

Mediator intervention techniques that operate to reduce asymmetric information and self-serving bias, overoptimism and overconfidence.

a. Premediation

In the pre-mediation stage, the mediation is confirmed and preparations are begun. Shortly thereafter, the parties are contacted to discuss various process design options. Information is gathered confidentially and process recommendations are made. Prior to the mediation day, the mediator will guide the parties in their preparations and confirm their commitment to the agreed upon process. A conference call or pre-mediation meeting may be convened.

An example of a confirmation letter with enclosure can be found as Attachment 1. This letter is intended to build commitment to the upcoming mediation session in several ways. First, it memorializes the financial commitment the parties are making to the mediator, which hopefully encourages them to begin preparations in order to realize the benefit. Secondly, it establishes that the mediator approaches the process in a deliberate and thoughtful way, which may encourage the parties to treat it similarly. It also introduces them to the idea that their input is essential to success, both in terms of designing a process and in supplying accurate information and analysis of the case. Third, the position statement is an opportunity for the parties to educate each other on how they view the case and for counsel to begin to prepare their respective clients for the types of conversations that will have to take place before settlement. Suggested content for the position statement is also included in this letter as well as a suggested deadline of ten days prior to the mediation. Hopefully, the parties will review the list and begin to think about it as well as have the deadline calendared and a reminder calendared several days prior to the due date. It is also helpful for them to have these types of questions in mind when the mediator initiates the pre-mediation phone calls.

An essential function of the position statement is to begin to get the parties and advocates thinking about how the other side views the case. It is also intended to prompt them to think about the weaknesses they see in their own case, as well as what counterarguments can be expected from the other side about those weaknesses. By having the parties and advocates acknowledge and begin thinking about the weaknesses in advance, it tends to infuse them into the verdict analysis and settlement evaluations. Accordingly, when advocates begin to prepare their client for mediation, they are better able to provide realistic advice based on how the case has developed. If the advocates have not yet had a realistic conversation with their client about the merits of their case, meeting with them to prepare the mediation statement opens the door for that conversation to occur. It is always much better if this conversation occurs prior to the mediation day. If it does not, the caucus rounds will take substantially more time and the frustration level of the parties and advocates will be even greater.

Attachment 1
Confirmation Letter

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

This letter confirms the terms upon which I will provide the mediation services you have requested on behalf of all parties. The mediation has been scheduled for _____, beginning at 9:00 a.m. in our offices at _____.

An invoice for your security deposit is enclosed pursuant to our fee schedule. According to the information provided to us, we have set this up as a 2 party mediation, therefore, the hourly rate is \$_____ to be divided equally among the parties unless otherwise agreed. This rate will be applied to all time spent on mediation related activities, including: conference calls, review of submitted materials, the mediation session and post mediation caucuses, required reports to the court, and post mediation activities.

If the mediation must be cancelled after this confirmation and if we are unable to fill the date with another mediation, the security deposit will be applied to the cancelled date. If we are successful in filling your confirmed date, the cancellation fee will be waived and your security deposit will be applied to your future date.

I will contact you in advance of the mediation for the purpose of developing a structure for the mediation day by agreement. I would be pleased to review such materials you may regard as relevant to the mediation. It will be helpful if you provide a case summary to our office ten (10) days prior to the scheduled date. I encourage that case summaries be exchanged with opposing counsel to the extent possible, with a confidential addendum addressed to the mediator only as you deem appropriate. (A suggested outline is attached.)

If you have any questions concerning these arrangements, please contact me. We appreciate your bringing this matter to us, and we look forward to assisting the parties in their search for resolution.

Sincerely,

Enclosures

Suggested Considerations for Position Statements

1. A brief recitation of the facts that gave rise to the litigation.
2. The present posture of the case (any matters pending in court or in any related litigation).
3. Any recent developments that may impact on the resolution of the case.
4. The history of any efforts to settle the case including any prior offers or demands.
5. A summary of the parties' legal positions and a candid assessment of their respective strengths and weaknesses.
6. Identification of parties, representatives and counsel who will be directly involved in the mediation discussions; and a confirmation of their authority to settle the case.
7. Description of any sensitive issues that may influence any settlement negotiations
8. The nature and extent of any prior or future relationship between the parties that may affect the mediation.
9. The negotiating strategy of the parties and counsel.
10. Any suggested approach you would like me, as your mediator, to take in an attempt to settle the case.
11. Any creative solutions

NOTE: To the extent possible, position statement should be shared with your opposition (the more your opposition understands about your position, the better able your opposition will be able to negotiate with you). You may make your statement confidential in whole or in part with those confidential portions presented in a p.s. not copied to opposing counsel.

