

Preparing for 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, 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?

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

10. 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.

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