



Preparing Your Client for Mediation Based on the Core Values of Mediation

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First, Prepare Yourself




Counsel's Preparation for Pre-Mediation Client Conference

- Assess the factual and legal merits of the case – write a position statement
- Identify knowns, likelihoods & unknowns
- Evaluate odds of success at trial
- Determine client's current expense in the case
- Estimate client's case costs for the future




Meet personally with the client




Checklist for Client Conference
Discussion of the Case

- Pre-trial matters
 - ✓ Procedural status of the case
 - ✓ Review of elements to prove claims and defenses
 - ✓ Discussion of uncontested facts relevant to proof of case
 - ✓ Discussion of contested facts relevant to proof of case
 - ✓ Remaining discovery
 - ✓ Pending or planned/anticipated motions practice
 - ✓ Current expenses
 - ✓ Current legal fees



Trial

- ✓ Review of the process
- ✓ Admissibility of key documents and exhibits
- ✓ Admissibility of key testimony
- ✓ Probable juror demographics & effect on case
- ✓ Judge's historic management and rulings in similar cases
- ✓ Projected length of trial
- ✓ Projected expenses & legal fees for trial
- ✓ Odds/probabilities for success at trial
- ✓ Forecasted range of outcomes at trial



Review of the Mediation Process & Conference

- ✓ Discussion of mediator's background, style & process for the mediation
- ✓ Confirmation of location, starting time & forecasted length of conference
- ✓ Explanation of confidentiality & inadmissibility of exchanges in mediation
- ✓ Review of negotiations process
- ✓ Establishment of realistic goals for mediation
- ✓ Explanation of binding effect of acceptance of offered terms of settlement
- ✓ Review of potential contingencies for finalized approval of settlement terms
- ✓ Description of adversary party's process for approving terms for settlement



Benefits of Out-of-Court Settlement over Litigation

Eliminates:

- Parties' time-consuming & resource-draining participation in pre-trial discovery
- Potential disclosure of personal & proprietary information
- Commitment of personal time &/or personnel's business time
- Ongoing legal fees and expenses

Eliminates:

- Expensive engagement of expert witnesses
- Potential adverse pre-trial and trial rulings
- Unpredictability of verdict & judgment at trial
- Unpredictability of appellate review of trial



Offers

- Immediate closure
- Terms of resolution unavailable through Court



**Contact
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How to prepare a client's civil case for mediation

By Frank A. Ray

To produce the best opportunity for a successful civil case mediation, lawyers for parties to the dispute should prepare for the mediation conference as if proceeding to trial.

Attorneys effectively posture a case for mediation by engaging in the same process that produces persuasive pressure points that influence the decision-making by a court and jury. The onus for convincing an adversary party of unfavorable exposures in a litigated case falls on the advocating party's trial lawyer, not the mediator. In preparation for a mediation, no viable alternative exists for counsel's thorough preparation and understanding of issues that drive the outcome of the case.

Write a clear mediation position statement

Through a party's attorney's written mediation position statement, the party's message should speak not only to the mediator, but also more importantly, to adversary parties and their counsel. In the narrative of the mediation position statement, a lawyer should project transparency about anticipated presentation of the case at trial. If admissible evidence will carry the day for a party at trial, in mediation, counsel's discussion of decisive evidentiary issues probably best influences and positions a dispute for resolution.

In a mediation position statement, the authoring lawyer should avoid use of effusive adjectives and adverbs to describe projected outcomes in the case. Understated narrative usually trumps a shrill or chest-

beating commentary. Overstatement and hyperbole fail to advance the fundamental purpose of mediation—arrival at an agreed reasonable compromise to terminate a dispute.

A properly crafted mediation position statement for a civil case should address and discuss the following:

- Procedural status of the litigation;
- Descriptions of relevant facts supported by copies of key documents and excerpts of witnesses' written or recorded statements;
- Indisputable dispositive legal issues;
- Disputed dispositive legal issues with a discussion of the rationale for probable rulings by the court;
- Assessment of claimed damages and remedies; and
- Each party's proposed terms for global resolution of the case.

