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**THE MEDIATION PROCESS**  
An Advocate's Model for Mediating

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**SUMMARY:**

I discuss how to prepare for a mediation and how to present at a mediation, so that you mediate the right cases at the right time in the right way.

**PREPARING:**

STEP 1

Make sure the case is right for a mediation.

A case is suitable for mediation if: 1. The parties wish to keep control over the outcome; 2. Trial exposes the parties to unacceptable risks; 3. A trial would be expensive, complicated, and/or time-consuming; 4. The parties seek a final resolution, rather than a delayed, appealable decision; 5. The case involves confidential or embarrassing information; 6. The case involves emotional issues appropriate for a setting more informal than a courtroom; and/or 7. The matter is not in suit, is not likely to be put in suit, but involves a disagreement that requires a neutral person to help the disputants reach a mutually agreeable solution.

STEP 2

Make sure the case is ready for mediation.

A case is ready for mediation when the parties have the information necessary for them to accurately evaluate the case. This includes the material facts, relevant law, and necessary expert opinions.

STEP 3

Get your client and opponent to agree to a mediation. Mutually agree upon a great mediator.

A great mediator need not have subject matter expertise, since he is not deciding the case. Instead, he should have the following qualities 1. He is Prepared; 2. He is Self-Aware; 3. He Follows a Process; 4. He Listens; 5. He is Objective; 6. He is Credible; 7. He is Creative; 8. He is Persistent; 9. He Guides the Parties to Their Solution.

Make sure your mediator follows a process!

Many lawyers think they can be mediators because they are advocates. This is not so. The roles of mediator and advocate are very different. Although a lawyer can be skilled at both, being skilled at one does not make her skilled at the other.

#### STEP 4

Contact the mediator; agree upon the fee; select a date; and get, review, sign, and return the Mediation Agreement.

#### STEP 5

Find out the mediator's approach. Where will the mediation be conducted, should position statements be filed, will there be opening statements and stipulations.

#### STEP 6

Outline your case. Identify: 1. The parties; 2. The claims; 3. The elements of each claim; 4. The material facts and the source of those facts; 5. The strengths and weaknesses of both sides.

#### STEP 7

Outline your opponent's case and your rebuttal to your opponent's case.

#### STEP 8

Do a critical information analysis. Make sure you have all essential information (sources of factual assertions and expert opinions and the law).

#### STEP 9

Determine your BATNA. That is, your Best Alternative to a Negotiated Agreement. In other words, if you don't resolve the dispute at the mediation, what is the best, most likely outcome for you.

For a case in suit, this means the result you most likely expect to get at trial (not the best verdict you could get).

This is often a best estimate, not an accurate prediction. Remember that before you draw lines in the sand later.

#### STEP 10

Consult with your client. Educate her on the elements of the case, strengths and weaknesses, your theory of the case and argument, and an evaluation of the most likely outcome for you if the case does not resolve at the mediation (that is, what is your BATNA).

Make sure your client gives you authority for a resolution (usually a dollar amount) and has informed her superior (if any).

#### STEP 11

Prepare and submit a position statement. If the statement will be shared (I recommend it is), set forth your position in a persuasive manner to your opponent. The statement should be clear, concise, and outline the relevant information.

I recommend the following sections: 1. A statement of the case; 2. The claims and elements of the claims; 3. A list of the completed discovery; 4. A summary of the facts (witnesses, documents, damages); 5. Your argument; 6. Weaknesses in your opponent's position; 7. The posture of the case (operative pleadings, pre-trial and trial dates); 8. Last series of demands and offers.

#### STEP 12

Create your mediation strategy. What is your opening position, how will you address your opponent's expected opening position, what is your opening offer, what moves do you plan to make, what is your BATNA?

Understand your client's interests (not her positions) and think about your opponent's interests (not his positions). To explore this concept more deeply, see "Getting to Yes" by William L. Ury and Roger Fisher.

### STEP 13

Confirm two days before your mediation the date, place, and time with the mediator, your client, and your opponent.

### **PRESENTING:**

### STEP 14

Make sure the person with authority is there. Meet with your client 30 minutes before the mediation to touch base and answer any questions.

Arrive at the mediator's office ten minutes early. Have everything you need to make your case. Bring water, a snack, and power cords for your devices.

### STEP 15

Have copies of your Position Statement for your opponent and the mediator. Give an opening statement that is clear, concise, and does not offend your opponent. Express your desire to resolve the case, but only on terms that are acceptable to your client.

State what issues and facts are not in dispute so the mediator can focus on the actual disputes.

Agree to not engage in last minute settlement games.

### STEP 16

Caucusing. When you and your client meet privately with the mediator, be sure to communicate what parts of what you say are confidential and what parts can be shared with your opponent.

Cultivate a mind to reach an agreement: be emotionally detached, reasonable, mindful of your BATNA, and aware of your interests instead of your positions.

Keep your client informed, advised, and able to make reasonable decisions.

### STEP 17

Make reasonable, intelligent negotiation moves through the mediator. Each move you make communicates your position to your opponent.

### STEP 18

If you reach an impasse, get creative in resolution options. Every case reaches an impasse just before it settles. Remember your interests; forget your positions.

Is the impasse because of your BATNA? Remember, a BATNA is often a best estimate, not an accurate prediction. Have you fully considered not just the strengths, but the weaknesses of your case? You drew a line in sand, not stone.

### STEP 19

Once the case settles, meet with your opponent, put the settlement terms in writing, and make sure there are no assumptions about the settlement terms.

Celebrate. You've reached a mutually agreeable settlement, and saved your client the expense, stress, and unpredictability of a trial.



Attorney Kriesen is a trained mediator (Quinnipiac University School of Law Center on Dispute Resolution forty-hour training). He is an Attorney Trial Referee, Fact Finder, and Arbitrator in Hartford Superior Court. He has been practicing law as a trial lawyer for over twenty-years and has negotiated hundreds and hundreds of cases. He studied Decision Quality in a program offered by Stanford. He holds a Juris Doctor from The University of Connecticut School of Law.