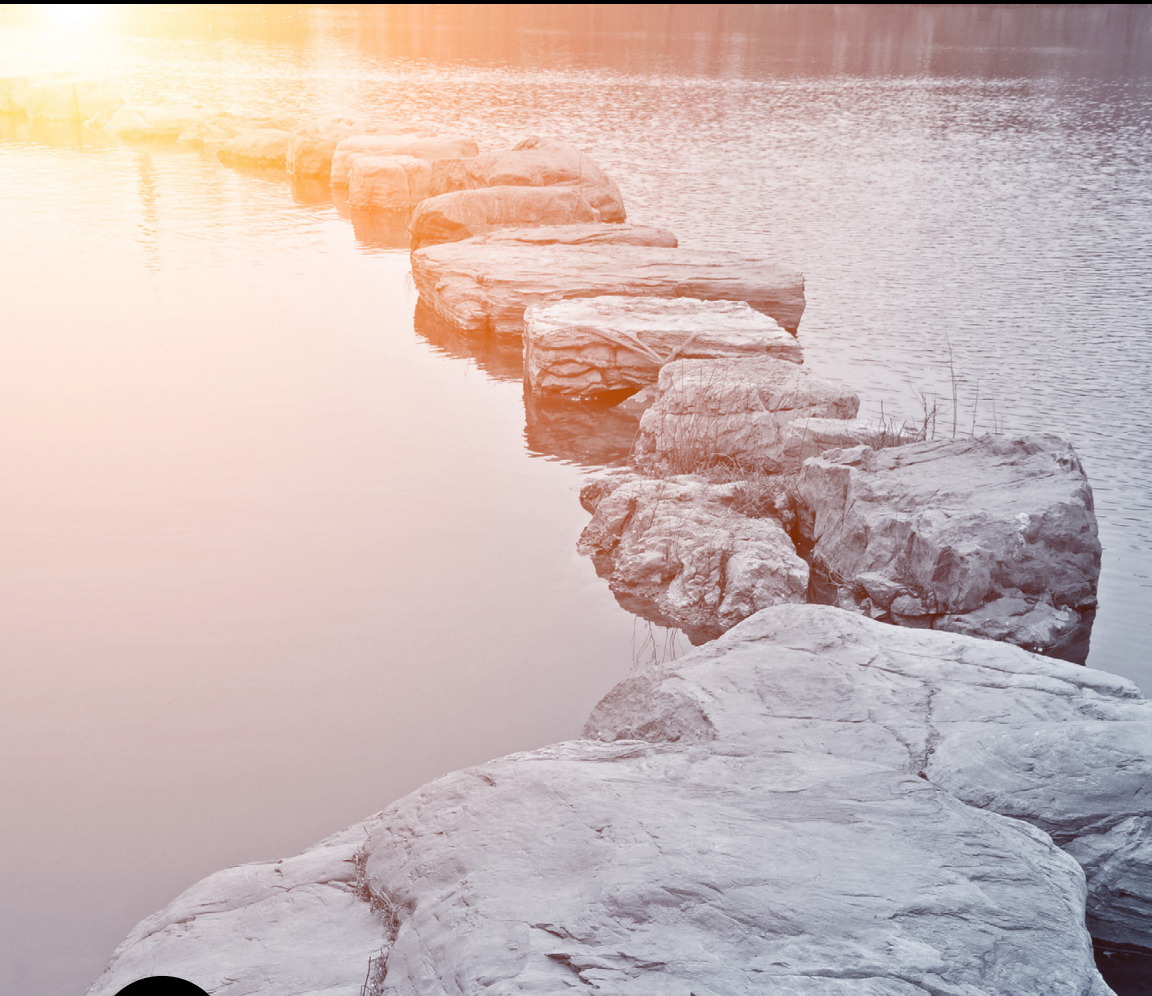


Mediation

A Comprehensive Guide to Effective Client Advocacy

Martha E. Simmons



Mediation

A Comprehensive Guide to Effective Client Advocacy

Mediation: A Comprehensive Guide to Effective Client Advocacy is the only text of its kind to provide legal professionals with the mediation strategies that will help them best serve their clients in out-of-court dispute resolutions.

This extensive resource offers step-by-step guidance in navigating the mediation process, including case and client assessment, how to choose an effective mediator, mediation preparation, ethical considerations, how to overcome barriers to settlement, and when to end mediation.

Mediation: A Comprehensive Guide to Effective Client Advocacy is an essential reference tool, and includes field notes, checklists, flowcharts, tables, and model documents to facilitate effective client representation. This practical guide draws on expert knowledge and extensive experience from renowned litigators, academics, and mediators from across Canada.

