

Judge Gail Tusan's Five Top Tips for Successful Mediations



By Hon. Gail S. Tusan, Senior Judge

1. Unpack the emotional barriers to consensus building early in the process.

Confidential breakout rooms provide the mediator with the opportunity early in the mediation to assess and work through a party's emotional barriers to reaching consensus or compromise.

The intimacy of breakout rooms facilitates candor and frankness between the mediator, the party and counsel. Trust and good rapport are built through the important work conducted in the breakout rooms. The mediator's ability to guide the parties toward settlement is enhanced by her active listening in private to disclosures and sentiments which if expressed during joint sessions or opening statements might prove fatal to a successful outcome.

2. Contribute to a professional decorum at all times in the virtual space.

It is easy to become overly relaxed and project an unprofessional image in virtual spaces. Regardless of whether you are participating in a mediation or hearing from home or office, position yourself in a stationery, quiet place, dress for success, fully engage and eliminate distractions, and prepare your client accordingly. Prepare your client and model yourself the same standards for professionalism as you would expect of the neutral.

3. Pre-mediation conferences are a cost-effective way to provide your neutral with case specific insight and background.

Pre-mediation calls set virtual mediations on a positive course and are time well spent by counsel with the mediator. Valuable mediation time is saved through conference calls between the mediator and each party's counsel held prior to the date of the mediation. Such calls provide counsel with the opportunity to school the mediator on the specifics of the case. The mediator should be informed about the procedural history of the case, prior efforts to settle, any outstanding offer or demand, the personalities involved, available financial resources and whatever else would inform the mediator as she prepares for the mediation.



4. Organize your discovery ahead of time in a shareable, electronic format.

Counsel should organize pertinent financial documents for purposes of sharing them during the mediation when questions arise. Ideally, the documents already will have been produced during an informal exchange of documents or formal discovery. Counsel should be prepared to "screen share" the documents to facilitate an "all eyes on" discussion of numbers. Often seeing written figures while being discussed removes the opportunity for vagueness and caginess revolving around critical numbers. "For Mediation Purposes Only" spreadsheets are extremely helpful to illustrate for the mediator the factual basis and/or rationale underlying settlement proposals.

5. Deliver your written offer/demand at least 24 hours prior to the mediation.

Too often precious time is wasted at the beginning of a mediation when parties insist that the other should be the first to put a number on the table or there is a dispute as to where things stood prior to the commencement of the mediation. Everyone needs to know the starting point for discussions. Unless the parties agree otherwise, the plaintiff should be prepared to initiate negotiations with a demand. Plaintiff should provide the opposing party with his/her/its current demand in writing prior to the mediation.

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Judge Tusan serves as a JAMS mediator and arbitrator in a variety of disputes, including commercial contracts, real estate, distributor/supplier agreements, family law, FLSA and employment, discrimination and civil rights issues. Learn more at jamsadr.com/tusan.