

How to Get the Most for Your Clients When Their Case is Referred to Mediation

Managing the Mediated Case From the Attorney's Perspective

by Bonnie Blume Goldsamt

Pursuant to N.J.Ct.R. 1:40-1 *et seq.*, 90 days after the first answer is filed in a civil lawsuit in any one of 12 case types, including employment, commercial, products liability, construction, environmental or Law Against Discrimination, counsel can expect to receive notice and an order, confirming referral of the case to mediation (the mediation referral order or MRO) and the appointment of a mediator.¹

This article is intended to assist counsel in better representing clients in managing cases sent to mediation, so they can obtain the best possible outcome for their clients.

First and foremost, counsel and their clients are required to cooperate in the mediation process in "good faith" and with a sense of urgency.² The mediator and counsel need to work together harmoniously, in a concerted effort to find creative solutions to the parties' conflict. The mediator also expects the clients to play a major role in the mediation process. After all, it's the *parties'*, not the lawyers', dispute.

Initial Contact Between Mediator and Counsel

Once the MRO is received, the mediator will contact counsel to set up the initial organizational conference call, as required by the court rules.³ Most mediators send notice of the conference call, including a proposed date and time, by fax or email. Upon receipt of such a communication, the attorneys should confer with each other and promptly confirm the date with the mediator. If counsel need to set up an alternative

date, *before contacting the mediator*, they should agree on proposed alternative dates and provide this information to the mediator. Barring complications, the call must take place within 30 days of the MRO. Most mediators schedule these calls during lunch time or at the end of the day (after 4 p.m.).

In more complex cases, involving multiple parties, including defendants or third-party defendants, who have not as yet been served and/or appeared, counsel may request additional time for the scheduling of the initial conference call, to facilitate the appearance of the additional parties. The mediator will not, however, postpone the conference call indefinitely. Sometimes, the mediator will proceed with an initial brief conference call to be followed up with a longer, more comprehensive conference call or calls once all parties have appeared. The mediator can customize the mediation to the needs of the parties, provided counsel explain any procedural concerns and make specific requests.

Organizational Conference Call

In the first organizational conference call, as required by the court rules,⁴ the mediator sets the tone and the schedule for the mediation, including informal information exchange. This is when the mediator begins to get a read of the case and an understanding of the procedural and substantive issues and a sense of the concerns of the parties. The call itself should take about a half hour (or less). However, more complex matters with multiple counsel and issues can take closer to an hour. More complicated cases may require follow-up conference calls both before the mediation begins and between mediation sessions. The mediator may also speak separately with counsel.

To ensure the best mediation possible with a positive outcome for the clients, attorneys need to work constructively and cooperatively with the mediator at all times, including

during the initial conference call. In advance of the call, attorneys should adequately prepare for the mediator's questions. Moreover, they should have their calendars (and those of their clients) readily available, as the mediator will be scheduling the mediation.

The mediator's agenda for the initial conference call looks something like this:

1. Introduction of the mediator, the mediation process and the mediator's and the parties' roles in the process under N.J.Ct.R.1:40-1 *et seq.*
2. Brief description (by each attorney) of the issues in the case, including any procedural problems, such as newly added parties, and factual and legal issues.
3. Discussion about informal information exchange. This is not discovery in the traditional sense, but rather information the parties need to be adequately prepared for mediation. To assist the parties, the mediator will set up dates for informal information exchange.
4. Discussion and assessment with counsel about who actually needs to attend the mediation. This includes the parties themselves and party representatives with full decision-making authority. In the case of corporate entities or municipal bodies, like towns and school boards, the discussion will focus on the party representative most likely to influence and recommend a settlement. The court rules empower mediators to require the attendance of "persons with negotiating authority."⁵ Claims adjusters should, if at all possible, be prepared to attend the mediation in person, and not just phone it in. Mediators understand that having the right people participate in person at the mediation can make a significant positive difference in the outcome. Attorneys need to understand

and appreciate this as well, so they can persuade their clients to participate in person.

5. Scheduling of submission of brief mediation statements of facts and proposals for settlement, usually due one to two weeks before the initial mediation session. The mediator has the discretion to determine whether mediation statements should be confidential (for mediator's eyes only) or shared among and between the parties.⁶ All documents and submissions prepared for the mediation are confidential in accordance with the New Jersey Uniform Mediation Act,⁷ and the court rules.⁸
6. Scheduling of the mediation, including back-up dates. Counsel should alert the mediator to any scheduling concerns, particularly for out-of-town participants. The mediator will work with counsel to ensure the needs of the parties are met as far as practicable.

