

At The Table: Mediation Advocacy

Session Outline

- I. PREPARATION & EFFECTIVE OPENING STATEMENTS

- II. PRESENTING CRITICAL EVIDENCE

- III. EFFECTIVE USE OF THE PRIVATE CAUCUS

- IV. SUCCESSFUL MEDIATION TACTICS

- V. EFFECTIVE USE OF THE MEDIATOR

- VI. PREPARING THE SETTLEMENT AGREEMENT

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I. Preparation and Effective Opening Statements

A. Preparation Before Mediation

1. Everyone whose decision is necessary for settlement should participate. Personal attendance is strongly preferred, although telephone participation can be accommodated.
2. Be familiar with the specific details of your case. The greater your familiarity and ease of presentation, the more expeditious and effective the proceeding. Have the basic documents of your case succinctly arranged so they can be referred to easily to aid your argument and to educate the mediator.
3. Talk with your client to become clear about his/her interests (or "needs"), as distinct from the positions (or "wants") that have been asserted in the dispute. Which interests are most important?
4. Consider whether there are any objective criteria to measure the appropriate damages and evaluate settlement offers/demands.
5. Consider what realistic alternatives your client has if the parties do not reach agreement. This includes a hard evaluation of the likely outcome if the case is litigated. It also involves assessing other factors — for example, the cost to litigate the dispute (your fees, expert fees, costs, client's time, witnesses' time) and the effect on the parties (disruption and emotional impact).
6. Consider how the other party is likely to evaluate the probable outcome if the case is litigated, and the other factors suggested above. Consider what you could do in your mediation presentation to change that evaluation. Try to understand the concerns and interests of the other party.
7. If information that has not already been shared is at issue or may be helpful, bring it with you. You can always control whether and how it is used.
8. Consider whether there is anything to be learned from the negotiations that have already taken place, if any. What are the barriers to reaching agreement that will need to be overcome during the mediation? How can the mediation help you overcome those barriers?

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9. Consider what you could do during the opening presentation to create the most favorable circumstances for negotiation. Remember, this is not an adversarial or adjudicatory forum. How can you phrase issues to make it more likely your opponent will hear and be receptive to your client's viewpoint and interests?

Think about items that would appeal to your client as part of a settlement package — do not limit yourself to the types of damages asserted in the litigation. Think about options that might appeal to the other side.

B. Effective Opening Statements

A professional, well-prepared opening statement is critical as it sets the tone for the entire negotiation. Your audience is the other side, particularly the decision-maker. Your goal during this presentation is not only to persuade the mediator that your client's position is correct but, more importantly, to persuade the other party that it is in his/her interest to find settlement terms that you will also find agreeable. Because emotional issues may exist, it may be difficult to be heard by the other parties involved. An effective opening presentation may create a turning point in the evolution of the dispute.

1. Open with courtesies addressed to the other side and express appreciation for their participation in the mediation.
2. Empathize with the other side's position and express a commitment to work together to settle the dispute. Demonstrate appreciation for the other side's efforts, limitations, difficulties, frustrations, etc.
3. Maintain eye contact with the other side and address them (this may be the only opportunity you have to let the client on the other side hear your version of the facts and the law).
4. Indicate that you are willing to respond to clarifying questions from the other side either when they are posed or at the end of your opening presentation.
5. If a brief was submitted to the other side prior to the mediation, try to determine if the decision-maker has read it.
6. Focus on the facts that promote an understanding of your client's position emphasizing issues that will drive the numbers or promote settlement.

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7. Review points where the parties agree and disagree.
8. Find the right balance between persuasion and aggression and avoid threats, exaggerations and legal jargon.
9. Express a willingness to listen to the other side's view of the important issues.
10. If your client is comfortable and capable, he/she may wish to participate in some way in the opening statement. Clients can be very effective in conveying factual aspects of their position and their willingness to explore appropriate settlement options.
11. Depending on the nature of the dispute, review the possible alternatives each side will face if agreement is not reached at the mediation.

II. Presenting Critical Evidence

A. Support Your Positions with Admissible Evidence

B. Show Key Documents Using Overheads

C. Use Visual Aids Including Charts, Videos, Demonstrations and Real Evidence

D. Make Consultants/Expert Witnesses Available by Telephone During Mediation

E. Control Disclosure Through the Mediator

1. When sharing information with the mediator in private caucus, be clear as to what can be relayed and what is to remain confidential.
2. Use the mediator to strategically deliver pieces of information to force a move by the other side. Give the mediator information to work the other side down or up.

