

Lawyer/Client Preparation for Mediation

(a) Before Mediation

1. Fully analyze all facts and issues relevant to the dispute. Speak to opposing counsel to narrow the issues; determine those which are central to resolving the dispute; and determine those which are not in dispute or are easily resolvable.
2. Identify what information you need and whether you have enough information to proceed to mediation. Exchange all necessary information informally or, if necessary, conduct discoveries prior to mediation.
3. Determine **when** it is best to mediate (for example, once the injury has crystallized).
4. Determine who the parties are and ensure that all parties needed to resolve the dispute have agreed to mediate.
5. Identify the strengths and weaknesses of **your** case and the **other side's** case.
6. Learn the law and assess the probable outcomes of trial.
7. Determine how much the dispute has cost to date and estimate the cost associated with seeking a resolution through trial. Request a litigation budget from your lawyer.
8. Identify non-monetary and non-legal factors that are important to you and do the same for the other side.

These might include:

- ? timely resolution (money now vs. money later)

- ? risk aversion and certainty (acknowledge that it is not unprofessional to pay a premium to avoid risk and achieve certainty)
 - ? stress avoidance
 - ? business concessions/interest in preserving relationship
 - ? avoid high legal fees (not uncommon to pay premium for early resolution to avoid such fees; also recognize that winners of lawsuit only recover small percentage of fees, if any)
 - ? avoiding publicity
 - ? avoiding a bad precedent
 - ? desire to save face
 - ? one or more parties want an apology
9. Determine whether the parties have **common interests** which should be explored during the mediation. Ask yourself why resolution of the dispute is in the interests of both parties?
10. If possible, learn about the other side's level of risk-taking and negotiation style and that of their counsel. Have the parties had settlement discussions before and what were the possible barriers to settlement?
11. Obtain some information about the working style of the mediator (i.e., the process used, the role of counsel and clients, the mediator's style--facilitative vs. evaluative)
12. Generate a set of settlement options with your lawyer ranging from ideal to unsatisfactory.
- ? determine "bottom line" or what are unwilling to exceed for settlement
 - ? limits of authority to settle
 - ? try to anticipate the other side's settlement range
 - ? strive for a "good" outcome, that is, one that is fair, wise, efficient, enduring, and implementable

13. Explore your BATNA (best alternative to a negotiated settlement)
 - ? explore and evaluate your options if a settlement is not reached
 - ? seek a settlement that is at least as good, if not better, than your BATNA

14. Prepare a mediation brief or summary.

15. Review the Agreement to Mediate with your lawyer to ensure it serves your interests.

16. Decide whether your lawyer will attend mediation with you and if so, what role each of you will play at mediation.

17. Prepare (or have your lawyer prepare) an opening statement setting out the facts, law, and interests.

(b) During Mediation

(i) Types of Client Representation in Mediation

Lawyers can play different roles during a mediation, depending on their client's instructions. Prior to the mediation session, you should determine with your lawyer:

- ? whether your lawyer will be present during the mediation session
- ? how active a role each of you will play at the mediation

The roles for counsel in mediation include:

- ? **Outside Advisor** Parties may attend mediation without counsel. In this case, counsel must protect the client's interests by providing legal advice before and after the mediation, and specifically, prior to signing minutes of settlement.
- ? **Silent Advisor** Counsel may attend mediation in the role of a "silent advisor." The lawyer's purpose is to monitor the proceedings, ensure the client's legal rights are protected, and advise the client during breaks concerning any matters that arose during the mediation.
- ? **Team Member** Counsel takes an active role in the mediation, by focusing on the legal issues and participating in any discussions as a member of the client's "team."

- ? **Dominant Player** Counsel acts as the dominant or sole participant in mediation. This is important when there is a power imbalance between the parties or your client cannot express him/herself clearly or effectively. This type of client representation places a considerable ethical and professional obligation on the lawyer, who must communicate with their clients, understand their perspective, advocate on their behalf, and ensure that their needs are being addressed throughout the mediation process.

(ii) Traditional versus Mediation Advocacy

Effective mediation advocacy requires a “shift” in attitude and approach from a competitive, adversarial frame to a more co-operative and collaborative one. Here are some tips on how to create an atmosphere which is conducive to obtaining settlements in mediation:

- ? Promote a conciliatory approach; foster a spirit of co-operation. Think of the opening statement as tone-setting for a problem-solving exercise and deliver it accordingly. For example, express your commitment to use mediation to settle the matter today, if possible. Thank the other side for agreeing to participate or for having suggested mediation.
- ? You need to persuade the other side to listen to you, therefore, treat them with courtesy and respect and set a positive tone. An approach geared to impeaching the character/credibility of the other parties will probably be counter-productive. Concentrate on describing the other side's behaviours and actions and their impacts on your client. Avoid personal attacks or generalizations about the other side's personality or deficiencies. Be hard on the problem but soft on the people.
- ? Be aware of your language. Avoid threats and generally aggressive statements. Avoid using words more appropriate to a trial context, such as “plaintiff,” “defendant,” and “position.” Remember that the parties are participating in the process and may not understand legal jargon. Try to translate terms that people without legal training may not understand.
- ? When asking questions to clarify or obtain more information, remember to use open-ended questions, for example, “Tell me more about...” Use a non-threatening tone of voice and avoid framing questions as demands or accusations (reserve cross-examination for adversarial processes).
- ? Attempt to understand and acknowledge the other side's position (and strengths) even though you may not agree with it.
- ? Remember that you are trying to persuade the other party, their representatives and counsel and not the mediator, therefore speak directly to them.
- ? Try to focus on other underlying interests of the parties in addition to legal interests (and in particular-- on common interests). Avoid extensive reference to legal authorities unless you need to convince the other side of the strength of your legal position.
- ? If there are clear and obvious weaknesses in your legal case, acknowledge them before the other side does so.

- ? Don't underestimate the value of an apology or an acknowledgment of wrongdoing. An early acknowledgment of error, contributory fault, or an apology on issues that you do not need to hold out on can go a long way.

(c) After Mediation

(i) De-briefing

If the mediation ended with no agreement or a partial agreement, counsel and client should analyze the session, in terms of the discussions which took place, and develop strategies toward resolution of the dispute. Factors to consider include: acquiring expert opinions on issues remaining in dispute; considering settlement options raised in mediation but not adopted; whether holding further mediation sessions is likely to be fruitful; and the advantages and disadvantages of using other dispute resolution processes, including preparing for trial.

(ii) Drafting the Settlement Agreement

Considerations to be examined by counsel and parties when preparing a written record of a negotiated settlement include:

1. Who does the drafting?
 - ? the parties
 - ? the mediator
 - ? the lawyer(s) for the party or parties
2. When should the agreement be drafted?
 - ? during joint sessions with direct input from the parties
 - ? after or between joint sessions
 - ? at the end of the mediation session
 - ? after the parties have had a chance to consult with their lawyers
3. What form should the settlement document take?
 - ? an informal memorandum of understanding (useful for addressing non-legal issues or if parties seek tentative agreement to allow them to get legal advice)
 - ? a formal legal contract which addresses rights and responsibilities of parties to each other and is enforceable under law.
4. Other considerations:

- ? clarity of clauses to avoid diverse interpretations or misinterpretations
- ? the degree of detail in the clauses (specificity can either encourage or discourage future conflict; conflicts involving intense emotions and little trust require structured agreements which specify all details)
- ? balance of concessions (so settlement does not appear one-sided)
- ? positive wording