

MAXIMIZING YOUR MEDIATION

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How do you get the most out of your mediation? How do you maximize the time you spend in mediation? The following suggestions will make your mediations more productive and successful. These suggestions are not hard and fast rules. However, you should at least consider each suggestion when you are preparing for mediation.

What is your goal at mediation? Why are you there? Your primary reason is to settle the case. So, how do you reach your goal of settling the case? You will need to convince the other side that your case does have merit. Remember it is highly unlikely that you will be able to convince the other side that their case is without merit, but you may be able to help them understand that your case has more merit than they previously believed.

A. PRIOR TO THE MEDIATION

1. Know your case.

Knowing your case builds your credibility and your case's credibility with the opposing party and their lawyer.

- Credibility requires not only honesty, but also knowledge. And, as in all negotiations, knowledge is power.
- You must be able to help the opposing side appreciate the merits of your case. The more merit, the more interest the opposing party will have in settling.
- If you appear unprepared, the opposing party may assume you are not taking the case seriously, or will not be prepared for a dispositive hearing (such as a motion for summary judgment) or trial.
- Don't miss the opportunity to build your credibility with the opposing side by being prepared.
- Review the file.
- Meet with your client, preferably in person – if not, by phone. Discuss your weaknesses openly and candidly with your client, and discuss how you can minimize your weaknesses.

2. Know your client's positions, interests and issues.

As their lawyer you must know your client's positions, interests (expressed and unexpressed) and issues in order to advocate effectively on their behalf.

- What is your client's real goal? What does your client need?
- What's important to your client? Why is it important to your client?
- What will motivate your client to resolve the case?
- Are there outside factors affecting your client's negotiating position, such as a spouse or supervisor who is pressuring your client?
- Know your client's BATNA (Best Alternative to a Negotiated Agreement), WATNA (Worst Alternative to a Negotiated Agreement), and PATNA (Probable Alternative to a Negotiated Agreement).
- Don't be unrealistic in assessing your BATNA. If your client's WATNA is highly likely, then an even slightly better offer than his WATNA can be attractive.

3. Anticipate the opposing party's positions, interests and issues prior to the mediation, and try to confirm their positions, interests and issues at mediation.

Understanding the opposing party's positions, interests and issues may help determine a creative solution. You will be better prepared to focus on issues that might prevent settlement and to discuss issues that are stumbling blocks to settlement for the opposing party.

- Discuss the opposing party's positions, interests and issues with your client. Your client may have critical information that you won't know unless you ask the client.
- Call the opposing counsel (or have coffee or lunch) prior to the mediation and discuss the case.
- Don't wait until you get to the mediation to hear for the first time what the opposing party's positions and interests are.
- Remember an effective advocate can argue both sides of a case.

4. Determine the most appropriate time for mediation.

Sometimes the timing of the mediation will increase the likelihood of settlement.

- Decide what you need to accomplish prior to the mediation, e.g. depositions, hearing on a motion for summary judgment, etc.
- Decide what you need to accomplish after the mediation if it is unsuccessful, e.g. depositions, hearing on a motion for summary judgment, etc.
- Does the mediation need to be very early before litigation costs make the case more difficult to settle?
- Does the mediation need to be close to the trial setting to put pressure on parties to resolve the case?
- Don't neglect returning telephone calls from the mediator's office because you are not ready to mediate. Call the mediator and discuss the best time to mediate.
- If you are scheduling a half-day mediation and think you may need additional time, set the mediation in the afternoon. If the mediation is scheduled in the morning, the mediator will not be able to allot additional time to the case if the mediator has another mediation scheduled for the afternoon.
- Consider whether a pre-litigation or pre-arbitration mediation would be productive. Even if the case does not settle, each party will have a better understanding of the other side's case after the mediation, and will better understand their risks and what discovery needs to be conducted. Also, consider whether attorney fees created after a lawsuit is filed will make the case even more difficult to resolve.

5. Send information to mediator in advance of mediation.

Any information provided to the mediator prior to the mediation will give the mediator a better understanding of the factual issues and legal issues. The mediator will be better prepared to explain and argue your client's position to the opposing party. Don't miss this opportunity to prepare the mediator to argue your client's case.

