

The role of a mediation advocate or advisor in a mediation

A jurist can be the initiator motivating the client to choose for mediation. When a client has become a party in the mediation, the jurist can be acting as his coach, preparing him for the mediation. As a lawyer you should be well aware of the dynamics of the many ways conflicts could develop and how the mediation procedures are being followed. During the exploration phase and while assessing the alternatives which could be presented during the mediation, you can make a valuable contribution in your role as a legal advisor. During the mediation it is very important to keep in mind that the mediator does not decide how the conflict is being resolved. Besides in mediation it is mainly about the interests of the parties and not about the legal rights and positions being held. Hereafter you will find a summary of general guidelines for a lawyer in a mediation, followed by the main factors for succeeding in a mediation and also the pitfalls. In the next chapters will be described, depending on the stage of the mediation process, how you can play your part and how to monitor effectively the mediation process In order to optimize the result for your client.

The role of the mediation advocate during the mediation in general

- The mediator is not deciding, so s/he has not to be convinced with (legal) arguments.
- The most important task is: taking care all interests are being considered and positions will be transformed in interests.
- The client is the mediation party; the lawyer will be acting as a coach or as an advisor.
- You can especially make a valuable contribution and participate actively in generating options.
- Take care you are part of the solution and you will not become part of the problem, so do everything you can to support your client bringing the mediation to a success through focussing on interests.
- The more you succeed in teaming up with your client and cooperating with the opponent, the more chances you have for success in a mediation.

Factors for success and failure in a mediation

The appropriateness for mediation can not only be established by personal characterizations or the factual characteristics of a case (factors disfavouing mediation, see part I. Research is showing that the main factors for success in a mediation are that parties: are willing to look for a solution of their conflict and being prepared to negotiate. Besides it is crucial to select a mediator with the right characteristics and experience.

A big advantage of a mediation is that all parties can jointly participate in one session. It is not necessary to start up a separate process with each party. At the same time the sheer number of parties seems to make it more difficult reaching a solution, however not impossible. More parties also implies more points of view and more options to generate which can contribute to each a solution. The pass rate of multi-party mediations is lower as opposed to conflicts with only two parties.

1 Key factors for success in mediation

- Parties want to solve the conflict.
- Parties are prepared to negotiate about a solution and they are having negotiating space.
- Selection of the right mediator.
- Being well prepared yourself, having a pragmatic approach and keeping in mind a clear strategy about how to tackle the mediation.
- Adequate factual knowledge and a realistic approach of the strengths and weaknesses of a case.
- A good preparation of the client.
- Client and lawyer can team up with a good division of roles and clear arrangements.
- Paying attention to the opening statement.
- Being familiar with the real interests of the client (and having thought about the possible interests of the opponent) and let them be a part of the mediation process, if necessary in a caucus. It is about how to reach the best solution considering the future and the underlying interests. It is not about having the best (legal) arguments, or exerting power.
- Looking for possibilities to enlarge the pie, so all parties have more to share. Not being content with as quick compromise.
- The lawyers of both parties are cooperating well during the mediation and the preparation.
- Both parties are represented by delegates with full mandate.
- Mapping out the constituency and being explicit about the settlement procedures.
- Having sufficient negotiating space.

2 Key factors for failure in mediation

- Not being prepared, without an overall plan.
- Having not prepared the client.
- A lack of factual knowledge with yourself or your client.
- Having no clear agreement about the division of roles, not teaming up with your client.
- Not wanting or being able to cooperate.
- A too small space to negotiate or a restricted mandate.
- Having no thought for the necessity of an internal legitimization and consultation with the constituency.
- Not being well represented or incompatible participants. Together with your client you will have to identify the issues and assess on which level solutions can be found. Here the right participants should join in, so top management if a strategic approach is required or the management who is directly involved when a solution for a specific project is required. Both sides of the table require the same number of participants with a comparable status and/or impact.
- Making an aggressive opening statement or making unreasonable demands or giving an unrealistic

presentation. This is not only the case with respect to the opponent, but this also applies to the lawyer giving his client a too positive impression of the chances 'to win this case'. As a result the client has too high expectations about the potential compensation to be received and will not focus on a realistic win-win result.

- Having no idea about the real interests of the client, BATNA WATNA or leverage.
- Beforehand aiming for 'the largest piece of the pie' instead of looking for possibilities to 'enlarge the pie' so all parties will be getting more.
- Being content too soon with one possible solution or trying to reach a compromise too quickly.
- Having a very narrow perspective to one's own role in the mediation (explaining the process, preparing or making an opening statement, giving legal advice and for the rest the client is on his own).
- Wanting to dominate the process, treating the mediation as if it is a legal battle, preventing the client from really participating in the process.
- Not presenting the interests during the mediation.
- Having no idea of the position, perspective or the interests of the opponent.