Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates[1]

A Basic Strategy

1. **Build a Foundation for Success**
2. **Allow Participants to Argue and Express Feelings**
3. **Moderate the Bargaining**
4. **Seek Out and Address Hidden Issues**
5. **Test the Parties' Alternatives; If Necessary, Evaluate the Adjudication Option**
6. **Break Bargaining Impasses**
7. **A Strategy Chart**

In order to be effective a mediator needs to have a strategy. Some mediators develop their approach as they go along, relying on their experience to suggest the right tactic as issues arise. If you are new to the field, however, you will find it nearly impossible to think through your strategy in real time, while the parties are talking to you and arguing with each other. Even experienced neutrals prefer not to rely entirely on their reflexes and plan in advance as much as possible.

Your understanding of what is keeping the parties apart will deepen over the course of a mediation, and the obstacles themselves may change as the process goes forward. Ideally you would have a unique strategy for each case. In practice, however, this may not be possible. Many mediators use a similar sequence of techniques designed to overcome common barriers, customizing their approach as they go along.

This chapter sets forth a six-step strategy that works effectively in many situations and you can apply as a default framework. Suggestions for dealing with more complex issues follow in Chapters Three through Nine.

1. Build a Foundation for Success

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

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

> *Example:* A company bought a shipping line, and later sued an accounting firm for allegedly overstating the enterprise's profitability and misleading the buyer into overpaying for it. The buyer's lawyer called the mediator ahead of time to warn her that it was crucial his client, the buyer's CEO, attend the mediation. However, he said, the CEO would not come unless the managing partner of the defendant accounting firm did as well, and would not commit to attend first for fear of seeming overeager to settle. The mediator called the defense attorney, who agreed that it would be very helpful if the principals attended, but said his client also did not want to be the first to agree to come.
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> The neutral decided to ask each side to tell her privately whether it would bring its principal if the other did so. They both answered positively. She then announced that both decisionmakers would attend.

Alternatively, you may learn that one of the participants is in the grip of strong emotions or for other reasons needs to talk with you. With the assent of the parties, you can meet privately with a disputant ahead of time, allowing the person to work through difficult emotions and arrive at mediation ready to make decisions. Or a lawyer may have a convincing reason to use an unconventional format for the process itself; if so, you can arrange it.

In summary, before the parties meet to mediate:

- *Ask for statements and talk with attorneys to identify potential obstacles*.
- *Address issues such as inadequate information or missing participants*.
- *If necessary, meet with an individual to work through an especially difficult issue*.

2. Allow Participants to Argue and Express Feelings

The challenge: Unresolved process and emotional needs. If parties do not settle, it is often because one or more of them want something more than the right settlement terms. A litigant

may be looking for a process: The opportunity to appear before a neutral person, state his grievances, and know he has been heard. Or a party may have a need to express strong feelings directly to an adversary or a neutral.

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

Response: An opportunity to speak and feel heard. This aspect of the strategy has three elements:

- Give disputants a "day in court."
- Allow them to express feelings to a mediator or adversary.
- Help them hear what others are saying.

Mediation is not a court session and mediators are not judges, but the process can give parties the experience of having received a hearing. They see their lawyer argue their case or present it themselves, and listen to their opponent's arguments. The mediator will not decide the dispute and may never express an opinion about the merits, but she can demonstrate she has heard the disputants. The experience of telling one's story and feeling heard out by a neutral person can have a surprising impact on a person's willingness to settle. Arguing the merits also focuses participants on the facts and legal principles relevant to the controversy. Knowing a neutral person will be listening encourages the parties to think through arguments and avoid extremes, helping them later to find acceptable compromises.

This aspect of the process often has an emotional component as well. The need to express strong feelings to one's adversary is a very human one, felt by executives and mail room clerks alike. In the opening session and later caucuses, parties can express some of their feelings about the dispute and each other.

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

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

Two years later, as trial approached, the defense decided to make a settlement offer. It was rejected. Defense counsel waited a few weeks and then made a more substantial offer. The word came back from the plaintiffs' lawyer that his clients would not settle. Why, the defense counsel asked: Didn't the family understand that juries in the area had been very hard on claimants lately, and the trooper had a reasonable defense? The plaintiffs' lawyer was

apologetic, but said the family was adamant and refused even to make a counteroffer. Instead, he suggested they mediate, and emphasized that the family wanted to begin with a meeting with the trooper.

