Chapter Six
Preparing Your Client for Mediation

Topics in this chapter include:
1. Explain the Mediation Process and Your Client’s Role
2. Explain How Your Role is Different than in Court
3. Re-Interview Your Client about Interests, Impediments, and Options
4. Review Needs for Information and Risks of Incomplete Discovery
5. Review Strengths and Weaknesses of Legal Case (Public BATNA)
6. Probe for Your Client’s Personal Benefits and Costs of Litigating (Personal BATNA)
7. Finalize Mediation Representation Plan
8. Prepare Your Client to Answer Likely Questions
9. Finalize Opening Statements
10. Checklist

The better you prepare your client for the first mediation session, the more comfortable your client will be in the session and the more confident she will be to make the inevitably difficult settlement decisions. You should prepare your client as suggested in this chapter regardless of the role that you expect to perform in the session. Most of this preparation will be useful whether you serve as a co-participant, silent advisor, dominant participant, or non-participant.

1. Explain the Mediation Process and Your Client’s Role

You may want to demystify the mediation process for your client. Your client may need a feel for the mediation setting and welcome a vivid account of what to expect. You should emphasize that mediation is a continuation of the negotiation process. Your client should understand that she will retain full control of what happens in the mediation. The mediator has no decisionmaking power; the mediator serves as a neutral to facilitate the process. No resolution can happen without your client’s approval. Moreover, no resolution can happen without the other party’s approval, which is why the other party is the primary audience, not the mediator.

Your client should understand that mediation is not an adversarial process. Instead, both sides will be collaborative, engaging in a problem-solving search for sensible and inventive solutions. The tone is not accusatory. Your client should be advised to be respectful, listen attentively, and show empathy. Your client may consider offering a sincere apology, if warranted. Your client should understand that the goal is not to “win”; it is to resolve the dispute.

Your client should be educated about the credentials of the mediator and what will likely happen in the first session. The session will consist of different stages from

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2. See Chapter 5.7 on “Select Your Primary Audience in the Mediation.”
openings, information gathering, and so forth toward conclusion. Your client should know the difference between joint sessions and caucuses, including the distinctive opportunities offered by caucusing. Your client should be aware of the typical techniques used by mediators such as the way mediators can act as a devil’s advocate, engage in reality testing, carry offers and counteroffers back and forth, and so forth. Your client is likely to appreciate seeing a videotape that demonstrates the key features of the process.

Your client should understand the extent to which what is said in the mediation session will be held in confidence. You should emphasize the degree to which anything said in the mediation session cannot be used later against your client in a legal proceeding. Be sure that your client is aware of the confidentiality limits. Your client should be told whether any information (if any) will be transmitted to the court. You also should carefully review with your client whether any particular information ought to be withheld or only disclosed in a caucus with the mediator. Your client should be advised that if she is unsure what to disclose, she should consult you privately.

Finally, your client should be reminded to be patient and open-minded. Your client should come prepared to reach impasses and to participate in lengthy and multiple sessions. Your client should be aware that even if the entire dispute is not resolved, mediation is still likely to result in settling some issues and narrowing the remaining areas of dispute.

2. Explain How Your Role Is Different Than in Court

You should explain to your client that you will perform a collaborative, problem-solving role in the mediation session instead of the familiar adversarial one typically observed in litigation. You might consider reviewing the distinctive differences covered in chapter 1 on negotiating. Otherwise, your client might lose confidence in you for not performing in the anticipated role of zealous adversarial advocate. Then, you may feel pressured to perform as your client expects even though that approach may not be the most effective one in the mediation session.

Re-Interview Your Client
1. Solidify substantive and process interests of your client.
2. Explore possible interests of other party.
3. Clarify likely impediments.
4. Prod your client to think about creative settlement options.

3. Re-Interview Your Client about Interests, Impediments, and Options

You should re-interview your client because a significant amount of time has probably elapsed between your initial interview and the upcoming first mediation session. New information may have surfaced. The personal circumstances of your client may have changed. Your client has had time to mull over what she wants. And, your client is now

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5 See Chapter 2.3 on stages of mediation.
4 See Chapter 5.11 on “Consider When to Caucus.”
5 See Chapter 2.4 on mediators’ techniques.
6 See Chapter 5.13 on confidentiality.
sharply focused and presumably ready to make hard decisions about how to handle the upcoming session.

In both the initial interview and the re-interview, the goals and techniques for interviewing are the same. You should re-interview your client to help her solidify her understanding of her interests as well as sort out the impediments that are likely to arise in the mediation session. You also should prod your client to envision creative monetary and non-monetary options for resolving the dispute. But, you should discourage your client from developing a firm bottom line. It is premature. Your client should go to the mediation session with an open mind.

a. Clarifying Interests and Impediments

When re-interviewing your client, you should assertively inquire about your client’s substantive interests—what your client really wants at the end of day. What your client says she wants may not be what she really wants. Applying the frequently cited Fisher-Ury dichotomy of “positions” versus “interests,” clients usually voice their “positions.” This common and narrow view of needs can miss what your client really wants to achieve in the mediation. Your client probably wants to satisfy her broader “interests”; the stated positions simply express one way to satisfy those interests.

