

RHODE ISLAND SUPREME COURT APPELLATE MEDIATION PROGRAM



HOW SHOULD COUNSEL PREPARE FOR MEDIATION?

Mediation is an opportunity for parties to craft their own resolution to an underlying conflict. The Mediator does not make any decisions, but serves as a facilitator to reframe the conflict, identify the underlying interests that gave rise to the dispute, and assist the parties in formulating their own mutually acceptable agreement.

Mediation does NOT work within the typical confines of the court process where there is a winner and a loser. Mediation is limited only by the creativity and imagination of the parties. An agreement that reaches far beyond the limited appellate powers of the court can be fashioned by the parties to meet their own needs.

In order for an agreement to be reached by the parties, it is important to move beyond the pending litigation and the appellate issues at hand, and refocus back to the facts that gave rise to the initial dispute. Thinking outside the context of litigation, try to determine the interests that lie behind the legal positions. Interests do NOT include “winning on appeal.” That is a legal position. An interest includes the underlying needs, desires, concerns, and fears important to each side. Ask yourself and your client the following questions:

- ***What interest of my client was affected that made him/her/it originally file suit?***
 - Examples: client wanted access to property, client was injured, client was owed money, business relationship deteriorated, lack of respect or acknowledgement of a problem, etc.
- ***Outside of winning on appeal, what would be the ideal solution to this issue? What is ultimately important to my client in the long run?***
 - Examples: reestablishing a business relationship, ending a relationship, receiving compensation, obtaining respect and/or acknowledgment, ability to develop property, etc.
- ***What are the other side's possible interests?***
 - Examples: maintaining the business relationship, paying the least amount of money, preserving his/her/its reputation, maintaining character of neighborhood, resolving issue quickly, etc.
- ***Other than taking our chances on appeal, what could happen if we don't settle?***
 - Examples: build elsewhere, find a substitute, lose the opportunity, leave empty-handed, etc.

Once you determine the underlying interests of your client, see if you can think of some creative solutions or options that may address the underlying needs. It is important to think OUTSIDE the context and limitations of litigation. Instead, focus on the resources or potential collective resources available to each client irrespective of pending litigation. Rather than listing demands and possible concessions, more options are generated if the parties are forthcoming about their underlying concerns and what they ultimately hope to achieve. Discuss these with your client prior to the session and give your client an opportunity to evaluate potential possibilities that extend beyond relief that the Court could provide.

Bring all options to the mediation table and be prepared to suggest them. Be sure to allow sufficient time for the mediation session and for follow up sessions. Encourage your client to consider that the he/she/it has the opportunity to participate in the resolution of the case and have it resolve quickly, but would not if the appeal continued.

