# How to Maximize the Potential for a Successful Mediation

**By: Richard L. Hurford**[1]

***I have been ruined but twice; once when I lost a lawsuit; and once when I won one.***
***Voltaire***

The literature is rich with articles on what has been characterized as the "Litigation Highway." The litigation highway is that phenomenon where litigants become so committed or entrenched in intractable positions they suffer the pain, cost, delay and unpredictability of litigation rather than look for a strategic and timely "off ramp" to achieve their true interests. Because litigation is not a "profit center" for most businesses and individual litigants, it has become common place for sage trial counsel and their clients to either avoid the litigation highway through an early mediation (even before the filing of a complaint), or engage in mediation in the search for an effective off ramp once on the hellacious litigation highway. Experience has shown that mediation has and does achieve a client's true interests in a manner that is often superior than traditional litigation and arbitration and without the pain, cost, delay, unpredictability, and risk.

All experienced litigators and mediators know there are a number of action steps that will maximize the potential of success for their clients at the time of mediation. Permit me to share ten mediation tips for consideration that have worked extremely well for my clients and lies at the core of the DRS Mediation Process™.

## Tip No. 1: Select the Right Mediator, the Right Process

The right mediator and the right process are important. Not all mediators are created equally; nor should they be. Neither one mediation style nor one mediation process necessarily fits all disputes. One of the greatest benefits of mediation, like other forms of alternative dispute resolution, is the mediation event can be specifically tailored by selecting the "right" mediator with the "right" process best suited to resolve your unique dispute. The mediator's personal style, as well as the mediator's knowledge, background and experience, are critical factors to consider in selecting the right mediator. The mediator whose process is perfectly suited to resolve a divorce action involving contentious parental rights issues, will not necessarily be the

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right mediator and process for resolving a class action employment, construction defect, or a products liability claim.

The mediator's process in conducting the mediation is his or her signature. What works for one mediator, will not necessarily work for another. Many competent and effective mediators eschew caucuses and meet with parties almost exclusively in joint sessions; other competent and effective mediators do not embrace joint sessions at all. Some are more "evaluative" others prefer a "facilitative" model and yet others gravitate to an "analytical" style. The process that maximizes the potential for success depends upon the particular needs of the parties and the dispute.

Most mediators will be more than happy to discuss their processes and procedures with you. In fact, a quick visit to the mediator's web site will provide a strong indication of the mediator's style. In that regard, Richard Hurford Dispute Resolution Services, P.C., has developed a very specific and distinctive process that guides the mediation from retention through resolution – the DRS Mediation Process™. While my clients consider this process extremely effective, there may be litigants who do not consider this particular process appropriate for their dispute. While the DRS Mediation Process™ is flexible, experienced parties inquire into the prospective mediator's process and determine if it is well suited for their particular and unique dispute.

It is also critically important the mediator have the trust (more on "trust" in Tip No. 10) of the attorneys and their clients and, in many cases, once an attorney is content the mediator recommended by opposing counsel is knowledgeable and guided by the right process, that attorney will defer to the recommendation(s) of opposing counsel. It does not bode well for a successful mediation to battle over a mediator who is not trusted by opposing counsel. Selecting the "right" mediator with the "right" process is truly more important than selecting "my" mediator.

As discussed in Tip No. 2, the mediation process demands meticulous preparation; a party should expect no less of the mediator. If a party wants a mediator to be creative, surface and explore realistic options, and exercise wisdom based on experience, the mediator must also be well prepared. Experienced trial counsel always selects a mediator who is as committed and willing to work as hard as they are. The mediator's process will provide an insight into whether the due diligence and preparation appropriate for the resolution of the dispute will be undertaken.

