# How to Maximize the Probability of Success at Mediation: Effective Preparation

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(Part 3 of a 4-part series on gearing up for a mediation.)

According to an old adage, failing to prepare is preparing to fail. This absolutely applies to mediations. Like many things in life, the key to maximizing the odds of a successful mediation is effective preparation. So how does one go about doing this?

I believe there are three tried and true steps. The first, and most important, step is managing the client's expectations. This goes for both sides, because no case is perfect, and nobody can predict what a judge or jury will do. Managing expectations comes down to a frank discussion between attorney and client about the strengths and weaknesses of the case, as well as the potential outcomes. What is the realistic range of damages? What kind of jury appeal does the case have, irrespective of the legal merits? These are the types of tough questions that must be addressed head on.

There also should be a discussion about what the future may look like if the case does not settle at the mediation. For instance, what will it cost to continue to litigate? What are the odds that new witnesses or evidence come out of the woodwork and have a drastic impact on the value of the case? When will the next opportunity to discuss settlement present itself?

The second step is getting your ducks in a row in terms of discovery, dispositive motions and trial preparation. Important documents should be obtained and critical witnesses should be deposed prior to the mediation. The parties should consider filing dispositive motions in advance of the mediation. This serves the dual purposes of having as much information as possible in order to assess the settlement value of the case for mediation, while also avoiding a last-minute scramble in the event the case does not settle and the parties have to get ready for trial.

The third step is preparing a mediation brief that both educates and sets the tone for the mediator. The extra effort is well worth it because a thorough mediation brief can save valuable time during the mediation that might otherwise be spent trying to understand the facts of the case, and it also builds credibility in the eyes of the mediator -- a key ally for both sides in settlement negotiations. A lengthy discussion of the applicable case law is often unnecessary, especially if the mediator is a subject matter expert. Instead, the focus should be on laying out the relevant facts and supporting evidence in an organized, coherent manner, as well as a discussion of the themes of the case, relevant procedural history, any obstacles to reaching a settlement and other pressure points.

Finally, there are differing schools of thought on whether to exchange mediation briefs with the other side. One view is that the briefs contain attorney work product and strategic insights that must remain confidential at all costs. On the other hand, educating the other side about the potential pitfalls of their case may cause them to "see the light" and reevaluate it. One way to reconcile these positions is for the parties to exchange only their respective factual summaries and supporting evidence and withhold the more sensitive sections of the brief. By doing this, the parties can establish at least some baseline understanding of the other side's view of the case, which can facilitate more productive settlement negotiations.

Next: Who Should Attend the Mediation?



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