

Representing Clients in Mediation: A Lawyer's Preparation Guide

1. Problem Solver or Adversary?

- Are you ready and willing to serve as a problem solver and not as an adversary when you advocate for your client during mediation?
- Is your goal to search for a mutually satisfactory and beneficial solution that meets the needs and interests of both parties?

2. Pre-mediation Communications with Client

- What discussions have you had with your client about settlement?
- Have you asked about your client's motivations for litigating and your client's impressions of the legal system?
- Have you discussed the overwhelming likelihood of resolution by settlement rather than trial?
- Have you asked about the expectations of your client? Do you fully understand those expectations?
- Have you over-promised what the legal system can realistically produce for the client?
- Have you explained the mediation process to your client as well as their role in the process?

3. Client's Emotional State

- What is your client's emotional state?
- Have you regularly monitored your client's emotions since your first meeting?
- Have you tried to promote a healthy client attitude toward settlement?
- Do you detect strong emotions or unrealistic expectations from your client? Have you addressed those emotions and expectations?

4. Case Information v. Settlement Information

- Have you taken into account all of the known information and engaged in a cost benefit analysis of what further information is needed?
- What the facts or legal issues will most affect settlement value?
- Have you developed these facts and researched these issues?
- What information may be important to settlement but not relevant to the legal dispute?
- How will you gather this information?
- Have you differentiated between information that critically affects settlement value from the information needed at trial and fully developed the settlement information first?

5. Evaluating the Strengths and Weaknesses

- Have you evaluated the strengths of your client's case?
- Have you *realistically* assessed the weaknesses of your client's case?
- What are the strengths and weaknesses of the other party's case?
- Have you adequately engaged in a two-sided assessment of the strengths and weaknesses, addressing all merits of the case as well as non-merit factors?
- Does this assessment include litigation cost as well as risk of outcome?
- Have you shared this *realistic* assessment with your client prior to settlement negotiations?

6. Parties' Needs and Interests

- Have you discussed with your client their needs and interests which might affect the client's desire for settlement or for trial?
- Have you anticipated the other party's needs and interests?
- To what extent are your client's needs and interests and those of the other party compatible, or at least not incompatible?
- Do your client's needs and interest fall outside the scope of litigation?
- How will those needs and interests of your client affect settlement negotiations?

7. Litigation Remedies v. Settlement Remedies

- What remedies are available through litigation?
- As the attorney, is your focus limited to a monetary award?
- What remedies would address the needs and interests of the parties, but are not available through litigation?

8. Authority to Settle: Business Entity

- If your client is a corporation, or other business entity, or an insured party, have you identified all of the critical decision makers?
- Have you conferred directly with all of those critical decision makers?
- Have you secured attendance of all of those critical decision makers?
- Are you certain that the attendees hold sufficient authority to make a full and final decision at mediation?
- If not, have you informed the mediator?

9. Authority to Settle: Governmental Parties

- If your client is a governmental entity, have you considered logistical challenges such as compliance with open meeting laws?
- Has the entire board met with you in executive session to discuss settlement evaluation and negotiation strategy?
- Will the representatives who attend the mediation have reasonable authority parameters?
- If the case can be settled only beyond those parameters, will the attending representatives have sufficient credibility with the other board members to make a strong recommendation for settlement?
- Do you know when the full board can meet to approve any settlement?

10. Insurance Coverage

- Existence of applicable insurance coverage?
- Nature and extent of coverage?
- Is there a dispute over coverage?
- If so, should the coverage dispute be negotiated before, during, or after negotiation of the underlying dispute?
- If global negotiations are best, will coverage counsel attend the mediation?
- Have you informed the mediator of the coverage dispute and the identity of coverage counsel?

11. Subrogation Interests

- Are there subrogation interests or outstanding liens?
- Have you verified the amounts?
- Have you informed counsel for the other party of these liens and the amounts?
- Are the liens negotiable?
- If so, can you resolve them in advance of mediation, contingent upon settlement of the case?
- If not, will/should a representative of the lien holder attend the mediation in person or by telephone?
- Have you informed the mediator of these interests and names of lien holder representatives?

12. Shadow Parties

- Is there a person who may have a strong influence on your client's settlement decision?
- Will that person help or hinder settlement of the case?
- Should that person attend mediation with your client?
- Have you informed the mediator of this person's influence?

13. Financial Limitations on Settlement

- Does the defendant have the financial ability to pay a judgment or settlement in the likely range?
- If not, what financial information will substantiate the defendant's claim of inability to pay?
- Can you bring that information to mediation?
- Will you need to bring an accountant or other financial person to explain it?
- What payment terms might the defendant need?
- Have you mentioned the financial concerns to the other attorney(s) and the mediator?

14. Client Control

- Do you have concerns about your client's unreasonable expectations and your ability to manage them?
- Have you contributed to the client's frame of mind?
- Have you tried to conduct a reality check on the client?
- Have you or will you request the mediator's assistance in persuading your client to become more reasonable?

15. Knowing the Mediator

- How well do you know your mediator?
- Does the mediator use mostly joint sessions or private caucus meetings?
- Is the mediator's style facilitative or evaluative, or does it change depending on the circumstances?
- Which mediation style would work better in this case?
- Will the mediator primarily address counsel or the clients?
- Have you prepared your client to participate to the extent that the mediator will expect?

16. Time Commitment

- How much time has the mediator set aside for the session?
- How can you best use the time?
- If you or your client's travel arrangements may conflict with the schedule, have you informed the mediator and the other attorney(s)?
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17. Attorney's Fees

- Is an award of attorney's fees an issue in the case?
- If so, have you and your client discussed the potential for a conflict of interest between you?
- Do you know the current amount of the fees and costs?
- Are you prepared to show verification of the amount without infringing on work product or privilege?

18. Rationale for Settlement Proposal

- Is there a rationale for the settlement proposal you will make at mediation?
- Are you prepared to share that rationale with the mediator and the other party?
- Are there calculations or documents you can bring to show the rationale?
- Do you have evidence adverse to and unknown by the other party that significantly affects settlement value in your client's favor?
- Have you weighed the risks and benefits of revealing the evidence to the other party?
- Have you disclosed the evidence to the mediator?

19. Written Mediation Statement

- Are you expected to prepare a written mediation statement?
- Is the statement confidential, to be only provided to the mediator, or non-confidential, written for the opposing party as well as the mediator?
- If it is confidential, have you written to educate the mediator and provided an overview of litigation risks?
- When is it due? Have you submitted the statement in a timely manner?
- Confidential or non-confidential, does your statement address all of the mediator's requirements?
- Is it balanced and candid, or is it argumentative?
- Will the statement assist the mediator in guiding the parties toward a settlement?

20. Negotiation History

- Have there been prior negotiations in the case?
- What was the last settlement proposal of each party?
- Have you sent any "non-offer" signals to the other party's lawyer?
- Have you revealed the full negotiation history to the mediator, including any "non-offer" signals made to the other party's lawyer?

21. Special Settlement Terms

- Are there special terms your client will want in the final settlement documents?
- Are "confidentiality of settlement terms" an issue?
- Are "payment terms" an issue?
- Will you insist upon certain language in the release?
- What other special issues does your client have?
- Have you requested the need for certain terms, language, or other special issues in your written statement?
- If not in your written statement, have you revealed the need for certain terms, language, or other special issues to the mediator at the outset of the settlement?