

Mediation from the Mediator's Perspective

Hon. Robert J. Schmisser, Schmisser Law Firm

**Friday, April 29th
11:00 – 11:50 a.m.**

NONTRADITIONAL MEDIATION
(and a few observations from the Mediator's point of view)

Robert J. Schmisser
District Judge – Retired
620-672-3292
schmisserlaw@gmail.com

Alternative Dispute Resolution (ADR) has become the customary path for most civil litigation. This presentation will focus on several mediation scenarios beyond traditional face-to-face caucus, non-traditional mediation, selecting a mediator, practical considerations and expectations of the mediator.

A. **Selecting a Mediator**

Mediators are unique. Selecting a mediator is much more than who is closest geographically or who did we use last time. While availability or cost may be factors, more important factors to consider could include how you or your client will work with the mediator, the personality of the other attorney or their client, subject matter expertise, willingness to meet face to face at a convenient location, etc.

B. **Appellate Mediation.**

The Kansas Supreme Court has established a pilot project referring twenty (20) selected civil cases pending before the Kansas Court of Appeals to mediation with the consent of the parties.

Having successfully completed several appellate mediations, I would comment as follows as to the advantages:

1. Appellate mediation allows global settlement including issues beyond the case itself.
2. The process allows the parties to feel they had the chance to tell their story without the limitations of the Court process.
3. Appellate mediation permits prompt resolution.
4. Appellate mediation may allow the final resolution to be confidential.

C. Criminal Mediation

The referral of pending criminal cases to mediation before trial is common in many areas of the United States including several counties in Northeast Kansas.

The format is similar to traditional mediation with the mediator acting as a sounding board and communication facilitator.

In my experience, the mediator in a criminal case assists the process as follows:

1. Frequently, the defense attorney has a client problem or the prosecutor has a victim/family problem that the mediator can address:
 - a) Defendant thinks the defense attorney does not spend enough time/is not fighting hard enough on the case.
 - b) Defendant needs to hear the "truth" from another source.
 - c) Victim/family needs to hear the "truth" from another source.
2. There are issues between defendant/victim/family beyond the criminal case itself.

It is critical that the mediation process does not open a new appellate argument for the defendant in a post-conviction challenge. I am unaware of any Kansas appellate decisions that have commented on mediation in criminal cases.

I believe it is critical that the defendant "consents" to the process and that at both the plea and sentencing hearings that the Judge confirms that the defendant understands his rights and wishes to proceed.

D. Attorneys Not Present

Particularly in domestic matters, I frequently mediate disputes where the attorneys do not attend the mediation.

It is my experience that sometimes the parties are more conciliatory when "it is just them".

Attached is the consent form I use that clearly states they are not bound to any agreement until the document is prepared and the party has had the opportunity to privately review the resolution with their attorney.

I believe the “attorney not present” mediation is particularly useful in the cases where money is a real issue, and the attorney has to limit their involvement for that reason.

E. Attorneys Not Involved

I have conducted several mediations referred to me where all of the parties are not “officially” represented by counsel.

I believe the “attorney not involved” can be useful in several circumstances.

1. The dispute is between clients of the same lawyer.
2. The scope of the dispute does not justify the expense of multiple attorneys.
3. The parties are members of the same family or have a business/personal relationship they want to protect.

Similar to the “attorney not present” format, I use a consent form that clearly states the parties are not bound to any agreement until the document is prepared and the parties have had the “opportunity” to privately review the resolution with their attorney, accountant or other advisor.

F. Submission Materials

Mediators really look at submission materials prior to the session.

If there are problems with your case, I think the best course is to deal with those problems in your submission so I have time to digest how you believe those problems are minimized. I will appreciate your candidness and realize that you understand your case.

Unless there is a real good reason why I should read 600+ pages of deposition transcripts, please send me a witness summary rather than asking me to sort it out.

I probably do not need to look at every page of tax returns for the last five years (but a nice chart showing the key figures is helpful).

