



# Best Tips for Mediating Complex Business and Government Disputes

**By Harold Himmelman, Esq.**

As a mediator and arbitrator, Mr. Himmelman has managed hundreds of complex, multi-million dollar disputes between businesses and between businesses and the government involving the False Claims Act, civil fraud, qui tam, whistleblower, Privacy Act, copyright royalty, information technology, government contracts, executive compensation, sports, environmental, energy, and a host of other cases, many of them having been prominently featured in the news. The following are tips he has found especially useful for mediators and counsel in resolving complex, high-stakes cases.

**1. Hire the right mediator.** The parties should take full advantage of one of the principal benefits of alternative dispute resolution: hire their own neutral and the right one. Carefully vet mediator candidates and conduct interviews if in doubt about a selection. These interviews can be conducted separately by each party counsel, together, or both. (Ex parte communications with a mediator before hiring and during a mediation are, of course, not only entirely permissible but a huge advantage. No one can ever talk with a judge, jury, or arbitrator ex parte.) Deter-

mine if the mediator candidate has the right style, temperament, time availability, dedication, and any other qualities needed for the dispute at hand. Will he/she dive into the details, express his/her point of view on the case at the right time and in the right manner, push the parties toward settlement? Or is the mediator likely going to be passive and just carry messages back in forth, in which case the parties might best be advised to save their money. And while always nice to hire a qualified mediator who is also a subject matter expert, if such a candidate is not available it is usually far more beneficial to hire a mediator with loads of experience mediating tough cases than it is to hire an expert in the field of law. The mediator can always be educated on the subject. After all, excellent judges try many cases where they have never had experience in the specific legal area before them.

**2. Focus on the merits of the factual, legal, and remedial issues** that will likely be dispositive if the matter were not to settle and proceeded to resolution on motions or at trial. Evaluate the merits issues throughout the mediation process. It is essential that when the real settlement negotiations begin

the mediator and the lawyers and their clients fully understand all the key issues in the case and the potential outcomes the parties could face if the matter proceeds through litigation so that discussions and bargaining can be conducted on a principled basis.

3. **Prepare rigorously and provide time to develop critical information.** Especially if the case is mediated prior to the filing of a complaint or early in discovery, build a mediation process that allows the parties to exchange and discuss key information informally both together and privately and confidentially with the mediator as appropriate.
4. **Exchanged mediation submissions.** The parties should typically plan on preparing a Joint Appendix of what they consider to be the key documents in the case as known at the time and providing this to the mediator. They should exchange succinct written positions on the key issues in order to try to get on the same page about what will drive litigation outcomes in the event settlement is not achieved. While the parties will rarely agree on merits outcomes, it is essential that they understand what the critical issues are.
5. **Confidential mediation submissions.** After the exchanged submissions, the parties' counsel should agree to have separate private, confidential conferences with the mediator. Typically, only in a private conference will counsel be willing to discuss faithfully with the mediator what a party has come to appreciate are the weaknesses, hurdles, and risks—both legal and business—in its case if it does not settle. These private sessions with the mediator also afford counsel the opportunity to share their clients' deepest concerns and

true business goals in resolving the dispute knowing that any information provided to the mediator in confidence remains in confidence. The private conferences also allow the mediator to discuss his/her thoughts candidly with counsel without putting them needlessly on the spot with the opposing party. These conferences further allow the mediator to better discuss potential settlement options without a party having to make any specific offers of settlement at that stage.

6. **Creative solutions.** The parties in every case should work with the mediator and ultimately the opposing party(s) to discuss and consider creative solutions to the dispute that may allow for resolution on terms that no court or jury could ever consider. Even in high stakes government disputes where money is typically the focus of the parties negotiations there can be interests on both sides that can provide opportunities to develop solutions that go beyond just monetary considerations.
7. **Lead up to the final mediation sessions.** The parties should not attempt to mediate the case in face-to-face sessions until it is evident that they have adequately considered all relevant issues and there will ideally be no merits-related surprises when they convene. The mediation sessions should be for good faith, serious, merits-based and, as appropriate, creative bargaining and not to re-hash or bring up new legal or factual issues. In this regard, it is often helpful for the mediator to reserve an hour or two for a final, lawyers-only meeting or conference call with him/her a few days prior to the mediation sessions in order to iron out any remaining issues the mediator is concerned about and to discuss final thoughts on exactly how the mediation sessions will be conducted.

