

Participating in a Mediation — A Guide for Attorneys

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After preparing your client for mediation comes time to execute the plan. You have developed your client's case. One of the primary purposes of mediating is to provide your client with a meaningful and intelligent choice between continuing to litigate or a settlement the parties develop and agree upon. Now it's time to see that your client's case gets the consideration it is due.

Educate and communicate with your mediator

Before mediation takes place, provide the mediator with a confidential settlement, memorandum or position paper outlining your case, along with a copy of the complaint, important briefs, and perhaps relevant portions of deposition testimony. Generally, include a clear succinct statement of the facts and law, as well as your position on damage and remedy issues. Summarize settlement attempts to date, and options for settlement. Discuss what you perceive as the opposing party's vulnerabilities. If you have a client with unrealistic expectations, say so. Likewise, if other pressures are weighing on the client's position, such as health concerns, family issues or lack of funds, let the mediator know. The mediator can keep these matters confidential, but at the same time put these realities into their calculus, to obtain a better outcome for your client. This memorandum can be a very useful tool for the mediator as it provides an opportunity to educate the mediator about the details and realities that surround your case.



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Editor's note: This is the final article in a three part series in The Advocate. Part I, "The Eight Benefits of Mediation" appeared in the October 2012 edition, and Part II, "How to Prepare Your Client for Mediation" was published in January, 2013.

On the issue of confidentiality, the mediator should provide counsel with a mediation agreement, which spells out the ground rules of the mediation, as well as the strict confidentiality that applies to the process. All counsel, as well as the mediator should sign this agreement, before the substantive process is underway.

It is also an excellent idea to prepare a list of the most compelling, as well as the more marginal reasons that support your position, as well as potential settlement options. This piece of the mediation mosaic isn't necessarily a part of your settlement memorandum. Rather, it provides you with an effective communication tool, when you are in the heat of negotiation. With this list, you can feel more confident that the mediator understands every available reason to engage the other side to further compromise, and ensures that your client's full range of interests are in the mix.

Mediation day

Show up on time and be ready to engage with your client. An initial joint session can be helpful, even for those who don't want to engage in a traditional joint session during the course of the mediation. It allows both parties to simultaneously listen to the mediator's initial welcoming comments and ground rules. Clients find it reassuring to see the participants gathered together as planned and devoting the day to this common purpose.

That being said, it can be a good idea for the mediator to stagger the parties' arrival if a particular party is going to need a lot of time and attention from the mediator in the first caucus session. The real negotiations between the parties will not take place until both parties have had the opportunity to fully vent their concerns to the mediator. It also prevents the other party and counsel from spending hours alone in a conference room, waiting to begin their initial caucus session. **Caveat:** typically both parties arrive at the mediation at the same time. The unorthodox approach of staggering the beginning of a mediation must be fully disclosed and agreed upon in advance. It is also imperative the party second to arrive be prompt and ready to engage, so the mediation does not stall.

Ask your client to turn off all devices in opening session and caucuses with the mediator, while you are shutting off yours. It will allow you to use your time in the mediation more effectively. Stay alert to new information. Often much more can be learned in the course of a day's mediation than in the formal discovery process. You might find you received correct answers to your discovery requests, but asked the wrong questions.

Be productive when the mediator is in private caucus with the other side. Discuss what occurred in your most recent caucus and what the mediator is telling you about the other party's position. Continue to examine your BATNA (best alternative to a negotiated agreement) after each caucus and brainstorm about what might move the mediation process forward.

Four negotiation points to keep in mind

The following four points are helpful in all negotiations, during the course of a formal mediation and in everyday life:

1. Learn and appreciate your own ability and your case's strengths;
2. Realize – or at least entertain the possibility — that you and your client may not know what the other parties want.
3. Consider whether the other parties actually know your case's weaknesses. Other parties often think their case is more transparent than it, in fact, is; and
4. Rather than focus on "the bottom line," be willing to think creatively.

There is often common ground that a mediator can explore when the parties become entrenched, but counsel must be willing to entertain the possibility of viewing the situation through a new lens. If you keep the above points in mind, you

and your client will mediate from a foundation designed for a successful outcome.

The negotiation process

Spend your private caucus time wisely. Provide the mediator with factual and legal information to reality-test the other party's expectations. Likewise, use the mediator to reality-test your own client's expectations, and to explore viable settlement options with your client. Listen to the mediator for clues about the needs and interests of the other side, and continue to ask the mediator questions for more information about the opposing side's position. Use the mediator to present your proposals, which you can request be attributed to the mediator, rather than you, if you prefer strategically not to own the proposals. If the mediation hits a wall, discern from the mediator whether this is an impasse that will take time to work out or if the parties are, in fact, intractable. An effective mediator will be persistent and can see opportunities you may not, so be patient. Mediation can be very effective, but it is rarely short or linear. Do not rush the process.

A negotiated agreement

If an agreement has been reached, put it in writing immediately. Sometimes this is not practical. If not, draw up at least bullet points that outline the agreement and how it will be structured. Each attorney should read and sign it. At a minimum, include the date of the mediation, the parties and counsel present and the basic points agreed upon. Decide who is drafting the final agreement, and when it will be circulated for review.

If the mediation ends without a settlement, despite the preparation and involvement of counsel and the parties, try to reach an agreement on the reason for the impasse. Seek

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an agreement to structure a method to deal with the problem and move forward. For example, if the impasse is the result of a lack of sufficient factual information, agree to a finite amount of discovery to target the issue of contention. If the dispute is a matter of law, decide if you can file a discrete motion, putting the legal issue before the court for a ruling.

But deal or no deal, a good mediation will help counsel know more about the case and the parties, so that resolution can ultimately be reached. Remember settlement is not an alternative to litigation. Rather, it is its normal outcome. By applying the principles within this article and those outlined in its companion pieces, mediation will be an effective, efficient approach for you and your client.

About the Author

Deborah A. Ferguson is the principal of *Ferguson Law & Mediation* and specializes in mediation and civil litigation. She has extensive advanced training in effective mediation, including the Straus Institute for Dispute Resolution, at Pepperdine University School of Law, and over 27 years of complex civil litigation and trial experience. Ms. Ferguson served as the President of the Idaho State Bar in 2011. She can be reached at 208-484-2253 or d@fergusonlawmediation.com.