Do not assume the mediator is an expert on the legal area of your case. If there are recent legislative changes or appellate court decisions, cite them in your submission materials. If you are going to send me a copy of an appellate court opinion, please highlight the areas you want me to focus on.

I probably will not study your materials a month prior to mediation, but it is nice to receive them before 4 PM on the day before. This is particularly true if your submission is lengthy or will require some research on my end.

Photographs, diagrams, etc. are very helpful.

I do not mind getting a lengthy email submission not followed with a hard copy, but if you chose to submit information to me in this fashion please bring a complete set of documents to the mediation session.

Unless there is a real good reason not to, I think your client should receive a copy of the materials you send to the mediator.

G. Early Mediation

I have conducted hundreds of mediations in which counsel agreed to mediate before depositions or have conducted little or no paper discovery with a goal of saving attorney fees and related expenses.

In my experience, early mediation requires one or more of the following factors to be successful:

1. The lawyers respect each other and have a reasonable working relationship;
2. The parties have a degree of legal experience and general sophistication that allows them to understand how expensive and demanding litigation can be so as to allow them to consider compromise without further participation in the litigation process;
or,
3. The case is of a nature that some of the issues are clear (such as liability, damages compared to insurance policy limits, capacity in a will contest).

One of the problem areas in early mediation is that the attorney may not be ready. While I believe you can effectively mediate without multiple days of depositions, I do believe the attorney needs to have talked to critical witnesses (or have copies of statements taken by an investigator).

H. Talk to the Banker First

I am amazed at how often mediated settlements are conditioned on approval of the bank because a party (who will obviously be paying money if the case is going to get resolved) has not discussed the case with their bank (or other source of money) in advance. I appreciate a mediation where the banker is educated as to the issues in advance and participates in the mediation in person or electronically. **Cash talks!** I think cases settle “cheaper” when there is no “financing contingency”.

I. Medical Liens in Personal Injury Cases

This is another area that I think early work prior to mediation pays off. My recent experiences with ERISA health insurance companies are that they start with the position that their lien is primary, not subject to reduction for comparative fault and not subject to reduction for attorney fees.

I think the plaintiff’s attorney should contact the medical lien claimant in advance and seek an agreement as to reductions for comparative fault and attorney fees.

I have had several cases where the Court “ordered” the medical lien claimant to participate in the mediation. While I am not 100% certain the Court has authority over a non-party, resistance from the lien claimant met with an order for an “apportionment hearing” post mediation will usually soften up even the most resistant medical lien claimant.

Medicare liens are troubling because it takes forever to get an answer. Recently, I mediated a case in which the insurance carrier agreed to issue a check in settlement without naming Medicare as a Payee. The lawyers for the plaintiff (big time television lawyers) agreed to indemnify the insurance carrier for the Medicare lien. The attorneys were going to hold the entire amount of the lien in their trust account pending a final negotiation.

J. Cheering Sections

Usually in the domestic arena, I have conducted a number of mediations in which a party brought along someone for “moral support” or “guidance”.

First, I think the mediator and the attorney on the other side are entitled to “notice” that the team approach will be applied.

Second, sometimes it really helps. If the party lacks confidence or has limited capacity, the moral supporter/friend may help the party do what they really need to do.

I try to have an understanding at the start of the mediation that if I think the “cheering section” is interfering with the process that the supporter will leave. I have had to carry through on that request on a few occasions.

K. Documenting the Settlement

I try to have a handwritten settlement sheet with appropriate detail signed by the parties and counsel before anyone leaves the mediation. Recently, I mediated a case where one side prepared in advance of mediation a five (5) page settlement document with blanks. After a settlement was agreed upon, the lawyers spent 90 minutes arguing about the settlement document (Microsoft Word and on the laptops) including multiple modifications. But, the paperwork was done before we left the mediation.

I have considered having a settlement agreement “template” prepared in advance with blanks to fill in. I have about one case a year where someone tries to get out of what they agreed to in mediation. Usually, the contention is the handwritten settlement agreement was merely “an agreement to agree” or that I (or the lawyer they discharged after mediation) told them they had several days to “walk away” from the settlement.

