

Mediation Checklist

I. Convening Stage

A. Analyze the barriers to settlement — why hasn't this case settled?

1. Communication failure?
2. Bad negotiation skills?
3. Lack of Information?
4. Emotion?
5. Good faith disagreement about trial or outcome?
6. Wrong people at the table?
7. Need for authoritative ruling?
8. Need for injunctive relief?

B. Identify the remedies to overcome the barriers to settlement:

1. Improve communications
2. Improve negotiation practice
3. Obtain the missing information
4. Deal with the emotions
5. Reassess predictions about likely trial outcomes
6. Get the right people involved
7. Narrow and frame the issues on which an authoritative ruling is needed
8. Seek injunctive relief or agreement to preserve the status quo

C. Match the remedies to the barriers to the kind of mediation that provides more of the effective remedies.

1. Facilitative mediation works well to address communication, negotiation, informational, emotional, and people problems.
2. Evaluative mediation works better to help disputants reassess likely trial outcomes.
3. Blended facilitative/evaluative mediation can address all barriers to settlement, except the need for an authoritative ruling, which can only be obtained from courts or rule-making bodies.

D. Define the process, without setting it in stone. Consider these elements:

1. Informational exchange
2. Submissions
3. Use of witnesses and/or experts
4. Format, length and agenda of mediation sessions
5. Role of mediator
6. Party representatives
7. Level of authority
8. Schedule
9. Parallel arrangements (e.g., adjustments in litigation schedule)
10. Other issues

E. Select the Mediator

1. Based on the identified barriers to settlement, consider what roles you may need the mediator to play:
 - a) Communication facilitator (“Nobody is talking to anyone in this case . . .”) (“Peel them off the ceiling when you tell them . . .”)
 - b) Negotiation coach (“How should we respond?”)
 - c) Giving a feel for unknown information (“Should we worry about a challenge to our expert?”)
 - d) Floating trial balloons (“What if we offered an indemnification?”)
 - e) Reality testing (“Are we missing something?”)
 - f) Option generation (“Do you have any ideas?”)
 - g) Diagnostician (“Why are stuck here?”)
 - h) Process consultant (“Where do we go from here?”)
 - i) Scapegoat (“We’ll blame the mediator’s evaluation when we talk to the board.”)
 - j) Catalyst for closure
2. Consider specific mediator attributes, in view of likely roles:
 - a) Process knowledge

- b) Ability to advise on format and sequence procedures
- c) Management/leadership skills
- d) Strong sense of process responsibility
- e) Parliamentary skills
- f) Extensive negotiation experience
- g) Negotiation coaching ability
- h) Strength (“bluster proof”)
- i) Good listening skills
- j) No fear of strong feelings
- k) Ability to manage emotions and create focus
- l) Good speaking skills
- m) Good analytical skills
- n) Subject matter expertise
- o) Appropriate legal or business background
- p) Ability to ask tough questions
- q) Ability to reality test
- r) Credibility
- s) Compatible personality
- t) Stature
- u) Decorum
- v) Compassionate, balanced demeanor
- w) Availability
- x) Cost/value

3. Gather information on mediator candidates by consulting:
- a) Resume
 - b) References
 - c) Interviews
 - d) Publications

F. Execute a Mediation Agreement, including at a minimum:

1. Name of mediator and mediation organization
2. Time and location of mediation
3. Confidentiality and immunity of mediator
4. Inadmissibility of statements, documents created for Mediation
5. Fees, cost-sharing
6. Right of each party to withdraw from the process at any time
7. Specific reference to codified privileges and confidentiality rules
8. Conduct re: pending or contemplated litigation
9. Specific issues to be mediated
10. Attendance at session by people with authority to settle
11. Schedule, procedures for pre-mediation submissions or conferences
12. Role(s) of mediator (e.g., evaluative input? how and when?)
13. Roles/obligations of non-party participants (consultants, witnesses)

G. Refine the mediation process with input from the mediator: people, information, and process issues.

1. People — who needs to be at the table?
 - a) Are specific skills, capabilities, or expertise necessary? For example:
 - (1) Financial/accounting
 - (2) Technical/scientific/engineering
 - (3) Damages
 - (4) Design
 - (5) Tax
 - (6) Structured settlement
 - b) Should outside counsel be present?
 - (1) Provide subject matter expertise
 - (2) Provide mediation expertise
 - (3) Resources needs
 - (4) Cost/benefit analysis

