

Tailored Mediator's Proposal in Commercial Cases

Frank A. Ray – private mediator for complex civil cases

Frank A. Ray Co., L.P.A., Columbus, OH

THE SUPREME COURT *of* OHIO **2020**
Dispute Resolution
Conference

“Collision of Egos”

Course Objectives – **theses/how to . . .**

- Identify basis for resolution of *competing noneconomic terms*
- Identify basis for resolution of *competing economic terms*
- Influence decision-makers for *approval of “mediator’s proposal”*

Alternative themes from the mediator

- **You *need* each other.**
- **Achieve renewed *collaboration*.**
- ***Renegotiate* your failed deal.**
- **Put this failed deal in your *rearview mirror*.**
- **Concentrate on your *business future*, not this bad memory.**
- **Rise above animosity; make a *sound business decision*.**
- **Take control of your *exit plan*.**

Invite use of the “**scientific method**” ¹

- Observe
- Understand [apply knowledge to learned information]
- Formulate a hypothesis for resolution
- Test and deduce
- Repeat and review
- Reach conclusion / ***finalize and apply thesis for resolution***

• ¹ Konnikova, Maria, *Mastermind*, Penguin Books, NYC (2013), pp. 9-24

Categories of Commercial Disputes

- Disputed *contract*
- *Warranty* challenge
- *Intellectual property* rights
- Business “*divorce*”
- *Liquidation* of business
- *Real estate* rights / transfer or use
- *Insurance* coverage

- *Accounting* malpractice
- *Legal* malpractice
- *Environmental* disputes
- *Shareholder / investor* claims
- *Construction* claims
- *Tortious* interference
- *Anti-trust*
- *Energy* rights
- *Banking* mistakes
- *E-communication* disruption

Consider initial *separation of parties*

- Obviate / neutralize / minimize *inflamed environment*
- Optimize effective *primacy* for mediator

Assess Decision-Makers

- Conduct interactive *voir dire*
 - “neutral” v. “stimulus-driven” exchange
 - tempered self-introduction
- “looking” v. “observing”
- “hearing” v. “listening”

Initiate with *facilitative approach*

- Establish *rapport*
- Engender *trust*
- Defuse “*reactive*” decision-making
- Promote *transparency*

Identify each *party's goals*

- Prioritize
- Compare
- assess commonality
- define departures

- Generate *each party's term sheet*
- *Merge term sheets*, as possible
- Assess *direct & collateral pressures* re-compromise of disputed terms
- Assess *risk v. benefit* for initiation of qualitative mediation

If viable, move to ***qualitative mediation.***

**Transition v. “flip the switch” from
facilitative to qualitative mediation.**

Implementing qualitative mediation/**goals**

- Eliminate *peripheral issues* from decision-making
- Identify and placate *unreasonable expectations*
- Promote “*mindfulness*” in decision-making
- Guide decision-makers to *logical “consolidation”* of ideas
- Encourage parties’ decision-makers to *embrace compromise*

Implementing qualitative mediation/**processes**

- **Segregated conferences with counsel only**
 - Secure parties' decision-makers' advance approval
 - Separate session with each party's counsel only
 - Joint session with parties' counsel only
 - Determine whether to include in-house counsel

- Joint session with parties and counsel
- Joint session with decision-makers only
 - Secure advance buy-in from parties' counsel

Challenges & assessments of issues with parties/*evaluation of appetite for mediator's proposal*

- Factual allegations – admissibility & credibility
- Viability of legal claims & defenses
- Variable outcomes on liability
- Ranges of economic damages models
- Foreseeable responses on noneconomic demands
- Judicial reactions
- Jury reactions
- Potential results on appellate review

Pulling the trigger for *Mediator's Proposal*

- Written or verbal “*leap to bottom-line*” – comprehensive “term sheet” for resolution
- Or written or verbal completion of working “term sheet”, delivering recommended *compromises of contested issues*
- **Process for mediator’s presentation**
 - Separately delivered to each party’s room
 - Identical delivery of proposal
 - Sequestered consideration
 - no negotiation with the mediator

Each response privately communicated to mediator – “yea” or “nay”

Tallying & Reporting *Responses to Mediator's Proposal*

- *If unanimously approved*, secure signed “Memorandum of Understanding” in confirmation of terms of settlement.
- *If rejected by any party*, after all parties respond, advise all parties, “The mediator’s proposal has failed,” & decline to identify any rejecting party to other parties.

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***Thank you* for the privilege to deliver
this presentation to you.**

Contact Information

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How to prepare a client's civil case for mediation

By Frank A. Ray

To produce the best opportunity for a successful civil case mediation, lawyers for parties to the dispute should prepare for the mediation conference as if proceeding to trial.

Attorneys effectively posture a case for mediation by engaging in the same process that produces persuasive pressure points that influence the decision-making by a court and jury. The onus for convincing an adversary party of unfavorable exposures in a litigated case falls on the advocating party's trial lawyer, not the mediator. In preparation for a mediation, no viable alternative exists for counsel's thorough preparation and understanding of issues that drive the outcome of the case.