An example of a pre-mediation letter can be found as Attachment 2. This letter summarizes the result of the pre-mediation phone calls. It is intended to orient the parties to the specific process that has emerged by agreement and gives them some guidance as they make their final preparations. Addressing the demand figure in pre-mediation allows the mediator to put the 'too high' number into perspective while building commitment to work through the issues. Having the demand figure in this letter allows the parties to acknowledge it and to anticipate it and to prepare their clients to hear it and to formulate a careful and reasoned response for the first caucus session. It also gives the mediator an opportunity to suggest a goal orientation to the parties for their future negotiations, rather than traditional relationship bargaining. The letter also allows the parties to plan on the mediator being in contact again prior to the mediation. This later round of premediation phone calls gives the mediator the opportunity to address any additional issues or developments in the case that have come up since the first pre-mediation call. If the issues are significant, a conference call can be initiated in order to get the preparations back on schedule or to agree upon additional parameters for the mediation session.

Attachment 2
Pre-Mediation Letter

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

This will confirm my conversation with each of you on ___ day ___, ___ date ___, 2005 relative to the parameters for our date of mediation session 1 mediation session in the above-styled case. At that time, the following was agreed:

The mediation shall begin at start time. The mediation will take place at location. Position statements shall be provided to me and will or will not be exchanged on or before date.

Plaintiff's and Plaintiff's Counsel's opening statement shall not exceed time. Defendant's and Defense Counsel's opening statements shall be not exceed time. It is my understanding that we begin the negotiations with the Plaintiff at \$.

I have suggested that each side be prepared to negotiate to their respective goals in three to five moves. (I have advocated that these negotiations not be based on traditional 'bottom line' relationship bargaining, but rather be based upon reasonable moves in relation to your respective goals for settling the case. These goals, having been based upon your evaluation of a reasonable settlement range, were in turn based on a reasonable verdict/judgment analysis. Each move in relationship to your goal should also have some clear basis. At the point in the mediation where both sides have identified respective goals, I would then ask each of you for the opportunity of exploring common ground, should your goals be different.

I am committed to being in touch with each of you over the next several weeks to assist you as you prepare for the mediation sessions, and should anyone have questions, please do not hesitate to contact me. Otherwise, I look forward to the opportunity of working with each of you toward the final resolution of this case.

Sincerely,

b. Opening Statements

After the mediator has opened the mediation with an orientation to the mediation center and to the process, in the opening statement stage, at a minimum, the parties and advocates will greet each other and acknowledge the purpose of the day. This is a critical time where negotiating behaviors for the day are likely to be set. The mediator will emphasize the importance of the day relative to the resolution of the case and secure a joint commitment to begin. Because this is a good opportunity for counterparts to educate each other, the parties and advocates will be given uninterrupted time to present their view. Active listening is encouraged, and the mediator will show appreciation for the participation in this stage.

This part of the mediation is very important because the parties may be hearing for the first time, in a well developed and convincing way, the case from their opponent's point of view as presented by their attorney. They also have an opportunity to observe the reactions of others in the room to the presentation. It may lead them to consider the different recollections of key facts and to reconsider their assumptions about how certain they are that their version of the facts will be taken as absolute truth by a jury. The experience may also allow them to look back at the events that lead up to the case and reflect on it with renewed understanding.

c. Caucus

In the facilitated negotiation part of the mediation, the mediator will encourage the parties and advocates not to lock themselves into a position before they have taken full advantage of the opportunity to listen to their counterpart's point of view and given full thought to their own interests. If positions are taken prematurely, the tendency is to use resources to defend that position rather than considering options. Secondly, the mediator will encourage an order or prioritization of discussions that will create momentum toward resolution. Thirdly, the mediator will continue to press for productive discussions of remaining issues while seeking to minimize frustration. During this stage, the mediator will also likely use a variety of techniques to encourage evaluation and reevaluation and sound decision-making.

At this stage, the mediator is not directly opposing the parties' point of view, but is instead prompting each of them to present questions or information to the other side that will provoke a reevaluation. The mediator therefore blends the role of message carrier, with that of an impartial observer, with that of coach and educator; encouraging the parties to consider what is being presented. An essential message from the mediator at this time is to ask each of the parties, "Ask yourself; What if the other side is right on this point?"

