

10 Mediation Tips for Young Lawyers

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From our experience, we thought it would prove helpful to offer the following 10 mediation tips for young lawyers. Each mediation session provides an opportunity to grow and refine your skills. As a young lawyer, you may be asked to accompany a senior lawyer to mediation or you may be charged with handling the mediation on your own. Regardless of your role, you must strategically approach mediation and set aside adequate time to properly prepare yourself, your client and your case.

- 1. Approach Mediation Preparation with Optimism.** Sometimes you begin mediation preparation thinking that there is *no way* the case will settle, only to be later surprised with a mediated settlement. Therefore, you should approach the preparation for every mediation with the belief that the case could settle.
- 2. Choose Your Mediator Wisely.** We have many talented mediators in this State. However, choosing an unfamiliar name off of a list of mediators or choosing a mediator because you have used that person in the past is a missed opportunity to designate someone whose background, experience and style may be particularly suited to your case. For example, suppose your case is a dispute over money between family members, in that case, it may be helpful to select a mediator who has experience resolving not only civil disputes but familial disputes, as an important role of the mediator in that case will be understanding the emotions of the parties. It may be useful to ask for recommendations for mediators from your colleagues and get feedback on mediators suggested by the opposing party before agreeing to any mediator.
- 3. Timing.** The timing of mediation should be carefully considered and discussed with your client and the opposing party. Many times your client may not want to spend money on discovery and would prefer to hurry to the mediation table. This is a mistake. You must educate your clients about the importance of completing the tasks you deem necessary (discovery, motions, etc.) prior to mediation in order to improve the likelihood of a resolution. For example, without certain information obtained through discovery, the client may not feel comfortable agreeing to a settlement or may not be able to properly analyze its risks. Or perhaps you feel that the client has a strong chance of prevailing on a dispositive motion and therefore filing it prior to mediation will provide the client with leverage at mediation. In short, do not close your eyes and pick a date on the calendar. Think strategically when selecting a mediation date.
- 4. Prepare Yourself.** It goes without saying that you must know the file inside and out for mediation. If you are accompanying a senior lawyer to the mediation, you will likely be relied upon to know the details of the file. Often times, we over prepare for issues that never come up during the mediation, but we have never regretted being over prepared. Identify the key documents or research that you may need and have those readily accessible either in hard copy or electronically. These may include documents you have not produced in discovery that you are willing to share for mediation only, such as the financial documents of your client, particularly if you are arguing that your client is unable to fund a settlement. If the file is too large to bring to the mediation, or you maintain electronic files, make sure you can access the file remotely or you have someone available at your office to email or fax a document to you. Talk to your colleagues about your case and get their thoughts on potential strategies and settlement ranges.

If you are making an opening statement (see #5), prepare an outline of it in advance and practice it. Also plan to bring your laptop, tablet or other gadget that can easily access your legal research provider in the event the opposing side raises an argument you want to research during the mediation.

5. Prepare Your Client. Meeting with your client prior to the mediation is critical, even if your client has participated in mediation in prior cases. Ideally, you should meet with your client in person a few days prior to the mediation. Some clients may want to prepare over the phone – insist that they meet with you in person by explaining the importance of mediation to their case. Sometimes your client may be coming from out of town and arriving the evening before the mediation or the morning of the mediation. In those instances, schedule a detailed telephone conference prior to the mediation and arrange to meet in person before the mediation starts to go over final questions or other preparation items.

During this meeting with your client, you should explain the mediation process to your client. In some instances, you will need to address routine issues such as what to wear. Will there be an opening session? What will your tone be? Why aren't you going to storm out at the first insulting offer? Share your strategy and theme and ask the client for additional input. Talk about the opposing party's mediation statement and ask for your client's thoughts. Most importantly, discuss your client's goals, whether they are realistic and how they might be achieved at mediation.