Exchange statements in a reasonable amount of time

Once the clients approve the content of mediation position statements, counsel should exchange the statements between or among counsel for all parties to the mediation. Counsel should do so at a time far enough in advance of the mediation conference that adversary parties have adequate opportunity for review, evaluation and response to the content of the statement.

If parties find themselves in a rushed mode for evaluation and decision-making by the time a mediation conference convenes, the unsettled feeling of a client's decision-maker probably translates to a stalemate in negotiations. By serving a mediation position statement on adversary counsel at a reasonable time in advance of the mediation conference, a lawyer's written advocacy will enjoy the best opportunity to strike a chord in the adversary's mind of risks for an unfavorable result at trial.

Provide a copy of the statement to the client

When a party's attorney receives a mediation statement from adversary counsel, the receiving lawyer should immediately provide a copy to the client. Even if the adversary's statement might qualify as "bad news" for the client, transparency in the process also dictates that clients are fully informed of risks as well as benefits associated with trial of the case.

Conduct a pre-mediation discussion with the client

Counsel's list of essential tasks for any mediation should include a pre-mediation discussion with the client to address a realistic range of results at trial. Counsel who have only viewed clients' cases through rose-colored glasses have done their clients and themselves a disservice. Experienced trial lawyers can attest that a so-called slam dunk verdict rarely manifests. In mediated cases, thoughtful litigators address and assess pitfalls of cases with the same commitment invested in discussion of



positive aspects of cases. In advance of a mediation, and in advance of a trial, the client needs to hear a rhetorical discussion of “what ifs” from the client’s counsel. Indeed, the client *deserves* to hear that discussion.

A mediation in which the parties have initially proposed entirely unreasonable terms for resolution probably arises from counsel’s unwillingness to address a potentially unfavorable outcome for the client. A party’s demanded terms for settlement that entail terms that no judge or jury could award will understandably evoke adversary counsel’s distrust of the demanding party’s willingness to negotiate in good faith.

Counsel for parties in litigation have a professional duty to address and, as necessary, attempt to adjust a client’s expectations about foreseeable results in litigation. Former Ohio Common Pleas Judge Donald A. Cox, now serving as a private mediator, describes this process as “client therapy.” While lawyers understandably strive to maintain clients’ confidence in their attorneys’ ability to achieve a desired outcome in litigation, those same lawyers best serve clients with discussion of the range of scenarios for the outcome of a lawsuit.


Pre-mediation discussions with the client should occur with the client’s decision-maker. If the client is an individual or single fiduciary, the lawyer finds a readily identifiable audience. If the client is a business or group or association of people, the attorney for such a client or set of clients should identify clearly the decision-maker or decision-makers for the client or set of clients. The lawyer for a business client or multiple parties should insist on unfettered access to the decision-maker for direction in handling a mediation.

Attend the mediation conference

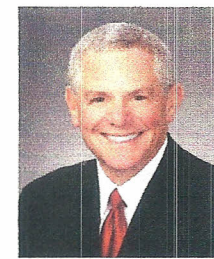
To optimize success in a mediation, the real decision-maker for each party should personally attend the mediation conference. Lead trial counsel for the parties should also personally attend.

In advance of the mediation conference, participating parties’ counsel should encourage clients to avoid describing demands or offers as “take-it-or-leave it,” “bottom-line” or “drop-dead” unless the clients are adamant and unwavering on such terms for resolution of the case. In pre-mediation discussions with parties, counsel should address compromise as a probable prospect for mediations that

produce settlements. If adversaries fail to embrace compromise as a mutual fundamental and ultimate goal for a mediation, little purpose probably exists for convening a mediation conference.

No doubt, some civil cases should proceed to trial for disposition, but most cases are better disposed by purposeful mediation. 

Author bio



For over four decades, Frank Ray practiced as a trial lawyer who conducted numerous jury trials for his clients. For the past two years,

Mr. Ray has withdrawn from the courtroom and has entirely refocused his law practice as a mediator and arbitrator for a broad spectrum of civil disputes. He is a solo practitioner at Frank A. Ray Co., LPA, in Columbus.



