

# *Six Best Practices for Effective and Successful Multi-Party Mediation*



By: Michael Hodgson

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When most people think of a lawsuit, a few things come to mind: written pleadings, motion hearings, juries, and trial. However, litigation involves a whole breadth of activities, from document review, written interrogatories, depositions, deep research, and, in many cases, data analysis. One often-overlooked aspect of litigation settlement is the use of alternative dispute resolution (ADR), which, in most cases, often involves mediation. However, ADR can represent a broader category of dispute resolution mechanisms beyond mediation, such as arbitration, mediation/arbitration, and mini-trials, to name a few.

In litigation, it is well-established that 90-95 percent of cases will settle prior to trial, and many will settle after the trial process has concluded. The vast majority of these cases settle during a mediation, which of course, is a process by which a neutral party reviews position statements, carefully listens to the parties, and provides feedback, thereby helping the parties negotiate a resolution to the lawsuit through shuttle diplomacy.

Courts often expressly encourage the parties mediate their dispute. More and more, federal and state courts have mandated mediation as part of the Court system that *requires* the parties to attend mediation. For example, in Missouri, the Federal District Court for the Western District has established a robust mediation procedure known as the Mediation and Assessment Program (MAP).

If courts encourage or require parties to engage in mediation and the most likely outcome of a lawsuit is a compromise settlement, then best practices would prescribe that effective practitioners should hone the skills of their litigator toolkit in a manner that maximizes efficiency with alternative dispute resolution. The following six practices are suggestions that will help ensure the negotiation phase of the case will be effective:

## **1. ENGAGE IN PRE-MEDIATION DISCUSSIONS WITH YOUR CLIENT FOLLOWED BY DISCUSSIONS WITH THE OPPOSING PARTY.**

When the court orders mediation or when sufficient information has been received that mediation is deemed to be beneficial, it is important to discuss with your client the reasons that it might be beneficial to engage in mediation and to explain the attorney's role in mediation. As part of the conversation, the client should be advised how the mediation process works, the client's role and a cost-benefit analysis should the mediation be unsuccessful. Once the client

fully understands the mediation process, the time has come to approach your counterpart to schedule the mediation.

Once both parties have agreed to engage in multi-party mediation, it is very helpful, if not essential, to engage in pre-mediation discussions. This is important because it does several things: First, it is useful to frame the discussion in advance, so on the day of the mediation, the parties are focused on a finite set of issues. Second, it can help set the tone of the mediation. For example, a professional exchange of information is likely to assist in disarming pre-existing biases held by clients (and occasionally attorneys) and will help facilitate constructive discourse. Finally, it allows both sides to attain a snapshot of likely areas of more intense dialogue, allowing the lawyer to better prepare for the other side's arguments and suggestions.

## **2. IF POSSIBLE, WORK WITH COMMON FACTS/DATA.**

More and more multi-party lawsuits are data-driven. In class actions, collective actions, and multi-party litigation especially, robust data analysis can be the single biggest determiner of effective persuasion at a mediation. In a dispute about wages, for instance, if a party has analyzed hundreds of thousands of time clock records, that analysis can (and usually will) demonstrate patterns that emerge, but only after reviewing the entire database. For example, if one or even ten payroll records are inaccurate, that might be attributable to human error, strengthening a "*de minimis*" or "rogue manager" defense, while if the data is systemically inaccurate, it may do the opposite: strengthening an argument for liability.

Because of this, prior to the mediation, it is absolutely critical to agree on a pre-set scope of informational data that both sides can access for analysis. At first blush, it might seem that having better and more robust data than the other side would be advantageous. However, the opposite tends to be true. If the parties have unequal access to information, the party with less information will undoubtedly discount the arguments posited by the other side, since they may feel "ambushed" and unfairly treated. Further, the party with the most data is more likely to dismiss the opposite party as having an incomplete picture of the whole.

When possible, the parties should exchange all data likely to be relied upon prior to the mediation, with enough time for each side to fully process and analyze that information. If one party does not have a full analysis, it may be a better practice to postpone the mediation until that analysis has been fully completed.

## **3. UNDERSTAND WHAT YOUR DATA/INFORMATION REFLECTS, AND ALSO ITS LIMITATIONS.**

While data analysis is one of the most critical components to effective multi-party mediation outcomes, it is not exclusive. Almost without exception, data alone does not tell the full story. A good example of how data can be incomplete is again found in employment litigation.

In restaurant litigation, generally speaking, the law would require that tipped employees, who are paid at a rate below state and/or federal minimum wage, be paid full minimum wage for time spent engaged in non-tip-producing activities, if that amount of time meets a certain threshold. It is possible to compare the amount of time that a server has customers with the time that the

employee is “on the clock.” The basic analysis would dictate that if the amount of time that a server has no customers is in excess of the legal threshold, it stands to reason that there would be a violation if the employer didn’t pay the higher hourly rate for that time, right? *Not necessarily.* First, the employee may spend even more time in non-tipped work even when they *do have* customers. Not all of the employee’s time with customers means that the time was actually spent performing tip-producing activities. Second, a server may wait to open an order until the customer places an order, even though the server has had customers for some time prior to what the time stamp might indicate. This might artificially deflate the recorded amount of time with customers.