**Tip No. 2: Prepare and Then Prepare Some More**

Thorough preparation is critical. One needs look no farther than any legal library to know there is no "sure thing." In each of the thousands and thousands of reported appellate cases, there was at least one party and attorney (who may have been just as intelligent and insightful as you and your client) who were certain of the correctness of their position only to be proven wrong after a costly and protracted trial and appeal. To avoid the pitfalls that have been visited upon so many who preceded, the experienced litigator knows the mediation may be the best and last opportunity for negotiating an off ramp that best maximizes the potential for achieving the client's critical interests. In preparing for the mediation, experienced mediation counsel will consider many of the following issues and more:

- Know the case. Even if it is early in the litigation or arbitration process, experienced counsel have already conducted a robust early case evaluation, reviewed relevant documents, and met with key witnesses. Although there are many reasons for conducting the early mediation of a dispute, the case evaluation may be one of the motivating factors for experienced trial and the client for seeking an early mediation.
- Determine if the opposing party believes it is ready for the mediation event. Because the desire for an early mediation is becoming more common in achieving a client's true interests, wise trial counsel's preparation will include subtle steps to determine if the opposing party believes it is prepared. If opposing counsel does not have all the facts and documents necessary to permit a reasonable comfort level at the time of mediation, as part of the preparation process, mediation savvy trial counsel will seriously consider voluntarily providing opposing counsel, within reason, the information requested for a productive mediation. If opposing counsel will readily be able to obtain the requested information through the discovery process, there is typically little benefit that will accrue by not voluntarily and selectively providing a certain amount of the requested information. If a client's interest is served by the successful termination of the dispute at the earliest practicable date or minimizing the costs and delay of litigation or publicity, needlessly withholding readily discoverable and relevant evidence that stands in the way of the client's objectives may not be particularly strategic. Moreover a voluntary exchange of information early in the life of a dispute may be mutually beneficial as it provides an opportunity for all parties to obtain information that will be of assistance at the time of the mediation. Cooperation should always be a two way street and contained within reasonably established boundaries. Part of the due diligence a mediator should conduct is to ascertain whether the parties believe they are truly ready to mediate. If, for example, the voluntary exchange of information will be an impediment to a

successful mediation, the mediator will endeavor to address that impediment. There are multiple nuanced, creative and mutually satisfactory solutions that can be explored to create the needed climate for a successful mediation. Of course, no party wants their cooperation to be abused and the voluntary exchange should not become an open invitation for more and more discovery that will defeat a party's critical interest in pursuing an early mediation. The experienced mediator, if requested, can be of invaluable assistance in resolving these and other competing interests in a creative and strategic way during the pre-mediation process.

- Advise the client what to expect during the life of the mediation and the important milestones that will occur.
- Know the case's strengths and weaknesses. Well before the mediation begins, candidly discuss the strengths and weaknesses of the client's case (i.e., what is the likelihood of success at trial or arbitration; is the law favorable or does a successful outcome depend on creating new or modified law; does the case involve third parties or witnesses who are important to the success of the case and, if so, will these third parties and individuals cooperate and what will be the impact of continuing the litigation or arbitration on that cooperation; is there problematic information that will almost certainly be disclosed as the result of further discovery; are there individuals likely to be deposed who will make poor witnesses; is the court or arbitrator prone to granting or denying summary judgments; is class certification a high likelihood; are there e-mails, policies, documents or deposition testimony that will be susceptible to misinterpretation or distortion at the time of trial or arbitration; does the case, i.e., the client's story, have jury appeal in the applicable venue; what have similar cases settled for; etc.). Quite frankly, sophisticated trial counsel and clients do not need a mediator to tell them about the strengths and weaknesses of the case they already know. What the parties want is a mediator with extensive litigation experience who will raise the costs and benefits of continued litigation that might not yet have been considered should the matter not resolve.
- Communicate with the mediator. Effective attorney preparation also includes having the appropriate and necessary confidential communications with the mediator. The mediator's preparation process should involve the opportunity for confidential communications concerning the particular needs of the attorneys and their clients. For example, occasionally a key role an attorney may seek from the experienced mediator is confirmation or a discussion during a confidential caucus certain weaknesses and risks a client faces should the dispute not resolve. Similarly, if a stay on threatened adverse publicity is important for an effective

mediation, soliciting the aid of the mediator to achieve that short term objective may prove helpful to both parties. As such, part of the preparation of sophisticated users of mediation is confidentiality sharing these concerns and issues with the mediator. Effective counsel does not hesitate to take full advantage of these opportunities.