Core Values for Mediation

Adopted by the Supreme Court of Ohio Dispute Resolution Section
based on recommendations of the Commission on Dispute Resolution (2017)

Introduction

Core values for mediation are guiding principles that direct behavior and action. These core values are found in statutes, regulations, rules, standards, and ethics that inform and govern mediators and mediation practice. They help define and guide best practices. Core values also create a guide for staying on the right path to achieve selected goals. To be an effective mediator, it is important to be able to define and describe the key characteristics of mediation and explain the core values of mediation.

One common way of describing mediation is that it is a structured, yet informal, process. As in any structure, the foundation is of critical importance, and in mediation core values create that foundation. To examine the core values, one can begin with the meaning of the verb mediate — to be in the middle, to act as an intermediary between two or more opposing participants. In its most fundamental context this is what mediation means.

This definition, however, does not present enough guidance for the mediator to be effective. The core values — guiding principles — that influence the mediation come from its early roots, cultural values, social conditions and other institutional factors.

Mediation is commonly structured as a six-stage process:

1. Pre-mediation preparation
2. Introduction
3. Explanations concerning the dispute
4. Identification of issues and concerns
5. Generation of solutions
6. Conclusion

Within this structure, the mediator must be able to explain the stages of mediation and the core values that provide a foundation for mediation. The mediator's work in every stage should be consistent with the core values.

The most pronounced characteristic of the mediation process is that it is a discipline based in practice. That is why training programs that teach the fundamentals of mediation include opportunities to practice the skills needed to be an effective mediator. To say that mediation is a practice is not to use the word practice as a noun, e.g., “a law practice.” In mediation, the practice is a verb — engaging in the work; much like a yoga class is a practice. The mediator works continually within the process to gain expertise and confidence. The mediator must be mindful that he or she takes on a special role that is distinct from being an advocate or counselor. The mediator will not decide the facts or determine the outcome. Mediation does not require either agreement or final resolution. Although mediation can help the participants reach resolution and sometimes repair relationships, it is always up to the participants to decide on any outcomes. In a trial or arbitration the goal is to reach a final outcome, such as a decision or an award. In mediation, the goal is to provide the participants with an opportunity to increase their understanding of their unique situation and to explore whether a mutually acceptable resolution is available.

Success in mediation can mean that the participants have reached a full or partial agreement, narrowed or defined the issues to be resolved, improved relationships, established a dialogue, expressed interests and perspectives, had an opportunity to be heard, or been able to give — or receive — an apology. Mediation is successful when the mediator follows the core values and supports the participants as they work toward removing barriers and creating a resolution. Learning about core values will help the mediator mediate in a way that provides the best assistance to the participants and guide how the mediator conducts himself or herself in that process. Below are discussions of the common use of the core values in mediation.

Core Values for Mediation

1. Self-Determination

Self-determination is the cornerstone in the foundation of core values for mediation. It is the mediator's job to support the parties in making their own voluntary and informed decisions. Any decisions the parties make must be free from undue pressure from the mediator. The mediator should empower and encourage the parties to consider their own needs and interests, to gather and obtain sufficient information to make informed decisions and to understand the implications of those decisions.

2. Neutrality

The mediator does not seek any particular resolution of the dispute. The mediator usually does not give advice; and the mediator does not make decisions. Neutrality is an important way for the mediator to support party self-determination by focusing on a constructive decision-making process rather than a particular outcome.

3. Impartiality

The mediator conducts the mediation in a way that is not partial, biased, or prejudiced. The mediator conducts the mediation in an even-handed manner. Impartial conduct removes any impression of favoritism and promotes respect of each party's exercise of self-determination. Impartiality requires the mediator to avoid having his or her own beliefs, preferences and other personal perspectives substitute for those of the parties.

