

## *Mediating in the Red Zone – An Advocate’s Checklist*

by Kent B. Scott

**I**t’s first down and ten on the twenty-yard line of your opponent’s goal. You are in the red zone. Here we go again. Crunch time. In lawyer’s terms, it’s mid-afternoon and you and your client are in the world of “mediation gridlock.” What can you do to travel that last twenty yards to resolution? What have you done to prepare for this moment? This is the moment when both you and your opposition dig your heels in up to your ankles.

A “fumble” at this point could send you and your client to the showers: cold, cold showers. What you say and how you play in the red zone can bring you across the resolution goal line or result in another turnover and send you back to the litigation system. The key to success in the mediation red zone starts before the negotiation begins and requires skill and patience as the goal line approaches. The following article is designed to help the mediation advocate negotiate his or her way through the mediation red zone.

### **Why the Need for Better Bargaining in the Red Zone?**

How are we doing as a profession in predicting the outcome of a litigated matter? A couple of recent studies revealed surprisingly identical results. Over 2,000 cases were analyzed in two separate jurisdictions. The studies compared the refused best and final settlement offer with the eventual verdict. In both studies, the plaintiffs committed decision errors in 61.2% of their cases. Defendants made decision errors in 24.3% of their cases. However, the magnitude of the error told an even more interesting story. On the average, the verdicts for the plaintiffs were \$43,100 *less* than the average offer while the defendants paid on average \$1,140,000 *more* than they could have to settle the case.

How can you make mediation a successful play in helping you and your clients achieve a better alternative to a litigated resolution? First, you need to determine when it is right to mediate. Second, you need to find the right mediator. Third, you need to ensure that you have properly prepared for the mediation by (1) drafting an effective and powerful mediation

position paper, (2) preparing your client for the mediation process, and (3) ensuring that you have someone present with settlement authority. Finally, to make mediation successful, you must trust the mediation process.

### **When to Enter the Mediation Red Zone**

Two phrases are responsible for not getting a matter to the bargaining table at the right time: (1) “It would be a waste of time because the other side is so unreasonable” and (2) “We are too far apart to explore settlement.”

Mediation advocacy in the red zone is not trial advocacy. Good mediation advocacy requires openness, candor, and a willingness to compromise. A forthright exchange of material information is required. Preparation is key for playing in the mediation red zone. Withholding material information usually turns into a fumble that ultimately sabotages the mediation process.

Additionally, being willing to compromise is critical to operating in the mediation red zone. No mediation should be held unless all participants come to the table with a desire and willingness to compromise in good faith. Every lawsuit involves handicaps, costs, and risks. Unfortunately, the “I win, you lose” attitude just does not work. Instead, both counsel and client need to come to the mediation with a willingness to find a better option from that of a litigated resolution. The advocate or client that comes to the table with an “I win so you can lose” attitude is offside and out of bounds, a sure recipe for impasse.

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## Choosing the Right Mediator

Mediator selection is critical to operating in the mediation red zone. Think of the mediator not as a coach, opposing player, or referee. Rather, the mediator is really like an unbiased color analyst that sits up in the booth and oversees the entire playing field. The mediator has the play book from both opposing teams and a computer full of information at his or her disposal that the mediator has studied. The mediator is neutral. The mediator's job is not to impose a resolution but to find pathways through which the players can navigate toward their objectives while mediating in the red zone. The following are a few factors to consider when selecting a mediator:

### Style

Do you need a “facilitator” or an “evaluator”? The best mediators will use an approach that uses both styles as the circumstances of the case require. Mediators should shy away from predicting outcomes unless given the opportunity to be fully informed of all material facts and law.

### Focused

The mediator must be patient, prepared, and candid. The mediator should be willing to work with the parties prior to, during, and, if requested by the parties, after the mediation until the case is resolved.

### Subject Matter Expertise

Commercial lawyers generally look for a mediator with expertise in the kinds of cases like the one being mediated. The mediator will have a better learning curve and grasp of the material areas in dispute. It is commonly understood that the mediator will be able to evaluate the opposing positions. However, keep in mind that a mediator with subject matter expertise should also have adequate training and experience in mediation process skills to be able to help the parties through the red zone.

### Process Expertise

Every mediator should first go through adequate training in the mediation process and be familiar with ethical standards, best practices, and standards for mediating a case. The mediator should have a working understanding of mediator ethics, best practices, and basic mediation concepts such as confidentiality, consent, and rights of the mediation participants.

## Prepare a Powerful Mediation Position Statement

The purpose of the mediation position statement is to both

educate and advocate. Your audience is the mediator and the opposition. Demonstrate the strong points of your case and set the stage for a successful red zone offense. But don't fumble around by taking positions that cannot be supported. The following suggestions will help you to write a powerful position paper that educates both mediator and the opposition:

### Remember Your Objective

The goal of mediating in the red zone is to cross the goal line of resolution. The idea is to end the dispute, not add to it.