- Preparing a position statement will also make you a better prepared advocate.
- Remember, a party's position statement is confidential and will only be read by the mediator.
- A position statement could include:
 - who will attend the mediation;
 - a brief summary of the facts of the case;

- a summary of the parties' legal positions and a candid assessment of each party's strengths and weaknesses;
- any recent developments that may impact the resolution of the case;
- a history of settlement negotiations;
- the present posture of the case (including any depositions taken, trial setting or hearing dates); and
- a description of any sensitive issues that may not be apparent but will influence settlement negotiations and any suggested solutions.
- You could go the extra mile and include a sample jury charge on each issue in your position statement.
- Provide the mediator with any critical documents – the contract, police report, expert report, excerpts of deposition transcripts, etc. Highlight the most important parts of the documents for easy reference.
- Don't send mediator boxes of information. Most effective mediators are too busy to review boxes of information.

6. Call the mediator prior to the mediation.

A telephone conversation between you and the mediator prior to the mediation will better prepare you both for the mediation and can be very helpful in setting the stage for a successful mediation.

- Ask the mediator:
 - to send you a copy of their resume and fee schedule;
 - when the mediator thinks mediation would be most effective;
 - what does the mediator know about the judge;
 - whether the mediator has prior mediation experience with your opposing counsel.
- Calling the mediator provides you an opportunity to briefly describe the facts of the case, describe the status of discovery and ask the mediator if he/she needs any particular information.
- You should advise the mediator about any unique facts about your client, the opposing party or the relationship between the opposing party and your client.
- Be prepared to advise the mediator what information the mediator can share with the opposing party and what information you want kept confidential.

7. Call the opposing attorney prior to the mediation.

Calling your opposing counsel prior to the mediation may give you a better understanding of the opposing party's position and the evidence that supports their position. It also provides an opportunity for you to establish a rapport with your opposing counsel.

- Ask the opposing attorney to explain their client's position.
- Find out if the opposing attorney's client needs any information from your client.
- Try to determine what type of relationship the attorney has with the client – is the client a close friend, long-term client, new client or pro bono client?
- Consider discussing the need for an opening session with opposing counsel.
- Try not to alienate the opposing counsel.
- Consider discussing your weaknesses with the opposing party, and explain how you can minimize your weak points to the jury.
- Don't miss the opportunity to build their trust and respect by being candid. Don't assume the opposing party knows the merits of your case.

8. Consider whether an opening/joint session is beneficial to resolving the case.

The opening/joint session has several purposes. It allows the mediator to explain the mediation process and establish ground rules for the mediation, permits parties to physically see and assess one another, enables the attorneys to share their client's position and the evidence that supports their client's position and allows the parties to speak directly to the opposing party's decision-maker.

- Although most of the time opening statements are beneficial, certain cases are more likely to be resolved by foregoing the opening session. For example, the opening session probably should be avoided if the parties will become so emotional that it hinders their ability to negotiate.
- Discuss with the mediator the pros and cons of an opening session.
- Advise the mediator of your concerns of the effect an opening session will have on your client and/or the opposing party.
- Advise the mediator if you believe an opening session is necessary.
- Consider whether you believe the opposing counsel will adequately inform their client of the risks of trial or of problems with their case.
- Do not routinely forego the opening session.

9. Consider the effect of demonstrative aids in the opening session on the opposing party and their attorney.

You need to know why you are using the demonstrative aids in order to use them effectively.

- Use aids that help your opponent better understand your position and the evidence that supports your position.
- Don't use a video presentation that is so long that it loses its effect.

10. Research the judge/jurors/arbitrators.

Find out as much as you can about the judge by searching the internet, e-mailing other attorneys and visiting with the court staff.

- You will be better prepared to advise your client on how a judge will rule on a particular issue.
- You will instill the client with confidence in their attorney.
- You could gain credibility with the opposing party.

11. Prepare the client for the mediation.

The better prepared your client is for the mediation, the more likely the case will be resolved.

- An unprepared client may develop unrealistic expectations or become entrenched in an unrealistic position.
- Discuss the strengths and weaknesses of your case with your client.
- Don't surprise your client with new information at the mediation – clients generally don't react well to surprises.

12. Explain the mediation and trial process to your client.

Clients are looking to their lawyers for guidance in an area clients know little about. Also, be aware that what clients know about the litigation process may be incorrect (i.e., from TV).

