

*The Hard Road to Peace:
Mediation 2000*



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Top Ten Ways to Make Mediation Work for You

- Select the right mediator
- Design the process
- Prepare, prepare, prepare
- Structure the session
- Anticipate and overcome obstacles
- Use closure techniques
- Preserve the agreement
- Use mediation in multi-party disputes
- Understand the differences of mandatory mediation
- Institutionalize the process

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Top Ten Ways to Make Mediation Work for You

1. Selecting the right mediator

- Participate in the selection process
- Seek suitable experience and process skills
- Be wary of “The Indifferent Neutral”
- Select the mediator, not the program
- Retired judges and ADR professionals
- Avoid knee-jerk rejections: consider the benefits of the other side’s choice

Top Ten Ways to Make Mediation Work for You

2. Designing the process

- You own it: negotiate the process!
- Steer away from pre-mediation conditions
- Bear costs equally and share process ownership
- Optimize the process by understanding facilitative and evaluative methodologies
- Confidentiality? Use submissions to open the dialogue for pre-mediation strategic planning

Top Ten Ways to Make Mediation Work for You

3. Preparing...Preparing...Preparing

- Plan the presentation and decide on its tone
- Put yourself in the opponent's shoes
- Create a valuation and litigation risk analysis
- Have a clear view of desired outcomes
- Improve and know your “no-agreement” alternatives
- Acclimate the client on mediation format and bring the right players to the mediation

Top Ten Ways to Make Mediation Work for You



4. Structuring the session

- Pros and cons of the “pit bull” opening
- Let the clients speak
- Observe group dynamics and body language
- Assess the mediator before you share
- Use joint sessions and ex parte caucuses wisely
- Book the late flight and allow sufficient time to reach and finalize an agreement

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5. Overcoming obstacles of success
 - Rights versus interests
 - Recognize downsides
 - Manage personalities and egos: difficult lawyers, principals *and* mediators
 - Use small points to build broad consensus
 - Let the mediator deliver your idea as theirs
 - Take cues from the mediator

Top Ten Ways to Make Mediation Work for You



6. Using closure techniques

- Master the “end game”
- Build a golden bridge
- Look for mutual gain: trade-off and packages
- Allow the other side to give you what you need while letting them have the last word
- If you cannot close, take baby steps during the risky “hour of diminishing returns”

Top Ten Ways to Make Mediation Work for You

7. Preserving the agreement and follow up
 - Document salient settlement terms
 - Keep the mediator involved until “The End”
 - Arbitration clauses to temper buyer’s remorse
 - Confidentiality concerns
 - Understand local laws on enforcement of settlement agreements
 - End on a high note and a hand shake

Top Ten Ways to Make Mediation Work for You

8. Mediation in multi-party disputes

- Settle in bunches: identify which claims and parties will best serve as building blocks
- Consider “loop back” or processes mixed with adjudication, arbitration and mediation
- Limitations of mediation in class actions
- Bifurcating claims for mediation in multi-party, complex litigation

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9. Understand mandatory mediation

- Can a voluntary process be mandatory?
- Take full advantage of the jurisdiction's rules
- Negotiate use of alternative process if court program inadequate
- ENE is not a facilitative process
- Problems with strategic deference to judges
- Motion practice

Top Ten Ways to Make Mediation Work for You

10. Institutionalize the process

- Tailor to specific customer retention needs
- Wisdom of three-tiered ADR clauses
- Buy in: communicate, educate and train
- Design process to foster preventative and early conflict resolution
- Quantify results: metrics and benchmarking
- Make economic, sensible choices