

## **Brim Mediation**

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### **PREPARING FOR A MEDIATION**

#### **A. Preparation Prior to Mediation.**

- I. Gather key facts and evidence beforehand, ensuring you have essential information available. Since mediation is confidential, ensure you secure statements under penalty of perjury when feasible.
- II. Evaluate the option of early mediation to avoid escalating litigation costs that could hinder a settlement.
- III. Assess the case thoroughly to determine the best alternative to a negotiated agreement, worst alternative to a negotiated agreement, and reasonable alternatives.
- IV. Choose a mediator or negotiate mediator selection with the opposing party.
  - a. Opt for a mediator equipped with the tools and flexibility necessary to facilitate a successful outcome.
  - b. Determine whether an evaluative, facilitative, or transformative mediator aligns best with your goals.
  - c. Draft a mediation agreement that identifies the mediator (including compensation, location, date, and time), considers the attendance of necessary decision-makers, and sets the parameters for any preconditions, such as initial offers, data exchange, or expert presentations.
  - d. Evaluate if merely getting parties to the table is sufficient.
- V. Conduct a pre-mediation meeting with the client to:
  - a. Prepare the client for the mediation process.
  - b. Establish realistic mediation objectives.
  - c. Discuss initial settlement positions, potential concessions, and a reservation number (final settlement offer).
  - d. Identify essential elements for the settlement agreement beyond main deal points.
  - e. Determine necessary attendees for the mediation.
  - f. Assign tasks to the client for the mediation process.
  - g. Prepare the client for potential direct questions from the mediator and brainstorming sessions where they may be invited to propose solutions.

- VI. Finalize and prepare the Mediation Brief.
- VII. Develop the Mediation Presentation.
- VIII. Consider strategies for engaging the opposing party that align with client goals. Remember that the audience is the opposing party, not the mediator.
- IX. Use graphics or presentation aids to enhance clarity and impact.

**B. During the Mediation Session.**

- I. Introductions. Make introductions that align with the chosen style (e.g., conversational, cooperative, or adversarial). Be mindful of the opposing party's demeanor when deciding on negotiation tactics.
- II. Opening Session:
  - a. Prepare a compelling and persuasive presentation that aligns with the established style.
  - b. Observe the reactions of the opposing parties during your presentation.
  - c. Have your client take note of both attorney and client responses to the presentation.
  - d. Identify issues or facts in the opponent's presentation that warrant a response.
  - e. Consider requesting a caucus for discussions with your client and/or experts after presentations before formulating a response. / Assess whether a joint session could benefit your client by exploring all potential solutions to the issues at hand, as this is often a neglected aspect of mediation.
  - f. Actively listen to gather insights about the opposing party's interests, including their needs and priorities.
  - g. Look for opportunities to encourage direct communication between the parties, bypassing the attorney's shield to discover underlying interests. Be ready to outline the key issues that are agreed upon and those that remain contested.

**III. Caucus:**

- a. Understand that the mediator will expect negotiations regarding settlement positions.
- b. Recognize that the mediator's goal is to manage expectations from both parties to facilitate agreement.
- c. Monitor the direction of offers and counteroffers, adjusting your strategy as needed.
- d. Maintain flexibility in your approach with the mediator, depending on your assessment of their effectiveness.
- e. At appropriate moments, clearly communicate your objectives to the mediator and collaborate on strategies to achieve them.
- f. Utilize the mediator's skills to help refine your settlement position.

- g. Remind your client that the mediator's opinions are advisory and not binding.
- h. Prepare to guide the mediator on how to effectively engage with the opposing side.
- i. Keep the client's interests front and center to avoid losing sight of their goals while striving for a resolution.
- j. Depending on your client's perspective, be prepared to view this mediation session as part of a broader negotiation process, while also being ready to counter that viewpoint.

#### IV. Impasse / Stalemate Resolution:

- a. When negotiations reach a standstill, assess the reasons behind the stalemate.
- b. Identify the type of stalemate: (1) relational, (2) factual/legal, (3) positional, (4) structural, or (5) values-based.
- c. Work to resolve the stalemate by employing strategies aligned with its nature. For instance, use objective criteria or third-party evaluation for factual/legal disputes; consider reframing, taking breaks, venting sessions, or offering compassionate responses for relational stalemates.

#### V. Conclusion:

- a. Ensure that a written document is signed to confirm that the agreement is binding and enforceable.
- b. Be prepared to finalize all aspects of the settlement that day, including non-monetary terms, as future opportunities may be uncertain.
- c. Consider drafting a preliminary settlement agreement to circulate beforehand to ensure all issues are addressed.
- d. Leave with the original signed document.
- e. If the session concludes in stalemate, suggest further steps to shift attitudes as a precursor to another meeting.
- f. Think about allowing the mediator to make phone calls to facilitate ongoing dialogue.