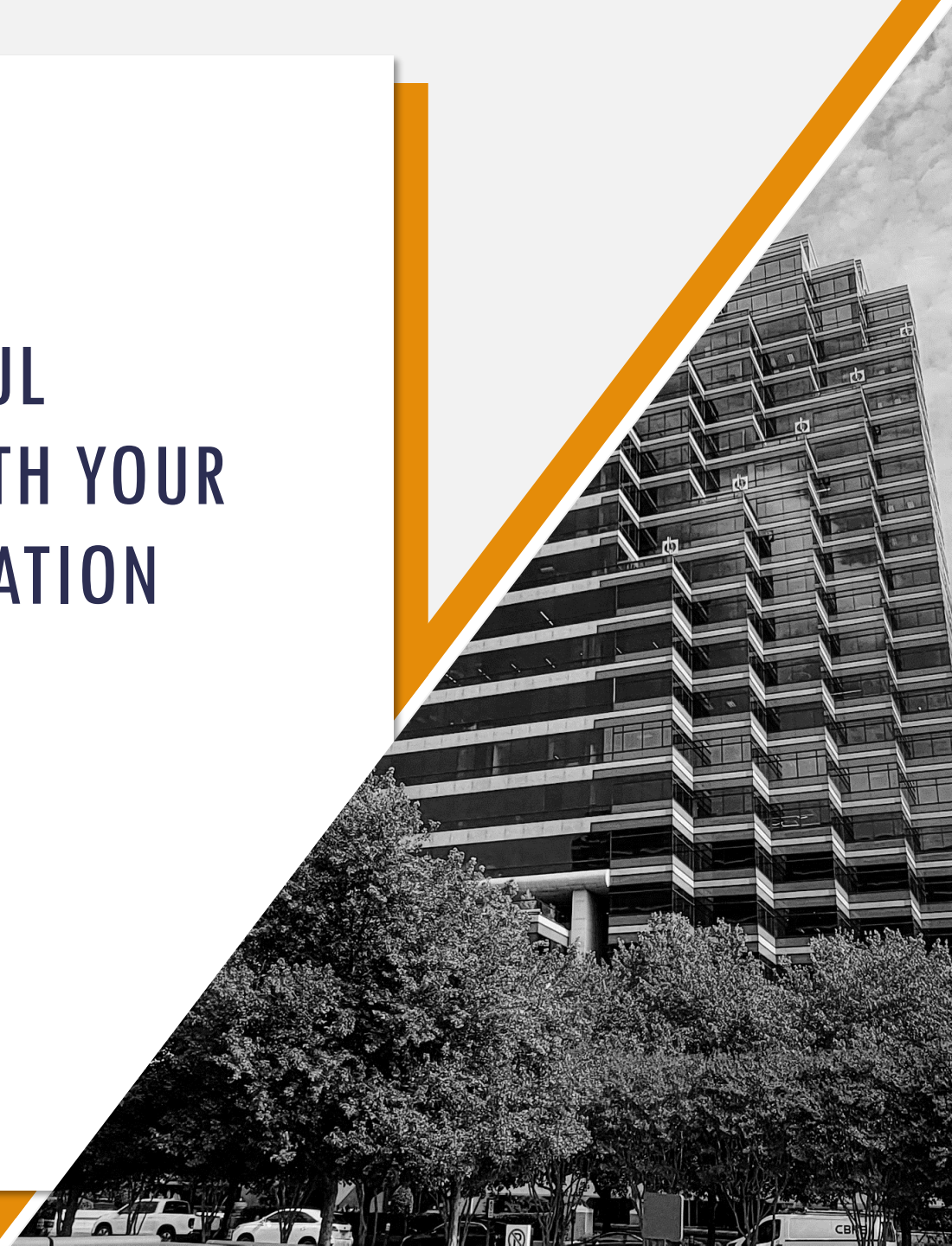


MASTERING MEDIATION: HOW TO PREPARE FOR A SUCCESSFUL MEDIATION AND COLLABORATE WITH YOUR MEDIATOR TO MAXIMIZE THE MEDIATION PROCESS

