



Mediation Success Checklist

By Amy Lieberman

Many thanks to the attorneys who attended a recent seminar and asked for a mediation preparation checklist to help increase the odds of mediation success.

- **Logistics:** Clearly define the date, time and location of the mediation. Determine if it is a half-day, a full day or multiple days.
- **Mediator Selection:** Select a mediation style and review mediator candidates.
- **Mediation Fees:** Determine the payment of mediation fees. Are they going to be split, paid by one side, or end up as a potential item to negotiate at the conclusion of mediation.
- **Attendance:** Who will attend? Will anyone attend remotely via phone? Be sure to inform the other party and the mediator of all in attendance, so they can address any objections. Review if you will have any issues accessing the decision makers. Do any of the participants need to catch a flight at the end of the day? If so, the issue will need to be resolved timely or rescheduled for a continuation.
- **Process:** Will there be a joint session for a “meet and greet” and discussion about process? What about for a limited discussion on substantive issues? If so, why? Will the parties exchange pre-mediation briefs? Will they be confidential or exchanged with a separate confidential brief for the mediator?
- **Pre-mediation call with mediator:** This call will need to be made within seven days of mediation. Discuss special challenges, such as strained relations between parties or counsel; insurance coverage issues; unrealistic expectations; non-legal drivers (stress, debts, precedent and privacy/publicity concerns).
- **Pre-mediation demands and offers:** Have you requested a specific monetary demand or counter be made before the mediation? Have you confirmed your recollection of past settlement discussions? Has anything changed since pre-mediation demands and offers were made?
- **Expectations:** Explain mediation negotiation process and importance of realistic expectations to client. Through this process, you may learn new information that will affect the view. You need to prepare your strategy, but be willing to take input from a mediator.
- **Emotions:** Strong emotions such as anger and frustration are normal. Mediator can address privately.
- **Attorney fees issues:** Consider the amount incurred to date by your client as well as the estimated fees incurred by the other party. Is there a statutory or contract basis for fee recovery?
- **Estimated cost of litigation:** Establish an estimated cost of litigation through summary judgment and through trial.
- **Needed information:** Gather all needed information including relevant documents, discovery responses, relevant testimony highlighted for mediator; liens, debts, financial and insurance information, business records, expert opinions, ruling on motions, structure analysis.
- **Non-monetary items that might help resolution:** Discuss some of the following non-monetary items that your client can bring to the table to better facilitate resolution, such as an apology, restructured terms, exit packages, transfers, meetings with others, public statements, etc.
- **Tax implications of settlement:** Consider the tax implications of each of the alternatives.
- **Confidentiality issues:** Consider the ramifications or penalties for a breach, i.e., liquidated damages.
- **Stipulated judgment/covenant not to execute.**
- **Board or government approval:** If it's needed, when could approval occur?
- **Food or snacks:** Don't forget to bring food and drinks to mediation. It will keep everyone energized.
- **Settlement drafts:** Generate electronic and hard copies of settlement documents and releases.
- **End-game options:** What are your end-game options? Split the difference? Mediator's proposal? Consider the last, best and final option. Determine the number of days to keep the offer open for. Schedule a second session if needed or schedule a mediator follow up.

Amy L. Lieberman is a full-time professional mediator of employment and business conflict. She has repeatedly been listed in the Best Lawyers in America, Southwest Super Lawyers, and Arizona's Finest Lawyers in alternative dispute resolution, and is the author of the book, "Mediation Success: Get it Out, Get it Over, Get Back to Business." Visit her website at www.insightmediation.com, or call Amy at (480) 246-3366.