

MEDIATION TIPS

By
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A monthly series of short articles on successful mediation advocacy.

Tip # 1: “*Manage Their Expectations Before Mediation.*”

The key ingredient for any successful mediation has nothing to do with what happens when you get there. It is management of the other side's expectations *before* you get to the table. This has to do with: (1) the education of the opponent about the merits; (2) demonstration of your mastery of the *other side's* case; (3) clarity about your commitment to the case; (4) and crystal clear communication about your pre-mediation negotiating position. These are achieved by written or informal communication about the case, conveying written settlement proposals, serving mediation briefs, and avoiding big surprises at mediation.

Coming to mediation with the other side relatively clueless about your case *or your negotiating position*, especially in a significant case, gives other counsel little chance to condition their client for what needs to happen. No insurance or corporate professional can be prepared with adequate authority, without a sense of your expectations and strengths. Plaintiffs find it hard to rethink a case (or their life) while at mediation, if they did not see the arguments coming.

So why are so many lawyers reluctant to communicate merits or positions before mediation? There are two familiar reasons. First, we are trained to be trial advocates and share as little as possible. The more we surprise the opponent at trial, the better. Second, we feel awkward conveying messages that might be poorly received, and want a skilled mediator to handle the painful messages. We might even blow the mediation off calendar, if we tell the other side what we really think. These are valid concerns, but must not stop us from skillfully preparing the other side. If over 90% of all cases settle, with or without mediation, getting to a fair settlement economically is at least as important for our clients, as saving a few cards to show in court.

To strike the right balance, ask yourself three questions going into mediation.

- **Does the other side know, at least generally, what my opening position will be at mediation?** If you are afraid that you might scare them away before the mediator gets the case, send general messages or hint at ranges that would *not* be acceptable. We

lawyers are great communicators, so find a way to get the message across. If all else fails, ask the mediator to sound out the other side in advance.

- **Does the other side know most of my best points, and appreciate that I understand theirs?** If not, you are not ready to mediate. Send a comprehensive settlement package. Have a cup of coffee after the CMC, and point the other lawyer in the right direction. Exchange briefs before the mediation (highly recommended). If the opponent thinks that you do not understand the real strengths on their side, your arguments will be unnecessarily discounted.
- **Are there any facts or law that will take the opposition by surprise at mediation, which significantly effect my client's position?** Why not tell them *now*. They will not get to your range without the information. If you need to see some realistic gesture by the opponent before revealing it, talk to the mediator about making that happen in advance. There are always ways to reveal enough to condition the other side, without giving away the store.

Managing expectations is not easy in our litigator's culture, but it is the essence of successful mediation. Think about it before you come to the table.

Each month I will explore one new tip to using mediation successfully. Next month: ***"No Surprises Please."***

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