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

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

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

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

Emotional discussions are often uncomfortable for the participants and make people temporarily feel angrier, but over the course of the process they can help disputants to let go of feelings and consider settlement. In this case, for instance, the fact that no legal issue was resolved at the meeting and the trooper denied being negligent did not matter. The key was that the family felt they had finally been able to express their feelings to the person responsible and knew he had heard them. You can achieve a great deal simply by allowing the parties to talk about their feelings and disagreements in a controlled setting. Chapter Six describes techniques for managing such discussions successfully. To facilitate expression of feelings and arguments:

- *Give the parties an opportunity to argue the merits directly to each other.*
- *Allow participants to express emotions, even unpleasant ones, intervening only as needed to maintain order.*
- *Don't focus on weaknesses in a party's arguments in front of an opponent. Wait instead for a private meeting to follow up on controversial issues or difficult feelings.*

3. Moderate the Bargaining

Challenge: Positional tactics leading to impasse. Negotiators often have trouble reaching settlement because they use a "positional" approach to bargaining, each making a money offer and then trading concessions until they reach agreement. Positional bargaining can be successful, but it often makes negotiators frustrated and angry. One party, for example, will open with an extreme position in the hope of setting up a favorable compromise. This will lead its opponent to complain the offer is "insulting" and refuse to counter, or make a very small concession. The result often is impasse.

Response: Become the moderator of the process. Ideally a mediator would avoid adversarial bargaining over money entirely, by convincing parties to look for a settlement based on fair principles or that satisfied their underlying interests. In commercial mediation, however, parties usually arrive suspicious of each other and determined to engage in money bargaining. A mediator's only practical option in such cases is to facilitate the process the parties want, while looking for an opportunity to move to a more effective approach.

One way to facilitate money negotiations is to act as a coach to each side. You can, for example:

- Ask a bargainer to support its number with an explanation ("I'll communicate it, but if they ask how you got there what should I tell them?)
- Help a disputant assess how its planned tactic will affect its opponent ("What do you think their response will be if you start at $10,000?")

If coaching is not enough you can become a moderator, giving bargainers advice about what they need to do to keep the process moving ("If you want them to get to $100,000 with the next round, I think your offer to them needs to be in the range of 700 to 800K …")

Chapter Four gives suggestions for facilitating money bargaining. By using these steps in combination with a continuing discussion of the legal case, you can often orchestrate a "dance" of concessions to move the parties toward settlement. In sum:

- *Parties in commercial disputes usually arrive determined to negotiate over money. When this occurs, help the disputants conduct monetary bargaining effectively.*
- *Coach each side, helping them to see how their tactics will be received and encouraging them to provide explanations as well as numbers.*
- *If necessary moderate the bargaining, advising parties how to move toward settlement.*

4. Seek Out and Address Hidden Issues

The Challenge: Disregard of hidden issues and missed opportunities. Negotiations in legal cases are often blocked by hidden psychological obstacles. They may include the following:

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

Unexploited opportunities for gain. Negotiators can often create more valuable outcomes by including non-money terms in settlement agreements. The key is for teach side to offer the other things that carry a low cost for the giver but provide high value to the recipient. A discharged employee, for instance, might value a change to her personnel file to indicate a voluntary quit or outplacement assistance, while her employer would value the employee's agreement to keep any settlement confidential. Even "pure money" settlements can be enhanced by terms that meet the parties' underlying interests, such as provisions for payment over time.

The response: Probe for and deal with hidden issues. Even as you are carrying out other tasks, look for clues to hidden emotions and overly-narrow approaches to settlement. Chapter Five describes ways to promote valuable settlements, while Chapter Six gives suggestions about how to identify and deal with emotional issues. In general,

- *Look for clues that hidden issues are present. Ask about them in private discussions.*
- *Don't be discouraged by initial brush-offs, and raise the issue again later.*
- *If you sense an issue exists, encourage disputants to talk about it. If necessary, advocate a solution yourself.*

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

Challenge: Lack of realism about the outcome in adjudication. Participants in legal disputes often justify hard bargaining positions in terms of the merits of the dispute. They are asking for a great deal or offering little, they say, because they have a strong legal case. The problem, of course, is that both parties usually argue they will win in court.