### Exchange Position Papers

There is a division of thought in the legal community as to whether position papers should be exchanged. Confidential material such as mediation weaknesses and process objectives should be provided to only the mediator. Keep in mind, however, that if you are going to reach your goal, you need to educate the opposition about your strong points. To settle in mediation, you need the opposition's consent. Your chances of obtaining that consent are greater if you educate the opposition on how to see things your way. I encourage the parties to consider making some good faith exchange of information, particularly if the mediation is taking place before formal discovery, motions, or expert reports have occurred.

### Support Your Statements

In reading your mediation position statement, the mediator will be interested in learning about the factual background of the case, the key issues, and the areas of agreement and disagreement. More importantly, the opposition will be looking to see how strong your position really is. Supporting arguments should be provided. Attach key documents and other exhibits as well as copies of cases that you believe to be controlling.

### Pre-mediation Conferences

I am a strong proponent of holding pre-mediation conferences, with the parties or their representatives, prior to the mediation itself. These conferences are usually held via telephone. I consider these conferences to be part of the mediation process and, as such, confidential. The following is a brief outline as to what, at a minimum, I like to discuss with counsel:

- The names and authority of those attending the mediation.
- Setting adequate time for the mediation.
- Discussion of key points and issues raised in the mediation position statements.

- Identifying the areas in which the parties are at an impasse.
- Counsel's perception of the personality traits of the parties.
- Whether or not a joint session is to be used.
- Encouraging counsel to exchange the non-confidential portions of their mediation position statements.
- Where points of evaluation by the mediator are needed.
- A history of offers and counter-offers between or among the parties.

### Preparing the Client

Before going to mediation, and in preparation for bargaining in the red zone, you and your client will want to prepare a playbook. You do not want to get your signals crossed. It is the attorney's job to help the client understand that a mediation is different from a court proceeding. Both counsel and client need to be clear on the roles of the mediation participants.

When preparing to bargain in the red zone, don't spend just a few minutes on the telephone with your client. Rather, think about holding a meaningful meeting. Go over the following points:

- The objective is to find the client a better option to a litigated result. Define those objectives.
- The mediation process is confidential. The judge can be told whether a mediation was held. If the mediation resulted in an impasse, that is all the judge is told. If the mediation resulted in either a partial or full resolution and was reduced to writing, that writing can be furnished to and enforced by the court.
- Client consent is required on all matters affecting process, procedure, and settlement.
- The mediator's role is to be neutral. The mediator will not attempt to decide who is right or wrong.
- You and your client are not going to the mediation to impress the mediator; you must impress the other side.
- Talk about the level of evaluation you want from the mediator.
- Be reasonable and courteous.
- Do not damage your credibility through exaggeration or false statements.

- Discuss what you want to go into the mediation statement and whether you want the mediation statement exchanged or just furnished to the mediator.
- Develop a bargaining strategy.
- Define agreed upon bargaining objectives. But be prepared to listen to the opposition and mediator. Expect the same courtesy from both.
- Keep an open mind and do not adopt a bottom-line approach.
- Be prepared to stay until the case is resolved or until the mediator says that an impasse has been reached.
- Some cases will take more than one session to settle. Do not be discouraged if the case does not settle at the first mediation.
- Counsel and client should hold a debriefing session after any mediation resulting in impasse. Discuss whether you want the mediator to follow up with the parties and what the scope of that follow-up would entail.

A well-prepared and articulate client is the best tool an attorney has as you go forward to bargain in the mediation red zone.

### Settlement Authority: Don't Leave Home Without it

The most common cause of a failed mediation is the absence of persons with real settlement authority. Settlement authority means the authority to agree to whatever is necessary and reasonable to dispose of the case or any material part thereof.

What about limited authority? Sometimes we see client representatives being sent to mediation without adequate authority to settle. They have only limited authority based upon their side's unilateral evaluation of the case. We call this situation "drinking the Kool Aid." This results in putting the handcuffs on the mediator. In doing so, that party has just sabotaged the mediation and wasted everyone's time, cost, and efforts to find a better option to a litigated result.

The lack of real authority is usually apparent to everyone. If the other side is fully empowered to settle, it will become justifiably upset at the uneven playing field and will lose interest in further mediation. Attempts to bring the other side back to the table later may not succeed.

How do you handle a situation dealing with institutional authorities

that need council or board approval? In many cases there will not be any one individual who has actual settlement authority. Insurance carriers and other institutions that operate by committee will evaluate a case based on information submitted in advance. Based upon that evaluation they will send a representative who is authorized to settle but only up to a specific amount. In these situations, it is essential that the claimant provide all necessary information in a timely manner so that the maximum authority will have been granted.

