


Mediation Advocacy: Effective Legal Representation in Mediation

Mediation Advocacy
Effective Legal Representation In Mediation



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The Overall Checklist:

- Preparing the Client
- Preparing the Format
- Preparing the “Shape of the Table”
- Preparing to Avoid Impasse
- Preparing the Mediation Team
- Preparing for Closure

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“PREPARATION” IS THE KEY

- Mediation is a process to resolve the client’s dispute
- Mediations should not be allowed to just “happen”
- ACCTM survey cites “lack of preparation” a theme of most failed mediations

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Step One – Preparing the Client for Mediation – Overview **1**

- Client must understand the **mediation process** – how it works
- Client must understand **mediation goals** – what “winning” really means
- Client must understand **range of mediation outcomes** – what can happen

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Preparing the Client for Mediation **1**

– **Process**

The client should understand ... **mediation is a reconciliation process, not an adjudication process.**

Reconciliation vs. Adjudication:

- *Mutual accommodation vs. positional debate*
- *Problem solving vs. fault finding*
- *Outcome is an agreement vs. a judgment*

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Preparing the Client for Mediation **1**

– **Goal**

The Client should understand the **mediation goals**: How do we “WIN” at mediation?

- “Winning” doesn’t mean “Making the other side lose”
- Mediation (reconciliation) is not a “win-lose” contest
- Object is “win-win” – an agreement

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Preparing the Client for Mediation
– Goal

1

- **“Winning” at Mediation** (The Real Goal): *Making A Good Decision.*
- We are here to make a decision – “Do we litigate or settle?”
- “Winning” means getting in position to making a **good** decision.
 - A fact based, reality based, informed decision.
 - Reality of the lawsuit AND reality of the settlement.

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Preparing the Client For Mediation
– Goal

1

- The “reality” of the settlement is **their number . . . their “final” number.**
- “Winning” is getting that number out, on the table, available.
- Then we’re in the position to make the “good” decision.

WE WIN!

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Preparing the Client for Mediation
– Goal

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It’s not about your number –
it’s about their number and your decision

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Preparing the Client for Mediation
– *Outcomes*

The Client should understand the range of **mediation outcomes**:

- A complete settlement agreement
- A partial settlement agreement
- A process to reach a settlement later
- A better understanding of the case

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Step Two – Preparing for mediation:
“Shape of the Table” Issues

- Initiating the Mediation Process
- Selecting the Mediator
- Pre-Mediation Organization
- Scheduling, Location, Duration
- Format
- Mediation Ground Rules

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Shape of the Table Issues

- Initiating the Process** –
 - Blame it on the judge (Court ordered it)
 - Blame it on the economics (fees, costs, time)
 - Ignore it (aren't we past all that?)

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Shape of the Table Issues

○ **Selecting the Mediator**

- Early better than late
- Consider style, technique, availability
- “Who will the other side listen to?”
- Subject matter experience (?)
- Interview, network, research
- Persistence, tenaciousness, willingness to work

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Take the time to make the right choice.

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Shape of the Table Issues

○ **Pre-Mediation Organizing Conference**

- Pre-mediation meetings – counsel and the mediator
- Plan agenda for mediation session
- Letter Agreement (from mediator)
- Case Management Order (from court)

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Shape of the Table Issues

○ **Scheduling, Location, Duration**

- When is the best time to mediate?
- Where is the best place to mediate?
- For how long shall we mediate?

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Give the mediation a fair chance to succeed!


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Shape of the Table Issues

- **Format for the Mediation**
 - Pre-mediation submissions – open, closed or both ?
 - Attendees – Who should be there?
 - Opening Presentations – timing, players, rebuttal, interactive?
 - Caucuses – timing, players, sequence?
 - Closure – special requirements?


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Shape of the Table Issues

- **Mediation Ground Rules**
 - *three essential elements:*
 - Confidentiality will be maintained
 - Parties will participate in the process
 - Authority will be present

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Shape of the Table Issues

- **A Word About Authority . . .**
 - Lack of Authority major cause of mediation failure
 - Insurance authority
 - Corporate authority
 - Governmental authority

Get the right players to the table

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Step Three – Preparing the Mediation Team

○ **The Team:**

- Opening Presentation Players
Counsel, Principals, Experts, Techies
- Caucus Players
Information Sources
Negotiators
- Decision Makers
The **REAL** authority

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Preparing the Mediation Team

○ **A word about Experts ...**

- Experts can take over the case
- Expert input or “Spin Doctors”?
- Another agenda?

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Step Four – Preparing the Opening Presentation

- Tell the client’s story for the client
– *the venting function*
- Tell the opposition “the other side of the story”
– *the evaluative function*
- Right tone and demeanor to communicate
- Visual aids

Give them a reason to change their minds.

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Preparing the Opening Presentation

- Address the defenses
- Separate facts from contentions
- Itemize damages
- Minimize argument
- Eliminate exaggeration
- Hit the high points – sell your case

Remember your audience!

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Step Five – Preparing for Caucus Sessions

- **Most under-prepared area**

Purpose:

- Mediator “probes vulnerabilities”
 - Reality check on claim and defenses
- Mediator explores settlement options
 - Brainstorms settlement scenarios
- Mediator facilitates negotiations

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Caucus Sessions

Exploring the Settlement Options

- Brainstorming the Settlement Options
 - Define the interests to accommodate
 - **Both sides’ interests**
 - Let the Mediator do his job

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Caucus Sessions

○ **The “Money Questions”**

- Know the cost of the litigation
- Know the cost of the remedy
- Know the value of the case

Damage analysis
Jury verdict data

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Know where you want to go

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Caucus Sessions

○ **Settlement Options – other than money**

- Future business arrangements
- Iron out joint undertakings
- Indemnity protection

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Only limit is your creativity.

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Step Six – Preparing for Closure

○ **Have the “special clauses” on hand or in mind:**

- Lien waivers, satisfactions,
- Releases, indemnifications, hold harmless terms
- Structured settlement programs
- Letters of reference, employment confirmation
- Confidentiality, non-disparagement, covenants not to compete

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Devil is in the detail ...

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Closure

- Date, time and place for government approvals
- Court approvals, required pleadings, dismissals.
- Handling the funds, escrow accounts

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Closure

- **The Drafting Stage**
 - Monitor the temperaments
 - Bullet point accords vs. final draft
 - List of concepts vs. detailed provisions
 - Pre-printed forms – good and bad
 - Use the mediator

Protect the deal

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Step Seven – Prepare to Avoid Impasse

- **Anticipate settlement blocks**
– *issues of fact or law*
 - Pre-think ways to un-block the blocks
 - Pending motions – Hearings – real or advisory
 - Continuing settlement discussions

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Mediation Advocacy

○ **ADR Re-Defines the Role of The Trial Lawyer in Conflict Resolution**

- Negotiator
- Deal Maker
- Diplomat
- Problem Solver

**The new role requires new skills...
*Mediation Advocacy***

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