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The Selection Process: Some Considerations

No matter who proposes the mediator, it is imperative that mediators are screened before being retained. Various criteria can be important in such screening. It is prudent to check references of potential mediators and to conduct telephone or in-person interviews if possible. Specific questions to ask the mediator will be outlined in the Resources at the end of this chapter. Some broad considerations that should be taken into account include expertise in the subject matter, the mediator's style, the mediator's process, any personal characteristics of the mediator, and the fees they will charge.

1. The Importance of Expertise in the Subject Matter

Specialized expertise is a much debated topic when it comes to mediator selection. Most civil litigators today will tout the importance of finding a mediator with direct knowledge of the subject matter of the dispute. With many experienced litigators entering the realm of mediation in most jurisdictions, it is not difficult to find a mediator who has litigated many similar cases to the one you are dealing with. This experience can be exceptionally helpful in negotiating settlement. Where the case you are dealing with is of a very specialized nature, it may be critical to find a subject matter expert, even though such an expert must be found outside your geographical proximity. Where specialized knowledge is required, you should not sacrifice the settlement by finding a less than ideal mediator. Sometimes, expertise in the subject matter is not sought because some feel that entering a mediation with a highly specialized mediator may limit the settlement to those that the mediator has experienced before. If you wish to enter a mediation with no preconceived notion of the outcome, a mediator without specific or extensive subject matter expertise may be best.

What is the subject matter of your client's dispute? It is important to consider not only the area of the law that your client's matter involves, but also the totality of the subject matter at issue. Not all disputes are the same. You may handle 20 slip-and-fall accidents that share some important similarities, but they will not be the same. The disputes may have drivers or factors behind the scenes that are significantly different from one another. Take the time to analyze all the underlying interests in your client's dispute.

Consider the following issues that may play into a slip-and-fall accident:

1. Financial—if the store in front of which the plaintiff fell has money to provide, it is a very different story from one in which the small-store owner is destitute.
2. Emotional—what if the slip and fall occurred outside a neighbour’s house. The neighbours have vehemently hated each other for years.
3. Legal—there are no merits to the legal case, and the lawyer thinks it best to hold out until trial.
4. Personal ego—there are as many egos at the mediation table as there are people. Each lawyer and each client has their own reasons and motivations for either staying at the mediation table or settling. Lawyers may want to prove they are better than the opposing counsel, or clients may simply want to hold out for unrealistic numbers.
5. Information—sometimes mediations are a valuable way of receiving much needed information from the other side.

These are certainly not the only motivations for mediation, but their enumeration suggests that a different type of mediator would be required depending on the nature of the root issue. Some mediators are particularly adept at handling emotional issues. Others are experts in the legal field in question. Still others facilitate communication with particular skill. You must be clear on what your client’s case requires.

2. Mediation Style of the Mediator

As described in Chapter 1, mediators often prefer either an evaluative or a facilitative style. Mediators will tend toward one end of the spectrum or another, although good mediators can alternate between the two. In addition, you can certainly work with the mediator to leverage the best of their skills for your particular case. If a more active evaluative style suits the case, you should share this with the mediator and ask if they would feel comfortable adapting their approach. Advocates may not always know for certain the approach a mediator will take, but mediators should be asked about the style and approach that they prefer before being selected. Mediation advocates must then be familiar enough with each style to be able to assess which would be best in their client’s situation.

Adding to the preference of the mediator, some advocates will prefer one style of mediation over another. This is important, because, after all, you must be comfortable enough with the style to advocate for your client. Moreover, the other side also has to be able to work with the mediator. A careful consideration of all the personalities in the room will be helpful. Even if you do not know your opposing counsel personally, you will likely have had some experience with them through initial discussions, negotiations, or discoveries. Take what you know, and predict whether a particular mediator will work well with them. The mediation

will be more successful if both counsel can work well with, and respect, the mediator.

3. Mediator's Process

While some elements are characteristic of mediation as a process, there is vast discrepancy in how different mediators conduct mediations. Knowing the approach of different mediators will help you to determine the right mediator for your client and your case. Do you think a long opening session with all parties present is preferable? Or would you prefer to do without an opening statement and go straight into caucus? Mediators often have preferred methods of conducting the process. However, you should recall that mediation is the party's process, so any effective mediator should display some flexibility in allowing you to dictate the way the mediation is run. Canvassing process with mediators at the interview stage, before they are retained, will help you to strategize for the mediation whether or not you wind up hiring that particular mediator. Your experience in mediation will also help you to decide which approaches work in particular cases.