In some circumstances, it may be appropriate for the mediator to respond to requests from the parties to give informal feedback to them privately relative to their case. This should not be done until the parties and advocates have made significant attempts to make progress on their own. This should not be imposed upon the parties by the mediator. If given, it should be a range of results supported by reasons why the actual result may shift from one end of the range to the other. The purpose is to create doubt in the parties' and advocates' mind about the certainty of the outcome if taken to trial and to gauge their risk tolerance, and to give them a sense of what the next few years will be like for them while the case is being litigated and appealed.

d. Reconvene

In the agreement stage of the mediation, the parties and advocates have formed some level of expectation for settlement and opportunities for positive-sum negotiation may be further explored before the agreement is journalized. Alternatively, part of the case may be resolved either as to some parties or as to certain claims.

If the case has not been resolved, the mediator will prepare the parties to take up negotiations again at some future point in time. The parties may agree that this should occur after crucial summary judgment motions have been ruled upon or after an agreed upon discovery plan has been completed.

An example of a reconvene letter can be found in Attachment 3. The letter is intended to show the parties their progress and to give them a sense that some variables have been fixed. At the same time, it recognizes that the parties appear to view the case very differently, which indicates that more work and more analysis is needed or that a negotiating strategy needs to be rethought. The letter is also intended to keep the mediator and the parties engaged while the case is further developed and hopefully receptive to the suggestion by the mediator at some point, that it may be appropriate to reconvene. Since an impasse report has not been filed with the court, the parties usually feel an obligation to attempt a reconvene, even if it is by telephone, before a final report is filed.

Attachment 3
Reconvene Letter

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

I want to thank each of you for your professional efforts in attempting to achieve resolution of the above-styled case in our mediation of _____, _____, 20__.

As a result of your discussions, you have achieved the identification of Plaintiffs' _____ damages and have categorized them into three groups. Global offers were exchanged without resolution. (Plaintiff at \$850,000.00 and the Defendants at \$10,000.00).

With the "negotiating ball" in Defendant's "court", Defendant requested an adjournment for purposes of completing damages discovery as it relates to the condition of _____ (present and future).

Defense Counsel agreed to provide 26(b) disclosures within the next thirty (30) days and further agreed to notice the deposition of _____ for the purpose of inquiring into _____. Defense Counsel also indicated his need to identify _____, if any.

I intend to contact both sides in the next thirty (30) days to determine your progress and what, if any, opportunity there may be for future discussions. (I have acknowledged the expressions of disinterest in future mediation; but remain committed to searching for meaningful opportunities in the future.

In the meantime, I am withholding my report to the court until we have completed the above action (unless you request otherwise).

I appreciate the opportunity to work with you and your respective clients. I am also enclosing my statement of services rendered and thank you in advance for your remittance.

Sincerely,

e. Mediator Interrogatories

If the case has not been resolved, and the parties are not able to make progress, the mediator may suggest that an adjournment with homework is more appropriate, rather than impasse. An example of mediator interrogatories can be found at Attachment 4. If everyone is agreeable to the exercise, formal questions will be directed to each side; the answers to which are to remain confidential.

The purpose of this exercise is to attempt to improve the parties' and advocates' analysis and to target particular problem areas. The questions are designed to provoke a specific type of response from the advocates that is neither vague nor ambiguous. By having them commit to a very specific opinion, they know that if the case is not resolved in mediation, the actual outcome will be measured against their specific predictions. Accordingly, they tend to be much more careful in their thought process and tend to scrutinize their own judgment to a greater degree than they otherwise would.

This method of giving the parties and advocates a new perspective has worked very well in extremely complex and contentious cases where the only other alternative was impasse and certain trial.

Attachment 4
Mediator Interrogatories

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

By agreement of the Parties, I present the following inquires for your consideration and response relative to verdict and risk analyses. I commit to each of you to maintain strict confidentiality as to any disclosure, unless otherwise agreed. I am not asking to be released from confidentiality at this time.

Please answer the following questions:

1. What is the probability in percentages that there will be a jury versus a non-jury trial?
2. What is the probability in percentages that there will be a finding that a breach of fiduciary duty did occur and did not occur?
3. What is the probability in percentages that there will be a finding that a fraud did occur and did not occur?
4. In the event of a finding that a fraud or a breach of fiduciary duty has occurred, what is the probability in percentages that any damages calculation will be reduced? Identify any documentary or other evidentiary basis and/or any legal basis for your position.
5. In the event of a finding that a fraud has occurred, what is the probability in percentages that the Judge will admit each of the parties' proposed fact and expert witnesses (please list by name and identify the value assigned by that expert).
6. Identify the range of verdicts so as to encompass an evaluation for which you are 90% sure that the ultimate result will lie within your range. For the range you identify, there should only be a 5% chance that the ultimate result will be below your range, and a 5% chance that it will be above your range.
7. Identify the chance that the ultimate verdict will lie in the following ranges (this should add up to 100%).

