

20 Tips for a Successful Mediation

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Because the vast majority of litigated disputes are resolved in the mediation process, it is essential for advocates to approach a mediation with the same level of preparation as they would a trial. Taking the time to evaluate the case and prepare the client thoroughly will result in better resolutions and more efficient, productive mediations.

Deciding whether and when to mediate a case.

1. *The earlier, the better. Mediate at the earliest opportunity.* Waiting too long to mediate can impede settlement possibilities because the parties can become entrenched in litigation positions and the accumulation of attorneys' fees and costs can drive the settlement amount. Be careful not to insist on complete discovery before attempting mediation. The additional information gathered may not merit the additional expense or delay in initiating serious settlement discussions.
2. *Mediate where the parties' real interests cannot be satisfied through litigation.* The parties in a mediation have ultimate control over the outcome and have the ability to address many interests that courts do not consider. In the typical employment case, for example, a mediated settlement may address non-disparagement, confidentiality, job references, records destruction and continuation of health benefits – issues that will not be addressed through the adversarial process.
3. *Mediate when there will be a continued relationship between the parties.* Mediation is an ideal process for disputes involving an ongoing relationship between the parties. Mediation offers a prompt, low-cost, confidential process to achieve a resolution and will often serve to improve communications between the parties in a dispute. Mediation can lay the groundwork and set guidelines for an improved relationship in the future.

Choosing the right mediator. Advocates in Washington are fortunate because there is a diverse group of mediators to choose from, with different styles, personalities and approaches. Interview potential mediators and speak with other advocates who have also worked with that mediator to ensure that the mediator you select will be the most appropriate for your specific litigated dispute.

4. *Look for a mediator with tenacity and persistence.* A common complaint about mediators is that they give up too easily when the monetary proposals appear too far apart. Tenacity and persistence are among the most important characteristics to look for in a mediator. Consider mediators who have a passion for reaching settlement, especially in cases where the barriers to resolution seem insurmountable, and who will follow up and stay involved in the case even after an unsuccessful mediation.
5. *Look for a mediator with flexibility in approach and format.* Because all mediations are different – involving distinct legal and factual issues, different relationships, specific business climates, unique client personalities and attorney dynamics -- a mediator should carefully consider the unique dynamics of each case and customize an approach to each mediation that is most likely to lead to a productive process and a successful resolution. A mediator who approaches a dispute

with a one-size-fits-all mediation style and format will miss important opportunities for developing rapport and earning the trust of the participants, identifying and addressing underlying interests, emotions, and a wide range of potential settlement terms.

6. *Consider with an open mind the mediator suggested by the other side.* When opposing counsel proposes a mediator, that indicates a level of trust and comfort with that mediator, and a judgment that the mediator will be able to be more persuasive with that attorney and/or her client. Keeping in mind that the goal of a mediation is persuading the other side (not the mediator) in order to reach resolution, using the suggested mediator may be one step toward reaching that goal.

Pre-mediation communications with mediator. Discussing background information and non-legal issues with the mediator is often a critical ingredient to a successful mediation. Pre-mediation conferences ensure that the mediation will be more productive and efficient, allow the mediator to customize the approach to mediation and be more fully prepared, and help avoid misunderstandings about the process and attendees. In mediation, there are no *ex parte* communication constraints in communicating with the mediator, although advocates should be mindful of the prohibition against revealing client confidences without consent.