- Determine if your client has ever participated in a mediation.
- Explain to the client what will most likely happen at the mediation, i.e., the mediation process. Don't assume your client knows what a mediation is. Remember, most people don't know the difference between mediation and arbitration.
- Advise your client that mediation is usually the best opportunity to resolve their case because everyone needed to settle the case is present and focused on it.
- Advise the client that the mediator is neutral and does not represent either side.
- Explain that the mediation process is confidential, and what "confidential" means.
- The mediator may have the parties and their attorneys sign an "Agreement for Mediation" which explains the mediation process and the confidentiality of mediation. Acquire a copy of the agreement from the mediator and have your client read it prior to the mediation.
- Your client should be prepared for an "unreasonably high demand or low offer" from the opposing party, especially if it is a response to your "unreasonably high demand or low offer".
- The more the client understands about the mediation process, the more comfortable they will be in negotiating a resolution.
- You should also explain the trial process to your client. Be sure to let them know that even though a case is set for trial on a certain date, it may not go to trial on that particular date.

13. Consider preparing a settlement agreement (CSA) and order of dismissal prior to the mediation.

Executing the final CSA and Order of Dismissal at the mediation may prevent later arguments over the contents of the final CSA. The mediator should have a short form settlement agreement, usually a one to two page document, which the parties can sign if an agreement is reached. Typically, the parties will sign the mediator's form CSA and subsequent to the mediation a more comprehensive CSA will be executed along with the Agreed Order of Dismissal.

- Occasionally, disputes will arise as to what provisions should be in the second, more comprehensive CSA. For example, one party may want a confidentiality clause (that was not included in the mediator's form CSA) to be a part of the more comprehensive CSA.
- Prepare the settlement documents with the appropriate blanks and bring them to the mediation. Or, prepare the settlement documents with the appropriate blanks, and when the case settles have your secretary fill in the blanks and fax or email the documents to the mediator's office. Alternatively, bring a laptop computer and portable printer to the mediation.
- If you use the mediator's form, don't leave out any terms or conditions to the settlement that are important to your client, but not a part of the mediator's form.

14. Specific preparations for personal injury case.

- Determine the existence and amount of any medical or attorney liens, and share this information with the opposing party prior to the mediation.
- Defendants need to know about liens, especially Medicare and Medicaid liens, to insure they are protected.
- If a lien exists, a defendant may require a release of lien or may require the lienholder's name to be on the settlement check.
- Don't wait until the mediation to address lien issues.

B. DURING THE MEDIATION

1. Demonstrate your preparedness.

Mediation is a rare opportunity to have the opponent's decision-maker give the case and settlement discussions their undivided attention. Don't squander it!

- Review your file. Don't wing it.
- Bring the file with you to mediation. Otherwise, time will be wasted arguing about what a witness testified to or didn't testify to.
- Have copies of critical documents ready to provide each person on the opposing party's side.
- Meet with your client prior to the mediation, preferably in person – if not, by phone.
- Review your last settlement negotiations. Many times the opposing attorneys and/or parties have a different recollection of where negotiations left off.

2. Understand that the opening/joint session provides many opportunities.

Understanding that the opening/joint session provides opportunities enables you to prepare to take advantage of those opportunities.

- Think about how you can use the opening/joint session to convince the opposing party to change their mind and see the merits of your case.
- Most likely, the opening session will be the only opportunity you have to speak directly to the opposing party about the merits of the case.
- Don't dismiss the opening/joint session as unimportant.
- Don't tell the mediator that "both sides know what the case is about so we don't need to spend any time going over it". The other party's decision-maker may not understand your client's interpretation of the facts and evidence, and your opening statement is an opportunity to persuade them.
- Remember the mediator may know nothing about your case. Also, the mediator will also use the opening session to observe body language and the subtle reactions to what is said to gain a better understanding of the dynamics of the conflict.

3. Be professional.

Professionalism will help you resolve the case to your client's satisfaction. The opposing party will not only be evaluating your client at mediation, but also will be evaluating you and how effective you will be to the jury, judge or arbitrator.

- Be on time. Make certain your client will be on time. Ask your client to meet you before the mediation. If late, apologize sincerely.
- Be courteous. Treat the other side in the same way you expect to be treated.
- Pay attention during the opening session. Don't look through your file, read the newspaper or check your phone messages or email during opening statements.
- Silence your mobile phone, and advise your client to do the same.

4. Listen carefully and respectfully.

Don't tune out. You might learn something new.

- Remember - First seek to understand, then to be understood.
- Listen actively, i.e., listen with the kind of attention that makes the opposing side feel heard.
- Look at the speaker. Also, observe the opposing party while their attorney is speaking.
- Be aware of your own body language. Don't roll your eyes.
- When the other side has completed their presentation in the opening session, ask open-ended questions to clarify any matters.
- Consider restating what the other side has said to show you understand their position. There is a difference between understanding and agreeing. Just because you *understand* their position does not mean you *agree* with their position. But, it is important that you and your client understand where the other side is coming from.

