

Mediation Advocate Checklist

1. Know your case. In the context of preparing for a mediation session, "know your case" means knowing and preparing the following elements.

- a. Know which facts are disputed and which are undisputed.
- b. Know which facts are critical, which are important, and which are merely background.
- c. Lay out the elements of your cause(s) of action and the facts you have. This will form the background of your preliminary statement.
- d. Know your damages or other desired relief (if seeking relief). This will help you focus on what you hope to achieve in mediation.
- e. Know your counter-claims and defenses (if you are actively resisting sought relief) and know your liability issues, disputed and undisputed. This is the first half of knowing the points you have to use in negotiation and the mediation.
- f. Know comparable jury verdicts (if any). This can be very important and helps you in evaluating your goals.

2. Know your alternatives to settlement. Once you have reviewed your case and answered the questions about the alternatives you are ready to talk with your client and spend the appropriate amount of time preparing them for mediation.

- a. Know your risk. Ask yourself: What is your range of results if you do not settle?
- b. Know how long and how expensive it will be to go to trial and what outcome is possible at trial. Ask yourself: What will it cost you to go to trial?
- c. Know what results are likely from a trial. Ask yourself not only what the range is, but: What is likely to happen if you go to trial?
- d. Be aware of your client's other options (such as walking away) and other tools (such as binding arbitration or binding summary trials).

3. Educate your client (and prepare yourselves as a team). If your client understands his or her case before the mediation and how the mediation itself will unfold, both of you will have a much more satisfying mediation experience.

- a. Explain the mechanics of the system (especially how a mediation session goes). Goal: Have the client understand the procedures and keep him or her from being surprised by the process.
- b. Explain the facts as the law sees them. Goal: Help the client to understand that what matters is not "the facts" but the admissible evidence. Goal: Helps the client avoid trouble later.
- c. Explain the law as the State has created it. Goal: Help the client understand that the result he or she will get will not necessarily be what he or she thinks is fair, but what the law allows.
- d. Update the status of the case (where everything is "how much longer."). Goal: Help the client understand how much, or how little, time settlement can save.
- e. Explain the status of negotiations (if any). Goal: To make certain that the client approves of at least here the negotiations will start.
- f. Determine and set the goals that the client is seeking from the dispute and the resolution process. Goal: To make certain that you are headed in the right direction in what you are seeking from the mediation session.
- g. Define your client's objectives. Goal: To get concrete goals.
- h. Examine the alternatives to the client's objectives. Goal: To help the client think in terms other than win/loss.
- i. Explain to your client the alternatives to settlement. (including risks, delays and enforceability and/or collectability of judgments problems, if any). Goal: To help the client realize that having a trial and receiving a verdict is not necessarily the end of the process.

4. Validate your and your opponent's file by making certain you have everything you need and by making certain the other side has been sent everything they should have in order to fully negotiate. Verify that you have asked for and obtained the items you feel you should have from them. Read everything in your file at this point.

5. The basic steps and considerations necessary to set up a successful mediation of most conflicts that are in litigation are listed below.

- **Select Mediator**

1. appropriate experience
2. appropriate methods
3. appropriate site
4. fee schedule
5. agreement of parties on mediator

- **Confidential Pre-Mediation Papers for Mediator**

1. concise statement of issues and positions
2. identify strengths and weaknesses
3. provide time line for case and for negotiations
4. detail who will be present and his or her relationship to the case
5. supplement, as appropriate, "hot" pleadings and case law

- **Pre-Mediation Client Caucus**

1. explain mediation process
2. review Pre-Mediation Papers
3. explain possible benefits of mediation
4. explore initial unrealistic positions and sensitive issues
5. discuss authority to settle
6. warn of possible multiple impasses
7. review the strengths and weaknesses of case

- **Order Referring to Mediation**

1. double check for confidentiality provisions
2. allocate costs
3. identify time, place, and persons attending
4. make certain that all persons with authority will attend

- **Lawyer's Role**

1. to persuade and negotiate
2. to communicate
3. to protect client
4. to remain reasonable and calm

- **Lawyer's Opening Statement**

1. introduce yourself -- humanize yourself
2. introduce your clients -- humanize your clients
3. acknowledge a belief in the process and your client's good faith
4. express sympathy
5. outline your position, the basis for your position, and areas of good faith disagreement

- **Initial Caucus**
 1. identify the strengths and weaknesses of case – discuss
 2. evaluate the expected outcome of your case
 3. discuss "the first credible offer" and when to make it
 4. discuss unanticipated elements or overlooked issues
 5. discuss initial expectations

- **Subsequent Caucus**
 1. discuss strengths and weaknesses of case as identified by the other side
 2. re-evaluate the expected outcome of your case
 3. discuss goals

- **Final Agreement**
 1. make sure you and your client both understand the terms of any final agreement reached in the mediation
 2. secure a written memorandum of the agreement signed by all lawyers and the parties
 3. assign responsibility for drafting formal settlement documents and timeframes
 4. arrangements to pay mediator fee

MEDIATOR'S CHECKLIST

JOINT SESSION:

STEP 1: Introduction (try to keep it around 2-3 minutes).

