

PREPARING FOR MEDIATION: ATTORNEY'S CHECKLIST

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STAGE ONE: PREPARATION

1. Prepare the case

- Develop understanding of the facts
- Analyze Issues: Strengths and weaknesses of both/all sides
- Compose strongest arguments
- Anticipate other party's arguments

2. Prepare the negotiation

- Identify the barriers to settlement, such as:
 - Communication failure
 - Bad negotiation skills
 - Lack of Information
 - Emotion
 - Good faith disagreement about trial or outcome
 - Wrong people at the table
- Identify the interests or needs of your client, and then of the other parties to the dispute to the extent you know or can speculate
- Consider various options, whether acceptable or not, that could exist to satisfy your clients interests and then those of the other parties
- Identification of these options allows you to determine the possible Alternatives to a Negotiated Agreement (the "best" one is referred to as your BATNA)
- A preferred outcome for the mediation is determinable with reference to the BATNA – the mediation should result in something that is better than the BATNA
- In most cases, risk analysis will help to identify a reasonable range of settlement; however, various intangible factors will still need to be considered

3. Prepare the client

- Explain the process
- What to expect and to expect the unexpected/be flexible
- Go over Ground Rules – how best to participate
- Identify Goals – ultimate goal is to get to a settlement, but subsidiary goals can include facilitating communication; obtaining a more comprehensive understanding of risks and costs and opponent's case; having an opportunity to present and persuade; limiting issues for trial if unable to settle
- Identify any issues re: authority to settle

4. Prepare for the Mediation Session

- Select the Mediator
- Schedule the Mediation, confirm identity of attendees
- Prepare the Mediator: Pre-mediation Submission
- Determine tone and theme for first session: prepare Opening Statement
- Review and sign Mediation Agreement with adequate confidentiality provisions

STAGE TWO: PARTICIPATION

- Seating: Control of your side and ability to observe everyone/make eye contact
- Establish tone: Be moderate in positioning and formality
- Deliver Opening Statement: primary purpose is to persuade the opponent, not convince the mediator
- Use opportunity to obtain information: open-ended questioning skills, not cross exam
- Present key documents and evidence as warranted, bring extra copies
- Maintain credibility and productivity: use principled negotiating
- Remember to identify confidential information to the Mediator before concluding caucus

STAGE THREE: RESOLUTION

- Determine necessary settlement terms and documents in advance
- Before conclusion of mediation session, draft a Settlement Term Sheet Agreement and have everyone present execute it
- Identify who is responsible for what follow-up: e.g., preparation of detailed Settlement Agreement, Releases, and/or Motion to Approve Compromise