A bigger problem is whether there has been full disclosure in a business, estate or domestic dispute. Early mediation can exacerbate this problem. A particularly difficult area is a farming operation and how to document prepaid expenses, growing crops, grain in storage (or sold on contract with deferred payment), breeding livestock (and home raised livestock) and feed on hand.

A common settlement agreement may provide that one party receives certain property and funds and the other party receives everything else. If everything else is not documented in the agreement (or discovery), the issue of full disclosure may be open for later argument.

J. Final Thoughts

1. The case will not settle if you are not ready. Your being busy is not an excuse to be unprepared.
2. The case will not settle if your client has unrealistic expectations. It should not be my job to educate your client as to reality.
3. It is hard for the mediator to be ready if you do not submit materials in advance. **But, is it really necessary to send the mediator 20+ or 50+ or 100+ or 500+ pages of materials? Brief good materials are better than voluminous poor materials.**
4. Who the Judge is can really make a difference in domestic matters.
5. Your complaints about the other lawyer or the Judge do not help settle the case.

6. **I think part of your job is making sure I get paid.**
7. Do not be afraid to tell me you disagree with me. I expect you to help me understand where the boundaries of the case are. My job is to settle the case. Your job is to represent a client. My responsibilities and your responsibilities are different.
8. There are things we can do to make the process more comfortable. New boyfriend or girlfriend is/are not present. Arrive and leave separately. No joint session. Mediating at a "neutral" location. Setting a reasonable time limit (flexible if we are close and everyone wants to continue).
9. **There are some cases that need to be tried.**

Conclusion. Many Judges are requiring ADR before any trial. I have mediated a number of cases involving less than \$10,000.00 (including a small claims appeal and several limited action cases) because the Judge ordered ADR. In all candidness, the parties to smaller disputes are often more interested in settlement than the parties to "big" cases. ADR can be cost effective, and the parties appreciate efficiency in resolving their dispute.

Consent to Mediation
State of Kansas v. XXXXXXXXXXXXX
Kingman County District Court

I, XXXXXXXXXXXX, consent to participate in a mediation of all of the felony criminal charges now pending against me in Kingman County, Kansas, District Court.

I understand the purpose of the mediation is to try to find a resolution of all of the charges and cases without having a trial.

I understand I do not have to participate in this process. I further understand that if I am at first willing to participate in the process that I can stop the mediation at any time by clearly telling my attorney XXXXXXXXXXXX or the Mediator Robert J. Schmisser that I no longer want to participate.

I understand the mediation is confidential meaning that a jury would never be told that I participated in mediation or that I was willing to consider any plea proposal. Mediator Robert J. Schmisser will not be allowed to testify at a trial of my case.

I understand Robert J. Schmisser is a retired District Judge from Pratt, Kansas. Although he used to be a judge, he cannot tell me exactly how District Judge XXXXXXXXXXXXX or any other trial judge will decide any of the issues of my case(s).

I understand I have an absolute right to a jury trial. My participation in the mediation does not change my right to have a jury trial to resolve each case.

I understand that Robert J. Schmisser is not my attorney. I understand that if I have any questions about the mediation process or my case in general that I have the right to privately talk to my attorney XXXXXXXXXXXXX about those questions.

I understand that Judge XXXXXXXXXXXX (or any other judge who might be assigned this case) is not participating in the mediation.

In the sentencing aspects of any case, the judge is not obligated to follow the recommendations of the attorneys and has an independent duty to impose a sentence as may be properly allowed by law.

Date:

_____XXXXXXXXXXXXXXXXXXXX

Consent to Mediation
In the Matter of XXXXXXXXXXXXXXXX
Harper County Case 2019 JO

I, XXXXXXXXXXXXXXXX, consent to participate in a mediation of the felony juvenile offender complaint now pending against me.