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Henning Mediation





PRE-MEDIATION (PREPARING FOR THE BEST OUTCOMES)





PRE-MEDIATION

How mediation differs from a trial

- Different Advocacy Skills
- Different Audience
- Different Focus
- Choices that are available in Mediation
 - Who is the right mediator for case? (you can't choose your judge, but you can choose your mediator!)
 - Whether to do in person or virtual/hybrid
 - Timing



PRE-MEDIATION

Preparation

While every mediation is different, there are several tasks you can complete to effectively prepare for the mediation:

- Talk to opposing counsel ahead of time
 - Confirm prior negotiations
 - Get agreement on when, where and how to conduct the mediation
 - Are there contingencies that must be met before mediation will be productive?



PRE-MEDIATION

Preparation

- Prepare your client:
 - Explain process
 - Client to clear calendar for entire day on mediation date
 - Discuss strengths and weaknesses of your case including ugly facts and venue issues
 - Prepare for emotional response
 - Manage client expectations: Set realistic expectations about the mediation process and outcomes
 - Range of acceptable settlement value
 - Failure to settle at mediation

PRE-MEDIATION

Preparation, cont.

- Prepare a detailed Mediation Statement with facts and legal issues and send to mediator at least several days prior to mediation date along with relevant pleadings, documents, etc.

Good

- Depending upon the complexity of the case, a phone call is acceptable.

Better

- Providing a Complaint or redacted evaluation or demand will work to convey necessary information to the mediator.

Best

- Best practice is a position paper summarizing the issues of the case, followed by a call to ensure any tricky issues are addressed ahead of time.



PRE-MEDIATION

Preparation, cont.

- Request a telephone conference with Mediator prior to date of mediation if necessary
 - Talk to the mediator when/if you have a difficult client
 - When dealing with difficult personalities
 - Emotional intelligence factors in here because you can educate the mediator on how to better gain the trust of your client
 - Talk about factors of the case that may upset your client and how to navigate a discussion around those factors/issues
 - Talk to mediator when you have difficult opposing counsel
 - Talk to mediator when you have a difficult case



PRE-MEDIATION

Preparation, cont.

- Organize file with pertinent documents easily accessible during mediation (pleadings, medical bills and records, contracts, etc.)
- Develop a negotiation strategy
 - Assess Opposing Party's Position
 - Anticipate opposing parties' moves
 - Understand each strength of opposing party and/or weakness of your client and understand how you will address them



PRE-MEDIATION

Preparation, cont.

- Formulate “arguments”
- Plan your opening statement
 - Introduce clients
 - Determine key points and supporting evidence
 - Be concise
 - Prepare a visual presentation
- Identify questions you want to address to opposing party

THE DAY OF MEDIATION



THE DAY OF MEDIATION

Let's do this!

- The Right Mindset
- Prior to Joint Session-talk with Mediator about concerns not previously raised (joint session concerns, client issues, counsel issues, etc.)
- Importance of Confidentiality



THE DAY OF MEDIATION

Joint Session

Mediator's Opening remarks:

- Be patient - Allow mediator to explain process without interruption

Opening statements: To Do or Not to Do

- Briefly set forth facts of case and issues to be resolved
- Be respectful and professional in your communications (refrain from accusations, name-calling, etc.)
- Avoid explaining to opposing parties the purposes and goals of mediation-leave that up to the mediator



THE DAY OF MEDIATION

Private Caucuses

- Be ready to discuss the goals you and your clients have for the mediation
- Acknowledge and be willing to discuss problematic aspects of the case, and hurdles to settlement (facts, witnesses, law, judge, personalities of parties and counsel)
- Listen to the interests of the other party
- At end of caucus confirm offer and any specific terms of offer (terms of payment, confidentiality, etc)
- Be open to changing and being flexible regarding offers
- Bracketing-Understanding and knowing when to use
- Dealing with emotions of your client and opposing parties (Stay objective, focus on big picture to reach a fair resolution, encourage and request break when emotions are at a peak)



