WHY THE BEST MEDIATIONS START BEFORE YOU ENTER THE ROOM

by ROBYN E. FRICK

In litigation, attorneys are trained to prepare for everything—every argument, every exhibit, every witness. Yet, when it comes to mediation, proper preparation often takes a back seat. Overlooking this critical step can turn a valuable opportunity for resolution into a frustrating waste of time and money.

As a mediator, I see how preparation—or the lack of it—shapes outcomes. Attorneys who come in well-prepared not only guide their clients with confidence, but also maximize the chances of a productive, lasting resolution. This article explores how attorneys can better prepare themselves and their clients for mediation, drawing on practical strategies and insights from real-world practice.

What to Expect in Mediation

For many clients, mediation is unfamiliar territory. Taking time to explain what mediation is—and isn't—can alleviate anxiety and set the stage for productive discussions.

Mediation is not a mini-trial, nor is it a battle to be won. It is a confidential, non-adversarial process designed to help parties find common ground and reach a resolution that works for them. There's no judge, no ruling—just a skilled neutral helping parties explore options, clarify their goals, and identify solutions.

Clients should understand that there will be downtime as the mediator moves between rooms, and that emotional moments are normal. It's also important to clarify whether your client wants to actively participate in the discussion or prefers to observe unless directly asked to contribute. A clear understanding of roles creates a sense of control and collaboration from the start.

Emotions, Concerns, and Goals

Mediation isn't just about facts and numbers; it's about people. Clients arrive with hopes, fears, frustrations, and unresolved emotional energy. Attorneys should help clients identify their concerns and goals before the session begins.

A mentor of mine (whose name I will disclose if you reach out to me) applied a "letter to Santa" (or Hanukkah Harry or other fictional gift-giving character) approach with clients. The purpose was to identify the client's driving forces without setting expectations. For instance, ask your client, "Money aside, what would you want to resolve this lawsuit? What do you think the other side would ask from Santa?" This type of discussion can reveal deeper needs that aren't always evident on the surface. Often, there are valuable components of a resolution that only clients can identify.

This approach also allows you to manage expectations—particularly if your client views settlement as a concession or expects a trial-like "win." When clients understand that being heard, respected, and involved in the outcome is a victory in itself, they become more open to negotiation and resolution.

Preparing for Mediation Day

Showing up prepared isn't just about being on time—it's about being mentally and strategically ready to advocate, listen, and adapt.

Thorough preparation also includes ensuring that key decision-makers are present. Important revelations often arise during mediation—some with significant emotional or financial impact—and only by being directly involved can decision-makers fully appreciate their weight.

Counsel should know the case inside and out. Even in early mediations, conduct as thorough an investigation as possible and consider a limited exchange of information with the other side solely for mediation purposes. Be ready to reference key evidence and anticipate opposing arguments. Just as importantly, identify and acknowledge the weaknesses in your own case. Doing so demonstrates credibility and sets the stage for serious negotiation.

Have a strategy for opening demands and offers. Know where you can be flexible, what matters most to your client, and how to communicate that effectively. This builds trust and shows you're there to get a deal done.

Settling or Walking Away

Every mediation has a turning point—the moment where one side must decide whether to settle or hold firm. Too often, that decision is reactive and driven by emotion. That's why it's critical to engage in a risk-reward analysis beforehand.

For plaintiffs, this means calculating a realistic recovery based on damages, fees and costs, and trial uncertainty. For defendants, it means analyzing exposure—breaking down the claims, evaluating likely damages, and weighing the cost of ongoing legal expenses.

The "bottom-line number" should not be aspirational; it should be based on the facts, the law, and outcomes in similar cases. And equally important, both sides should consider the non-financial costs of litigation—stress, time, relationships, and reputation.

Helping clients visualize the months (or years) of discovery, experts, and court delays ahead can shift the focus toward resolution. When clients understand the full picture, they're more willing to engage in meaningful negotiation.

Crafting Creative Solutions

One of the key benefits of mediation is the ability to design solutions the courtroom can't offer. Mediation is not confined to win-lose outcomes—it's a chance to build agreements that reflect what the parties actually value. Settlements aren't limited to dollar amounts. They can include confidentiality provisions, letters of reference, apologies, future business terms, or structured payment arrangements.

Clients are often surprised—and relieved—when they realize resolution doesn't have to mean surrender. Creativity, combined with persistence, opens the door to agreements that feel more personalized, dignified, and fair. That's why it's also smart to come with a draft settlement agreement in hand. When progress is made, you want to capture it before fatigue or second-guessing erodes the deal.

Choosing the Right Mediator

Mediation is a process shaped by the people in the room. Just as you wouldn't go to trial without knowing your evidence, you shouldn't mediate with someone who isn't prepared, experienced, or engaged.

A good mediator does more than shuttle numbers between rooms—they create an atmosphere of respect, insight, and strategic progress. They understand the law, but they also understand people.

When evaluating a mediator, consider a few essential questions: Will they take the time to prepare and be familiar with the issues? Do they understand both the legal and emotional context of the case? Do they genuinely care about helping the parties find resolution? Do they have the skills to manage conflict, lower tension, and keep discussions moving productively? Will they persist even when settlement seems out of reach?

Look for a mediator who has been in your shoes—who understands litigation, client dynamics, and the practical pressures attorneys face. A sense of humor also isn't a bad thing, especially because you will be spending considerable time with this person during the session. A mediator who knows how to build trust with both parties and counsel can make the difference between a session that stalls and one that succeeds.

Final Thoughts: Make it Count

Mediation is one of the most effective tools in our legal system—not just because it resolves disputes, but because it empowers people to take control of their conflicts and move forward. But its success isn't accidental. It takes thoughtful preparation, emotional awareness, and strategic execution.

Attorneys who prepare their clients with these principles in mind elevate the entire process. They make better use of their time, create more value for their clients, and build reputations as problem-solvers. They also get more business.

The next time you schedule a mediation, approach it as the meaningful opportunity it is—one that, when thoughtfully handled, can deliver true resolution and closure.

Robyn E. Frick *is a full-time mediator with over 19 years of experience as a litigator representing both plaintiffs and defendants. She mediates business, employment, real estate, and personal injury disputes, bringing legal insight, emotional intelligence, and ego-free efficiency to every case. Robyn has also served extensively on court panels conducting mediations and settlement conferences. She can be reached at www.RobynFrickMediation.com or Robyn@RobynFrickMediation.com.*

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