I. PREPARING YOUR CLIENT.

Preparing your client for mediation is essential to the mediation process. In some ways, mediation preparation is simply an element of the “best practices” that should be exercised throughout the attorney-client relationship. It is the communication vital to earning the trust and confidence of your client. In addition, case preparation and thoughtful planning for the settlement process best positions you to secure the most value possible for your client.


Many clients will be unfamiliar with the mediation process. Start with the logistical basics. Confirm who will be in attendance as your client representative(s), their lawyers, any experts, whom to expect from the opposition, their lawyers, any insurance representatives, and the mediator. Confirm the date, time and the physical location.

B. Helping Your Client Form Reasonable Expectations: The Mediation Process.

1. The Mediator.
Introduce your client to the mediator you have selected and agreed upon with counsel for the opposition. Conduct wide-reaching due diligence on the mediator, consulting as many sources as practicable, including colleagues in the community in which the mediator primarily practices.

If you have not included your client in the selection process, explain whom he or she is and why he or she has been selected for your particular case. Whether or not you have prior experience with the mediator, share what information you have learned through due diligence, including his/her education and employment history prior to becoming an expert in dispute resolution. Was he or she a judge, plaintiff’s attorney, defense attorney, from a big firm, small firm, in-house? Share your views and those of others on how that might impact the perspective of the mediator and his or her mediation style.

Explain what you have learned or experienced about the mediator’s negotiating style. Is the mediator aggressive, opinionated, evaluative? Or, is the mediator more facilitative? Does the mediator tend to want to hear from clients? Does he or she tend to negotiate with the parties? Advise your client how the mediator’s individual style may impact how you conduct the mediation.

2. The Mediator’s Chief Goal.

The chief goal of every mediator is, quite simply, a settlement. Their success in their field is defined by whether they have helped the parties achieve a resolution. Your client thus needs to understand that while the mediator will discuss the merits of the case, perhaps for hours, the success of the mediation is not dependent upon whether you have convinced the mediator that you are right and your opposition is wrong. The primary relevance of substance (factual and legal) to the mediator is as ammunition to use in convincing the parties to settle. What does this mean? It does not mean that you or your client will ignore the merits. To the contrary, as discussed herein, preparation on the merits of your claims and defenses is vital.

3. The Mediation Format.

Explain the format of the mediation. Most mediators begin with a plenary session at which time he or she may make a statement about the process, his or her goals and ask the parties to sign a confidentiality agreement. The mediator may then invite counsel and/or the parties to make an opening statement. The client should be prepared for possible interruptions and questions during the opening statement.

Counsel your client that following the opening statements of the parties, which could take a significant portion of the opening session, private caucusing/shuttle diplomacy will likely follow. The mediator will separate the groups into different rooms and that they may not reunite until an orchestrated meeting or at the conclusion of the mediation, if at all.

Your client needs to understand that she may hear hyperbolic expressions of the weaknesses of her case and the opposition’s strengths. The client need not be surprised, alarmed or disappointed, but rather, informed and prepared with proof. Despite the potential for hyperbole, both you and your client should critically listen to the opposition as you evaluate your case and any settlement scenarios.

The mediation process includes much “downtime,” which is a misnomer if you want to do the best job for your client and keep your group sharp. Many clients want to see “action” at the very beginning. In some cases, the client may be an impatient executive accustomed to having full control, and must be prepared (and have the trust) to give up some of that control to the mediator and for long periods of time. The client should be assured that mediation is a process – “a marathon, not a sprint” and that frequently the “action” occurs in the last few hours of the scheduled mediation. The client should be prepared for massive shifts of momentum. The mediation process can be an emotional roller coaster as the client tries to read cues from the mediator, makes difficult concessions that are not accepted, believes a deal is imminent, only to learn of a new barrier. The client should remain patient, but vigilant, and should not plan for any breaks (or use the “downtime” for anything other than continued internal dialogue on the dispute you are mediating) throughout the day.

Mediators have a number of techniques designed to move the parties closer to a settlement. Familiarize your client with those tools:

Causcuses between subgroups: The mediator may try to change the dynamic by speaking directly to the lawyer outside the presence of the client, suggesting a lawyer to lawyer meeting, or a principal to principal meeting. Prepare your client for these possibilities.

Bracketing: With bracketing, the mediator attempts to close the gap between the parties’ positions, e.g., convincing one party to offer to settle for X dollars if the other moves to Y dollars.

Decision Tree: The mediator will encourage the decision-maker to consider options, anticipate the potential outcomes in the case and assign probabilities. The concept is to help the decision-maker realistically assess risk and thus move the parties toward settlement.

