

Mediation Memos and Conversations with Mediators

Ideally, mediators should arrange to get concise, factual memos to be shared with the other side and also have confidential conversations with each lawyer. Mediators should request memos to be provided far enough in advance so that they can read the memos and still have time to talk with the lawyers before the mediation session.

Mediation memos might address the following issues:

- Identity of the parties, lawyers, key expert witnesses, and any other important individuals or entities in the case
- The nature of the claims
- Itemization of damages (for defendants, their itemized valuation of the claims)
- Pivotal legal issues, possibly with citations of principal statutes, cases, or other legal authorities
- Undisputed facts
- Disputed facts
- Procedural history
- Status of discovery, noting potential future discovery
- History of negotiation, if any
- Identification of individuals expected to attend mediation
- Attachment of critical documents such as pleadings and contracts

Separate identification of undisputed and disputed facts can be especially helpful. It should be useful to see if both sides agree about what is disputed or not. And it can help focus the discussion in mediation to understand the differences, clarify misunderstandings or misinterpretations, and develop realistic estimates of the likely court outcome.

Confidential conversations might address the following issues:

- How the mediator could be most helpful
- Strengths and weaknesses of the legal case
- Personalities and dynamics between lawyers and parties in the case
- Whether the parties will (or might) continue their relationship after the case is resolved
- Potential barriers to agreement
- Non-negotiable issues for each side
- Issues where negotiation is possible
- Realistic estimate of additional legal fees and costs if the case goes to trial
- Interests of each party that might prompt them to accept a less favorable financial settlement

For further discussion, see Brian Farkas & Donna Erez Navot, [*First Impressions: Drafting Effective Mediation Statements*](#), 22 LEWIS & CLARK L. REV. 157 (2018).

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