

## Mediation Tips for Lawyers

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### Scheduling mediation

1. Don't be rude to my staff. I have a thick skin and you (and your client) can yell at me - but don't yell at the staff – I don't pay them enough for verbal abuse.
2. The mediator needs cause number, court number, party's names and attorney's names plus include everyone's cell phone numbers and email addresses. I need this in case of an emergency.
3. I try to look up each case the day before to see what's in the court's file. (Hint: Affidavits can be very informative.)
4. If you need to cancel, give plenty of advance notice. As a mediator, I reserve your time. If you cancel, then I lose money. If you think the case will settle, keep me posted.
5. Expect to pay a cancellation fee if you cancel with less than 3 days notice. .
6. Read the mediator's mediation packet and send a copy to your client at the time the mediation is scheduled so they can review it ahead of time. (Hint: Clients don't like surprises.)
7. Encourage your client to research "Texas family law mediation". I have some forms on my website as well as you tube videos, Wikipedia, [www.mediate.com](http://www.mediate.com) or [www.mediation.com](http://www.mediation.com) have info on mediation.
8. If domestic violence is an issue, let me know at scheduling. I can have the people arrive at different times and I've even stood in the hallway when someone must go to the restroom so that there are no issues. (Hint: The mediation success rate goes up when the client feels respected and safe.)
9. Let the mediator know ahead of time about any other possible issues – I had to make an accommodation when a young couple showed up with 30 elders from their community and for a breastfeeding mother. Almost anything can be handled, but it's nice to know in advance.
10. If you need a strong male mediator for a difficult client, then don't schedule with a female. (Hint: Some people prefer to use someone outside their community for an independent set of eyes and opinions.) I understand that some people only respect men – so why waste your time and money with a female.
11. Tell the mediator how they will be paid – by your attorney check or the client is paying. Mediators always prefer cash, but don't expect me to be able to make change – I'm not a bank.
12. If there is an amicus attorney, they must come to mediation or be available by phone. Also, notify the TX Attorney General if they are a party to the case. All necessary parties need to be included. You are wasting your client's money if you schedule without everyone necessary present and/or available by phone.
13. If you think there might be a "conflict" with a certain mediator. Then pick someone else. (Hint: If in doubt, always take the most conservative route – avoids grievances.)
14. A client can appear by phone or on-line (such as Zoom) but I find that the settlement rate sometimes drops. (Hint: I find observing people in person to be helpful.)

## Preparing your client for mediation

1. Discuss what mediation is ahead of time with your client. Many people show up to mediation terrified since no one has explained the mediation process to them. It's good to prepare your client or have them read about mediation in Texas.
2. Make sure the client knows where they need to be and the start time. If I'm at the office at the start time then my 4 hour clock is ticking. I've had people show up 2 hours late and be upset that I only had 2 hours for them. Be sure to tell them to bring all info they might need as well as all their passwords to access info. It wastes time if the person does not bring required info or they cannot access the info at mediation.
3. Discuss the pros and cons of their case -

If custody is an issue, I like to see the 3 top reasons why X should have custody and why Z should not. I like to hear the pros and cons of both parents (Hint: We all have pros and cons – no one is perfect). If your client only has negative to say about the other parent, then you will probably have problems at mediation. The mediator normally wants to see all report cards for the past 2-3 years (tardies and unexcused absences are relevant).

**BATNA – Best Alternative to a negotiated agreement**

**WATNA – Worst alternative to a negotiated agreement**

There are no slam dunk cases. You are doing your client a disservice if you have not prepared them for mediation. (Hint: Try to verify your client's side of the story before attending mediation.)

4. Advise your client no handguns at mediation.
5. Have the client write up their 3-5 top goals that they want to accomplish at mediation. Such as their (1) must have's (2) would like to have's and (3) optional have's as well as the reverse for what they will never agree to do, what they don't want to do and what they would do if forced to do so.
6. Be sure they have a babysitter for the children so that they don't need to leave mediation early or leave before the mediator declares in impasse.
7. If a child wants to be interviewed by the mediator then everyone must agree ahead of time. A third party must bring the child and remove the child after I interview them. The child is not allowed to be in the mediation room with either parent.
8. If you or your client must leave at a certain time let the mediator know at the time of scheduling and again when the mediation starts.
9. If the client leaves BEFORE the mediator declares an impasse that is reported to the judge and can have a negative impact with the Judge.
10. Either you or your client pay their mediation fee – it's awkward to show up to mediation and the client never knew they had to pay.
11. Explain the mediator's role. (Hint: They are not to call or email the mediator after the mediation for free advice! I refuse to talk to them and they get mad.)
12. Know your judge and how your judge tends to rule.
13. If there was a social study done, go over it ahead of time with the client. Also, send me a copy at least 48 hours before the mediation and bring a copy to the mediation.
14. Discuss Texas legal terms and current Texas family law with your client – Co-parenting, Joint Managing Conservatorship, visitation, rights and duties, etc.

