

## TIPS AND TECHNIQUES

### ***CONDUCT IN THE MEDIATION SESSION***

- I. Make sure you are prepared! (See checklist on preparing for mediation).
- II. Since the other party is your fact-finder and decision-maker in mediation, you want to establish and maintain credibility and trustworthiness with them. These are some of the attributes for your (and your representative) to display, by word or action:
  1. An open and respectful demeanor.
  2. That you are here in good faith to listen and to see if the dispute can be resolved in a way that works for everyone.
  3. That you are prepared to move on to the next stage (for example, formal complaint or litigation) if the case cannot be resolved.
  4. That you are not seeking an agreement at all costs, but you are prepared to be reasonable.
- III. Be firm but gentle. Don't try to intimidate or humiliate anyone, or pound on the table. It is not to your advantage to antagonize the other side in mediation, nor for them to lose face. Don't cross-examine. Remember, you want to make it easy for them to see things your way!
- IV. Listen, with few interruptions. Feed back occasionally what you heard the other party say. Look for opportunities to agree, or remark on shared interests. Participants on the other side may be prepared to view you as challenging, difficult or unreasonable – surprise them!! Questions should be posed in a manner not to produce defensiveness on the other side.
- V. Make eye contact with the other party, not just the representative or the mediator. Remember that this is a rare chance to access the other side directly.
- VI. Keep any opening statement brief. The other side already knows much of what you would say about the case. View the opening statement less as an information-delivery device and more of an opportunity to build credibility and the other side's (particularly the other side's client's) trust.
- VII. Try to make your opening statement more compelling in human terms, not just legal ones.
- VIII. Unless you have decided to let your representative do all the talking, invite him or her to add to what you have said.
- IX. Look for something to validate or compliment the opponent's circumstances or statements.
- X. Unless you and your representative specifically determine otherwise, you should do the talking – on your own, in response to the mediator's questions and, unless clearly inappropriate, in response to the other side's questions and comments. Mediators generally encourage clients to speak on their own.

- XI. Recognize the utility of private meetings (caucuses) with the mediator. Caucuses are tools for you to use to test ideas, discuss matters that you do not want the other side to hear, and to be frank with your representative.
- XII. Let the mediator set the pace. Do not argue with the mediator in front of the other side; save any concerns you have to discuss in a caucus.
- XIII. Recognize that strong emotions may emerge, and that mediation offers a safe forum for expression of strong feelings. Mediators are trained specifically to handle emotions productively. Let the mediator do his or her job.
- XIV. Understand the nature and limits of confidentiality:
  - 1. While, generally, information received during mediation cannot be introduced later as evidence, that does not stop people from indirectly using what they hear as part of litigation strategy.
  - 2. In employment disputes, there often is little that would be devastating to a party's case if disclosed. From this perspective, confidentiality is more of a psychological tool to reduce anxiety and build faith in the process.
  - 3. The overall goal of mediation is to share information, not withhold it.
  - 4. Valuable information about the other party's demeanor and viability as a witness is not at all limited by confidentiality.
  - 5. If you are worried about discussing or releasing something in joint session, save it to discuss with the mediator in caucus. The mediator can help you decide how to deal with the matter.
  - 6. Plan for specific confidentiality concerns as part of your pre-mediation preparation. Occasionally, you may have to negotiate about a confidentiality issue before proceeding with mediation.
  - 7. Confidentiality of the agreement reached in mediation is a separate matter. Generally, trying to keep the agreement confidential is discouraged as administratively impractical.
- XV. As in any negotiation, look for opportunities to reach a compromise (make concessions) consistent with your interests. Your concessions, coupled with the trust you have built as you went along, can breed concessions by your opponent.
- XVI. Give reasons for your concessions and offers, linked to your interests.
- XVII. Listen carefully to the mediator's summaries and feedback. The mediator has considerable credibility with the other side and you want to assure that the mediator understands your interests and accurately represents what you have said to them.
- XVIII. You must be able to trust the mediator and be frank during caucuses. Mediators are valuable in helping you assess your case, generate options, and move toward settlement, but they cannot do this without your candor.