

Mediation Offices of Nancy E. Hudgins

San Francisco and Northern California Mediator, Special Master and Parenting Coordinator



Mediation Preparation For Lawyers

Nancy E. Hudgins
Mediator

www.hudginsmediation.com

neh@hudginsmediation.com

(415) 939-4614

18 Elements of Mediation Preparation

1. Start a file of past mediations
2. Develop a pre-mediation checklist
3. Listen to your clients
4. Draft an engaging mediation brief
5. Match the mediator to the case
6. Develop your BATNA's and WATNA's
7. Determine the zone of possible agreement
8. Show, don't tell
9. Role play

18 Elements of Mediation Preparation

10. Create value
11. Logroll: exploit your differences
12. Strategize for the joint session
13. Script your moves
14. Line up your negotiation strategies
15. Anticipate their negotiation strategies
16. Adjust your attitude: Go positive
17. Prepare for emotion
18. Design the mediation process

Start a File on Past Mediations

- Less than 2% of cases are tried, yet we spend tons of time preparing for trial
- Approach mediation in a disciplined way
- For each past mediation ask these questions:
 1. Did I select the right mediator for the case?
 2. Did I evaluate my BATNA and their BATNA?
 3. Did I calculate the zone of possible agreement?
 4. Did I take full advantage of the joint session?
 5. Did I have an effective game plan?
 6. Was surprised by the other side's posturing, facts or legal arguments?
 7. Did I work to create value?
 8. Which strategies were effective? Which were not?
 9. Was my client adequately prepared?
 10. Did my client feel the case was fully resolved?

Develop a Pre-Mediation Checklist

- I always like to have a plan. If I have a plan, I can work the plan. I am also less reactive and more focused when I have a plan.

1. Listen to your clients
2. Review the facts and the law
3. Gather documents
4. Calculate damages
5. Draft the mediation brief
6. Match the mediator to the case
7. Evaluate your BATNA and their BATNA
8. Determine the zone of possible agreement
9. Show, don't tell
10. Role play
11. Create value
12. Exploit your differences
13. Strategize for the joint session
14. Prepare your client
15. Plan for emotion
16. Script your moves
17. Line up your negotiation strategies
18. Anticipate their negotiation strategies
19. Adjust your attitude
20. Design the mediation process

Listen to Your Clients

- You'll want to act on your clients wishes, as opposed to your assumptions. The ABA suggests we ask our clients: ***What is really important to you about this case and why?***
- Then you listen by giving your full attention, and
 - Suspending your own thoughts and feelings
 - Refraining from judging
 - Asking, “Tell me more.”
 - Checking to make sure you understand

Drafting an Engaging Mediation Brief

- The most important reader of your brief is the other side's *clients*.
- Your brief is an *opportunity* to speak directly to the other side's clients
- Engage the other side, and the mediator, with your brief
- Use a conversational tone; drop the legalese
- Consider inserting pictures within the brief
- Attach documents you want the other side's clients to see

Match the Mediator to the Case

- Cases are different. Mediators are different.
- Your client and their client are different.
- Do you need a *directive* mediator who will tell you, your client and the other side what to do?
- Do you need an *evaluative* mediator who has the trial experience to evaluate evidentiary issues, chances of success at trial and verdict ranges?
- Do you have a case where there may be an ongoing relationship? If so, do you need a *facilitative* mediator who will elicit and clarify underlying interests?
- Do you have a case with difficult people (the other lawyer, the other client, sometimes your client)? If so, you need an *empathetic* mediator who is trained to listen to and work with high conflict personalities.

Evaluate BATNA's and WATNA's

- What's your Best Alternative to a Negotiated Agreement?
 - Trial?
 - Summary judgment or narrowing of issues?
 - Limited discovery and then a return to mediation?
- What's your Worst Alternative to a Negotiated Agreement?
 - Trial?
 - Summary judgment?
 - Your client's loss of a relationship?
 - Further waste of psychological/financial resources?
- What is the other side's BATNA or WATNA?

