

## 5 strategies that will help you reach a good outcome in mediation

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Lawyers can create good outcomes for their clients in mediation when they employ strategies that underscore the importance of leverage, contact with participants on other side, and clear communication. Information is the real currency of negotiation.

Everything matters and even the most benign thing may signal what the other side is thinking and valuing.

For that reason, the first strategy is to share information. Try to avoid the knee-jerk reaction that leads you to overly protect your position on the factual and legal issues of the case. If you keep the “good” information to yourself, you are not maximizing your leverage. Surprises can serve you well in trial, but not in mediation.

You should avoid anything that makes you look suspicious or unable to make a decision. Remember that most cases settle, so saving important information for trial is like buying insurance you don’t need. Instead, share key information before mediation. It’s good to keep in mind that some institutions need time to make decisions, including carriers and coalitions of plaintiffs’ attorneys.

The second strategy is to re-think your “opponent.” Lawyers commonly refer to the other side as “they” (i.e., “They’re not here in good faith!”). Not everyone has the same opinion of your case or the same motivation to mediate. If you assume that everyone on the other side views the case in the same way, you give power to the most intransigent people who oppose you.



Instead, make contact with members of the other side casually, in a meet and greet, or in a joint session. Listen to the way in which they talk about their positions. Try to articulate your responses in a way that is attractive to and can give leverage to those who are likely to agree with you. Keep in mind offers and demands often come from internal negotiations.

Third, take full advantage of joint meetings. Most lawyers want to avoid joint sessions because they do not want to intensify the conflict with inflammatory allegations and provocative, overly-confident predictions of trial outcomes. Lawyers have it in their power not to conduct joint sessions that way.

Joint sessions offer a number of beneficial opportunities to speak with represented parties and important decision-makers, to set a positive tone for resolution, to size up the differences between the players on the other side, to look for unexpected common ground, to gather information and clarify misunderstandings, and dig deeper into damage-related calculations.

Joint sessions also save time, since it takes twice as long to convey information through the mediator than what can be said directly in joint session. If you make the mediator convey all the provocative things to other side, the listener will react poorly to the mediator. Maybe the mediator can manage that transference. Maybe not.

Fourth, make a strong demand or offer that gives you enough room to move without losing the other side's confidence that a deal is possible. Many lawyers who start negotiating with extreme numbers get worse deals than if they had started reasonably. Sometimes they get no deal at all.

The farther you start from your targeted landing point, the larger the jumps you will have to make, potentially damaging your credibility in that moment and in the future. Explain to clients that opening demands and offers are intended to send a message. Explain how "brackets" can mean more than the midpoint and can help parties negotiate efficiently with less frustration.

Fifth, be willing to evaluate the effectiveness of your decisions in the moment. Try new things relative to your interests and outcome goals. "This is the way we always do it" is not a good strategy. What was done in the past does not necessarily mean it is the best way to proceed and will not persuade the other side that you found the best way to do it in the case at hand.

If you get stuck in one way of doing things, your opponents will figure it out and take it into account next time. Instead, think about whether your choices will help to convince the other side.

If you find yourself wondering whether you're getting the best results possible in mediation, try some of these strategies. Over time, you can compare outcomes within certain case types or with certain participants. This may give you a rough idea of your progress in terms of economic outcomes, efficient case management, and confidence levels.

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