

# INDIANAPOLIS BAR ASSOCIATION



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## Making Choices in Mediation

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One of the true ironies associated with the popularity of mediation is that many parties are refusing to negotiate outside of mediation.

This is unfortunate and wasteful. Smart lawyers realize that they can still settle a case without mediation, and they are reserving mediation for the tougher situations.

The most basic rule of choosing a case for mediation is that about any case can be mediated. About the only thing that will make a case unsuitable for mediation is if it is too small to justify the attorneys fees and mediator fees associated with the process. Even so, some small cases end up in mediation because the costs of going forward to trial are even greater than the cost of mediation.

One thing to remember in choosing cases for mediation is that there are no hard and fast guidelines as to what makes a case attractive for mediation. For example, some may take the position that a case cannot be mediated when there is a dispositive issue that is awaiting ruling by a trial judge. Even in such a case, the parties may be in a position to assess the possibility of the ruling going for or against them, and they may be willing to compromise based upon their



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assessment of the risk. Another example may be the case in which a party is afraid to settle because of the precedent that could be set by paying a claimant even one dollar. Such a case may be susceptible to settlement if a confidentiality agreement can be obtained. A third example may be the case in which the person prosecuting the claim is motivated by principle. The case may be settleable if the person's needs can be met even if principle cannot necessarily be fully addressed.

The bottom line is that every situation that is going to cost a client money to try should be submitted to mediation if it cannot be settled beforehand.

Once the decision to seek mediation has been made attention turns to selecting a mediator. Deciding who to choose is an imprecise science. However, it is a step in the mediation process that must be taken very carefully. You must begin by weighing the temperament, knowledge, age, experience, and personality of your client, the opposing attorney, and the other party. It also helps to have some idea as to which of the parties or attorneys in the case will need the most persuasion in order for the case to settle. Depending upon the mix of these factors, there are some cases in which you need a mediator who has knowledge in the area of law that is the subject of the case. In other cases, you may need an older mediator;

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