5. Use temperate language.

You want the opposing party to hear what you are saying. People don't listen as well when they are yelled at, threatened, or when they are assaulted with abusive language. If you act unprofessionally, the opposing party will focus on and discuss you, rather than the merits of your client's case.

- Use language that draws the opposing party to you. Use language that motivates them.
- React professionally to an opposing party's improper conduct.
- Don't lambaste, insult or personally threaten the opposing party, their representative or their lawyer. Don't use profanity, pejoratives (fraud, liar, scam, fake, egg-sucking dog) or attack the integrity of the other side. Don't present your closing argument.

6. Address the opposing party (the decision-maker) in your opening statement, not the mediator.

The opening/joint session provides many opportunities. You have an opportunity to talk directly to the opposing party (and this may be your only opportunity to do so) and explain why the jury/judge/arbitrator is going to decide the case in your client's favor.

- Look directly at the opposing party, and address your opening statement primarily to that person.
- Explain that you are the attorney hired to represent your client's interests.
- Explain that you are going to make certain statements that they (the opposing party) will disagree with, but ask them to try to understand your client's position, even if they disagree with it. Let the opposing party know you will do the same when their attorney is speaking, and you have told your client not to interrupt and to listen carefully when the opposing attorney and party are speaking.
- Acknowledge that different versions of the facts exist, and then explain why you believe the jury will accept your client's version of the facts.
- Don't address all of your comments to the mediator or the opposing counsel, except in unique circumstances.

- Consider letting your client talk in the opening session. If you believe your client is credible and presents well, let the client tell their story, especially if the client has not been deposed, so the opposing party can see that your client is a strength for your case. Allowing your client to share their story may also have therapeutic value for the client.

7. Opening demands and offers.

Remember your demands or offers are signals to the opposing party.

- One of the worst mistakes a plaintiff can make is to start at a number that is totally unrealistic. The plaintiff, especially the lawyer, will lose credibility with the opposing decision-maker. And, as the plaintiff lowers their demands, the plaintiff will feel he is giving in too much and that his lawyer is selling him out.
- One of the worst mistakes a defense lawyer can make is to “cut to the chase” and offer most of her authority too early in the process. Such offers increase the plaintiff’s expectations, and later result in substantial disappointment and anger from the plaintiff.
- Consider what message you want to send with the demand or offer. What message will be sent by the dollar amount? Do you want to include a verbal message with the demand or offer (“we’re near the end of the rope”)?
- Consider what response your demand or offer will elicit from the opposing party, and whether it will further the negotiation.

8. Provide evidence for your demands and offers.

Advocating your client’s position without presenting any evidence is like trying to fly a kite without any wind. It won’t fly.

- The opposing party needs to see the evidence that will be presented to the jury.
- One of the most effective ways to convince your opponent is to stick to the evidence.
 - Relate what people will say at trial and what appears in the documents.
 - Quote from the depositions to make your point.
 - Explain the inferences to be drawn from the testimony, if explanation is needed, in neutral language.
- Provide relevant documents and pictures, even if you know the opposing side has already seen them. The decision-maker may not have seen the information – for various reasons. Don’t assume the other side has reviewed and evaluated all the information you have provided to them.
- Review trial reports for cases with similar facts and injuries OR just similar facts (if liability at issue) OR just similar injuries (if damages at issue).
- Prior to mediation consider submitting the case to an E-jury (on-line jury questionnaires), especially if the case involves very unusual facts or issues.

9. Make certain your client and the opposing party do not focus on inadmissible evidence – evidence that the jury will never hear.

If your client and/or the opposing party focuses on inadmissible evidence, they will not be able to evaluate the case properly.

- Be sure to explain to your client or the opposing party when the evidence is inadmissible.

- Don't use clearly inadmissible evidence to try to convince the opposing party of the merits of your case. If you do, the opposing party may discount your legal skills and your ability to effectively persuade the judge, jury or arbitrators.

10. Understand that any new information revealed during the mediation may not be evaluated immediately and affect negotiations on that day, especially if the new information is presented to an insurance company.

Insurance companies often obtain authority for a claim from a committee that reviews the file and assigns a settlement value (authority) to the case.