Write a clear mediation position statement

Through a party's attorney's written mediation position statement, the party's message should speak not only to the mediator, but also more importantly, to adversary parties and their counsel. In the narrative of the mediation position statement, a lawyer should project transparency about anticipated presentation of the case at trial. If admissible evidence will carry the day for a party at trial, in mediation, counsel's discussion of decisive evidentiary issues probably best influences and positions a dispute for resolution.

In a mediation position statement, the authoring lawyer should avoid use of effusive adjectives and adverbs to describe projected outcomes in the case. Understated narrative usually trumps a shrill or chest-

beating commentary. Overstatement and hyperbole fail to advance the fundamental purpose of mediation—arrival at an agreed reasonable compromise to terminate a dispute.

A properly crafted mediation position statement for a civil case should address and discuss the following:

- Procedural status of the litigation;
- Descriptions of relevant facts supported by copies of key documents and excerpts of witnesses' written or recorded statements;
- Indisputable dispositive legal issues;
- Disputed dispositive legal issues with a discussion of the rationale for probable rulings by the court;
- Assessment of claimed damages and remedies; and
- Each party's proposed terms for global resolution of the case.

Exchange statements in a reasonable amount of time

Once the clients approve the content of mediation position statements, counsel should exchange the statements between or among counsel for all parties to the mediation. Counsel should do so at a time far enough in advance of the mediation conference that adversary parties have adequate opportunity for review, evaluation and response to the content of the statement.

If parties find themselves in a rushed mode for evaluation and decision-making by the time a mediation conference convenes, the unsettled feeling of a client's decision-maker probably translates to a stalemate in negotiations. By serving a mediation position statement on adversary counsel at a reasonable time in advance of the mediation conference, a lawyer's written advocacy will enjoy the best opportunity to strike a chord in the adversary's mind of risks for an unfavorable result at trial.

Provide a copy of the statement to the client

When a party's attorney receives a mediation statement from adversary counsel, the receiving lawyer should immediately provide a copy to the client. Even if the adversary's statement might qualify as "bad news" for the client, transparency in the process also dictates that clients are fully informed of risks as well as benefits associated with trial of the case.

Conduct a pre-mediation discussion with the client

Counsel's list of essential tasks for any mediation should include a pre-mediation discussion with the client to address a realistic range of results at trial. Counsel who have only viewed clients' cases through rose-colored glasses have done their clients and themselves a disservice. Experienced trial lawyers can attest that a so-called slam dunk verdict rarely manifests. In mediated cases, thoughtful litigators address and assess pitfalls of cases with the same commitment invested in discussion of



positive aspects of cases. In advance of a mediation, and in advance of a trial, the client needs to hear a rhetorical discussion of “what ifs” from the client’s counsel. Indeed, the client *deserves* to hear that discussion.

A mediation in which the parties have initially proposed entirely unreasonable terms for resolution probably arises from counsel’s unwillingness to address a potentially unfavorable outcome for the client. A party’s demanded terms for settlement that entail terms that no judge or jury could award will understandably evoke adversary counsel’s distrust of the demanding party’s willingness to negotiate in good faith.

Counsel for parties in litigation have a professional duty to address and, as necessary, attempt to adjust a client’s expectations about foreseeable results in litigation. Former Ohio Common Pleas Judge Donald A. Cox, now serving as a private mediator, describes this process as “client therapy.” While lawyers understandably strive to maintain clients’ confidence in their attorneys’ ability to achieve a desired outcome in litigation, those same lawyers best serve clients with discussion of the range of scenarios for the outcome of a lawsuit.

Pre-mediation discussions with the client should occur with the client’s decision-maker. If the client is an individual or single fiduciary, the lawyer finds a readily identifiable audience. If the client is a business or group or association of people, the attorney for such a client or set of clients should identify clearly the decision-maker or decision-makers for the client or set of clients. The lawyer for a business client or multiple parties should insist on unfettered access to the decision-maker for direction in handling a mediation.

Attend the mediation conference

To optimize success in a mediation, the real decision-maker for each party should personally attend the mediation conference. Lead trial counsel for the parties should also personally attend.

In advance of the mediation conference, participating parties’ counsel should encourage clients to avoid describing demands or offers as “take-it-or-leave it,” “bottom-line” or “drop-dead” unless the clients are adamant and unwavering on such terms for resolution of the case. In pre-mediation discussions with parties, counsel should address compromise as a probable prospect for mediations that

produce settlements. If adversaries fail to embrace compromise as a mutual fundamental and ultimate goal for a mediation, little purpose probably exists for convening a mediation conference.

No doubt, some civil cases should proceed to trial for disposition, but most cases are better disposed by purposeful mediation. 

Author bio



For over four decades, Frank Ray practiced as a trial lawyer who conducted numerous jury trials for his clients. For the past two years,

Mr. Ray has withdrawn from the courtroom and has entirely refocused his law practice as a mediator and arbitrator for a broad spectrum of civil disputes. He is a solo practitioner at Frank A. Ray Co., LPA, in Columbus.

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