- c) Should clients only be present?
 - (1) Business issues/resolution
 - (2) Not in litigation
 - (3) Clients sophisticated
 - (4) Bargaining advantage or equality
 - (5) Neutralize other side's counsel
 - (6) Economize
 - (7) De-escalate, change tone
 - (8) Separate, parallel track with litigation
 - d) Should counsel only be present?
 - (1) Clients are the problem
 - (2) Emotional issues
 - (3) Authority issues
 - (4) Information control
 - (5) Imbalance in effectiveness
 - e) People problems? Getting the right people to the table:
 - (1) Make it the mediator's job
 - (2) Educate the mediator
 - (3) Use pre-mediation private caucuses
 - f) People problems? Use the court or agency to get the right people to the table.
 - (1) Use the pre-trial conference effectively
 - (2) Know the local rules and personalities
 - (3) Ask the mediator: "Who do you want to be present?"
2. A special people problem: making sure there is sufficient authority at the table.
- a) Recognize that authority is a key preparation issue
 - b) Be clear about what you mean — actual, virtual, or delegated authority?
 - c) Plan for contingencies — are there any (e.g., approval of a reimbursing authority)? If so,
 - (1) Pre-clear with affected parties

- (2) Set up ratification schedule
 - (3) Involve affected interests
 - d) Special authority issues: insurance companies. Understand:
 - (1) Structure
 - (2) Lines of authority
 - (3) The coverage
 - (4) Links up the hierarchy
 - (5) Reporting and reserving realities
 - e) Special authority issues: government agencies. Understand:
 - (1) Decision-making structure
 - (2) Political issues
 - (3) Media issues
 - (4) Statutory and regulatory issues (e.g., Sunshine Laws, Public Meeting requirements, Re-openers, Bidding Requirements)
 - (5) "Policy" issues
- 3. Information exchange
 - a) Categories of potentially pertinent information
 - (1) Legal
 - (2) Factual
 - (3) Technical
 - (4) Interests
 - b) Mechanisms of information exchange:
 - (1) Voluntary disclosure
 - (2) Rules of civil procedure
 - (3) Mediated disclosure
 - (4) Joint testing
 - (5) Neutral experts
 - c) Reciprocity standard
 - d) Plan next steps should mediation fail
 - (1) Perishable evidence

- (2) Evidence outside the privilege
 - (3) Evidence outside the mediation
4. Process issues: Advance confidential sessions between each party and mediator
- a) Need to educate the mediator on complex dispute?
 - b) Need to refine and focus issues before the mediation session?
 - c) Need to begin brainstorming settlement options before mediation?
 - d) Need to ask or tell the mediator anything confidentially in advance?
 - e) Weigh likely added value against cost and time
 - f) Agree on schedule and expected session duration
5. Process issues: Format for mediation session
- a) Level of formality
 - b) Role of experts, fact witnesses and others
 - c) Evaluative input — how and when?
 - d) Joint session(s)
 - e) Private caucuses
6. Setting up preconditions to mediation
- a) Procedural v. substantive
 - b) Risks v. gains
 - c) Possibility of stalemate

H. Be alert for questionable tactics:

- 1. Bringing little or no settlement authority
- 2. Demanding concessions as the “price of admission” to mediation
- 3. Mediating solely to delay or increase costs
- 4. Submitting a pre-mediation statement of no substance
- 5. Presenting a damage claim with little or no credible back-up

II. Preparation Stage

A. Before the mediation, clarify in writing:

1. Your goals
2. Your strategy
3. The pertinent facts and law
4. The options for solutions
5. Your alternatives to agreement (risk analysis)
6. Step into their shoes and repeat steps 1-5 from the other side's perspective
7. What you know about the mediator and his/her approach

B. Know your interests/Know their interests

1. Money?
2. Publicity?
3. Time?
4. Continuing relationships?
5. Employee impacts?
6. Future business plan?
7. Cutting losses?
8. Avoiding broader implications?
9. Other interests?

C. Critically evaluate your case (Do your own "litigation risk analysis")

1. Pretend you represent the other side(s)
2. Ask yourself: How does the other side see the key issues, facts, and law?
3. Ask yourself: How could we lose this case?
4. Ask yourself: If we lose, what will we lose?
5. Ask yourself: What is our worst document? Witness? Fact?
6. Ask yourself: What is the other side's best argument?
7. What will the litigation cost (legal and expert fees, opportunity costs)?

D. Prepare your team:

1. Have an education plan for team members
2. Role of business person
3. Role of inside counsel
4. Role of outside counsel
5. Role of expert(s)
6. Play “what if”

E. Prepare the Mediator:

1. The issues and your legal position
2. The negotiation history and barriers
3. Your interests and objectives
4. Choose your channel: pre-mediation statement, advance caucus, joint session?

F. Craft your Pre-mediation Statement:

1. Think about format, focus and tone
2. Attachments (key documents, deposition excerpts, legal authorities — use highlighting and post-it notes)
3. What to share, when
4. What to hold back, until when

G. Plan for the negotiation:

1. Hypothesize the other side’s interests
2. Develop alternative settlement strategies in line with interests
3. Play “what if”
4. Value different packages

H. Other activities:

1. Preserve or destroy status quo?
2. Avoid unnecessary and wasteful diversions
3. Develop parallel opportunities

4. Beware “left hand/right hand” phenomenon
5. Balance pros and cons of trying to change other side’s BATNA (best alternative to a negotiated agreement) and WATNA (worst . . .)

