

PREPARING FOR THE MEDIATION

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In preparing for a mediation, a key factor that will positively affect the outcome of the conference is your pre-mediation approach. Critical to this endeavor is your interaction with the mediator and opposing counsel prior to the date of the session.

With respect to those qualities that one should seek in a mediator, selecting an individual who will read the briefs carefully will prove invaluable. Of equal importance, however, is the actual preparation of a thorough and well thought out mediation submission. This is counsel's opportunity to educate the mediator with respect to their position on the issues of liability and damages, so as to ensure that the neutral has a clear understanding of the case and the parties' positions. Not only will this result in a savings of substantial time that would otherwise be spent educating the mediator, but it will also help move the mediation forward expeditiously. Further this will enable the neutral to engage in a more informed and reasoned discussion of the issues.

In preparing a mediation submission, counsel should be brief and to the point. All too often submissions are styled in the form of a motion to a court making argument for certain relief. This is not the format that should be used. Rather, the

document should set forth a synopsis of the facts surrounding the case; the parties positions on the issues of liability and damages; an itemization of the types of damages sought; any preconditions to settlement such as a confidentiality agreement; the status of the proceeding, including the submission of dispositive motions and any decisions with respect to same; and a summary of any settlement discussions to date.

As a general rule only those documents that are essential to the mediator's understanding of the submission should be annexed. Also, counsel should not submit a one-sided statement of facts and omit those that are contrary to their position. The failure to make a balanced presentation will result in a loss of credibility with the neutral.

In dealing with opposing counsel prior to the mediation consideration should be given to exchanging the submission that has been provided to the mediator. The most common reason for not doing so is the concern about revealing information which tactically should be withheld. Better to exchange a mediation statement with your adversary, and to discuss this information with the mediator in private session. In either case, information that you do not wish to share with the other party should not be included in your submission. This will reduce the possibility of an inadvertent reference to same by the neutral.

In addition to the foregoing, some parameters with respect to the negotiation should be discussed in advance. At minimum, plaintiff's counsel should make a formal settlement de-

mand prior to the time of the proceeding. Often the parties rely upon nothing more than the fact that all have agreed to appear as an indication that there will be a sense of reasonableness at the mediation. Nothing could be further from the truth. In fact, it is common for demands or offers to be made at the inception of the mediation which renders further negotiations impossible. Further, there is often miscommunication with respect to pre-mediation demands and offers. Moreover, the parties oftentimes base their pre-proceeding settlement evaluation on this erroneous information, which may well make it impossible for them to make the necessary adjustment needed in order to settle their case at the time of the mediation..

Further, any preconditions or factors other than the monetary demand which will impact on a settlement, should be raised in advance. For example, the requirement of a confidentiality agreement; lien information; the need for a set-aside; or the requirement that part of a settlement be structured should be discussed. In essence, to the extent possible, there should be open communication between the parties prior to the mediation with regard to any variables beyond a monetary demand or offer that might affect their ability to settle the case.

A well-crafted mediation submission and advance communication with your adversary are critical components of the ADR process that are within your control. Both will help to maximize the possibility of a successful mediation.