

Maneuvering Through Mediation: The Tricks, Twists and Turns of Finding Untracked Powder – Resolution

by Michele Mattsson and Kent B. Scott

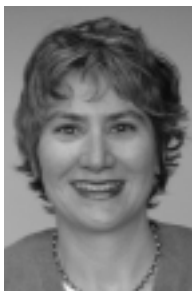
Anyone who has ever experienced the joy of skiing through Utah's dry, untracked powder has felt euphoria – the bliss of floating, effortlessly. But like mediation, getting there takes lots of work and creativity. Do you hike up to your favorite backcountry spot before anyone else does? Do you hire a helicopter? Do you dash up to the nearest resort and try to be the first person on the lift? How do you avoid the dangers? In this article, we'll discuss the tricks, twists, and turns of getting to the untracked powder – getting to a settlement.

Getting Ready: pick the day, pick the gear, prepare yourself, and coordinate work with your companions.

Preparing the client for mediation is an important task. Plan on who will attend the mediation. Determine who the decision maker is – your client or someone else? Bring the important players along. Leave the difficult players behind (unless it's your client).

Talk to your client about the process, about what to expect, about how the client can help make the process a success, about how much it will cost and how much can be saved by settling. Talk about how you'll act – differently from court appearances. Brace your client for the ups and downs of the process. Stress the "ups." Have your client help with mediation preparation. Involve your client in the process of selecting a mediator. Let him or her review and comment on mediation position statements. Inform your client how the opening session works and who will and will not be present. Listen to your client's concerns about the process and act on them. For example, if your client is fearful of meeting in joint session, ask the mediator to shorten or dispense with that portion of the mediation.

MICHELE MATTSSON is the Vice Chair of the Utah Bar ADR Section and the Chief Mediator at the Utah Court of Appeals.



Arming the Mediator: decide where to go, how to get there.

While the attorney's role in the mediation process may not be as dominant as in a traditional court setting, the time and effort given to preparation is nonetheless critical. Prior to the mediation, legal counsel can work with the mediator in determining how much information should be available in order to give the mediation its best chance to succeed. Think about whether you want to exchange position statements or furnish confidential memoranda to the mediator only. If possible and advisable, involve opposing counsel in the preparation process. Talk about the personality traits of the parties and discuss trouble spots. Suggest ideas for settlement so the mediator, counsel, and the parties can begin to embrace the possibility of resolution.

Getting Together: meet up; begin the trek.

The joint session begins the overt portion of the mediation process. The parties, their counsel, and the mediator typically meet in a room together to discuss the mediation framework and the parties' respective positions. The mediator introduces the session – outlines the process, the ground rules, and the benefits of mediation. Counsel should then be prepared to make an opening statement outlining pertinent facts and his/her legal position. Think through your opening statement. Brevity is often warranted. Rehearse and fine tune it like you would for oral argument. But remember the focus is different. You are not making an argument like you would in court. You are setting the stage for fruitful negotiations. It is never helpful for an attorney to be too critical of the opposing party or opposing attorney in an opening statement. It is always helpful for an attorney to express

KENT B. SCOTT is a member of the Utah Bar ADR Section and a member of the American Arbitration Association panel of mediators and arbitrators.



a willingness to work towards resolution and to express his/her optimism that a mutually acceptable agreement can be achieved.

An important strategic consideration is whether to have your client speak in the opening session. Many attorneys are afraid to have their clients speak in the opening session and rightfully so. Balance the need of your client to vent with the negative impact it may have on the negotiation process. Some clients have trouble staying focused and do more harm than good. Others are well-spoken and can set the stage for an open, productive discussion. (If it won't be productive for your client to speak in the group session, give him/her the chance to vent when you're alone with the mediator.)

Consider how much time should be spent in the joint session. In many mediations, it's more productive to keep the joint session short. In other cases, most of the mediation can be conducted in the group session.

Splitting Up: chose your own way to the top.

In the typical scenario, the joint session concludes, and the parties and their attorneys separate into different rooms. The caucusing process then begins in earnest. The mediator will often decide who to start with first, but if you believe it would be more productive to start with one side or the other, suggest it to the mediator.

What do you do when you're alone with your client?

We talk a lot about what happens when you are in caucus with the mediator, but not about what happens when you are alone with your client. Although this may be an awkward and antsy time, much can be accomplished. Here are some suggestions:

1. Let your client vent about what has gone on so far in the mediation. Do necessary damage control after the joint session. (If your client is concerned by what the mediator has said, discuss it with the mediator when he/she returns.)
2. Evaluate the strengths and weaknesses of the issues raised by each side.
3. Talk about your client's short and long term business and personal goals.
4. Discuss a case budget. How much will it cost to proceed – money, manpower, and time?
5. Let your client know there are no "have to's" in mediation, but discuss the value of resolution and finality from an economic and emotional perspective.

6. Listen to your client's underlying concerns; then help your client focus on his/her real interests.
7. Try new ideas for creating settlement options.
8. As the mediation goes on, review the progress that has been made. Reiterate the positive concessions made by the other side. Commend your client for his/her efforts.
9. Go for a walk with your client. Let your client go for a walk. Let your client take a "smoke break."
10. Be sociable. When you get bogged down, change the subject. Learn more about your client. Discuss topics of common interest.