III. Effective Use Of The Private Caucus

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A. Advantages

1. Permits the mediator to establish a more personal rapport with each side.
2. Permits a party to vent emotionally.
3. Allows a mediator to uncover — or a party to share — sensitive or confidential information.
4. Parties can strategize with the mediator on what to disclose and how to do so. Also, the mediator can float hypotheticals and gauge reactions in private before sharing them with both sides in the joint meeting.
5. Shields each side from unproductive encounters with the other side.
6. Allows more frank reality testing by the mediator.
7. Permits frank confrontation by the mediator of behavior that is counter-productive to the negotiations

B. Possible Risks of Caucuses

1. May contribute to a feeling of secrecy and undercut “joint problem-solving” feel of a mediation with only joint sessions.
2. May encourage parties to polarize and disavow responsibility for their own dispute, placing the burden on the mediator to bridge the gap.
3. May contribute to a feeling of mistrust, as parties wonder what is being said behind their backs.
4. May inhibit consensus building in multi-party negotiations by encouraging parties to strike side deals.

C. Minimizing Risks

1. A good mediator will manage the risks to minimize the downside by explaining during the introduction that caucuses will be used and why.
2. The mediator can give each side “homework” to do while the other side is in caucus so they maintain interest in the negotiations. Homework can include brainstorming the next move, calculating the cost of proposed settlement options, calling the office for more information, reporting back to superiors and getting more authority, etc.

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IV. Successful Mediation Tactics

- A. Develop a Mediation Plan in Advance**
 - 1. Helpful to obtain a demand beforehand.
 - 2. Map out in advance how you think negotiations should proceed.
 - 3. DO NOT make your best offer before the mediation. There is the expectation that you will move off of your demand/offer in the negotiation process.
 - 4. Attempt to determine the reasonable jury verdict/arbitration value of the case.
 - 5. Evaluate the other side's need to "win".

- B. Reduce the Adversarial Tone of Advocacy.**

- C. Don't Oversell Your Client — Be Realistic About Risks, Alternatives and Possible Outcomes.**

- D. Use the Joint Sessions to Evaluate the Other Side's Attorney, Client, and Witnesses.**

- E. Negotiate Global Value When Agreement on Sub-Issues is Not Forthcoming.**

- F. Where Appropriate, Develop Non-Monetary and Non-Traditional Remedies That Further the Interests of the Client and Opposing Party.**

- G. Do Not Respond to Unreasonable Demands.**

- H. Meet the Opposing Party "Halfway".**

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- I. Use Double Moves (When is it Appropriate to Make Consecutive Offers?).**
 - 1. New information is revealed.
 - 2. To revive stalled negotiations.
 - 3. Opening demand/offer does not generate counter offer.
 - 4. To test opponent's best offer.

- J. Waive/Negotiate Medical Payments**

- K. Negotiate Mediation Fees or Timing for Implementation of Settlement Agreement**

- L. Recess Mediation to Obtain Additional Information**

- M. Use "What If" Inquiry (e.g., Would opposing party agree to accept \$50,000 if you were willing to offer it?)**

- N. Negotiate Scope of Confidentiality in Appropriate Cases**

V. Effective Use Of The Mediator

Experienced counsel realize that the mediator can be an effective "tool" in the negotiation process to convey information, and to sound out the other side on sensitive issues. In some cases, the mediator can even be used to assist in negotiating chiropractic and other medical treatment fees. The mediator can be a useful resource for the following:

- A. To Help Convene the Mediation (Use pre-hearing conference call, if needed.)**

- B. As a Negotiating "Partner" (How should we respond?)**

- C. To Test Your Position (Are we missing something here?)**

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- D. To Help Generate Ideas**
- E. To Help Break Down Communication Barriers**
- F. As a Sounding Board to Help Develop Offers, Counter-Offeres and Non-Monetary Remedies**
- G. As a Process Consultant (Where do we go from here?)**

VI. Preparing The Settlement Agreement

- A. Get All Agreements in Writing**
 - 1. Bring a laptop to prepare an agreement or provide a blank settlement agreement to be completed at the end of the mediation. ADR providers can supply a generic agreement form.
 - 2. Obtain signatures at the mediation of every party involved in the agreement.
- B. Insert Confidentiality Provisions, When Applicable**
- C. Use CCP 664.6 and Evidence Code 1123 to Enforce Agreements**

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