing
- Transaction costs
- Take some chances
- They don't always mean what they say
- Reality test the initial statement
- Could use the time between offers more effectively
- Management of time important but not a thing that dictates case
- Diffuse the attorney stating the strength of their cases in front of clients
- Try to get attorneys to be honest about strengths and weaknesses
- Encourage attorneys to consider strength and weakness of their case
- Can't keep secret information because it may be the key to settle. Have to use it strategically
- Have to consider the emotions when looking at the offers, is there underlying reasoning?
- Do you really want to send that message at this time
- Insurance companies sometimes use colossus and their representative is stuck;
- In family law ask
  - What do you think x is worth to the other party
  - Bring other issues into the argument ...money or property
  - How does what you just offered get you towards the final resolution that you claimed that you desire.
- Make sure that parties understand the mediator is working hard for them
- Always let the attorneys save face
- Wait to see how the parties move
- Mediators may be more bold and direct
- Invite people to give a message to the other side
- In family law matters, easier and a lot more issues involved
- Ask parties what they think the range of settlement will be
- Guide parties by asking questions as to what response they expect \
- Do you care what folks outside your family think about you after its all said and done
- Re bracket
- Stress how much do you want to pay your lawyers
- If both sides still need each other after the mediation is over then stress that fact
- Try using some humor sometimes for a reality check
- Stress the starting over again aspect
- In family law money is not always the number one issue, but it is difficult to get parties to move

- Make sure parties understand that the time that a mediator spends in private caucuses with each is not dispositive of merits of each side's case
- Keep the process going and parties talking
- Why is your number what it is
- Do they want to settle
- Do no harm → do you protect a party who's not in the know on the other's agenda
- Maintain confidentiality w/o doing harm
- Distribute information on \$
- What the \$ from? Does it mean?
- Bracketing
- What's the effect of that offer
- Were negotiations coached?
- Match negotiation speeches, manage the timing
- Keep it symmetrical
- Live in the question
- What can that money do vs can't do
- What would be your response to that move
- Education → reality testing
- The necessity of visual information exchange for parties
- How to make defense lawyer look good
- Don't wish to embarrass litigators
- Use 2 tools. Money movement. New information
- You don't give power to other side if you react to their number
- Keep eye on your side of negotiation
- Send a message with \$ movement
- Bring something new in as a mediator each time
- Keep them focused on substantive issues to get response
- Don't get locked into \$ agreements too early and give suggestions as to message given
- I can take this # in there, but how do you think it will affect them
- Everyone has a measuring stick, but each one needs to cast their demand in terms of a measuring stick
- Please help me understand how you arrived at this #, so I can explain to.....
- If I go to you and said.....put yourself in their shoes and think about how they would feel
- Assume I don't really know where it will end in terms of the negotiation
- Focus people on prioritizing what is really important to them – what do you absolutely have to have – if they have a laundry list of things
- People come in w/ unrealistic expectations and their lawyer might make that worse by pumping up the client and blocking resolution because of considerations such as fees
  - Manage this by asking questions to client instead of lawyer
  - Talk with people about how their offer will be perceived, whether it will get them where they want to go
- Look for things to add other than #s

- Remind/talk to people about what will happen if they don't settle
- Talk directly to client – ask them what they think will work\
- Ask key people to reflect on what the conflict is really about – recognize what the dispute means
- State truth to give perspective
  - We are now arguing about used furniture- you could buy new furniture for amount you are paying me
- Remind parties not their to try the case
  - Can be there all day arguing – if you agreed, we wouldn't be here. Here to figure out how to resolve this.
- Ask parties what they are trying to communicate to other side and what they think the response will be
- Let the process go – let the parties say what they need to say
- Time to dance and suffer as part of process
- Lawyer is going to have to be happy in order to settle
- Mediator as 2<sup>nd</sup> party voice of trust
- Willingness of parties to participate – honest w/ mediator
- Mediator asks questions to get at what is behind the number/concession – questions aimed at disclosure of rationale behind position taken
- Client message vs attorney message
  - Client may be operating from misinformation
  - Validation of advice given by atty
  - Subtly getting client on same page as atty or vice versa
- Realty → cost/ risk of alternatives
- Jurisdictional view → ok, have you seen that in is this jurisdiction? What is judge x's past handling of this issue
- Unrealistic views by clients → learning experience
- Updating what we know; opinions change as new information gained
- Hurt feelings –vs- money
- When they say... “it's not about the \$,” it's definitely about \$
- Talk about opportunity- what can we agree on today that you cannot achieve at the courtroom? What limits do rules of evidence, proc, and time/ place on the result you might achieve at the courthouse?