Your client may not have thought carefully or clearly about her underlying interests. By pursuing this threshold inquiry, you are giving your client an opportunity to think more thoroughly about the interests that she wants advanced in the mediation session. It gives you an opportunity to ensure that you understand your client’s needs. Be sure to review how to interview your client about interests in chapter 3.2.

You also should explore with your client what might be the interests of the other party. Remember, the case cannot settle without the consent of the other party. If you learn about all the parties’ interests, you and your client will be better equipped to develop, assess, and propose solutions that might be acceptable to everyone at the table.

Finally, you should re-visit what your client thinks might be the obstacles to settlement. This is your last chance before the mediation session to be sure that you have a grasp of the likely impediments. You should inquire whether the impediments might be due to data, relationship, value, structural, or interest conflicts. Be sure to review how to interview your client about impediments in chapter 3.2.

b. Prodding Creative Solutions

During the re-interview, you also should prod your client to begin exploring options for settling the dispute. This is the occasion for you and your client to begin thinking outside the “legal box”; this is the occasion to be imaginative and inventive. Your discussion should not be limited to monetary solutions despite the fact that your client’s positions and legal claims may have been framed in monetary terms. Payment of

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7 See Chapter 3 on the initial client interview.
8 See Chapter 7.2(d)(iii) on how to handle your client’s bottom line in the session.
9 See, e.g., John W. Cooley, Mediation Advocacy Ch. 3.4 (1996); Dwight Golann, Mediating Legal Disputes—Effective Strategies for Lawyers and Mediators Ch. 3.2 (1996).
10 Roger Fisher Et Al., Getting to Yes—Negotiating Agreement Without Giving In Ch. 3 (2d ed. 1991).
money from one party to the other is not always the best or exclusive solution. You may be surprised by what you learn when you persist in exploring fresh ways to satisfy your client’s interests.\textsuperscript{12}

Your understanding of your client’s interests can be the launching pad for discovering more value and non-monetary solutions. Your client should be asked about sources of value, objective criteria, and non-monetary options, especially possibilities that a court cannot or is unlikely to order but could be included in a settlement agreement.\textsuperscript{13} In a surprisingly large number of cases, mediators have found that parties want more than money or something other than money. For instance, in an employment dispute, an employee’s interests in new challenges and dignity may be met by the employer changing the employee’s job responsibilities, providing her good references, or even offering an informal or published apology. If critical interests can be met with inventive, non-monetary solutions, the parties may become more flexible in resolving any remaining monetary issues.

\section*{4. Review Needs for Information and Risks of Incomplete Discovery}

You should review with your client the information that she needs before she is ready to engage seriously in the mediation session. Your client will have to make some difficult, if not painful judgments, about what information she requires short of full discovery. She needs to contemplate settling the dispute without a complete understanding of everything that happened in the case.

You should discuss with your client the risks and benefits of settling before completing full discovery. Your client must weigh the distressing possibility that more discovery might have unearthed more valuable information that might have resulted in a more favorable settlement. This risk shrinks as discovery increases. Of course, more discovery increases the risk of the other party unearthing information damaging to your client. Other benefits of less discovery and early settlement include saving time and money, reducing the acrimony and angst inherent in the adversarial discovery process, and increasing the likelihood of salvaging the personal or professional relationship between the parties.

\section*{5. Review Strengths and Weaknesses of Legal Case (Public BATNA)\textsuperscript{14}}

You should engage your client in a brutally frank discussion about the strengths and weaknesses of her legal case. Your discussion should be thorough and include a candid assessment of the probability of success in the adjudicatory forum, the likely outcome, and the cost of getting there. This decision-tree-type analysis\textsuperscript{15} will give your client a rational reference point against which to judge whether settling may be more or less attractive than adjudicating. Such an analysis will avoid the common and frustrating

\textsuperscript{12} Fisher, \textit{supra} note 10, at 42.  
\textsuperscript{13} See Chapter 1.3 on preparing for a problem-solving negotiation. Techniques are suggested for identifying sources of objective criteria and value.  
\textsuperscript{14} Fisher, \textit{supra} note 10, at ch. 6 (The BATNA is the Best Alternative to a Negotiated Agreement. The BATNA is the best alternative to settling the dispute or what happens to the party if the party does not settle the dispute. In legal cases, the BATNA is usually what would happen in court.).  
\textsuperscript{15} For a full discussion of the use of decision trees, see Appendix A.
obstacle that arises when your client thinks going to court is more attractive than it really is.

This discussion will not only prepare your client to answer potential questions in the mediation session, it also will prepare your client to hear your likely answers to questions about the legal case, answers that might otherwise surprise and upset your client if heard for the first time in the session.

6. Probe for Your Client’s Personal Benefits and Costs of Litigating (Personal BATNA)

You should help your client identify her personal BATNA—the benefits and costs of litigating that are personal to her and that she is uniquely qualified to identify and appraise. By combining the value of your client’s personal BATNA with the value of the public BATNA, your client will learn how attractive going to court really is as compared to any settlement offer.

