

# How to Get Through Your First Mediation, and What to Expect

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150 Lombard Street, Suite 3  
San Francisco, CA 94111-1133  
Phone: (415) 982-7172  
Fax: (415) 982-8021  
Email: [adrmaster@abanet.org](mailto:adrmaster@abanet.org)

They didn't prepare you for this in law school. You have agreed to mediation (either voluntarily, or because the court requires it) and you are about to contact your opponent to talk about which mediator you will use and when you will hold the mediation. You may have even rescued several of my earlier "Practitioner" columns from the bottom of your parrot's cage, and decided on what type of mediator (high/low profile) and mediation (information/process centered) you need for this case. You have talked with your colleagues, who suggested various names. You have discussed potential mediators with your client, you have some names in mind, and it is now time to try them out.

Your opponent has also done her homework. She has names. Do you fight to the death over which mediator to use, go back to court to get one appointed, or compromise? One approach is to try to agree on the qualities you are looking for in the mediator. If you can agree on those qualities, you can explore why each of you believes the people on your list have those qualities.

If you cannot agree on qualities, perhaps you can agree on disclosure and a random method of selection. By disclosure, I mean what you would like to know about the persons suggested by the other side. What would you agree would be a disqualifying factor? You can send a joint letter to three or four people, describing your interest and asking for their expertise (if that is your concern) or any connections to the other party or counsel. This may eliminate one, or more, of the potential mediators. For choosing among the remainder you can – with your client's permission – use any random method.

Wait a minute. Did he advise using a "random" method – such as flipping a coin – to choose a mediator in a case that is this important? Yup. Here is an exclusive mediator secret, not usually revealed in print: If the parties are actually ready to try to settle their dispute, and they know what type of mediation and mediator they want, there are dozens of competent mediators who can bring the dispute to resolution. And that is the secret you must share with your client. The success of the process does not depend on getting the perfect mediator. It depends on the readiness of the parties to settle.

Once you have agreed upon a name, it is best to send a joint letter, in which you provide the case caption and names of counsel, to contact the mediator. At the same time, call the mediator to ascertain availability. I use a conference call to be sure that the parties and mediator are aware of each other's expectations and needs. You need to be flexible about scheduling, since a busy mediator may be unavailable on any of the dates you and your opponent have chosen. Plan on a full day. Mediation is not a quick process, but patience is usually rewarded.

Do not be surprised if the mediator sends you an agreement to be signed by both sides. There are a couple of items I include in mediation agreements, as do many others. First, the mediator will undoubtedly mention the confidentiality, and refer to Evidence Code Section 1152.5, the mediator confidentiality statute. Second, if the mediator is an attorney, he or she may include a written statement explaining the role of a neutral intermediary, and noting that the mediator cannot act as an advocate for either party. Although this statement may seem superfluous when clients are represented by counsel, a cautious mediator may include it to satisfy professional liability insurance requirements.

Third, the mediation agreement may require the parties to agree upon immunity and indemnification for the mediator. While the possibility of successfully suing a mediator is extremely remote, this kind of provision keeps even the best financed party from being able to exert any improper pressure on the mediator during the course of the mediation. Fourth, the mediation agreement will set forth the mediator's compensation. Ordinarily, mediators charge by the hour. Many have a minimum numbers of hours for which they charge, since they normally block out a full day for a mediation.

If the parties want to submit a statement of the case prior to mediation, most mediators will accept it. Some mediators (and I am not among them) require it.

When you get to the mediation you can expect certain common behaviors, although mediation styles vary. My own practices are fairly typical, so I will use them to illustrate what happens at a mediation. I begin with an "opening statement" in which I take care of housekeeping details, and set up ground rules for the process. The housekeeping details include introducing the participants and the mediator, checking to be sure parties with authority to settle are present, finding out if there are any time constraints, and describing the location of caucus rooms, rest rooms, and telephones. My own ground rules include an acknowledgment of the confidentiality of communications made to the mediator, a commitment to civility and respect in the mediation, and a requirement that parties not interrupt each other. I try to assure both parties that they will always have a chance to respond and be heard.

Then I describe the process I will use in an attempt to bring the parties to resolution of the dispute. I use joint meetings and separate caucuses in which each party speaks privately to the mediator. I emphasize three aspects of these separate caucuses. First, I assume the confidentiality of what is communicated in the caucus and ask permission before conveying information to the other side. While a party may initially be reluctant to allow me to disclose certain information, it is sometimes critical to the process. In general, if you have the "smoking gun" and tell the mediator about it – but do not allow the mediator to convey some version of that to the other side – that information will not help resolve the dispute. Few mediators would think it worthwhile to try to move the other side on the basis of "secret" facts.

Second, I often use the caucus to play "devil's advocate." I will try to assure the parties in advance that appearing to take one side "for the sake of argument" does not mean that the mediator is necessarily convinced by that position. Rather, it is a technique for exploring the underlying interests of the parties. It is often necessary to explain this again during a caucus, because parties have become so invested in their positions that alternative views evoke an emotional response.

Third, I explain that the amount of time spent in a particular caucus is not indicative of anything. It is difficult for a client to be sitting in one room while the mediator is in another room with the other client and his lawyer. The client may fear that she is not getting equal

time to present her case, or suspect – often quite accurately – that the mediator is talking about her position.

I conclude by trying to ascertain whether the parties understand what the process is going to be, answering any questions, and gain in the assent of the parties to participating in the process.

After this opening statement there is a great deal of variation in how mediators operate. I spend some time trying to test the parties' appreciation of the inevitability of resolution (through the full panoply of litigation, or some agreed upon resolution) and their understanding of the costs (direct, indirect, financial, emotional, and intangible) of continuing a dispute. I also give the lawyers an opportunity to present the legal position of the case in the presence of each other. Other mediators go directly to caucus in order to ascertain the positions of the parties.

Somewhere early in the mediation, most mediators ask the client to tell his or her story. While there are those who characterize this as "venting," I consider it the most important part of the mediation. It is the client's dispute, and only the client knows his or her real interests in this dispute and its resolution. Most mediators engage in "active listening" to be sure that they are understanding what the client is saying. I never leave a caucus until I feel certain that I appreciate how the client views the dispute.

Mediators react differently to lawyers who try to structure their clients response, interject, or "protect" the client from him or herself. At one pole, the mediator may ask to speak to the client outside the presence of the lawyer. At the other pole, the mediator may not react at all and let the lawyer take charge. In my view, it is important for lawyers to remember that this is the client's dispute, and only the client can ultimately accept or reject a settlement.

At some point, the mediator will begin to shuttle between the parties, conveying possibilities and trying positions. Do not be surprised if, when you say to the mediator "You tell them such and such," the mediator refuses. One of the tools that mediators use is their ability to control the timing of exchanges of positions and information, and their ability to phrase neutrally a contentious position. In addition, do not be surprised if the mediator waits some considerable time before talking dollar ranges and settlement ideas. Because the parties have often focused exclusively on dollars, and failed to explore their interests and the possibilities for settlement, mediators do not like to simply convey dollar offers early in the mediation.

If the mediation goes well, the parties will reach a settlement. I do not let the parties leave until some document embodying the agreement has been written and signed by everyone. While there may be a need to further refine the agreement, it is vitally important to reduce the major aspects to writing. This protects the lawyers as well as the clients. It is fairly common for parties to subconsciously convert their mental construct of the deal they "might have gotten" into a belief that was what they agreed to. With a written agreement, the lawyers can simply point to what the client signed and avoid disagreements with their clients, as well as their opponents.

When going into your first mediation, expect success. You are unlikely to be disappointed.

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