Determine the Zone of Possible Agreement

- In the vernacular:
 - the same ballpark
 - the same zip code
 - sometimes, the same planet!
- Determine your reservation point, that number at which you will walk away
- Determine their reservation point
- Devise a strategy to claim as much value in your intersecting ZOPA's as possible

Show, Don't Tell

- What works at trial works at mediations, too
- Visual aids can be more dramatic than you can
- Consider:
 - Foam boards
 - PowerPoint slides
 - Video graphics
 - Charts and graphs
 - Distributables—something to hand the other side

Role Play

- I may lose you here, but I ask you to consider grabbing a colleague or friend and role playing your next negotiation
- Fill them in on the case, then ask them to listen to your arguments and come up with the other side's best arguments
- Then go a step further: you take on the other side's case and ask your client to listen to you
- If you begin to understand their view and the emotions behind them, the steps to resolution may become more apparent

Create Value

- Negotiation does not have to be a zero sum game— whatever you gain, I lose
- Even if the case appears to only be about money, consider:
 - Making an apology
 - Using of a portion of the settlement funds for an altruistic or meaningful tribute
 - Surfacing interests that have different value to your side and the other side that can be swapped so that each gets more of what they want

Logroll: Exploit Your Differences

- People care about the issues in a mediation, but, their passion is not equal on every issue
- Each side may have:
 - Different priorities
 - Different time preferences
 - Different risk assessments
 - Different risk tolerances
 - Different future expectations
- Ask questions to investigate differences and then swap them to your advantage

Strategize for the Joint Session

- The value of joint session is the ***opportunity*** to hear directly and speak directly to the other side's clients. Take advantage of it!
- Ask the other side to speak first. Listen as fully as if you were listening to your own client.
- When it's your turn to speak, speak directly to the other side's client.
- Educate your clients that the warrior mode is not conducive to productive mediations. Warn them that you plan to be collegial, cordial and collaborative. They'll appreciate your versatility.

Script Your Moves

- Bill Walsh is famous for the innovation of scripting the first 25 plays of the game in practice the week before. He believed that these decisions were best made before entering the *tension*, *stress* and *emotion* of the game. (The italicized words are his.)
- So, too, with mediations. Scripting your moves ahead of time can enhance your ability at the mediation to stay in the game and not get side-tracked from your settlement objectives.
- Of course, Walsh, and you, can make changes as the circumstances dictate.

Line Up Your Negotiation Strategies

- As part of your negotiation game plan, consider these strategies:
 - **Aspire higher (or lower):** 10-20%; studies show you'll have better outcomes
 - **Decide what to disclose:** be strategic about how much and when
 - **Decide which questions to ask:** Why is an issue problematic? Why not? What if?
 - **Decide what to concede (and when):** They may even be small points. Concessions beget concessions. Ask for concessions in return.

Anticipate the Other Side's Strategies

- Think ahead of time about what the other side might do and how to parry their thrusts
- Three suggestions:
 - **Be prepared.** Do your due diligence about the other lawyer and the other party, as well as historical settlement values for your type of case and venue
 - **Act prepared.** Hey, we all get busy. If you haven't had time to adequately prepare, at least act prepared.
 - **Prepare to re-frame.** If the other side is stuck in the past, change the frame to the future. If the other side is being positional, change the frame from positions to problem-solving. If the other side is thinking about loss, change the frame to gain.

Adjust Your Attitude: Go Positive!

- Studies show that negotiators who enter negotiations in a positive frame of mind have better negotiated outcomes.
- Be optimistic that the case will settle.
- Effective negotiators listen to, and often out-listen, the other side. They accentuate the positive. They look for common ground. They talk about interests, not positions. They figure out ways to create and claim value for their clients.

Prepare For Emotion: Your Client's...and Yours

- Strong emotions come up in every mediation
- Just doing these 3 things will help the emotions dissipate faster in the moment
 - Know they will arise and be aware when they do
 - Name them, silently to yourself
 - Empathize with your clients when they are emotional
- Try these 3 strategies
 - Breathe
 - Take a walk around the building or around the block
 - See the negotiation from a distance, as a fly on the wall

Design the Mediation Process

- Consider a pre-mediation call with the mediator and/or the other side to discuss:
 - Preparedness: Is there something the other side can give you to help you formulate your mediation goals? Is there something they need from you? Is there a legal sticking point that briefing could help illuminate?
 - Process: Would a joint session be helpful? Would you like the mediator to listen carefully to your client? To the other side's client? Would meeting together at the end help the parties begin to mend a relationship?

Further Reading on Negotiation

- I consulted these texts in preparing this presentation. They are accessible to read and refreshingly lacking in jargon.
- Babcock & Laschever, Ask for It (2008)
- Cialdini, Influence: The Psychology of Persuasion (2006)
- Craver, The Intelligent Negotiator (2002)
- Fisher & Ury, Getting to Yes (1981)
- Fisher & Shapiro, Beyond Reason (2005)
- Malhotra & Bazerman, Negotiation Genius (2007)
- Ury, Getting Past No (1993)
- *And there's also my blog: www.hudginsmediation.com/blog, where I offer tips and strategies on negotiation and mediation*

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I hope you'll connect with me:



Hudgins Mediation



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