

# Mediating a Case

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**During this talk, we will view a power point mediation presentation and several video clips for examples on presenting a case at mediation.**

**What is Mediation?** Mediation is an informal, flexible process in which parties to a dispute engage a neutral third party to facilitate a discussion between the parties and their attorneys and keep them focused on options to resolve the dispute. In essence, the skilled "neutral" identifies and discusses the various risks to each party in continuing the dispute. Typically, most of the mediator's work occurs in confidential sessions with each party.

Initially the parties meet collectively with the neutral to discuss the facts of the case. Then the parties typically adjourn to separate rooms. The neutral assists in settlement communications and negotiations, but the parties retain the decision-making power.

Any resolution comes from the parties and, therefore, meets their needs and interests. Mediation produces a voluntary, win-win solution. The parties are free to pursue litigation if their case is not resolve in mediation.

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**Why Mediate?** Mediation offers many advantages including flexibility in the process to adapt to the special facts and needs of the parties; opportunity to present a summation of your case to the other party; resolution of the dispute in a private and informal manner with direct involvement of the client; control over the outcome; saving of litigation expenses; speed of settlement; makes settlement more likely; provides needed reality check for opposing counsel or party; helps everyone to value case; provides needed reality check for the client; and increases potential for creative solutions.

**When to Mediate?** When both parties desire to participate in a good faith effort to resolve their differences. Many times there needs to be an exchange of preliminary demands and offers to determine that the parties would be committed to mediation.

**Where and with Whom to Mediate?** The parties present at mediation must include all the necessary parties with full authority to settle the claim and flexibility to agree to the solutions and packages proposed. You also may want an agreement prior to mediation that the party coming to mediation will have authority to settle for the full amount of the dispute. No mediator can perform effectively if participants in the process do not have the authority to settle their respective claims.

**Tips for a successful outcome in mediation:**

**1. Demonstrate good faith: Participate with the intention of resolving differences.**

Listen and look for all possible options and solutions for resolving the dispute. Be creative but realistic. Understand the stated and unstated needs and requirements of the opposing party (ies). Try to find resolution options that maximize your client's recovery, but also meet the special needs and interests of the other party.

**2. Take advantage of the flexibility of the process.**

The mediation process can be adapted to suit the needs and circumstances of your case. What are the major points that you want to demonstrate to show the strength of your case? Determine if review and presentation of key information, testimony or even expert opinions or demonstrations will be helpful to develop focus on the critical issues and establish the strength of your case. Parties do not need to agree on the facts to settle, but it helps to demonstrate the strength of your position. The key is that parties appreciate the risks and benefits of various settlement options and how they meet their particular needs and interests.

Be creative and open to possibilities. Mediation allows for "win-win" resolutions. Identify multiple options that might be the basis for a mutually negotiated resolution. Many times, solutions are not the ones thought of prior to mediation.

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### **3. Select a successful mediator.**

Good judges and lawyers do not necessarily make the most effective mediators. If you want ensure a successful mediation, you need to select a successful mediator. As mediation becomes an increasingly popular form of dispute resolution, a handful of full-time mediators have emerged. If possible, talk to someone who has used the mediator in a similar situation. Review the mediator's background. Keep the mediator's role and function as a facilitator rather than an adjudicator.

Important Mediator Qualifications: (1) Mediator should have substantive experience in field of law related to case; (2) Mediator should be a litigator. (3) Mediator should be a lawyer. (4) Mediator should have taken mediation training. (5) Mediator should have a reputation for settling cases

### **4. Supply information: Provide the mediator with a summary of your position in advance of mediation.**

Unless your case is a simple one, prepare a concise, focused, written pre-mediation summary of your position prior for the mediator to educate and arm the mediator with critical facts, documents excerpts and issues involved. Identify for the mediator if there are any special situations, real world business or personal relationships, personalities, procedural problems or other considerations that may impact the negotiations. By having a sense of each party's position in advance, the mediator can work more efficiently. He or she can quickly focus upon what is essential to resolution.

Identify and understand the strengths and weaknesses of your case and that of the other party(ies). Discuss this fully with your client and the mediator. Identify and understand the barriers to settlement and the factors (economic, psychological, relational, legal, procedural) driving the controversy.

