

Middle of the Road: Settlement Discussions During Small Claims Arbitrations

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9 Steps To Successfully Mediate in an Arbitration

- ▶ 1. Introduction
- ▶ 2. Let The Litigants Tell Their Story
- ▶ 3. Summarize The Positions
- ▶ 4. Get More Information
- ▶ 5. Identify the Issues
- ▶ 6. Options for Resolution
- ▶ 7. Arbitrator Limitations
- ▶ 8. Agreement
- ▶ 9. Conclude

1. Introduction

- ▶ Set the tone and state the ground rules
 - ▶ Follow all Small Claims Arbitration rules (Arbitrator's Handbook pgs. 87-89)
 - ▶ Explain to the litigants you will be neutral and impartial
 - ▶ Try to help the litigants relax and not be nervous or combative
 - ▶ There is no one sized fits all approach – be fluid and adapt to the litigants
 - ▶ Use your style

- ▶ Explain the process of mediation and possible outcomes
 - ▶ Have a prepared statement

- ▶ Mind your time throughout the arbitration/mediation
 - ▶ Control the clock
 - ▶ Tell the litigants they will be given time to tell their story
 - ▶ Do not allow litigants to talk endlessly

2. Let The Litigants Tell Their Story

- ▶ Give each litigant the opportunity to tell their story
 - ▶ Plaintiff – Why Defendant owes Plaintiff money
 - ▶ Defendant – Why Plaintiff is not owed the claimed money
 - ▶ Counterclaims – visa-versa
- ▶ Actively listen to what litigants have to say
 - ▶ Do not presuppose what litigants might say
 - ▶ Do not Interrupt litigants
 - ▶ Do not let litigants interrupt each other.
 - ▶ It is ok to cut off repetition
- ▶ Look for “Tells”
 - ▶ Key Words
 - ▶ Repeated Facts
 - ▶ Triggers - Emotional State

3. Summarize The Positions

- ▶ Restate the specifics of what the litigant said using impartial language
 - ▶ Make sure to address all litigants
 - ▶ Restating serves two purposes:
 - 1) Allows litigant who just spoke to recognize they were heard
 - 2) Allows the other litigant to hear the other side's position in a neutral tone from a third-party
 - ▶ Recognize litigants' feelings, but keep them focused on the issues not extraneous matters (focus on the bricks not the mortar)

- ▶ Remember your obligation to be impartial

4. Get More Information

- ▶ Open ended questions
 - ▶ Will help you understand the litigant's position
 - ▶ Mind your time, use only a few open ended questions (as needed)
 - ▶ Listen to the answers for facts and for clues on how the litigant thinks
 - ▶ Use the "Tells" to focus litigants on resolution
- ▶ Direct questions
 - ▶ Fill in gaps of missing facts
- ▶ Be neutral
 - ▶ Do not drop hints as to how you might rule as the Arbitrator if the litigants do not settle

5. Identify The Issues

- ▶ Plaintiff
 - ▶ Why did Plaintiff commence this small claims lawsuit?
 - ▶ How did Plaintiff come up with the amount sued for?

- ▶ Defendant
 - ▶ What are Defendant's defenses?
 - ▶ Why does Defendant not owe what Plaintiff the money?
 - ▶ Does Defendant claim to owe a different amount?

- ▶ Facilitate litigants thinking towards their own resolution
 - ▶ Highlight the strengths & weaknesses of the litigant's case
 - ▶ Remain neutral – talk in neutral terms

6. Options For Resolution

- ▶ Use the “Tells,” devil’s advocate, brainstorming, and the facts to help litigants generate options for settlement
 - ▶ Help litigants prioritize settlement options
- ▶ Help litigants find mutually agreeable solutions
- ▶ Remind litigants that settlement brings resolution on their terms
 - ▶ Studies have shown that defendants are more likely to pay settlements than judgments.

7. Arbitrator's Limitations During a Mediation

- ▶ No Ex-Parte communications
 - ▶ At no time should an Arbitrator communicate ex-parte with a litigant
- ▶ Do not suggest case values for either litigant
- ▶ Do not simply resort to litigants splitting the difference
(Enhancing the Professional Reputation of Arbitrators, NYLJ, May 1, 1995, p S7, col 1, at col 1-2))
- ▶ Remain impartial
 - ▶ If you have to render a decision you do not want either party to have perceived you as partial to either side
(Matter of General Acc. Ins. Co., NYLJ, Dec. 15, 1994, at 30, col 5 [Sup Ct, NY Cnty 1994] [Stanley Parness, J.])

8. Agreement

- ▶ Help draft a written agreement between the litigants.
 - ▶ Act as a scribe, not an advocate
 - ▶ Use simple terms and bullet points.
 - ▶ In case of default, Plaintiff gets settlement amount, not the amount sued for
- ▶ Watch out for agreements when one litigant has counsel
- ▶ Have litigants read the agreement aloud and try to understand that they are agreeing to the terms within the written agreement
- ▶ Make sure that each litigant signs the agreement
- ▶ make sure each litigant receives a copy of the signed settlement agreement

9. Conclude

- ▶ Congratulate The litigants for hard work and diligence in finding a solution.
- ▶ If an agreement can't be reached, thank the litigants for their efforts and make your decision.
 - ▶ Briefly restate the strengths/weaknesses of both sides
 - ▶ Conclude by thanking litigants and tell them you have been given a lot to think about.
 - ▶ Make sure to give the impression that you have not yet made up your mind



About Darren R. Marks, Esq.

Darren R. Marks is a Partner at Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. in the firm's Supreme Court division. Mr. Marks focuses on litigating in State and Federal Courts and before various administrative agencies.

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Helpful Resources

- ▶ www.mediate.com
- ▶ www.internationalpeaceandconflict.org
- ▶ www.CRinfo.org
- ▶ www.acrgny.org
- ▶ www.adr.org
- ▶ www.abanet.org/dispute/home.html
- ▶ <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=26440>
- ▶ <http://www.jjay.cuny.edu/dispute-resolution-program>
- ▶ <http://www.beyondintractability.org/>