Mediator’s Proposal: A mediator’s proposal is a device that can be used (once!) at the end of the mediation if no agreement has been reached. The mediator chooses the terms of a settlement. Neither side knows whether the other side accepts or rejects unless both accept. The benefit to this approach is that no floor or ceiling is set for future negotiations. The downside is that, if the proposal is not accepted, the mediation with the particular mediator who made the proposal is likely over.

C. Your Approach and Strategy.

1. Preparation, Preparation, Preparation.

Communicate to your client the importance of being prepared and what it is that you will be doing to get prepared. Explain the nature of the mediation briefs, the legal and factual research to be conducted, the need for you to update all aspects of the case, selection of key evidence to be used at mediation and anything specific to your case that you need to complete beforehand to increase the likelihood of a successful mediation.

2. Roles of Participants.

Counsel and client will each have unique roles in the mediation process. Ensure that your client understands what you expect from her. Walk through the phases in the mediation:

i. Opening Statement. As a general rule, counsel will present the opening statement at the joint session to ensure that the right points are covered and the appropriate messages sent.

ii. Client Role. The client should participate directly in the mediation process, but it must be thoughtful and strategic. Just as you prepare for argument, just as a witness is prepared for deposition, so too should you prepare the client. Anticipate questions that may be asked by the mediator and then discuss and role play answers.

The client should be prepared to discuss his business history/culture/philosophy and strategic vision, industry norms, the impact of opposition’s conduct, actual damages—any matter that the client knows well and which has relevance to and/or motivates the claims and defenses—or the desire and ability to settle the case. The client must be told (directly) not to exaggerate.

iii. Feasibility of Solutions. All present at the mediation—counsel and client should be prepared to thoughtfully and creatively consider various settlement scenarios. Encourage your client to listen with curiosity and approach the process with an open mind.

iv. Damage Explanation and Quantification. Damages are at the very heart of the resolution. If your client is seeking damages, do not simply throw out a number, even if it is early in the case. Develop your damage theory/defense. You will need to decide who will present the damage analysis—usually counsel or even an expert. If your client is seeking damages, he or she should be prepared to discuss the damages from a personal/business view.
v. Legal Challenges/opportunities/realities. All matters “legal” should be handled by counsel. Let your client know that he need not be concerned with defending against challenges to the legal case.

3. Attitudes of Participants.

The client must be prepared to demonstrate her sincere and steeled resolve for fairness. The key message to send to the mediator (and thus to the opposition) is your client’s (truthful) resolve to see the case through in the absence of a reasonable and fair settlement as defined by your client. Thus, you must counsel your client on the importance of resolve.

Equally critical, however, is an explanation that there exists some natural tension between being resolved/emoting resolve and obtaining a settlement. You must counsel your client to avoid “fooling” the mediator. If your client is successful in “fooling the mediator,” for example, “x dollars is my bottom line,” the mediation could well fail based upon an artificial and false construct. Time, expense and most importantly, an opportunity, will have been wasted.

The lesson is thus that the client should not over-advocate nor should he/she expect you to over-advocate your position. Be resolved, but follow the golden rule: Never Fool the Mediator.

The client (and counsel) should understand that they must have complete intellectual sobriety while in session and exhibit no familiarity or jocularity with the mediator.

4. Ready Access to Client Resources.

Ask your client to arrange in advance any potential access to information at home. For example, as solutions are discussed, access to the company CFO to assess the impact of a potential settlement scenario may be useful to the mediation momentum. Assess your case and determine who might be useful to have at the ready to find a document or answer a question about the events underlying the claims.

5. Creativity in Solutions.

Ask your client not to wait until the mediation to consider settlement scenarios, but to creatively think about potential solutions well in advance of the mediation. Push your client to raise the level, to reach out to others within the organization and think outside the box.

Identify the settlement “currency.” It is not just the amount of money, but the timing and characterization of it. Think about tax consequences—both positive and negative. Ask your client to consider whether there are viable alternatives to money. For example, is future business worthy of consideration? What motivates the claim or defense? Is there a personal offense? Is business reputation at stake? Are there options that address those concerns—an apology, a press release, confidentiality?


Your client should not hear the opposition’s position for the first time at the mediation. Let your client know what she should expect to hear about your case from the other side. While you may not need to explore every nuance of every claim and defense, you should globally explain the claim or defense and the basis for each and, if applicable, any settlement themes that your opponent is likely to present. This aspect of the pre-preparation process will not only allow the client time to consider and develop a response, but will give her confidence to project genuine and thoughtful resolve.

E. Preparation Logistics.

The client must be given the time and tools to digest all of the information that you will impart to him. The first preparation session should occur as far in advance of the mediation as is necessary for your client to absorb the information and complete any “homework” assignments you may make. Ideally, this first meeting should occur at least two weeks before the scheduled mediation. Conduct a second preparation session the day before the
mediation, and not only re-emphasize the critical aspects of the client role and expectations, but cover any new developments, e.g. issues that have arisen in communications with opposing counsel, issues that have been raised in briefs, etc.

