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Mediation Best Practices Guide for In-House Counsel: 
Make Mediation Work for You

MEDIATION IS ESSENTIAL TO IN-HOUSE PRACTICE

Mediation is everywhere. Many courts require it as part of their case management process. Commercial contracts often contain an Alternative Dispute Resolution clause that mandates or recommends mediation before the parties may resort to the courts for relief. Therefore, to be an effective in-house lawyer today, one must understand the mediation process and how to use it effectively. Inside counsel responsible for managing litigation should be as well-versed in the nuances of mediation as with court procedural rules. It is a consensual process custom-crafted by the parties and the mediator, largely without set rules. Every aspect of a mediation is subject to negotiation. It requires a different mind-set and approach than litigation.

Given this reality, one would think in-house counsel would be inundated with guides on what to consider in structuring a mediation, how to use the mediation process to try to achieve a desired outcome, and how to handle all of the individual decisions that must be made in the course of a mediation affecting the outcome and determining whether a party deems the mediation a success or a failure. Surprisingly, we have found few useful resources for in-house counsel and little such guidance of value.

This guide was drafted to help fill that gap. In it, we try to identify important factors in-house counsel should consider at each step of mediation—before it takes place, during the actual mediation session, after apparent impasse in negotiations, and after resolution ultimately is achieved. This guide addresses the pros and cons of many of the choices available to in-house counsel. We include illustrative examples. And at times, we present conflicting viewpoints because there are seldom clearly right or wrong decisions when it comes to mediation strategy. Mediation is as much art as it is science; it is as much psychology as legal merits. Mediations can be long but are rarely dull, at least to creative lawyers, as each mediation is different and has its own path.

If we have achieved our goal, in-house counsel who read this guide – whether they have handled one, one hundred, or one thousand mediations – will all find something to think about, something they had not considered before, something that helps them increase the chances of success in their future mediations.1

1 This is a guide to mediation. Discussion of more complex processes involving mediation, e.g., “med-arb,” where initially mediation is used and any issues not settled by mediation are then arbitrated (often using the same neutral, who morphs from mediator to arbitrator), are beyond the scope of this guide.
WHEN TO MEDIATE

Mediation is an important tool for in-house counsel for managing caseloads, securing favorable results, and diminishing litigation expenses. Mediation is the parties’ process to design; it does not belong to the mediator or law firm. The parties are empowered to drive negotiations and agree upon settlement terms. They are the decision-makers.

Mediation is low-cost compared to litigation or arbitration. Even if mediation does not lead to immediate settlement, it can still be beneficial by helping counsel and parties focus the case, eliminate issues, simplify litigation to the most essential inquiries – and eventually lead to settlement.

There are three typical triggers for mediation:

1. The parties to the dispute mutually agree that mediation would be beneficial.
2. An underlying pre-existing contract mandates mediation.
3. An adjudicator – court or arbitral institution – requires mediation prior to moving to adjudication.

If you know the other side is recalcitrant or that its people are likely to be difficult to negotiate with, you might opt for early mediation just to get a mediator talking with them and challenging them to think about their case more objectively. In particular, if you believe opposing counsel has client control problems, it may be helpful to have a mediator involved early on.

Mediation may be employed at any stage of a dispute, whether during early case assessment, on the eve of trial, or even while an appeal is pending. Although every case is different, it is often prudent to mediate as early as possible in the life of a claim. Early mediation not only saves on protracted litigation expense and reduces open-file duration but also helps to get parties to the negotiation table before they become further entrenched in their positions.


Mediations in which a party has not developed a good sense of the value of its case or does not feel it has enough information to assess the value of its opponent’s case are less likely to succeed than those in which both sides have a good sense of the relative merits. Thus, make sure both sides have given thought as to what key pieces of information are critical to their assessments of the case, and then exchange that information before the mediation.

Keeping mediation’s flexibility in mind can help you design a successful mediation process. For example, the two sides could agree that each side can briefly interview the other side’s key witnesses, exchange key documents, or provide some missing information for the other side. A good mediator will as early as possible in the mediation process explore with the parties what information each side believes it needs to help it decide whether or not to settle and on what terms and then help broker the exchange.

Other factors can affect the use and timing of mediation. For example, if there is an existing suit regarding the dispute, a dispositive motion is pending, and the decision is likely to turn on the adjudicator’s assessment of who is being more reasonable, you may want to mediate before the motion is decided. In that case, ask the mediator to do some “reality testing” with the other side if in your view it clearly is being unreasonable and therefore is likely to lose the motion. Having the other side realize that may bring about prompt party-resolution of the entire dispute or at least of the motion.
ENGAGING COUNTERPARTIES IN MEDIATION

This section addresses strategies for securing counterparty agreement to mediate. Despite the increased acceptance of mediation as a dispute resolution tool, not all disputants necessarily consider its use or, if they do, consider it at an appropriate time. Because mediation is voluntary in most instances, it may be necessary to persuade a counterparty to agree to mediate.

One way to address this problem is to insert mandatory mediation clauses in your contracts so that mediation occurs as a matter of course if the dispute resolution provision is triggered. This way, neither party feels it might be viewed as weak for suggesting mediation.³

A company that publicly demonstrates its good faith intent to use ADR constructively is more likely to inspire confidence in a trading partner to join it in mediating a dispute. CPR’s 21st Century Pledge, which can be subscribed by any firm, makes this visible commitment:

Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes.⁴

Here are some other strategies for engaging a reluctant counterparty in mediation that have sometimes been successful:

• Identify cost “gates” for the dispute and discuss with the counterparty the possible cost savings by mediating sooner rather than later. The costs and distractions that can be avoided by mediating early include those relating to continued preservation of evidence under a litigation hold if the matter is not promptly settled, full document production, depositions, dispositive motions, trial and appeal, and tying up company personnel and other resources for years in litigation rather than conducting business.

• Offer to have an ADR provider contact the counterparty to familiarize it with mediation and its benefits.

• Offer to pay all mediation fees or suggest that the parties take turns paying fees rather than splitting costs each time (so a reluctant party would pay nothing for a first in-person mediation session but would pay for a second session if one is needed).

• You may also wish to pay all mediation fees if a mediation ends in settlement but split the fees if it fails to achieve closure, thereby providing some incentive to the other side to work towards resolution.

• Offer to accept the counterparty’s choice of a mediator.⁵

• If litigation has commenced, enlist the court’s assistance. Have the court suggest to the counterparty the value of mediation, perhaps using a court-annexed mediation process. In some jurisdictions, a court can order mediation whether or not both parties agree to it.

