

# NEUTRALIZING THE IMPASSE: *The Mediator's Guide To Settlement*

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“NEUTRALIZING THE IMPASSE: The Mediator's Guide”

Level: Intermediate

CLE Credit for Florida Bar Members

CME Credit for Certified Mediators

# MEDIATION

## GOALS

- **Facilitate Negotiations**
  - **Avert Impasse**
- **Secure a Resolution**

# PRESENTATION

## GOALS

- **Expand Your Knowledge**
- **Improve Your Negotiating Skills**

# ADVANCED PREPARATION

“Give me six hours to chop down a tree and I will spend the first four sharpening the axe.”

Abraham Lincoln

BY FAILING TO PREPARE,  
YOU ARE PREPARING TO FAIL

*Benjamin Franklin*

BEFORE ANYTHING ELSE,  
PREPARATION IS THE KEY TO  
SUCCESS

ALEXANDER GRAHAM BELL

**“If your enemy is secure at all points, be prepared for him.”**

Sun Tzu, The Art of War



ARE YOU  
PREPARED?

- **Fact Investigation**
- **Identify Legal Issues**
- **Liability Analysis**  
(% likelihood of winning)
- **Valuation Analysis**  
(How much is at stake?)
- **Settlement Authority**  
(Decision Maker)  
(BATNA/WATNA)
- **Set Starting, Target, and Reservation Points**
- **Pre-Mediation Negotiations**  
(Offers, Demands, PFS/OJ)
- **Mediation Summaries**
  - Detail key facts and issues
  - Confidential or Not?



## **STRENGTHS and WEAKNESSES**

- **Fact Investigation**
- **Identify Legal Issues**
- **Liability Analysis**  
(% likelihood of winning)
- **Valuation Analysis**  
(How much is at stake?)

**PREPARATION**





## PREPARING for NEGOTIATIONS

- Settlement Authority  
(Decision Maker)  
(BATNA/WATNA)
- Set Starting, Target, and Reservation Points
- Pre-Mediation Negotiations  
(Offers, Demands, PFS/OJ)
- Mediation Summaries
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  - Confidential or Not?

# Prerequisites to Court-Ordered Mediation





## RULE 1.720

(b) **Appearance at Mediation.** Unless otherwise permitted by court order or stipulated by the parties in writing, a party is deemed to appear at a mediation conference if the following persons are physically present:

- (1) The party or a party representative having full authority to settle without further consultation; and
- (2) The party's counsel of record, if any; and
- (3) A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

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## RULE 1.720

### (d) Appearance by Public Entity.

If a party to mediation is a public entity [the] party shall be deemed to appear ... with full authority to negotiate ... and ... recommend settlement to the ... decision-making body of the entity.



# Certification of Authority

## RULE 1.720

- (e) **Certification of Authority.** Unless otherwise stipulated by the parties, each party, 10 days prior to appearing at a mediation conference, **shall file with the court and serve all parties a written notice** identifying the person or persons **who will be attending** the mediation conference as a party representative or as an insurance carrier representative, **and confirming that those persons have the authority** required by subdivision (b).



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# Sanctions for Failure to Appear

## RULE 1.720

- (f) **Sanctions for Failure to Appear.** If a party fails to appear at a duly noticed mediation conference without good cause, the court, upon motion, shall impose sanctions, including award of mediation fees, attorneys' fees, and costs, against the party failing to appear. The failure to file a confirmation of authority required under subdivision (e) above, or failure of the persons actually identified in the confirmation to appear at the mediation conference, shall create a rebuttable presumption of a failure to appear.





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## The Mediation Session

- Introductions
- Opening Statements (persuasive; not offensive)(listen!)
- Open Discussion of the Issues
- Caucuses
- Demands / Offers
- Settlement / Impasse / Continued Efforts
- Memorializing the Settlement



# Effective Negotiating Strategies



# Demonstrate Professionalism

- **Likeability**
  - Friendly
  - Professional
  - Empathetic
  - Positive
- **Balanced Perspective** (see both sides)
- **Active Listening** (be engaged)
- **Affirmation**
  - “Thanks for explaining it so clearly.”
  - “Thanks for listening so politely...”
- **Acknowledging Loss | Apology**



# Demonstrate Professionalism

## **NOTE: Puffing is Allowed**

Comment to Fla. R. Prof. Resp. 4-4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category ....”



## Establish Credibility

- **Clearly Outline Your Position**
- **Thoughtfully Address Objections**
- **Discover the Other Side's Motivations**
- **Present Sensible Offers**
- **Send Messages with Your Offers**
- **Back Up Your Moves with Facts and Law**





# Disclosing Weaknesses

## ■ **ACKNOWLEDGE**

(known or obvious weaknesses)

- Establishes credibility
- Neutralizes opposition's arguments

- or -

## ■ **WITHHOLD**

(undisclosed)

- No benefit to disclose to opponent
- Consider revealing to the mediator



# Revisit Expectations

- **Re-Assess Risk Tolerance**
- **Reframe Expectations**  
(BATNA and WATNA)
- **Brainstorm**
  - Closed Door
  - Mediator Guided
  - Open Session
- **Be Patient**  
(Negotiation takes time)



# ROADBLOCKS



# Identifying the Problem

- When to Negotiate
  - **Not too early**
    - ❖ fact/legal issues should be reasonably clear
  - **Not too late**
    - ❖ when legal fees eclipse damages
- Negotiating Style & Tactics
  - **Competitive** (Zero Sum)
  - **Cooperative** (Win-Win)

# Identifying the Problem

- Participant Expectations
- Participant Resistance
  - ☐ Attorney
  - ☐ Party
  - ☐ Other Participants
- Histrionics & Ultimatums





# Conquer Histrionics

## his·tri·on·ics

[histrē'änik]

NOUN

***histrionic*** (*singular noun*)

exaggerated dramatic behavior designed to attract attention.





