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# Mock Trial Mediation: A More Effective and Cathartic Settlement Tool

**Litigation and Dispute Resolution**

Recently, the authors — Wendy Hufford, general counsel of a publicly-traded company that operates retail women's clothing brands and stores, and Brian Moran, a business litigator at an AmLaw 200 Firm — discussed Hufford's frustration with the typical "shuttle diplomacy" type of mediation.

Hufford recounted her common experience of walking away from failed mediations with the nagging sense the case would have settled if only the parties had simply been given an opportunity to directly communicate with one another. Too often, she has been left with the disillusionment crooned in Peggy Lee's 1969 US pop classic "Is That All There Is?"

Instead of leaving with a deal, she fell victim to the typical break-out session type of mediation — the one where the parties are kept completely separated and the mediator simply shuffles back and forth trying to extract counteroffers in the hope of coming to a number somewhere in the middle.

Amid bemoaning this wasted expenditure of time and resources, Moran recalled a successful mediation in an antitrust case over 30 years ago. It was achieved against seemingly insurmountable odds. He represented an upstart company that had taken on MCI, the successor to RCA Globcom, then the dominant long-distance telephone carrier on the island of Guam. There was considerable acrimony not only between these two competitors, but also between litigation counsel. Indeed, the animosity lead at one point to his co-counsel physically wrestling in open court with opposing counsel over an exhibit on an easel, prompting the judge to look at Moran and ask, "Did I just see what I thought I saw?"

Despite such hostility and the disinclination of the parties even to broach the idea of settlement, a deal was achieved due to the novel approach of the Hon. Stanley Sporkin. Relatively new to the federal bench at the time, Judge Sporkin brought with him a wealth of practical experience, both as the former director of enforcement for the Securities and Exchange Commission (SEC ) from 1974 to 1981 (during the heyday of hostile tender offers and legendary financial scandals) and as general counsel for the CIA from 1981 to 1986.

As the case approached trial, Judge Sporkin announced it was his practice to do a "walk through." He explained that the walk through required the parties to appear before him and present their case. While there would be no live testimony, each side would be given a specific amount of time to present their case using written exhibits, deposition testimony, and demonstrative evidence, followed by an opportunity to rebut the other's evidence. There were opening and closing statements. It was essentially a dress rehearsal not only for the judge, but also the parties.

As you can imagine, the strengths and weaknesses of each party's case were apparent. Judge Sporkin then donned his mediation robe, and skillfully brought the matter to a compromise. In achieving a settlement that had been considered, at best, a remote possibility, Judge Sporkin had the advantage of his clout as the presiding judge at the upcoming jury trial. The parties recognized he would be deciding critical pretrial motions. While that clout hung in the air during the walk through, it was never used coercively.

Most importantly, the "walk through" enabled the parties, particularly the plaintiff, to air its grievances, tell its story, and get what amounted to its "day in court." It was extremely cathartic. It also compelled the parties to directly confront and engage with one another, which greatly contributed to the successful outcome.

Recounting that walk through 30 years ago inspired the authors to wonder how a similar approach might work in the context of private non-binding mediation. What would a template for a mock trial mediation look like?

The ultimate goal is obviously settlement. With that in mind, what features would best enhance the desired outcome? There are five features that come to mind. First, the cost should be kept within

reason, in line with the objective of avoiding the cost of a full-blown trial. Second, the format should provide an opportunity for each side to present their case directly to the other party and respond to the evidence cited against them. In this way, the parties can have their “day in court.”

Third, each party should have money at stake if a settlement is not reached. Skin in the game would incentivize the parties to give the mediation their best good faith efforts. Fourth, the parties should commit to seeing the process through to the end. No one should be allowed to walk out or abruptly bring the mediation to an end. Fifth, there should be a finite time for the mock trial mediation to come to an end. A deadline will keep the parties meaningfully engaged throughout the process.

With these guiding principles in mind, we suggest two alternative templates, the first entailing an expedited, more informal process (the Simple Method), and the second consisting of a more fulsome mock trial (the Mock Trial):

## A. The Simple Method

This method would consist of the following steps:

1. The mediation would be limited to a single day;
2. The case would be “tried” to the mediator;
3. Each side would verbally present their case to the mediator, supplemented with whatever documentary or other evidence they chose;
4. Each side would have an hour to present their case, with the plaintiff going first for 40 minutes, then the defendant for 40 minutes, followed by the plaintiff’s rebuttal for 20 minutes and ending with the defendant’s 20-minute rebuttal;
5. Each client would have the opportunity to speak (but would not be required to do so);
6. The mediator, after a lunch break, would then meet separately with each side to discuss the strengths and weaknesses of their case; and
7. The mediator would then try to broker a settlement for the remainder of the day.