It is best to begin the mediation in the morning, thereby allowing sufficient time for the process to unfold. Mediation requires time and patience by all participants. Attorneys and their clients should resist the temptation to put other matters—professional or personal—on their calendar that day. If the parties perceive progress is being made, they invariably stay well beyond the free hour of session time. By announcing at 10 a.m. that you (or your client) have to leave for a closing or a dentist appointment at 1 p.m., you may unnecessarily irritate other parties and counsel, who consider such an action to demonstrate a lack of good faith. Moreover, by imposing such unrealistic deadlines (often as a tactic), counsel may frustrate or delay any progress being made in the negotiations.

Preparing for the Mediation

Counsel and their clients should prepare for the mediation well in advance

of the scheduled date(s). Parties routinely expect their attorneys to do all the talking in the mediation. For their part, attorneys frequently advise their clients in advance not to speak at the mediation. This is not the most useful advice, because the mediator will invariably speak directly to the parties, regardless of the presence of counsel.

It is far better for the clients to be prepared to participate in the mediation and ready to discuss facts and his and her needs and interests in getting the conflict resolved. Counsel can, and should, help their clients recognize that mediation provides them with the opportunity, often for the first time, to present their case before a neutral facilitator, as well as the other parties and counsel. However, the neutral facilitator is not the decision maker. Rather, the key to resolution lies in the hands of the parties who created the dispute in the first place.

Counsel should also help their clients realize that disputed facts and legal issues will not be resolved in mediation. It is unlikely that one party will be able to persuade the other to abandon his or her case in mediation. Thus, the only 'victory' to be achieved in mediation is a satisfactory settlement that works for all concerned.

In meeting with clients to prepare for the mediation, attorneys should outline the issues, including disputed facts and law, the strengths and weaknesses of both the client's case and the other party's case. Too often, attorneys seem overly positive about their own client's chances for a successful outcome (through trial). Counsel should realistically discuss possible outcomes as well as the costs of pursuing the matter in the courts, including all professional fees. Yet, attorneys frequently neglect to provide such crucial information to their clients, leaving these difficult conversations for the mediator.

Counsel should advise their clients

on how the law applies to the facts, and provide general legal information and information about litigation and its costs. They should provide specific information about the legal issues, and discuss what information is at hand and what information is needed from the other party in order to evaluate the facts. Counsel and clients should discuss how the facts should be presented during the mediation, including claims the client is pursuing and any claims being pursued by other parties.

Counsel can assist clients in planning for possible compromises and trade-offs, which could be accomplished in the mediation. A client may be able to give something up to another party, which *that* party needs, at a low or no cost to the client.

The Statement of the Case

The mediator spends time before the mediation and between sessions reading submissions and reviewing documents. Counsel (and their clients) ought to treat the mediator with respect, as he or she is there to assist the parties in resolving their dispute.

Time and effort should be spent in preparing the statement of the case to ensure it contains the following information (and relevant documents): 1) identification of the issues; 2) a summary of the facts; 3) an explanation of the client's position; 4) citation of applicable law and cases (if a particular case is important, attaching a copy is a good idea); 5) a summary of any prior negotiations, including any demands and offers; 6) identification of any special problems, which may need to be considered (even any emotional/relational problems between the parties or counsel); and 7) a detailed breakdown of any damages claimed.

In preparing clients for mediation, counsel should ask them to clearly articulate their needs and interests, and to identify the needs and interests

of the other party. In order to prepare strategies and techniques, role playing by way of simulated negotiations may prove helpful. Counsel should coach their clients in negotiating possible outcomes and advise their clients on reasonable and appropriate ranges for settlements.

The Opening Statement

The court rules require the mediation to commence with an opening statement of the mediator "describing the purpose and procedures of the process."⁹ Most of the time, attorneys come prepared to speak during the joint opening session. Once in a while, they ask to go right into caucus session without a joint opening session. That can be a mistake, as much can happen and much can be learned about the parties and the case in joint session.

Before the mediation, counsel can do much to bolster their client's case. For example, they can prepare aids for use in the mediation to help the mediator and the other parties (and counsel) understand the client's perspective and positions. They can also prepare summaries and copies of supporting documents for use in mediation, making sure there are enough copies in advance for all parties and the mediator.

Practice Note 1: A well prepared, skilled and experienced mediator may need to spend more than an hour on preparation time to be 'up to speed' on the case; and few cases settle in an hour. The benefits of a mediated settlement far outweigh the costs of that mediator's services, which are split between and among the parties.

