

Do's and Don'ts during the Mediation

First Organisational Telco with the Mediator

Do's:

- Make the extra effort to have the client participating to the first telephone conference or meeting
- Explain to the client why its participation matters

Don'ts:

- Do not try to make the life of your client too easy
- Do not remain an «advocate» of your client in the mediation

Opening statement/First intervention

If the lawyer starts:

Do's:

- Speak only if necessary and restrict yourself to what's needed
- Main purpose of your intervention is to help the Client to start, to express itself
- Rapidly hand over to the Client

Don'ts:

- Do not start pleading

In all circumstances:

Do's:

- Keep it short
- Phrase the issues as invitations to look for solutions together

Don'ts:

- Do not try to cover too much ground

Communication Generally

- Be genuine in your explanations, use words that are understandable, acceptable to the other party
Do not be condescending, accusing, bullying
- Use the «I» or the «We» words
Do not use the «you» or «YOU» word
- Discuss issues in a problem solving manner
Do not cross-examine the other party
- Accept that the other party is expressing a legitimate concern,
Do not over-interpret the message
- Address emotions and feelings as an item of discussion per se, i.e. directly with words (direct communication on emotions)
Do not let communication be driven by feelings and/or emotion

Lawyers' Role during Mediation

- Focus on your client's interests all along the mediation
Do not aim at a specific outcome
- Be a support to your client, help it to put things into perspective and let it decide
Do not take the lead from your client, do not decide for the client
- Help your client see the other side's arguments and accept responsibility
- **Be patient during the mediation**
Do not jump to your BATNA when it does not go as hoped, do not let your frustration sit in the driving seat

Issues in Relation to the Evaluation of the Client's BATNA

Do's:

- Be modest in your capability to evaluate your client's BATNA
- Be aware of your own biases when assessing facts
- Pay very much attention and use negative facts and evidence to revisit your BATNA with your client
- Re-evaluate with the client its BATNA and walk-away price
- Discuss the client's BATNA with the Mediator

Don'ts:

- Do not rely on your intuition
- Do not stick to your initial BATNA

Confidentiality and caucuses

Do's:

- Bear in mind that confidentiality is limited and pertains to proposals, positions and statements, not to the facts of the matter
- Use caucuses to discuss with the Mediator, the opportunity to raise delicate questions/information

Don'ts:

- Do not take uncontrolled risk with respect to delicate information or facts

How to work with the Mediator

Do's:

- Be the Mediator's accomplice in your relationship with the client
- Share your confidential information with the Mediator
- Trust your Mediator
- Like the Mediator, observe the ongoing mediation

Don'ts:

- Do not try to manipulate the Mediator (especially in caucuses)
- Do not lie to the Mediator
- Do not expect striking techniques or bold moves from your Mediator

Finalisation of the Settlement

Do's

- Take the time to draft a final and enforceable agreement during the mediation
- If it is impossible, and the final drafting has to take place after the mediation, do it as fast as possible (time is of the essence)

Don'ts

- Do not finalise without the Mediator
- Do not depart from the spirit of mediation (problem solving)

Thank you.

Pierre Kobel, Attorney-at-law,
Accredited Civil Mediator, FSA, CSMC
10 rue du Conseil-Général
1205 Geneva

+41 22 808 00 88

www.kobel-law.ch

pierre.kobel@kobel-law.ch

Kobel Avocat
Attorney-
at-law