



Office of the  
**Ombudsman**  
for United Nations Funds and Programmes

# MEDIATION ADVOCACY

## **GUIDE FOR LAWYERS REPRESENTING PARTIES IN MEDIATION**

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Mediation Unit of the Office of the Ombudsman  
for United Nations Funds and Programmes

**HOW TO:**

**EFFECTIVELY  
REPRESENT  
CLIENTS IN  
MEDIATION**

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Please feel free to reach out to the Mediation Unit if you have any questions:

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# MEDIATION

**M**ediation is a **voluntary, informal, and confidential** process that takes place with the **consent** of all parties involved. In mediation, a trained neutral person, a **mediator**, assists the parties to work toward a resolution of a dispute, with the parties themselves remaining **in control** of the final decision.

A mediator is **impartial** and **independent** and has no personal interest in the outcome of the dispute. Their role is to create a **confidential** and **safe** environment that encourages all parties to participate in a **problem-solving process**. A mediator is not a judge or an arbitrator and does not determine the final outcome of the dispute. A mediator uses their skills to allow the parties to be heard in a **respectful, non-judgmental** way and assists them in reaching their own solution.

# REPRESENTATION IN MEDIATION

A lawyer is **not required** to participate in mediation. The parties often represent their

interests in mediation themselves, especially in the United Nations context. That said, if a party wishes to engage a lawyer to represent their interests in the mediation process or to draft the final settlement agreement, such party is encouraged to do so, especially at the stage of drafting the terms of the settlement agreement.

The lawyers that represent the interest of the parties in mediation, as opposed to in court proceedings, should have a **different set of skills** beyond those typically required of attorneys representing clients in adversarial proceedings such as courts. These skills are not inherited, they are **learned** and **practiced**. Below is a summary of skills that these lawyers should have to be successful.

**WHAT ARE THE  
SKILLS THAT A  
LAWYER SHOULD  
HAVE WHEN  
REPRESENTING  
PARTIES IN  
MEDIATION?**

# 1. TRUSTWORTHINESS

One of the main assets the mediation lawyers have is trustworthiness. The lawyers that have built a reputation of trustworthiness would have the **confidence** of the clients and the other party, making it easier to achieve a settlement **faster** and **efficiently**. For example, trustworthiness can be demonstrated when a lawyer **truthfully** states in mediation that the offer that is being proposed in mediation is the final offer of their client.

# 2. ACTIVE LISTENING

Lawyers in mediation should be **good listeners**, paying **attention** to everything that is said, and removing the victimization or demonization of the other party from the communication. Active listening **enables** the parties to **feel heard** and to reciprocate in the same manner, creating **trust** and **credibility**. Being an active listener is not an easy task, and as Ernest Hemingway said, “*most people never listen*”. Active listening allows them to **understand** the other party and/or, at the very least, to know what their interests are.

Research shows that 93% of what we communicate is **non-verbal**. This means that a good lawyer in mediation practices “active listening” while observing **body language, facial expressions, tone, and silence**.

### 3. PREPARATION

It is fundamental for the lawyers participating in the mediation to **prepare** for negotiations and think through and **anticipate** the **different possibilities** that may come up with their party. It may be that the client would like to have a joint session or a private session (i.e., confidential time during the mediation without the other party or their lawyer being present). Accordingly, lawyers will benefit from **learning adaptability** and **flexibility** in order to respond to requests and questions from their clients and the other party. Here are **some ideas on how to prepare for a mediation**:

- Lawyers and parties need to be prepared to respond to the multiple options, both as to the process and substance, that can be presented;



