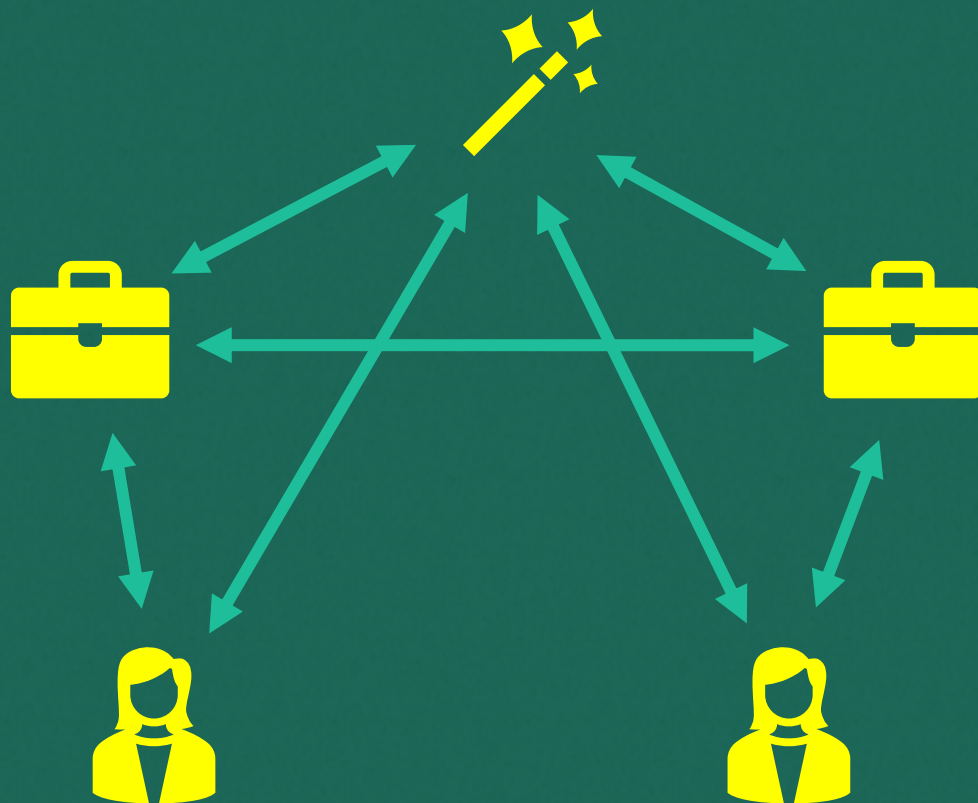


Mediation Preparation in Court-Connected Programs

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The role of the
court is to provide
structure



COURT RULES



FORMS



RESOURCES/INFORMATION



PROGRAM DESIGN

What is most
useful for
program
administrators?



Draft 1

- Weaknesses and strengths of both side's cases
- Proposed Settlements
- C. Dynamics and personalities of the parties, including potential power imbalance issues
- D. Underlying Business and Personal Interests
- E. Ways in which the mediator could be helpful
- F. Potential barriers to agreement
- G. Mediation process
- H. What documents should be exchanged during mediation

Comments: The purpose of the pre-session communications is twofold: (1) to assist attorneys in preparing for mediation and ensuring success in mediation and (2) to assist mediators in understanding the background of the case. Shared mediation statements may assist attorneys and the mediator in gaining mutual understanding of the status of the dispute.

Authors in "First Impressions: Drafting Effective Mediation Statements" recommended the use of pre-session phone calls instead of confidential briefs due to feasibility, since it is often less expensive for an attorney to jump on a phone call with a mediator instead of spending hours writing a formal statement, and confidentiality, since there is less risk of disclosure when communication occurs over the phone instead of in writing.

In "What Happens Before the First Mediation Session? An Empirical Study of Pre-Session Communications," the authors found that "Pre-session communications are often said to take place between the mediator and the lawyers, without the disputants." The report from the Task Force on Improving Mediation Quality states that their survey participants, almost all of whom were attorneys, "had a very strong preference for calls without parties."

4. When a mediation program is likely to have cases where at least one party is self-represented, where feasible the court may wish to require pre-session communications in the form of confidential phone calls between the mediator and each litigant/litigant's attorney or conflict coaching.

The mediator may choose to go over the suggested topics in A.1, A.2, C.3.a or C.3.b.