- There should also be a candid discussion with the client of the strengths and weaknesses of the opposing party's case.
- Know the client's risk appetite and all interests. While all clients want to "win," for many clients, particularly business clients, reducing risk, enhancing predictability and other factors can also be very important interests. The full range of the client's risks and interests should be canvassed and discussed including such issues as: meeting the litigation budget and the desire to avoid continually escalating costs and delay; the tax consequences of the timing and characterization of any resolution or adverse decision; the impact of recently departing or soon departing employees who may be critical witnesses; the consumption of internal resources that might or should be more profitably devoted to other activities; the potential of adverse publicity and its likely impact; the importance of good will that may be impacted by the dispute; setting undesirable precedent (which may or may not be exacerbated by a settlement); the need for confidentiality and return of information disclosed during discovery; the messages a settlement or adverse outcome will send and to whom; the impact of a resolution or adverse outcome on the practices and interests of the client; etc.
- Ascertain the opposing party's interests. In addition to considering your interests in resolving the litigation, give careful consideration to the interests of the opposing party. Every party has an interest in resolving a dispute and one of the most creative ways to fashion a mutually acceptable resolution is to identify and address those interests (more on this in Tip No. 8). While most mediations clearly focus on "the money," creativity is still a key component of successful mediations in addressing the disparate interests of the parties.
- Know the client's BATNA (best alternative to a negotiated agreement). What will occur, and at what cost and risk, if a resolution is not achieved? At what level is the alternative to a negotiated agreement better than accepting terms that are unsatisfactory? Although the parties want to maintain flexibility during the mediation (for example, in the event unknown facts and issues are disclosed at the mediation you may want to re-evaluate your BATNA) come to a preliminary understanding with the client on the walk away points and issues. A bad resolution is not in any client's best interests and certainly not the objective of any

experienced mediator. However, do not rely upon the mediator to recognize and counsel against a bad resolution. That is exclusively the province of the well prepared attorney and client.

- Select the correct client representatives to appear at the mediation. If the right individuals aren't present at the mediation, the mediation may well fail in reaching the objective. Part of the mediator's due diligence process requires an evaluation of whether all the correct individuals, including those with true settlement authority, will appear at the mediation. In certain cases where emotions are raw and still volatile, it may be prudent not to have the principal antagonist present (or present only during the caucus). In other cases the spouse or significant other of a party may provide the support network necessary to allow that party to make a difficult decision. Carefully consider these and other related issues in preparing for the mediation. If there are concerns about the party representative(s) selected (or not selected) by opposing counsel, certainly do not hesitate to make those concerns known to the mediator during your confidential pre-mediation communications.

**Tip No. 3: Prepare a Short, Succinct and Professional Mediation Summary**

Know your audience. Some parties believe the Mediation Summary is prepared for the mediator's benefit and to persuade the mediator of the righteousness of a client's cause. Experienced litigators and mediators know better. Simply because the mediator may be convinced of the merits of a case or defense, does not mean the mediation will be successful unless the opposing party is similarly persuaded. The main purpose of the Mediation Summary is to tell a compelling and credible story in a professional manner (more on "professional" in Tip Nos. 9 and 10) that underscores to the opposing party its case weaknesses and risks should the matter not resolve at the mediation. A compelling story, based upon the law and the facts of the case, which is told in a concise manner, is a precious opportunity to induce the opposing party to reconsider its BATNA. Experienced litigators and their clients will not squander this opportunity and know the time and effort required to prepare an effective Mediation Summary will lay the foundation for a significant potential return on the effort invested.

**Tip No. 4: A Professional Opening Statement and Carefully Orchestrated Joint Session Can Have a Positive Impact**

Some do not see the benefit of a Joint Session or making an Opening Statement. Experienced litigators and mediators know the significant advantages that can potentially accrue from a short, persuasive, and well-constructed Opening Statement. Of course, there are some

disputes and mediations where Joint Sessions and Opening Statements may be counter-productive and these unusual cases should be discussed thoroughly with the mediator prior to the scheduled mediation. However, in most cases the Opening Statement, just like the Mediation Summary, is an excellent vehicle to persuade the opposing party to reconsider its BATNA.