- They should have a **pre-mediation call** with the mediator prior to the mediation session. This call will normally be set up by the mediator, but it can be requested as well;
- They are encouraged to prepare a **mediation statement**. Lawyers should provide the mediator with all the **advocacy points** needed for the case and that they wish to present and be considered;
- They should think of **creative initial offers** and demands, which could be made in consultation with their clients. They should also consider **non-monetary factors** in their offerings or demands, such as an apology;
- They should also **prepare their client** before the mediation session, e.g., by informing them about the process, what may happen, and other key aspects like joint sessions and private caucuses;
- **Joint sessions** are generally **encouraged**. They are used for breaking the ice, establishing the way forward, and can expedite the process. However, the

occurrence of joint meetings depends on the nature of the mediation. In the UN context, litigation-related mediations typically omit joint sessions due to multiple layers of the organizational decision-making process regarding settlements. In contrast, joint sessions are more common in arbitration-related mediations, but frequently, the ultimate decision-maker does not participate in the process.

- They should not finalize the session without some type of **progress**, whether as to the process or substantive matters. There will be moments where parties will get frustrated or where settlement does not seem feasible, but remember that agreements can happen right after the worst moments. To that end, it is important that a mediation lawyer always stays **optimistic** and **persistent**. Lawyers in mediation will prepare and identify innovative resolution options and will not finalize the session, leaving the parties hopeless of a settlement, including by informing the parties of the **other available options** and **next steps**.

## 4. EMPATHY

Lawyers in courts are practiced in stating their arguments while undermining the arguments of the counterparty. This approach is not useful in mediation, where the goal is to reach a **mutually determined agreement**. Being empathic in a mediation setting means to **understanding** the **interests** of the other party and **being open** to considering resolutions that will meet those interests, as well as your clients.

## 5. CREATIVITY

Lawyers that represent parties in mediation need to be **innovative** in the **options** and **possibilities** that they could offer their clients, generate with them, and eventually the counterparty. Litigation often does not allow the same level of **creativity** as alternative dispute resolution processes. In most litigated cases, the dispute is narrowed down to a number of other resolutions which benefit only one party. Mediation offers **multiple options**, and **multiple factors** are identified that play a role that could be important for

both parties in order to reach an agreement. Parties usually have **complementary** interests, which opens the door for the lawyers participating in the mediation to offer creative solutions to reach a **common ground**.

## 6. FLEXIBILITY

Lawyers in mediation assess the situation and strategize their negotiation depending on the **features** and **progress** of the process. They can **change** their **approach** throughout the process as well as make use of the different tools available to them. This is key, particularly in **cross-cultural mediations**, given that different values, beliefs, and morals are involved, as it would happen often in the context of the United Nations.

## 7. SELF-AWARENESS


Effective lawyers in mediation **reflect** on their approaches and how they communicate with their clients and the mediator. They should **seek feedback** and be mindful of **gender**, **race**, **ethnicity**, and other **intersectional cultural issues**.

## 8. CONFIDENCE

Lawyers in mediation should be **confident** about their clients' case and interests but at the same time, be **open** to **admitting** the **weaknesses** of the case. Mediation lawyers should **understand** their client's case thoroughly and **clearly communicate** its strengths and weaknesses to their clients and, when appropriate, to the mediator.

## 9. PATIENCE

Mediation usually takes more **time** and **energy** than expected; it could be physically taxing, and there would be moments when the parties become **frustrated** or **angry**. Lawyers should be **patient** and **resilient**, but at the same time, they should also know when to take a **break** from the negotiations or when to **finalize** them.



As you can see, mediation is an **art** and a **skill** that can be learned with much **practice**. Effective mediation lawyers will be able to bring the interests of both parties to a common ground of understanding, which will lead, hopefully, to a settlement agreement that would satisfy both parties' interests.<sup>1</sup>

We hope this material provided useful information on the key skills that lawyers should have to successfully represent their clients in mediation. If you would like to know more about our office and the role of mediation, do not hesitate to contact us at [mediation@fpombudsman.org](mailto:mediation@fpombudsman.org); or visit our website at <https://fpombudsman.org/>.

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<sup>1</sup> This guide was prepared based on the article by Hon. Daniel H. Weinstein titled “*Reflections of a Leading Neutral on Mediation Advocacy*.”