Practice Note 2: Documents prepared solely for mediation may be confidential under the New Jersey Uniform Mediation Act.¹⁰ So, counsel must be clear and agree in advance on documents that are *not* to be considered *confidential* and that may be used for trial purposes.

The Usefulness of Caucusing

Some mediators treat anything discussed in caucus as confidential and not to be shared with other parties without express permission. Others treat information gleaned from caucus sessions as information that *may, in the mediator's discretion*, be shared with other parties *unless the mediator is asked to maintain confidentiality with respect to that particular information*. The mediator should inform counsel and the parties about how he or she handles caucuses and the information derived during that time. If the ultimate decision is not (as yet) to share particular information, counsel should make sure to remind the mediator about this before the mediator leaves the caucus. This is helpful to the mediator, who is probably juggling several matters at a time.

Early caucuses generally focus on information exchange. Clients are able to talk directly and privately with the mediator and explain their needs and concerns. During these meetings, the mediator endeavors to understand the underlying conflict and to determine how best to assist the parties in finding solutions to their problems. At the same time, clients and counsel begin to develop confidence in the mediator and in the process. Even the most skeptical attorneys and clients may perceive a glimmer of hope that the matter may actually settle.

Settlement Demands/Offers

In developing settlement options, the best advice is for clients to be open and flexible. Too often, clients become fixated on only one solution, which naturally involves prevailing in court and receiving sizeable dollar amounts from other parties.

To avoid, or at least minimize, the focus on money, mediators tend to shy away from getting to these issues too soon in the negotiations. Once initial

offers are being contemplated, counsel should advise their clients to make principled opening demands or offers.

Instead of adding kindling to the fire, counsel can encourage their clients to be creative and think outside of the proverbial box. Attorneys can ask their clients to identify and list all the things the other party can do to satisfy their interests and to identify and list all the things they can do to satisfy the other party's interests. This list should encompass all non-economic components of the potential settlement.

Practice Note 3: The mediator is not a mind reader. If a client needs something in order to settle, counsel should make sure to get it out on the table.

Making a rational and reasonable opening offer helps significantly in the process. Counsel and client should be prepared to explain how they arrived at this demand. Demands and offers that are too high or too low can stall the mediation and anger the other side unnecessarily. Also, it is unwise to decide in advance on a bright line beyond which your client will not move. So called bottom lines have little use in mediation. Once again, the key in developing settlement options is flexibility.

On Reaching Agreement

Before setting foot in the mediator's

office, counsel and clients should list all components that must be contained in a written agreement. Since flexibility is key in mediation, this may change during the mediation process.

Attorneys should take careful notes as the mediation unfolds. This will prevent them from forgetting an important term when drafting the agreement, especially since the drafting will likely occur in the mediator's office. Indeed, once resolution is reached, the mediator will ask counsel to draft a settlement agreement, including all salient terms and conditions. Before signing the agreement, parties are informed that this is their final 'deal.' To ensure that proper and complete language is contained in the settlement agreement, attorneys can bring draft paragraphs with them to include in the document itself. They can also ask their staff to forward (by email or fax) copies of draft documents and releases.

A Few Final Words of Advice

From the beginning, establish a working relationship with the mediator. Be professional and courteous and create a tone of cooperation, congeniality and conciliation. At all costs, *avoid being confrontational*. Use the mediator as an ally and a resource. Give the mediator the tools with which to work.

During the mediation, use the lan-

guage of persuasion, not advocacy. Establish your own credibility and trustworthiness in the eyes of the mediator. Actively work on problem solving. In so doing, you and your client are demonstrating that you recognize the mediation as an opportunity for developing creative options aimed at a satisfactory settlement for all concerned. ♪

Endnotes

1. A proposed change to the mediation referral order would make attorneys more aware that they and their clients may select a mediator, or, in default thereof, accept the court-appointed mediator.
2. N.J.Ct.R. 1:40-4(a) and (g).
3. N.J.Ct.R. 1:40-6(a).
4. N.J.Ct.R. 1:40-6(a).
5. N.J.Ct.R. 1:40-4(g).
6. N.J.Ct.R. 1:40-6(e).
7. N.J.S.A. 2A:23C-1 to 13.
8. N.J.Ct.R. 1:40-4(c) and (d).
9. N.J.Ct.R. 1:40-4(g).
10. N.J.S.A. 2A:23C-1 *et seq.*

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