I understand the purpose of the mediation is to try to find a resolution of this case without having a trial.

I understand I do not have to participate in this process. I further understand that if I am at first willing to participate in the process that I can stop the mediation at any time by clearly telling my attorney XXXXXXXXXXXXXXXX or the Mediator Robert J. Schmisser that I no longer want to participate.

I understand the mediation is confidential meaning that a jury would never be told that I participated in mediation or that I was willing to consider any plea proposal. Mediator Robert J. Schmisser will not be allowed to testify at a trial of my case.

I understand Robert J. Schmisser is a retired District Judge from Pratt, Kansas. Although he used to be a judge, he cannot tell me exactly how Judge XXXXXXXXXXXXXXXX or any other trial judge will decide any of the issues of my case.

I understand I have an absolute right to a bench (judge) trial or a jury trial. My participation in the mediation does not change my right to have a trial to resolve this case.

I understand that Robert J. Schmisser is not my attorney. I understand that if I have any questions about the mediation process or my case in general that I have the right to privately talk to my attorney XXXXXXXXXXXXXXXX about those questions.

I understand that Judge XXXXXXXXXXXXXXXX (or any other judge who might be assigned this case) is not participating in the mediation. In the disposition (sentencing) aspects of any case, the judge is not obligated to follow the recommendations of the attorneys and has an independent duty to impose a penalty (sentence) as may be properly allowed by law.

Date:

XXXXXXXXXXXXXXXXXXXXX

CONSENT BY PARENT

I am the mother of XXXXXXXXXXXXXXXXXXXX. I have read the foregoing Consent to Mediation. I have had an opportunity to speak to my son XXXXXXXXXXXXXXXXXXXX about this process. I believe he understands this process and wishes to participate in mediation. I consent to the mediation process and will participate as appropriate. If I wish to stop the mediation, I will clearly tell XXXXXXXXXXXXXXXXXXXX or Mediator Robert J. Schmisser that I wish to stop the mediation.

Date:

**Domestic Consent to Mediation
Marriage of XXXXXXXXXXXX
Kingman County Case 2017 DM**

The undersigned interested person/party in the above referenced matter consents to Robert J. Schmisser acting as a mediator to seek agreement and resolution of any disputes in the case. I understand Robert J. Schmisser is an attorney, but he is not acting as an attorney for anyone in this case. While he may comment on the law, he is not giving me legal advice.

Mediation is a confidential process and the details of the mediation discussions are not admissible in Court unless they are admissible by rules unrelated to the mediation.

Robert J. Schmisser has substantial Court experience, but he cannot predict or guarantee how another Judge might decide any of the issues of this case.

The final decision of whether to make or accept any settlement proposal belongs to the client acting with the benefit and advice of their personal attorney.

If I am represented by an attorney of record who is not present during the mediation, I am not bound to any settlement until I have had an opportunity to review the proposed settlement with my attorney and have the opportunity to give final approval.

All issues involving the welfare of children are subject to the continuing jurisdiction of the Court. The Judge has final approval authority regarding any domestic court agreement.

**Domestic Consent to Mediation
Marriage of ██████████
Ford County – Pre-Suit**

The undersigned interested person/party in the above referenced matter consents to Robert J. Schmisser acting as a mediator to seek agreement and resolution of any disputes in the case. I understand Robert J. Schmisser is an attorney, but he is not acting as an attorney for anyone in this case. While he may comment on the law, he is not giving me legal advice.

Mediation is a confidential process and the details of the mediation discussions are not admissible in Court unless they are admissible by rules unrelated to the mediation.

Robert J. Schmisser has substantial Court experience, but he cannot predict or guarantee how another Judge might decide any of the issues of this case.

The final decision of whether to make or accept any settlement proposal belongs to the client acting with the benefit and advice of their personal attorney.

I am not bound to any settlement reached in mediation until I have had an opportunity to review the proposed settlement with an attorney of my choice and have the opportunity to give final approval.

The Judge has final approval authority regarding any domestic court agreement