Moreover, depending upon the nature of the dispute and the personalities of the parties, the Opening Statement and Joint Session can also have a number of other beneficial purposes. For example, and just to list a few: making an appropriate statement of regret or sympathy (where warranted and not to be confused with an apology); developing a rapport or empathy between the party representatives; allowing a party, desperately in need of having his or her "story" told in public, to have the satisfaction of that story being told by counsel in a persuasive and professional manner; suggesting to the opposing party the time is ripe for the parties to move past arbitrary positions and begin mutually exploring true interests; telegraphing to the opposing party the willingness to think creatively, etc. In sum, don't dismiss the power and the salutary benefits of an effectively tailored and professionally orchestrated Joint Session and Opening Statement in furthering the client's negotiation strategy.

Given the benefits that can obtain from a Joint Session and an Opening Statement one might question why an attorney or mediator would avoid either. In all candor, the aversion of some mediators and sophisticated counsel to the Joint Session and Opening Statement is borne of the belief and experience that opposing counsel or their representatives may do more harm than good during the Joint Session. Unfortunately, if the parties ignore Tip Nos. 9 and 10, the consequences can be the death blow to a successful mediation. Certainly, process will defer to practicality and a mediator will not invite or insist upon an Opening Statement from a party who cannot or is unwilling to carry it off in a fashion consistent with Tip Nos. 9 and 10. For experienced and effective trial counsel, who knows the objective of the mediation, this is typically not a concern.

**Tip No. 5: To Share or Not to Share**

As is true of information in virtually every setting is also true in mediation – information is power. Some believe it is best <u>not</u> to share certain information and exploit this power during the mediation process in the "hope" to use that information as a devastating surprise during trial. Experienced litigators know that approximately 98% of all civil cases filed in state and federal court never reach trial. They also know that it is more likely than not that competent opposing counsel will eventually discover or become aware of the "surprise" prior to any trial. As such, discerning counsel will weigh very carefully not whether to disclose certain information but when and how to exercise this negotiation power as part of the negotiating strategy. Should the

disclosure take place in the Mediation Summary, the Opening Statement, or during the course of a caucus? Unless counsel and the client can articulate a compelling reason not to disclose a surprise, a party is typically best served by the exercise of its power and disclosing the surprise at a strategic time during the mediation process. Of course there can be exceptions and in case of doubt do not hesitate to discuss the issue candidly with the mediator either before or during the mediation. If the mediator is an experienced trial attorney, there can be no harm in soliciting the mediator's insight based upon experience as to the costs and benefits of disclosing the surprise to achieve the client's ultimate objective. Anything relayed to the mediator in confidence must be held in confidence until express permission is given to disclose the surprise to the opposing party. One of the critical roles of the mediator during the caucuses is, when requested, to offer fair and appropriate guidance; there is no requirement that anyone accept any requested guidance the client and attorney don't ultimately agree with. Moreover, there is always the real possibility that what a party believes is a powerful surprise may be no surprise at all. Absent a discussion of the surprise with the mediator, a party may never know if the surprise will be as compelling to the opposing party as believed.

**Tip No. 6: Develop a Negotiating Strategy and Plan Ahead**

The concept of "anchoring" is as applicable in mediations as it is in any other negotiation setting. The first demand and counter-offer are critically important in that they are capable of communicating either hopelessness or glimmers of hope to the opposing party. An ineffective demand or counter that fails to achieve a client's objectives, ones that are well below (if you are the defendant) or well above (if you are the plaintiff) what a client's final position will ultimately be, and a party knows will be totally unacceptable to the other side, is not necessarily a productive negotiation strategy. The first demand and counter should be based upon a reasoned evaluation of a client's risks and invites the further discussions necessary to reach the client's ultimate objectives. The opening demand and counter are critical first steps on the road to the ultimate goal: a mutually satisfactory resolution. Moreover, if the ultimate goal sought will require creativity, consider imbedding a kernel of creativity (particularly if it is a non-issue for the client) in the opening position. If the sole purpose of a party's opening position is to simply demonstrate or telegraph a party's "power" or how "tough" or "disdainful" it is, or is otherwise unrelated to the ultimate objective, one could argue such an opening position has absolutely no strategic or practical value.

