


MEDIATION: INSIGHTS FROM U.S. PRACTICE

William E O'Brian Jr
Associate Professor of Law
University of Warwick

A decorative graphic consisting of several horizontal lines of varying lengths and colors (teal, light blue, white) extending from the right side of the slide towards the center.

Mediation is very popular in the U.S.

- Litigation is very expensive in the U.S.
- Jury trials make the outcome highly uncertain.
- Courts are overburdened and look for ways to reduce their dockets.

Example of How Costs Motivate Settlement

- Suppose case where damages = \$500k and likelihood P will win is 60%.
- If costs are \$100 k each, P should accept any amount over \$200k.
- D should be willing to pay up to \$400k.
- Thus there is a settlement range of \$200k to \$400k.

But suppose parties do not agree on likelihood of success

- If P thinks he has an 80 % chance, he will now insist on \$300k.
- If D thinks P has only a 40 % chance, he will only pay \$300k.
- Thus, no margin of error.
- This level of disagreement is probably very common indeed.

Mediation Can Help With Process

- Reluctance of Parties to Broach Settlement.
- Give parties a chance to vent feelings.
- Gets the mediator, rather than the lawyer to tell the client the weaknesses of his case.
- Help especially with multiple party cases.
- Help find win-win solutions.

Mediation Can Help with Valuing Case

- Hearing the Other Side present its case forces parties to confront other arguments.
- Mediator can help by engaging in reality testing or perhaps even opine on parties' chances.
- But parties may be unreasonable or even negotiate in bad faith.
- Should mediator be able to report this to the court?

Not all cases are suitable

- General arguments against settlement
- Some cases are strong and parties should be able to stand by their rights.
- Some cases are mainly about legal questions and need the court to tell the parties their rights.
- But, not everyone who thinks he has a strong case is right. Carleton Case.

Insurance Issues

- Insurers' and insureds' interests not always aligned, especially if excess exposure.
- Example: \$100k insurance policy where damages are \$500k, and case can be settled for \$100k.
- Insurer motivated to reject, but insured may want to accept.
- US doctrine of bad faith. Mediation may establish reasonable settlement value.

Steps in a Typical US Mediation

- Pre-mediation written submissions
- Meeting attended by clients with authority to settle.
- Opening statement by mediator
- Opening Statements by parties
- Caucuses/ shuttle diplomacy
- Bring parties together to brainstorm and/or conclude settlement agreement.

E.U. Directive

- Generally a very positive step.
- Handles issue of inviting compelling mediation very well.
- No mention of authority.
- Need exception to confidentiality to deal with bad faith negotiation.