

Tips for a Successful Mediation

Bergen County Bar Association

April 17, 2023

1. Understand the legal issues. It is always prudent to know the law applicable to your issues. Read and understand the applicable statutes. Know your colleague and their positions. Know your mediator and have a pre-hearing discussion with the mediator and all counsel to clarify procedures.
2. Make sure you have sufficient information and you understand the positions of the parties. Don't hesitate to ask the other counsel for information and documents that you feel you need in advance of mediation. If the other party refuses to provide you with such information, it causes trust issues and difficulties in reaching agreement.
3. Try and see both sides of the issue. Clients are not always truthful. Do not take an "outlier" position and then move from that unreasonable position and think that you have made a meaningful step towards resolution. For example, demanding Open Durational Alimony on a very short-term marriage is not only contrary to the law, but is offensive.
4. Disclosure and Discovery. In Family Matters, provide an UPDATED and ACCURATE Case Information Statement without "TBD's." If there are premarital claims, list them and provide numbers or percentages. Do not claim Lifestyle expenses which exceed the net available income to meet those "needs." In non-family matters, make sure you have your proofs lined up i.e. expert reports, medical records, copies of contracts, etc.
5. Provide a thorough Mediation Memorandum. The more detailed, the better. Educate the mediator up front regarding the facts and why you are taking your positions. Before sending it out, re-read what you have written and make sure it is accurate.
6. There is nothing wrong with counsel meeting privately with the mediator to alert him/her of "unspoken" background which may be helpful to resolving the dispute.
7. If you have previously made a demand for settlement, let the mediator know your position. It is not secret because you will have had to convey that to the other side. You must have a goal, and don't go backwards!
8. Do not bring your trial position to a mediation. The idea is to come to a resolution of issues which are acceptable to the clients. Remember, mediation is an alternative to trial which will afford the clients an opportunity to resolve their case with finality and to avoid lengthy appeals.

9. Think through your proposals and whether they will provide your client with what is needed. Think through what consequences should be imposed if the other party does not comply with the agreement. Parties have the ability to enter into much more creative solutions than the Courts. Do not take positions which are likely to impede resolution.
10. Think through what is important to the other party. If you can address your own client's needs while also meeting some of the needs of the other party, you will be that much closer to obtaining a successful agreement.
11. Avoid making unreasonable initial offers or demands. Sometimes parties believe that they need to start with a super extreme high-ball or low-ball offer. This often makes it difficult to settle cases as the other party then feels that he/she needs to take extreme positions.
12. Be patient. Mediation is often a process. If you threaten to take your ball and go home too quickly, you may lose an opportunity to reach agreements that make sense, and which could save your client thousands of dollars in professional fees and costs in the long run.
13. Avoid posturing or acting like a bully. Be cordial. Do not attack the people involved – confront the issues. Personal attacks often backfire. It is usually easier to get a settlement accomplished with a little “sugar.”
14. Listen and try to understand what is important to the other party. You may think you know, but you may be jumping to conclusions or letting anger-yours or your client's - interfere with logic. Often an agreement can be worked out that addresses what is important to both parties. Remember, each party needs to get something.
15. Avoid bottom line positions until later in the negotiation, and only if you mean it. It is fine to keep some room for negotiation but avoid drawing the line in the sand too early.
16. Be sure your client is committed to agreements reached before you sign on the dotted line. Nobody says that you must reach a final agreement during an initial mediation session. It is better to take time to think about an offer than to agree to something that your client will likely have buyer's remorse over later.
17. If you come to agreement on certain terms, make sure to have an accurate agreement. A poorly drafted agreement may include ambiguous or unenforceable terms. Always place the agreed upon terms in writing and have them signed by the parties.
18. To enhance your likelihood of getting paid, be prepared...be fair...be reasonable...be realistic.