

# Questions for In-House Counsel to Ask Litigation Counsel About Mediation Checklist

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A Checklist of questions for in-house counsel to ask when considering whether to mediate commercial disputes, including the benefits and drawbacks of mediation, when and where to mediate, and the appropriate participants to the mediation. This Checklist is also useful to any parties considered or involved in mediating any civil disputes.

This Checklist summarizes key issues and questions for in-house counsel to ask when mediating commercial disputes. For more information on mediation, see Practice Notes Complex US Mediation: Key Issues and Considerations ([1-575-6667](#)) and Mediation of Employment Disputes: Key Issues and Considerations ([6-583-2305](#)). For more information on the mediation process generally, see Mediation Toolkit ([1-505-0918](#)).

## WHAT IS THE STATUS OF THE DISPUTE?

- Is litigation or arbitration under way? If so, are there possible challenges to:
  - jurisdiction; or
  - venue.
- What is the status of discovery, including:
  - has it begun; and
  - does it continue during mediation?
- Regarding dispositive motions (a pre-answer motion to dismiss or a motion for summary judgment):
  - have motions been filed; and
  - is mediation more or less likely to be effective before or after the motion is decided?
- Regarding prior settlement discussions:
  - did prior settlement discussions reveal impediments to settlement; and
  - how may mediation help remove those impediments?

- How long may it take for the court or arbitrator to resolve the case?

## WHAT ARE THE PROJECTED COSTS OF LITIGATION OR ARBITRATION?

- What are the pre-trial costs?
- How much may it cost to try the case?
- Is an appeal available:
  - (if so) are appeals available only at the end of the case; and
  - what is the cost to appeal?
- Are litigation costs recoverable from the other side?
- Are internal costs recoverable from the other side?
- How much has the client spent to date on the litigation or on pre-litigation matters like investigations and other due diligence?
- How much may the mediation cost?

## WHAT ARE THE CHANCES OF SUCCESS AT TRIAL?

- How strong is the claim regarding:
  - liability; and
  - damages?
- What are the prospects for collection?
- How strong is the opposing case?
- Is a trial likely to bring adverse publicity?
- (If defending) regarding the risk of an adverse judgment, what is the exposure for:
  - compensatory damages;
  - punitive damages; and
  - attorneys' fees.
- What additional information is necessary or helpful to assess more accurately the likelihood of success?

## HOW IS THE RELATIONSHIP WITH LITIGATION COUNSEL'S COUNTERPART?

- Has it been difficult to deal with opposing counsel or the opposing party?

- How may a mediator help?
- How is opposing counsel likely to approach mediation?

### WHO IS INVOLVED IN PREPARING FOR THE MEDIATION?

- Do any of the following need to participate:
  - senior management;
  - in house counsel;
  - insurance carrier;
  - regulators; or
  - creditors?

### HOW DOES THE MEDIATION PROCESS WORK?

- How long may it last?
- Are there preliminary discussions with the mediator before the first mediation session?
- Should there be any limited pre-mediation discovery, such as:
  - each party proposing finite requests for production of documents; or
  - taking one or two key depositions?
- At the mediation session, is there to be:
  - an opening session;
  - private caucuses (see Practice Note, Complex US Mediation: Key Issues and Considerations: Private Caucuses ([1-575-6667](#))); and
  - further joint sessions.
- Is the client expected to speak during the mediation sessions?

### WHAT IS THE ROLE OF CONFIDENTIALITY AND PRIVILEGE IN MEDIATION?

- Is there a mediation privilege?
- Should the parties and the mediator sign a confidentiality agreement?
- Is the attorney-client privilege to be respected?
- Does the work product doctrine continue to protect materials prepared for litigation?
- Are settlement demands and offers to be protected by Federal Rule of Evidence 408 and its state-law analogues?

See Practice Note, Mediation: US Privilege and Work Product Issues ([7-505-5461](#)).

### WHAT IS IN-HOUSE COUNSEL'S ROLE IN THE MEDIATION?

- Should both in-house counsel and the company's executives attend?
- (If only in-house counsel) what settlement authority does he need.
- Should in-house counsel be involved in the preparation of the executives expected to attend?

### HOW TO SELECT A MEDIATOR?

- What is the mediator's experience and background?
- What is the mediator's track record of successful settlements?

- Does the mediator have familiarity with the client's industry?
- How are the parties agreeing to the selection of the mediator?
- Which of the following mediator styles is best for this case:
  - evaluative;
  - facilitative; or
  - transformative?

See Practice Note, Complex US Mediation: Key Issues and Considerations: Styles of Mediation ([1-575-6667](#)).

### WHO SHOULD ATTEND THE MEDIATION?

- Should the following people accompany outside counsel:
  - inside counsel;
  - someone who has sufficient knowledge of or access to the relevant facts;
  - someone with full authority to negotiate a settlement; and
  - insurance carrier representative?

### HOW CAN THE CLIENT CONTRIBUTE TO THE MEDIATION'S SUCCESS?

- Does counsel need:
  - additional information;
  - monetary authority; or
  - suggestions for non-monetary solutions, such as future business or payment in kind?

### WHY NOT SETTLE NOW?

- Because 95% of civil litigation settle before trial, are there reasons not to settle now, including:
  - can the other side afford to continue with the litigation or arbitration;
  - are the chances of winning the case by dispositive motion high;
  - does settlement jeopardize potential claims for indemnification;
  - does settlement encourage non-parties to bring claims; and
  - does settlement create a reputational risk for the client?

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