For example, only your client would be able to figure out how much she would be willing to give up to settle and salvage a continuing relationship with the other side. Only your client would be in a position to estimate, for instance, that she would be willing to accept $10,000 less than the value of her public BATNA (the benefit of going to court) if she could settle the case and save the relationship. Her personal cost of litigating, the cost of her personal BATNA, would be $10,000. Therefore, a settlement offer that is $10,000 less than the likely outcome in court would be attractive.

Only your client would be able to assess how much she would be willing to give up to go to court in an effort to establish a precedent or to be vindicated. Only she would be able to estimate that she would be willing to achieve in court $15,000 less than the value of her likely public BATNA if she could secure the personal benefit of being vindicated, for instance. To gain her personal benefit of litigating, which is the value of her personal BATNA, she would be willing to sacrifice $15,000 in court. Therefore, a settlement offer that is $15,000 more than the likely judicial outcome would be attractive.

How to probe for your client’s specific personal benefits and costs is explained in the decision-tree plus appendix.16

7. Finalize Mediation Representation Plan

You should finish developing your representation plan with your client. The plan consists of a strategy for advancing the parties’ interests and overcoming any impediments.17 Your plan may need to be refined after you re-interview your client about interests, impediments, opportunities for expanding value, objective criteria for resolving distributive issues, and creative possibilities for settlement. As already discussed,18 your plan will shape the tone and content of your briefing paper, opening statements, what is said during the joint sessions and caucuses, and the direction of any settlement discussions. However, your plan should not rigidly precondition what you and your client do. The plan should be flexible enough to accommodate new information, challenges to key assumptions, and spontaneous, creative new possibilities for resolution. In other words, you and your client should implement the plan with an open mind.

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16 See Appendix A on Decision-Tree Plus Analysis, Section 3.
17 See Chapter 5.1 on preparing a representation plan.
18 See Chapter 5.1 on preparing your case for the mediation session.
8. Prepare Your Client to Answer Likely Questions

You should review with your client the questions that she is likely to be asked by the mediator, other party, or other attorney.\(^{19}\) This preview gives your client an opportunity to prepare productive answers that comport with a problem-solving approach as well as an opportunity to guard against any surprising answers.

Possible questions that your client should be ready to answer:

[The story]
What happened?
What documents do you have to support your conclusions?
What witnesses will support your conclusions?

[Interest analysis and stimulate out-of-the box legal thinking]
What are your interests/goals/needs?
What do you think are the interests of the other party?
What do you want out of the mediation?
Do you have any new ideas for possible solutions?

[Evaluation of BATNA]
Are you familiar with any weaknesses in your legal case?
What do you think is the probability of your succeeding in court?
What do you think is the likely court outcome?
How much more time will it take to prepare your case for trial?
How long do you expect the trial to run?
What are the remaining approximate costs of getting ready for trial and the trial?
What are your options if there is no settlement?

[Diagnosing the impasses]
Why do you think you have been unable to settle the dispute?
What efforts have you already made to settle and why have they failed?

[Status of negotiations]
Do you have any offers still on the table? If so, what are they?
What is your bottom line?

9. Finalize Opening Statements

You should finish preparing the opening statements. You should resolve whether your client will present an opening statement, who will speak first, and how to divide the presentation of the story, BATNA, what your client wants, and what help you want from the mediator. You need to work through the tone and content of these statements and be sure that your client understands how they are different than opening statements in court.\(^{20}\)

You should advise your client that if she omits any important information in her opening statement, she will have a chance to supply the information later. You will elicit


\(^{20}\) See Chapter 5.10 on preparing opening statements, and Appendix E, “Sample Opening Statements.”
the information directly from her by posing follow-up questions. Because you want to keep your client engaged actively, you should resist the temptation to fill in missing facts yourself.

10. Checklist: Preparing Client

1. Explain mediation process to your client.
   □ a. Remind your client that mediation is a continuation of the negotiation process.
   □ b. Explain that it is a problem-solving process.
   □ c. Review stages of the mediation.
   □ d. Review techniques of mediators.
   □ e. Show a videotape of an actual mediation.
   □ f. Review the level of confidentiality.
   □ g. Determine whether any information should be withheld from the joint sessions or mediator.
   □ h. Advise your client to be patient and open-minded.

□ 2. Explain your different role in the mediation session.

3. Re-Interview your client.
   □ a. Clarify Interests
   □ b. Clarify Impediments
   □ c. Prod for Creative Solutions

□ 4. Review what essential information your client needs before the mediation session and the risks of incomplete discovery.

□ 5. Review strengths and weaknesses of the legal case (public BATNA).

□ 6. Probe for your client’s personal benefits and costs of litigating (personal BATNA).

□ 7. Finish developing your mediation representation plan.

□ 8. Prepare your client to answer likely questions.

□ 9. Finalize the opening statements.
   □ a. Will your client present a statement?
   □ b. How will you divide the presentation of the story, public and personal BATNAs, what your client wants, and what you want the mediator to do? (See Mediation Representation Plan, part 3.4.)
   □ c. Will your client speak first?