7. *Provide information to help the mediator understand and communicate effectively with your client.* Often there are emotional factors or idiosyncrasies that may impede productive communication between the mediator and your client, such as anger, cynicism about the legal system, difficulty trusting “the system,” etc. Informing the mediator of such issues will help the mediator connect and build rapport with your client and establish trust and open communication – all necessary factors for a successful resolution. For example, a plaintiff in one of my employment discrimination mediations recently had an extremely disappointing experience in personal injury litigation, including an unsuccessful mediation and a very low jury verdict. Her attorney in the employment matter informed me of this before our mediation and warned me that the plaintiff would need special assurances to build trust and participate fully in the mediation. With this information, I spent additional time in the initial caucus with the plaintiff explaining the process and everyone’s role, answering questions, addressing concerns and ensuring that she fully understood and was invested in the process before proceeding. This background information and an extended initial caucus with plaintiff were essential to the parties reaching a successful resolution at the end of the mediation day.
8. *Discuss with the mediator any perceived barriers to settlement and other hot-button issues.* Possible impediments to settlement come in many forms, such as a party’s desire to set legal precedent, a party’s proposed course of action based on a “principle” that doesn’t include settlement, an opposing counsel who has client control problems, a party’s impending bankruptcy, etc. Informing the mediator of these factors in a pre-mediation discussion, even if your perceptions are not totally accurate, provides a fuller view of the dispute and improves the mediator’s ability to identify and directly address the parties’ underlying interests.
9. *Discuss the mediation format and attendees.* Be certain to determine beforehand with the mediator whether to have a joint opening session, and whether to have parties give opening statements during a joint session, or have only the mediator provide her opening statement. Many advocates (and some mediators) have strong opinions about the usefulness of a joint opening session in general, and the effectiveness of a joint session changes, depending on the

variables of each case. Additionally, determine who will be attending the mediation (and inform your client of the attendees) and confirm with the mediator that the correct individuals with authority will be among the attendees.

Preparing your client for mediation. This component of mediation preparation is multi-faceted and crucial. Client preparation for mediation is often overlooked as discovery and litigation preparation sometimes become all-consuming.

10. *Explain the process and purpose of mediation to your client, including the obligation to mediate in good faith.* Help your client approach the session as a problem solver rather than a combatant. Explain the change in process -- from warfare to treaty negotiation, and explain your new role -- from litigation warrior to mediation advocate. Discuss with your client the realities of litigation -- the expense, delay, distraction, risks, psychological toll and uncertainty. Prepare your client for compromise and explain that the goal is settlement and closure, not victory. Prepare your client for a long day that may feel like an emotional roller coaster, and encourage patience.
11. *Clients should be fully prepared for questions from the mediator and encouraged to communicate directly with mediator.* Prepare your client to give his/her perspective at the mediation and to take advantage of the opportunity to be heard. Counsel your client to be honest with the mediator and to avoid answering a question if necessary. Often the client is more persuasive than his or her attorney, especially in revealing underlying interests. Direct communication about the dispute allows your client to be in control of one aspect of a process that is often mysterious to participants.
12. *Provide a realistic and honest case assessment to your client.* Don't wait until the mediation for your client to hear about the weaknesses of the case for the first time. Mediations result in better outcomes for your client where your client has been fully informed of the legal issues and risks ahead of time by his/her own lawyer. Ensure that your client reads the other side's mediation memo. Help broaden your client's perspective of the dispute and think about the conflict from the other side's perspective. Identify the underlying interests of the other side and discuss with your client proposals that address those interests.
13. *Prepare a negotiation strategy but avoid determining a hard and fast "bottom line" before mediation.* Work with your client to stay fluid and open-minded to allow the mediation process to reveal settlement options. Many cases settle on terms that parties did not even consider at the start of the mediation. Identify options for resolution and discuss them with your client in a way that does not produce unreasonable expectations. Prepare a negotiation strategy, and fully discuss your WATNA and BATNA.

Mediation memos. The submission of a mediation memo is a great opportunity to explain your client's perspective to the mediator and helps save valuable mediation conference time by educating the mediator beforehand. Remember, however, that the primary goal of mediation communications generally is to persuade the other side, not the mediator.

14. *Exchange pre-mediation memos with the other side.* The exchange of mediation memos enables each side to respond to specific assertions more effectively, helps further the goal of convincing the opposition, and allows the opposition to more fully evaluate the strengths and weaknesses of the case. Submitting a separate, confidential memo to the mediator along with the exchanged memo is always an option.