# Conquer Histrionics

## his·tri·on·ics

- The Problem:

- ☐ **Bogus arguments** (no actual value)
- ☐ **Demanding free discovery under the guise of negotiations**
- ☐ **The Chest Beater**  
("I've never lost a case like this")



# Conquer Histrionics

## his·tri·on·ics

- The Problem:

- ☐ **Good Cop / Bad Cop**

One storms out; the other offers the “bottom line” which is really the target, not the reservation point

- ☐ **Unreasonable Moves**

- ☐ **Threats of Walking Out**

- ☐ **Presenting an Ultimatum**




# Conquer Histrionics

The Solution:

[1. Be patient.]

[2. Confront, if necessary.]



# Tactics to Avoid Impasse

## **Overcome the Lull**

Bring the parties together (snack or to talk)

## **Get Agreement on The Easy Stuff**

Release – Dismissal – Confidentiality

## **Brackets**

["If I go to ... will you go to ...?"]

## **Split the difference**

Only works if the parties are already close to agreement

Mediator  
Tactics

## High–Low

Agreement Contingent on External Factors  
*(e.g., outcome of appeal)*

**Final Offer** at Target or Reservation Amount  
*(Communicate a sense of urgency!)*

## Silver Bullet - The Mediator's Proposal

1. Acceptance at Mediation; or
2. Acceptance by Email Deadline  
(after the mediation conference)

Mediator  
Tactics

# BEYOND THE MEDIATION CONFERENCE

## KEEPING THE NEGOTIATIONS ACTIVE

### Mediator Tactics

- **Get a partial agreement** to settle rather than impasse at mediation
- **Continue Negotiations Beyond the Mediation Conference**
  - ❖ Resume in-person mediation
  - ❖ Mediator guided telephone, email, or video conferencing





# Memorializing the Settlement

## Parties

## Terms

Performance obligations and deadlines, including (but not limited to) who pays restitution and amount to be paid, who pays legal fees/costs, dismissal with prejudice, release, contingencies, deadlines, and confidentiality.

## Signatures

**Common  
Essentials  
to  
Settlement  
Documentation**

# Post-Mediation Requirements



# MEDIATION REPORT

## Florida Rules of Civil Procedure, Rule 1.730

### **Rule 1.730. COMPLETION OF MEDIATION**

- (a) No Agreement.** If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.
- (b) Agreement.** If a partial or final agreement is reached, it shall be reduced to writing and signed by the parties and their counsel, if any. The agreement shall be filed when required by law or with the parties' consent. A report of the agreement shall be submitted to the court or a stipulation of dismissal shall be filed. By stipulation of the parties, the agreement may be electronically or stenographically recorded. In such event, the transcript may be filed with the court. The mediator shall report the existence of the signed or transcribed agreement to the court without comment within 10 days thereof. No agreement under this rule shall be reported to the court except as provided herein.

# MEDIATION REPORT

## U.S. District Court, Middle District of Florida, Local Rule 9.06

### Rule 9.06 - **Mediation Report; Notice of Settlement; Judgment**

(a) **Mediation Report:** Within seven days following the conclusion of the mediation conference, the mediator shall file a Mediation Report indicating whether all required parties were present and had authority to settle the case. The report shall also indicate whether the case settled, was continued with the consent of the parties, or whether the mediator was forced to declare an impasse.

(b) **Notice of Settlement:** In the event that the parties reach an agreement to settle the case or claim, lead counsel shall promptly notify the Court of the settlement in accordance with Local Rule 3.08, and the Clerk shall enter judgment accordingly.

# MEDIATION REPORT

## U.S. District Court, Southern District of Florida, Local Rule 16.2

### Rule 16.2(f) **Mediation Report; Notice of Settlement; Judgment.**

(1) Mediation Report. Within seven (7) days following the mediation conference, the mediator shall provide the parties with a Mediation Report. If the mediator is an authorized user of the Court's electronic filing system (CM/ECF) then the mediator shall electronically file a Mediation Report. If the mediator is not an authorized CM/ECF user, the mediator shall either: (a) file the Mediation Report conventionally; or (b) with the consent of the parties, arrange for one of the parties to file a "Notice of Filing Mediator's Report," which shall attach the report as an exhibit.

(2) Notice of Settlement. In the event that the parties reach an agreement to settle the case or claim, counsel shall promptly notify the Court of the settlement pursuant to the requirements of S.D. Fla. L.R. 16.4.

# MEDIATION REPORT

## U.S. District Court, Northern District of Florida, Local Rule 16.2 / 16.3

### **Rule 16.2 Notice of a Settlement or Intent to Plead Guilty or Motion to Continue; Assessing Costs**

(A) Duty to Give Notice. Each attorney of record must ensure that the Court is notified immediately when:

(1) A civil case is settled

### **Rule 16.3 Mediation**

The Court may order the parties to mediate a civil case. The parties may agree to mediate a civil case even when the Court has not ordered them to do so. Mediation must be conducted in accordance with the Rules for Certified and Court-Appointed Mediators adopted by the Florida Supreme Court, except as otherwise ordered, but this sentence does not apply to a settlement conference—even if called “mediation”—conducted by a district or magistrate judge.



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General: 1.0

Ethics: .5