6. Carefully Prepare a Mediation Statement. In our experience, mediations are more productive when the mediator has had the opportunity to review and give thought to the parties' respective views of the case. Prepare a Mediation Statement to the mediator in advance of the mediation. In the Mediation Statement, emphasize your strong arguments, abandon or minimize your weak arguments so they do not become distractions. Also, what are the key documents that should be included? Mediation statements should attach copies of your key documents if it will enable the mediator to better understand your case. Avoid attaching unnecessary documents such as copies of invoices if you could easily reference the total in your Mediation Statement. Be clear and concise. Also, if there are issues or facts you need to bring to the mediator's attention that you do not want in the general brief, consider preparing a "pocket brief". Most of the time, however, you can simply discuss the matter you want to remain confidential with the mediator prior to mediation or during the mediation session.

7. Call the Mediator (and maybe Opposing Counsel). Prior to mediation, call the mediator, especially if you have never met him/her. This conversation provides the opportunity to give the mediator a "head up" on issues with client management and other issues you may have elected not to discuss in your Mediation Statement. For example, does your client have unrealistic expectations? Are you unsure how to handle a particular issue in the context of mediation? We have never had a mediator refuse to speak with us prior to mediation and most mediators we have worked with have been more than willing to talk through the foregoing. The key is to be candid – this is not the time for pride or posturing.

As you prepare for mediation, think about whether a joint session is appropriate for the case. Our experience is that clients generally do not want to be in the same room with the opposing party and opening sessions filled with "we're sorry for your loss" type of sentiments

that only solidify the client's emotions and are counterproductive. That being said, there are cases where a joint session may be productive such as when the parties' positions are not far apart, the emotion meter is low, etc. Therefore, we do not automatically reject the notion of a joint session. Regardless, you should communicate with the mediator and opposing counsel prior to mediation to discuss this issue.

8. Be Prepared to Go the Distance and Reach a Settlement. It is often impossible to predict how long a mediation will last. Mediations only scheduled for a half day frequently go beyond that time. If at all possible, be prepared to stay as long as needed to attempt to resolve a case, including clearing your calendar of any obligations after 5 p.m. During the mediation, avoid non-strategic extended breaks which slow the momentum of the session. Have lunch delivered and continue working. If a settlement is reached, do not leave the mediation without a signed Mediation Settlement Agreement. Although you may be tired and mentally exhausted, find the energy to focus on the all important task of carefully preparing the Mediation Settlement Agreement. Remember, this is the document that the Court will look to if there is a dispute as to what terms were agreed upon. Bring a template Mediation Settlement Agreement that has the caption and signature lines already set up in addition to the boilerplate clauses and releases on a thumb drive or on your laptop. You will be glad you did this, as it will save a significant amount of time preparing the Mediation Settlement Agreement at the end of the day.

9. Be Flexible, Patient and Creative. Mediation requires a lot of patience in addition to preparation. Opposing parties are also making strategic moves designed to send a message to your client. "Bottom line" offers are often not final. The initial offers are frequently way off target. Try not to react – you know they are coming and you should have prepared your client for them. Offers and counteroffers at mediation are frequently small and take time. Consider the mediator's advice, but do not be afraid to disagree with the mediator at times. During the breaks, talk to your client about where you are in the process and their perception of how things are going. Try to encourage the client to remain optimistic if there is still a potential to settle. However, always be mindful that the decision to settle at the end of the day belongs to the client. Be thoughtful of the words you choose when summarizing an offer for the client and the risks and fees/costs if the case continues. Sometimes it is necessary to continue a mediation to provide a party the opportunity to think about a settlement offer. In that event, still get the terms that are on the table in writing and the agreed upon window to accept them. Also, think creatively. You will be surprised how often a case that seems to be purely about money settles with non-monetary agreements between the parties, such as an apology or payments directed to a charity rather than the plaintiff.

10. Post-Mediation Follow-Up. Finally, after mediation, call the mediator for constructive feedback on how you handled the negotiations. Most of our mediators are experienced trial counsel and/or retired judges. Their observations and feedback will help you improve your skills for the next mediation. Then share what you've learned with your peers. Good luck at mediation!

Iurillo & Associates, P.A., located in St. Petersburg, is comprised of **Camille J. Iurillo**, Shareholder, **Gina M. Pellegrino**, Associate, and **Sabrina C. Beavens**, Associate. The primary

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