1. Secure the participation of key decision makers
For purposes of this chapter let us assume that you have dealt with two key threshold questions: Do you wish to mediate at all, and if so who will be the mediator? (For a discussion of these issues, see chapter 11.) Your next priority is to ensure that the right people are present at mediation.

Having capable decision makers is probably even more important than obtaining the best possible neutral. A mediator, after all, only helps people negotiate: It is the parties who make the settlement decisions. Your opponent, and sometimes your own client, may not be planning to bring the people necessary for the process to succeed, and the mediator probably won’t know enough at the outset to be able to make a judgment about this.

If you know a person who is important but not likely to come on her own initiative, ask the mediator to secure her participation. In doing so, you benefit from several factors. First, having agreed to mediate, everyone will feel an interest in building a good relationship with the neutral. As a result opponents will often agree to procedural requests they would have refused coming from you.

Mediators also have a bias in favor of including participants. Better, a neutral will think, to bring in someone who later proves unnecessary than to lose a settlement because a key decision maker is missing at crunch time.
A software company, Andover Networks, sued a former employee who had joined a competitor, Cupertino Design, alleging that the employee had recruited former team members to join her, in violation of her non-competition agreement with Andover.

Andover’s attorney believed that Cupertino would fund any settlement, and it was therefore essential that Cupertino participate in the mediation. Its general counsel refused, however, arguing that her company was not formally a party to the litigation and that it was up to the defendant employee to resolve the matter.

The Andover lawyer responded by agreeing to mediate, then asking the mediator to persuade the GC to attend. In doing so he stressed how important her presence would be to the success of “our” case. He suggested the Cupertino lawyer was trying to substitute an employee for the real defendant in part to get a lower settlement price and in part to avoid the embarrassment her activities were causing the company.

The mediator talked with the general counsel at length, emphasizing the advantages to ending the distraction the litigation was causing for her company and its new employee. The Cupertino lawyer adamantly refused to travel from California to Boston to attend the mediation. She did, however, agree to be present by speakerphone, beginning at 6:30 a.m. her time, for the opening session and all caucus discussions with the mediator. She honored this commitment and her participation proved crucial to reaching agreement.

Sometimes the missing person may be your own client; recall for example the case in chapter 2 in which a lawyer decided it was essential to have a reluctant client at mediation and used the mediator to persuade him to attend. In unusual circumstances a lawyer may decide that success requires excluding someone from mediation, or at least limiting how they participate in the process. Here too a mediator can help.
A manufacturer and general contractor were at odds over the installation of a heating/ventilation system. The manufacturer claimed the system was defective and sued for $2.5 million in damages. The contractor countersued for more than $1 million in outstanding invoices.

The contractor’s inside lawyer, who had tried for months to negotiate a solution, warned his outside counsel that the manufacturer’s project director had to be excluded from the mediation. “If he’s calling the shots,” she said, “it’s not worth mediating. He’s highly opinionated, abrasive, and defensive about this whole project. His lawyer couldn’t control him in our negotiations, and if he’s in the mediation it’s not going to go anywhere.”

The outside counsel passed the request along to the mediator. The manufacturer’s lawyer reacted predictably: No one was going to tell his client whom they could bring to the bargaining table! Two weeks of discussions ensued. Eventually, with great reluctance, the contractor team agreed to attend despite the project director’s presence.

Apparently the contractor’s lawyer had lost—but perhaps not. Raising the issue emphasized her basic theme: that the genesis of the dispute lay in the unreasonable demands and abrasive style of the project director. The interaction also affected how the director acted during the process. He was the soul of reasonableness—it almost seemed to the mediator that he’d been medicated. Perhaps he simply felt obligated to prove to his colleagues on the plaintiff team, as well as to the mediator, that he could be civil and fair-minded to a fault.

Attempts by one side directly to exclude another party’s representative are very unusual. The more common way to deal with this kind of problem is to bring in a higher-level person who, one hopes, will sideline the troublesome player. The contractor’s attorney, for example, might have dealt with the dysfunctional project manager by telling the mediator she thought the two companies’ CFOs should participate, and offering to work to secure the presence of her executive if the mediator would persuade
the other side to bring theirs. If your own client is the one whose representative is unhelpful, you might use the same strategy in reverse.

2. Mold the process to your needs

Commercial mediation has a typical structure that begins with all parties meeting together but for most of the process has them separated in private caucuses. In some situations this format may not be optimal, and if so, you can ask the mediator to change it. The cases described in chapter 1 provide examples of how this can be done.

- **The time frame.** Commercial mediations are typically scheduled for a single day, but in the *Krueger v. MIT* case the lawyers arranged for sessions to be held on two separate days, and in the insurance dispute the parties held meetings over a period of months.

- **The location.** Legal mediations usually occur at the office of the mediator or one of the lawyers, but the attorneys in *Krueger* choose to hold the second day at a rural conference center. They did this primarily to create a productive atmosphere, but also, as the plaintiff lawyer noted, to discourage his clients from walking out prematurely. In the insurance case, meetings were held at airport hubs, hotels, law offices, and mediation facilities.

- **The agenda.** In *Krueger* the first day was devoted to arguing the legal issues and the second to allowing disputants to work through emotional barriers and bargain. In the insurance dispute the plaintiff’s inside counsel began by refusing to discuss substantive issues and declined to compromise at all until the insurer made a large offer.

- **The structure.** The first day in *Krueger* consisted only of lawyers and was conducted almost entirely in joint session. The second day began with a breakfast meeting involving the mediator and the plaintiff side, then an emotional joint session followed by caucus bargaining.

In the insurance dispute the lawyers recognized that the complexity of the case, involving a large claim and decades of layered insurance policies, required a special structure. They set up a meeting between the mediator
and the two dozen lawyers and party representatives to deal with organizational issues, followed by private sessions between the mediator and lawyers and experts for each side to orient the neutral to the issues in the case. The mediation itself involved multiple meetings in different formats and locations.

A professional sports league was in litigation with a cable company over a contract dispute involving the monthly fee charged to subscribers for access to its games. The league argued that their contract mandated that the channel be put on a “low cost tier,” a classification that would maximize the audience for its games. The cable company said the contract justified putting the channel on a “high tier” channel, which was necessary for the company to recoup the license fee demanded by the league.

After two days of mediation the parties appeared to deadlock. The league lawyer thought, however, that they were talking apples and oranges—each side seemed to be using a different definition of “low tier.” He suggested that the technical experts confer. It quickly became apparent that the league was using a definition that was in force when the contract had been negotiated five years before, while the cable company was using its current definition, which had changed substantially. The confusion resolved, the parties resumed their discussions and eventually struck a deal on a renewed contract that included a settlement of their dispute.

For examples of lawyers working to influence the structure of a mediation, see chapters 1 and 2 of the Advocacy DVD.

Chapter 11 discusses issues to consider in setting up a mediation. The key point is that whatever format you want, a mediator can help you obtain it.