Of course the opening position should not be crafted to simply please the opposing party or to communicate hope that the ultimate settlement will be higher or lower than the case's worth as determined by counsel and the client during the mediation preparation process. Experienced negotiators plan and evaluate their opening carefully to achieve the ultimate interests of their

clients. If a party cannot support the reasons, interests and principles upon which the opening position is based to the mediator, it will be very difficult for the mediator to explain and explore the rationale with the opposing party. While the mediator may be very good, the mediator is not a miracle worker.

**Tip No. 7: When to Disclose the Bottom Line Should be Strategic**

Disclose the bottom line strategically when it is calculated to do the most good. Mediation is akin to cooking a succulent dish. The necessary ingredients are added in the correct order and carefully cooked with care and expertise. There is no benefit to deviating from the recipe and bringing the dish to a boil way too early. Add the ingredients of your negotiating strategy to the mediation in the right order and at the right time, slowly stir the pot with the appropriate care, and let the mediation process fully develop. Experienced negotiators are never in a rush to communicate their bottom line too early to either the mediator or the opposing party. Having taken the care to develop a negotiating strategy, experienced negotiators let that strategy work, as well as the mediation process, in a natural and holistic flow.

For example, if the mediation is long, difficult and protracted, the parties and the mediator may deem it most appropriate to declare a short "cooling off" period to further explore, raise and contemplate creative resolution options. The declaration of a bottom line at a premature stage of the mediation may deprive a client of this opportunity. Unless that is the intent of a party's negotiation strategy, there is no reason to disclose a bottom line precipitously. If the mediation appears to be languishing, and patience is running short, inquire of the mediator if the time is ripe for the communication of the bottom line and the impact of such a communication on the client's overall negotiation strategy. It certainly does no harm to at least seek this input.

**Tip No. 8: You Will Learn More by Listening Than by Talking**

What seasoned litigator worth his or her salt does not believe in the ability to sway and shape the opinions of others with the spoken word? The spoken word (together with an intact ego) is how litigators make a living, win the confidence of clients, and move juries, judges and arbitrators. When in trial, it is often critically important for the jury to believe that the attorney is the "smartest person in the room" and the trial attorney will intentionally convey this impression. This is particularly true when cross examining the opponent's expert witness. If the trier of fact believes the attorney in a products liability or malpractice action, for example, is smarter and better prepared than the opposing party's expert, that attorney has taken a major step toward victory. However, in the mediation setting listening and learning is far more important than

demonstrating one is the smartest person in the room. Unlike the court room, in the mediation context Albert Einstein's observation is apt:

> "If you're the smartest person in the room you are probably in the wrong room."

Experienced and sophisticated negotiators want to learn as much as possible during the mediation process and silence can be a very powerful tool. Not every statement made by the opposing party during the Opening Session requires a quick response. In that same vein, it is very difficult to ascertain the true interests and objectives of the opposing party if one is talking, focusing attention upon the formulation of the next utterance, sneaking a peek at the I-phone (which may also be misconstrued as rude and dismissive), or otherwise not listening very intently. There is absolutely no substitute for the learning that will take place by listening carefully during the joint session and the caucuses. Also, it is often more important to listen for what is not said rather than focus exclusively on what is said.

