Making the transition from litigation to mediation

By William H. Ledbetter Jr.

To most of the legal profession, medi- 
ation is counter-intuitive. From our first day in law school, the focus has been on litigation. Why bother learn- ing about a process that seems so dif- ferent? There are several reasons:

First, because the Virginia Rules of Professional Conduct require it. At- 
torneys must advise clients about the availability of the various forms of 
dispute resolution and the possible advantages and disadvantages of 
each.

Second, the availability of media- 
tion empowers attorneys to provide a 
more professional service to clients. 
Better results can be achieved. It is 
far less costly, time-consuming and 
stressful than litigation. It is private 
and confidential. And even if a me- 
diation session proves unsuccessful 
in a particular case, no harm has been 
done.

Third, by serving clients in this way, 
lawyers can run their law prac- 
tices more effectively and efficiently. 
It’s better to be seen as well as profes- sional service.

Lawyers are increasingly recogniz- ing these realities and, as a conse- 
quence, improving their practices. 

As an indicator, Diane Strickland, a 
retired Roanoke circuit judge and 
ADR professional, observed in this 
newspaper last year that “the num- 
ber of mediations convened annually 
in [Virginia] now far surpasses the 
number of jury trials conducted.” (VIR- 
GINIALawy ersWeekly, March 10, 
2006.) Since then, the trend has con- 
tinued and even accelerated.

Of all the factors that are impor- 
tant for a litigator’s successful shift to 
skilled mediation, perhaps the key is 
the key. Has anyone ever attended a 
trial advocacy seminar at which thor- 
ough preparation was not (correctly) 
touted as the most important com- 
ponent? Mediation is no different.

In some respects, preparing for 
médiation is much like preparing for a trial. One must be familiar with the 
facts, the relevant law and the con- 
tent of pleadings. But in other ways 
preparing for mediation is markedly 
different.

Timing. Counsel must decide when to mediate, being mindful not only of the need to know enough about the case to evaluate it intelli- 
gently but also to assess the client’s 
desire to settle. Cost and time sav- 
ings are also a part of this calcula- 
tion. The right time may be before a 
complaint is filed, on the eve of trial, 
or after some discovery has been 
completed. There is no right answer. 

Attorneys need to decide the proper 
time to mediate on a case-by-case 
basis.

Approach. The goal is to resolve the 
dispute by a fair and mutually- 
acceptable compromise. To do so, 
sheath a sword, mount a white charger and do combat for a client’s 
cause. Most people respond better to 
an approach that signals confidence 
but is not offensive or intimidating. 
Parties who feel the other side is try- 
ing to bully them in mediation often 
respond by behaving just as strin- 
gently, thereby making settlement difficult, if not impossible.

Strategy. Once this adjustment 
in vision and approach is in place, 
the attorney should devise a plan of 
action that will achieve the compro- 
mise position the client seeks. Of 
course, the plan cannot be im-

utable. Flexibility is vital to suc-

cessful mediation. For example, if a 
claimant’s attorney enters mediation 
thinking that the defendant is vicar- 
iously liable under the doctrine of re-
spondent superior, he needs to 
quickly adjust his position if defense 
counsel raises doubt about whether 
the tortfeasor is indeed an employee. 

Similarly, a defense attorney or 
claims representative who begins the 
médiation skeptical of the claimant’s 
contention that her injury is dis-
abling should be prepared to modify 
his position upon hearing from and 
viewing the claimant.

Information Sharing. The strat- 
 egy should include using the media-
tor to full advantage. The attorney 
should advise whether it would be 
useful to disclose some relevant tid- 
bit of information to the mediator, be- 
fore the mediation begins, that may 
assist the mediator in understanding 
interpersonal relationships, a hidden 
agenda, or other dynamics in play. 
Ex parte communications are always 
permissible and sometimes indis- 
perable. For instance, an attorney 
in a domestic relations dispute may 
notify the mediator that there are 
fault grounds on each side, but that 
the attorneys have resolved to try 
and downplay these issues in the upcom- 
ing property division mediation. A 
claimant’s attorney can inform the 
mediator beforehand that the client 
may have unrealistically high expec-
tations so that the mediator can de-

velop a strategy to deal with the 
problem.