THE DAY OF MEDIATION

The mediation within the mediation-Multiple parties

- Always be aware of the “mediation within the mediation” and make it work to your advantage.
- Multi-party mediations may require mini-mediations between co-defendants or co-plaintiffs
- Determine respective liability and/or damages
- Negotiate with one party at a time
- Consider the possibility of utilizing more than one mediator for extremely complex multi-party cases

SETTLEMENT / AGREEMENT



SETTLEMENT / AGREEMENT

Enforceable Agreement

Goal of Mediation

- Settle (Ultimate)
- Gather information (Consolation prize)

Mediation Process

- Process itself
 - Negotiations
 - Bracketing
 - Mid-Points
- Agreement

Agreement - Enforceable

- Mediator will prepare
- Don't rush!
- Necessary terms
 - Include "obvious" and "standard" terms in writing
 - Confidentiality
- Assumptions



SETTLEMENT / AGREEMENT

The fine print

- Clearly communicate with Mediator and opposing counsel regarding terms of settlement to be included in Settlement Memorandum
- Amount and terms of payment
 - Structure
 - Liens
- Any special terms/Release Language
- Method of payment
- Payment timeline
- Required Tax ID information
- Required signatures to Releases and/or Settlement Agreement
- All Terms in Writing

AFTER MEDIATION



POST MEDIATION

Post mediation

- Often mediation causes the parties to realize additional discovery is needed before a resolution can be reached. Once that discovery is complete, talk to the mediator to explore how best to continue negotiations.
 - When to reconvene in a mediation; Round Two
 - When to allow the mediator to make calls



POST MEDIATION

Confidentiality Continues Indefinitely

What is Not Confidential? When Does Confidentiality Not Apply?

- Confidentiality does not apply to:
 - The fact that a mediation occurred;
 - The names of the parties;
 - The names of the attorneys;
 - The names of the neutrals;
 - Information on whether the parties appeared at the mediation;
 - The outcome of the mediation or a written and executed mediation agreement (unless there is a confidentiality agreement or court ruling about confidentiality related to the outcome).



POST MEDIATION

Exceptions to Confidentiality

- The ADR Rules list specific exceptions to confidentiality:
 - When threats of imminent violence have been made by a participant to self or others;
 - When the mediator believes that a child is abused or that the safety of any party or third person is in danger;
 - When legal claims or disciplinary complaints are brought against a neutral or an ADR program and arising out of an ADR process, confidentiality is waived only to the extent necessary to protect the neutral or ADR program.



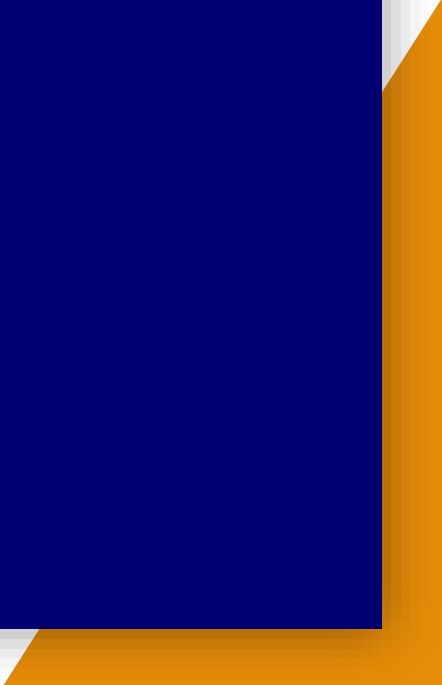
RULES OF PROFESSIONAL CONDUCT APPLICABLE TO MEDIATION



- Rule 1.2 Scope of Representation
- Rule 1.3 Diligence
- Rule 1.4 Communication
- Rule 1.6 Confidentiality of Information
- Rule 1.14 Client with Diminished Capacity
- Rule 2.1 Advisor
- Rule 3.1 Meritorious Claims and Contentions
- Rule 4.1 Truthfulness in Statements to Others



QUESTIONS?





