Mastering Mediation: Beyond the Session Itself

New York Law Journal August 05, 2025

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Mediation has become an indispensable tool in modern legal practice, offering a pathway to dispute resolution that can be more efficient, cost-effective, and ultimately, more satisfying for clients than traditional litigation. However, successful mediation doesn't simply materialize when parties gather in a room. For lawyers, effective advocacy in mediation begins long before the formal session and extends through every interaction leading up to a potential agreement.

This article delves into the critical, often overlooked, strategic considerations that can significantly influence a mediation's outcome. From the initial stages of scheduling to the nuanced dynamics of pre-mediation conferences and crucial "dos and don'ts" during the process, we'll explore how proactive planning, clear communication, and a collaborative mindset can empower lawyers to best serve their clients' interests and unlock the full potential of mediation.

Scheduling for Success: Best Practices for Lawyers

The process of mediation often begins long before the actual session, specifically during scheduling. How lawyers approach scheduling can significantly impact the mediator's ability to prepare and the parties' readiness to engage (David A. Hoffman, "Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals" (MCLE, Inc. 2013); Dwight Golann, Mediating Legal Disputes 101-03 (3d ed. 2016); Jeanne Behling, "Getting the most out of a pre-mediation conference," Advocate Magazine (Sept. 2024)).

Dos for Scheduling Mediation:

- **Be Proactive:** Respond promptly to scheduling inquiries from the court or the mediator. Delays can signal a lack of commitment and slow down the entire process.
- **Communicate Availability Broadly:** Provide a range of dates and times that work for you, your client, and any essential third parties (e.g., insurers, experts). The more

options you provide, the easier it is to find a mutually agreeable date (John W. Cooley, "Mediation Advocacy" 109-114 (2d ed. 2006); U.S. District Court for the Southern District of New York, Preparing for Mediation: A Resource for Advocates 5-6 (Oct. 2023)).

- **Coordinate With Your Client Early:** Before suggesting dates, confirm your client's availability and ensure they understand the time commitment required for a mediation session, which can often last a full day.
- **Inform the Mediator of Key Deadlines:** If there are impending court deadlines, discovery cutoffs, or other significant dates that might impact the mediation's urgency or strategy, share this information with the mediator.
- **Be Flexible:** While you have preferences, approach scheduling with a willingness to compromise. Flexibility demonstrates good faith and a genuine desire to mediate.
- **Consider the "Right" Time in the Litigation Lifecycle:** While courts may order early mediation, consider with your client whether sufficient discovery has occurred to allow for a meaningful discussion. If not, communicate this to the court or mediator, perhaps suggesting a later date or a phased approach (Kimberlee K. Kovach, "Mediation: Principles and Practice" 211-13 (6th ed. 2016); Leonard L. Riskin, "Mediator Orientations, Strategies and Techniques," 1 *J. Disp. Resol.* 7, 24-26 (1994)).

Don'ts for Scheduling Mediation:

- **Delay or Obstruct:** Don't intentionally drag out the scheduling process or offer only dates that you know are unworkable for the other side or the mediator. This creates unnecessary friction and wastes time (Dwight Golann, "Mediating Legal Disputes" 101-03 (3d ed. 2016)).
- **Offer Limited Availability:** Don't provide only one or two narrow windows of availability, especially if they are far off in the future. This puts undue pressure on others and complicates the mediator's job.
- **Fail to Consult Your Client:** Never commit to a mediation date without first confirming your client's availability and preparedness. Last-minute cancellations or rescheduling due to client unavailability are disruptive.
- **Treat Scheduling as a Strategy:** Don't use scheduling as a means to gain a tactical advantage or to frustrate the opposing party. The goal is to set the stage for resolution, not to win a preliminary skirmish.

- **Ignore the Mediator's Preferences (within reason):** While your schedule is important, mediators often have specific days or times they prefer. Accommodating these preferences, where possible, can foster a more collaborative atmosphere.