Client Involvement. Persons with 
real authority to settle the case 
must participate. For the claimant, 
this may mean only the attendance of 
the client and counsel. On the other 
hand, a young adult may wish to 
to confer with a parent or a married 
claimant with the spouse, at least 
when negotiations reach their 
concluding stages.

For the defense, someone with au-

thority to settle the claim within a 
reasonable and foreseeable range 
must be in the room or, less desirable 
but usually workable, on speaker 
phone, so that the negotiations can 
move step by step, without interrup-
tion, to a final and binding settle-
ment. One of the most common 
causes of impasse is the lack of 
“authority” to reach a settle-
ment on terms that seem to be ac-
teptable to everyone present without 
having to confer further, in detail, 
with a supervisor, or even a commit-
tee, at some distant place. 

An acknowledged variation occurs 
when mediation involves a public 
body. Attorneys know that a negoti-
ated settlement with a governmental 
entity may require subsequent ap-
proval by an authoritative body, often 
sitting in public session, before it can 
become final. Normally, this fact 
does not change the dynamics of the 
médiation process, but the client 
should be apprised of it before the 
mediation session.

In some cases, it may be just as im-

portant to consider who should not 
be present at the mediation as who 
should be. In domestic relations dis-
putes, the involvement of an in-law 
can have a blackboard-scratching ef-
fect that impedes the process from 
the start. Similarly, a well-meaning 
but irate relative, or a “friend/signif-
icant other/adviser” whom the client 
ths may be helpful supportive in 
the negotiations, often proves to be 
of a hindrance.

Client Preparation. Clients gen-
erally expect attorneys to be forceful, 
dynamic, theatrical, assertive and 
even downright combative in order 
to maximize the chances of a successful 
outcome in court. Such an approach 
is antithetical to successful medi-
ation. It is critical to carefully explain 
the nature and purpose of the medi-

ation process, including how it differs 
from court, while assuring the client 
that if the negotiations are not suc-

cessful, there will be a time and place for the more familiar adversarial 
techniques.

Clients need to know that patience is 
a cornerstone of successful media-
tion and that success often is 
achieved in small increments over 
the course of many hours. Clients 
should be encouraged to bring some-
thing to occupy themselves and to 
re-
duce frustration if discussions move 
at glacial pace, as they sometimes do. 

Further, the client should be pre-
pared to receive unacceptable pro-
posals for settlement without 
exasperating, understanding that 
proposals and counter-proposals that “test the boundaries” are common-
place in the search for a mutually-
acceptable compromise.

Client Presentation. It is almost 
always helpful for the litigants to speak 
before mediation is scheduled. The 
initial joint session, however briefly, 
whether it be each spouse explaining 
his/her respective positions, or cros-
suits dispute, or a claimant outlining 
the effects of his injury on his liveli-
hood and career, may help put on 
expressing sincere regret for the 
claimant’s travails. Although such 
remarks should seem to be extempo-
aneous, they should not be. Very 
few of us can make concise, helpful 
statements without some fore-
thought.

Attorney Presentation. Speak-
king of the “first day in law school,” 
the attorney’s presentation during the 
opening joint session should be no more than a self-defense of the initial 
statement in a jury trial. Granted, 
the presentation should be brief and 

dicate attorney’s role in the matter 
and be placed in the search for a mu-
tually acceptable compromise.

Reaching Agreement. Are 
impediments to resolution such as 
lies against recoverable funds or 
outside issues? What techniques 
should an attorney suggest to the 
mediator if an impasse occurs: 
“bracketing” or “book-ending,” or 
some other device? Attorneys should not just leave it up to the mediator to think 
about how to get to “yes.” Once the parties achieve resolution, coun-
sel should be prepared to stay the 
extra time to get the settlement in writing.

Skilled mediators are comfortable 
in the courtroom because they know 
how to prepare effectively. As attor-
neys learn the secrets of preparing 
for mediation, they become just as 
comfortable with this increasingly 
popular, efficient and effective 
method of resolving disputes.

William H. Ledbetter Jr. served on 
the 15th Judicial Circuit Court from 
1981 to 1999. He is currently retired and 
has consulted with The McCommons Group since retiring from the bench.