USE YOUR SKILLS

Scenario 1

- The mediation begins with opening statements. Plaintiff's counsel begins negotiations with a demand of 5 million dollars. The mediation quickly breaks down and no agreement is reached.
- The day after mediation, Defendant filed a Complaint for defamation against the Plaintiff which included a statement that the Plaintiff was seeking to extort millions of dollars from Defendant.
 - a) Do you see any issues regarding the behavior of counsel in this situation?
 - b) What are the concerns for the mediator?
 - c) Are there any Rules of Professional Conduct that come into play?
 - d) How could these problems have been avoided prior to mediation?



USE YOUR SKILLS

Scenario 2

- The parties in a personal injury case agree to mediate their dispute. No lawsuit has been filed at the time of the
- You are mediating a case involving the death of a child. Both parents are plaintiffs in the case and attend the mediation. The mother has been the primary contact for the case up until the time of mediation; however, resolution will require the consent of both parents. During the mediation, the father gets very upset when any of the facts concerning the child's death are brought up, and frequently leaves the caucus room when issues concerning both liability and damages are raised for consideration. It is a case with significant damages; however, there are also very real defenses that must be considered. Counsel for plaintiffs is well aware of the difficulties in prevailing at trial, and is concerned that the case may not survive a motion for summary judgment; but the parents do not seem to know that the case has serious obstacles. The defense team knows that the case is not a slam dunk, but they do not know the details that will make it as defensible as it is and are very concerned about damages.
 - a) What are the concerns for counsel representing the parents in this situation?
 - b) What are the concerns for the mediator?
 - c) Are there any Rules of Professional Conduct that come into play?
 - d) How could these issues have been avoided prior to mediation?
 - e) Do you have suggestions for how to ensure appropriate resolution under the circumstances?



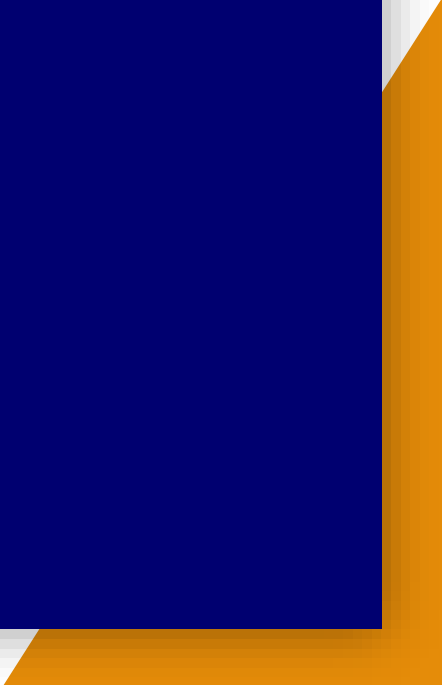
USE YOUR SKILLS

Scenario 3

- The mediation of a personal injury automobile collision case has been scheduled six weeks in advance of the mediation date. Liability in the case is clear, and Defendant has agreed to admit liability for the purposes of mediation. Two days prior to the mediation, Plaintiff's counsel receives updated records from the plaintiff's orthopedic surgeon which contain notes that surgery is not being recommended for Plaintiff's injury. Plaintiff's counsel has spoken to Plaintiff prior to mediation and has instructed Plaintiff to refrain from mentioning this information to anyone during the mediation.
- On the day of mediation during joint session, Defendant's counsel announces that the mediation needs to conclude by 1 pm, as counsel has a flight to catch for an out-of-town deposition on another case. Plaintiff's counsel asserts that unless the opening offer is at least six figures they don't believe that a settlement can be reached that day due to the time constraints. Counsel have not discussed these matters with their clients, or the mediator, before making these statements during the joint session. Furthermore, in discussing settlement range with Plaintiff's counsel prior to the mediation, Plaintiff had indicated a willingness to settle for \$95,000.
 - a) What are the concerns for counsel in this situation?
 - b) What are the concerns for the mediator?
 - c) Are there any Rules of Professional Conduct that come into play?
 - d) How could these problems have been avoided prior to mediation?



QUESTIONS?



**THANK YOU FOR
ATTENDING
AND
THANK YOU TO
OUR HOST,
HENNING MEDIATION**