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⁵ See below for a discussion regarding why you may wish to agree to the counterparty’s choice of mediator.
SELECTING THE MEDIATOR

Selecting a mediator is arguably the most critical decision in the mediation process. The success of the mediation can be heavily influenced by who is selected, so carefully consider what qualifications and background will work best for each dispute and the parties involved. This section highlights considerations for selecting the best mediator for your dispute.

In choosing a mediator, perhaps the most important issue to consider is whether the other side will trust this person. This is particularly important if you are working with counterparties who are less experienced with mediation or who you think may have an unrealistically favorable view of their side of the dispute. The factors listed below will matter little if your opposing party does not trust the mediator. This is why it is often prudent to agree to counterparties’ suggested mediator. But even then, you must conduct your own due diligence to make sure you are comfortable with the suggested mediator, including how that mediator works so you can best prepare for a productive negotiation.

Here are some factors that are important to consider in selecting a mediator:

- **If a mediation clause specifies a provider organization, what are the rules of that organization for selecting the mediator?**

  For example, the CPR “Mediation Procedure” sets out how the mediator will be selected. Unless the parties agree otherwise, the mediator is selected from CPR’s Panel of Neutrals, which is comprised of over 500 preeminent neutrals (mediators and arbitrators) worldwide in over 30 specialty areas. If the parties cannot agree on a mediator, CPR will work with them to generate a list of the best candidates for their case, focusing on any preferences for mediation style, subject matter expertise, and geographic location.

  If the parties are still unable to agree on a mediator, each party will be asked to rank the list of candidates in order of preference, and the candidate with the lowest combined score will be appointed as the mediator by CPR. CPR will break any tie.

  If the parties agree, they can utilize a different mediator selection procedure to better fit the circumstances. For example, a general dispute resolution clause in a contract between international companies may call for an international mediation process and provider. But if a particular dispute is purely local, it is likely better suited for a different protocol and a local provider.

  So long as the parties agree, deviating from the original contract language may be more appropriate than relying on the specified protocols. Remember, everything is within the parties’ control. If they want to change the process, they can do so as long as they all agree. A party’s focus should always be on what is most likely to help it achieve a resolution that comes closest to its desired outcome.

- **Does the mediation clause specify a time period for completing the mediation?**

  If the time period is short, mediator availability may become a critical factor, although the parties jointly can (and often do) amend time limits. It can be difficult to schedule a mediation with a busy mediator. You may have a long wait until he or she is available. If

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you or your counterparts feel strongly that a particular mediator is best suited for your dispute, it may make sense to wait for this person. You may need extra time to prepare for the mediation, so the mediator’s immediate availability may not be necessary. But if time is of the essence, consider vetting a candidate whose calendar is less crowded. It is good to get fresh perspectives and to grow the field of experienced and successful mediators with whom you work.

**If there is no mediation clause, does either side have any special needs that must be addressed?**

For example, is it important that the mediator be fluent in more than one language or that the mediator be culturally sensitive to the parties and dispute?

**Is the mediator free of any conflicts of interest?**

Prior to selection, make sure the mediator has disclosed any potential conflicts of interest that might give rise to the appearance of partiality or lack of independence. Under CPR’s *Mediation Procedure*, CPR will ask the candidate to disclose any known circumstances that would cause reasonable doubt regarding the candidate’s impartiality. If a clear conflict is disclosed, the individual will not be proposed to the parties. Any other circumstances that a candidate discloses to CPR will be disclosed to the parties. A party may challenge a mediator candidate if it knows of any circumstances giving rise to reasonable doubt regarding the candidate’s impartiality or independence.

No matter what the process is for mediator selection, be certain to check references from colleagues who have worked with the mediator, particularly during the last year. Ask about style, preparedness, diligence, professionalism, and any other specific qualities you believe are important for resolving your dispute.

Also, don’t hesitate to interview the mediator. While you should not disclose confidential or other sensitive information to the mediator at this time, you may pose appropriate hypothetical questions to gauge how the mediator might address your concerns. Stylistic approaches and interpersonal dynamics between you, your counsel, your team, and the mediator are important. Mediators rely on developing trust. If you have doubts about how well you will work with the mediator, that is a red flag and suggests you should keep looking.

**Does the mediator’s subject matter expertise suit your needs?**

Some disputes involve discrete areas of the law or business and thus may benefit from a mediator with subject matter expertise. But knowledge of the law, underlying industry, or relevant technology is not by itself a sufficient reason for selecting a mediator. Look to the other factors on this list as well to ensure the mediator is a good fit for your dispute.

**What is the mediator’s style?**

There is sometimes a question about whether the mediator’s approach is primarily facilitative or evaluative (those are the two principal mediation styles in commercial mediation). A facilitative mediator will help guide the parties in bettering their communication and negotiations, so they can craft their own resolution of the issues presented. An evaluative mediator will also support party negotiations and communication. But the evaluative mediator will provide parties and their counsel an assessment of likely outcomes and probe the legal and factual strengths and weaknesses of the positions presented.\(^7\)

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Some mediators adjust their styles to the needs of the parties at different phases in the process. Quite commonly, the neutral will start the mediation in a facilitative mode and become more evaluative when it appears that the parties are ready to move toward closure, or it appears that offering an assessment can break an impasse.

- **What will the mediator — and this particular mediation — cost?**

Mediators may offer several suggestions to charge for their services. They may charge by the hour, by the day, or by the mediation. In addition, there usually are charges for preparation and follow-up and some mediators may charge for travel time, especially if they have to travel to a distant city. Some mediators or their firms may charge an administrative fee in addition to the mediation services fee. When budgeting mediation costs, if there is an ADR institution involved in the selection process, investigate whether there will be selection and administrative costs incurred, in addition to the costs of the mediator.

Before selecting a mediator, make sure you know all the fees likely to be charged and that they are commensurate with the amount in dispute. (You probably won’t want to spend $10,000 a day mediating a $10,000 dispute).

- **Do the parties value cultural, racial, or other diverse attributes in selecting a mediator?**

The diversity characteristics of a mediator may be an important factor in your selection process. Diverse characteristics include, inter alia, race, gender, sexual orientation, age, and national origin. By being familiar with mediators with diverse backgrounds and diverse demographics, you can enhance the chance you will find one who is best suited for your case.

