Preparing for Mediation

What is the role of the Mediator?

The mediator is an impartial neutral intermediary whose role is to help the participants reach a settlement. The mediator will not impose a settlement but will assist the parties in exploring settlement options. The mediator does not communicate with the Court except to file an ADR Outcome Report or seek sanctions for failure to comply with mediation regulations and rules.

What is mediation?

Mediation is an informal, confidential, flexible, and non-binding process in which an impartial person called a "mediator" helps the parties to understand the interests of everyone involved, and their practical and legal choices. The mediator helps the parties to:

- Communicate more effectively.
- Analyze their risks and opportunities in litigation
- Explore legal and practical settlement options, and
- Reach an acceptable solution to the dispute.

The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves. Mediation leaves control of the outcome with the parties.

How to prepare for the Mediation

Counsel and clients should be prepared to discuss all relevant issues. Before the mediation session, clients and counsel should discuss the mediation process and understand it is confidential and non-binding. As part of preparation, counsel are encouraged to discuss with their clients a complete and reasonable litigation budget, without downplaying the costs of proceeding to trial.

Counsel and clients should be prepared to state their own case analysis and to listen carefully to that of the other side. Keep in mind the purpose of this exchange is to educate the other side, although, persuasive and forceful communication is permitted. Civility and mutual respect is vital. Hostile or argumentative tactics are likely to cause positions to become entrenched and thus discourage progress.

Submission of Briefs

The parties shall submit a mediation brief 5 days prior to the mediation.

The brief may or may not be exchanged with the other side, depending on the agreement of both parties. Exchange of briefs is helpful where the goal is to present a persuasive case to the other side. No exchange may be preferred where the parties wish to disclose information to the mediator only, such as the range of settlement that is desired.

In either event, parties should be prepared to frankly discuss all aspects of the case during private discussions with the mediator.

The mediation brief should address the following subjects:

1. Your expectations as to the outcome of mediation.
2. The results you hope to achieve.
3. Your understanding as to the current position of the other side.
4. Impediments to reaching agreement.
5. Major legal issues that make reaching an agreement difficult.

What to expect at the Mediation Session

The mediator's opening statement will usually discuss the mediation process and stages, the mediator's role and the confidentiality requirements.

All participants will be required to sign a confidentiality agreement specifically agreeing to hold confidential all discussions in mediation.

Each party will present its uninterrupted opening statement setting forth its position.

After the opening statements, the mediator and parties may ask each other questions or respond to the opening statements. Most mediators will allow this process to continue as long as it appears to be useful.

Thereafter, the mediator may call for a private discussion with each side, sometimes called a caucus. During this time, statements previously made in the joint sessions are explored more fully. The mediator should discuss her or his practice regarding confidentiality of information disclosed during private caucuses with all participants present before engaging in private discussions.

In private discussions, clients and counsel should assist the mediator in understanding the issues and interest at stake. The parties may wish to disclose confidential information to the mediator during these discussions. The mediator will help the parties and counsel to see the strengths, weaknesses, positions, arguments, risks and possibilities of their case.

Either in private discussions or joint sessions, the mediator may assist the parties in generating and exchanging proposals for settling the case. When the parties reach a settlement agreement, all essential terms will be reduced to writing, which will be an enforceable contract if the parties so agree.

Why mediate?

- Mediation is a voluntary, confidential process.
- Mediators do not give legal advice and will not judge you on your case.
- Mediation could SAVE you TIME and MONEY if it is used early.
- Mediation reduces conflict and hostility, whereas trials may increase these feelings.
- Mediation provides high satisfaction with results because you participate and express your personal interests and concerns.

What is the difference between mediation and a settlement conference?

A mediation differs from a settlement conference in several important respects. During a traditional settlement conference, the presiding officer generally meets with the attorneys for each side in alternating caucuses. Clients are often not included in these discussions until late in the process.

During a mediation, discussions are often held with all clients and their attorneys present in order to look for common ground that will result in resolution. If caucuses are necessary, they may include meeting with the client and their attorney, the client without their attorney, or only with the attorney, depending on the needs of a particular mediation and the comfort level of the participants. The goal of a mediation is not merely to settle the case, but to reach a result that all parties believe to be beneficial, a result that the parties as well as their attorneys have participated in reaching."