- 8. Have the right party representatives participating in the mediation** and attending the actual mediation sessions. It is vital that parties bring the right people to the table with full authority to settle the case. On the private side, this is not usually a major problem, but it is nonetheless important that individuals attend who are high up in their corporate structure and have the flexibility to adjust their company's settlement goals as the discussions proceed. It is rare in tough cases that any party gets exactly the result it wants when it comes to the mediation. Maintaining the ability to reach beyond a pre-determined mediation goal is essential as many cases settle with the parties giving up something more than they wanted. You don't want client representatives to be on the phone all day passing on the mediator's messages to key decision makers who are the absent wizard of Oz—you want the right people to hear directly from the mediator. With the government, it is usually possible for the mediator, working closely with the line attorneys, to arrange for Justice Department supervisors or key officials in the agency DOJ is representing to be briefed on the mediation and even attend a mediation session, as appropriate, so that the government, too, can adjust its approach to settlement working directly with the mediator.
- 9. Keep your cool and have the client do the same.** It is perfectly acceptable and often necessary for some venting to occur during any mediation and there is a time and place to allow for this. But at bottom, the lawyers and clients are mediating because they have agreed to try to resolve their dispute in a voluntary way rather than having a solution imposed upon them by a court or jury, where the outcomes are always unpredictable and the risks of unwanted

results always high, let alone extremely time consuming and costly. Participants in mediation should remember they are playing a different role than when they are litigating. At the end of the day, everyone must put aside their emotions. While the goal in mediation is to “win,” that is to say, obtain the best possible result in accomplishing a party's objective, winning is best accomplished by facing up to the realities of what litigation would look like and working faithfully with the mediator and with and through the neutral to get the other side to join in an agreed solution. In this respect, the very best practice is for each side to start negotiations with reasonable, meaningful settlement proposals. Neither the mediator nor the opposing party will put any real stock in extreme demands and such demands just get the bargaining off to a rocky start, stoking the opposite party's emotions and producing anger rather than the start of progress. Be principled. In so being, a party incentivizes the other side to do the same and sends a strong signal that a settlement can be achieved. Remember that a party never has to make its next move until it sees what the other side's position is.

- 10. Never give up.** As long as progress is being made in the negotiations, the mediator should be allowed to continue working on the case even if no final resolution is reached during the day or two of mediation. Many complex cases are effectively resolved in the days or weeks after the scheduled mediation by the mediator working the phones, convening an occasional meeting if needed, and otherwise following up with the parties' counsel.
- 11. Preparing the final settlement agreement.** Once a settlement in principle is reached, the mediator should remain involved to

help the lawyers, as needed, prepare and execute a final settlement agreement. Issues often arise unexpectedly during the preparation of final agreements and the mediator can be helpful in resolving them, including bringing the lawyers together for drafting sessions should that be necessary. For example, in U.S. False Claims Act cases there are often contentious issues concerning the scope of releases and covered conduct. While such issues should be identified and considered as early as possible in the mediation process, they often surface anew at the final stage of preparing a settlement agreement for execution.

**12. Always maintain flexibility.** All of the above tips have proven to be highly successful in resolving most complex, high-stakes business-to-business and government disputes. But the essence of mediation is that it can and always should be tailored to meet the needs of the par-

ties. Each and every case is different. The mediation process, unlike judicial proceedings, can always be tweaked to make sure it is meeting the parties' objectives and this tweaking can occur throughout the process. The parties should work with the mediator at all times to make sure the process continues to best serve them. If they do so, and if they have a mediator who never gives up, they have a very good chance of a successful resolution.

*Harold Himmelman has been in law practice since 1967 when he began his career as a trial attorney in the Honors Program of the Civil Rights Division of the Department of Justice. He entered private practice in 1975 and has spent the years since litigating and counseling companies in business-to-business and government disputes. For over two decades he has been a senior mediator in the volunteer Alternative Dispute Resolution Program of the U.S. District Court for the District of Columbia and for the U.S. Court of Appeals for the District of Columbia. He has been affiliated with JAMS during this entire time. He can be reached at 202.533.2024 or [hhimmelman@jamsadr.com](mailto:hhimmelman@jamsadr.com).*