Many companies have programs that require diversity be considered before engaging law firms. These programs help promote a legal profession that reflects the diversity of a global economy. CPR’s *Diversity Commitment* affirms that such considerations are equally important in a mediation and should be applied to the selection of mediators.6

- **Can the mediator accommodate the parties’ technology needs?**

The parties may need a neutral mediation site or special facilities for communication (such as video conferencing). Sometimes the cost of travel may be too great for what is at stake in a particular dispute, and video conferencing can provide a good alternative. If this issue is important, explore any special needs with the mediator or institution prior to selection.

- **Should you select a lawyer, judge, or non-lawyer as the mediator?**

Selecting a non-lawyer to be the mediator may be advisable if the parties believe special subject matter expertise would be helpful for resolving the dispute. This may occur where the dispute turns more on the facts than the law in a specialized area and/or one or both parties want the mediator to be able to be credibly evaluative. For example, architects and engineers are sometimes selected to mediate construction disputes. If legal issues are important, lawyers or judges are often preferred.

- For other ideas on evaluating a mediator, see the CPR *Due Diligence Evaluation Tool*, available at https://www.cpradr.org/resource-center/toolkits/neutral-evaluation-selection-tool

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6 See https://www.cpradr.org/strategy/committees/diversity-task-force-adr/diversity-resources
PREPARING FOR MEDIATION – ORGANIZATIONAL PHONE CALL

After a mediator has been retained, the most common next step is holding an organizational phone call attended by the mediator and counsel for all parties. This section offers suggestions for in-house counsel to consider in preparing for the mediation.

The main purpose of an initial organizing call among the parties and mediator is to establish the ground rules for the mediation. In-house counsel should attend this telephonic meeting even if outside counsel has been retained. It is not trivial and is an important step to help maximize the chances the mediation will succeed.

You should address the following topics during the call:

- **Informational needs:**
  If you do not have all of the information you need to support negotiations during the mediation, this is a good time to solicit the mediator’s assistance in acquiring information the other side may have. Remember: you aren’t engaging in full-blown discovery but rather acquiring enough information to negotiate intelligently. Make sure the mediator memorializes in the mediation agreement or in another writing promptly sent to all parties after the call that they have agreed to an information exchange.

  If this is a complex matter with many parties in court, you might suggest that the schedule for information exchange be entered as a court order (but remember that the order will likely become a matter of public record). Parties are especially likely to keep their commitments when a court is involved. Whether or not additional information is exchanged at this time or later as part of the mediation process, during the call, you should address confidentiality and use of information received as part of the mediation process outside of the mediation. Keep in mind that the applicable mediation law and/or rules often provide for confidentiality.

- **Attendees with authority:**
  The organizational call is also the time to determine who will attend the mediation and their respective levels of negotiating authority. Be sure that individuals for all sides with comparable authority attend. If your side will have someone with full settlement authority at the mediation, make sure each other party also will.

  However, if having someone from your side with complete negotiating latitude is not possible, consider discussing this with the other party and the mediator as early as possible so that expectations can be managed, and a determination made whether to proceed or delay until the key decision-makers of all necessary parties are available.

  Insurance carriers and corporate Boards of Directors often have the final say on settlement terms. Participation by these third parties should be recognized early and handled with the mediator’s assistance to avoid misunderstandings that can derail the mediation. If the names and titles of the expected participants are not known at the time of the organizational call, that information should be exchanged at a later pre-determined date, such as when mediation statements are due.

  Insurers may be responsible for the final decision on the amount of a payment. Attendance by a claims representative with full settlement authority is desirable but may not be possible. Consider whether he or she can be available by phone, videoconference, or email on short notice if it becomes essential to engage the claims representative in the negotiations. Regardless of whether the insurance claims representative will attend the mediation, work with your carrier to make sure proper settlement authority is secured prior to the mediation.
• **Confidential statement for mediator:**

During the call, the mediator will seek agreement among the parties regarding the submission of confidential mediation statements. In almost every instance, there is value in submitting such a confidential statement. The statement should contain facts, legal arguments, and other information that could influence the resolution of the matter. You may also wish to include a summary of negotiations so far and why you have sought the assistance of the mediator. It is helpful for the mediator to hear if negotiations have stalled and, if so, why.

You should also include a statement about what you hope to accomplish through the mediation process. Mediators sometimes have additional topics they would like the mediation statements to address, and those topics should be identified during the organizational call and promptly confirmed by the mediator after the call, typically in an email to counsel.

There may be circumstances outside of the dispute itself that will influence settlement or party behavior. For example, a party may seek to eliminate any “clouds” over itself because of a potential loan, upcoming shareholders’ meeting, or planned acquisition. This information is rarely evident in openly exchanged documents, but it may indicate an essential party interest and play a significant role in the settlement process. This interest could be disclosed to the mediator in the confidential mediation statement.

Finally, although a party’s confidential statement is usually written for the mediator alone, some mediators may suggest that sanitized or abbreviated versions be exchanged by the parties, redacted to remove sensitive information. This exchange may be particularly helpful if the parties have not had detailed communications with each other prior to the mediation because this exchange may be first time each side lays out the legal and factual underpinnings for its position.

• **Establish the logistics:**

Establish the logistics so there are no misunderstandings. Agree on where you will meet for the mediation, whether there will be a joint session and when it will begin, how long everyone will be expected to stay, whether there will be opening statements by each party and, if so, who will make them.

Determine how lunch will be handled: whether it will be brought in and who will pay for it or whether the parties will expect a break and go elsewhere to eat. Ensure that the mediation site has enough rooms, so each party can have its own break-out room for caucusing. Although making these arrangements may seem tedious or unnecessary, it can be detrimental to the process if, for example, lunch is provided for the host party but not for the visitors or if people from the two sides plan to leave at significantly different times.

• **Confidentiality and cybersecurity:**

Although confidentiality of the mediation process is usually not an issue, if one of the parties is a public entity subject to an open meetings law, then confidentiality of the process, or the lack thereof, should be discussed during the organizational call. Public entities sometimes require their mediations to be held in open meetings and recorded.

Before any sensitive information is exchanged with the mediator, it is important to ask the mediator about his or her cybersecurity protections to make sure your data remain as safe as possible. At a minimum, ask the mediator for his or her cybersecurity plan and whether he or she has cybersecurity insurance to determine how best to communicate.
• **Ex parte communication:**

Unlike judges, mediators typically engage in ex parte communications with each side, and the typical commercial mediation contemplates such communications.

Ask the mediator what his or her practice is on this point. Also review any applicable mediation statutes, institutional rules, and the parties’ mediation agreement to make sure you are aware of any applicable restrictions on ex parte communications.

• **Fees and retainers:**

Even if fee/retainer information has previously been communicated to you, it is a good idea to discuss this in the organizational call so there is no misunderstanding, especially if you have offered to pay all the mediation costs.

