

Client Information: Mediation

Introduction

Unlike litigation, you the contracting officer are directly involved in a mediation and will play a key role as a presenter of information, a negotiator, and a decision-maker. If you are not adequately prepared, you will not be able to effectively negotiate or make reasonable settlement evaluations during the mediation. Therefore, the opportunity to achieve the Government's objectives may be lost if you fail to properly prepare for the mediation.

You should meet with your counsel several times before the mediation to fully discuss the mediation process, your role and that of the lawyer, and issues such as format, procedure, demeanor, and dress. Your lawyer should outline the philosophy of mediation, so you can understand the operating environment. Finally, you should develop a negotiation strategy. This will be based on an analysis of the case and the full range of settlement possibilities, options if the case does not settle, and the goals and interests of both parties.

I. Understand the Mediation Process: You need to understand the process, “the rules of the game,” to avoid surprises during the mediation. Your lawyer should explain:

- What to expect in the room/facility
- The neutral role of the mediator
- The process: mediator opening statement, parties' opening statements, joint discussion, caucuses, etc.
- Confidentiality options in caucus
- Options to take breaks as needed
- Location of break-out room
- Who will be there
- The process for drawing up agreement
- Issues related to duration—what to do if time runs out and there is no agreement
- If a lawyer will not be present, discuss options for consulting with lawyer as mediation progresses

II. The Mediation Philosophy: You need to understand the *climate* in which you will be operating. You will bring a different outlook to a mediation than would be appropriate for testifying at court.

- Understand the purpose behind mediation—to explore all options for resolving the dispute more effectively than is likely to occur in litigation
- Attributes needed: patience, flexibility, creativity, problem-solving, cooperative attitude, listening, open-mindedness

- Anticipate there will be impasses. Next step is to try to work through them.
- Understand the need to adapt to changing circumstances as additional information comes forward and the mediator provides input.
- Remember the mediation does not have to end in agreement, but also consider what alternatives you'll have if you do not reach agreement.
- Be alert for the possibility of unpleasant exchanges, how to handle them.

III. The Negotiation Plan: Knowing the rules of the game and the operational climate is not enough for a mediation. What should you *do* once you are at a mediation? The game plan is your “negotiation plan.” Your lawyer will work this with you.

A. Initial Case Assessment. Where you go in the mediation depends on where you start from. You begin with a realistic evaluation of the merits of the dispute.

- What are the strengths and weaknesses of your case? Their case?
- Identify necessary information to evaluate your position and opponent's position.
- Determine what information or evidence might be useful or persuasive during the mediation.
- What new information or facts would alter your assessment of the case?

B. Assessment of Business Interests. No matter how good your case may be *legally*, you may have other interests besides having your lawyer litigate the case to a decision.

- What are the business or operational interests of the Government?
- Determine, if possible, the business or operational interests of the other side. Anything you can offer them that poses no problems for the Government?

C. Settlement Issues. After assessing the merits of the case and the parties' real interests, discuss and outline settlement options and alternatives.

- What is the Government's settlement range for this dispute? Don't just think money—what non-monetary proposals might the Government offer?
- What will happen if the parties cannot settle the dispute?
- What are the costs associated with not settling? (monetary, time, loss of focus, degradation of business relationship)
- What are the best and worst alternatives to settlement? This will help you decide whether to accept or reject a settlement offer.

D. Strategizing the Mediation. Although a mediation requires flexibility, an initial strategy should be developed. Just recognize you may need to adapt or abandon your initial approach, depending on what surfaces during the mediation.

- Determine who should take the lead role during the mediation. In making this decision, consider your ability to articulate positions, knowledge of the subject matter, and ability to negotiate persuasively. Your participation will also demonstrate how well you would perform as a witness in front of a judge.

- Remember that roles may shift during the mediation process, which is fine. Sticking rigidly with a pre-determined approach limits flexibility.
- Anticipate the expected negotiation style of the other side and determine the most effective way to negotiate.
- Develop an opening position and a probable final position. Prepare rationales to support negotiating positions.
- Consider several hypothetical negotiation scenarios and evaluate the probable outcomes of each. Develop possible counter-offers and responses.

E. Practical Issues. You don't want practical problems tripping you up at the last minute. Try to think about these in advance.

- Are any approval authorities needed? If so, how can you and your lawyer communicate quickly with them? Their schedules? Cell phones?
- Are any funding issues a possible obstacle to accepting an offer? Do you need to condition the settlement on the availability of funds or the coordination of the Comptroller?
- If money is likely to change hands as part of a settlement, be sure you know the right party to issue a check to (e.g., watch assignment of claims)
- Prepare for time constraints. Decisions may need to be made in uncomfortably short time periods (though no final decision can be made until all approvals needed are received).
- Keep your schedule free from unnecessary disruptions during the mediation.

F. Post-Mediation Review Session. Consider having some time after the mediation to talk with your lawyer about the mediation. Give input about your opinions of the process and the outcome, suggestions for future mediations, things you would have wanted to know that you didn't. Did you like the mediator? Was the presence of counsel helpful? These and other points are part of a helpful mediation "debriefing."

Conclusion

When preparing for the mediation, you need to have enough information to confidently negotiate and evaluate counter proposals. Adequate preparation is the best tool you can have.

Checklist of Questions to Consider

- ❑ What are the facts in this dispute? Are we missing any key documents or information? Do the parties disagree over any facts?
- ❑ What are the Government's business needs?
- ❑ What are your goals for this mediation? What is the most important? What is the least important?
- ❑ What do you believe are the strengths of your case?
- ❑ What do you believe are the weaknesses of your case?
- ❑ What do you believe are the strengths and weaknesses of your opponent's case?
- ❑ What are your settlement expectations?
- ❑ What compromises will you consider to reach a negotiated settlement?
- ❑ What terms or conditions are you unwilling to consider under any circumstances?
- ❑ What do you believe are the other side's interests in this dispute? What do you believe is their most important objective?
- ❑ What is the opposing party's interests in a negotiated settlement?
- ❑ Are you interested in a quick resolution? Does the other side have an interest in a quick recovery? Why?
- ❑ Do you have an interest in preserving a continuing business relationship with the other side?
- ❑ Do you have any contracts with the opposing side, which are not the subject of this dispute?
- ❑ What are the obstacles to resolving this dispute?
- ❑ Do you believe that emotions or hostilities will impact settlement opportunities? If so, how can these be dealt with effectively?
- ❑ Are there any other parties whose participation would increase the likelihood of settlement?
- ❑ What concerns do you have about mediating this dispute?

- ❑ What role do you want to take with regard to negotiations during the mediation? Do you want to present the opening statement at the mediation?
- ❑ What new information or fact would alter your position or increase the likelihood of accepting the other side's offer?
- ❑ In evaluating a proposed settlement, what information or advice would you need to feel confident enough to accept it?
- ❑ Are there any documents or information that must be provided before you would agree to a settlement?

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