



Who Should Attend the Mediation?

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

Who should attend the mediation seems like an easy question. The parties and their counsel, right? Not so fast. There are some nuances to consider.

First, which attorneys should attend? Ideally, the attorney who has been responsible for the day-to-day management of the case and has intimate knowledge of the facts should attend in-person. That said, the division of labor within many law firms dictates that the attorney who is responsible for managing the case and who knows the facts is not always present at the mediation. In this situation, the attorney attending the mediation could be at a disadvantage if he or she is not adequately brought up to speed on the facts and procedural history of the case in advance.

However, in-depth knowledge of the facts is not the only consideration. The trust and rapport developed between an attorney and client are also critical to having successful settlement negotiations. The attorney who has established the trust and rapport with the client should be a key player at mediation, even if he or she does not have the best command of the facts.

As for the client, there may be several players who should attend. If the party is an individual, then obviously that person should be physically present. In addition to the individual parties, there may be other influencers who should attend. That includes

spouses, parents, business advisors and others who must have a say in the result.

If the party is a corporation or other business entity, then there also may be several potential attendees. Whether it is an owner, officer or other member of management, someone with an acceptable level of personal knowledge of the facts of the case and the operation of the entity should be in attendance. Someone who has the authority to enter into a settlement on behalf of the entity also should be there. If there is insurance coverage involved, then a representative from the insurance carrier should attend.

Sometimes a party like a business entity will send a representative who has no factual knowledge or settlement authority. This is the proverbial “warm body.” The warm body serves no purpose at the mediation other than to satisfy a requirement that the parties have a physical presence there. In fact, there is an opportunity cost to the business resulting from the warm body spending the day sitting idly at the mediation. Disappointment or surprise over the attendees (or absentees) at the mediation also is an immediate obstacle to productive negotiations.

If in-person attendance by someone who knows the facts or has settlement authority is not possible, it may not be a deal breaker, but only if the parties have a discussion about it well in advance of the mediation so there are no surprises. In my experience, the parties just want some assurance that the other side will be committed and engaged during the mediation process regardless of who attends. With today’s technology, this can still be achieved without an in-person presence at the mediation. That said, paving the way beforehand by communicating with the other side is critical to making it work.

Ultimately, the important thing is not the physical presence of a particular individual, but, rather, that the individual making the decisions has a thorough understanding of the issues in the case and its potential settlement value so that he or she knows what to expect during the negotiations. Again, it comes down to avoiding surprises, which can bog down and derail even the most productive settlement discussions.

This is the final installment of my 4-part series on gearing up for a mediation. If you enjoyed it and found some value in it, please share it with your colleagues and help spread the word about my mediation practice. Thank you!



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