• **Memorialize the ground rules:**

To the extent possible, establishing the ground rules is necessary for avoiding later negative feelings (disappointment, annoyance, anger, etc.) and possible derailment of the process.

Make sure the procedural matters described above are memorialized in a mediation agreement, which should be written by the mediator or ADR institution. Most mediators have preferred practices laid out in forms adaptable to each case and/or they attach an appendix to the agreement that sets out the schedule separately from the terms. We strongly recommend using the *CPR Model Agreement for Parties and Mediator* as a touchstone. It is found at the end of the *CPR Mediation Procedure*.⁹ If the mediation agreement is entered into before the organizational call, a writing summarizing the call should be sent by the mediator promptly after the call.

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PREPARING FOR MEDIATION – MAKE A PLAN

Even if the parties are well-versed in the law and the facts of the case, preparation for a mediation still requires groundwork. This section outlines how to plan for negotiations and effective communication during the in-person mediation session.

Mediation is first and foremost an opportunity to communicate, and effective communication during the mediation can pave the way for a favorable outcome. Plan and practice how to synthesize information using demonstrative exhibits, oral presentations, and brief summaries that present your case to the other side (not just to the mediator) in its most favorable light. And remember it may well be the mediator, not you, who shows this presentation to the other side, so make sure it is clear, unambiguous, accurate on the facts and law, and easy to understand. Avoid argumentative language that may inflame the counterparty. The following outline highlights some steps you can take to prepare for the mediation session.

- **Develop your negotiation plan:**

  A negotiation plan should be carefully constructed prior to the in-person mediation session and consider all of your needs and interests. This includes any economic, social, procedural, or other concerns you may have. A negotiation plan should also clarify your strategy for making compromises and the roles that all participants will play in the mediation. Formulation of your plan should take into account what you believe are the needs and interests of the counterparty. A plan that does not consider them is less likely to succeed. Additional items to consider include:

  - Should the opening statement be delivered by counsel, a business representative, and/or a representative of any involved insurance carrier?
  - Who will be the primary spokesperson in discussions with the mediator?
  - Who will be identified to the mediator as the primary decision-maker?

  The following exercise will help you clarify your goals for the mediation. It will also help to step into the shoes of the other party, something that often is overlooked but is most helpful in reaching settlement.

  - List your aspirational goals for the mediation.
  - For each goal, note the “resistance points” beyond which you do not want to go.
  - Analyze the resistance points again, but this time as if you were the other party. Estimate what the other party’s realistic needs are—not what you think they should be, but what you believe the other party thinks they are.

- **IN-HOUSE PERSPECTIVE**

  “I participated in a mediation where each side was asked to summarize and articulate – without judgment – the other side’s position and to draft settlement terms it expected the other side would be insisting on, including the bottom line, and to then share this in a joint session. I found it very effective.”

  - Consider whether there are other settlement facts outside the scope of the dispute itself that may be relevant or helpful in settling the dispute for you or for the other party. Thus, ask yourself:
    - Do you and the other party value key terms differently?
    - Do the parties possess elements of value they might exchange, and which might not even relate directly to the instant problem?
    - Are there cultural differences in negotiation/communication style and, if so, how to accommodate them so they are not an impediment?
    - Identify facts and solutions on which the parties possibly can agree.
• **Explore creative settlement options:**
  Broader commercial relationships enhance the chance of creative tradeoffs that will advance the interests of both parties and foster a positive continuing relationship. Brainstorm with your business people on possible ways to exchange value to mutual benefit.

• **Meet with the mediator prior to the mediation session:**
  This can assist in designing the mediation process. Ex parte meetings before the mediation session can provide the mediator with additional context around the dispute, beyond the written materials you may have already submitted. If the mediator does not suggest such a meeting, you or your counsel should suggest it.

  - An important function of such meetings is to clarify and supplement your mediation statement (for example, with information you did not want to put in writing) to ensure the mediator understands the facts, law, and argument of your case and to make sure the mediator understands what is important to you and must be part of any settlement. It is an opportunity for you to determine how well-prepared the mediator is and to ask questions about the process and share your concerns.

  - Ex parte meetings also give the mediator insight on your preparations and allow the mediator to ask you questions and gently probe for weaknesses. The ex parte meeting may provide you with an opportunity to study how your team interacts with the mediator. This will help to further refine your negotiation strategy for the in-person mediation session.

  - Some mediators like to hold such ex parte meetings after they have studied all of the confidential mediation statements so that the mediator’s thinking is informed by those statements. Some mediators may hold more than one ex parte meeting with each side, going back and forth several times between the parties before the mediation session. Some or all of these ex parte meetings may be held by phone or videoconference rather than in person.

• **Draft a proposed settlement agreement:**
  If you are the party expected to pay something, it can be helpful to prepare a draft settlement agreement that sets out all the terms you hope the other party will accept in return for your payment. Many parties and counsel make it a practice to already have a draft settlement agreement (or term sheet, or memorandum of understanding) on the computers they bring with them to the in-person mediation session, so they can modify the draft throughout the mediation session with an eye toward finalizing and signing it at the close of the mediation.

  - Some terms, usually non-monetary in nature, may be discussed at the organizational conference call or can even be negotiated and tentatively resolved prior to the in-person mediation session.

  - Experience shows that negotiating many material settlement terms after the amount to be paid has been established can be more difficult than addressing them early.

  - In cases where the parties can agree before the in-person mediation session on an early partial draft settlement agreement, typically including the less contentious issues, the remaining process will likely be simpler. Later, the parties can focus on the more difficult issues, such as the amount to be paid. Having a draft agreement in hand before agreeing on money reduces the risk of late stage failure to agree. The negotiation may require that the earlier agreement be re-examined or re-shaped.

  - A draft settlement agreement creates a helpful environment for negotiation by sending a message that the party being asked to pay is serious about negotiating until the dispute is settled. The other party should then realize that if it can agree on an amount, payment will follow reasonably soon thereafter. Setting and maintaining the right (positive) atmosphere is important.

  10 See below for more discussion of negotiating and drafting the settlement agreement at the conclusion of the mediation.
**A Mediator’s View on Bluster and the Role of the Mediator:**

Save bluster for trial, although it rarely impresses judge or jury. Mediators hear bluster as noise. They wait patiently until it ends and then quietly home in on the essentials of the dispute and the interests of the parties. By expressing their understanding of each side’s point of view, they earn trust with the parties. Having earned trust, they play devil’s advocate, turning the dispute this way and that, looking at it from different perspectives, and inviting each side to join them in the journey. You may not know what the other side needs to hear to influence it to turn in your direction. The mediator pulls that out from everything you have said and not said and offers it to the other side without betraying confidential information. It is an artful seduction, done with the interests of both parties in mind. The mediator will let you know what the other side needs to hear. The mediator will help you frame your message.