<u>Verdict Range</u>	<u>% Probability</u>
\$0	
\$1-200k	
\$201-250k	
\$251-300k	
\$301-350k	
\$351-400k	
\$401-450k	
\$451-500k	
\$501-600k	
\$601-1m and up	
	=====
	100%

8. Identify the median range of possible verdicts?
9. What is the probability in percentages of punitive damages being considered by the finder of fact?
10. To the extent punitive damages are considered by the finder of fact, what is the median punitive damages award?
11. Identify the approximate cost to litigate this case through trial and appeal.
12. What is the likelihood that a verdict above the \$400k mark will be upheld by the _____ Supreme Court?

I appreciate the opportunity to work with you and your respective clients. I am also enclosing my statement of services rendered and thank you in advance for your remittance.

Sincerely,

f. Mediator's Proposal

If the case has not been resolved, and the parties are not able to make progress, the mediator may suggest that the parties determine whether a mediator's proposal is appropriate, rather than impasse. This is an intervention of last resort for the mediator. An example of mediator's proposal letters can be found at Attachments 5 and 6. If everyone is agreeable to this method of attempting to close the case, a formal proposal will be directed to each side; the response to which are to remain confidential. The purpose of the mediator's proposal is not to give an evaluation of the value of the case, rather it is a statement about the mediator's opinion of where the case can settle.

The keys to using the mediator's proposal successfully are: (1) that the parties absolutely cannot make progress themselves, and (2) that no one is compromised if the proposal is not accepted. The way that the latter is accomplished is by the mediator never publishing the specific answers given. The publication will either be two yes answers or two no answers; resolution or no resolution. The mediator must also give some basis for the number that the parties can accept and it can not be a split the difference number.

If the mediator's proposal is not accepted, the mediator should still try to close out the mediation in a positive way and to attempt to use the reconvene technique discussed in section d above and included as Attachment 3.

Attachment 4
Mediator's Proposal Letters

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

This letter confirms that at the conclusion of our third mediation session on _____ the parties determined that a mediator's proposal should be presented to both sides for confidential responses.

Accordingly, the following Mediator's Proposal is being presented to both sides for confidential responses not later than 2:00 p.m. _____ time on _____.

(1) Defendant _____ shall pay Plaintiff _____, the sum of _____ within _____ days from the due date of this agreement, subject to execution of the release as set forth below. Said sums shall be apportioned with the reasonable designations as _____, _____ and attorney's fees.

(2) Defendant's counsel shall prepare a complete and mutual release. Said release shall contain standard terms and conditions to include without limitation the following: (a) No admission of wrong doing by either party; (b) Mutual non-disparagement; (c) Confidentiality as to the terms and conditions of settlement (including, but not limited to the amount herein) with a reasonable liquidated damages clause equal to one-tenth of the amount received by Plaintiff (excepting attorney fees and litigation costs). In addition, said Complete Release shall acknowledge the continuation of the confidentiality provision set forth in the protective order entered by the court; (d) Plaintiff shall be responsible for all taxes and tax consequences, shall indemnify Defendants and shall hold them harmless.

(3) Said release shall be reviewed and approved by Plaintiff's counsel. Thereafter, said release shall be signed by all parties.

(4) The above-styled case shall be dismissed with prejudice; each party to bear his/its own costs, with the exception that the Defendants shall pay Plaintiff's re-mediation costs.

Once I have received both confidential responses, we will publish the result as either resolution or non-resolution. The specific answers given will never be disclosed.

I am withholding my notice to the court until we receive the confidential responses from each of you. I strongly urge you to meet with your clients and review the risks together with the costs and time to be incurred in an ultimate resolution of this case, absent acceptance of this proposal.

Please know that I appreciate the opportunity to continue to work with you and your respective clients.

Sincerely,

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

VIA U.S. Mail and E-MAIL

Plaintiff's Counsel
Mail Box #
e-mail address

Defense Counsel
Mail Box #
e-mail address

Re: Style of the Case

Dear Attorneys:

This letter confirms that the above styled case is resolved pursuant to the Mediator's Proposal of
_____.

Congratulations to you and your clients for your most professional efforts in achieving resolution of this matter.

Sincerely,