

Subjects for Trial Counsel to Discuss with the Client About Mediation Checklist

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A Checklist of issues for trial counsel to review with the client when considering whether to mediate commercial disputes, including the benefits and drawbacks of mediation, when and where to mediate, and the appropriate participants in the mediation. This Checklist is also useful to any parties considered or involved in mediating any civil 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 \(1-505-0918\)](#).

THE STATUS OF THE SUIT

Discuss with the client:

- The status of discovery, including:
 - how much is completed; and
 - whether it will continue during mediation.
- Regarding dispositive motions (a pre-answer motion to dismiss or a motion for summary judgment):
 - the chances of a success on a dispositive motion;
 - whether motions have been filed; and
 - whether mediation is more or less likely to be effective before or after the motion is decided.

- Regarding previous settlement discussions:
 - whether previous settlement discussions revealed impediments to settlement; and
 - whether mediation may help remove those impediments.
- How long it may take for the court or arbitrator to resolve the case.

PROJECTED COSTS OF LITIGATION OR ARBITRATION

- Provide the client with an estimate of:
 - the pre-trial costs;
 - the cost to try the case; and
 - how much the client has spent to date on the litigation.
- Discuss the availability of an appeal, including:
 - whether an appeal is available only at the end of the case; and
 - an estimate of the cost to appeal.
- Determine whether:
 - litigation costs are recoverable from the other side; and
 - internal costs are recoverable from the other side.

CHANCES OF SUCCESS AT TRIAL

Discuss with the client:

- The strength of the claim regarding:
 - liability; and
 - damages.
- The prospects for collection.
- The strength of the opposing case.
- The likelihood that the trial will bring adverse publicity.
- If defending, the risk of an adverse judgment, including factors such as:
 - whether there is adequate liability insurance;
 - whether there are adequate funds or assets to satisfy a judgment; and
 - whether a judgment may imperil operations.

THE RELATIONSHIP WITH LITIGATION COUNSEL'S COUNTERPART

Discuss with the client:

- The experience and ability of opposing counsel.
- The difficulty in dealing with opposing counsel or the opposing party.
- How a mediator may help.
- Opposing counsels' likely approach to mediation.

PREPARING FOR THE MEDIATION

- Identify roles, if any, for:
 - senior management;
 - in-house counsel;
 - experts or other consultants;
 - the insurance carrier;
 - regulators; and
 - creditors.

DESCRIBING THE MEDIATION PROCESS

- Discuss how long the mediation process may last and where it will take place.
- Discuss preliminary communications with the mediator:
 - that already took place; or
 - are anticipated before the first mediation session.
- Discuss whether there should be any limited pre-mediation discovery, such as:
 - each party proposing finite requests for production of documents; or
 - taking one or two key depositions.
- Discuss whether at the mediation session there will 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.
- Explain the dynamic of joint sessions, including whether there will be, for example:
 - an introduction; or
 - a presentation.
- Explain the caucus, including:
 - downtime; and
 - delay.
- Discuss the possibility of follow-up sessions.

THE ROLE OF CONFIDENTIALITY AND PRIVILEGE IN MEDIATION

- Describe the mediation privilege available in the applicable jurisdictions.
- Discuss whether the parties and the mediator should sign a confidentiality agreement.

- Describe how the attorney-client privilege applies in mediation.
- Describe how the work product doctrine applies in mediation.
- Describe the extent to which Federal Rule of Evidence 408 and equivalent state-law rules protect settlement demands and offers.

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

IN-HOUSE COUNSELS' ROLE BEFORE THE MEDIATION SESSION

- Discuss whether both in-house counsel and the company's executives should attend the mediation.
- Obtain the settlement authority in-house counsel need if only in-house counsel attend.
- Discuss whether in-house counsel should be involved in the preparation of the executives expected to attend.

SELECTING A MEDIATOR

- Discuss the desired experience and background.
- Discuss potential mediators' track records of successful settlements.
- Discuss whether the mediator should be familiar with the client's industry.
- Describe how the mediator selection process works.
- Determine which of the following mediator styles is best for the case:
 - evaluative;
 - facilitative; or
 - transformative.

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

ATTENDING THE MEDIATION

- Discuss whether the client is expected to speak during the mediation sessions.
- Decide whether outside counsel should be accompanied by:
 - in-house counsel;
 - someone who has sufficient knowledge of or access to the relevant facts;
 - someone with full authority to negotiate a settlement; or
 - the insurance carrier's representative.

INVOLVING THE CLIENT IN THE MEDIATION'S SUCCESS

- Decide whether counsel need:
 - additional information; or
 - suggestions for non-monetary solutions, such as future business or payment in kind.
- Decide whether an apology to or from the client might be appropriate.

SETTLEMENT AUTHORITY

- Determine counsels' recommendation for a favorable settlement.
- Discuss to pros and cons of settlement at certain dollar ranges.

DETERMINING WHETHER TO SETTLE NOW

- Determine whether there are reasons not to settle now (95% of civil litigations settle before trial), including whether:
 - your client or the other side can afford to continue with the litigation or arbitration;
 - the chances of winning the case by dispositive motion are high;
 - settlement jeopardizes potential claims for indemnification;
 - settlement encourages non-parties to bring claims;
 - settlement creates a reputational risk for the client; and
 - settlement may affect a governmental investigation or prosecution.

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