- Introduce yourself, have parties introduce themselves.
- Describe process (who speaks first, ground rules).
- Describe joint & private sessions, confidentiality.
- Reinforce objectives of mediation.

STEP 2: Plaintiff's Counsel gives account of the circumstances which lead to the filing of the complaint.

- Ask Plaintiff's Counsel to present the opening statement.
- Listen.
- Keep things flowing.
- Thank them for the presentation and for the Defense Counsel's active listening.
- **DO NOT ASK ABOUT DEMANDS AT THIS POINT.**

STEP 3: Defense Counsel gives its opening statement.

- Listen.
- Thank them for the presentation and for the Plaintiff's Counsel's active listening.
- Ask questions only if necessary.

STEP 4: Plaintiff and Defendant define the issues.

- At your discretion, you may allow the Parties to make statements to each other. (Check with Counsel first, assess attitudes and determine whether the comments are likely to be helpful.)
- Be careful asking questions.
- Inform parties of subsequent steps: caucus, attorneys caucuses, possible subsequent joint sessions.
- Direct all parties to their respective rooms.

STEP 5: Caucus with your co-mediator.

- Discuss your respective observations.
- Consider options for process.
- Map-out your mediator strategy for Step 6.

PRIVATE SESSIONS:

STEP 6: Hold private, confidential session with Plaintiff.

- Listen and take notes.
- Give assurances that you understand what is being shared.
- Create trust in the process.
- Summarize your understanding of what has been said so far.
- Consider whether it is appropriate to do reality testing at this point.
- Confirm the approach you plan to take based on what you have heard.
- **ASK FOR A DEMAND IF ONE HAS NOT BEEN MADE PRIOR TO MEDIATION.**
- Give encouragement to allow the process to work.

STEP 7: Hold private, confidential session with Defendant.

- **Listen and take notes.**
- **Summarize your understanding of what has been said so far.**
- **Create trust in the process.**
- **Outline the process to be followed.**
- **Deliver demand.**
- **NEGOTIATION BEGINS.**

STEP 8: During the negotiation process, a series of private confidential sessions may be necessary.

- **Throughout the negotiation process, your objective is to explore options for settlement.**
- **Encourage the parties as problems are resolved.**
- **Assess the productivity of the process; consider other approaches before declaring impasse.**

AGREEMENT & CONCLUSION:

STEP 9: Go over the terms of the mediated settlement agreement with the parties.

- **Clarify the terms of the agreement.**
- **Have parties review and sign the agreement.**
- **Make a copy for each attorney.**
- **Thank the parties for participating and conclude the mediation.**
- **Group hug if appropriate.**

A SAMPLE INTRODUCTION

It's good to see the two of you here. I'm (Mediator's Name) and this is (Mediator's Name). We will be serving as your Mediators.

The purpose of our meeting is to help you work out an understanding acceptable to both of you to resolve the situation that has been developing for you.

First, we would like to explain how we will proceed, so you know what is happening next. We will begin by asking each of you to explain how you view things. We will do our best to understand your point of view. After that, we will identify and agree on what the basic issues of disagreement are. Then we will work together with you in examining exactly what you want of each other and what some possible solutions might be. Our goal is to help you find a solution that both of you feel comfortable with.

We would like you to understand what our role is here. Our goal is to help *You* figure out *Your own solution to Your problems*. *You* are the ones who will be living with your solution from here on, so we want you to be the ones who decide what the solution will be. We won't be telling you what to do or trying to judge who is right or wrong. We are much more interested in helping you to think about solutions for the future than in trying to judge what happened in the past. Mainly we are interested in helping to talk about a solution that both of you can live with. We want to assure you that anything that you may say during our session is confidential. We will be taking notes from time to time so that we can remember things, but when we finish, we will destroy our notes.

Either of you may ask to take a break at anytime during our discussion. For example, if you feel yourself getting really upset at any time and feel that you really need to take a break to simmer down a little, let us know, and we will take a little time out. You can step outside for a few minutes if you wish, but we will ask you to let us know what is happening and then to return when you are ready to continue. Sometimes it is helpful for us as Mediators to meet separately with each of you during our discussion, so we may be doing that occasionally as well.

