

# **Readiness Checklist for Mediation: Things You Should Discuss With Your Client Before Mediation**

## **Explain The Process Of Mediation**

- Explain the Mediation process to the client
- What is mediation?
- How does mediation compare to litigation?
- Why should the client consider mediation?
- What is the mediator's role?
- What is the Client's role in mediation?
- Who may attend the mediation?
- Confidentiality in mediation:
- Whether the client will speak directly with the mediator and/or other side
- Obtain client suggestions for non-monetary solutions, such as future business or payment in kind that may be desirable
- Decide whether an apology to or from the client might be appropriate

## **Selecting A Mediator**

- Discuss the desired education, experience, and background of your mediator. Is subject matter expertise really necessary, or are mediator skills more important?
- Describe how the mediator selection process works
- Determine whether an evaluative or facilitative mediator would be best for this case

## **Explain How The Status Of The Dispute Influences The Mediation Process**

- Has suit/arbitration been filed?
- Is trial/arbitration looming?
  - How long will trial/arbitration take to a final resolution?
  - Have there been any continuances?
  - Is the tribunal likely to grant a request for a continuance from the other side, further delaying the matter?
- Are there pending dispositive motions before the court/arbitrator which create some risk?
  - How should that risk inform the client's decision-making?
  - Discuss your honest assessment of chances of success on the pending motion
  - Whether mediation is more likely to be successful with the risk hanging over the parties' heads (creating uncertainty) or after a decision is made (may be too late or the client could spend more money for the court to "punt" on the matter until trial).
- Has the judge/arbitrator made any preliminary decision in the dispute?
  - Has the judge/arbitrator indicated an early assessment of either party or their case?
  - Either explicitly or implicitly?
- What is the status of discovery?
  - How much is completed?
  - Are party depositions completed?
  - Discuss your honest assessment of the other party as a witness and likely impact they will have as a witness on decision by judge/jury;
  - Discuss your honest assessment of your client as a witness and likely impact they will have as a witness on decision by judge/jury;
  - What discovery needs to be completed?
  - What is the estimated cost of completing discovery?
  - Are expert witnesses needed?
  - What is the estimated cost of the expert witness through the close of discovery?
  - What is the estimated cost of the expert witness through the end of trial?

- Regarding previous settlement discussions:
  - What are the impediments to settlement presently?
  - How can the client and counsel best seek the assistance of the mediator to overcome those impediments?

### **The Impact of Opposing Counsel on the Case**

- Discuss how opposing counsel presents in front of a judge/arbitrator/jury and the likely impact it may have on a decision
- Discuss how a mediator may assist the parties in dealing with opposing counsel
- Discuss the opposing counsel's likely approach to the mediation

### **Settlement Authority**

- Determine your recommendation for a favorable settlement range (please do not discuss a client's "bottom line" unless you want the client to "anchor" on that number and exhibit inflexibility to move beyond it at mediation)
- Discuss the pros and cons of settlement at certain dollar ranges
- What is the likely result for the client on its best day should the matter go to trial?
- What is the likely result for the client on its worst day should the matter go to trial?
- What is the likely result for the client on an average day should the matter go to trial?

### **Anticipated Costs Of Litigation Or Arbitration**

- What is the likely cost to litigate to resolution (deposition costs, expert fees, attorney fees, etc?)
  - The pre-trial costs
  - The cost to try the case
  - How much has the client spent to date on the litigation
- Is there a right to appeal an ultimate resolution by the court/arbitrator?
  - Whether an appeal is available only at the end of the case
  - What is the likelihood of either party to appeal should they lose at trial?
- An estimated of the cost to appeal
  - An estimated time to complete appeal
  - Whether the resolution of the appeal is likely to result in re-trying the matter or a portion of it
- Cost and Fee-shifting:
  - Are the parties subject to a fee-shifting contractual provision, statute, or rule making an award of fees likely or possible
  - Are litigation costs are recoverable from the other side
  - The extent to which expert fees are recoverable (REMINDER: NRS 18.005 allows only "\$1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.")
- How long it may take for the court or arbitrator to resolve the case

### **What Are The Chances Of Success At Trial?**

- What is the attorney's honest assessment of the strength of the plaintiff's claim, considering both liability and damages?
- If you obtain a judgment, does the defendant have assets available for collection?
- What is the attorney's honest assessment of the strength of the opposing case?
- The likelihood that the trial will bring adverse publicity
- Discuss the risks of an adverse judgment, including:
  - The availability of adequate liability insurance
  - The availability of adequate funds or assets to satisfy a judgment
  - Whether a judgment jeopardizes the survival of the client's business