To some degree parties bluff about their litigation options to justify aggressive bargaining positions and do not expect to be taken literally. However, to a surprising degree disputants actually believe in their clashing predictions. Even when parties are told, for example, that their predictions of success in court add up to over 100 per cent (one believes that it has a seventy per cent chance of winning, for instance, while the other thinks it has a sixty per cent chance of prevailing) and this is impossible, their confidence in their own prediction remains unshaken. It is the other side, they say, that is being unrealistic. The problem is illustrated by the following experiment:

> Students at Harvard Law School are preparing to negotiate the settlement of a personal injury case. Before they begin, the students are asked to make a private prediction of their chances of winning based on their confidential instructions. What the students don't know is there is nothing confidential about the instructions: Both sides have received exactly the same data, with different labels. Since both sides have the same information they should come out with the same answers, but this is not what occurs.
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> In fact, hundreds of law and business students told to negotiate for the plaintiff assess her chances of winning as being nearly 20% higher than students who are assigned to the defense. The two sides' predictions total nearly 120 per cent.
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> Asked to estimate what damages a jury will award if the plaintiff does win, there is a similar disparity: Plaintiff bargainers estimate her damages at an average of $264,000, while defense negotiators looking at the same data estimate a verdict of only $188,000.

What caused these distortions? It was not due to disparities in information, because both sides had the same facts. Nor was it due to lack of experience: When I asked litigators training to be mediators to take on plaintiff and defense roles in the same problem, their predictions were similarly distorted. Disagreements like these are a serious barrier to settlement, because

parties understandably resist accepting an outcome worse than their honest (but inflated) estimate of the value of their case.

As we will see in Chapter Seven, there are two basic causes for disputants' distorted thinking about their legal alternatives. One is lack of information. The other is their inability to interpret the data they do have accurately.

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

You can be an effective facilitator of an information exchange. If, for example, a plaintiff has explained its theory of liability in detail but has given no explanation for its damage claim, you can suggest it flesh out damages. Parties will often respond cooperatively to your request although they would have refused the same inquiry coming from their opponent. Suggestions about how to foster information exchanges appear in Chapter Seven.

Second Response: Reality test. As the Harvard study showed, even when parties have the relevant information they often do not interpret it accurately. Another way to help to solve merits-based problems is therefore to help disputants analyze their legal case.

The least intrusive way to accomplish this is through questions that help parties focus on evidence and issues they have missed. It is important both that you ask questions pointed enough to prompt someone to confront a problem and avoid comments so tough the disputant concludes you have taken sides against her.

Questions. Begin with open-ended questions asked in a spirit of curiosity; in this mode, you are simply trying to understand the dispute and the parties' arguments. ("Tell me what you think are the key facts here…" or "Can you give me your take on the defendant's contract argument?") Your questions can progress gradually from open-ended queries ("Have you thought about . . . ?") to more pointed requests ("They are resisting making a higher offer because they believe you won't be able to prove causation . . . What should I tell them?")

Analysis. You may also want to take a party through an analysis of each element in a case, applying a systematic framework to prevents disputants from skipping over an embarrassing weakness.

Discussing the merits can help to narrow litigants' disagreement about the likely outcome in adjudication for several reasons. For one thing, it helps counteract disputants' tendency to be overoptimistic. Doing so also assists lawyers who are dealing with an unrealistic client but are reluctant to disagree with the party for fear of damaging the client's confidence in them. Talking over the merits can also give a disputant a face-saving excuse for a compromise it secretly knows is necessary.

Evaluative feedback. In some cases questioning and analysis is not enough; a disputant may be wedded to an unrealistic viewpoint or require support to justify a settlement to a

supervisor. In such situations you have the option to go further, by offering an opinion about how a court is likely to decide a key issue or even the entire case. Evaluations can be structured in a wide variety of ways, for example "My experience with Judge Jones is that she usually denies summary judgment in this kind of situation" or "If the plaintiff prevails on liability, what I know of Houston juries suggests they would value damages at somewhere between 125 and $150,000."

One key point to note about these examples is that the mediator is not saying how she *personally* would decide the case, but rather is *predicting* the attitude of an *outside decisionmaker*. Expressing your personal opinion about what is "right" or "fair" in a dispute is almost always a bad idea, because it is likely to leave a listener feeling you have taken sides against him. Properly performed, a neutral evaluation can be helpful in producing an agreement. However a poorly done or badly timed opinion can derail the settlement process. More advice about how to use evaluation effectively appears in Chapter Eight.

To deal with disagreements about the merits:

- *Ask each party open-ended questions about the case.*
- *Ask them to respond to specific points.*
- *Lead each side through a systematic analysis.*
- *If necessary, offer a prediction of how a court would decide a specific issue or the entire case. Delay any evaluation as long and keep it as general as possible.*

6. Break Bargaining Impasses

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

Responses: You have several options to deal with a stalled bargaining process.