## B. The Mock Trial

This more formal method would entail the following 12 steps:

1. The mock trial mediation would be conducted over a single day or, depending on the complexity of the litigation and the number of parties, two days[1];
2. The mediator would serve as the bench judge;
3. A jury of six individuals from the local community would be empaneled by the mediator, with a majority required for a verdict;
4. There would be 10 minutes per side for opening and closing arguments;
5. Each side would be allowed to call two witnesses who would each testify for up to 40 minutes each, with 20 minutes for cross and redirect examination;
6. The jury would have 75 minutes to deliberate and render a verdict;
7. During jury deliberations, the mediator would meet in break-out sessions with each side to explore a pre-verdict settlement before the panel returns its verdict[2];
8. If a jury verdict is reached prior to the end of the 75-minute break-out sessions, the mediator, if he or she is making progress, can hold up announcing the jury verdict;
9. Once a verdict is announced, the losing party becomes obligated to pay the full cost of the mock trial mediation[3];

10. If there is a question as to who prevailed — perhaps because of a deadlock or a compromise verdict, which can occur with counterclaims at stake — the mediator would either declare a tie or a victor. Such decision would lie in his or her sole and absolute discretion;
11. After the verdict is announced, the parties are each given a separate half hour to interview the jurors and get feedback. During the juror interviews, the mediator would separately meet with each side; and
12. After completion of the jury interview sessions, the mediator excuses the jurors and re-convenes the mediation in an effort to broker a post-verdict settlement.

**NOTES**

1 The mock trial mediation proceeding would be non-binding, confidential, and inadmissible for any purpose, other than to enforce the contractual obligations of the mediation agreement. Of course, the parties could choose to make the proceeding binding.

2 If the parties prefer, both sides could choose to observe the jury deliberations before any break-out sessions.

3 The cost of the mediation would be fixed up front and cover the mediator's time (including pretrial preparation), the jurors' time, the cost of a stenographer or videographer and all other out-of-pocket costs. Each side would pay the full fees and costs (i.e., 100 percent) up front. The monies would be held by the mediator and released upon the return of the jury verdict, with one-half being returned to the party who obtained a favorable verdict.

Each of the foregoing formats would yield a number of benefits: expose the strengths and weaknesses of each side's case; bring the matter to a head and hopefully render the case ripe for settlement; furnish each party with the opportunity to have their "day in court," which can be cathartic and allow an aggrieved party emotionally to accept a settlement; arm the mediator with additional leverage and arguments (arising from the testimony, evidence, jury verdict, and/or juror feedback) to convince the parties to settle; and lastly, by virtue of the fee-shifting provision in the case of the Mock Trial, monetarily incentivize the parties to settle prior to the announcement of the jury verdict and the imposition of the mediation fees on one party.

This proactive client-participatory mediation could be accomplished in a single day. (See the model of the 10-hour schedule for the Mock Trial below.) It would also come at a cost in line with the normal fees incurred for the typical mediation, during which the fee clock is running while people are simply sitting around in a conference room awaiting the return of the mediator from the unilateral "negotiating" session with the other side camped out in another conference room.

Given the vagaries and uncertain outcome of the current passive, disengaged mediation process, mock trial mediation certainly seems worth the old college try.

## 10-hour Mock Trial mediation schedule

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| 8:00 am – 8:20 am | Introduction by the mediator |
| 8:20 am – 8:30 am | Plaintiff's opening statement |
| 8:30 am – 8:40 am | Defendant's opening statement |

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| 8:40 am – 9:40 am | Plaintiff's witness #1 |
| 9:40 am – 10:40 am | Plaintiff's witness #2 |
| 10:40 am – 11:40 am | Defendant's witness #1 |
| 11:40 am – 12:40 pm | Defendant's witness #2 |
| 12:45 pm – 1:45 pm | **Lunch break** |
| 1:50 pm – 2:00 pm | Plaintiff's closing argument |
| 2:00 pm – 2:10 pm | Defendant's closing argument |
| 2:15 pm – 3:30 pm | Jury deliberations and pre-verdict break-out sessions with the mediator |
| 3:35 pm | Announcement of the jury verdict |
| 3:40 pm – 4:10 pm | Defendant's interview of the jurors |
| 4:10 pm – 4:40 pm | Plaintiff's interview of the jurors |
| 4:45 pm – 6:30 pm | Post-verdict break-out sessions with the mediator |

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