15. Explain the importance of full disclosure at mediation. I've had a couple of MSAs "blow up" when undisclosed assets were discovered so I offer to include "any undisclosed asset is 50/50" or "100% to the innocent party" to encourage people to be truthful.
16. Remember that if allegations of child abuse or elder abuse arise at mediation the mediator is required to stop the mediation and call the appropriate authorities. (Hint: I've thankfully never had this happen, but one lady hinted at it and when I asked follow-up questions she changed the story.)
17. Crying, temper tantrums, etc. normally won't impact an experienced mediator. I have lots of Kleenex in the office, but tears won't win a case.
18. Have your client dress comfortably and to bring enough cigarettes or anything else they might need for a 12-hour mediation.
19. Mediation is hard. Most mediators reality test with the client. The mediator will "shine the light" on all the dark corners of the person's life. Mediation is sad, frustrating, slow, painful, exhausting, and emotional for most participants.

#### At least 24 hours before mediation

1. Confirm that the client has paid the mediation fee or bring an attorney check to the mediation.
2. Send active pleadings to mediator.
3. Send any settlement offers that have been made.
4. Send a short confidential summary of the case and desired outcomes to the mediator. (Hint: Don't expect me to read hundreds of pages).
5. If you are going to ask for a therapist or an amicus, bring a list of at least 3 proposed people with their name, address, phone number. Confirm that they are still taking cases and their costs. If you are going to use insurance, have your client run a list of available counselors or therapists. (Hint: If your client has no money then you need someone cheap.)
6. Parenting coordinators and/or parenting facilitators are growing in popularity. If you think you will need one then bring their information and their cost.
7. Call your client and remind them to bring essential items to mediation. Such as how much is the health insurance, if federal taxes are owed then how much, copies of their bank statement and credit card statements for the past year, etc. (Hint: I'll make copies to get the process moving.)
8. Let the mediator know the pros and cons of your case. If your client has been "naughty" let the mediator know at the beginning of the mediation.
9. Make sure you have the FIS done, a list of all assets and liabilities and anything else helpful to the mediation process. (Hint: To warm a mediator's heart, come to mediation prepared.)

#### Professionalism by the attorneys

1. Call opposing counsel ahead of time and discuss the case. I cannot believe how often the two attorneys have never spoken and don't know each other. I settle a lot of cases by taking the attorneys out to just meet each other and size each other up.
2. We are professionals – be courteous to each other. (Hint: Tomorrow you might need a favor from your opposing counsel so don't burn that bridge).
3. I will not tolerate bullies, cussing, threatening, insulting or physically attacking the other attorney. Treat others the way you want to be treated. Think - Would your mama approve of your behavior? What if I talked to your mama like you are talking to opposing counsel? (Hint: Yes, I had to get

between 2 attorneys that we getting physical and I threatened to call 911 and have the male attorney arrested for assault. I drove him nuts when I said “in this office we always use our inside voices”).)

4. Can you agree ahead of time of the list of all assets and liabilities? That would make my job a lot faster and easier.
5. You are your client’s advocate. I don’t take it personally when you find out at mediation that your client lied. (Hint: Clients lie) I try to treat each attorney with the respect they deserve. I don’t hold you responsible for your client’s actions. (Hint: Mediation often shows the attorney how their client will be on the witness stand. It can be an enlightening day for the attorney and money well spent.)
6. If your paralegal is the one that “knows” this case – bring them to the mediation.
7. Remember the 7 P’s – Proper prior planning prevents piss poor performance.
8. Don’t even think about serving someone at the mediation. And remember that a mediator cannot be called as a witness to testify to what was discussed at the confidential mediation.
9. Don’t impose on the mediator’s staff. They are not there to be your personal assistant or to get your coffee.
10. If you don’t like the mediators style, then use someone else. Each mediator is a bit different in their style.