Comments: Prior to walking into a session, the people involved should know what mediation is and be prepared to negotiate. When a party is represented by an attorney, it is the responsibility of the attorney to prepare the client. But when a party is self-represented, the mediator and the court are incentivized to help the

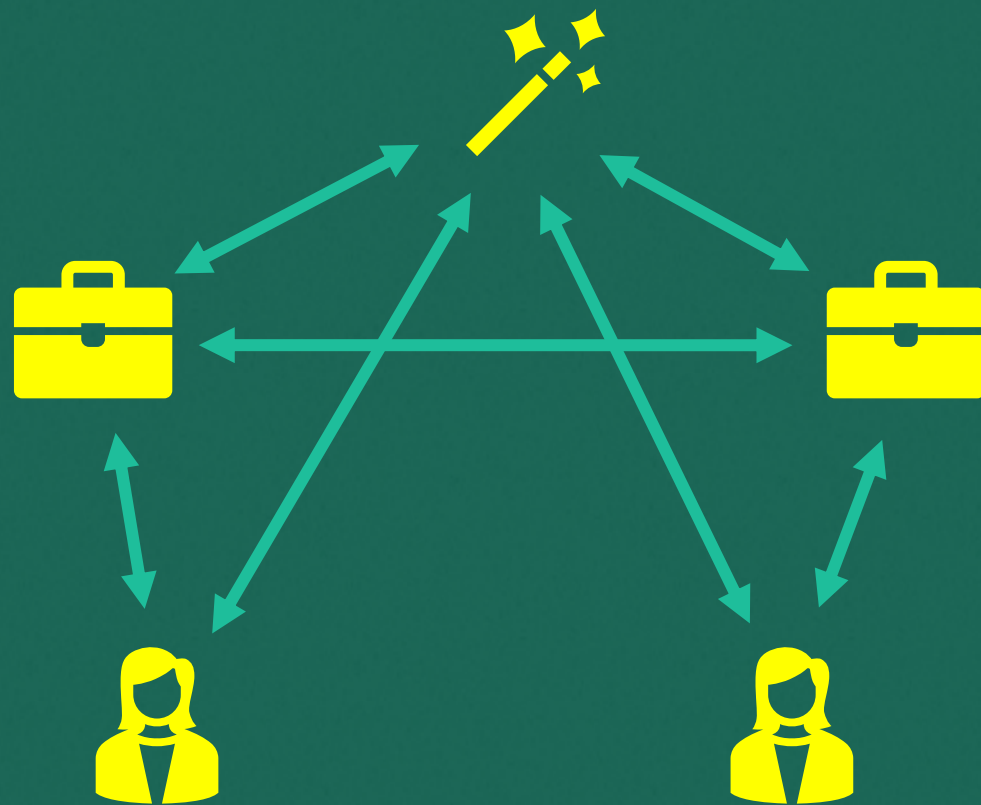
Draft 2

on Statements

appropriate, courts should create guidance for attorneys around the submission of mediation statements, including clarifying the scope of confidentiality for mediation statements.^{vi}

Mediation statements (Shared or Confidential) should address the following:

1. Who the parties are;
2. What the nature of the relationship is;
3. When did the dispute emerge and how was it discovered;
4. What is the nature of the dispute;
5. What has happened since the dispute was discovered;
6. What damage has the dispute caused each party;
7. Is there an ongoing or future relationship between the parties;
8. Who are the key players;
9. What is the relevant procedural history;
10. What are the critical issues that would be dispositive of the case;
11. What is the history of settlement negotiations, including each side's



Information and Preparation Materials



Self-Represented
Litigants

A. Preparation for Self-Represented Litigants

1. Information on the court-connected mediation program

Regardless of whether a case is simple or complex, or mediation will be at the trial level or at the appellate level, court resource materials for self-represented litigants regarding mediation preparation should provide self-represented litigants with clear and helpful information.