It is necessary for this process for each of you to sign this written agreement to mediate. If you would just look it over, please. It basically says that you have come of your own accord, that what you say here will be kept confidential, and that the Mediators will not be asked to release information discussed here, nor will they be summoned into court to testify on matters disclosed here.

Last of all, we would like to discuss ground rules a bit. We ask each of you to agree not to interrupt when the other person is speaking. We have placed paper and pencil here on the table so that you can keep notes about any responses to make. We also would like for you to agree to avoid the use of any abusive language, name calling, etc. These rules are especially important in the next part of our discussion here.

Moving into the "The Story-Telling Stage":

We'd like to begin now with hearing each of you explain your perspective on this situation, beginning with Plaintiff's counsel, then we will hear from Defense counsel. Please begin.

ACTIVE LISTENING FOR MEDIATORS

I. PAYING ATTENTION TO THE SPEAKER ("ATTENDING"):

1. *Look at the speaker.* Keep the other persons in view so you can observe their reactions, but generally maintain eye contact with the speaker.
2. *Show that you're interested in what he/she is saying.* Encourage by unobtrusive use of "yes," "I see," "um hum." Use positive body cues at appropriate points -- nods, smiles, note-taking, furrowed brow, etc.
3. Most of the time, *lean slightly toward the speaker.* Keep an open, relaxed posture. Keep your physical movement to a minimum.
4. *Engage the speaker* by looking for opportunities to subtly mirror his/her cues. Do not mimic, but do look for ways to be *CONGRUENT*. For example, if he/she speaks slowly, match his/her cadence.
5. *Draw the speaker out.* Say something like, "I'd like to hear a little more about [subject]."
6. *Try to listen for what is NOT being said* -- what's missing that you might expect to hear in the circumstances?
7. *Observe HOW things are said* -- the emotions and attitudes behind the words may be more important than what is actually said. Look beyond the mere words the speaker uses -- remember that much information is displayed in voice intonation and body language.
8. *Say little yourself!* You can't listen while you're talking.
9. *Show that you're listening and interested* by asking QUESTIONS and FEEDING BACK, REFRAMING and SUMMARIZING. However, particularly in early stages, be careful not to interrupt the speaker's flow.

II. ASKING QUESTIONS:

10. *Questions serve three basic purposes:*
 - to show you're listening (especially in the early, trust-building stage);
 - to gather and organize information (particularly in the problem-solving stage); and
 - to express in question form what otherwise might be an academic statement -- for example, to test reality (most often in problem-solving and closure stages).
11. Generally, questions should be open-ended, not closed-ended. Closed-ended questions can be answered "yes" or "no," or with a specific answer like "two" or "January." They may encourage the answerer to stop talking. Open-ended questions cannot be answered so simply, and encourage the speaker to talk and explain in complete sentences. Open-ended questions are good because they invite a person to open up and tell his/her story. Examples of open-ended questions: "Tell me more about [subject]," "what happened next," "how did you feel when that happened," "what would you like to see as an outcome." Use close-ended questions exceptionally -- only to increase control over the flow of information or to confirm certain important facts.

III. FEEDING BACK, REFRAMING, AND SUMMARIZING:

12. When the speaker pauses, there's an opportunity to *confirm that you've been listening and that you understand by FEEDING BACK* what you've heard/observed to the speaker. It also is a way to check that your perception of what you think you heard/observed is accurate, as well as a way to validate for the speaker what he/she is feeling.
13. To feedback, *repeat or paraphrase* what the speaker has said (or displayed as unspoken feelings). Examples: "so, when that incident happened, you felt like . . .", "it sounds like an important issue for you is how to deal with . . .", "what I think I'm hearing is that you really need to . . .", "I can see that you have strong feelings about that." *Pause expectantly* to let the speaker react. Common signs that you've done it right: the speaker will nod vigorously and/or respond, "yes, and . . ."
14. Sometimes, repeating the *last couple of words of a speaker will encourage him/her to go on*, but you generally do not want to repeat verbatim what the speaker said -- you may sound like a mimic! Paraphrase instead. However, *DO be conscious of particular words* that seem important to the speaker and use them, if appropriate, in your paraphrasing.
15. *REFRAMING is a special way of feeding back*, and is one of the Mediator's most important tools. It is restating what a party has said to *capture the essence, remove negative overtones, and move the process forward*. Reframing also is a way to translate a positional statement into a statement of interests or needs. Example: a separated spouse says angrily, "He's so irresponsible that I never can depend on him to pick our child up on schedule." Simple feedback might be, "so it really bothers you if he isn't on time to pick up Johnny" -- while a reframed response might be, "so a regular schedule is important for you and Johnny." Either response may be appropriate, and the difference is subtle; the first might be better at an early point in trust-building, while the second might be better later, during problem-solving.
16. *Summaries are part of most feedback*, but sometimes you want to focus particularly on a summary. At major transitions, such as after one Party has told his/her story and before you turn to the other Party, do an overall summary of major points, and ask for confirmation.
17. *Generally use neutral language*. Example: one Party says the other was "hysterical." In feeding back, you might say the Party was "crying." A "liar" becomes a person who "disagreed" or "sees differently." Be careful not to get so pretentious that the Party feels you've misrepresented their point of view.

