



Effective Follow-Up After the Mediation

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I often ask attorneys what they look for in a mediator. One of the most common responses I get is that they want a mediator who follows up with the parties if the case doesn't settle at the mediation.

Attorneys' opinions may differ when it comes to how a mediator should follow up after a mediation that doesn't result in a settlement, but there is no doubt that most expect it. Here is my take on how to be as effective as possible.

First, effective follow-up by the mediator starts at the mediation, not afterwards. When the end of the mediation session is near and the parties do not appear to be close to a deal, I will often work with each side to clarify where the parties stand, why there is still a gap between their respective positions and what needs to be done before the parties can reengage in settlement discussions.

This discussion includes a – “Where do we go from here?” – exercise. The goal of this exercise is to set the parties' expectations for the mediator's follow-up, as well as the mediator's to-do list for the coming days, weeks or months. Depending on the parties' feedback during this exercise, a mediator's follow-up could entail scheduling a call with the parties right after they have had the opportunity to speak to a decision maker who wasn't available during the mediation session, or after the court makes a ruling on a key issue that could impact the settlement value of the case.

If the mediation ends with a mediator's proposal that is later rejected, then my practice is to

follow up with the rejecting party about the reasons for rejection, and whether there are other settlement options to explore, like a counter-proposal by the rejecting party. I do this even before I notify the other side(s) of the result of the proposal, so I can gauge each side's willingness to continue the negotiations despite the rejection of the proposal.

Time is of the essence here, since the parties' settlement postures can change with the passage of time. Therefore, the mediator should act quickly and also encourage the parties to do so in order to preserve the momentum from the mediation.

All that being said, in my experience, the effectiveness of a mediator's post-mediation follow-up efforts still comes down to the parties' willingness and commitment to continue talking about a potential resolution. If any of the parties are not willing to engage in further dialogue, then the mediator's options are greatly limited.

Nevertheless, in such a situation, I have found that the parties still appreciate a mediator who has been transparent and diligent throughout the follow-up process. On the flipside, a lack of transparency and urgency on the mediator's part is a formula for frustration and disappointment among the parties.

To sum up, the keys to effective post-mediation follow-up by the mediator include: (1) the parties willingness and commitment to continue the settlement discussions; (2) a clear action plan for the mediator's follow-up efforts; and (3) the mediator's transparency, diligence and urgency in continuing to explore a resolution.

Your follow-up questions are welcomed!

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