

Preparing for Mediation: A Resource for Advocates
U.S. District Court SDNY
October 2023

This guide provides general information for counsel who participate in the Mediation Program at the U.S. District Court for the Southern District of New York. The information contained in this guide should be used to prepare yourselves and your clients so that you can fully participate as soon as the first mediation session begins. Each mediation is unique, as is each mediator's style, and the interests and approaches of counsel and parties. Counsel should use this guide however would be most helpful in each case, recognizing that there are many downsides to failing to prepare. Each topic is discussed in greater detail in the linked resources and articles.

I. Introduction to the SDNY Mediation Program.

The SDNY Mediation Program has been in operation since 1992. Cases enter the Mediation Program either through referral from a judge (a Mediation Referral Order), or through one of the Court's early automatic mediation protocols. Mediations are conducted by a [panel](#) of trained and highly experienced neutrals. In most instances, mediators are selected for proposed assignment at random from the sub-group of mediators who have the subject matter expertise that is relevant to the case. Mediators serve pro bono. SDNY mediations take place pursuant to the Court's [Mediation Procedures](#), including the [Confidentiality Agreement](#). More information about the Mediation Program, including mediator assignment, recusal, convening, and complaints can be found in the procedures, on the [Court's webpage](#), or by email at MediationOffice@nysd.uscourts.gov.

II. Preliminary Call(s) with the Mediator

Once a mediator has been assigned, the mediator may convene introductory calls. These calls can be conducted with all counsel together, or individually, and may or may not include the parties themselves. These calls build rapport with the mediator and provide a forum to share information that will be useful for the mediation session. Discussions may include the nature and posture of the case, critical legal issues, facts that are undisputed and disputed, the status of discovery, any settlement discussions that are ongoing, potential for future relationships, parties' intangible interests, any necessary steps to prepare for the actual mediation session, and how the mediator can be most helpful. For more information on this topic, please [see these two articles](#).

III. Discovery Before Mediation Sessions

Cases typically enter the Mediation Program at an early stage. Some mediation-related discovery may be required by Court order in [FLSA](#), [Employment](#), and [§ 1983 cases](#). Parties are encouraged to voluntarily conduct discovery focused on select areas that might assist with the mediation process. Request whatever information you need in order for your client to make informed decisions about settlement and provide information to the other side so that they can also make informed decisions.

IV. Preparing as Counsel for Mediation Sessions

Investigate and understand the facts of the case and the applicable law so you can address all claims, defenses, and remedies with the mediator and the other side. Consider and reconsider positions so that they are appropriately oriented towards settlement. Explore the obstacles or advantages that might exist due to multiple parties on either side. Identify the appropriate parties to attend and the role of any insurance representative. For more information on this topic, please see [this short article](#) and [this more detailed guide on preparation](#).

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V. Preparing Clients for the Mediation Session

Counsel should prepare their clients to participate in the mediation process. Clients must receive an explanation, in advance, about how the mediation process is intended to work and their role in making it effective. Counsel should convey reasonable expectations to clients about the case and the mediation process. As relevant, counsel should describe the venue, format, typical flow (including joint sessions and caucuses), claims and defenses, and settlement interests and positions of each party. Clients should be prepared to hear things that they will disagree with, and they may be asked challenging questions. They should be open to reconsidering their positions based on the discussions in mediation. Challenges presented by cases with multiple clients should be addressed before entering the mediation. For more information on this topic, please see [this article at 899](#).

VI. Mediation Statements

The mediation statement lays the groundwork for successful mediation by focusing on the most salient points. The statement may include: the party's contentions about liability and damages; a candid assessment of strengths and weaknesses of claims and/or defenses; the status of any settlement negotiations, including prior demands and offers; any barriers to settlement; any non-monetary proposals for settlement; any other facts that may be material; and next steps in the litigation if settlement is not reached. For more information on this topic, please see [this guidance](#) provided by an SDNY panel mediator, and [this law review article](#) at 176.

VII. Mediation Venue

Deciding where and how to mediate is important. Remote mediations continue to be very common. In-person mediations can take place in the office of a mediator or attorney, or in the courthouse. Counsel should discuss with their clients and the mediator whether in-person, virtual, or hybrid would be most beneficial. If the mediation will be on a remote platform, [preparing yourself and your client to participate](#) in this venue will be critical to everyone's experience of the process.

VIII. The Mediation Session

Mediation sessions vary widely, depending on the needs of the parties and counsel, the nature of the case, and the approach of the mediator. Consider what type of process would work best for each case and each client. What benefits might accrue from working jointly versus in private caucus? Can the mediator be helpful by listening, facilitating analysis, providing negotiation coaching, offering perspective or information, and/or by using impasse-breaking tools like brackets or proposals? Consider the approach proposed by the mediator and speak up if a different practice or method could be helpful. Mediations vary in duration. Before the mediation session, and/or at the outset of a session, be explicit about any time constraints.

IX. Memorializing Agreements

When mediation results in agreement, the materials terms should be documented in a writing signed by the parties, and/or authorized representatives, at the time of the mediation. Typically, the parties will later complete full settlement documents. Before the mediation session, counsel should be familiar with any specific requirements or limitations for finalizing settlements in specific case types. Additionally, to help improve the program, counsel should complete a post-mediation survey form found [here](#).