#### How Do Experienced Mediators Facilitate Integrative Bargaining?

- Look for underlying meaning about what the parties really want, ask different kinds of questions to see what each position represents
- See what's actually motivating the parties
- Allowing parties to vent is necessary –blowing off steam is important, to allow parties to get that out of the way in order to get to the big stuff
- For family, play with summer schedules relating to kids' school vacation
- Brainstorm ideas and put on blackboard
- Look at body language when all parties are together; follow up with a question
- Listen for subtle clues
- Let them vent their thoughts/emotions

- What do you want if you get that, what will that allow you to do, and work down to the heart of the matter
- Actually listen to the parties
- Options
  - Explore the party's needs, fears, interest, etc.
  - Actually listen
  - Use past experiences to create new option(s)
  - Evaluate what the party's have available for trading
- Look for something one side really values that the other side does not
- Asking "why" questions
- Is there anything else your interested in besides money?
- Listen for clues – may pickup on something that has not been addressed in what otherwise would have been considered a throw away comment
- Flip the deal
- Truly listen
- Looking for the bone
  - "Why" - be curious
- Thinking out loud
- Ask peripheral questions
- Listening
  - To venting, find the underlying interest
- Draw analogies
- Ask parties, "How would you like to see this thing pan out?"
- Ask parties to feel their story
- And explain why you want that
- How do you think you can get there
- Tell a personal story or reflect on an experience similar to that of the parties
- Payouts
- Apologies
- "What's important to you about that?"
- "Why"
- "What would you be doing if you were not here today? Anywhere you could be"
- What can you get here that is not available in court
- Listen to the throw away comment or statement
- Making them feel safe – open them up
- Mediator states the importance of underlying interests @ first phone call
- Create environment of trust
- Tell about self-background
- What is meaningful to them
- As the mediator, I know the least about this and I want to hear from you, your side of the story
- Ask them to explain this area
- Not under estimating parties knowledge of human nature/body language, lack of sincerity
- Mediator must be sincere
- We can do things today that we can't do in court

- Ask/find out real issues for each party
- Ask about how it offends them
- What will make them “whole”
- Listen well and go close about approaching them
- Paint a picture
- What do you really think is important to the other side
- What would money mean to you
- How will you use the money
- If you get everything you want today, what will you do
- Ask them to brainstorm without judgment
- Keep throwing it back
- Identify personalities, who work together, and place them together
- To client: what do you want out of this?
- Be patient, continue to ask questions, and engage in dialogue
- What is it you want
- Ask parties and attorneys to throw out ideas without evaluation until later
- Repeat back what you are being told
- Simple apology
- In court parties are one dimensional, In mediation in multi dimensional
- What else can we do for you; what else is important
- Judge sees a black and white snapshot
- Mediation allows for a landscape view, explain this to parties
- Don't disregard a party's suggestions, clarify meanings of parties suggestions
- Ask “why” multiple time
- Why is this your position
- Get depth of answer
- If a party wants an apology, just do it, mediation is confidential
- Admit if you're been an ass hole
- Ask parties directly “what, besides money, will satisfy you in this case”
- Talk to client, establish trust relationship to encourage discussion
- Listen for cues
- Interest
- “How can I help you today”
- Motivating factors
- What do you want
- Ask if there is a business situation
- Read situation – pick up on what is important – check back with them for understanding which encourages them to talk more
- Caucus meetings
- Staying together – start off with what they have in common i.e. the kids
- Ask open ended questions, “what do you think would make this work”
- Make suggestions to parties that addresses all the interests
- Ask parties to describe their ideal solution and work from there – helps to unlock personal interests and lets the mediator hear what they really want
- Ask questions about how a proposed resolution is really going to work in a real life setting – remind them of what will happen in life if they implement this

- Caucus with attorneys without clients to get insight on case/clients
- Provide opportunity for clients to vent
- Ask a lot of “how” and “what” questions
- Hypothetical questions
- If \$ not a consideration/possible solution, what other types of solutions might address this problem
- What is the ideal and what does that look like
- Providing future interest for attorneys
- Listening for/ asking about verbal cues

#### How Do Experienced Mediators Facilitate the Closing of a Mediation?

- Risks and uncertainties of outcomes of trials favor early resolution of most disputes
- Fear – uncertainty
- You want this decided by 12 people who cannot get out of jury duty?
- The risk of not getting the \$ at all vs. \$ here, today
- Reaffirm worst case scenario
- Role reversals
- Mediator draws the picture (showing bad aspects of not settling)
- If lawyers are a problem ask them to leave
- Strategic recess
- Use of visual aids
- Be willing to work with and help write up agreements
- Parties only
- Go back to joint session
- Go back to what they agreed upon and expand
- Emphasize the time that has been invested
- Emphasize the lack of control
- Talk about the price of peace, what it’s worth to know that something has been resolved (rear of appeal)
- Ask clients if they can live with the agreement; is it good enough
- Cut cards
- Go off script, something you don’t normally do
- Tell them to “man up”
- Tell them, “I’m concerned about your situation”
- Leave AC off so the room gets hotter or heater so it gets too cold
- Take away comforts; interject religion
- Bring in accountant to say party is broke
- Threaten continued bad press
- Beg
- If I can get the other attorney to agree to recommend to his/her client that they pay \$ in settlement
- Get the attorneys away from the client and ask tacit attorney
- Will you recommend to your clients that they take it?
- Then ask the other attorney