It is everyone's job to see that the individuals who are authorized to settle the case are present. This should be handled at the pre-mediation conference level. If you want to have a successful mediation, do not try to mislead the mediator or the other side about this critical element of the mediation process. Bring full settlement authority and insist that the other side do the same.

### Playing in the Red Zone – Let the Bargaining Begin

All disputes that arrive in the mediation red zone have stumbling blocks. Often a dispute will look too challenging to overcome. Negotiating your way through the red zone is about *persuading* as opposed to *compelling* your opponent to give you something while at the same time providing the opponent with a solution to its problem.

To reach a resolution, a case must enter the “zone of bargaining.” The zone of bargaining is that place where the demands of the parties can be supported by the facts and law of the case. Get into this zone as soon as possible. JUST DO IT! This will make the process go easier on all. It really doesn't matter who makes the first move. It doesn't matter if you use baby steps, bracketing, or massive movement. JUST DO IT! Make the magic words of mediation your mantra: “Movement, Movement, Movement.”

The following are a few moves out of the red zone playbook you may find useful when you find yourself with an opponent who is really digging in its heels:

- Seek first to understand the underlying reasons for your opponent's position.
- Advocate by educating. This is the art of mediation advocacy.
- Be balanced in your trade-offs. Work with the mediator to find a solution for your opponent's problems, while at the same time obtaining a solution for your client's needs. Make it easy for the other side to give you what you need by solving

the other side's problem while you achieve your client's objectives in the process.

- Get real. Observe each concession and respond accordingly. Making a generous concession, if it is still within your acceptable range, should elicit a generous response from your opponent. If you make a significant concession, you should expect a reciprocal response. It may sound obvious, but if your opponent refuses to play that game, do not continue to be generous. Instead, simply go back to matching your opponent's response. Just keep the mantra of movement alive.
- The bottom line. I would discourage counsel and their clients from coming to a mediation with a bottom line in mind. Instead come with an open mind and a willingness to educate and be educated by your opposition. Be willing to listen, and seek to understand the opposition's material points. Work with your client and the mediator to evaluate the strengths and weaknesses of those points. It costs nothing to listen. There is no one compelling you to settle just because you are trying to better understand the root cause of the impasse in your case.

### Trust the Process

Sometimes it pays to “take the cotton out of your ears and put it in your mouth.” While you are in a mediation, you have formed a relationship based upon party consent, confidentiality, and your own creativity. Your relationship was forged in conflict. Your goal is to change the dynamics of the relationship and convert it from conflict to resolution. While bargaining in the red zone, you may experience what is known as “The Four Horsemen of Mediation”: Frustration, Hopelessness, Fear, and Helplessness. These “Four Horsemen” often lead to anger, which often results in impasse.

Trust the process. The sure route to a poor outcome in the mediation red zone is to lose your composure and make an unforced error. Don't fumble the ball. Pay close attention to what your opponent is revealing about its own objectives, while calmly holding on to your own. Stop resisting and start listening. Look for a better option to a litigated resolution. If you do, you will strengthen the prospect of a satisfactory mediation red zone result as you cross over the goal line of resolution. Don't let “The Four Horsemen of Mediation” frustrate your ultimate objective. Stay on track, and give your mediation its best chance to cross the goal line.

If everyone would take an eye for an eye, then no one would see straight. Trust the process. Work the process. By doing so you will strengthen your chances of reaching a satisfactory result, whether you settle or remain at an impasse.

### **Be Willing to Say “No Deal”**

There may be a time where you decide to “go for broke” on fourth down rather than attempt a field goal. Whatever the circumstance, execution in the red zone is about getting what the client needs as opposed to what it may want. It is essential that both you and your client are clear and on the same page in terms of your willingness to walk away.

Abraham Lincoln may have said, “A good settlement is better than a good lawsuit,” but always remember that “no deal is always better than a bad deal.” Just make every effort to stay on the same page with your client.

### **Conclusion**

The sure route to a poor outcome in the mediation red zone is to lack candor, go for a win-lose result, and lose your composure. This type of approach will result in impasse. The challenge to mediating in the red zone is to be able to find an alternative for your client that is better than a litigated resolution in terms of remedy received, money spent, and sweat, toil, and tears expended.

Remember your job as counsel. It is not up to you to get a matter settled. That is not your job, particularly when you need the consent of your opposition to achieve a bargained for resolution. Rather, your job is to work alongside your client to search for your best options given the nature of the playing field you have been asked to be a part of. Having done that, you can say, “This was a good day to be a lawyer.”

I close with the words of Winston Churchill while serving as the leader of his country in its darkest hour: “Never give up. Never, never, never, never give up.”