



WHAT SHOULD YOU BE DOING BEFORE THE MEDIATION BEGINS?

EDITED BY ROBERT N. DOBBINS

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Think about how much time and effort you expend in working on a matter for your client. You get to the point where your case management plan calls for mediation as the logical step to resolution. Query: What should you be doing before the mediation begins? Here are some thoughts for you to ponder...

document it going into the session? Prepare a “deal points memo” and a draft settlement agreement (with appropriate blanks); bring it with you and share it with your mediator. You can make the strategic decision as to when to deliver it to the other side.

- I. *Pre-Mediation Contact with Your Mediator*: Unlike arbitration or judicially-supervised proceedings, communications directly with your mediator before mediation is acceptable. Consider a short, private telephone conversation between your mediator and the responsible attorney (the one who has authority over the file and who will be attending the mediation) before the mediation. Generally, this conversation will take about 10 - 15 minutes. It’s intended to give you and your mediator an opportunity to explore your client’s and your objectives in the upcoming mediation, previewing your view of any *difficult conversations*.



- II. *Deal Points Memo & Draft Settlement Agreement*: Premature to be thinking about this topic? You know what you are looking for, what your client needs; why not

“The first key to successful mediation is *Preparation* - consider the opportunities...”

- III. *Mediation Statements/Submissions*: You are not required to prepare a mediation statement, but you normally do. Consider sharing your submission with opposing counsel. If there are things you truly need to keep confidential, you can add a separate confidential section to the mediator’s copy. If you decide to submit a mediation statement, it would be useful if you addressed the following points:
1. **Factual History**: Where appropriate, consider including here some insight into the relationship between the parties and your view of how it may have unraveled into the dispute.
 2. **Procedural History**: At the risk of stating the obvious, where are you in the case (presuming that suit has been filed)? If the history includes a previous mediation session that was

unsuccessful, why in your view was it unsuccessful?

3. Key Factual/Legal Issues in Dispute: If there is controlling case law on the subject, which you believe will help your mediator guide you down the path toward resolution, this would be a good place to cite and discuss it.
4. Underlying Interests of Parties: This is important for you and your client to examine. This is the non-monetary part of the mediation – what are your client’s needs, wants, desires; what is this dispute really all about for her/him? These are the drivers of the monetary side.
5. Factual and Legal Strengths of Your Client’s Position: Be honest with yourself here, and be prepared to step away from your position during negotiations. (In depth discussion can be confidentially submitted.)
6. Factual and Legal Strengths of the Other Side’s Position: It’s not that you need to accede to the other side’s position; this will help you prepare to at least acknowledge its existence and that it has its own strengths.

“Preparation for mediation should be treated with the same vigor as if prepping for Trial...”

7. What will a fair outcome for *both sides* look like? Try to look through the eyes of the other side – how do you think he or she would answer the question?

8. What has kept the parties from settling this dispute? Though you may have to dig deeply here, try to identify and examine the “Barriers to Settlement”.
9. Is there something else you think the mediator should know to better understand the dispute and the parties to it? Most likely, this is a part that you may want kept confidential, at least going into the mediation.

“Why not prepare a Deal Points Memo & draft Settlement Agreement to frame your discussions?”

- IV. Preparing Your Client: At the risk of stating the obvious, this may be the most important part of your pre-mediation preparation. *Early on*, familiarize your client with the process so that she has few surprises about what will happen at the mediation. Explain that he may hear statements from the other parties that may be hurtful or offensive; encourage your client not to be hurt nor take offense as this is part of positioning and advocacy that is an integral part of the process. Help your client to anticipate the role of negotiation, the process of negotiation, and to realize that the important thing is to stay at the table and keep things moving forward. Prepare your client for impasse – it is not that negotiations end there; rather, that it is when we must get most creative. Ask her to examine her expectations from this process

we call mediation? Shift his focus from positional to problem-solving.

V. The Role of Cooperation and Realism: Remember that successful negotiations require the parties to work together, to cooperate in the quest for a negotiated end to their dispute. Also, be prepared to acknowledge and *honestly evaluate the risks* of going to trial; be realistic in your evaluations of a settlement proposal as it compares to the likely outcome and costs (economic and emotional) of leaving the last best offer on the table.

VI. Your Mediator's Approach: Without getting bogged down in mediation theory, we know that there are different mediator approaches to the process. These relate to the level of involvement by your mediator in finding the ultimate outcome. It ranges from purely facilitative to evaluative and to entirely directive. All of these mediator styles can be used in combination throughout the fluid process of mediation.

VII. Mediation is a Process: Remember mediation is a process with a beginning, middle, and, with your hard work, a successful end. *Help it to run its course*; any attempt to short circuit the process will likely derail it. Persistence + Patience = SUCCESS.

THE SHORT NOTICE GROUP

TIME: it is how lawyers make their living and the source of constant stress. Unexpectedly you find yourself under pressure – you need to calendar your case for mediation on short notice. We understand which is why we have created the ***Short Notice Group***.

Sign up for the ***Short Notice Group*** to receive priority to calendar your session when we have an opening (due to cancellations or continuances) on our schedule. Send us an **email to join the Group**. Our goal is to help you and your firm relieve the pressure of time.



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ROBERT N. DOBBINS, LL.M.

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New Address:

303 Broadway · Suite 104-150

Laguna Beach · California 92651-1816

Telephone: 949-837-2880

Facsimile: 949-266-8034

Website: www.appropriatedisputeresolution.com

Email: dobbins@appropriatedisputeresolution.com

ING NEW YORK CITY MARATHON RESULTS REPORT

5 November 2006 was a very special day: 38,000 runners, 2+ million spectators, 5 boroughs of NYC.

My predicted time: 4 hours 40 minutes

My actual finish time: 4 hours 26 minutes!

Winning time: 2 hours 9 minutes – WOW!!

Thank you all for your support of my adventure; your energy helped to make it a tremendous experience. Together we raised just shy of \$5000 for the Team for Kids, to which I had dedicated my training and my run; from the Kids: many thanks.