All court-annexed mediation programs should ensure that materials focused on mediation preparation:

- 1) Are written in plain language;ⁱ
- 2) Are well-designed, including links to videos describing the mediation process and/or the court's mediation program (if available);
- 3) Are accessible;ⁱⁱ
- 4) Are accessible in multiple languages;
- 5) Are available on the court's website.ⁱⁱⁱ

Communication from the court to the litigant about mediation should:

- 6) Include the place and time of mediation; whether virtual and/or online participation is permissible;
- 7) Address the fee for mediation (if applicable) and how the fee is to be paid;
- 8) Address the required participants, and whether other individuals aside from required participants may attend;
- 9) Include a format (such as a form) for written mediation submissions, if appropriate
- 10) Address whether the session(s) will be joint, separate, or some combination thereof;
- 11) Address security considerations;
- 12) Address needs for accommodation such as an interpreter, and/or other accessibility issues;
- 13) Explain the scope of confidentiality in connection with any aspect of the mediation process

2. Preparation materials

Self-represented litigants do not have the luxury of having an attorney assist them with preparing for mediation. As such, court programs can create resources to assist self-represented litigants with preparing for mediation.^{iv}

At a minimum, resources provided can help self-represented litigants think through:

1. Documents that would need to be brought to the mediation to effectively discuss the issues;
2. Barriers to settlement;
3. Interests of the various parties.

Sample questions and forms are provided in the appendix.

Appendix

PARTY CONSIDERATIONS IN ADVANCE OF MEDIATION **Worksheet**

1. What do they need the mediator to know?
2. What is one thing they hope to learn from the conversation?
3. What is something important to them that they would like to share?

1. Guidance for attorney-client preparation conversation

2. Guidance for Mediation Statements



Attorneys

B. Attorney Preparation

1. Guidance for attorney-client mediation preparation conversations

Courts should provide guidance for attorneys as to the best ways to prepare their clients for mediation. Attorneys should be reminded by the court that they should consult their clients so that their clients are equipped with knowledge about the process and understand the difference between litigating and participating in mediation.

Generally, attorneys should discuss with their clients the following:

1. The role the attorney will play in the mediation/the role the client will play in the mediation;
2. The role the mediator will play;
3. The strengths and weakness of the case;
4. The risk and costs of moving forward with litigation;
5. An estimate of the actual costs and hours;
6. Discussion of settlement/resolution parameters;
7. Who will attend the mediation;
8. The materials the attorney would like the party to prepare;
9. The materials the attorney will prepare on behalf of the client;

2. Mediation Statements

When appropriate, courts should create guidance for attorneys around the submission of mediation statements;^v including clarifying the scope of confidentiality for mediation statements.^{vi}

Mediation statements (Shared or Confidential) should address the following:

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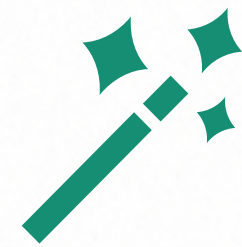
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8. Who are the key players;
9. What is the relevant procedural history;
10. What are the critical issues that would be dispositive of the case;
11. What is the history of settlement negotiations, including each side's last settlement offer;

- Conflict Check
- Appropriateness for Mediation
- Review of Evidence/Mediation Statements
- Pre-session communication with Attorneys - Agenda



Mediators

a. Sample Agenda

- i. Introductions
- ii. Scope of confidentiality
- iii. Role of the mediator and the process
- iv. Check for potential conflicts with the mediator
- v. Discussion of the dispute
 1. Parties (relationship)
 2. Procedural posture/timing of the case
 3. Any offers of settlement to date
 4. Scope (determine whether there are any side issues or disputes)
 5. Information that the parties may need to prepare for mediation or to advance settlements (e.g., further discovery, appraisal or inspection of property, professional estimates of repair costs.)
- vi. Logistics
 1. Selecting a date for the mediation session (if necessary)
 2. Determine who will participate (authority to settle)
 3. Use of the online platform (if used)
 4. Any aids or assistance needed by the parties
- vii. Structure of the Session
 1. Role of the clients and counsel
 2. Role of the SRL (address power balance concern)
 3. Openings (length; focus; client or counsel speak?)
 4. Caucus v. Plenary sessions

v. Discussion of the dispute

1. Parties (relationship)
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vi. Logistics

1. Selecting a date for the mediation session (if necessary)
2. Determine who will participate (authority to settle)
3. Use of the online platform (if used)
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vii. Structure of the Session

1. Role of the clients and counsel
2. Role of the SRL (address power balance concern)
3. Openings (length; focus; client or counsel speak?)
4. Caucus v. Plenary sessions
5. General discussions of expectations, opportunities to make the session productive, or obstacles to overcome

viii. Additional topics, suggestions, or questions from counsel/SLR

ix. Explanation of next steps

What preparatory materials does your court/organization have for mediation?

What preparation resources/materials would be helpful to you, that you don't currently have?





Feedback?

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