

SEVEN (SOMETIMES SURPRISING) FACTS ABOUT MEDIATION

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If you have ever been part of a lawsuit, you are probably aware that somewhere in the range of 95% of employment-related lawsuits are settled, dismissed, or otherwise resolved before trial. While some cases are resolved through direct negotiation between the lawyers, or through motions filed with the court, a significant number are resolved through mediation.

Mediation is, essentially, a formalized negotiation process with the assistance of an experienced lawyer, retired judge, or (in court-ordered mediations) a magistrate judge. The parties to a dispute hire the mediator (or, sometimes, are provided with a mediator by the court), and then the attorneys and one or more client representatives from each side meet with the mediator to try to work toward a resolution of the dispute. Many courts require parties to attempt to resolve their disputes through mediation before proceeding to trial.

Clients who have never participated in a mediation are sometimes surprised by the process – and occasionally worried about mediation before they understand what it will involve. Here are seven facts that are most frequently surprising to clients when we start preparing for mediation:

1. The mediator can't force you (or the other side) to do anything. A mediator's job is to help the parties resolve their dispute. Most mediators will point out the weaknesses in each side's case, and try to get each side to move toward the other side's position. Some mediators will give an opinion of what the case is "worth," but that evaluation is not binding or enforceable in any way – although it can be useful to get a neutral third party's view of the case.

2. You might not ever see the opposing party. Depending on the mediator and on the particular facts of the case, you may not even see the other party to the dispute during the mediation. Some mediators conduct a joint session for both sides at the outset, but many others – especially if there are emotional issues involved – do not.

3. There is a lot of waiting involved in a mediation. For most (or sometimes all) of the mediation, you and your attorney will be in one conference room, while the opposing party and the other attorney will be in another conference room. The mediator will spend time in each of those rooms, talking with the parties and their lawyers, listening to their positions, asking questions, and so on. Obviously, when the mediator is talking to the other side in a separate room, he or she is not talking to you. While you will undoubtedly have discussions with your attorney during these breaks, and may need to research facts, contact others at your company, or otherwise work toward resolving the case – you will likely have a fair bit of down time.

4. Most cases settle in the last hour of the scheduled mediation, or later. It is a near-universal rule that negotiations expand to fill the time allotted to them. If you are scheduled for a half day mediation, most often the parties will settle – if at all – just before the end of your half day; if a full day is scheduled, don't be surprised if the case settles at the very end of the day, or if everyone needs to stay late because negotiations are finally getting somewhere.

5. Sometimes settlement isn't the only purpose. While parties almost always go into mediation with the goal of resolving the dispute, that is not always the only goal, and a mediation that does not resolve the case is not necessarily unsuccessful. Sometimes mediation serves other purposes: it might allow the parties to agree on steps to be taken before further discussions will be productive; it might give the parties more information about their opponent's position; it might allow the parties to narrow the dispute, by eliminating some claims or some parties; or it might – although less often – confirm that the parties' positions are too far apart and too hardened to make further discussions useful.

6. Even if a mediation is unsuccessful, there may be further negotiations. Most mediators will follow up at some point – some sooner than others, some more diligently than others – on cases that do not settle. And your attorney may contact the other side or the mediator to try to continue discussions, or to find out what made negotiations break down (if it wasn't obvious). Even if the parties leave a mediation without any plan for further discussions, that doesn't mean that negotiations are over forever.

7. Every mediation is different. Your role will vary, depending on the facts of the case, the claims being brought, the personalities of the parties, attorneys, and mediator, and numerous other factors. At a minimum, your attorney needs you to show that

you (and your company) are taking the case seriously, and that you are an honest, trustworthy businessperson. Your attorney may also need you to provide information and answer questions from the mediator – or your attorney may need you to sit quietly while he or she discusses the case with the mediator. Follow the lead of your attorney – but don't hesitate to ask in advance if you aren't sure of your role.

Mediation gives you an opportunity to participate directly in efforts to resolve your lawsuit. Mediation can also put you in an unfamiliar, and potentially uncomfortable, situation. With some advance planning, you will be better prepared for the process and its ups and downs.

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