

## A dozen top tips for mediating a federal law case

What elements are used to successfully settle a federal court case? We sat down with four retired U.S. District Court judges from our JAMS Washington, D.C./Maryland panel to gather their insights into what those key elements are and how to apply them to a successful mediation.

Here are the top 12 mediation tips from **Hon. William Connelly (Ret.)**, **Hon. Benson Everett Legg (Ret.)**, **Hon. James Robertson (Ret.)** and **Hon. Frederic N. Smalkin (Ret.)**.

**1. Prepare the mediator.** To be effective, the mediator must fully understand the dispute. Write the mediator a letter that lays out the controversy and attaches the salient documents. Arrange to call the mediator a few days in advance of the session to make sure that the mediator understands the strengths (and weaknesses) of your case and your objectives.

**2. Prepare your client.** The client must understand the mediation process and be committed to reaching a reasonable settlement. Discuss negotiating strategy and agree on settlement goals prior to the mediation. Have the decision maker present.

**3. Understand the insurance landscape.** Know whether there is insurance and,

if so, the extent of coverage. Are there problems with the insurance, such as a defense with a reservation of rights, low claim reserve, a wasting policy, etc.? Have the insurance representative present. Understand that the insurance representative is often engaged in two negotiations: one with you and one with his or her carrier.

**4. Consider the tax implications.** Favorable tax treatment can greatly enhance the value of a settlement. Conversely, structuring a settlement incorrectly can result in IRS penalties. Always obtain competent tax advice in advance of the mediation.

**5. Execute a term sheet before you leave the mediation.** Bring a proposed term sheet with you. The term sheet should contain a clear summary of all settlement terms and be signed by counsel and the parties.

**6. Identify the non-economic settlement terms that must be negotiated.** Cash is king, but a settlement will include other components that must be agreed upon. These can include confidentiality, a non-disparagement clause, a neutral reference, payment terms, an apology or a commitment to change procedures within an organization.

**7. Decide whether there**

**will be opening statements.** The table-thumping, “we will bury you” opening is counterproductive. Have opening statements only if there is a specific purpose, and make them brief (10 to 15 minutes) and firm but polite. Consider having them if your client’s unrealistic expectations might be put in check by hearing the case articulated by opposing counsel. Consider having them if discovery has not taken place and you believe that the other side lacks important facts. Otherwise, skip the opening.

**8. Be prepared to negotiate within a reasonable range.** Outrageous demands and lowball offers damage your credibility. Demands and offers must be supported by the facts and law of the case. Reasonableness is not a sign of weakness; it’s a sign that you are serious about settling.

**9. Have a strategy if the mediation reaches an impasse.** A mediation will deadlock when, for example, the plaintiff is demanding \$1 million and the defendant is offering \$10,000. At that point, moving up and down by a few thousand dollars wastes time and ultimately leads nowhere. Have a strategy for identifying a range that can settle the case.

**10. Put everything on the table at the beginning of**

**the mediation.** Do not hold back your interest in counsel fees, a confidentiality/non-disparagement clause, a neutral reference, etc., until the end of the mediation. These are all key components that affect the settlement. As the parties are finalizing the term sheet, don’t be the one to say, “Is it time to talk about counsel fees?”

**11. Don’t schedule a mediation unless you are prepared to settle on the day of the mediation.** Some lawyers believe they can leverage their adversary’s disappointment to get a better deal a week or two after the mediation session. Because attitudes harden, they are usually disappointed. Take advantage of the momentum of a mediation to get the case settled then.

**12. Be courteous and reasonable to all.** The other side is more likely to engage in good faith bargaining if they believe you respect them and are courteous and reasonable in your conduct. To get respect, give respect.

**Hon. William Connelly (Ret.)**  
**Hon. Benson Everett Legg (Ret.)**

**Hon. James Robertson (Ret.)**

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