**Counterpoint – A Client Representative’s View on Bluster and the Role of the Mediator:**

While bluster alone may be unproductive, it can be important for a party representative to convey the party’s position to the mediator with emotion, energy, and confidence at some point in the negotiations. The ultimate goal of the mediator is to get the parties to agreement. This necessarily involves trying to get each party to move closer to the other party’s position. Because mediators often view impasse as failure, they will focus more energy, especially late in a mediation, on the party they perceive as most amenable to adjusting its position.

While it is helpful to remain objective and dispassionate in the early stages of a mediation in order to build credibility with the mediator, it is equally important to convey effectively to the mediator when you are unlikely or unwilling to move much further from your current position. Since this often comes at a time when the mediator is focused on simply getting the parties to close what by this point in the negotiation may be a relatively small gap, a party representative may have to “draw the line” or “dig in his or her feet” or express a high level of confidence that any alternative non-mediated outcome would be better than making the further move advanced by the mediator or the other side. This kind of stance, while considered bluster by some, is necessary to effectively communicate when the pace and scope of a party’s willingness to give up more has slowed down and narrowed.
ORGANIZING THE IN-PERSON MEDIATION SESSION

The next step in the process is the in-person mediation session (often called the conference). This event provides you with a number of opportunities for modifying the process as needed. In this section, we discuss whether or not to hold a joint session, typically at the beginning of a mediation; how to handle caucus sessions between a sole party and the mediator; and how to address impasse.

You must make sure the mediator understands what material from your ex parte discussions with him or her (whether during caucuses the day of the in-person mediation session or at any other time) may be shared with the other parties. Some mediators assume everything a party tells them may be shared with other parties in the absence of an express prohibition. Others assume they can share nothing without express permission. It is crucial to know which approach your mediator is taking: an incorrect assumption could be embarrassing, detrimental to your position, and delay or prevent settlement.

Joint Session or Not?
Whether or not to hold an initial joint session at which both sides are invited to speak depends primarily on whether you think it is likely to harden positions, alienate people, and impede progress or, conversely, foster trust and dialogue and lay the foundation for a productive mediation session. While mediators often have strong opinions on this issue, the parties should make the final call as to whether a joint session is desirable. In reaching this decision, consider the following:

- What is the mediator’s view on the wisdom of a joint session in this case and why?
- How amenable is the mediator to your making this determination and how much capital will you have to spend if the mediator disagrees with you? If you know this decision will be important to you, it is a good idea to raise it with the mediator in one of the pre-mediation discussions. If you anticipate your reason for raising it could antagonize the other side, raise it in a private call with the mediator.
- What are the emotional needs of the people at the table? Does someone need to vent and, if so, would this be productive; does someone on one side need to know directly that someone in power on the other side really heard his or her story; does someone need to hear an expression of sympathy from the other side in order to start discussions? Do not discount the emotional aspects of the situation. Disputes rarely have absolutely no emotional component, whether in their cause or their resolution.
- How willing are the people at the table not to just listen but also to hear what the other side is saying? Does enough trust still exist so that everything each party says will not be reflexively rejected or found insulting?
- What is the need or desire of the people at the table to hear the other side’s position to understand it better, to address areas of perceived misunderstanding, and to identify areas of agreement and disagreement? Some parties may perceive the unwillingness of the other party to participate in a joint session as a negative.
- Even if neither side wishes to speak at an opening joint session, many mediators will still hold one at which everyone is introduced, and the mediator makes a short presentation regarding the plan for the day, checks on lunch arrangements, room assignments, emphasizes the flexible nature of the process, and sets a positive tone.
- The mediation process is completely flexible. Joint sessions need not always be at the beginning of the in-person mediation session, and there can be more than one joint session.
To make a joint session at which one or both sides speak more productive, you should:

- Build trust by actively listening to what the other side has to say without immediately reacting to it even if it is antagonistic or confrontational.

- Use open and engaged body language. No one on your team should be making faces or rolling his or her eyes when hearing something with which he or she disagrees.

- Make eye contact with the opposing parties; you are trying to persuade them, not the mediator.

- Direct your comments/questions to trying to understand the other side’s position and not to arguing your own.

- It may be a good idea to take a short break during the joint session after hearing the other side’s position, for a private conference or a caucus with the mediator, so your side can discuss how to respond constructively to what it has just heard.

- When presenting your position, speak without antagonism or posturing, explain your position factually, and acknowledge that the other side might interpret the facts or law differently.

- Have the most genuine and credible person in your party take the lead in speaking.

- Acknowledge areas of common ground.

- Make it clear you are there to solve a problem and find a solution and, if true, that you are open to being creative in that solution.

- In situations where it is appropriate, if you can credibly convey sympathy (as opposed to conceding responsibility), do so without sounding patronizing. This can be powerful.

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**IN-HOUSE PERSPECTIVE**

One in-house attorney who handles a lot of commercial litigation notes: “If parties are in a continuing commercial relationship and they intend to stay that way, joint sessions are absolutely necessary. A good mediator will know very quickly the respective motivation of each party coming to mediation and should be able to control the discussions, so they are not counterproductive. If the parties trust and respect the mediator, the sessions will not be hostile.”
Addressing Key Issues That Arise in the Private Caucus

To advance the discussion in mediation, you should ask the mediator questions that will help you understand more about the other side’s position. Below are questions recommended by experienced mediators and in-house litigators for you to consider asking during your caucuses with the mediator:

- Who is driving this decision on the other side? Who is the decision-maker?
- What do you think the other side is looking for or needs to settle?
- Why do they need that?
- What sticks in their craw?
- Do you think they are interested in preserving a business relationship?
- Is there any leverage we can apply to bring their demand down/offer up?
- Are the right people at the table?
- Is there anything besides money that might help to settle this dispute?
- Is there anything we are missing in our assessment of the matter?
- What areas of agreement do you see in our relative positions?
- Are there some fundamental factual disagreements you think may be hindering progress? Do we need to find a way to resolve/address them for the mediation to be successful?
- Are there particular personality dynamics at work that we need to understand?
- What are the biggest differences in how the two sides assess the case?
- What are the vulnerabilities of the other side if this case does not settle?
- Do you think they have carefully considered the transaction costs of taking this case to trial?
- Do you believe they have a realistic view of their risk of loss in this matter?

