

Outline for Preparing for and Handling an Effective Mediation

WHEN TO MEDIATE

1) Early Mediation:

- A. Inadequate information.
- B. Differing motivations.
- C. **Best practice:** Discuss with opposing counsel the incentives and expectations for an early mediation. Find out what information the other side needs to fully understand your defense/claim and supply it.

2) Late Mediation:

- A. Litigation expenses have been spent.
- B. Feelings have hardened.
- C. Decrease in uncertainty; Increase in anxiety.
- D. **Best practice:** Confer with opposing attorney to select the optimum time to mediate.

SELECTING YOUR MEDIATOR

1) Analyze your case.

- A. Does your case call for an evaluative or facilitative mediator?
 - 1. Narrow or Broad Issues:
 - a) “Narrow” defines one-time, one-client disputes that have a single or limited focus; i.e., a personal injury.
 - b) “Broad”: continuing relationship with client or continuing relationship between parties.
 - B. **Best Practice:** Evaluative Mediator for “narrow”; Facilitative Mediator for “broad”.

2. Analyze your client.

- A. Reasonable, problem-solver—Evaluative Mediator.
- B. Angry, fighter—Facilitative Mediator.

3. Analyze your style.

- A. Negotiator—Facilitative Mediator.
- B. Litigator—Evaluative Mediator.

4. Analyze opposing counsel and his client.

- A. If the opposition is aggressive, demanding—Facilitative Mediator.
- B. If opposition is cooperative—Evaluative Mediator.
- C. **Best Practice:** If you don’t know a mediator’s style, interview her or him, get some references, and call around. Contact the mediator and discuss what you believe would be the best approach. *Ex parte* communication with a mediator is permissible.

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Best practice: Advise opposing counsel of your intent to speak privately with the mediator.

TO DO LIST FOR BEFORE YOUR MEDIATION

1. **Flexible or tough approach:** What will your approach be?
2. **Settlement Agreement:** Prepare a draft settlement agreement and releases that include the critical terms and conditions, while leaving the disputed items, i.e., settlement amount, blank. Obtain your client's approval of documents prior to the mediation.
3. **Your client:** Hold a pre-mediation conference with your client. Discuss your negotiating strategy. Develop parameters for settling the case, but caution your client about becoming wedded to pre-conceived notions of negotiating limits. Is there anything you or your client want to keep confidential?
4. **Essential Parties:** Ensure that all the essential individuals will be present, particularly the person who has final say over the settlement amount. Similarly, if a relative or friend is advising/controlling your client, make sure they attend as well.
5. **Liens and Lien Holders:** Know the amount of your liens prior to the mediation and be prepared to resolve them to your client's satisfaction. Have the lien holders present or available by telephone. You should understand Medicaid and Medicare liens and set aside trusts.
6. **Pre-Mediation Discussions:** Consider holding a pre-mediation conference with the mediator and/or opposing counsel to discuss special issues, a party or opposing counsel's idiosyncrasies, client or adjuster problems, waiving a joint opening session, time constraints, etc.
7. **Mediation Facilities:** Make sure the mediation facilities are adequate. Number and size of breakout rooms, teleconferencing or video conferencing requirements, wireless, DVD player, projection screen, printer for settlement agreement and releases.

MEDIATION SUMMARY

1. **Confidential:** Remember, It is not the mediator you want to impress with the strength of your claim or defense, but the other side of the table. You should put your best case forward, not holding anything back, which also means acknowledging the weak points.
2. **Better Practice:** If there is confidential information you wish to share with the mediator, submit a separate, confidential statement along with your mediation summary.

OPENING STATEMENTS

1. **Remember your audience:** Your goal is not to persuade the mediator you have the stronger side of the argument. It is the other opposition you must convince. Always, always, always, be professional and courteous.

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2. **Prepare Client:** Make sure your client understands that opening statements are an opportunity to listen and learn. Caution them against arguing with a speaker or correcting you. With the right client, you may want her or him to speak. Make sure your client is prepared. It is not the time or place to whine or argue. They can do that privately with the mediator.
3. **Presentations:** If you feel a presentation is essential, make sure there are no technical hitches and copies for everyone.
4. **Opening demand or offer: Better Practice:** If you have not made one, seriously consider consulting with the mediator before making your opening demand or offer.

PRIVATE SESSIONS--NEGOTIATIONS

1. **Remaining in Joint Session:** If the issues are broad and part of the goal is to restore relationships, it is often worthwhile to remain in joint session to discuss problems and resolutions openly and directly between the parties. The mediator should know when to break out to private caucuses, or you can ask to separate.
2. **Managing the Mediator:**
 - A. **Better practice:** Allow him or her to participate in formulating counter-offers and demands or do it privately.
3. **Downtime:** Use the intervals when the mediator is in the other room to refine your strategy, prepare your next move, and to discuss the benefits of a potential resolution.
4. **Mediation Goals:** Make sure you and your client have established preliminary, but flexible, parameters for settlement.
5. **New Information:**
 - A. **Better practice:** Disclose everything in your mediation statement. If you wish to divulge new information during the course of the mediation, make sure you have hard evidence, document, affidavit, available to support it.
6. **Alternative solution or extra value:**
 - A. **Better Practice:** Provide this information to the mediator early and work with him or her to decide when or how to present this alternative solution or new value.
7. **Settlement Conditions:** If you wish to include particular settlement provisions, confidentiality, non-disparagement, releases of non-parties, etc., alert the mediator early and provide her or him with a draft settlement agreement containing the provisions you desire

CONCLUDING THE MEDIATION

1. **Settlement:**
 - A. Settlement Agreement: Don't leave a mediation without an agreement in writing.
 - B. Neutral as Mediator/Arbitrator of Settlement Agreement: Include a reference that the arbitration will be pursuant to RSA chapter 542 to ensure enforceability of the arbitrator's ruling in court.

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2. No Settlement:

- A. Future negotiations:
 - 1) Discuss conditions, timing, and/or framework for continued discussions.
 - 2) How long will the last offer/demand be available?
 - 3) Involve the mediator in future negotiations.
- B. Other issues:
 - 1) Partial settlement of some disputes.
 - 2) Resolution of discovery problems, deadlines; trial schedule.

After 25 years on the Superior Court, Judge Robert Morrill has spent the last six years as a private mediator and arbitrator. He is a panel member of the American Arbitration Association for both commercial and employment cases and has been selected to serve on its Judicial Settlement Conference Service panel. He has mediated over 500 cases and arbitrated in excess of 100 more.

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