In preparing your client, use a written agenda. Much of the information you will impart to the client will be new and perhaps overwhelming. Your client will then have something to reference when focusing and preparing for the mediation. A sample agenda is included in the accompanying Appendix.

II. PREPARING YOURSELF.

A. Due Diligence.

Know who you will be dealing with at the mediation. Do your homework. Conduct complete due diligence on your opponent and the mediation attendees. Assemble biographies on the mediator, the mediation attendees and the opposition’s experts. Understand the history and culture of your opponent, especially as may relate to litigation and dispute resolution. Share the information with your client and, where appropriate, the mediator.

B. Legal and Factual Research.

Know your case. Many advocates approach mediation without thoroughly knowing the case, assuming that it is unnecessary, if after all, it may go away during the mediation. But, to build the genuine and realistic resolve so important to the negotiation and to really understand the potential value (or lack of value) of a case, you must know the case (including, most assuredly, the damages aspect of the case) and be prepared—with law and proof to support it. Accordingly, before the mediation is the time to analyze your client’s claims and defenses and be aware of the proof that exists or that must be developed. Develop the proof. Develop the rejoinders to the arguments made by your opposition. Work with the confidence of knowing that the value of settlement will only increase and if mediation fails, you are that much further ahead with the preparation of your case.

C. Briefing Book.

Many lawyers come to the mediation session armed only with copies of the mediation briefs. Doing so does little to advance your goals of full preparation and sending the accurate message that your team (client and counsel) are fully engaged, prepared and resolved. As you are conducting your due diligence and legal and factual research, and preparing your damage analysis, prepare short memoranda on both the significant components of your case and your rejoinder to the stated and anticipated criticisms of your approach. Although you will know many of the issues as a result of living with the case, be certain to comb the opposition’s brief for criticisms and be prepared to respond to each major part.

Assemble the memoranda in a notebook, with an appropriate index so that the information is readily accessible. Doing so avoids fumbling, making calls to obtain information or just not having the information when you need it. On critical issues, have copies of your memoranda for the mediator. Whether you settle or not, this part of preparation sends a powerful message to both opposing counsel and his client about the way in which your team will prosecute/defend if the case is not resolved.

D. Draft Agreement.

If settlement occurs during mediation, you never want to leave without a written, binding agreement that sets forth the essential terms of the settlement. No preparation is complete without ensuring that you bring a draft agreement to the mediation. It need not be what you expect the final settlement documents to look like, but be sure to include the essential terms to which each party will be bound. Having a draft will ensure that appropriate language is included and not lost in the rush of the moment, saves time at the mediation, and allows you to take advantage of the momentum.

III. PREPARING WRITTEN MEDIATION SUBMISSIONS.

A. The Exchanged Brief.
The brief that is (usually) exchanged with the opposition serves two purposes. First, it is usually the mediator’s introduction to a case that you have lived with, sometimes for years. Second, it is the medium by which you begin to help frame your case for settlement and manage the expectations of the opposition.

The content of the exchanged mediation brief is sometimes dictated by the mediator. Regardless, it must be a thoughtful, thematic presentation, not just a regurgitation of the claims and defenses. Further, its length and content must respect the time and logistical constraints faced by the mediator. A full-time mediator often conducts mediation sessions daily.

In your exchanged brief, tell a compelling story that helps both the mediator and the opposition understand the claims, defenses, damages and the parties’ respective positions. Consider attaching key documents, but do not substitute documents for thoughtful, well-written presentation of the case. And, do not attach so much material that the significance of the key data is diluted.

The exchanged brief should not be polarizing but should impart information on your position, giving the mediator tools to effectively express to the opposition its downside and weaknesses. And, it should convey your position to your opponent’s decision-maker(s) to give them much to think about as they consider what a third party decision-maker might do with the case.

B. The Confidential Brief.

It is sometimes helpful to the Mediator to provide summaries of your experiences, observations and due diligence. Certain sensitive issues, if raised in an exchanged brief, may further polarize the parties and inflame passions. Accordingly, consider whether it is helpful to share information and opinions which may assist the mediator in his or her task of resolving a dispute that you have lived with for months, perhaps years, in a matter of hours. The list of potential matters to disclose is endless and wholly dependent upon the nuances of your case. However, some suggestions follow.


What is the relationship with their counsel? Will they be relying upon their counsel or will a decision be made with little guidance from their counsel?

What might the mediator first experience with that person that you have found to convey a false impression? What is their past relationship with your client(s)? Do they have real authority to settle or do they need to look to someone else? Who is the real decision-maker?