- Try to present all information that you want the opposing party to consider at least 30 to 60 days prior to the mediation, unless there is a strategic reason for not doing so.
- Don't present new information at the mediation expecting the opposing party to drastically change their position during the mediation.

11. Effective use of the caucus.

When the mediator is meeting with the other side, use this time to explore your client's interests, fears, concerns and questions.

- Clients welcome and appreciate it when you give them your undivided attention.
- You can use this time to go over what the mediator discussed when he was meeting with you and your client, and to review any relevant trial reports.
- Be candid with your client when the mediator leaves the room.
- Plaintiff's lawyers should use this time to do math! Most plaintiffs do not understand what a defendant's offer translates into as far as their "take home" number and are sometimes too embarrassed to ask.
- Defense lawyers should use this time to explore the costs of going forward if the case does not settle, such as deposition costs, expert fees and trial preparation. Some company representatives may not understand the substantial costs of preparing for and trying a case. And, more experienced insurance adjusters certainly do not want to be surprised at the future cost of continued litigation.

12. Consider meeting with the mediator privately during the mediation.

You may need to share information with the mediator outside of your client's presence.

- Explain to your client that the mediator may want to meet privately with the attorneys during the mediation.
- Be careful – make certain your client is comfortable with you meeting privately with the mediator. Your client may feel you are doing something behind their back, especially if you meet privately multiple times with the mediator.

13. Consider meeting with the opposing counsel during the mediation, especially if you have reached a potential impasse.

You may want to request a meeting with the opposing counsel to clarify their position or your client's position, or just to ask "what's going on in your room."

- Ask the mediator if he thinks it will be helpful for the attorneys to meet privately.
- Consider what you want to accomplish by meeting privately with the opposing counsel.
- Don't use the private meeting with opposing counsel to berate the attorney or his client.

14. Considerations when a client is participating by telephone.

Generally, it is best to have your client present at the mediation – it is much easier to say “no” over the phone. It is also more difficult to convince someone to change their position if they are not present at the mediation. Also, the Court’s Mediation Order usually requires the party’s physical presence at the mediation. If a client must participate by telephone:

- Obtain the client’s work, home and mobile telephone numbers and email address.
- Find out if there is someone else you can call who can reach your client if you cannot. Alternatively, find out if there is someone else who can make a decision on the case other than your client contact – for example, your contact’s supervisor.
- Make certain you can reach the client at all times, even during lunch and after 5:00PM. Remember your client may be in a different time zone.
- If your client desires to participate by telephone, definitely discuss this with your opposing counsel and the mediator.
- If everyone agrees to permit your client to attend by telephone, make certain to have the opposing counsel sign a Rule 11 agreement.

15. Be a creative problem solver.

Clients have problems, and come to lawyers to have their problem solved.

- Mediation is an opportunity for lawyers to find a creative solution to their clients’ problem that better meets their clients’ needs, rather than have a court impose a decision upon them.
- Think creatively, rather than focusing only on your client’s position.

16. Determine the common interests of the parties.

You need to know not only your client’s interests, but also the opposing party’s interests.

- Both parties should want to get on with their lives, put the lawsuit behind them, stop spending money on attorney fees and resolve the matter on their own terms, rather than have a jury, judge or arbitrator tell them what to do.
- Be able to acknowledge the other party’s interests, perspectives and feelings.
- If you know a party’s interests, you should know how to motivate them. Motivated parties typically are willing to make concessions. When concessions are being made, a solution becomes possible.

17. Consider requesting a mediator’s proposal.

A mediator proposes a number in writing to settle the case and gives the proposal to each party. Each party will circle either “yes” or “no” to indicate their acceptance or rejection of the proposal.

- If both parties accept the proposal, the mediator will tell each side all parties have agreed to the mediator’s proposal and the case has been settled for the proposed number.
- If either party rejects the mediator’s proposal, the mediator will tell each party the case has not been settled, and the mediator will not indicate which party rejected the proposal.

- Many mediators prefer not to make mediator proposals, but rather have the parties work out a settlement through negotiation. Some mediators believe a mediator proposal may cause the mediator to lose their perceived neutrality.

18. Closing the deal.

A settlement depends on each side making a decision to which the other side will agree.

- Make the settlement as painless as possible for the other party.
- Don't make it hard for the other side to say "yes" by insisting on impossible terms.
- If there is a special term or condition of settlement that your client must have, consider when you want to disclose this "non-negotiable term" to the other side.
- Advise the mediator of any special term or condition of settlement early in the mediation.