

# Preparing for Mediation

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## SUMMARY

The costs of preparing and defending lawsuits and, more broadly, the human and emotional toll taken by litigation have caused many people to turn to mediation to resolve disputes. Taking a few steps to prepare for a timely mediation and the right choice of mediator will pay off in saved cost, time, and stress.

## IS MEDIATION SUITABLE FOR ALL DISPUTES?

Mediation, in principle, should be suitable for any civil dispute except for those involving issues of industrywide impact or that require a binding judgment that all can follow. Parties that reach a negotiated settlement cannot bind other parties. A potential participant must initially weigh these factors with the client when deciding whether to mediate. However, few disputes are not amenable to mediation.

## TIMING IS (ALMOST) EVERYTHING

The common wisdom is that mediation should occur sooner rather than later. If the preparation for a court hearing is mostly complete, the parties may have jettisoned a principal advantage of the mediation process: saving time, cost, and human resources.

## HOW TO CHOOSE THE MEDIATOR

**Who chooses?** There is an advantage in letting the opposing party pick the mediator as long as all parties are satisfied that the mediator is experienced, neutral, and effective. Opponents are more likely to take bad news from their own choice of mediator than from strangers.

**What sort of expertise?** Save under a few exceptional circumstances, most good advocates appreciate a mediator's knowledge in any specialty

the dispute requires. In the same way, if the dispute is going to court, most judges are generalists and will not have a detailed knowledge of the particular issues before the trial. It can be helpful for the mediator to have expertise in a particular technical area, although experience in the process of bringing parties together is more important.

**Are lawyers preferable to nonlawyers?** Most mediated disputes arise in a legal context. An evaluation or appreciation of the legal issues is often important, and integrating legal and factual issues can be difficult for nonlawyers. In addition, lawyers are generally acquainted with working within a process and can help formulate a mediation proposal that suits the needs of the parties.

**Are co-mediators advantageous?** This method can be appropriate in certain kinds of disputes. If the dispute involves difficult technical issues or a particular area of the law, one mediator (a technical expert or a judge or lawyer with expertise on the legal issue) can fill the knowledge base and the other can deal with the mediation process itself and with bringing the parties to agreement.

**What functions will the mediator serve?** Consider the purposes of the mediation. In addition to the factors mentioned above, the kind of mediator you choose depends on the role you would like him or her to serve. The primary roles of a mediator are facilitator, communicator, and evaluator.

*Facilitator.* If the purpose of the mediation is largely to ensure that the right people are sitting around the table in an organized process, the mediator's function is simply to organize and facilitate the process. This probably requires a mediator who is familiar with mediation but does not necessarily offer a great deal of experience.

*Communicator.* If the effective advocate believes that the client's message is not getting through to the other side, the advocate may conclude that the most vital function for the mediator is communication. The reception to bad news depends to some extent on the deliverer. Negative information is more likely to be heard and considered if it comes from someone who is

considered neutral. The mediator thus plays an important role in ensuring that the parties share and understand all vital information. This function probably requires the assistance of an experienced mediator.

*Evaluator.* One school of thought holds that mediators should not offer opinions or evaluations of the issues. Most experienced advocates, however, want and even require this exercise on the part of the mediator. A nonbinding and confidential discussion with a neutral third party can be extraordinarily helpful in evaluating the alternatives to settlement. The mediator serving this function should have sufficient experience and gravitas that his participation will be respected. The experienced mediator knows how to explore issues with the parties in a way that is helpful and will not compromise the position of the parties in front of one another.

## RESOURCES

### More Best Practices

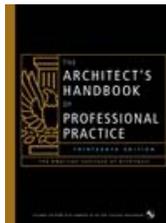
The following AIA Best Practices provide additional information related to this topic

- 17.04.07 Dealing with Aggressive Negotiators
- 09.03.02 Pros and Cons of Arbitration
- 09.03.03 Mediation for Conflict Resolution

### For More Information on This Topic

See also “Managing Disputes” by Frank Musica, Esq, Assoc. AIA, in *The Architect’s Handbook of Professional Practice*, 13th edition, Chapter 12, page 345.

See also the 14th edition of the *Handbook*, which can be ordered from the AIA Bookstore by calling 800-242-3837 (option 4) or by email at [bookstore@aia.org](mailto:bookstore@aia.org).



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### Key Terms

- Practice
- Legal management
- Disputes
- Mediation claims