

Tips To Successfully Resolve a Dispute Through Mediation¹

You are involved in a legal dispute and have either filed or been served with a complaint. Now it is up to the judge or jury to decide which party wins, right? Not necessarily. For certain cases, mediation offers a more palatable shortcut to resolving your dispute.

What is Mediation?

Mediation is an opportunity for the parties to meet with a neutral individual called a mediator to reach an agreement on their dispute outside of the judicial process. The mediator is not the judge or the jury and does not make any decisions related to the court case. The mediator helps each party see the strengths and weaknesses of their claims. In mediation, each party's legal arguments and factual stories are the focus, and which party is correct on the law has little to no relevance. The purpose of mediation is to reach a negotiated agreement alternative that allows the parties to end their litigation in court.

Is A Mediated Settlement Required?

No. Whether parties settle at the mediation, or even engage in the process, is completely voluntary. All parties need to agree on is the resolution in order to reach a settlement. Unlike the litigation process, in mediation there are no outcomes imposed by a judicial officer.

Why Should You Consider Mediation During Litigation?

The short answer is saving time and money. Litigation in the United States is notoriously costly and slow. In addition to attorney's fees, each side is usually responsible for their own pre-litigation costs of discovery and expert witnesses. On top of the cost considerations, the courts make decisions at their own pace. It is typical for courts to take as long as 6 months to over a year to decide just one motion application made by the parties. In many U.S. jurisdictions, a case being resolved within 12 months or less by simply relying on the judicial process is extremely rare.

That is why many U.S. court systems increasingly require that the parties include mediation as either a voluntary or mandatory step in the litigation process. Sometimes litigants make the grave mistake of treating the mediation step as just another box to check on their way to court. But mediation can offer an efficient resolution of a legal problem, in much less time and at a much lower cost than the judicial process.

How to Have a Successful Mediation?

The foundation for a successful mediation is to avoid (1) holding the mediation too early in the process for the parties to meaningfully engage at the mediation; (2) becoming too entrenched in one side's own view of the case; and (3) discounting the mental and financial cost of extended litigation.

There is a simple fix for all three: attorney preparation and attention to the mediation process.

1. Mediations Scheduled Too Early in the Litigation Process

Following the line of thinking that the quickest resolution of the legal matter is the best and cheapest option, mediations are sometimes scheduled very early in the litigation process. Depending on the type of case, the scheduling time could be a mistake.

Scheduling the mediation too early can result in parties lacking sufficient information to effectively discuss the value of their case for settlement during the mediation. The only documents exchanged might be the plaintiff's complaint and the defendant's answer. The parties may not yet have had the opportunity to assess the value of their case by reviewing relevant case documents, considering potential witness testimony, or testing their legal theories via dispositive motions.

As a result, neither party has the benefit of input from the court as a view to their case or what evidence may support or harm their case. The parties feel that they could win big. They have a narrow vision and cannot see the weaknesses in their own case or appreciate the risk of litigation.

Your attorney should also work with the mediator and opposing counsel (if they are amenable) to appropriately schedule the mediation during a premediation call with the mediator. A mediator with litigation experience will also understand the

issues of mediating too early in the case. The mediator can suggest limited discovery on certain core issues that could help the mediation process.

2. "My case will prevail" viewpoint

Related to the early timing of mediation, sometimes parties become entrenched in their view of the case even later in the litigation process, after documents have been exchanged and depositions taken, parties may become entrenched in their view of the case. They may be convinced that they will win on all claims and are not interested in compromising.

This issue becomes especially relevant when there is a third party, such as an insurer, paying for the costs of litigation.

Your attorney should work with you to explain the mediation process and objectively explain your case to you to understand where compromise can benefit you in resolving your case. Understanding where to compromise will help the mediation process be successful.

3. Litigation As Seen On T.V.

In the beginning of a case, some clients may even enjoy the litigation process. They have watched enough legal dramas (and comedies!) to be excited about their day in court. Mediation is also not as captivating as conflict, given the inherent nature of mediation to lean towards resolution rather than more drama.

But the litigation processes that occur neatly in just one hour of a legal drama can take years in real life. Clients tend not to comprehend the drain of years' long litigation takes, not just on their wallet but also on their mental health.

Before a party can get their day in court, parties usually need to open up all their files (including all emails and electronic files). Parties likely need to answer hostile questions from opposing counsel under oath. Parties need to review legal filings, many of which will be complex and require counsel's assistance to fully understand. It does not matter whether you are an individual or corporate party, being a litigant can be taxing!

Your attorney is your advocate but is also your counselor. Explaining the realities of litigation to the client is an important step to take on the journey to a successful mediation. Mediation can be successful if the parties are open to working together

with their attorneys and the mediator to resolve issues such as early scheduling, entrenched case views, and understanding case realities that impact settlement.

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