IV. MANAGING THE FLOW OF COMMUNICATION:

18. *Stick to the speaker's subject*. You may want to go to something else, but give the speaker time to finish.
19. *Don't be too quick to try to move on* when the speaker repeats things. Remember, repetition may indicate: (a) that the subject is very important to the speaker, and (b) that the speaker needs to feel that you've really heard him/her on the subject. This is a cue that you need to feedback what the speaker is saying.
20. *If repetition does go on too long* you can try saying something like, "Well, it's clear to me that [subject] is very important to you. Is there anything else that's also important for us to understand?"
21. *Be comfortable with silence*. Usually, one of the Parties will speak up soon enough. Use silent cues -- pauses, turning to another Party expectantly.

HOW TO OVERCOME IMPASSE

As negotiations proceed, Parties sometimes reach an impasse -- often not due to overt conflict, but rather due to resistance to workable solutions or simply exhaustion of creativity. While the impasse might signal that the dispute is unresolvable in mediation, the mediator may believe that a workable agreement is still possible. Below are some techniques to get negotiations moving.

Remember: The goal isn't to overcome impasse per se, but to help the Parties analyze and negotiate constructively. The Parties are free to stick with a position -- there may be a legitimate reason for impasse, and it's not your job to pressure the Parties into a settlement!

1. Take a break. Often, things have a way of looking different when you return.
2. Ask the Parties if they agree to set the issue aside temporarily and go on to something else - preferably an easier issue.
3. Ask the Parties to explain their perspectives on why they appear to be at an impasse. Sometimes, the Parties need to feel and focus consciously on their deadlock.
4. Ask the Parties, "what would you like to do next?" and pause expectantly. Or, say "frankly, it looks like we're really stuck on this issue. What do you think we should do?" These questions help the Parties actively share the burden of the impasse.
5. Ask each Party to describe his/her fears (but don't appear condescending and don't make them defensive).
6. Try a global summary of both Parties' sides and what they've said so far, "telescoping" the case so that the Parties can see the part they're stuck on in overall context. Sometimes, the impasse issue will then seem less important.
7. Restate all the areas they have agreed to so far, praise them for their work and accomplishments, and validate that they've come a long way. Then, ask something like: "do you want to let all that get away from you?"
8. Ask the Parties to focus on the ideal future; for example, ask each: "where would you like to be [concerning the matter in impasse] a year from now?" Follow the answers with questions about how they might get there.
9. Suggest a trial period or plan; e.g., "sometimes, folks will agree to try an approach for six months and then meet again to discuss how it's working."
10. Help the Parties define what they need by developing criteria for an acceptable outcome. Say: "before we focus on the outcome itself, would you like to try to define the qualities that any good outcome should have? "
11. Be a catalyst. Offer a "what if" that is only marginally realistic or even a little wild, just to see if the Parties' reactions gets them unstuck.
12. Offer a model. Say: "sometimes, we see Parties to this kind of dispute agree to something like the following"

- 13.** Try role-reversal. Say: "if you were [the other Party], why do you think your proposal wouldn't be workable?" or "if you were [the other Party], why would you accept your proposal?"
- 14.** Another role-reversal technique is to ask each Party to briefly assume the other's role and then react to the impasse issue. You also can ask each Party to be a "devil's advocate" and argue against their own position.
- 15.** Ask the Parties if they would like to try an exercise to ensure they understand each other's position before mediation ends. Ask Party A to state his/her position and why, ask Party B to repeat what B heard, and then ask A if B's repetition is accurate. Repeat for B. Listen and look for opportunities to clarify.
- 16.** Ask: "what would you be willing to offer if [the other Party] agreed to accept your proposal?"
- 17.** Use reality-checking. For example, "what do you think will happen if this goes to court?" Draw out the emotional, financial, and other costs of litigation and delay.
- 18.** If all else fails, suggest (or threaten) ending the mediation. Parties who have invested in the mediation often won't want it to fail, and may suddenly come unstuck. This approach is useful where one Party may be hanging on because he/she enjoys the attention the process provides, or enjoys the other Party's discomfort.