

Issues to Discuss Before Mediation

My background or qualifications

1. Any questions you have for me or about my background, qualification or impartiality.
2. Availability or fee structure.

The “A, B and C’s” of the conflict – “C” = conflicting goals or demands

3. Who are the parties and what are the parties’ conflicting goals or demands? Can you provide a short non-argumentative summary statement?
4. What is the history of these conflicting goals?
5. What are/were the triggering events that led to the conflict?
6. Status of adjudicatory matters. What is ongoing? Any pending court deadlines?

The “A, B and C’s” of the conflict – “A and B” = attitudes and behaviors

7. What attitudes exist among the parties (counsel) that may be unproductive in this effort? How to best address those attitudes?
8. What historic behaviors have contributed to or been demonstrated in this conflict? How to best address those?
9. Are there any historic or personal conflicts that we need to take into consideration in this mediation?

“System” effects – external pressures, limitations, actors or trends

10. What external non-party actors, factors or pressures affect our ability to resolve this conflict?
11. What trends or systemic factors affect the actors in this settlement effort? Such as economic, political or other pressures, legal limits, administrative authority, chains of command, approval mechanisms, insurance, collateral agreements, accounting issues, external finance, related litigation or precedential issues or other factors that bear upon or limit one or more of the parties?

The mediation session

12. Who are the best persons to attend and participate in mediation?
13. Would any other person(s) make the mediation process go more smoothly or faster? Need anyone available by phone?
14. Is it advisable to have or establish some mediation guidelines or ‘code of conduct’?
15. What documents, maps or plans would be useful to have at the mediation?
16. Have we found a date, time and venue for the mediation?

Data needed

17. What informational exchange is needed (if any) to get parties prepared for the mediation?
18. Documents (if any) that you think I should review before the mediation to get an overview

Preparing for mediation

19. What other actions will get us best prepared to identify settlement options?
 - 19.1. In what ways, if any, may we be stuck in “cash” only approaches to bargaining?
 - 19.2. What, if any, are the potential future relationships among the parties? None, limited, re-engaged?
 - 19.3. What creative ideas or approaches would open up some settlement options?
 - 19.4. What, in any, contingencies bear upon the settlement terms? Can any such contingencies be built into the settlement?
20. Can we make a tentative list of issues for resolution in mediation?
21. If you reached a full resolution, what would constitute the components of a comprehensive agreement for resolution?
22. Use of a mediation agreement (sample can downloaded at <http://www.jpmmahon.com/Mediation%20agreement-Word.doc>)
23. How should your clients be best prepared for participation in this mediation?

Attitude and willingness to negotiate - barriers

24. What barriers exist, if any, to a productive discussion towards settlement? Are clients willing to participate in such a process?

25. What could you say to brief your clients in preparation for mediation?

Attitude and willingness to negotiate – What zone are you in?

26. With what goals and expectations do the parties and their counsel approach this mediation?

27. What steps could move a nonnegotiable conflict into a negotiable conflict?

<p style="text-align: center;">Zone 1 Offers and counters</p>	<p style="text-align: center;">Zone 2 Mid-zone</p>	<p style="text-align: center;">Zone 3 We are here to learn, be creative and consider options</p>
<ul style="list-style-type: none"> • We each know the other's case; this is a place to exchange offers and try to persuade them that they should make concessions. • The options for resolution are fixed and limited; not much room for creativity. • We have a rather solid idea of what is reasonable and fair. If something was heard that concerned us, we could make modest adjustments in what we think is fair. • Let's get to exchanging offers and counters quickly. 	<ul style="list-style-type: none"> • Although we have studied this case, we are also here to listen. We are willing to listen to the other party's views. • Although the options for resolution seem known, we can listen to what develops. • Although no new or creative ideas have emerged, we are willing to listen. Something creative could emerge. 	<ul style="list-style-type: none"> • We are open to discussion and consideration of new data. • Although having ideas about fair resolution, we will also look for and at new approaches. We are willing to consider creative options. • We could learn from the other party and are willing to listen. • This case could perhaps benefit from creative approaches.

Avoiding settlement decision errors

28. What decision errors are most likely in working toward settlement? Perhaps relating to the attitudes and behaviors above?

29. What steps can we take to reduce the likelihood of decision errors?

30. What steps can we take to avoid avoidable impasse?

Agenda for the mediation session. What is a good agenda for the mediation session? As a starting point, consider modifying the following:

31. Introductions, agreement on goals for the mediation, ground rules, confidentiality

32. Questions from parties or counsel on the mediation process

33. Discussion – the “legal realities”:

33.1. What are the legal realities of this matter?

33.2. If you do not settle, what will be presented to the court/arbitrator?

33.3. What decisions must the court or arbitrator make?

33.4. What drives those decisions?

34. Discussion – the “settlement opportunities”:

34.1. What are the interests of each party? What interests must be adequately satisfied to prefer settlement over litigation?

34.2. What should be included in a comprehensive resolution? What are all of the elements of a settlement agreement?

34.3. In what ways does each party value these elements differently?

35. Exchange packages for settlement.

36. Decision making: how does litigation compare for each party with the settlement options developed?

Any other questions?