

How to Maximize the Use of Your Mediator

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As published by the *Broward County Bar Association Barrister*, January 2017

Successful mediation is a process that involves more than showing up in the mediator's office with your client. Rather, the process should begin days, or even weeks, before the scheduled mediation date.

The purpose of mediation should control the timing of the proceeding. Not all mediations are designed to settle a case; sometimes parties require mediation to draft a case management plan to be submitted to the court. Where settlement is the goal, however, success may depend on whether relevant discovery is complete or whether dispositive motions are outstanding.

Advance preparation enhances the likelihood of successful mediation. This preparation begins with telling your client what to expect during the mediation process: stressing the mediator's status as a trustworthy neutral, explaining the format of the mediation with its opening statements and separate caucuses, and pointing out the confidentiality of the proceedings.

Your client should be prepared to listen to - and consider - the points raised by the other side as part of the risk assessment process and should be aware that the jury (or judge in a non-jury trial) will be considering the

evidence as presented by all sides of the dispute.

Preparation for mediation should include communication with the mediator. Mediators work with what they are given, and the less they know about a case, the less they can help you. A pre-mediation letter or email to the mediator outlining the facts, determinative legal issues, discovery status, negotiation history, and trial status is invaluable. A pre-mediation phone call can add to the mediator's understanding by providing details or nuances about the case.

Flexibility is a key element to maximizing your mediator's effectiveness. A party or attorney who draws "lines in the sand" gives the mediator little room to help the parties achieve resolution of a case. A mediator's observations may be a reality check for measuring the strength or plausibility of a position.

Patience is another critical element. Every mediation proceeds at its own pace that cannot be rushed. Changes in offers or demands, recognizing whether expectations are reasonable, and reevaluating the strength and weaknesses of evidence or legal positions takes time. Each caucus can help with educating the client about the gap between a pre-conceived

"necessary" settlement sum and the probability that the jury will agree with this target. These conversations usually require a deft touch. Listen to the mediator's input on whether the parties can reach agreement rather than making a "grandstand," premature exit.

Even if full settlement cannot be achieved at the mediation conference, the mediator can remain an effective arrow in your quiver. Your mediator can help develop a post-mediation plan, help set goals for discovery or motion practice, or narrow the dispute with a "high/low" settlement range or some other option. A mediator can also be asked to assist the parties in reopening settlement discussions weeks or months after formal mediation concludes.

It's all part of the process.

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