

Mediation - A Checklist for Your Client

By Brian McDonald

Once you have considered some of the concepts here, complete the following Checklist with your client to get to the nuts and bolts of the mediation process itself. Put it on your own stationery and use it in every case.

A CHECKLIST FOR ATTORNEYS TO ASSIST IN PREPARING A CLIENT FOR MEDIATION*

The great majority of the time with sufficient preparation your mediation can be successful.

Mediation takes on several forms to deal with different types of cases. This checklist is directed to the personal injury and commercial mediation.

Once you decide it is the right time to submit your matter to mediation (generally the earlier the better), your advocacy concerns typically turn to assembling information in a brief, scheduling, anticipating, speculating, planning, etc. When you go to trial, you will have had several client meetings reviewing testimony and preparing for cross examination, and, when appropriate, videotaping and playback. If you were accompanying your client to their deposition, you would not consider going without adequate preparation.

The goal of all parties to a mediation should be to reach a final, binding, life-long resolution of your client's case on the day of the mediation. You need to have your client as fully and completely prepared as if for deposition or trial.

The following outline checklist can be copied and sent to your client a few weeks before the scheduled mediation. Thereafter, your review of these points together with your client at a pre-mediation meeting will make the client more comfortable, and allow them to understand the pace and process of their mediation. Your client particularly needs to understand the different roles of the mediator, counsel and the parties, as outlined in this Checklist. Your client will be of more assistance to you, and this preparation will mean the chances of resolution are greater.

You must consider the extent to which your client's active participation will assist or hinder your case. If your client can articulate their position in an

effective manner, it will greatly assist their case as the opposition will be evaluating your client's effectiveness with an ultimate trier of fact.

While some of the principles set forth in this may appear basic, it is always helpful to review them prior to each mediation, whether it is your first, fifth or five hundredth mediation. After all, it may be your client's first and last mediation session.

Any comments, corrections or suggestions regarding this attached checklist will be appreciated. (e-mail: Brian@pier9law.com)

CLIENT CHECKLIST FOR MEDIATION

THE MEDIATOR

Who is the mediator? {insert name of mediator}_____

A copy of the mediator’s resume is attached detailing the mediator’s training and experience.

WHO ELSE WILL BE PRESENT AND WHY

We will discuss additional people we may want at your mediation or on telephone standby. Critical expert witness? Spouse? Significant other? Supervisor with “ultimate” authority?

LOGISTICS -- LOCATION AND DURATION

Date: _____ Time: _____

Place: _____

How long will the mediation last? It is impossible to estimate. While it may take less than a day, be prepared to work past 5:00 p.m. Do not make any evening plans.

OUTLINE OF STANDARD MEDIATION

1. The initial meeting-- Mediator, Parties, Attorneys, Adjusters.
 - * The mediator will introduce everyone and go over the ground rules.
 - * The lawyers will often make an opening statement to outline their important points.
 - * I will address certain important issues in your case at this time. The mediator may ask you to speak. You need to be as precise and correct as possible.
 - * We will discuss areas that we do not want to discuss at the joint initial meeting so that you and I will be in agreement on them. We can hold certain information until later in the mediation.

2. The first separate "caucus" (private meeting) when we meet with the mediator and the other side is no longer present.
3. Subsequent private caucuses. (The mediator may go back and forth several times.)
4. Lawyer caucuses. It may be that the mediator will ask the lawyers to meet separately. Do not fear! Nothing will be decided without your full and complete understanding and specific approval.
5. Later joint sessions are possible.
6. Settlement Agreement: When we reach agreement, a written agreement will be prepared, approved, and signed by everyone, including you and me. In order for the Agreement to be enforceable pursuant to Code of Civil Procedure §664.6, you must sign it personally.

WHAT IS THE ROLE OF THE MEDIATOR?

The mediator is a neutral and will remain neutral. The mediator is therefore impartial, has no decision-making authority and will maintain confidences.

The mediator is not a judge or a jury and will not make a decision.

Our job is to convince the other side, not the mediator.

The mediator is present to facilitate discussions and to assist the parties to reach lasting resolution.

