

Our Mediation Process

When mediation consists primarily of trading demands and offers, the reactivity inherent in litigation can unintentionally be exacerbated. Structuring the process instead as an evaluative dialogue between each party and the mediator can mitigate reactivity, allowing for a more objectively reasoned evaluation of risks and options.

Our mediation process generally proceeds in three stages:

1. Briefs are submitted approximately two weeks before the scheduled mediation date.
2. The mediation begins with everyone together in joint session.
3. The mediator then meets privately with each side in caucus.

Step One: Mediation Briefs

Briefs are submitted—either in confidence to the mediator or exchanged, at the election of the parties—approximately two weeks before the scheduled mediation date.

The disputes that come our way usually involve significant deltas in settlement positions. It is asking too much of decision-makers to modify firmly held positions to the degree necessary to bridge such significant gaps without a reasoned basis for doing so.

When the time comes to speak in confidence with each party during the caucus phase of the mediation, part of our job will be to provide that basis through an evaluative discussion of the points that are likely to drive the decision of a jury, judge, or arbitrator.

For our input into that dialogue to be credible, it is incumbent upon us, in preparation for the mediation, to put in whatever time it takes to fully assimilate the critical legal and factual issues. Review of the briefs, supplemented when appropriate by our own research, gives us the basis we need to do that part of our job.

Step Two: Joint Session

The mediation starts with everyone together in joint session.

Each side will be given the opportunity to set forth how it sees its position. The mediator then summarizes the presentation back to confirm that nothing has been missed or misunderstood.

This serves two critical functions.

First, while positions may have been exchanged ad nauseam in the course of litigation, the impact of reactivity is so profound that often little real communication has taken place. When the mediator can succinctly summarize back a presentation of some length and detail, it reassures that party that it has been heard and understood, and that the mediator did indeed take the time to read and assimilate its briefing sufficiently to have accurately tracked the presentation.

Thereafter, in caucus, if the risk evaluation articulated by the mediator differs markedly from the view held at the start, there is some basis for giving that feedback credence.

Second, the opposing side—having been mentally counter-punching throughout its opponent's presentation, and thus taking little of it in—is usually listening intently to gauge what the mediator has taken away from the presentation.

Ironically, even in heavily litigated cases, this is often the first time the decision-makers have truly heard—rebounced through the mediator—the basis for their opponent's position.

Of course, we do not aspire to establish agreement between the parties in joint session, only a degree of clarity regarding what is keeping them apart.

Step Three: Caucus

Robust evaluation of issues and options is essential to finding a path to resolution.

The caucus provides a safe space to hear devil's advocacy on risks, share information that may inform or constrain settlement options, and identify options without fear of compromising future negotiating positions.

This is an iterative process. Caucusing will continue until it is no longer generating movement toward resolution and it has become clear which issue or issues—out of the many the parties have been disputing—are actually driving the delta in settlement positions.

At that point, the mediator should be able to introduce a proposal for resolution under a protocol that assures each party can respond initially in confidence, without the risk that it might leave without an agreement but burdened with a new floor or ceiling on future settlement negotiations.

This process has been field-tested for decades. While counterintuitive to those accustomed to the time-honored progression of position bargaining, it has resulted in thousands of settlements in disputes ranging into the billions of dollars.