When the mediator comes to the caucus room, how much do you let your client talk?

It depends. It depends on the need of your client to have his/her feelings validated and understood. Lawyers get nervous when their clients talk too freely, but it is important to let the mediator and client open up a dialogue. Avoid the temptation to cut your client off too early. Both counsel and the mediator can gather important information from a "rambling" client. At a point, however, counsel should intervene and help get the client back on focus.

THE LAW FIRM OF

VAN COTT, BAGLEY, CORNWALL & MCCARTHY

IS PLEASED TO ANNOUNCE THAT



GABRIELLE "LEE" CARUSO

HAS JOINED THE FIRM.

LEE CARUSO brings 26-years of employment law experience to the firm including eighteen years representing management in the labor intensive Detroit area. She comes to Van Cott from the Utah Attorney General's office where she served as Chief of the Employment Section of the Litigation Division.

Ms. Caruso earned her J.D., *cum laude*, from Michigan State University. She can be contacted at **801-237-0335** or **gcaruso@vancott.com**.

VanCott
Serving Utah's Legal Needs Since 1874

SALT LAKE CITY ■ OGDEN ■ PARK CITY

www.vancott.com

What happens if you get along with opposing counsel?**What if you don't?**

Clients rarely like each other and sometimes counsel don't like each other either, but it helps if counsel can be cordial professionally. The more people who are able to cooperate in mediation, the better. When counsel get along and trust each other, much can be accomplished. They can talk with the mediator in advance of the mediation to discuss personality traits of clients, "hot spots," "hot buttons" to avoid, earlier settlement discussions, past and recent interactions between the clients, and new settlement strategies. During the mediation, counsel can talk together with the mediator to discuss difficulties their clients are having and to iron out lingering legal issues. Such a meeting is most productive if counsel are respectful of one another. If you do not get along with opposing counsel, avoid elevating tensions. Limit yourself in the joint session. Suggest going directly to caucus. Rely more on the mediator to dilute your emotion and to be your mouthpiece.

What can you do if the opposing party dislikes you?

It is rare that an opposing party will have much affection for you as counsel, particularly if you have filed suit and litigation has proceeded. During the mediation, do not give the opposing party more to dislike about you. Make the necessary points to advocate on behalf of your client, but don't be unduly critical or accusatory of the other party. Don't come on too strong. Make overtures to improve the relationship. Be sympathetic.

How to prepare offers and counteroffers

At a point, the mediation moves from information gathering to negotiation. Knowing what you know, how can the case be settled? There is a skill associated with making offers and counteroffers. Rapport and timing are crucial. It is always a back-and-forth process that can't be rushed or forced. Begin with the end in mind. Be goal oriented, not advocacy minded. Don't start too low or too high with your opening offers. A first offer should never be a final offer. Leave yourself room to negotiate, but don't discourage the other side from continuing with the negotiations by being unreasonable, unrealistic.

Don't be discouraged from continuing negotiations when the opening offer is too high or too low. They always are. It's not where you start, but where you end that counts.

Encourage your client to make concessions that are important to the other side, but are of limited impact to your client. Involve your client in the process. Don't overlook your client's concerns. Address them early. Include all the issues you want resolved in your offer. It's counterproductive to add new demands late in

the negotiation process. Don't backtrack.

Factor in what you know of the personalities in the other room when crafting an offer. Stay flexible. Avoid taking the "bottom line" approach.

Work with the mediator in side caucuses with opposing counsel to get a sense of where things are going; how much flexibility the other side has; how to keep the ball rolling. Ask the mediator's advice. The mediator is the only person who knows the chemistry of the moment in both caucus rooms.

Have something in reserve to sweeten the pot and to complete the deal. Agree to pay for settlement document preparation, to pay the mediator's fee, to write a letter of apology, to do future work, to trade a service.

Be willing to make the last move, even if it's a small one.

What to do when the client draws a line in the sand

When a client draws a line in the sand, it either means he or she is frustrated or that negotiations have reached an impasse. Counsel and the mediator need to determine which it is and avoid the latter, if at all possible. Here are some tips. Review the progress that has been made up to that point. Ask to talk to your client alone. Take a lunch break. Go for a walk with your client. Discuss what will happen if the case doesn't settle. Indicate how much it will cost to proceed and discuss likely outcomes. Talk about risk. Get creative. Throw out new ideas. Add a new twist to an old idea. Keep your independence. Keep a sense of humor. Tell your client what you think is a "good deal" and what is not. The client is always the boss, but the attorney is the professional and must remain objective.

Conclusion: the untracked powder.

There are a lot of ways to get to resolution, but all take effort, creativity, and agility. Pick the day. Pick the gear. Decide where to go, how to get there. Meet up, split up. Keep up. Work together. Catch your breath. Come together. Though the way up may be exhausting, the ride down – having resolved the dispute – is liberating.

The genesis of this article was a breakout session at the Mid-Year Convention in St. George in 2004. Panelists were V. Lowry Snow, Terry L. Wade, and Kent B. Scott; Michele Mattsson was the moderator.