

# Mediation Strategy: The People to Bring and How to Use Them

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The people you bring to a mediation have a major impact on whether it succeeds or fails. This may seem obvious, but deciding whom to bring is not always easy. There are important tactical considerations for both sides, both in deciding whom to bring, and reacting to the other side's choices. In some instances, if a particular person is not present there is no point in going forward with the mediation. Who you should bring, how you should react to the other side's choices, and what you need from the mediator depend on whether you are a plaintiff or defendant. Let's look at plaintiff's choices first.

If you represent an individual plaintiff, certainly the plaintiff must be at the mediation. If you are concerned about the plaintiff's emotional state, or readiness to face someone on the other side there are three things to remember. First, you cannot protect the plaintiff completely. He will be deposed before any trial, and your opponent will have the opportunity to assess whether plaintiff will make an effective witness.

Second, you can let the mediator know, early in the mediation, that your client prefers to speak in private caucus. You can take a forceful legal position in the joint meeting, and let the mediator hear directly from your client only when you are alone. While the mediator will also assess your client's potential as a witness – and that will be a factor in developing a realistic range of settlement – the mediation will not be a vehicle for conveying that weakness to your opponent.

Third, you can bring a person to the mediation who will make your client more comfortable. For instance, if your client is uncomfortable making decisions without his spouse, bring her. The mediator may not permit the spouse to speak in a joint session, but that will not prevent the mediator hearing a spouse's view in private caucus.

Indeed, sometimes the spouse is the real decision-maker in the case. The underlying factual issues in the case – particularly in employment related cases – may have an effect on the couple's relationship. In some instances, the mediator may be able to help settle the case by making the implicit dynamic explicit, and speaking directly to the spouse. Where the spouse is preventing a settlement because of a desire for some form of vindication that is not available through litigation, the mediator may be able to re-focus the spouse on available remedies.

If you represent an individual defendant, the choices are similar to plaintiff's. If an insurance company is involved, the adjuster must be at the mediation if you want to have a chance of success. If the adjuster is only available by telephone, the mediation becomes impossibly difficult. When the mediator is unable to talk directly to the person with authority

to settle the case, she must rely on defense counsel to accurately convey what she says to the adjuster and what the adjuster says back to her. Assuming that defense counsel is completely honest, wholly committed to settlement, and has the communication skills of David Gergen, it is still unlikely to work. There is too much loss of the nuance which mediation relies upon to succeed.

If you are plaintiff's counsel and the defense shows up at a mediation without an adjuster, you are probably better off leaving. It is a signal that either the defense is insufficiently serious about mediation at this time, or it wants to use mediation to have you change your position without having any obligation to re-consider its own position. If a positional bargainer comes to the mediation without an adjuster, you are likely to be asked to bid against yourself. Here's how that works.

Defense counsel announces that her side is willing to mediate and she has full authority to settle. She will only call the adjuster if there is a significant change in your initial position that would require more of a response than she has authority for. If you are willing to make a change, she is likely to rapidly move to the limits of her authority. Thereafter, she will characterize your concessions as insufficient to take to the adjuster. She may even take the position that the two of you are essentially partners in trying to move the invisible adjuster. If you are willing to keep moving, she will eventually call the adjuster. She will then return extremely disappointed with his recalcitrance and tell you that you will have to move more. And so it goes. You have undoubtedly been exposed to this game in other contexts. Unfortunately, it can also show up in mediation. Your best response is not to play.

If you represent a corporate defendant (in a case where there is no outside insurer), or a public entity, the decision about whom to bring to the mediation can become extremely complex. With a corporate defendant the representative must be knowledgeable about the underlying facts of the case, and have sufficient authority within the corporation to settle. At the same time, she must not be so personally invested in the dispute that she sees compromise as a personal threat. Who – and how many – you bring sends a message to your opponent. If the person you bring is not sufficiently high up in the corporation to convey the importance to the corporation of settlement, the other side may be unwilling to move. Again, if there is another person in the corporation who must be called to approve a deal, it is unlikely that the mediation will succeed.

How many people you bring also sends a message. If you are defense counsel and you bring the general counsel of the Fortune 500 parent company, as well as corporate counsel from the subsidiary, and assorted vice-presidents and spear carriers, you are sending two messages: 1) We are serious; 2) We are going to bury you. If you are plaintiff's lawyer (and a sole practitioner) you can use the mediator to level the playing field. First, you can ask the mediator to establish a ground rule that only one person on the other side acts as spokesperson. Second, you can refuse to participate in any extended joint sessions. Let the mediator carry messages between caucuses. A good mediator is unlikely to be intimidated by multiple counsel. And if the assembled corporate counsel attempt to play "good guy, bad guy" with an experienced mediator, it is unlikely to be successful.

If you are defense counsel for a public entity there are always limits to the authority of any individual to settle. A general counsel for the public entity may have authority to make a certain level of settlement out of a "claims and judgments" account. Larger settlements may require approval of a budget official or the elected officials responsible for running the public entity. Whether the public entity uses an internal or external Risk Manager, he or she always has limited authority. In some instances this will be enough to settle the case. In others, it will be necessary to have the settlement approved by the public body.

If you are plaintiff's counsel suing a public entity there are a couple of ways to improve the chances for a successful mediation. First, a public entity must have a representative at the mediation if outside counsel is handling the case. If the case is being handled in-house, you should have a representative of the agency or entity that will have budgetary responsibility for the settlement. Second, remember that you are dealing with a political entity. You need allies. If you reach an agreement that must be approved by a public body, make sure that everyone present signs the agreement, and that it contains a provision saying the signers will make every effort to gain approval of the agreement by the public body. When the political heat increases, it is always tougher to repudiate a deal you signed. If anyone insists his or her signature is superfluous, that is a sure sign the agreement is in danger.

Although neither side can dictate who the other side brings to a mediation, it is a good idea to talk about who will be there in advance. If the parties can agree to who they will bring to the mediation, that may be the first step in a cooperative effort to resolve the case

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