In such a case, the data, while extremely robust, maintains inherent flaws. A lawyer’s failure to recognize the flaws (or gaps) in the data and be ready to address them at ADR will result in an adverse outcome for the client(s) (and eventually, if uncorrected, at trial). Effective litigators know what limitations data maintains and can use the data both defensively and offensively in negotiations. They can tell the other side of the limitations and also use strategies to fill in the gaps that are disadvantageous to their position, strengthening their clients’ negotiation position, and increasing the arguments’ persuasiveness.

#### **4. MANAGE CLIENT EXPECTATIONS BEFORE AND DURING THE MEDIATION.**

Professional ethics rules mandate that the client is responsible for all decision-making about whether to settle, for how much to settle, or whether to go to trial. Necessarily, it follows that the client needs to understand why an offer should be accepted or rejected. By front-loading not only what the process will look like, but what a range of reasonable outcomes might look like, a lawyer helps their client manage their emotions and look at their case with some objectivity. Effective litigators know that there is no one “bottom line.” And they should fully apprise their clients and recommend that they do not maintain a bottom line either.

#### **5. SET GOALS/BENCHMARKS BASED ON OBJECTIVE CASE VALUATION.**

Effective case valuation is highly important. It allows both parties to compare what they reasonably believe to be an adequate outcome against each side’s relative place in the bargaining position during the negotiation. It is rare that either side to the dispute would start with a bargaining position close to their anticipated result. Because of the adversarial nature of litigation, and because of the lawyers’ duty to “zealously advocate,” mediations will require hours of hard work, with multiple exchanges through the mediator, to establish a range (or whether there even is a range) in which a resolution might be attained.

Prior to the mediation, each side should carefully analyze their case, looking at the available data, potential witnesses, statutory and case law authorities, the judge assigned, and the potential jury pool, combined with known results on similar matters. All of these factors are to be considered in arriving at an “acceptable range” or outcome. Once those benchmarks are established, it enables a party to better decide whether to compromise and end the litigation.

## **6. MAINTAIN FLEXIBILITY WITH RESPECT TO BENCHMARKS AND BE OPEN TO THE OPPOSITION’S ARGUMENTS.**

But benchmarks/goals cannot, and should not, be static. The inherent nature of the process for advocacy will inevitably result in unexpected or unanticipated exchanges at mediation. In these situations, the effective litigator knows that he or she should remain flexible and open to considering the other side’s arguments. Even extra-legal factors, such as financial solvency of one party, may dictate a divergence from the other party’s established baseline range, even if reasonable by any other measure.

Baseline expectations are vital, to be sure, but like data, they don’t dictate the totality of the circumstances. A \$2,000,000 verdict is largely unenforceable in practical terms where a party has only \$100,000 in assets. Thus, it is imperative to maintain some sort of flexibility that is entirely circumstance-dependent.

Moreover, if, as discussed above, a party fails to anticipate the entirety of the arguments and defenses presented at mediation, intractability based on pre-mediation benchmarks can be disastrous and will lead to poor outcomes.

Ultimately, mediation rewards preparation, communication, and adaptability in equal measure. Those who approach the process with both rigor and openness are best positioned not only to resolve disputes efficiently, but to do so in a way that reflects the true complexity of modern litigation. Along with the assistance of an experienced mediator, these six “best practices” will help ensure that you and your client will successfully navigate the ADR process on the day of the mediation.

In conclusion, successful mediation requires far more than persuasive advocacy during negotiations; it demands preparation, transparency, strategic analysis, and adaptability long before the parties arrive at the mediation table. As modern litigation becomes increasingly data-driven and procedurally complex, effective litigators must be prepared not only to understand the legal merits of their case, but also to evaluate the strengths and weaknesses of the underlying facts, data, and practical realities that influence settlement outcomes. Attorneys who proactively communicate with clients and opposing counsel, carefully analyze available information, and establish objective benchmarks for resolution place themselves in the strongest position to negotiate effectively and efficiently.

At the same time, mediation is ultimately a dynamic process that rewards flexibility and professionalism. No amount of preparation can fully eliminate the unpredictability inherent in litigation or negotiation. The most effective advocates recognize that settlement discussions often evolve as new arguments, risks, and practical considerations emerge. By remaining open-minded, managing client expectations realistically, and approaching the process with both confidence and adaptability, litigators can maximize the likelihood of achieving favorable and meaningful resolutions. In the end, successful mediation reflects a balance between rigorous preparation and the willingness to engage constructively in pursuit of practical solutions.

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## About the Author

Michael Hodgson has litigated and mediated hundreds of class action and collective action lawsuits for over 20 years. He brings a wealth of experience in complex litigation settlements, including wage and hour law and class and collective actions, giving the parties the best opportunities for resolution that serves all sides.

When not practicing law, Mike enjoys spending time with his family and volunteering with the area's youth through Scouting America.

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