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Mediation Preparation Checklist

A guide for counsel and parties preparing for mediation

Not every item applies to every case. Work through what fits the matter in front of you.

1. The Mediation Process

- Mediation is a search for a mutually acceptable resolution that matches the risk of continued litigation. No one determines who is the prevailing party; it is designed to avoid the risk of loss.
- Less formal than the rest of litigation—the focus is productive conversation over legal argument.
- The mediator is neutral and cannot impose an outcome. Nothing is settled unless the parties agree.
- Private caucus discussions with the mediator are candid and can be confidential if flagged.
- A negotiated settlement allows terms a court cannot order—payment structures, non-monetary relief, confidentiality, releases, and future arrangements—plus flexibility and risk management.
- Explain the shape of the day: caucusing, shuttle negotiation, down time. Expect and prepare for possible multiple impasses that will need to be worked through.
- Explain that early offers are rarely the last, and that waiting between mediator visits is normal.
- Review applicable confidentiality and privilege rules. Confidentiality of mediations is governed by evidence rules and mediation statutes, if any. Confidentiality can be increased by agreement under a Mediation Agreement. Some cases involving public entities may not be subject to contractual confidentiality.

2. The Mediator's Role

- **Transformative:** empowers parties, improves communication, rebuilds relationships.
- **Facilitative:** guides discussion, asks questions, clarifies issues neutrally.
- **Evaluative:** assesses the case, suggests settlement options, takes a more directive approach.
- Mediators often mix approaches. Consider what the client and the case need.
- Consider and talk to the client about the mediator discussing the risk profile of their case.

3. Participants, Authority, and Approvals

- Identify key participants: parties, insurers, personal attorneys, CPAs, or trusted advisors.
- Confirm the individual with actual settlement authority will attend or be reachable all day.
- Understand that who is and how they are participating is disclosed to all parties; that is not a confidential communication.
- Identify any approval that makes a settlement conditional—excess carriers, court approval, guardians, fiduciaries, lenders, spouses, or partners.
- Identify lienholders and any party with a right to subrogation. Obtain current financial information for total balance (payoff) and reinstatement, if relevant.

- Identify contractual constraints: consent-to-settle clauses, indemnity obligations, joint defense agreements.
- Confirm the client's authority is documented—resolutions, powers of attorney, fiduciary authority.

A settlement that requires a signature from someone not participating is not a settlement. Identify required approvals in advance.

4. Identifying Interests, BATNA, and WATNA

- **Position =** what a party demands (e.g., "I want the house").
- **Interest =** the underlying need (e.g., financial security, avoiding disruption).
- List and rank the party's interests. Examples: money, certainty, speed, sustaining an ongoing relationship, optics, reputation, confidentiality, avoiding precedent, acknowledgment, and relief from anxiety and stress.
- Do the same for the other side. Identify at least one thing you can offer that they would value.
- **BATNA:** best likely legal outcome, minus remaining fees, costs, and risk. Consider time, cost, stress, and collectability.
- **WATNA:** worst likely legal outcome, including fee awards, interest, and other losses (distraction from primary business).
- Assess realistically: does the best legal outcome satisfy the client's highest-ranked interests? Does a negotiated agreement satisfy them better?
- Develop a possible settlement range and do not establish "bottom lines."

5. Risk and Case Analysis

- Strengths and weaknesses of the legal claims and the fact disputes, element by element.
- Credibility of key witnesses, including the client, as a factfinder will see them.
- Evidentiary risk; venue, judge, and comparable outcomes; appellate exposure.
- **Probability breakdown:** multiply the hurdles—Example: 50% liability × 50% damages = 25% success rate. A case may feel worth the risk to litigate but examine in depth.
- Build a damages range—low, likely, high—with offsets, interest, and fee-shifting exposure.
- If seeking a monetary judgment, consider collection risks: assets, policy limits and erosion, solvency, enforcement burden.
- Calculate the client's net recovery after fees, costs, liens, and taxes.
- **Experienced parties:** If a party such as a large entity or insurance company has significant experience or results from similar cases, focus on case-specific nuance and comparables and examine whether this is truly similar or an outlier.
- **Parties new to litigation:** use plain language, concrete examples, and written summaries.

6. Common Negotiation Biases

- **Fixed-pie bias —** assuming a purely zero-sum game.
- **Vividness bias —** over-focusing on one term, fact, or document.
- **Escalation of commitment —** refusing to shift strategies despite mounting losses.
- **Framing effect —** risk averse in gains, risk seeking to avoid losses.
- **Anchoring —** over-adjusting to the first number on the table.
- **Reactive devaluation —** discounting a proposal because of who made it.
- **Confirmation Bias/Overconfidence —** a known bias and lens that evaluates all information, even if neutral or adverse, toward one's own position.

7. Negotiation Strategy

- Opening proposal: extreme proposals often backfire because it may lead to negotiation being stalled or reaching a very early impasse. Be strategic, not aggressive.
- Plan a possible concession pattern in advance—the size and timing of each move, and what message it communicates.
- Identify all terms upfront to avoid adding new, last-minute terms ("Oh, by the way…").
- Consider non-monetary terms: timing, payment structure, confidentiality, mutual releases, references, apologies, future dealings.
- Understand the other party's perspective—look beyond demands to interests.
- Handling extreme offers: stay calm, listen to understand rather than to respond. Mediation is about exchanging perspectives.
- Patience is key—resolving a long-standing dispute takes time, and midday impasses are normal.
- Plan flexible settlement ranges but avoid setting an unmovable "bottom line."

8. Preparing the Client Personally

- The client is the decision-maker; no one will settle without their agreement.
- Prepare them to hear the other side's version of events, which may feel unfair or even offensive.
- Prepare them to discuss the challenges and risks of their case.
- Discuss the emotional arc: early frustration, midday impasses, late fatigue and pressure.
- Discuss what closure looks like, and what will remain unresolved, if anything, after any settlement.
- Cover the practical: timing, location, meals, dress, work and childcare coverage, and phone availability.

9. Documents and Closing

- Mediation statement submitted; key exhibits, damages model, and lien figures organized.
- Draft settlement agreement shell in advance, ideally shared with all parties.
- Authority documentation, release language, and dismissal papers in hand; e-signature capability ready.
- Reduce any agreement to writing before anyone leaves the session.
- **Terms may include:** parties, amount, payment timing, scope of release, dismissal, confidentiality, non-disparagement, lien responsibility, and default remedies.
- **If it does not settle:** identify the specific gap and what would close it, keep the mediator available, and debrief the client so the day reads as progress rather than failure.
- After: calendar every deadline, resolve liens, confirm funds and disbursement, and diary continuing obligations.

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