NOTES FROM THE FIELD

Gordon Sloan

The way mediation needs to head is that counsel need to have a chat on the phone before the mediation and talk about what they want out of the mediator. I think they should be selecting the mediator based on what they want, and give orders as to what they want and do not want, from the mediator. The best lawyers have done this. They tell me what they want me to do and what they don't want. They give marching orders. I think this is key. The mediator is a helper, an assistor—so tell me how to assist.

4. Personal Characteristics of the Mediator

Each mediator will have a variety of personal characteristics that should be taken into account when deciding whether they are indeed the right fit. These characteristics range from gender to culture to language. Knowing your client is key here.

It would be ideal if mediators knew and shared their particular affinities and characteristics that affect their mediation style. The truth is, however, that this knowledge is likely not held and even if held, is likely kept hidden. The field of mediation is one that many want to enter and is, hence, very competitive. Mediators, like lawyers, want to get mediation work, and they will often express an ability to handle a case even if it is not the ideal case for them.

What do you do about this? Do not stop at asking a mediator if the case is one they can handle adeptly. Instead, give the mediator various scenarios and ask how they would handle them. Do they seem competent? Are they sensible? Can they adapt to the particular needs of your client? Do you think they will get along with your client? These considerations are difficult to ascertain at an early stage, but considering them is essential.

5. Mediator's Fees and Availability

There is great variability in the amount that mediators charge for their services and what their wait lists look like. While fees and timelines may seem like less important matters, they can be essential and can come hand in hand. Clients should be approached with the question as to whether they prefer the ideal mediator even if that would mean waiting a year or more. Some mediators indeed have such wait times. Particularly if you are opting for mediation to save the time of trial, a mediator with more imminent availability may be the better choice.

Most court programs have roster mediators that work for these programs. Another selection consideration is whether to utilize a mediator from a mandatory mediation roster. Roster mediators generally charge a lower fee and are more readily available than some private mediators. Roster mediators can certainly be excellent mediators. After all, in order for a mediator to become part of the roster, a certain amount of training is required. Picking a roster mediator takes some of the complexity out of selecting a mediator.

There is a more tactical approach to roster mediators. Some advocates will hire a roster mediator in cases where mediation is mandatory and they see no way that a settlement will come to fruition. The goal here is to save money and to cross the mandatory mediation hurdle. Even if this is your starting point, put effort into the mediation. Much to your surprise, you may just find that the case settles.

Table 3.1 lists a variety of resources for finding a roster mediator.

NOTES FROM THE FIELD

Jim McCartney

Reputation and experience are big factors. The knowledge and skill required to understand and manage the mediation process are important, probably more so than subject area expertise on the part of the mediator. The majority of my work comes from existing clients or referrals by them. The Qualified and Chartered Mediator designations granted by the ADR Institute of Canada are good indicators of training, experience, and peer review.

Ontario	Toronto: < http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/torontoroster.asp > Ottawa: < http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/ottawaroster.asp > Windsor: < http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/windsor-roster.asp >
British Columbia	< http://www.mediatebc.com/Find-a-Mediator.aspx >
Alberta	< http://aams.ab.ca/ADR_Professionals.htm >
Saskatchewan	< http://www.adrsaskatchewan.ca >
Manitoba	Family Mediator Directory (not court-connected) < http://www.familymediationmanitoba.ca/wp-content/uploads/Directory-of-Mediators_Octobr30_2015.pdf >
Quebec	< http://imaq.org/recherche-de-professionnel >
ADR Atlantic Institute (not court-connected)	< http://www.adratlantic.camp8.org/page-913026 >

Defining Barriers to Settlement

Despite all the work that you have done to prepare and strategize for mediation, barriers can impede settlement and lead to impasse. What is impasse? Robert Benjamin, writing of impasse in the family context, explains that different people use the term differently: some view it as a momentary period of being stuck, while others see it as a total collapse or deadlock.¹ No matter which of these is your definition of impasse, understanding the barriers to settlement is the first step in overcoming them. This section will describe some particular challenges that exist in mediation; there are certainly others. If your mediation hits a roadblock, think of what the reason might be. Only then can you begin to resolve it.