### **5. Limit rhetoric: avoid inflammatory statements in joint session.**

Many mediations begin with a joint session attended by all parties, their counsel and the mediator. Joint sessions allow the mediator to set the tone for the negotiations to follow and provide an opportunity for others to express their views. Attorneys and their clients, however, should be careful to avoid incendiary comments in the presence of their opponents. Other professionals generally do not wish to be assaulted with bombastic, self-serving pronouncements by their adversaries. Tact is the watchword in joint session remarks.

### **6. Be honest: Do not deceive your mediator.**

Many attorneys, and some of their clients, often try to prove their negotiating prowess by attempting to deceive the mediator. This "strategy" wastes the mediator's time

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and will result in the mediator's lack of confidence in your position. A professional mediator will zealously safeguard your confidences and admire your courage in privately acknowledging weak points in your position. In general, the mediator will keep confidential anything requested to be kept confidential and disclose any other information.

#### **7. Expert witnesses at mediation.**

Depending on the issues in dispute in a case, consider bringing an expert to the mediation.

#### **8. Substantiate claims: Consider a mediation presentation with power point or video. Bring key contracts, correspondence and relevant documents to the mediation.**

Bring a copy of the claims file, policy and other relevant documents to the mediation. Frequently, the content of specific documents becomes an issue, and a party or attorney's recollection of the essence of a written document is refreshed, and sometimes dramatically altered.

#### **9. Mental preparation.**

- a. Do you really desire to negotiate a settlement? What is an acceptable financial range in which to settle the case? Are you reasonable in your evaluation?
- b. What is your negotiation demand or offer? Plan the negotiation so that after adjusting your position two or three times, you end up in a range where you can reasonable accept settlement and closure.
- c. Objectively evaluate and write down the strengths and weaknesses of your claim. Do the same for the other party, as if you were on that side of the dispute.
- d. Identify factors that may affect your settlement, pro and con.
- e. Prepare questions to use during presentation and negotiations to help you clarify and present your view of the dispute and to lay the groundwork for your evaluation and eventual settlement.
- f. Be prepared to share responsibility as you objectively see it.
- g. Focus on your interest -- not your rights!

#### **10. Act immediately: Upon settlement, prepare and sign a settlement memorandum.**

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When an agreement is reached during mediation immediately reduced it to a written settlement memorandum stating all important terms of settlement and time periods to comply.

### **Books on Mediation:**

To develop and utilize mediation as an effective tool, you may find it useful to read more on the subject as follows:

- [Getting to Yes: Negotiating Agreement Without Giving In](#)
- [Getting Past No: Negotiating Your Way from Confrontation to Cooperation](#)
- [Getting Together: Building Relationships As We Negotiate](#)
- [Getting to Peace](#)
- [Beyond Machiavelli: Tools for Coping With Conflict](#)
- [Getting Ready to Negotiate](#)
- [The Promise of Mediation](#)
- [When Talk Works: Profiles of Mediators](#)
- [From Conflict to Cooperation: How to Mediate a Dispute](#)
- [The Mediation Process: Practical Strategies for Resolving Conflict](#)
- [The Mediator's Handbook](#)
- [Basic Skills for the New Mediator](#)
- [Basic Skills for the New Arbitrator](#)
- [Dictionary of Conflict Resolution](#)
- [Encyclopedia of Conflict Resolution](#)
- [Conflict Resolution: Its Language and Processes](#)
- [Conflict Resolution: Theory, Research & Practice](#)
- [Conflict Resolution: From Theory to Action](#)
- [Interactive Conflict Resolution](#)
- [Herding Cats: Multiparty Mediation in a Complex World](#)
- [The Keys to Conflict Resolution: Proven Methods of Settling Disputes Voluntarily](#)

### **On-Line Resources on Mediation:**

- [Harvard Mediation Program](#)
- [Straus Institute for Dispute Resolution \(Pepperdine University\)](#)
- [Syracuse University Program on Analysis & Resolution of Conflict](#)
- [Harvard Program on Negotiation](#)
- [Training in ADR Skills](#) (nationwide listing)
- [Kennesaw State University - Masters Program in Conflict Management](#)
- [American Bar Assn. Section on Dispute Resolution](#)

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- [American Bar Assn. Publications on Dispute Resolution](#)
- [Society of Professionals in Dispute Resolution \(SPIDR\)](#)
- [Mediation Essays](#)
- [Academy of Family Mediators](#)
- [Cornell / PERC Institute on Conflict Resolution](#)
- [CPR Institute for Dispute Resolution](#)
- [Lectric Law Library - Alternative Dispute Resolution](#)

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