

## Preparing for Court-Ordered Mediation

**COURT-ORDERED MEDIATION** is occurring with increasing frequency throughout Los Angeles County in all civil and probate matters. As a result, mediation is often a new lawyer's first hands-on experience in the litigation process. The following tips can make you a more effective advocate at a court-ordered mediation.

First, counsel your clients about the opportunity of mediation. Few clients understand the differences among mediation, arbitration, and settlement conferences. Be sure clients know what will happen during the mediation. Prepare them to think creatively and to discuss new perspectives rather than just rehash old issues. In short, prepare them to resolve the case. The most challenging clients are those who know it all, have attended dozens of mediations, and have strong opinions. Each mediation, like the facts of every case, is different, and the dynamics between the mediator and the participants present opportunities for outstanding results. Later, when the mediator is meeting with the other participants, help your clients refrain from indulging in flights of paranoia. You simply do not know what is being discussed, so there is no point in worrying about it. Instead, use the time to work with your clients on creative solutions.

Second, prepare a mediation brief, not a trial brief. Understanding the difference can cause a difficult case to resolve. An ideal mediation brief contains:

- A simple statement of the facts. Get to the point in a sentence or two. Use descriptive words (for example, landlord-tenant, seller-buyer, builder-owner) instead of personal names.
- A list of discussion points. The mediator is looking for points to discuss with the participants. You may have several factual and legal controversies in the case. Summarize them in your brief and have the details available to discuss at the mediation.
- Suggested solutions. Focus on solutions that may not be available from a trial court.
- A notice to the mediator if your brief is confidential.

Third, develop alternative solutions. Creativity is king. A good mediator will instinctively find creative solutions. Since you, as the lawyer, have been dealing with the controversy, you are best able to prime the pump. You can read the case law and predict what the court will or will not do, but in a mediation all the boundaries for resolution are swept aside. The slate is clean and open to fresh solutions.

Consider the tactics for presenting your solutions. Mediation involves a process, and time may need to be spent in the process before the matter is ripe for resolution. Solutions can be:

- Suggested in your mediation brief.
- Presented "spontaneously."
- Presented at the 11th hour, or when at an impasse.

Enter the mediation determined not to let the last, best, and final offer pass if it is a good result for your client, and not to elect instead to proceed with the expense, uncertainty, and anxiety of trial.

Fourth, consider the emotional issues and how to deal with them. At mediation, as at trial, you often must protect your clients from themselves. Use objective descriptions of events and facts rather than emotionally charged allegations in your brief and oral presentations.

Sometimes, especially when family or partnership relationships are involved, the participants may be best served if they are separated during mediation. When this is the situation, counsel should notify the mediator before the mediation, so the mediator can handle the separation smoothly. Hot tempers at the beginning of the mediation require the mediator to spend time cooling them down.

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Fifth, evaluate whether the mediation is premature. If critical facts or participants are missing, the answer is yes. However, not all facts or participants are critical. At the mediation it is possible to proceed without all the details that you need for trial. If you do not have some of the material facts, determine how to work around them. Most mediators will quickly gain a sense of whether the mediation is premature. If so, they should stop the mediation, assign homework, and set a new date to reconvene. These assignments sometimes lead to a resolution of the controversy.

Sixth, use the mediation to help your client's case. Not all cases resolve at mediation. According to Julie Bronson, the ADR administrator for the Los Angeles Superior Court, 60 percent of the matters sent to mediation in 2003 resolved with either a full or partial agreement of the participants. Be prepared to reevaluate your perception of your client's case. A good neutral will give you the benefit of an unbiased opinion about the strengths and weaknesses of your case and can help you assess the opposition's case. Make sure you understand what the neutral has told you rather than let your own arguments blind you.

Before the mediation begins, you should assure yourself and your client about the mediator's qualifications. Check the mediator's credentials by visiting [www.lasuperiorcourt.org/adr/](http://www.lasuperiorcourt.org/adr/). Mediators are requested to keep the information on this page up-to-date. For each mediator, the site lists a short resume and a table of the types of matters the mediator has handled.

Utilizing these tips will yield better mediation results. When asked what she would suggest to new lawyers to prepare for mediation, Bronson said, "Educate your client to the process, know your case, show up, and be prepared to discuss settlement in good faith." ■

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