**Tip No. 9: Litigation Advocacy and Mediation Advocacy are Different**

Experienced litigators do not confuse trial advocacy with mediation advocacy. They are completely different types of advocacy as they have radically different purposes. In a trial or arbitration, the attorney is attempting to convince the trier of fact of the righteousness of the client's position(s). In mediation, advocacy during the Joint Session and Opening Statement is obviously designed to effectuate a resolution that is acceptable to the client. To achieve such a resolution, experienced litigators know the client wants and needs the cooperation of the opposing party, i.e., a client's success at the mediation is dependent upon the opposing party accepting the resolution that is sought. To secure the cooperation of the opposing party, it really makes very little sense to engage in hyperbole or an all-out attack on the morals, ethics, or interests of the opposing party. If a party places themselves in the shoes of the opposing party for a moment, would that party want to cooperate with an individual who has just delivered a scathing personal onslaught on the party's integrity, conduct, motives or values? When planning and crafting the Opening Statement, seasoned litigators focus on the audience whose cooperation is required to achieve the client's objective. Will the words that are uttered, and the manner in which they are delivered, further entrench the opposing party or will it give the opposing party a reason to reconsider its BATNA and positions and cooperate in reaching the ultimate goal. The former is ineffective mediation advocacy; the latter is effective mediation advocacy.

This is not to suggest that effective mediation advocacy cannot be forceful, persuasive, and compelling. Of course, mediation advocacy should be. No one expects or requests a party

to be tentative, obsequious, servile or demure. However, effective mediation advocates tailor the content of the message and how it is delivered given the client's strategic objectives at the mediation.

**Tip No. 10: Think Team and Harness the Power of Positive Conflict**

As stated by a respected philosopher, positive "conflict lies at the core of innovation." Indeed, positive conflict is a component in literally all successful mediations. As any professional Team Leader knows, a critical ingredient to the success of a highly effective and well-functioning team in solving difficult operational or other business problems, is the ability to generate, embrace and harness the power of positive conflict. In many respects the experienced mediator leads a *de facto* team for the duration of the mediation process whose function is a commitment to focus its energies on crafting, if possible, a creative and mutually satisfactory resolution. Many of the mediator's rules, processes and activities are intended to establish such a settlement team for the short period of time necessary to achieve a mutually satisfactory resolution.

Positive conflict is the antithesis of a battle of wills, a fight over intransigent positions (as opposed to true interests), demonstrations of personal distaste and judgments, raw demonstrations of power, deception and factual legerdemain, etc. Positive conflict focuses on a candid and trusting discussion with the mediator during the caucus of the good faith difference in ideas, interests, and goals of the conflicting parties and the willingness to mutually explore a potential satisfactory resolution that achieves the client's objectives. Let there be no mistake, positive conflict does not require any party to abandon its true interests or strategic objectives.

There are two thoughts that have been of assistance in laying the foundation for an effective team and harnessing the power of positive conflict.

> "Do not find fault, find a remedy." Henry Ford

> "If you wish to make a man your enemy, tell him simply, 'You are wrong.' This method works every time." Henry Link

Insisting on or telling the opposing party it is at "fault" for the entire world's problems, or focusing exclusively on or characterizing the opposing party as the enemy or a villain, will not ultimately be a productive negotiation strategy. As difficult as it may be to believe, aggressive and effective lawyers who achieve great results for their clients at mediation look for ways to cultivate an effective short term "settlement team" and exploit positive conflict – they attack problems not people. They give significant thought and detailed attention to the verbal and non-

verbal signals they give throughout the mediation that will cultivate positive conflict and the willingness to work as a team.

It is hoped these tips are thought provoking, perhaps a bit controversial, stimulate discussion, and are helpful in achieving a very positive and productive mediation process for your clients. They lie at the heart of the DRS Mediation Process™ developed over decades of experience in trying scores of lawsuits and arbitrations and negotiating hundreds of settlements. In fact, these tips have been provided to my clients who I have represented during mediations and have been very effective in explaining and preparing my clients for the mediation process and the search for a strategic "off ramp." Like any checklist or listing of tips they must be tempered and adapted to the particular dictates of the dispute and the client's objectives.

Any comments and suggestions you might have for improving or enhancing these tips are truly welcome and invited. We all embrace the importance of continuous improvement. Please submit your comments to me at richard@hurfordresolution.com.

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