1. Misunderstanding the Nature or Process of Mediation

Sometimes counsel and clients, despite best efforts, misunderstand the nature and purpose of mediation. With all the various forms of mediation that exist, it is not surprising that misapprehensions occur and can cause problems. If one or both sides of a dispute do not understand how mediation works, there will be people involved in the process who may not fulfill their expected roles. For example, lawyers may act overly adversarial, or clients may refuse to participate. In addition, all participants may have expectations of the process that do not materialize. If one or more parties have participated in mediation before, they

¹ RD Benjamin, “Strategies for Managing Impasse” in J Folger, AL Milne & P Salem, eds, *Divorce and Family Mediation: Models, Techniques and Applications* (New York: Guilford, 2004) 248.

may expect a similar proceeding. But because mediation approaches are inherently variable, subsequent mediations may manifest very differently.

Make sure you understand the nature of mediation and the different orientations that the mediator may adopt (see Chapter 1). Share these insights with your clients before going into mediation in order to avoid surprise and misunderstanding. Explain that flexibility is important because the process may go in unanticipated directions. Holding to steadfast, preconceived notions can only be detrimental.

2. Discomfort with Your Role in Mediation

Experienced advocates may find the transition to mediation advocacy a difficult one. You will be required to draw on different skills than traditional advocacy demands. *Are you prepared to shift your role?* Many advocates find managing their clients' emotions challenging. Clients will likely show more emotion in mediation than you will have experienced in other types of advocacy. *Are you comfortable with such displays?*

Even with thorough preparation, you may find yourself uncomfortable with this new role once the mediation begins. Remember the importance of reflective practice. Throughout the mediation, you should think about your performance and the way in which you are fulfilling your role. *Are you allowing your client sufficient time to speak? Are you maintaining a conciliatory tone?* If you are reaching an impasse in the mediation, think about whether something in your behaviour may be contributing to the impediment.

3. Relationship Between Counsel

The way in which counsel on either side interacts with their counterpart has a significant impact, either positive or negative, on the outcome of mediation. Research shows that mediation is more successful when representatives get along.² It is difficult to resist settlement irrationally, or to act overly aggressively, with an opposing counsel whom you know personally. Moreover, if you model respectful interactions with your opposing counsel, your clients are more likely to follow suit.

Sometimes the relationship between counsel can be the most difficult barrier to overcome. Friction that can be a result of prior professional and personal relationships can pose tremendous difficulty in achieving settlement. Mistrust or intimidation are particularly damaging sentiments in the face of settlement potential.

² See e.g. John Lande, "Getting Good Results for Clients by Building Good Working Relationships with 'Opposing Counsel'" (2011) 33 U La Verne Law Rev 107.

The mediator can help you to overcome this barrier in many cases, but there are proactive steps that you can take as well. Be open with opposing counsel and name the issue at hand. If it suits your case, assert the fact that you have worked together on highly litigious files in the past but that this file will require a more collaborative relationship. Take the time to repair your relationship with the opposing counsel. Whether in the office or over coffee or lunch, make every effort to re-establish a cordial working relationship.

4. Lack of Information

Negotiations may break down because either you or your opponent, or both of you, may not have enough information. Informed choices and decisions require sufficient background. Particularly in mediations that take place before discoveries, there may be many elements that require more consideration. Few clients will be willing to gamble in the face of a dearth of important information. This is not to say, however, that you need every possible answer to every question.

There is a fine line between waiting too long to mediate, in which case parties may become increasingly polarized and entrenched in their positions, and mediating too soon and risk lacking vital information. Chapter 4 described the “80-20” rule, which stipulates that 20 percent of the discovery time yields 80 percent of the required information. Keep this in mind when determining whether an impasse is a result of insufficient information. If gaps are ascertainable during mediation, be sure to fill them. A break may be required to gather more data. Any deal premised on insufficient or incorrect information will not hold up in the long run. Get the intelligence you need, and give the information needed by your counterpart. Only with such exchange can robust, long-lasting agreements be created.

5. Choice of Mediator

Despite your best efforts to select the appropriate mediator for the case, you may find during the mediation that, in fact, you are not working with the optimal neutral facilitator. *Does the mediator have the right skills, knowledge, and ability to manage your case?* Douglas Henderson conducted a study in which he found that “a mediation is only as good as the mediator, with the following attributes critical in overall mediation success: intervention techniques employed (aggressiveness and diversity of techniques); demographic characteristics (age, experience, functional specialization); and overall quality of mediators.”³

3 Douglas A Henderson, “Mediation Success: An Empirical Analysis” (1996) 11:105 Ohio St J Disp Resol 113.

It might come to pass that midway through the mediation you are dissatisfied with your choice of mediator. If this is the case, do not waste more time. Convene with opposing counsel and see if you are both of the same opinion.

