

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

The Mediation Process

- What is mediation and how is it different from court or arbitration?
- 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
- Discuss joint and separate sessions (also called caucuses)
- Discuss whether the client will speak directly with the mediator and/or the other party
- Discuss whether an apology to or from a party might be appropriate
- Discuss whether an opening presentation at mediation is desirable or appropriate
- Are there desirable non-monetary solutions, such as future business or payment in-kind?



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 (if required by contract or otherwise)
- Determine whether an evaluative or facilitative mediator would be best for this case

How the Status of the Dispute Influences the Mediation Process

- Has suit/arbitration been filed?
 - How long will trial/arbitration take to reach a final resolution?
 - Have there been any continuances?
 - Is the tribunal likely to grant a request for a continuance, further delaying resolution?
- Are there pending dispositive motions before the court/arbitrator that create some risk?
 - How should that risk inform the client's decision-making?
 - Discuss an honest assessment of chances of success on the pending motion(s)
 - Discuss whether mediation is more or less likely to succeed with a motion pending or whether the parties should wait until after a decision is rendered
- Has the judge/arbitrator made any preliminary decision in the dispute?
 - Does the decision provide an early assessment of either the parties or their case?
 - How likely are the parties to overcome the early decision?
- What discovery needs to be completed?
 - Are all depositions completed?
 - Discuss an honest assessment of each party's performance as a witness and likely impact each will have on a decision by the judge, jury, or arbitrator
 - Are expert witnesses needed?
- Have the parties engaged in previous settlement discussions?
 - What are the impediments to settlement presently?
 - How can the mediator assist the parties to overcome these impediments?

The Impact of Opposing Counsel on the Case

- Discuss how opposing counsel presents in front of a tribunal and his/her likely impact on a decision
- Discuss how a mediator may assist the client in dealing with opposing counsel
- Discuss the opposing counsel's likely approach to the mediation

Settlement Authority

- Provide recommendation for a favorable settlement range (avoid discussing 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
- Discuss the best, worst, and most probable result for the client should the matter go to trial/arbitration
- Discuss the advantages of preparing a joint draft settlement agreement, leaving out the terms of consideration, but fully negotiating the standard language. (Having a prepared agreement gives the parties a better opportunity for a durable agreement that is binding, enforceable, effective, and final.)

What are the Chances of Success at Trial or Arbitration?

- Provide an honest assessment of the parties' claim(s), considering liability, damages, and defenses
- Discuss the likelihood that a 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 a party's business, encouraging a bankruptcy filing

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 a decision by the court/arbitrator?
 - Is an appeal available only at the end of the case?
 - What is the likelihood that either party will appeal should they lose at trial?
 - An estimate of the cost and time to complete an appeal
 - Whether 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 cost or fee-shifting agreement, statute, offer of judgment, or rule?
 - The extent to which expert fees are recoverable (REMINDER: NRS 18.005 allows \$1,500 per expert, unless the court determines that "circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.")

The Practical Advantages of Mediation even if you don't Settle

- "Free" discovery on important issues raised in support of the parties' positions
- Preview of any "smoking gun" that the other party thinks will win their case
- Testing the attitude of the other side and counsel
- Conducting an inventory of case weaknesses and how to overcome them
- Providing baseline information for an offer of judgment
- Testing the conviction of the parties regarding the strength of their case
- Strategic planning in the down time while the mediator is meeting with the other side
- Gauge how the parties, counsel, and their arguments are perceived by a neutral third party

