

How to Make Mediation a Success

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Mediation is a central and often required part of domestic litigation. During my career, I have participated in and observed numerous mediations with varying results. I have completed mediation training and am a registered neutral with the State of Georgia. My mediation training reminded me of the various reasons that mediations can fail and the steps I have taken in the past to make mediation a success. Mediations can fail due to the parties, the attorneys, the mediator, and sometimes simply because the case is not ready to settle. This article will focus on the role of the attorney in facilitating a productive mediation and will provide practice pointers that will improve the likelihood of settlement in your cases.

- Prepare Your Client. It is vital to prepare your client prior to the mediation. You should explain to the client how to conduct him or herself during the opening joint session and during the caucusing. Remind the client that the mediator is not acting in the role of a judge but rather that the mediator is a facilitator to the negotiations. Emphasize to your client the need to keep an open mind and to be patient throughout the process, but also that he or she is not required to settle and can end the mediation at any time.

- Temper Your Client's Initial Expectations. Mediation can be a very tough experience for your client. We can often forget this fact because we are so familiar with the process. Particularly with family law cases, your client may have extremely negative feelings towards his or her former spouse and may feel that his or her spouse is not participating in good faith during the process. Be prepared to explain to your client that he or she should expect the opening offer to not be in the range of acceptance but that such an offer does not necessarily mean that the other party is not willing to settle or participate in mediation in good faith. Rather,

your client should expect at least several rounds of negotiations before the offers become in the range of acceptance.

- Select the Appropriate Mediator. Selecting the appropriate mediator can be crucial to having a successful and cost-effective mediation. It is important to make sure that the mediator selected is approved by the Alternative Dispute Resolution (ADR) office for the county that has jurisdiction over the case. Depending on the county, selecting an approved mediator through the ADR office may allow for several free hours of mediation or a discounted rate. This also ensures that the mediator is certified to handle domestic and family law cases. You should also choose your mediator based on the specific issues in your case. For example, if your case involves the division of a family-owned business, then you should consider hiring a mediator with a business litigation background. Similarly, if your case involves substance abuse or domestic violence, then you should hire a mediator that has experience or expertise in handling those issues. Finally, you should take into consideration the mediator's gender and personality and how they will affect your client's relationship with the mediator.

- Educate the Mediator. Educate the mediator in advance of the mediation. Most mediators allow and encourage such communications. Specifically, send to the mediator, with opposing counsel copied, the previous offers of settlement and your client's financial affidavit. A mediation memorandum can also be prepared which sets forth the issues to be discussed, information about the parties' interests, an assessment of the strengths and weaknesses of the case, relevant legal authority, and information about whether there have been prior negotiations between the parties.¹

- Use the Mediator to Persuade Your Client. On the day of the mediation, consider an attorneys-only or private meeting with the mediator. Here, let the mediator know

what issues are most important to your client and your opinion on how the mediator could be most effective in dealing with your client considering the particulars of your client's personality. Mediators are skilled in many different approaches to mediation, such as reality testing and the soft approach. In a private meeting, you should let the mediator know which approach would be most helpful to assist your client in reaching a settlement. For example, if you have a difficult client who is not being receptive to your advice on a particular issue, then ask the mediator to reality test this issue by giving his or her opinion on how the judge would rule. On the other hand, if your client needs to tell his or her story prior to settling, then ask the mediator to take a soft approach to mediation by listening and building trust with your client.

- Focus and Motivate Your Client Throughout the Process. Many clients find the mediation process exhausting, as they are forced in a matter of minutes to make life-changing decisions, many of which will affect their children. This is especially true as the mediation reaches the late afternoon and your client has to make childcare arrangements and deal with hunger pains, fatigue, and restlessness. Throughout the mediation, continue to keep your client focused and motivated. Remind your client of the very high success rate for mediation and that the mediation process naturally takes a long time. Despite the cost and expense of a full day of mediation, if successful, the parties will end up with a more palatable result for both parties at a fraction of the cost of a trial.

- Take Organized Notes During Caucus. During a caucus with the mediator, it is important to take accurate and organized notes. Such notes can be useful during the mediation, as well as after an unsuccessful mediation in continuing the progress made at the mediation through a written offer letter. Especially important is having notes setting forth in detail the last offer made by each party, taking care to carry forward agreed-upon terms from the

previous rounds of negotiations. I have also found it useful to note the time when each offer is made so I can get an idea of how long each caucus is taking. Clarify the opposing party's offer with the mediator, and ask the mediator to request any additional information necessary to allow you to respond to the offer. Likewise, when making an offer, review the mediator's notes to ensure that the mediator is presenting the offer correctly and completely.

- Reach a Final Agreement at Mediation. A settlement offer should be prepared in advance of the mediation, if possible, to allow the negotiations to begin immediately. If there is already a settlement offer pending, then prepare a response to present at the start of the mediation, as doing so provides the framework for the settlement discussions and sets the tone for the mediation in a manner most conducive to your client. Additionally, crafting a settlement offer or response prepares both you and your client for the negotiations and allows you a chance to understand on which issues the client is willing to compromise. Along those lines, I would also recommend that you come prepared with a draft of a formal settlement agreement, and any other applicable documents, such as a child support addendum and a parenting plan, so that the parties can finalize and execute all documents at the mediation if the case settles. Bring your laptop so that you can revise the documents during breaks. Having the parties execute the actual settlement agreement at the conclusion of the mediation prevents costly back-and-forth and unnecessary disputes in transforming the mediator's handwritten agreement into a formal settlement agreement.

- Reserve Minor Issues. As the parties enter the final stages in reaching a final settlement agreement at mediation, it is important not to sacrifice the ultimate resolution of the case because of disputes over such relatively minor issues as division of furniture or details regarding a sale of real property. It is more important to have a signed mediated agreement on

the major issues so that the mediation day is not lost. If there are minor issues remaining, one option is to ask the mediator to arbitrate such issues or to agree upon a third-party arbitrator. Alternatively, the remaining issues can be reserved for the Court's determination with an abbreviated hearing, rather than a full trial of all issues.

Hopefully the above practice pointers will help you prepare for and be confident in mediation so that your client can end the day with a signed final agreement that fully resolves his or her case.

¹ Patricia A. Siuta, Civil Mediation Training, Henning Mediation and Arbitration Service, Inc., p. 38-39 (2011).