6. Psychological Barriers to Settlement

Settling a dispute can be difficult for some parties. While common sense would indicate that individuals would be relieved at the prospect of resolution, psychological barriers can prevent settlement from taking place. Research has described several psychological factors and biases that may fly in the face of agreement. This section cannot cover them all, but will note some of the more prevalent ones. Note that these psychological barriers may influence your perceptions in the mediation as well as your client's, although your client's will likely be more heavily affected. After all, you have probably come to care about your client and this case. Such care and concern can influence your perception of the situation. Being cognizant of these factors will help you help your client to overcome them.

a. Cognitive Dissonance

Individuals are uncomfortable considering information that contradicts their point of view. *Cognitive dissonance* is the psychological term that describes this occurrence. Rather than accepting one's own mistake or fault, people tend to justify their behaviour, blame others, or ignore the existence of conflicting data. These attitudes can affect mediation in a meaningful way, because the process is premised upon self-determination, acknowledging fault, and seeking mutual understanding.

In order to overcome cognitive dissonance, ensure that the mediator is providing reality checks throughout the process. When you are in caucus with your client, probe yourself to consider the other side of the issue. *If you were counsel for the other side, what would you be thinking? What facts would be important to you? What would be standing in the way of settlement?*

b. Attributional Bias

Attributional bias is also a natural and important psychological factor to consider. People tend to impute negative intent toward an adversary and positive intent toward themselves. This dynamic plays out in mediation when clients look to an external explanation for the harm caused to another. For example, drivers may blame road or weather conditions for their own accident, or they may attribute the behaviour of the other driver to negative intent or negligence (“He intended to cut me off”; “She must have been using a cellphone”).

In determining settlement in mediation, it is often helpful to separate blame from the settlement figure. Even if your client is not willing to accept blame,

they may want to settle and, in so doing, pay to end the fight. This approach allows the client to attribute the dispute externally while still accepting a settlement that works for them.

c. Selection Bias

Selection bias also comes into play in mediation. Particularly where you have been working on a case for an extended period of time, you begin to see the truth in your client's side of the story. Then, information that supports your client's situation is incorporated into your own schema, and any information that contradicts your view of the case is ignored or discounted.

Enter mediation with an open mind. Be willing to hear the other side's point of view. Question whether your defence of your client's position is reasonable. Remember that your approach in mediation must be different from your typical litigation approach.

d. Overconfidence

Russell Korobkin discusses optimistic overconfidence in the context of dispute resolution and impediments to settlement. He explains, "People believe that the chances of good things happening to them are better than they are in reality, and that the chances of bad things happening to them are worse than they are in reality."⁴ This phenomenon sets parties up to reach impasse at mediation because they assume that they will do better in court than pure logic would dictate. It is not uncommon for counsel to feel frustrated when their clients do not listen to reason. Once again, here is an opportunity for the mediator to provide a reality check and help parties to unpack their own assessments of what the alternatives to settlement look like. Do not allow your judgment to be clouded by overconfidence. Be pragmatic and realistic.

e. Reactive Devaluation

Reactive devaluation is a curious phenomenon: it holds that any offer made by an opponent will be viewed with suspicion, while the same offer made by a neutral party will be accepted as legitimate. The old saying, "The grass is greener on the other side" epitomizes the psychological impediment of reactive devaluation. As soon as an option becomes unavailable, its attractiveness increases. Conversely, if another party offers a settlement option, even if it would have been acceptable before the offer, it is immediately devalued.

4 Russell B Korobkin, "Psychological Impediments to Mediation Success: Theory and Practice" (2006) 21 Ohio St J Disp Resol 281 at 284.

If the offer appears to be made easily, a client may assume that their adversary might make further concessions, or they may refuse the offer out of pure spite. Whatever the reason, the simple fact that an offer was made *by the other side* makes it less attractive than if the exact same offer was made by you. In the end, though, in order to settle, one side must be willing to accept a proposal made by the other side.

To combat the effects of reactive devaluation for your client, you should, as much as possible, prepare with them all the possible acceptable solutions that may arise. If the other side offers one such solution, you should accept it in due course without devaluing it because of the person who delivered it. If a particular settlement was acceptable to your client before the mediation, it should remain so during the mediation, unless considerable information has arisen to the contrary.

The concept of reactive devaluation should make you consider which offers of settlement should be made by you, as they will likely be devalued by the other side. One way to circumvent this issue is to have the mediator present options. (The mediator's role in making proposals will be discussed in more detail later in this chapter.)

5 See e.g. Michelle Lebaron, *Bridging Cultural Conflicts: A New Approach for a Changing World* (San Francisco: Jossey-Bass, 2003).