IN-HOUSE PERSPECTIVE

One thing usually best avoided in an opening joint session is to negotiate money. The back and forth of money negotiations are usually the closing chapters of a mediation. Once money is being negotiated, everything else tends to fall away.

Before getting to money, the merits should be explored, the interests of each side should be examined, and their risk preferences should have a chance to become evident. The costs of litigation in money, time, and emotional wear and tear might first be acknowledged and discussed. Many things that go to value should have been explored in caucus and possibly joint sessions. Usually there is no point in discussing money before exercises such as brainstorming and decision-tree analyses of all possible outcomes other than trial, evaluation of witness credibility, attractiveness of the facts and law of a case to a judge or jury, collateral damage from litigation, and external pressures that make litigation more or less attractive. Money demands and offers can be informed only by the value of what is being negotiated.

All this takes time. Of course, there are some commercial cases in which liability is tacitly or openly acknowledged, both sides clearly know the risks, and the only question is how much one side will pay the other. Even in those cases, negotiating the amount requires background understanding, time and patience.
Even if you ask these questions, you may not get satisfactory answers because of the mediator’s confidentiality obligations. One way to handle this may be for the mediator, with your permission, to share your specific concerns with the other side and see what its response is. Depending on the issue, the mediator may suggest that the other side respond directly (and not through the mediator) to you in a joint session.

Mediators naturally want to have a sense of how great the gap is between the parties and how much headroom they have to work within on each side. This can result in awkward questions about what amount of authority you have or what your bottom line is, information that you are generally inclined to keep close.

Below are strategies for addressing these types of inquiries from the mediator by signaling to him or her the relative bounds of your authority without disclosing information you do not want to divulge:

- Explain that while you have some flexibility in your current offer, given what you know about the case, you see it as an x-figure (for example “low six figure” case). This gives the mediator a sense of where you are without being too specific.

- Use the other party’s prior comments about value of the matter – either offered previously between the parties or during the mediation session – as a starting point to make reactive comments.

- Specifically concede that some claims are clearly valuable, while the value of other claims may be open to question. Be ready to trade claims that are not valuable to you, but are valuable to them, but hold these as bargaining chips until you are close to a deal.

- Convey to the mediator that the current offer/demand is “nowhere near my authority” and that the other side “will have to move a very long way in order to get to a range that will allow it to settle within my authority [or within our assessment of the matter’s value].”

- If you are the defendant/respondent, explain that you are “hesitant to move at all” given the current demand and that any move by you at this point could lead the other side to think you are willing to resolve the matter for more money than you are.
A related issue occurs when you get close to the actual limits of your authority: how do you convey that in such a way that the mediator does not discount it as posturing. One of the biggest dangers in a mediation is that a mediator may misread a party, draw a wrong conclusion, and try to move the parties to a place one of the parties is unwilling to go, misleading the other side in the process. You should convey your position that avoids this pitfall, and the following will help you do so:

- Keep in mind that an actual limit will not be believed until it is affirmed more than once. Say your number and be prepared to stick to it to prove you mean it.

- Signal the mediator two or three moves earlier that it won’t be long until you reach the limit of what you are willing to pay/take. Reaffirm that again on the next move as well so the mediator sees you are serious.

- Make smaller moves each time, thereby signaling you are slowing down and reaching your limit.

- Tell the mediator you are concerned that any move by you will result in a counter that will take you beyond your authority and, therefore, that it would be preferable if the mediator presented your offer to the other side in the following terms: “If you can come to X, I think there is a pretty good chance I can get the other side to agree to that.” In that way, you have not technically made an offer and moved off your last position, but you have still enabled the negotiations to move forward.

The mediator may return after meeting with the other side and say that, unfortunately, the other side has a dramatically different view of the case and its value and will convey a demand/offer that reinforces this. There are several possible responses:

- You can reject the counterparty’s position and reiterate your own. This is rarely productive unless you are at a “take it or leave it” point.

- You can increase your offer or lower your demand. This may be necessary but by itself may not be particularly productive.

- The most effective way to help the mediator try to break through this roadblock is to share more information with the mediator or go over your position in greater detail to help the mediator see where he or she can test the strength of the other party’s position and resolve. Any or all of the following information can be helpful. Some of it you may authorize the mediator to share with the other side and some you may ask the mediator to withhold but still consider how to use.

    - Jury research
    - Documents discrediting the other side’s position
    - Key deposition testimony
    - Affidavits
    - Information about the judge or jurisdiction where the case will be tried
    - Verdict or damage analyses
    - Legal analyses
Another challenging issue is how to interpret the messages that are being sent by the other side in its offers/demands. When it demands $10 million, does that mean it will take nearly $10 million to settle the case or could it settle for $100,000? And when you respond with $20,000, should the counterparty take that to mean that you will never settle for more than $50,000 or that you might settle for up to $5 million?

There is no way of knowing for sure at the outset of a mediation, and no way to exactly convey or precisely read, the meaning of the offers and demands. But within a relatively few rounds of this back and forth, an experienced party (and certainly the mediator, who has access to information from all the parties) can form a reasonable idea of where the negotiation is headed and what it will likely take to resolve the matter.

If you are trying to help direct the negotiations to a particular range, it can often be helpful to engage the mediator in a discussion of how he or she thinks you can best do that. The mediator has knowledge of things happening in the other room you don’t. While the mediator can’t directly share this information with you, he or she can use it to help you make offers/demands and send messages that will advance, rather than harm, the negotiations.

The most effective strategy in conveying a message is in saying something that the other side will:

- Listen to because they trust the mediator’s belief that the message is significant.
- Perceive as important because the information is critical to their assessment of risk if they do not settle.
- Appreciate because it is being shared in a manner that is direct but non-threatening.

IN-HOUSE PERSPECTIVE

Early assessments of the midpoint are artificial and unproductive. If a case is worth $250,000 and one side starts at $5 million and the other at $100,000, the midpoint is still $2,550,000. The midpoint in the first round of that negotiation bears no relationship to reality. Midpoints make sense only when the parties have bracketed their bargaining positions sufficiently close to each other so that either position could be a possible outcome at trial or either outcome fairly represents the settlement value of the case. So, if parties are bargaining at $200,000 and $300,000 and either number is not unrealistic, the midpoint of $250,000 makes sense and is probably close to where the matter ultimately will settle.
At what point in a mediation does it stop being helpful to talk about the merits?:

**A Mediator’s Answer:** “The views of the parties as to the merits of the dispute should be discussed by the mediator confidentially with each party early in private caucus, primarily to help the mediator understand the underlying facts of the dispute, the respective interests of the parties, each party’s assessment of its risk of litigation, and foreseeable problems in reaching a settlement agreement. Thereafter, discussion of the merits should be limited, and the mediation discussions focused primarily on the best interests of the parties and how they might reach a settlement.”