The process often continues as mediators may conduct pre-mediation conferences, with or without party attendance. Some focus solely on logistics like dates and times. Others use these sessions to gauge the existing settlement discussions and counsel's perspectives on potential resolution points. These pre-mediation opportunities can be invaluable for identifying non-monetary aspects of a dispute and assessing counsel's willingness to collaborate with the mediator. It's a safe environment to learn if one side is overestimating their case's strength without inflaming the conflict.

Dos and Don'ts for Lawyers at a Pre-Mediation Conference

Lawyers can follow simple rules to best leverage the strategic value of a pre-mediation conference.

Dos at a Pre-Mediation Conference

- **DO Be Prepared to Discuss Logistics:** Have your client's and your own availability handy for scheduling the mediation. Confirm preferred platforms (in-person, virtual) and any special technical needs.
- **DO Be Open About Prior Settlement Discussions:** Be ready to briefly summarize any previous settlement offers or demands. This helps the mediator understand the history and current "gap" between the parties.
- **DO Share Your Client's Core Objectives (Including Nonmonetary):** Monetary figures are often just one piece of the puzzle. For example, if a party is not only financially motivated, but also deeply concerned about clearing their professional reputation and receiving an apology. What does your client want to achieve beyond just a dollar amount, whether it is an apology, a change in policy, a public statement, or something else that offers closure.
- **DO Clearly Articulate Your Perspective on Potential Resolution Points:** Share what you believe are the key issues or areas where a resolution might be found.
- **DO Be Willing to Collaborate With the Mediator:** Show openness to the mediator's process and a willingness to work together to find common ground. Be candid and trust the mediator to work efficiently and to safeguard confidence.

- **DO Be Realistic:** While representing your client vigorously, be open to the mediator's subtle probes.

Don'ts at a Pre-Mediation Conference

- **DON'T Advocate:** Avoid launching lengthy legal arguments or trying to convince the mediator of the merits of your case. This is a facilitative, not an adjudicative, process.
- **DON'T Be Overly Adversarial:** While you represent your client's interests, an overly aggressive or hostile demeanor with the mediator can be counterproductive to establishing a collaborative tone for the mediation itself.
- **DON'T Withhold Key Information:** While you don't need to lay all your cards on the table, don't purposefully conceal critical non-monetary interests or significant obstacles that the mediator absolutely needs to understand to effectively help.
- **DON'T Make Non-Negotiable Demands at This Stage:** While you might have a strong opening position, avoid presenting it as a take-it-or-leave-it offer during the pre-mediation conference. This can prematurely shut down exploration.
- **DON'T Inflame the Conflict:** This is a "safe environment." Avoid accusatory language or revisiting past grievances during this preliminary discussion (Steve Mehta, “Pre-Mediation Moves: What Smart Lawyers Do Before They Log On”).

What Lawyers Should Do in Mediation:

To maximize the chances of successful mediation, lawyers should actively engage in the following practices:

- **Prepare Thoroughly:** Understand your client's core interests, not just their stated position. Develop a clear strategy for the session, including opening statements, key talking points, and a range of possible settlement options. Have all relevant documents readily accessible (Hon. Judith Gail Dein, "How to Prepare For A Mediation," Boston Bar Association Journal (May 22, 2025)).
- **Educate and Prepare Your Client:** Ensure your client fully understands the mediation process, its confidential nature, the mediator's role, and the importance of good-faith negotiation. Discuss their Best Alternative to a Negotiated Agreement (BATNA) and Worst Alternative to a Negotiated Agreement (WATNA) so they can make informed decisions ("Prepare Your Client for Success at Mediation"; Leonard L. Riskin & James E. Westbrook, "Dispute Resolution and Lawyers" 297–99 (3d ed. 2005)).

