

AS A PERSON THINKETH: PREPARING FOR MEDIATION SUBSTANTIVELY, EMOTIONALLY AND ATTITUDINALLY

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“The greatest discovery of my generation is that a human being can alter his or her life by altering his or her attitudes of mind, that literally feeling differently will allow us to think differently about any given situation.”

- William James

We begin with an essential question:

What might the legal profession do (or not do) to increase party satisfaction with the mediation process -- whether or not parties reach settlement?

As practicing mediators and teachers of alternate dispute resolution, we’re often asked about the “secret sauce” needed for mediation success. Experience has taught us time and again that the prospect of reaching a mutually acceptable outcome through mediated settlement discussions primarily depends on two key variables: (i) pre-mediation *preparation*... substantively, emotionally and “attitudinally”; and (ii) the willingness of the parties to work together *cooperatively*, rather than adversarially.

None other than acclaimed essayist and philosopher Henry David Thoreaux said that, throughout life, people should seek to “*Simplify. Simplify.*” When it comes to mediation, a similar admonition applies: We say people...parties, counsel, and mediators alike, would do well to “*Prepare. Prepare.*”

To be sure, preparation and cooperation do not come easy for most. People seem to be hard wired for competition when they’re embroiled in conflict. We get our dander up. The “fight or flight” response takes hold. We worry about getting what we perceive to be ours and in not getting “dissed” by those we perceive to be our opponents.

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Cooperation requires as much attitude adjustment as it does substantive preparation. This article will explore ways in which disputants might set the stage for a more cooperative, and less competitive, mediation experience through mindful, purposeful *preparation...* substantively, emotionally and attitudinally. Each area of preparation is necessary and as important as the other.

The tips that follow we believe to be applicable to parties, counsel, and other mediation participants/stakeholders with equal effect.

1. *Consider Whether You Have a Dispute, a Conflict, or Both.*

The terms *dispute* and *conflict* are commonly used interchangeably, but it is very helpful when preparing for mediation to make a clear distinction between the two. A dispute is an argument or debate over contending views, positions, or interests and is related to rights and responsibilities. A conflict is discord or strife resulting in a severance of friendly relations. If you have a dispute, the outcome you're likely seeking is resolution of the issues. If you have a conflict, the outcome you seek centers on reconciliation of the relationship. If you have both, you need to prepare for both resolution and reconciliation.

2. *Understand Your Interests and Create Options for Meeting Them.*

One of the most important things that you can do to prepare for mediation is to know what are your needs and interests. Before you can identify your interests, you have to separate them from your positions (*i.e.*, proposed solutions). An interest is what you want to gain from mediation. It is that which must be satisfied in order for you to say "yes" to any proposal, counter-proposal or settlement offer. A position, on the other hand, is how you expect an interest to be met.

When assessing what are your (and the other party's) interests, ask yourself: What are my core needs? Concerns? Fears? Motivations? Aspirations? If you cannot give coherent expression to these variables, then you've probably not thought long and hard enough about your interests and the underlying drivers to why you're pursuing mediation in the first instance. Knowing and being able to express your interests is foundational to one's objective assessment of alternatives to a mediated settlement.

While your interests may have many ways to be met, any single position prescribes only one of those ways. Take time well in advance

of the mediation to intentionally consider your interests and needs... and prepare yourself to adjust them as the mediation process unfolds. Then spend some earnest time thinking about the various ways in which your needs and interests might be satisfied. This will help you to be open and flexible in finding solutions to meet your needs and increase your chances of arriving at an outcome that also is acceptable to the other party.

When thinking of various options that might appeal to your needs and interests, do be mindful of the fact that “options” *don’t require a commitment or a decision* when under initial consideration. Rather, an option is just one possibility that could lead to a workable agreement or part of an agreement. People often shut down creative thinking and bring ‘mediation momentum’ to a grinding halt because they shoot down options much too quickly. Again, options don’t require a commitment or a decision merely to be considered and further explored. They’re just ideas that could lead to an agreement or an aspect of a workable agreement.

3. Consider Not Only Your Own Interests, But Those of Others as Well.

Mediation is about finding solutions that will work for all parties. It is a solution-making process. Thus, the greater your understanding of the other party’s feelings, perspectives, needs and interests the better you will be able to create a solution that everyone can agree upon. Take time before the mediation to try to understand what a solution would look like for the other party. Try to anticipate their essentials and non-essentials.

