

Preparing for Mediation: 5 Checklists for Attorneys and Mediators

*This material is
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It does not constitute
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Topics Attorneys Should Discuss With Potential Mediators

- Availability
- Conflicts check
- Training and experience
- Verify Rule 114 Qualified Neutral status
- Verify mediator's style/approach
 - Describe your style/approach
 - Do you offer pre-mediation phone calls / discussions?
 - Discussion of joint and/or separate sessions for this specific case
 - Do you suggest / refrain from suggesting settlement options?
 - Do you evaluate / refrain from evaluating factual or legal strengths and weaknesses?
 - Do you offer / refrain from offering an opinion about likely trial outcome?
- What is your fee structure?
- Do you require an Agreement to Mediate to be executed before the session?
- Do you require / permit mediation submissions? (Confidential? Preferred format? Deadline?)
- Request Mediator Bio

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Mediation Process Overview to Discuss with Client

- Logistics of the mediation (who, when, where)
- Description of mediation process
- Information about the mediator
- Description of the role of the mediator
- Explanation of how mediation differs from trial
- Discussion of "mediation mindset"
 - Be open to hearing new information
 - Be curious about how other sees the situation
 - Be flexible in thinking about possible solutions
- Discussion that client may experience strong emotions
 - Before mediation:
 - May feel a mix of emotions (anxiety, uncertainty, anger, hopefulness, fear, etc.)
 - During mediation: May feel
 - "Insulted" by other's "extreme" offers
 - Confused by other's legal arguments
 - Defensive / feel identity is being attacked
 - Frustrated by pace or "back-and-forth" counters
 - Angry at other side's proposals

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Mediation Process Decisions to Discuss with Client (and Mediator)

- **Discuss Role Expectations:**
 - Decide who will attend (full settlement authority)
 - Explain how advocate's role in mediation differs from role at trial
 - Decide what role attorney will play:
 - Does client need "protecting"?
 - Would an "advisor" role be more appropriate?
 - Discuss client's role in mediation
 - Decide whether client will play an active role:
 - Would client benefit from active role?
 - Would client benefit from addressing the other side directly?
 - Decide who will sit nearest the mediator
- **Discuss Openings:**
 - Decide whether to make an "opening statement"
 - Discuss "goal" of possible "opening statement"
 - Set tone of cooperation?
 - Establish credibility?
 - Convey information about facts / law?
 - Decide who will make "opening statement"
 - Attorney, client, both?
 - Determine content of "opening statement"
 - Express desire to collaborate?
 - Express desire to reach mutually agreeable resolution?
 - Focus on legal aspects?
 - Focus on client's perspective of situation and impact on client?
- **Discuss Use of Joint and/or Separate Sessions:**
 - Discuss pros and cons of each in this case
 - Make case directly v. indirectly through mediator?
 - See other's response in person v. filtered through mediator?
 - Assess other's credibility / strength as trial witness in person?
 - Assess emotional state of parties
 - Discuss pace of mediation if separate sessions are used
- **Discuss Focus of Mediation:**
 - The Past: "what happened" / facts?
 - "The Law" / trial outcome?
 - The Future: options for resolution?
 - Combination of all?



Prepare Self and Client for the "Distributive Dance"

Develop Negotiation Plan / Strategy:

- Conduct factual and legal analysis
- Candidly assess trial option:
 - What does a "win" at trial look like?
 - What does a "lose" at trial look like?
 - Chances of winning / losing?
 - Cost to "win"? [money / time]
 - Is judgment collectable?
- Information management:
 - What / when to put key facts on the table?
 - What information do you need from other side?
- Assess benefits of early resolution:
 - What risks avoided?
 - What can be obtained in mediation, but not at trial?
- Brainstorm non-monetary options
- Determine "tentative" negotiation range – yours and theirs
- Determine "tentative" bottom line
 - Beware: may change during mediation
- Estimate: Any ZOPA (Zone of Possible Agreement)?
- Determine Opening Offer [Nina Meierding framework]
 - Reasonable / Credible / Extreme / Insult
- Manage Client's Expectations:
 - Prepare Client for the "Dance" / series of concessions
 - Plan for movement that's not reactive
 - Plan to estimate other's next move
 - Be prepared to "listen"
 - Discuss importance of being "flexible" re proposals
 - Anticipate need to "reassess" upon learning new information
 - Prepare Client to be patient with process
 - Discuss importance of listening and re-evaluating case throughout mediation

Written Mediation Submissions

Content Options for Written Submissions

GOAL: To provide information for Mediator to form opinion re legal strengths/weaknesses, likely trial outcome, settlement amount.

- Chronology of events
- Discussion of factual background and factual disputes
- Discussion of relevant law
- Copies of key documents filed with court
- Copies of relevant documents, depositions, other evidence
- Copies of relevant case law
- Summary of settlement discussions to date
- Assessment of strengths and weaknesses of case
- Discussion of subjective factors that may impact resolution

"Alternative" Content Options for Written Submissions*

GOAL: To provide guidance to Mediator to help parties create a path to alternative future / meaningful solution

- Short summary of legal / factual issues
- Status of litigation / settlement talks
- Short summary of your case's weaknesses / other side's strengths
- Discussion of client's goals for mediation / how client would benefit from resolving the matter now rather than through litigation
- Discussion of client's interests and needs (monetary and non-monetary)
- Discussion of possible or anticipated obstacles to settlement (emotions? relationships? finances? parties' / attorneys' attitudes? other?)
- Anything else that would help mediator understand dispute and facilitate resolution between parties

* "Rethinking Mediation: The Briefs," by Michael D. Young, 2013, *Alternatives to the High Cost of Litigation*