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Resolving Disputes Through Mediation: 5 Tips To Make The Process Successful

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You and your client have decided to mediate. That is the greatest challenge in the process. As advocates, we can often become wedded to our legal positions but mediation calls for a more open-minded approach. Mediation requires you to think about things from your adversary's perspective and be creative. The day of mediation can often be the most important one in the case. Be prepared. Be patient. Be focused. The process can be a taxing one on both lawyer and client, forcing hard issues to be addressed. The stakes are high, but so are the risks and costs of litigation. If you have decided the time is right to mediate, then the incentives are there too. Below are five tips to aid in the effectiveness of the mediation process.

1. Consider Selecting an Expert Mediator Rather Than an Expert in Subject Matter. While the parties will ultimately decide if there is a settlement to be reached at mediation, it is typically a skillful mediator that will help pave the way for a potential resolution. Selecting an experienced mediator to assist in the process is therefore essential. The key question faced in the selection of a mediator is whether you want an expert in the subject matter at issue in the dispute or simply an expert mediator. Most parties initially seek an expert in the subject matter in question, but an experienced mediator is often equally, if not more, valuable. There are some situations

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where familiarity with the issues can aid in the effectiveness of the mediation process. But a facilitator with well-honed mediation skills is usually adept at becoming familiar with new subject matter rather quickly. I have seen many mediations fail because of a mediator that simply was not skilled enough at moving the process in the right direction and "handling" parties in the soundest manner. On the other hand, I have come to appreciate the ability of an accomplished mediator to deal with even the most difficult of clients or adversaries and aid in an unexpected resolution. It is worth considering whether you really need someone familiar with the subject matter to understand the issues. Most of the time, you will find yourself better served with a proficient mediator.

2. Take the Time To Prepare for the Mediation. If you want someone to understand your position—whether mediator or adversary—you need to know your facts and law thoroughly. If mediation takes place in the later stages of litigation, you probably already are very familiar with the facts of the case, the key documents, and the applicable law. But if you mediate in the early stages (which can be highly beneficial and cost effective if an early resolution is reached), take the time to learn the case: research, review documents, map out the case. Do not just learn the strength of your position—learn the weaknesses. When possible, request that pre-mediation submissions be exchanged by parties. If there is something you want to share with the mediator confidentially, you will have ample time to do so during the mediation. I find it is useful to explain your position not just to the mediator but also to the other side. If the case has already progressed to the summary judgment stage or close to trial, this may not be as beneficial. In the early stages of litigation, however, it is just as crucial for your adversary to understand your view of the case as it is for the mediator to learn the case. Expect that the mediator will likely spend just a few hours reviewing the submissions before the mediation date. Keep it simple. Clearly set forth the relevant facts and key law. Sometimes less is more. Submit crucial exhibits but do not bog the mediator down with hundreds of unnecessary pages that can be summarized succinctly. Even if not supplied as exhibits to any pre-mediation submission, you should still identify key documents and bring them with you to the mediation. Do not forget to bring copies. It sounds simple, but I've seen too many adversaries forget or not bother. There is no need to have to pass the document around the table. Bring enough for all attendees—lawyers, parties/representatives, and the mediator.

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3. Manage Client Expectations. Preparing the client or representative who will attend the mediation is crucial. For some, this may be a new experience. Walk them through the process just as you would in advance of a deposition or trial. Make sure any representative attending on behalf of your client is knowledgeable about the matter and has settlement authority. Discuss weaknesses and potential ways to address them. Prepare your client for potential questions that may be raised by the mediator or your

adversary. Mediation is a pathway to resolution and as difficult as it may be for some clients, urge them to put emotions aside and be realistic. You should always have a "game plan" for the mediation and think through potential settlement offers/demands but be sure your client knows that you will also need to be willing to listen to what both the other side and the mediator have to say. New information may come to light during the process. It is a good idea to know the limits of what your client is willing to give or take in order to settle before you walk into the mediation, but you both need to know when to stretch those limits.

4. Adjust Your Attitude and Approach to Negotiations. As litigators, we are trained to be advocates, to be aggressive, and to win. Mediation is a different endeavor, requiring a distinct approach. At the onset, adjust the "litigator" attitude. If you are beginning with opening statements, remember this is not a trial—try to persuade not win. Hard issues may need to be addressed and patience can wear during the process so try to keep your cool and, most importantly, be respectful. You must consider the needs of not just your client, but also the adversary. In order to negotiate a resolution, you need to build a deal where both sides "win" and, likely at the same time, both sides "lose" something. Ultimately, a deal can only be struck if both sides agree. Insulting the other side unnecessarily will hardly induce consent on their part to an amicable resolution. You are an advocate for your client, and that role does not change in mediation. Just be more mindful of how you interact with the other side. You are not going to "win" the mediation but you may persuade them to see things your way. The old saying goes: you catch more flies with honey. Its cliché. But it is almost always true.

5. Focus on All Key Aspects of a Settlement—Both Monetary and Non-Monetary. The main focus of a mediation is almost always the monetary settlement. But make sure you address any key non-monetary points at the mediation. You do not want to walk away having reached a mutually acceptable number only to find out there are non-monetary points that were never discussed that are actually deal-breakers. Make a list of all key issues before you begin the mediation process and do not leave the table until they are discussed. Sometimes these points may not be as important as the monetary aspect of the settlement but you can use these for bargaining. Other times, they are at the forefront of any negotiated deal. Either way, do not shy away from these non-monetary points—raise them. If confidentiality or the scope of a release is an issue, discuss it. Do not wait until a settlement agreement is already circulated to raise points that are important to your client. You want to leave the mediation knowing a settlement has been reached—on everything.