#### “Blessing” aka “drive-by” Mediations

Many mediators will offer a discounted fee for a “quickie” (one hour or less) mediation. I have a cover sheet that I attach to document prepared by an attorney. The parties and attorneys show up and everything is signed at the mediator’s office once they sign my Agreement to Mediate.

#### Possible “No Shows” at Mediation

1. Let the mediator know ahead of time that the other party might not show. Give mediator the person’s email address and phone numbers. The mediator should attempt to contact the person. Sometimes a phone call can guarantee other party’s attendance or the mediator begins to document that the person knew of the mediation and has decided not to participate.
2. Go to court and get an order from the judge to attend mediation with a certain mediator or have the judge sign an order to appear at mediation at a specific date, time and location.
3. Some mediators offer a discounted mediation if they know ahead of time the mediation will not go forward. (Hint: I have people come sit in my office for an hour as we enjoy a delicious hot beverage then I file a document with the court that mediation could not proceed.)
4. If you are pretty sure the other side won’t show, let the mediator know so a second mediation can be scheduled that day.

#### Pre-litigation or early intervention mediations

Some people want to do mediation BEFORE filing legal documents at the courthouse. I have done them - but I prefer that the petition be filed at the courthouse so that I can e-file the MSA. The TX Supreme Court has ruled that these Mediated Settlement Agreements (MSA) are valid and enforceable.

I have done a couple of long term marriages that required a series of mediations to get the couple to work out their differences. In the last session, we all sat in the same room. If you have an unusual case, you should mention this to the mediator at the time mediation is scheduled.

If you wonder if mediation will even work, then call the mediator you propose using and see if the mediator will discuss the topic in a general/nondescript manner

## Partial settlements

I offer partial settlements to keep hearing/trial short. I list those areas of agreement and the areas that the judge will need to decide. I understand that many attorneys want all or nothing, but I offer it for issues that are not in dispute.

## How to make mediation efficient

1. Bring your complete file and have your client bring all their paperwork.
2. Have an inventory listing all assets and liabilities – I often waste 2 hours trying to figure out what people have. Ahead of time, determine the value of all assets and liabilities. Have the property appraised by a professional appraiser. Photos are often helpful. Certified copies of criminal records can be helpful.
3. If drug tests or other important items have been done, bring the results.
4. Have client make list of everything in the house – whether they want it or not. It's really nice to have the list typed with columns for "husband" and "wife" and I can check the items off as we make agreements.
5. Don't bring up in the last hour "one more item" to discuss. Bring it up in the first session or I discount its importance. Often a case "blows up" when we have reached a settlement then one party announces that there is an item or topic that we need to discuss.
6. Have client control. Why is the mediator always the bad guy? Why does the mediator bring up all the "stuff" that you should have discussed with your client prior to mediation? I'll do it -- but it slows the process down.
7. I always try to make the attorney look good. If I have a question, I might take the attorney into the hallway far away from the client to discuss a sensitive topic.
8. Trust your mediator. Mediation is a process and if allowed the space and time I have truly seen "magic" happen. Give the process time to simmer. Mediators see good people at their worst. It's the death of their relationship. The client's feelings are all over the place. A good mediator knows this and has a thick skin.
9. If you have a "smoking gun" but don't want to share it. Then you can tell me you have the "smoking gun" that you will use in court but you don't need to disclose the details.
10. Remember that even the thinnest pancake has 2 sides. Quite frankly, I think that every story has 3-4 sides – her side, his side, and the side from all the observers.
11. Attorneys feel compelled to "vent" to show their client how tough they are and that they are their advocate. I'll let you go for a while, but don't blame me for going over 4 hours when you have been "difficult" for the first half of the mediation.
12. As a mediator, everyone lies to me. I know it. You know it. Probably only the client does not know it. The mediator is NOT the decider of the truth – the judge will do that. The mediator's job is to settle the case where neither party has gotten everything they wanted but they can live with the settlement.
13. Don't force me to "beat up" your client to make the case go away. Some people need to go home to sleep on it (or talk to their mama). And some people just need a judge to decide. As a mediator, I don't believe in picking the weakest party and then "forcing" a settlement just so my settlement rate is 100%. I have over a 90% settlement rate but some settle the next day or the next week. I am dealing with a person at one of the worst times of their lives and I am not going to intimidate or pressure someone into settlement.
14. Trust your mediator. I take a lot of training each year. Sometimes there is a reason behind my bizarre questions. My job is to settle this case. Settlement involves negotiation and determining what is truly

important to your client. You are your client's advocate – sometimes clients make poor decisions, but it's their life – not yours.

