

MEDIATION PREPARATION CHECKLIST

1. The Mediation Process Explained

- Mediation is an exploration for a mutually acceptable solution. It is designed to save time and money and avoid the expense of a formal, litigation process.
- Mediation is informal—the focus is on conversation and exploration over competitive argument. Of course, competitive bargaining occurs, but it is different than what occurs in trials, depositions, and court hearings because the conversation is about exploring solutions.
- Parties can have candid and confidential discussions with the mediator.
- Settlement negotiation gives parties more options for resolution, avoids loss, and allows for terms and relief not possible in court, often better meeting parties' real interests.

2. Mediator Roles

- Transformative: Empowers parties, improves communication, rebuilds relationships.
- Facilitative: Guides discussion, asks questions, clarifies issues/disputes.
- Evaluative: Assists risk analysis, suggests settlement options, takes a more directive approach.
- Mediators often use a mix of these approaches. **Consider what approach or approaches may be useful.**

3. Identify Interests & BATNA/WATNA in Advance of Session

- Position vs. Interest:
 - Position = What a party demands (examples: I'm entitled to x monetary amount, I want the property).
 - Interest = The underlying need for demand (examples: stability, financial need, property necessary for a certain purpose, improving relationship, distrust, anger, optics).
 - **Identify interests.**

- BATNA (Best Alternative to a Negotiated Agreement):
 - **Determine your best, likely outcome in the case.**
 - Consider and include time, stress, and costs.
- WATNA (Worst Alternative to a Negotiated Agreement):
 - **Determine your worst, likely outcome in the case.**
 - Consider any potential fee awards and other costs and losses.
- **Assess realistically—Does a trial or negotiated agreement better satisfy the party’s interests?**

4. Perform Risk Analysis in Advance of Session

- **Identify strengths and weaknesses of both legal claims and fact disputes.**
- If seeking a monetary judgment, consider likelihood of collection, collection costs, and impacts of delayed payment.
- Consider likelihood of reductions in any petition for attorney’s fees.

5. Common Negotiation Biases

- **Fixed-Pie Bias.** Assuming only a zero-sum game. Consider broader solutions beyond the specific claims in the case. The other party’s priorities may not be the same as yours. Consider whether there is something they care about that you don’t.
- **Escalating Commitment.** People tend to take larger risks when perceived to be down, such as when a significant amount of attorney’s fees have been spent. Litigation is not a business investment. Reflect on whether you have adequately determined the impact of any new information and adjusted the risk analysis accordingly.
- **Overconfidence.** Consider whether you are overconfident in your likelihood of success (example: 50% liability x 50% damages = 25% total chance of success, but this often feels like a 50/50 case).
- **Failing to Understand the Other Side’s Perspective.** Beneath every bargaining position is an interest. Understanding the other side’s interests is a path to find agreement because the real interest may be easier to meet than the stated demand.

6. Determine Negotiation Strategy in Advance of Session

- Opening Proposal: Extreme proposals do not result in the best settlement. Be strategic, not aggressive. Proposals should convey a benefit.
- Identify all terms of a proposal in the initial proposal to avoid adding new, last-minute terms (avoid an “Oh, By the Way...”). This may include non-monetary terms such as confidentiality or non-disparagement.

- Consider a funnel strategy (large movement followed by smaller)—consider the messaging each proposal communicates.
- When receiving proposals consider evaluating them in terms of what interests the proposal does and does not meet.
- Handling extreme proposals:
 - Stay calm, listen to understand, not just to respond.
 - Mediation is about exchanging perspectives so try to look behind the numbers of a proposal.
 - Consider not responding in kind with an equally extreme proposal. Consider a proposal which explains your position.
- Patience is key; resolving a long-standing dispute takes time. A mediation is a very small percentage of the entire case and often the most productive.
- Consider flexible settlement ranges in advance but avoid setting a fixed “bottom line.”