



Preparing for Mediation

By Robert E. L. Wright

Mediation is increasingly gaining acceptance as the preferred method of ADR in Michigan courts. When I was in law school, there was no course on how to prepare for mediation. Having served as a mediator for several years, I have acquired some tips that I use to prepare my own clients for mediation and I would like to pass them along to you.

There are three phases in preparing for the mediation process: (1) counseling your client about the use of mediation; (2) preparing your client for mediation; and (3) preparing your case for mediation. This paper provides guidance on each of those three phases.

A. Counseling Clients on Using Mediation

In counseling a client about mediation before deciding whether to engage in the process, a lawyer may wish to cover the following topics:

1. The advantages of mediation over litigation in potentially reducing the cost of and time expended in resolving the dispute.
2. The high settlement rate (>70%) in mediation.
3. The high rate of performance (>90%) of mediated agreements.
4. The disadvantages of mediation include: there may be no agreement; the outcome is not binding unless reduced to an enforceable agreement; it adds expense; and it creates no legal precedent for future disputes.
5. Whether the case is "ripe" for mediation.
6. Whether the client has sufficient information or discovery to make informed decisions at the mediation and, if not, what more they need to know.
7. Whether the parties should request a pre-mediation conference with the mediator.
8. The scope of confidentiality provided by rule or statute and any additional expectations about confidentiality that the parties may need to cover in an agreement to mediate.
9. Whether the parties need a standstill agreement for discovery and motions.

10. The choice of a mediator.
11. The location of the mediation.
12. Who should attend the mediation and whether the client should bring an expert witness, a fact witness, other supporters, or anyone else.
13. What pleadings, demonstrative evidence, or other information the client or lawyer should bring.
14. The stages of the mediation process.
15. Differences between the roles of a mediator and a judge or arbitrator.
16. The techniques mediators may use.
17. When mediation may not be appropriate for the situation, e.g. domestic abuse, extreme imbalances in bargaining capacity, or client impaired by age, drugs or alcohol.
18. That mediation is a voluntary process that the client may terminate at any time.

B. Preparing Your Client for Mediation

Once a client decides (or is ordered) to try mediation, you may wish to:

1. Explain the mediation process and what is expected of your client during the mediation.
2. Remind your client that the object of mediation is not to “win,” but to reach a satisfactory resolution and that mediation is simply a moderated settlement negotiation.
3. Encourage your client to value any pre-existing relationships between the parties or the improved relationships mediation can create.
4. Ensure that your client or their representative has full authority to settle.
5. Discuss who will give each portion of the presentation and the role your client will play in the overall process and decision-making.
6. Advise your client to develop a working relationship with the mediator, use the mediator as an ally and protect your client’s credibility and trustworthiness with the mediator.
7. Coach your client on more effective communication styles by asking them to avoid confrontational or adversarial communication, whenever possible. Encourage professional and courteous behavior, using the language of persuasion.

8. Work with your client to prepare their opening statement.
9. Prepare a confidential memo for the mediator from your client, if no written summary was requested.
10. Have your client watch a videotape of an actual mediation session.¹

C. Preparing the Case for Mediation

The lawyer must also develop a strategic negotiation plan with the client. The well-prepared lawyer will likely:

1. Discuss the costs, risks and benefits of not reaching a settlement.
2. Discuss the best result each party can hope for in litigation.
3. Discuss the worst result that could happen in litigation.
4. Ensure your client knows the facts and issues of the case.
5. Examine the legal and factual strengths and weakness of each party's case.
6. Explore your client's position, goals, needs and interests. Establish a list of priorities, possible trades and rapport-building "throw away" items.
7. Surmise the opposing party's position, goals, needs and interests.
8. Explore your client's emotions which could be triggered by the dispute, the other party or other aspects of the mediation. Allow your client to express those emotions before the mediation, but reassure your client that a skillful mediator will help them manage their emotions and give them appropriate expression during the mediation.
9. Advise your client on how to best put forward his or her interests.
10. Advise your client about any confidential information which should, as a matter of strategy, not be disclosed to the other side or disclosed only when strategically appropriate.
11. Help your client set reasonable expectations for mediation.
12. Identify sources of objective criteria that will allow principled bargaining.
13. Alert your client to expect unforeseen evidence or arguments that may arise during the course of mediation.
14. Prepare your client for questions the mediator or another party may pose to him or her.

¹ I recommend one from Harvard's Program on Negotiation: *Saving the Last Dance: Mediation Through Understanding*, available at <http://www.pon.org/shop/saving-the-last-dance/> (2001).

15. Identify possible impediments to a negotiated solution, including relationship issues, data or information problems, conflicting interests, structural sources of the conflict, and value-based sources of conflict.
16. Brainstorm possible solutions to the situation, especially focusing on solutions which can satisfy the interests of both parties. Ask your client to identify and list all the responses s/he can think of to satisfy the other's interests.
17. Ask your client to identify and list all of the things the other side can offer to satisfy their own (their own) interests and rank them.
18. Determine whether any limits exist on a party's ability to settle.
19. Discuss negotiation styles.
20. Develop an opening offer strategy.
21. Practice, in a simulated role-play, the agreed strategies and styles. If the stakes are high enough, consider hiring a mediator to play the part.²

How lawyers prepare clients for mediation depends on their client representation skills, their experience with the process, their attitudes towards mediation, their expectations about the process and their client's expectations about the process.

Near the close of the last century, I took my first mediation course. Instantly, I became a "true believer." Since that transformation in perspective and professional goals, I have devoted myself to assembling the skills I need to serve as a skilled neutral, represent clients in the process and train others to become mediators. While mediation may no longer be the latest fad, we lawyers still have plenty to learn about effectively employing the process on behalf of our clients. I hope this article assists you in doing so.

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² For more information see ABA, Div. of Prof'l Educ. and Sec. of Litig., *What Every Litigator Needs to Know About Mediation* (Videotape 1993), <http://www.abanet.org/cle/catalog/clecatalog05-06.pdf> (Nov. 8, 2005); Tom Arnold, *20 Common Errors in Mediation Advocacy*, 13 *Alternatives to the High Cost of Litig.* 69 (CPR Inst. 1995); Lee Jay Berman, *Lawyers Preparation for Mediation Puts Money in Clients' Pockets*, <http://www.mediationtools.com/articles/preparation.html>; Bobby Marzine Harges, *The ABC's of Effective ADR: Ten Practical Tips for Representing Clients in Mediation*, 43 *La. B. J.* 142, 143 (Aug. 1995); Jeff Kichaven, "Is That All?" *Attorneys Need to Prepare their Clients for Mediated Settlements*, <http://library.findlaw.com/2000/Mar/1/129535.html> (Oct. 26, 2005); L. Randolph Lowery, *Preparing Your Client . . . For Mediation*, 53-AUG *Disp. Resol. J.* 30, 33 (Aug. 1998); Jacqueline M. Nolan-Haley, *Propter Honoris Respectum: Lawyers, Clients, and Mediation*, 73 *Notre Dame L. Rev.* 1369, 1376 (May 1998); Stephen P. Younger, *ADR and Beyond: Effective Representation of Corporate Clients in Mediation*, 59 *Alb. L. Rev.* 951, 953-57 (1996).