III. Presentation Stage

A. Objectives

1. Create a focus consistent with your negotiation strategy (e.g., if you’re vulnerable on liability, focus heavily on damages; if you want a business solution, focus on business relationships and opportunities and have your business person speak)
2. Show the other party its no-agreement alternative (without alienating it)
3. Educate the mediator and “win him or her over”
4. Create a spirit of dialogue with the other side (e.g., look at their decision-maker when you speak; take the opportunity for direct questions and answers)
5. Keep party control of the process (e.g., avoid treating the mediator as a judge or arbitrator)

B. Identify audience(s)

1. Other side’s decision-maker
2. Other side’s lawyers and advisors
3. Insurers, if any
4. Avoid thinking other side is monolithic
5. Mediator
6. Your own client

C. Coordinate and clearly define roles of counsel, experts, witnesses, decision-makers — balance use of saber and olive branch: *This is not a court trial and you are not in a courtroom. There is no judge and jury.*

D. Choose presenter(s).

1. Counsel?
2. Clients involved in the underlying matter?
3. Witnesses?
4. Experts, consultants, others?

E. Consider use of props, charts, exhibits — visual aids can be even more effective in a small, informal mediation than in the courtroom

1. Show key documents; use overheads
2. Summaries, charts, and chalks are powerful
3. Videos, demonstrations, and real evidence is powerful
4. The site itself may be a powerful part of the presentation

F. Pitfalls to avoid:

1. Assuming an informal approach to preparation is adequate for an informal process
2. Too much rhetoric
3. Taking a “cross-examination” approach to asking questions
4. Not knowing how to value different packages (e.g., they want to pay over time; they propose a structure; they want to perform the remedial work; they want to assign their rights against another party; they want to buy your building; they want to reinstate your contract)

G. Be alert for questionable tactics by the other side, for example:

1. Bringing a client who has not read the opposing pre-mediation submission
2. Backtracking on previous settlement offers without good reason (e.g., change of law)
3. Posing argumentative and disruptive questions

IV. Negotiation Stage

A. Choose a negotiation approach

1. Positional: Get as much as you can by making high (low) demands (offers) and only grudgingly giving concessions in exchange for equal or greater concessions
 - a) Anchor high
 - b) Trade offers and demands
 - c) Plan your pattern of concessions carefully and watch theirs
 - d) Bargain issues as a package rather than individually, unless it suits you otherwise

2. Principled: Regard the dispute as the opportunity to negotiate a wise and principled decision on the merits in an amicable and cooperative way
 - a) Separate the people from the problem
 - b) Focus on interests not positions
 - c) Invent options for mutual gain
 - d) Use objective standards
 - e) Know your best alternative to a negotiated agreement (“BATNA”)

3. Interest-based/Joint-gain
 - a) Separate the people from the problem
 - b) Focus on interests not positions
 - c) Invent options for mutual gain
 - d) Do not be bound by objective standards
 - e) Negotiate on the basis of your interests rather than your best alternative to a negotiated agreement

B. Knowledge is power: Before making an offer or demand:

1. Talk about process (learn their views)
2. Talk about interests (learn theirs)
3. Explore options (hear their ideas)
4. Exchange information

C. Reassess your no-agreement alternatives continually

D. Using joint sessions vs. private caucuses (e.g., Give this reaction or proposal directly or through the mediator? Get the mediator's advice.)

E. Avoid common mistakes:

1. Assuming a fixed pie
2. Consistently misleading the Mediator about your real interests
3. Assuming the other side is willing to engage in interest-based negotiation, and thus revealing all your interests prematurely
4. Leaving no room for "movement" at the Mediation
5. Characterizing an offer as "firm and final" too soon

F. Be alert for questionable tactics:

1. Misrepresenting interests
2. Misrepresenting no-agreement alternative
3. Misrepresenting constraints and/or bottom line
4. Raising new issues in the 11th hour
5. Pretending to search for win-win solutions to delay/prolong the process
6. Pretending insensitivity to litigation costs (misrepresenting fee arrangements)
7. Switching spokespeople mid-stream to confuse and create distance from "unauthorized" concessions

V. Closing Stage

A. Document settlement: never leave without a written agreement

1. Final settlement agreement (if deal is simple)
2. Agreement in Principle, with final agreement to follow (if deal is complex)
3. Role of Mediator as drafter
4. Dispute resolution clauses

B. Know potential mediator impasse-breaking techniques

1. Create a package of trades
2. "If they will come to _____."
3. Confidential listener — drop dead double blind
4. The "letter" (letter of apology, letter of recommendation)
5. The executive session
 - a) "Napoleon syndrome"
 - b) Empower those in power
6. Tailored arbitration
 - a) Bracketed
 - b) Baseball
 - c) Streamlined
 - d) All of the above
7. Time out for all parties
8. Follow-up by Mediator

C. Be alert for questionable tactics:

1. Threatening to walk out the door
2. Threatening to close the door forever on settlement discussions
3. No intention to implement agreement