

PREPARING FOR MEDIATION

1. Timing is Everything

- o In general, mediate at the earliest possible time to avoid wasting time and money, provided that the parties are ready to settle the case.
- o Ensure that you are sufficiently informed to evaluate the case for settlement.
- o Ensure that the key players have been identified on each side.

2. Select the Right Process

- o Do you want the mediator to provide an evaluation of each side's case?
- o Is your client interested in restoring/repairing their relationship with the other side?
- o Would face-to-face discussions be helpful?

3. Select the Right Mediator

- o Is the mediator's style evaluative or facilitative, or both?
- o Is the mediator comfortable with face-to-face discussions, if needed?
- o Does the mediator have sufficient experience?

4. Preparing for Mediation

- o Identify the factual, legal, and nonlegal issues which must be resolved.
- o Identify the individuals who must be present
- o Set aside sufficient time for the mediation.
- o Bring any key documents or data with you to the mediation and/or distribute in advance.
- o Have the intention to resolve the dispute on the day of the mediation.

5. Preparing Your Client

- o Explain the process, including the stages of mediation.
- o Emphasize that the parties are the decision makers.
- o Prepare client to participate effectively during mediation.
- o Realistically review the strengths, risks and costs of going forward.
- o Determine a range of acceptable outcomes.

6. Preparing the Mediation Statement

- o Summarize the procedural history and status of case.
- o Set forth key factual and legal issues.
- o Describe any important nonlegal issues.
- o Provide pertinent pleadings and exhibits.
- o Review history of any settlement negotiations.
- o Include confidential letter to mediator, as appropriate.

7. Strategies for the Joint Session

- o Remember that your opening remarks set the tone for the entire process.
- o Address yourself to the decision-maker(s) on the other side.
- o Avoid arguing with, attacking or alienating your adversary.
- o Encourage your client to participate fully.
- o Be willing to listen to and address the issues raised by the opposition.
- o Look for areas of agreement or common ground.
- o Don't be impatient to begin bargaining; allow the parties to "have their day in court."

8. Working With the Mediator

- o Treat the mediator as a collaborator.
- o Share risks and weaknesses, as well as strengths.
- o Do not mislead the mediator about your position,
- o Use the mediator as a sounding board to explore strategies and options.
- o Be creative.

DON'T

1. Add fuel to the dispute. This includes encouraging the client to litigate by focusing only on the strengths of the case, denigrating the other side, over-identifying with the client and/or the conflict, failing to provide a balanced view, and failing to caution client as to the risks and costs of litigation.
2. Prevent your client from talking with the mediator and/or the other side.
3. Block or rush face-to-face discussion and/or emotional expression between the parties.
4. Use hardball negotiation tactics including taking extreme and rigid positions, imposing arbitrary preconditions to settlement negotiations, etc.
5. Focus excessively on future litigation such as discovery, motions, etc.
6. Attempt to manipulate or mislead the mediator as to your client's true position and convictions.

DO

1. Encourage the parties to talk about what's most important to them, including how they feel about the situation and what they need. Let them say what's on their mind. Be patient.
2. Ask your client to see the other side and accept some responsibility for the problem.
3. Address your client's desire for revenge or retribution.
4. Make sure your client knows the weaknesses of his/her case and the risks of proceeding to trial.
5. Make sure your clients know how much it will cost them to proceed to trial.
6. Regard the mediator as a collaborator. Enlist the mediator's help in achieving a settlement that will meet your client's real needs.