**A Party’s Answer:** “A mediation is always in lieu of adjudication. A party can’t assess whether a mediated outcome is favorable or not without a clear assessment of what the adjudicated outcome would be. Therefore, the merits are always important to a mediation. Moreover, the merits help to provide a party a rational basis for moving from one position to another or asking the other side to do the same. If the parties set aside the merits completely, the mediation comes unmoored.

“I certainly agree that a mediation is not the time to argue directly to the other side that your view of the merits is more accurate than theirs. However, arming the mediator with key facts or legal authority can help the mediator ask the other side the tough questions that may cause a move. At some point in the mediation, it may become less important to discuss the merits than simply what you are willing to do to reach a resolution, but I would suggest that this point comes late in a mediation and even then, does not mean you thereafter ignore the merits entirely.”
PRACTICAL CONSIDERATIONS FOR CONCLUDING THE MEDIATION

This section addresses what an in-house lawyer should do following a mediation, whether or not it results in settlement. First, we cover who should document settlement and how this should be done. We then address impasse and what actions will increase the chances of accord in the future.

When Agreement is Achieved

At the end of the negotiation, the mediator may suggest a plenary session to bring parties together and finalize the process, including memorializing all the key terms of the settlement. Before leaving an in-person mediation session that has resulted in settlement:

- **Memorialize the key settlement terms:**

  The parties must prepare and execute a written account of the settlement terms before leaving the mediation session, no matter the amount in dispute nor the complexity of the settlement terms. Memories can fail, and memories and minds can change, making it unwise to wait to document the terms of the settlement until after parting company. In the event of a dispute about what was agreed at the mediation, it is unlikely you will be able to call the mediator to testify because mediation agreements and/or governing rules or law often preclude this. Here are some options for memorializing agreement:

  - It is best to leave the mediation with a fully executed Settlement Agreement. In practice, that usually is not possible logistically.
  
  - A “term sheet” or a “memorandum of understanding” (MOU) may be useful if it is not possible to finalize the formal Settlement Agreement at mediation. The term sheet or MOU should be reviewed by law firms, clients and the mediator; all stakeholders should sign off on the document to affirm their agreement. Any such document must include the date, parties’ names, names and signatures of their authorized representatives, and a summary of the all the key terms of the settlement.
  
  - It is also good practice to state that the memorandum will be followed by a formal Settlement Agreement including ancillary terms by a date certain. The date certain should be as soon as practicable. Remember, however, that if the parties later disagree on the terms of the formal Settlement Agreement, the term sheet or MOU may be deemed by a court to be the settlement agreement, and any terms not included in it would fall away. For that reason, if, as frequently happens, the parties choose to defer preparing the formal Settlement Agreement until after the mediation session, you must include in the term sheet or MOU all terms that are essential to you.
  
  - In the simplest case, an email from one authorized representative to the other stating all the key terms of the settlement and a return email adopting it might have to suffice. However, a formal Settlement Agreement should be drafted and executed as soon thereafter as possible.

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11 Now that you have envisioned yourself going through all of that effort late in the day, you will see the wisdom of drafting a skeletal agreement, term sheet, or memorandum of understanding before entering the mediation session. It should omit, but leave room to add, terms subject to negotiation. Non-controversial terms may be included (e.g., preamble, recitals, and terms concerning governing law, interpretation, merger/integration, signature block). Consider sharing your draft with the counterparties before or during the mediation session unless you believe that will not advance matters or be counterproductive. Avoid using the draft to suggest actual settlement terms because doing so could alienate the other side. Sometimes providing a neutral draft before or during negotiations can encourage progress. Use your assessment of the atmosphere and needs of the moment and confer with the mediator if in doubt.
Consider any international aspects:

If the parties are residents of different countries, the one receiving the greater benefit under a settlement agreement reasonably might be concerned about whether it will be able to collect after the other party returns to its foreign home. An exhaustive discussion of this subject is beyond the scope here, but we present two ideas to increase chances the deal will be honored:

- You might contract for an alternative means to collect in the event of default. Those might include a confession of judgment enforceable where the counterparty has assets, a letter of credit that can be drawn upon, a commercial guarantor, or escrow. In each case, use legal and/or financial experts to secure the arrangement.

- Another way to improve the odds of successful transnational enforcement is to secure agreement in writing from the counterparty that the mediator will serve as an arbitrator after the mediated settlement is achieved to render an arbitration award based on the settlement agreement terms. That is best done contractually, in the original mediation agreement. Some jurisdictions around the world and some U.S. states expressly provide for such a procedure or deem the mediation settlement agreement to have the same force and effect as an arbitral award. However, some jurisdictions appear to bar this role for the mediator after settlement is achieved. The purpose of converting a mediated settlement agreement into an arbitral award is to create an enforceable award, embodying the terms of the settlement, under the New York Convention of 1958.¹²

- Counsel familiar with the laws of the involved countries and transnational enforcement of awards should be consulted as soon as possible.

In Case of Impasse

A mediation session that does not immediately result in settlement does not mean mediated resolution is not ultimately achievable. The session may simply have been the first step in a longer mediation process. For example, you may have learned something new about the case at mediation and now need more time to consider the situation. Perhaps the mediator has assisted in securing agreement to provide documents or information that will need additional review before mediation resumes. Perhaps the parties now realize that additional discovery is necessary (if there is a pending suit). Or perhaps the parties need time to get past the strong emotions the mediation has brought to the fore. Whatever the reason, if you hope to ultimately resolve the matter through mediation, it is important to keep the negotiations alive, and the following strategies may help:

- Agree to keep informal communication lines open:
Reaffirm to the mediator and, where productive, your counterparty, your interest in finding ways to settle the dispute and ask them to work with you in continuing the negotiation process.

- Authorize the mediator to circle back:
A mediator should contact the parties and offer continuing assistance if the case did not settle. But don’t wait for the mediator to make the offer; encourage the mediator to stay engaged and outline your expectations for him or her going forward.

- Document agreed principles, facts, partial solutions, and potential solutions:
Although the case might not be ripe for settlement, the parties may have found some points of agreement during the process. Ask the mediator to help you document these areas of accord and brainstorm possible solutions. Then encourage the mediator to do the same with counterparties. This is best done before the mediation session terminates.