4. Conflict of Interest

A conflict of interest exists when there is any relationship between the mediator, any participant, or the subject matter of the dispute that compromises or appears to compromise the mediator's impartiality or neutrality. Checking for potential conflicts of interest before and during mediation and disclosing anything that might suggest partiality is critical in maintaining neutrality and impartiality. It is also important for the mediator to avoid subsequent relationships with the participants or their representatives that might influence or be reasonably viewed as influencing the mediator's neutrality or

impartiality during the mediation or compromise assurances of confidentiality during the mediation.

5. Competence

The mediator has a duty to maintain and improve mediation skills. In addition, the mediator will conduct mediation so as to provide a high quality process that maintains the integrity of the process and is true to the core values of mediation. A mediator should be honest and forthcoming with the parties regarding his or her qualifications to act as a mediator.

6. Confidentiality

Ohio's enactment of the Uniform Mediation Act (UMA) protects "mediation communications" in Ohio's courts, legislature, and administrative agency processes and limits the communications the mediator can have with the court and others. It is important for the mediator to inform the participants that he or she will not be communicating with the court or others about what is said in the mediation unless there is a specific exception under the UMA.

When the participants agree to confidentiality, they may word that agreement to extend their own obligations not to speak about anything communicated during the mediation process beyond the obligations imposed by the UMA. This can be useful in promoting candor within the mediation, but the participants may want to create exceptions to the confidentiality agreement to permit disclosures that would be healthy (talking with family members about what was said) or seem important (reporting threats of harm). A confidentiality agreement in other words may be worded to be broader than agreeing to abide by the obligations of the UMA. A broader agreement can create new obligations for the participants that carry the possibility of monetary or other damages for breaching the agreement by telling a friend, business associate, or competitor for example, what was said during mediation. When they can speak candidly, the participants can voice their underlying interests and move beyond their stated positions to make progress toward a mutually acceptable solution.

Core Values for Mediation

7. Flexibility and Informality

The mediator may adopt a particular style or a model of mediation, such as a facilitative, evaluative, or transformative style. The mediator, however, must adjust the process to meet the needs of the participants. The mediation process is informal in that there are few rules. The mediator may suggest rules and the participants may agree to them. For example, some mediators ask parties to use rules of common courtesy or establish ground rules such as speak directly to the mediator or do not interrupt when someone else is speaking. In mediation, participants can speak openly in ways that are comfortable for them. The mediator's efforts to work flexibly and adapt the mediation to the needs of the participants should be guided by whether the particular approach will support or undermine core values.

8. Fairness of Process

Fairness in mediation means that the parties experience the process as being fair to each of them. It is important for each party to feel respected, heard, and included. Sometimes mediators confuse their responsibilities to offer a fair process with a duty to ensure a "fair" outcome for the parties.

9. Voluntariness of the (Settlement) Agreement

For court mediation programs parties may be ordered or strongly encouraged to participate in mediation, but any agreement they make must be

a voluntary exercise of self-determination. Stating that an agreement reached in mediation must be voluntary means it is without undue pressure from the mediator or others and that there must be an absence of coercion to settle. As a core value, voluntariness of the agreement is distinguished from voluntary participation. Courts may refer matters to mediation, typically through a court rule or a general order to mediate.

10. Cooperation

Mediation is significantly different from a trial or arbitration because it requires cooperation to reach a resolution. Parties may come to mediation with an expectation that one of them will "win." If the mediator cannot engage the participants in a cooperative process, the mediation will not go forward. There are several benefits to cooperation. First, if the parties cooperate, they can better understand that they share the power to make agreements. Second, their own agreements are usually more appropriate to their unique situations. Third, agreements parties make themselves are more sustainable over time. Cooperation can be misconstrued.

The parties are not required to like each other or to compromise their own integrity. Cooperation focuses on the value of mutually acceptable resolutions and sometimes, the value of improving relationships, which are more often the product of working together.

Conclusion

Reviewing and reflecting on the core values as well as statutes, regulations, rules, standards and ethics that inform and govern mediators and mediation practice are important tasks to help mediators develop skills and engage in a meaningful and helpful process. Core values also help mediators to stay in compliance with statutes, regulations, rules, standards and ethics regarding mediation.