

CHECKLIST

PREPARING YOURSELF TO PARTICIPATE IN MEDIATION

- I. Keep in mind fundamental principles, including the following:
 1. Mediation is a *facilitated negotiation*. While there are some things that are quite different from regular negotiations, you still need to rely on your basic negotiation skills.
 2. Do not enter mediation if you are doing so primarily because of weaknesses in your case. That sends exactly the wrong message to your counterparts. Enter mediation only if you are prepared to fight and win if mediation is unsuccessful.
 3. In court, the representative is an *advocate* – a civil gladiator. In mediation the representative holds the advocate role in ready reserve, but engages predominantly in *problem-solving*.
 4. Remember that mediation is not about achieving a quick “split-the-difference” compromise. Most likely, you do not need a mediator for that. In mediation the parties work with a neutral to develop an outcome that *both sides, after thorough consideration, are satisfied will work for them*. This might be a compromise – but often the outcome is a creative “win-win” solution that neither party fully contemplated before.
- II. Preparation tips and techniques:
 1. Begin by conducting an overview of what mediation is about:
 - Opportunity to take case “off line” to see if it can be resolved
 - Much different than court – informal, no judge to decide things
 - Voluntary – lose no rights to go on if decide to withdraw from session
 - Confidential
 - Fast, inexpensive
 - An opportunity to tell your full “story” without interruption.
 - You control the outcome – don’t have to settle if you don’t want to
 - You can leave anytime you want
 - An opportunity to see how the other side views the case
 - The mediator’s independence and impartiality
 - The role of the mediator – to help discussion and negotiation
 - Mediator brings perspective, skills, experience, and a new dynamic
 - You have little to lose by participating
 2. Conduct an overview of what to expect in the mediation session

- Mediator will explain the process in detail and ask for questions
 - Parties open by describing their views of the case
 - Mediator will ask each side for what they want to achieve in mediation
 - Mediator probably will use private meetings (caucuses) with each side
 - Caucuses are confidential
 - You will talk to the mediator a lot, but your real message is for the other side
 - The mediator will encourage you to focus on the future
 - The mediator will not provide advice
 - The mediator may ask a lot of questions
3. If you agree to try mediation, then proceed to the preparation below
 4. Review your position and interests:
 - What are your legal positions?
 - What are your *major interests* – not just positions, but the important outcomes and needs? Be sure to include the kinds of things that are of less concern to a court, such as:
 - Need for a good future relationship
 - Desire to leave the organization
 - Need for career development
 - Need for vindication or apologies
 - Stability, tranquility, minimizing disruption
 - Reducing emotional stress
 - What are the “best case” and “worst case” scenarios if you do not settle?
 5. Look at 4 above *from the perspective of the other side*. This will help you develop potential concessions and fallback options, and act as a reality check.
 6. Acknowledge both the weaknesses and strengths of your case and the opponent's. This may present an opportunity to view the risks and costs associated with taking the case beyond mediation.
 7. Think of a *range* of possible outcomes that might work. Identify those that *also might relate to some interest of the other side*. This helps you use an interest-based approach and minimize fixation on only certain outcomes.
 8. Against the background of 4 through 7 above, consider a negotiation strategy. What are the “must haves” and “would like to haves?” What are some compromises (concessions) you may be able to offer the other side? What should be your starting point?
 9. It is very important to prepare for the possibility that mediation may develop some options that you had not considered before. This needs to be viewed positively. Unlike unassisted negotiations, where you should impose on yourself a firm “bottom line,” the creativity of mediation calls for flexibility.

10. Consider who the key decision-makers and approving officials are for your side, if you develop a settlement agreement. Should they be in the mediation?
Available nearby or by telephone?
11. Consider who are the key people for the *other side*? What do you want to happen in terms of their attendance or availability?
12. Explore your role, if you have a representative, your representative's role, and the options for who will be present and when. Who will do most of the talking? Will the representative be present with you for all, some, or none of the mediation session? Considerations include: your credibility, persuasiveness, and competency; the opponent's anticipated negotiating style and how you would cope with it; your comfort level with going toe-to-toe with the other side; and the existence of any legal or confidentiality issues which require sensitive handling. Will part of your representative's strategy be to display some empathy or agreement with the other side?
13. Mediators frequently encourage parties to speak directly and freely. In fact, this is a good opportunity for you to freely express your concerns and feelings in a way that you may not have been able to before. Make sure you are comfortable with and *prepared* for this.
14. Be aware that hostility, intransigence, and offensive statements are likely to be counterproductive. While you need to be frank and assertive, you should be careful not to introduce unnecessary barriers to settlement. The basic principle: *make it easy for the other side to see things your way.*
15. Do not be anxious about hostility or dominance from the other side, mediators are very conscious of balancing power and often set "ground rules" to control unproductive communications flow. This is one of their ethical obligations and a primary principle of the mediator's role.
16. It is **very** important for you to understand that, unlike a judge, the mediator is not going to decide anything is not the main person to be persuaded. You should visualize mediation as an opportunity and a vehicle to persuade the *other side*. Nonetheless, remember that the mediator has to find you credible to effectively take your offers and interests to the other side.