15. Pro Se Litigants can be difficult. They can take up a lot of time. It seems to slow down the process considerably. Let me know ahead of time if anyone is appearing pro se.
16. I don't like people to bring other people with them, but many people do. Sometimes they are the decision maker. Trust your mediator's judgment. Sometimes the "difficult" third party needs to hear with the mediator says. I always reserve the right to ask the 3<sup>rd</sup> party to leave. (Hint: if the mother-in-law is the issue, bring her. She'll hate me when I let her know how little her opinion matters.)
17. If you know ahead of time that your client is crazy, manipulative, unreasonable, bi-polar, on drugs, etc. let the mediator know. A head's up is greatly appreciated.
18. If you know ahead of time that it's going to be a horrible, difficult, terrible mediation, let the mediator know ahead of time. Work with your mediator. Your mediator is your friend. Be considerate of the mediator.
19. At mediation, we don't have to follow the Texas Family Code, I can address "fears" of the parties, I can "think outside the box" it offers an alternative especially when the people are already co-parenting effectively.
20. Don't allow your client to "take" (aka steal) items out of the mediator's office.

#### The Mediated Settlement Agreement (aka MSA)

1. Carefully read the document. Don't just skim it. It does not hurt my feelings if you see a typo or you can make my document clearer.
2. Make sure your client understands the MSA. Reading it out loud takes a long time, but then they cannot claim that you did not tell them something.
3. Make sure it is e-filed with the Court.
4. Normally all parties and attorneys leave with a signed copy.
5. The MSA is not a formal legal document – don't put in a bunch of legalize when it's not needed. Sometimes a bit is needed - but you are preparing the legal document using the TX Family Practice Manual - so know what's in the manual. If you have something specific you need then bring it and I can attach it as an Exhibit. For example, my wording uses "will" but I know the legal document will be "shall". I purposely try to write the MSA is basic easy to understand English.
6. Don't blame me when it takes 2 hours to write up the agreement. If you have certain things you want, then have them prepared so that I can "cut and paste" them into the MSA or attach as an Exhibit.
7. To avoid future problems, I like to be as clear and complete as possible in the MSA. I've seen several MSAs written by other mediators that are just bare bones and don't address hardly any issues – I suspect these MSAs would encourage future litigation or a second session of mediation. I need your input and suggestions for the final MSA.
8. Sometimes we are all tired at the end and we forget to include every possibility. Such as couple agrees to sell boat and split proceeds – but no one will make an offer on the boat – what happens if an asset turns out to be a liability?
9. I have had the attorneys need to leave but they want me to write up a proposed MSA. This normally takes 1-2 hours. I will do it but I expect to be paid for the time it takes me to write it.

## Clarification of MSA

1. Occasionally the attorneys come back for a clarification. I've only had 2 require more than 15 minutes of a tele-conference.
2. If it takes more than an hour, I charge for the work I do – especially when asked to write a report to the judge or a memo to the attorneys.
3. To avoid clarification, read the MSA before signing carefully.

## After mediation

1. If an impasse was declared, give your client a day then follow up to see how they are feeling. Often cases settle within 48 hours of an impasse after the parties have had time to think. And, let them know how much more money needs to be paid to go to trial – this often resolves a case.
2. All mediators have off days. I don't know why. Sometimes I'm on fire and other days it's like trudging through thick oatmeal.
3. Send your mediator a thank you note or even a gift.
4. Write a nice review on the Facebook attorney groups, yelp or [www.avvo.com](http://www.avvo.com) about the mediator.
5. Spread the word among your attorney friends to try the mediator.
6. I always go home and wonder what I could have done better at mediation. It's an on-going educational process.
7. If you reached an impasse, let the mediator know what the judge finally determined. It can help the mediator when a similar situation arises.

## How I would pick a family mediator

Talk to other attorneys and see who they like to use.

Mediation prices vary so select a mediator that your client can afford.

I would pick a mediator that belongs to a mediation group in Texas:

- Texas Mediator Credentialing Association (TMCA) - the only group that credentials mediators in Texas and has a grievance policy for their members
- Texas Association of Mediators (TAM)
- Association of Conflict Resolution – Houston Chapter
- Association of Attorney-Mediators (they have malpractice coverage)
- State Bar of Texas – ADR Section