¹² At this writing in February of 2018, UNCITRAL Working Group II (Dispute Settlement - formerly Arbitration and Conciliation) completed its work on the preparation of a draft convention and a draft amended Model Law on international settlement agreements resulting from mediation in New York. Both draft instruments will be considered for finalization by the Commission at its upcoming session in New York (25 June - 13 July 2018). These instruments will make the enforcement of settlement agreements arising from international commercial mediation faster and easier and will help level the playing field between international commercial mediation and international commercial arbitration, thereby giving parties a more realistic choice between the two procedures. Much process remains before implementation. Once the instruments have been finalized by the Commission, the potentially long process of ratification and domestic implementation begins. http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html
Here are a few key practice pointers for memorializing agreement:

- No matter how simple the terms of the settlement, the best practice is to create a written term sheet or MOU signed by all parties before leaving the mediation session if a full formal Settlement Agreement cannot be drafted and executed at that time.

- In the term sheet or MOU, state that the parties have reached agreement freely and intend to be bound.

- In the term sheet or MOU, state the key settlement terms clearly enough to be enforceable and dictate performance.

- While it is acceptable to note that a formal Settlement Agreement with ancillary provisions will follow, never phrase your term sheet or MOU as being “subject to” a later written agreement unless that is what is desired. In other words, avoid creating any doubt that a settlement has been reached, that the terms of the settlement are embodied in the term sheet or MOU, that those terms have been agreed to by all the parties, and that the parties intend those terms to be enforceable.

- State that the term sheet or MOU will be admissible in evidence in any proceeding to enforce its terms. Place the term sheet or MOU and its terms clearly outside of mediation confidentiality.

- A party may wish to recite a specific representation on which it has relied to reach agreement. Including that representation in the written document may be in the interest of the counterparty to avoid a fraud defense later.

- Specify the governing law.

- Have the parties irrevocably consent to the jurisdiction of and propriety of venue in the courts of a particular locale over the parties to enforce the settlement.

- Include merger/integration terms as appropriate.

- State that the individuals signing on behalf of the parties are authorized.

- State that the parties were represented in the mediation by counsel and that the parties had complete opportunity to and did consult with their counsel.

- Have the lawyers and party representatives from each side sign.

- The mediator does not usually sign the term sheet, MOU, or formal Settlement Agreement.
• **Document information gaps and agree on methods to fill them:**

Following the mediation session, you may identify areas where you need more information from counterparts in order to proceed. Ask the mediator to help you secure this information as part of your continuing efforts to work with counterparts to resolve the dispute.

• **Agree to continue mediating:**

Before leaving the mediation without settlement, ask the mediator to help you design a process to continue negotiations. For example, you might agree to provide documents to your counterparty by a certain date and, in return, the counterparty agrees to continue discussions relating to that point one week later.

• **Hold principal-to-principal discussions:**

In some cases, progress may be best achieved if stakeholders from the businesses talk to each other directly. In-house counsel usually will want to participate in the conversation or at least be present to make sure no admissions or counterproductive statements are made. But sometimes the most fruitful discussions will take place one on one. This might not suit every situation but can be an effective solution if the business people are strongly motivated to put the dispute behind them.

• **Hold discussions between in-house counsel:**

Likewise, it may help to remove law firms from the conversation. In-house counsel for the two sides might discuss possible solutions without outside counsel being present to show good faith and their ability to collaborate to achieve the best results for their clients.

• **Informally interview subject matter experts:**

To fill information gaps, you might ask the mediator to help facilitate informal interviews of subject matter experts, or other witnesses, to better understand the issues presented. You could agree that any information gathered is part of the mediation process and thus inadmissible in court. Similar processes might be explored in interviewing employees, contractors, or technical experts.

• **Change party representatives:**

When the obstacle to settlement is a party representative, it may be useful to discuss with the mediator the possibility of changing the mediation participants going forward. In many instances nothing can be done, but sometimes the mediator can have a frank discussion with that party’s counsel to explore possible change in the composition of the team. However, if the mediator does this, matters will likely be made worse, particularly if the “difficult” individual learns of the discussion and remains on that party’s team.

• **Ask the mediator to speak with the insurance carrier(s):**

Settlement is sometimes delayed when the insurance carrier needs additional time to evaluate the claim or where an insurance tower exists, and disputes remain over coverage. To the extent insurance issues have hindered settlement, ask the mediator to work with the carrier(s).

• **Deal with other perceived deficiencies:**

There are times when the dispute does not settle because your counterparty representative was uncooperative. You may wish to document this after the session, reminding the other side that you proceeded in good faith and will continue to do so in the best interests of your client. You might also seek guidance here from the mediator on whether he or she can press the uncooperative party representative to change his or her behavior in future mediation sessions.
You might consider having someone higher up in your organization contact his or her opposite number at the other party to ask that other person to have a frank discussion with the uncooperative party representative. But that can be counterproductive if the uncooperative party representative learns of the request and is not replaced, for example, because the lack of cooperation is exactly what is intended by the other party.
AFTER-ACTION REVIEW

At the conclusion of each project, many companies will conduct an after-action review to assess what worked and what did not during the project and also analyze any next steps. Such a process applied to mediation can be helpful for in-house counsel to capture any learning that might be useful in the future. Elements of the review may include:

- **Non-financial or extra-contractual matters:**
  Do you leave the mediation with a better understanding of business partners? Were you able to identify creative solutions or partnering opportunities?

- **Personnel, including personalities:**
  How did the team work together? Did outside counsel perform at or above expectations? Would you work with those attorneys again? Was the mediator effective? Would you select the mediator again?

- **Project team:**
  Was the in-house team prepared and proactive in negotiations?

- **Monitoring the relationship:**
  Who is responsible for managing the counterparty relationship going forward, if necessary? How will this be done?

- **Offer commentary to the administering institution:**
  If an institution appointed the mediator, return its evaluation form. Institutions like to know what their mediators are doing well or not well, and they pay attention to feedback.
FLEXIBILITY EMPOWERS THE PARTIES TO CONTROL THEIR OUTCOME

Mediation offers great flexibility. It is the parties’ process. Because it operates outside the strictures of formal adjudicative processes, it allows parties the opportunity to creatively and independently determine how best to structure the process for resolving – and then to resolve – their own disputes.

We hope the suggestions in this guide will help you evaluate what mediation process will best suit your needs, enhance your ability to convey messages in mediation in a way that helps the other side hear them as you intended, and increase the chance that you achieve the outcome you desire.