What are their attitudes? How do they view their exposure and thus the mediation? Do they have an unfair sense of entitlement? What are their incentives to settle? What are their disincentives to settle? What is the culture of the corporate client? What is their negotiating style? Attenuated negotiations? Come close to making a deal, but fails to finalize? Renegotiates points already agreed upon?

Opposing Counsel. Introduce the mediator to counsel with whom he or she will be dealing. What is your experience with counsel? What is counsel’s legal/trial experience? What is their style? Prepared? Smart? Charming? Endearing? Sanctionious? Sincere/Insincere? Willing to try cases? Capable? Strategic? Should the mediator look to opposing counsel for help in settling the case? Influence over the decision-makers?

Your Clients. Take this opportunity to educate the mediator about your client(s), his or her experience, successes, values and personality. Share with the mediator the emotions your client(s) experience about the dispute. Are they angry and why? Are they embarrassed by the advantage taken of them? Are they practical? Thoughtful? Decisive? No-nonsense? Good judgment? Are there reasons a settlement for your client now is wise? Will a
mediation in the future be less likely to succeed for whatever reason? For example, do you know that historically your client gets wed to the litigation process once involved?

**Your background.** If you are new to the mediator, you may wish to share your background, the nature of your practice and your relationship with your client.

**The case and legal climate in your community.** If you are working with a mediator who is from out of town, you may wish to share nuances about your court system. Are your juries pro-plaintiff? Pro-defendant? Does your court see high dollar verdicts? Are there nuances to the system that could impact the litigation? What are the unique rules that govern? Disclosure obligations? Limits on depositions? Who is your judge? Who are your arbitrators? When are you set for trial? If particularly significant, share with the mediator your impressions of the effectiveness of witnesses—both lay and expert.

**Historical Settlement Efforts.** If you do not share historical settlement efforts in the exchanged brief, do so in the confidential brief. The mediator should know where you have been, and when in the process it occurred. The mediator should know why this time the settlement terms will be significantly different or why this time the case has a better chance of settling.

**Settlement Concepts.** Many cases are just about payment of money. Others have different currencies. Can you settle with a business deal? Should there be a complete divorce? Will an apology help? A joint press-release?

**Mediation Dynamics.** What are the dynamics of the dispute that make resolving the dispute a challenge? Personalities? Is ego involved? What are the dynamics that impair the chance to settle? Is one party willing to take substantially less than the stated claim in order to fulfill an unrelated need? Share what you believe might lead to a resolution. Does the mediator need to show one side that it has real risk?

### IV. PREPARING FOR THE OPENING STATEMENT.

Most often, mediations begin in a joint session. Some mediators discourage an opening statement, others make it optional and still others expect or require it. The opening statement, delivered well, is an opportunity to send messages and (continue to) frame expectations of the opposition.

Depending on the individual circumstances of each case and the timing of the mediation, your opening statement at the joint mediation session may be the first time opposing counsel and the mediator will be able to take your measure and assess whether and to what extent you are a formidable opponent. Perhaps even more significantly, however, the opening plenary session may be the first time that the decision-maker(s) for your opponent will actually hear the substance of your client's viewpoints unencumbered by her lawyer's re-packaging of your client's position. Like a game of "telephone," sometimes messages are lost in the translation.

Accordingly, your opening statement should not be off the cuff, but strategically thought-out and well-prepared. You want the mediator, opposing counsel, any insurance carrier and the decision-maker(s) to know that you are organized, well-prepared, knowledgeable and can effectively tell a compelling story to a third-party decision maker, whether it be a judge, arbitrator or jury. Consider using demonstrative tools, but as with any presentation, make sure that the demonstrative proof does not disrupt your momentum, and only enhances your presentation.

Consider and then develop any messages you want the decision-maker(s) to hear. Do not assume that they have necessarily read what you have filed in the case or even the mediation brief. Be ready to explain the basis of your client's position and justification for the damages sought or the defenses to the damage claim.

Finally, as with most any presentation, oral argument or opening statement to a jury, practice, practice, practice. Gather your colleagues or friends, give your opening, ask for feedback and be receptive to the thoughts you are given.

### V. CLOSING THOUGHTS.

Although every mediation is different based upon the facts and circumstances of each individual case, something can be learned from every mediation process for use in the future. At the conclusion of each mediation, avoid the
temptation to simply close the file. Take the time to prepare a memorandum on what transpired. Include the nature of the sessions, the offers made, and techniques used by the mediator. As you prepare and collect these memoranda, you will see patterns emerge, what works and what doesn't, and be able to generate ideas on how to approach and handle your next mediation. For the same reasons, consider building a “mediation library.” Keep a notebook(s) on every case that has mediated. Include the correspondence and communications that have led up to the mediation, the exchanged and confidential briefs, the briefing book, any settlement agreement, follow-up correspondence and the memo prepared at the conclusion. Your mediation notebooks will be a repeated source of valuable information.