Do not be afraid! Mediation is non-binding. Only if you agree and sign an agreement, will it be binding. If no agreement is reached, we will continue with the lawsuit and may ultimately go to trial and appeal, if necessary. There is no penalty if we do not reach agreement at mediation. We merely pay our share of the cost of the mediator for the time devoted by the mediator to review each side's position papers and at the mediation itself.

The mediation is confidential under the California Evidence Code. We must sign a written agreement (called a stipulation) at the beginning of the mediation which will insure confidentiality. This means that nothing you say during the mediation, nor any concessions you may make toward settlement, can be used against you later if the case does not settle at the mediation.

The mediator can never be a witness later in the case.

The mediator may play devil's advocate in the separate private meetings with you and me, and will help both sides identify the strengths and weaknesses of their case. The other side will be present in the beginning meeting, but not at the later private meetings.

Please remember the mediator does not make any decisions, only the parties make decisions. We need to influence the other side and we will use the mediator to help us do this.

MY ROLE AS YOUR LAWYER AT THE MEDIATION

My role is different at this mediation than it would be at trial. Due to the nature of the mediation my role will be much more conciliatory at the mediation.

I will present an opening statement that is aimed at getting a favorable resolution for you at the mediation.

I will not object to evidence.

I may not reveal all of your case. I may withhold matters at the beginning.

I will be present at all caucuses and will go over the strengths and weaknesses of our case with the mediator. I will talk openly and cordially to the mediator in the private caucus. If I agree there is a weakness in our case, it is for a good reason, and may help us get our case settled.

I want you to participate, and I want you to observe. If I do not want you to answer a question from the mediator, I will interrupt. Please do not be

offended if this happens. Remember, I am there to help you get the best resolution possible.

I want you to listen closely to what is said in the private meetings (caucus(es)). After the mediator leaves and goes to speak privately with the other side and we are alone, we may re-evaluate our position based on the information we receive.

If you and I have not discussed it, I request that you not disclose any new information at the mediation -- either in joint session or private caucus with the mediator -- without first discussing it privately with me.

My approach will be very different if we do not reach a resolution at mediation and decide to go to trial.

I may express understanding or empathy with the other side at the mediation to achieve a positive resolution. This does not mean that I agree with the other side, and does not mean I am selling out your case.

I may avoid certain issues at the mediation if I feel they will hurt the chances of resolution or adversely affect our position.

At all times I will be respectful of the mediator, the mediation process, you, and your goals.

I understand the dispute is yours. I will ask you to make the final decisions subject to my advice and counsel.

YOUR ROLE AT THE MEDIATION

Concentrate on listening to the points raised by the other side at the joint session and the mediator at the joint and private sessions as they will pinpoint what they perceive to be the strengths and weaknesses of your case.

Mediation is your opportunity to evaluate and re-evaluate your case in light of the information provided to you by me and the other side.

I want you to participate in the negotiations and discussions when we are in private caucus. However, try not to lose your temper, or you will lose your point and our focus.

Since you may be asked some questions by the mediator in the initial joint session, we will discuss beforehand the remarks you should make and the feelings you want to express. Remember this must be done in a constructive manner. I want you to talk in an accurate, believable and consistent manner. Do not whine or complain. When you come across genuine, you will be most helpful to your case.

Unless we decide otherwise -- and remember to alert me in private as to any new information of which I am not aware -- at the separate caucuses and because of the confidentiality of the process, you may speak freely and openly to the mediator. If you ever have a doubt about what to say, always tell the truth.

This mediation will hopefully allow to have a neutral, objective review and analysis of your case. Since the mediator will be repeating what the other side is telling her/him to a great extent, this is what we can expect to hear at trial. Expect the mediator to play devil's advocate in the private caucus. Do not conclude that this means that the mediator is agreeing with the other side.

If an agreement is reached, it will be put in writing. I will review it with you and, if it is acceptable, I will ask you to sign it.

Remember we are trying to walk away with a lasting agreement, not win an argument. Be patient with yourself, this may be a new experience. Enter the mediation with an open mind and allow the process a chance to work.

****The author acknowledges that the concept and content of the checklist for mediation is from Mediation: A Texas Practice Guide, Eric Galton, Esq., published by American Lawyer, L.P. The format has been adopted so that you can send the checklist to your client to review prior to mediation.***