

HOW AND WHEN TO MEDIATE: PRACTICAL TIPS FOR SUCCESSFUL DISPUTE RESOLUTION

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INTRODUCTION

The following outline identifies a number of practical issues that commonly arise in connection with mediation. The outline is not exhaustive but, instead, focuses upon dynamics that are most frequently encountered by both novice and very experienced mediators. Mention is also made of behaviors or tactics that have the intended or unintended consequence of sabotaging settlement negotiations.

TIMING AND TIME

A. Mediation Session Length Factors

1. Number of Parties Involved?
2. Sophistication/Experience of parties?
3. Number and Complexity of Relevant Legal and Factual Issues?
4. Are Some Parties/Representatives Participating Remotely?
5. Does the Mediator Manage Time Efficiently?

B. When To Mediate?

1. Benefits of Early Mediation
 - a. Limits Costs and Attorneys Fees
 - b. Provides Opportunity to Preserve/Salvage Parties' Business, Employment or Other Relationship
 - c. May Prevent Later Formation of Inflexible Settlement Positions
 - d. May Prevent Development of Toxic Attorney/Client Relationship
2. Reasons To Defer Mediation
 - a. Some discovery May Be Necessary To Identify Material Facts
 - b. A Party May Need to Experience the Emotional and Financial Pain of Litigation Before Settlement Expectations are Lowered

- c. Evidentiary and Other Rulings May Be Needed Before Counsel and Parties May Accurately Assess the Risks of Trial or Arbitration
3. Dangers Of Mediating Too Late
 - a. Substantial Expenditure of Time and Money May Harden Settlement Positions
 - b. Evidence Developed in Discovery May Have substantially Improved or Diminished A Party's Chances at Trial or Arbitration
 - c. Pretrial Motions Practice May Also Have Radically Altered A Party's Assessment of Risk

THE MEDIATION PROCESS- KEYS FOR SUCCESS

A. Pre-Mediation Considerations

1. Does the Opposition Have Sufficient Information To Properly Evaluate Your Client's Case? Are You and Your Client Sufficiently Informed To Enable Thorough Evaluation of the Opposing Party's Case?

1. Do Circumstances Warrant A Pre-Mediation Call With the Mediator?

2. Arrange For attendance of Necessary Parties Or Representatives- Be Aware Of Any Court Rule (eg. LR 39.1) That May Impose Particular Attendance Requirements

3. Written Submissions

- a. If in Doubt, Ask Mediator What He/She Desires

- b. Last Minute Submissions Might Not Be Read

- c. Consider Exchanging submissions With opposing Counsel

- d. Emails of Unreasonable Length Are Seldom Appreciate

B. At Mediation

1. Is A Joint Session Useful Or Is It Dangerous? Why?

2. Allow Your Client To Be Heard!

3. Be Candid With the Mediator- If You Don't Trust the Mediator, Why Did You Select Him/Her?

4. Negotiate In Good Faith and Be Patient- Not Everyone Can Assess Risk and Make Appropriate Decisions Equally
5. Do Not Leave Essential Settlement Terms (eg. Confidentiality, Payment Terms) For Last Minute Discussion
6. If The Case Settles, Obtain A Written Settlement Agreement- Do Not Ask The Mediator To Prepare One
7. If The Case Doesn't Settle, Will the Mediator Continue To Assist The Parties?

PLANNING TO FAIL: THE DOOMED REMAIN ALIVE, IF NOT WELL

- A. Never Return Calls or Emails from Client or Opposing Counsel;
- B. Appear Late, If At All, At Every Litigation Event;
- C. Avoid Discussing Risk and Cost of Litigation with Client Until Mediation;
- D. Choose Mediator Because He/She Promises To Choose You As Mediator For His/Her Next Case;
- E. Overstate Value of Case in Written Submission to Mediator, If Any, and Use Same as Vehicle for Ad Hominem Attacks Upon Opposing Party and Counsel;
- F. Arrive At Mediation with Multiple Clients, No Valid Waiver of Conflict of Interest, and Assume That Mediator Will Resolve Any Such Conflicts;
- G. Appear At Mediation With No Discernible Negotiating Plan and Insist That It Is the Mediator's Job To Create Such Plan;
- H. Ignore Client At Mediation By Working On Other Matters, Have Lengthy Sessions With Mediator Outside Client's Presence and Otherwise Avoid Client By whatever Means Possible;
- I. At Mediation Threaten To End Negotiations and Leave Every 30Min.-1Hr.;
- J. Ask Mediator To Reduce Or Waive Fee Because Case Did Not Settle For Amount Of Your Initial Demand;
- K. If Contingent Fee Arrangement, Ask Mediator To Help Conceal The Amount Of Settlement And Fee From Your Partners Because You Are Leaving The Firm;

CONCLUSION

Proper planning for effective negotiation at mediation requires a set of skills that are indistinguishable from those responsible for effective advocacy: credibility, clear communication, thorough preparation and patience. Good lawyers possess and apply these skills consistently.