Persevere and project optimism. The first bit of advice may seem overly simple but embodies a basic truth about mediation: When in doubt, persevere. Even experienced mediators find more often than not that parties get stuck at some point. It often happens during the late afternoon or early evening, when energy levels decline and each side has made all the compromises it feels it ought to and more. The key thing to remember at this point is: This mediation probably *will* succeed. If you can keep the parties talking and avoid a freeze-up, they will find a solution.

The disputants will be looking for signals from you about whether it is worth continuing, and it is important to send positive signs, as long as you remain within the bounds of reality. You can say that you believe a deal is possible, but don't suggest you are ignoring the very real gap that must be bridged.

Return to a prior tactic. Another option at impasse is to return to an earlier stage or tactic. You may wonder why, if an approach has not worked once, it would be successful the second time around. Surprisingly often, however, something that was rejected earlier will

evoke a positive response later in the process. Peoples' emotional states shift over the course of a mediation, they learn new facts, and they realize their original strategy is not working. As this occurs they often become more open to compromise.

Invite the disputants to take the initiative. A simple tactic is to ask the disputants to take the initiative. You could, for instance, say, "What do you think we should do?" and then wait quietly. If disputants realize they cannot simply sit back intransigently and demand you produce results, they will sometimes offer surprising ideas. If you do this, however, be prepared to wait a couple of minutes.

Test flexibility privately. Another option is to test the disputants' flexibility in private. Parties may refuse to offer anything more to an opponent whom they think is being unreasonable, but still be willing to give private hints to you. You can, for example, ask "What if?" questions ("What if I could get them down to $50,000; would that be acceptable?) or use techniques such as "confidential listener" or a "mediator's proposal" described in Chapter Nine.

Adjourn and follow up. If the disputants are psychologically spent or have run out of authority, the best response may be to adjourn temporarily. You can follow up with shuttle diplomacy by telephone, propose a second mediation session, or set a deadline to prompt a parties to make difficult decisions.

In summary, to deal with bargaining impasses:

- *Persevere and remain optimistic. Even parties in apparent impasse will usually find a path to settlement.*
- *Return to a prior tactic, such as analyzing the legal case or exploring non-legal concerns.*
- *Ask the disputants to take the initiative.*
- *Probe the parties' flexibility in private.*
- *Adjourn and follow up with telephone diplomacy, another session, or a deadline.*

Conclusion

This six-step strategy will produce success in many situations, particularly when a case is relatively straightforward and the parties have a strong incentive to settle. It is a solid foundation on which to premise your mediative efforts. No single set of strategies, however, can overcome all obstacles. Relying on these tactics alone is like playing a musical instrument with only one octave or being a pitcher with only two pitches: You may accomplish less than you are capable of, and will sometimes fail where a more comprehensive approach would bring success.

Experienced mediators use this basic strategy as a foundation, modifying their approach to deal with the specific obstacles they encounter in each dispute. In Part II we will go deeper into the process, exploring a variety of barriers, and approaches to overcome them.

7. A Strategy Chart

A Basic Strategy

Challenges	*Responses*
1. Missing elements: People, data, emotions	☐ Contact counsel ahead of time to learn about the dispute.
	☐ Arrange for information to be exchanged and decisionmakers to attend.
	☐ If necessary, meet with participants ahead of time to begin working through emotional issues.
2. Lack of opportunity to present arguments and express feelings	☐ Provide disputants with a "day in court" to argue their case.
	☐ Provide a setting in which they can express their feelings to you and the other party.
	☐ Encourage participants to listen to each other's views.
3. Positional tactics leading to impasse	☐ Encourage principled and interest-based approaches, but support pure-money bargaining if the parties want to use it.
	☐ Advise bargainers about the likely impact of their tactics.
	☐ If necessary coach or moderate the bargaining.
4. Hidden Issues	☐ Probe for hidden emotional obstacles.
	☐ Identify personal and business interests.
	☐ Treat emotional and cognitive problems. Encourage the parties to consider imaginative terms.
5. Lack of realism about the outcome in adjudication	☐ Foster an exchange of information.
	☐ Ask questions about legal and factual issues.
	☐ Point out neglected issues and lead an analysis of the merits.
	☐ If necessary, predict the likely court outcome on one or more issues.
6. Inability to Reach Agreement	☐ Persevere and remain optimistic.

	☐ Invite the disputants to take the initiative. ☐ Repeat earlier tactics. ☐ Adjourn and follow up.