- If I can get the other attorney to recommend to his client to accept \$, will you recommend to your clients to make an offer for \$\$\$\$
- Cost of trial
- Finality
- How long would it take for you to make the amount asked for...how about them... is the amount of time worth the amount of \$
- Control in making decision – would you trust 12 strangers to make decisions about your business?
- Get back to life
- Will the other side declare bankruptcy after the settlement which will mean you may never see any money
- Expand the pie – with insurance coverage
- Won't have to pay anymore attorney fees
- Bracket
- Split the difference
- Flip a coin
- The insurance company has the check here, today
- Cash → that day
- Go back to the beginning
- Get attorneys together → what can we do
- Give back
- Follow them out
- Change the scenery – take a walk
- Risk of losing
- Quantify chase
- Expense
- Time
- Stress
- Longer term injury to personal/professional reputation
- Expressive faith
- Emphasize forgiveness
- Appeal to human kindness
- Appeal to inner self-goodness
- Offer mediator's proposal at or after mediation
- What is the worst/ best thing that could happen
- You guys are too close to the end to let this settlement get way
- Contribution to charity
- BATBA
- State the truth of where the parties were in the beginning, show progress
- Let the parties know the judge could come up w/ something a lot worse – tell them what judges are like or can be like
- Telling the parties you're declaring impasse
- The light you're seeing at the end of the tunnel might be the train instead of the end
- Ask them to visualize how they will feel if it's done or not

- Educate about the legal process – what they're going to have to do, how it will affect their lives (personal life revealed, tense relations, cost of trial)
- Remind them of who will really lose if parties don't reach agreement
- Last chance to control your own destiny
- Declare the impasse
- Address the loss of not settling in time, \$ and stress
- Think about the cost of publicity if this goes to trial
- Reputation can still be damaged, even if you win
- If you don't settle, are you prepared to deal with the status quo
- Quantify option a/b on the charts
- Turning the decision about this dispute over to someone else
- Ask attorney to tell client that they can do better
- Emotional price for not settling
- Don't use good \$ to chase bad \$
- Don't waste emotional energy on litigation
- Raise issue of litigation addicts and how life would be different if litigation was resolved

#### What are some Intuitive Mediator Techniques?

- All the time as needed
- I understand
- Not my fault
- Keep mouth shut
- Hang it there
- Remain calm
- Redirect
- No humor
- Keep separate
- Empathetic
- Kind and gentle
- Work all day
- Nice, pleasant
- Indirect, polite
- Free services
- Comfortable setting with meals
- You should know the laws in the area you are mediating
- Pressure is ramped up near the end
- Keep going if things look positive until the early hours of the morning \*validate offer
- Keep communication open
- Keep them together and talking together; let everyone vent until finished
- Talk to everyone
- Let clients have security blanket
- Asking why
- Mediation is great
- Taking responsibility for decisions in order to say what they want to hear

- Follow process/steps
- Stay late
- Have to settle it that day
- Case ready to mediate
- Soften any conflicts that may arise
- Comfort them
- Push to resolution
- Make assumptions about where people are
- Sympathy
- Direct the process
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What are some Counter Intuitive Mediator Techniques?

- Harsh, straight forward
- Put time constraints on it
- Can settle after mediation is recessed
- Asking what
- Litigation may be a better process for you
- Blame – shift your role to be more judgmental
- Stop it
- Get emotional
- Cut off or give it a time limit
- Limit time for clients
- Disappear from the decision making room
- Make absolutely no sense
- Invalidate an offer
- Question the validity of the thoughts
- Clear
- Direct
- Not giving anything away
- Uncomfortable setting
- Being a good and effective mediator does not always require expertise
- Allow the process to work and reach the right outcome
- End the session at a reasonable time
- Tell it like it is
- Close down early
- Only have 2 hours
- Allow admission
- Get angry
- Come short
- Humor
- Go into other sides' mood
- Encourage the parties to not sign tonight
- Follow the process
- Arrange for selected outsider input
- Passive
- Uncaring

- Tough love
- Talk tough → get real
- Allow conflict to surface and work with it
- Let them live with it – controlled fight
- Let them go to court
- Realizing you don't know – wait for situation to reveal itself