This will help you be more creative in developing options and finding solutions. Look for shared goals and interests that you both have. Many times parties come to mediation with very similar goals and interests, but have very different positions or ideas about how they should be met. When both parties begin to look for mutual ways that benefit the other, the mediation process becomes a powerful opportunity for resolution and reconciliation.

4. Know Your Essentials from Your Non-Essentials.

When trying to resolve a dispute or reconcile a conflict, it is crucial for you to know what is essential to you and what is not. The more honest you are in identifying the non-essentials the better off you will

be. Knowing your essentials and non-essentials will keep you on track and focused and prepare you to be flexible and creative in reaching an outcome acceptable to you and the other party. You will also find it helpful to spend time thinking through the *best* and *worst* outcomes that are possible should you not reach a mediated agreement.

5. *Acknowledge, But Manage, Your Emotions.*

“Emotions” are an integral part of our humanity; therefore, it is unwise to disregard the psychological and emotional needs of parties/participants when engaged in mediated problem solving. Simply put, mediation is not just about the “law and the facts,” but, most importantly, also about the PEOPLE! Mediators and counsel alike, with education and thoughtfulness, can be central to effectively navigating/managing potentially turbulent emotional waters at mediation.

We believe that putting people first... what they think, what they feel, what they need... as the predominant focus at mediation will enable participants to do the next indicated “right thing” at various points in the process, no matter the challenge. We should people before the positions, people before the “papers,” people before the procedures. Indeed, positions, papers and procedures exist to assist the people, not the other way around.

Emotions at mediation are inevitable. Every conflict has an emotional element invoking a psychological element. Successful mediations require sensitivity to psychological dynamics underlying how people think, feel, behave and arrive at decisions. Indeed, “impasse” at mediation is often caused by mismanaged negative emotions.

And, contentious legal disputes and conflicts can produce the strongest emotions... chief among them fear, anger, hurt and resentment! The emotional content of a controversy has the potential to bring out the best and worst in people. Negative emotions can cause people to become ineffective and unproductive when trying to seek solutions to problems.

Indeed, impasse at mediation almost always results from negative emotions. Hence, as you contend with your emotions, try to work through them as best you can prior to the mediation in order to minimize their becoming a stumbling block to resolution and/or reconciliation.

Preparing people mentally for mediation is important; they need to be primed early before the mediation session so that they may be

sensitized to the need for open-mindedness, flexibility and creativity. Emotions often drive poor mediation strategy (anchoring too high or low, demands for attorney fees or punitive damages, negative outbursts/ad hominem attacks, just to name a few)... the very antithesis to effective preparation!

Consequently, people need to get and stay focused on a common goal of achieving an objectively reasonable resolution (and, when desired, genuine reconciliation), not a one-sided, short-sighted “win.”

To maximize the opportunity for mediation success, both mediators and counsel alike should (i) become self-aware of their emotions and those of the parties/constituents they serve at mediation; (ii) help parties to appreciate the impact of their emotions on decision making and negotiated problem solving; and (iii) manage their own emotions (rather than to disregard them) and those of the people they serve toward constructive expression and productive ends in mediated problem solving.

6. Gather and Organize All Pertinent Information.

Prior to the mediation conference, you and the other party should gather all pertinent information sufficient to make informed decisions about options for resolution and/or reconciliation. If there is information you need from the other party, ask them for it. Likewise, if you receive a request for information from the other party, be generous and timely in giving it to them. It is common for the mediator to help with these informal information exchanges.

7. Some Final Thoughts.

Mediation is *hard work*...and there's just no way around this! The better *prepared* the parties are and the more willing they are to work together, the greater the possibility of a satisfactory outcome. Thorough preparation may take considerable time and reflection on your part, but the fruits of your preparation will be seen in the quality of your outcome. So, prepare early, prepare often, and prepare well!

No mediated settlement can be reached without you and the other party's consent. It is, therefore, imperative that everyone collaborate to craft a mutually acceptable outcome. You “win” only when the other party “wins.” Proceeding to mediation with this mindset will be extremely beneficial, greatly enhancing the likelihood of resolving the issues, reconciling relationships, or both. And this, we contend, can

yield more to the process than mere “settlement”; in fact, the participants will likely conclude the process with a greater sense of “satisfaction.” And what could be better than that?