Opening Session. Many advocates are opposed to starting a mediation with a joint opening session due to fear of polarizing the parties and starting the mediation off on the wrong foot. However, there are several important reasons for advocates to remain open-minded about a joint session if it is only for the mediator to provide her opening statement.

15. *Agree to a joint opening session for the participants to collectively hear the mediator's opening statement.* The mediator's opening statement serves as a ceremonial start to the mediation process. The mediator outlines her role and the role of the parties, describes the mediation process, establishes a cooperative tone and sets the stage for settlement. Although advocates and some clients have heard mediators' opening statements on numerous occasions, typically the process is a new experience at least for the plaintiff, and a full explanation of the process allows parties to ask questions about the process and encourages a focus on a common goal of settlement and closure. Introductions and handshakes that take place during the opening session add a human element to the dispute and can even help assess demeanor.
16. *Consider a joint session for parties' statements.* With the guidance and assistance of the mediator beforehand, parties' statements in joint session can be useful in many cases. Often plaintiffs benefit immensely from the opportunity to tell their story, and the opportunity to speak directly to the opposition in mediation may serve as the only chance to have their "day in court." At the same time, heartfelt, conciliatory statements by a defendant can allow the plaintiff to feel understood, often paving the way to closure. Of course, there are circumstances in which substantive statements by either side in joint session may not be helpful and may even be counterproductive. Advocates should rely on the mediator to help determine what information should be communicated directly and how to most effectively navigate a direct information exchange with the other side.

Mediation Conference. Mediation is an organic process that typically takes unanticipated twists and turns on the way to closure of an often protracted, expensive legal dispute. As a form of alternative dispute resolution, the success of mediation depends largely on skills that are truly *alternative* to those typically required in litigation. Advocates should come with a strategy for both negotiation and information exchange and be prepared for the unexpected.

17. *Be honest about the weak spots and bad facts in your case.* Although this suggestion may seem like an anathema to trial attorneys primed for the battle of litigation, the process of negotiation and resolution depends on realistic case assessment and recognition of the risks of litigation. Remember that the communications made in caucus with the mediator are confidential. Acknowledgment of the weaknesses of the case lends credibility to the discussion of the strengths of the case. An honest discussion of the weaknesses of the case allows for a broadened view that includes the other side's perspective and serves as the basis for movement in negotiations.
18. *Consider recognizing weaknesses or bad facts with the opposition.* By giving the mediator the authority to share with the opposition an acknowledgment of a weakness in the case, even if the message is greatly watered down, that party makes an essential step towards closure. First, the recognition of bad facts or other weaknesses portrays to the other side a realistic case assessment and builds trust and momentum towards closure. Second, such an acknowledgment may validate a belief held by the opposition and, in turn, can serve as a pivotal point in the mediation --

allowing that party to finally stop obsessing about the past and to look forward towards resolution. Rely on the mediator to help identify those hot button issues and to help carefully craft a message to be relayed to the other side that will help achieve closure.

19. *Be patient with and honor the mediation process.* Mediation requires parties, who have been engaged in litigation warfare in many cases for several years, to reach complete closure and resolution in a single day. This transformation from warfare to peace treaty, especially in the absence of any prior negotiation, requires time and process. Parties often need the give and take of the negotiation process to fully understand and appreciate the case, especially where the clients haven't been fully informed of the legal issues and risks ahead of time. Many parties need time and help from the mediator to understand how and why their case has not improved but gotten worse over time. Allow your client to have these opportunities.
20. *Don't wait until the end of the negotiation to raise important (and potentially inflammatory) settlement terms.* At the end of a long mediation day, when the parties have worked hard to reach agreement on the magic number that will satisfy everyone, many non-monetary terms proposed late in the process may threaten to kill the tentative "deal." An effective approach is to pursue parallel tracks of negotiation throughout the mediation – one track related to the dollar amount and the other track related to other terms important to the parties.

Mediation requires hard work, patience, flexibility and creativity on the part of the parties, their attorneys and the mediator. With careful planning and client preparation, advocates can achieve for their clients closure and resolution with more lasting and satisfying results than litigation.

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