- **Communicate Effectively With the Mediator:** Provide the mediator with a concise and persuasive pre-mediation statement that outlines the case background, key issues, and your client's perspective. Be willing to share additional relevant information privately (ex parte) with the mediator to help them understand nuances and potential roadblocks (Dwight Golann, "Mediating Legal Disputes," 103-05 (3d ed. 2016); U.S. District Court for the S.D.N.Y., Preparing for Mediation: A Resource for Advocates 5-6 (Oct. 2023)).
- **Listen Actively and Empathize:** Pay close attention to the other side's perspective and underlying interests, not just their demands. Demonstrating empathy, even for an opposing party, can sometimes open doors for creative solutions and build rapport (Christopher W. Moore, "The Mediation Process: Practical Strategies for Resolving Conflict," 164-67 (4th ed. 2014); Anna Krolikowska, "Mediation Communication Strategies: 6 Effective Approaches," Anna Krolikowska Blog (July 30, 2024)).
- **Be Flexible and Creative:** While advocating for your client's interests, be open to exploring a wide range of solutions, including non-monetary remedies. Think outside the box for win-win outcomes that might address underlying issues or future relationships.
- **Focus on Interests, Not Just Positions:** Shift the discussion from what each party "wants" (positions) to *why* they want it (interests). Identifying shared or compatible interests can lead to innovative solutions.
- **Manage Client Expectations Realistically:** Help your client understand the strengths and weaknesses of their case from an objective standpoint. While advocating zealously, ensure your client has a realistic view of potential outcomes in and out of mediation.
- **Maintain Professionalism and Respect:** Engage with all parties, including opposing counsel and the mediator, with courtesy and respect. A constructive atmosphere is conducive to resolution.
- **Be Prepared to Reality-Test:** Work with the mediator to thoroughly evaluate the strengths and weaknesses of both your case and the opposing party's case, including the potential costs and risks of litigation (Beyond Intractability, "Reality Testing").
- **Empower Your Client to Participate:** Encourage your client to speak directly when appropriate and comfortable, especially regarding their personal interests or experiences related to the dispute.

- **Be Patient and Persistent:** Mediation can be a long process with ups and downs. Maintain a positive attitude and remain committed to finding a resolution, even when challenges arise.

What Lawyers Should NOT Do in Mediation:

To maximize the chances of successful mediation, lawyers should avoid:

- **Treating mediation as merely another deposition or discovery session:** Don't interrogate the other side or use the session solely to gather information for trial. This adversarial approach hinders open communication and trust.
- **Refusing to engage in good faith:** Don't enter mediation with a fixed "my way or the highway" mentality. Be prepared to listen, explore options, and compromise.
- **Underestimating the mediator's role:** Don't view the mediator as merely a messenger. They are skilled facilitators who can help bridge gaps and reality-test positions. Engage with them openly.
- **Bringing a client who is unprepared or uninformed:** Ensure your client understands the process, the confidentiality rules, and has realistically considered their BATNA and WATNA. A disengaged or surprised client can derail the process.
- **Failing to provide the mediator with relevant information (within ethical bounds):** While maintaining client confidentiality, share enough information with the mediator (ex parte if necessary) to give them a full understanding of the case's strengths, weaknesses, and any emotional drivers.
- **Being unwilling to shift positions or consider non-monetary solutions:** Don't be solely fixated on a monetary outcome. Explore creative solutions that might involve future relationships, apologies, or specific performance that litigation may not offer.
- **Focusing solely on past wrongs:** While the facts are important, dwelling excessively on grievances without looking forward to a potential resolution can be counterproductive.

Conclusion: Elevating Your Mediation Advocacy

Effective mediation advocacy is an art that extends far beyond the negotiating table. As we've explored, success hinges on meticulous preparation, strategic communication, and a clear understanding of the mediator's role. From proactive scheduling that sets a collaborative tone to leveraging pre-mediation conferences for deeper insight, and crucially, avoiding pitfalls that can undermine the process—each step is an opportunity to

strengthen your client's position. By embracing these best practices, lawyers can transform mediation from a mere procedural step into a powerful pathway for achieving optimal, interest-based resolutions for their clients.

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