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## Beyond the Courtroom: Embracing Mediation Advocacy

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Conflicts are inevitable, but litigation is not. Because mediation is designed to avoid expensive and slow litigation, parties (including those who spend much of their time as litigators) should take a different approach to advocacy.

The goal of mediation is not to conquer the other side, but to persuade them to accept a settlement voluntarily. While it is useful to convince them of the strength of your case, an overly aggressive, attacking approach can hurt more than it helps. Instead, mediation advocacy should be both firm and collaborative.

### Pre-mediation Communications

Good advocacy starts before mediation begins. While private communications with a judge are forbidden before trial, they are encouraged with a mediator. A one-on-one telephone conversation with the mediator can be invaluable in describing the case, prior negotiations, barriers to settlement and ideas for overcoming them. Devote time to this part of the process, as first impressions are important. You want the mediator to understand your case and your settlement goals, and you want to build a relationship based on trust. Many mediators will also request a written submission to further these purposes. Prepare your clients for mediation (if you are a client, ensure you are prepared). If anyone is new to the process, explain what will happen. Consider who will speak, what topics they will address and what they will say.

### Opening Mediation Sessions

While opening statements by each party were once common in mediation, they are now increasingly rare. Experience has shown that they often inflame more than persuade. The parties generally already know each other's arguments, and

committing to them again in a formal setting tends to harden positions rather than establish a tone of productive compromise. Thus, most mediators now convene the parties in a joint session only to welcome everyone, describe the agenda and discuss general ground rules.

After that, mediation typically consists of shuttle diplomacy, where the mediator travels between private caucuses with each party.

If you find yourself in a mediation with an initial joint session, gather information as you would in a deposition, don't just argue as if you were in a courtroom. Learn everything you can about the other side and their settlement goals. When they speak, look for clues for nonmonetary interests that may be worth more to them than they will cost your client. When you speak, watch their body language to identify issues that seem to upset them, and notice when they lean in with more interest. To be sure, you want to convey that your case is strong and that you will be formidable adversaries in court. But unlike court, mediation is about getting your clients' needs met by reaching an agreement the other side is willing to sign because they believe it meets their needs as well.

### Private Mediation Caucuses

In private caucuses, leverage the unique features of mediation to advance your goals. Explain your interests thoroughly so the mediator knows exactly what you want. The mediator's job is to understand what both sides need in order to achieve it, so make this as easy as possible.



Generate options that enhance value for both sides. In a case focused on money, consider structured payment approaches with different time horizons, as well as mechanisms that allocate financial risk to parties better situated to accept it. In a case with nonmonetary interests, brainstorm with the mediator to find creative approaches. Option generation is part of mediators' training and experience. They can be ingenious and resourceful, and they have a unique perspective on the case because they hear both sides' views in the private caucuses.

Arm the mediator with arguments to use against the other side to lower their expectations. Your arguments will be more effective if they come from the mediator, as the other side sees you as biased and the mediator as neutral. Learn from how the mediator describes the other side's arguments to you, which can be invaluable in objectively assessing the case.

Pay attention to confidentiality rules. Mediators want you to speak candidly with them and will honor a request to keep something confidential. Because mediations can be long and can include many issues, it is a good practice at the end of a private caucus to remind the mediator of anything sensitive that you do not want the other side to hear.

### Mediation Bargaining Tactics

In addition to expanding the settlement pie, parties also want to focus on getting as large a piece for themselves as they can. Tactics begin with the opening offer. Making the first offer permits a party to anchor with a number that can set the tone for the negotiation. Research shows that a reasonably aggressive opening can improve the final result.

At the same time, making the opening offer carries risks. Starting too high may insult the other side, and going too low may concede more than is necessary. Waiting for the other side to begin the bargaining avoids these problems, gathers information and allows setting the negotiation midpoint. Research also shows that there can be a tendency for parties to split the difference between offers, and the second offer establishes this midpoint.

Because the decision on whether to make the first offer has both benefits and drawbacks, it should be tailored to each case, depending on the issues and the parties involved. In all cases, it is useful to bolster your offer with objective criteria that support its legitimacy and fairness.

At the end of the process, there can be a focus on negotiation bottom lines, which introduces its own risks. Experienced mediation participants can be wary of disclosing

their bottom line to the other side, because parties have different perspectives on the finality of a so-called "final" offer. The other side may treat it as just another offer and demand further concessions. Bottom lines can also change over the course of a mediation as new information is learned. Thus, it can be better to speak of negotiation goals rather than inviolable bottom lines.

### Impasse

Mediation can succeed even if it appears to be headed for an impasse. Be patient. Use the mediator as a resource to suggest options for moving forward. Consider shifting from private caucuses to a joint session, or vice versa. Change the cast by bringing in new negotiators or client representatives with fresh eyes and ears. Reduce the bargaining range by making a conditional offer to move to \$X if the other side agrees to move to \$Y. Ask the mediator to make a settlement proposal. If necessary, adjourn and reschedule for a later date. Recognize that the vast majority of cases will eventually settle before trial.

### Finalizing a Settlement

If you reach a deal, formalize it during the mediation. This will help to avoid the phenomenon of settler's remorse, which can unravel the agreement later. Draft a short agreement in principle with the mediator, and have both sides sign it before the process concludes.

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