

MEDIATION PREPARATION CHECKLIST

Nancy Maisano, MAISANO MEDIATION, LLC

1. Select the Right Mediator

- Consult with colleagues for recommendations.
- Identify the barrier(s) to settlement.
 - What do you need from the mediator to reach resolution?
 - Match the barriers to settlement with the mediator's expertise (i.e. traumatized client, opposing counsel's lack of knowledge of the underlying substantive law).
- Look for a mediator with a reputation for tenacity and persistence.
- Look for a mediator with flexibility in approach and format.
- Identify a mediator who will be persuasive to your client? To the other side?
- Consider the mediator proposed by the other side.
- Assess the mediator's willingness to follow up and remain involved after mediation.

2. Pre-Mediation Communications with the Mediator

- Help the mediator best communicate and connect with your client.
- Identify the factors driving the dispute and help mediator address them. Emotions? Principle?
- Inform mediator of the barriers to settlement and other hot-button issues. Are there client control problems? Unrealistic expectations?
- Discuss preferred format (joint session?), logistics and attendees.
- Inform of any scheduling conflicts that may shorten the process at the end of the day.
- Inform mediator of who should attend for the opposition to ensure proper authority
- If insurance is involved, will the rep attend in person or by phone? Different time zone?
- Inform mediator if final approval of settlement is necessary by a separate board or governing entity.
- Confirm the status of current negotiations. Who moves next?

3. Select Appropriate Attendees

- Identify client representative with true authority to evaluate and develop settlement proposals and modify preexisting settlement authority.
- Determine whether the presence a client's spouse (or other trusted support) will be helpful or a detriment to the process.
- Ensure that a key person for settlement be available by phone for the duration – accountants, tax advisors, benefits office staff, human resources staff, etc.

4. Preparing Yourself

- Prepare yourself as if for trial with a full understanding of the facts and the legal claims/defenses.
- Strive for objectivity. Critically evaluate your case. What is your worst document? Witness? Fact?
- How does the other side view the case? What is their best argument?

_____ Change your role from litigation warrior to mediation advocate. Become a problem solver. Focus on interests, not winning.

_____ Identify information that has not already been exchanged but would be helpful to share.

5. Preparing your Client

_____ Discuss fully the realities of litigation, including the expense, delay, distraction, emotional toll, adverse publicity, the unpredictability of judges and juries.

_____ Discuss the potential outcomes at trial and the consequences of each.

_____ Provide a full calculation of fees and costs through trial. Explain fee shifting if applicable.

_____ Discuss the process and purpose of mediation, the obligation to mediate in good faith, confidentiality. Explain the role of the mediator. Emphasize the goal of settlement and closure rather than victory. Prepare your client for periods when mediator is with the other party.

_____ Explain the change in approach – from warfare to treaty negotiation.

_____ Explain the change in your role – from litigation warrior to mediation advocate and problem solver.

_____ Identify the attendees. Describe the roles of the participants.

_____ Prepare your client for a long, potentially draining, emotional day. Encourage patience, flexibility and open-mindedness.

_____ Provide a realistic and honest case assessment. Do not wait for the mediation day to discuss the weaknesses and vulnerabilities of the case. Explain your claims and damages calculation and the opponent's claims and defenses.

_____ Help broaden your client's understanding of the dispute.

- Encourage your client to think about the other side's perspective.
- Explain how both sides' needs can and should be met in settlement. Encourage a constructive, problem-solving approach.

_____ Prepare your client to tell her story and have her "day in court."

- Anticipate direct questions from the mediator.
- Encourage open communication.
- Explain the confidentiality of private caucused with the mediator.
- Stress the importance of candor about the weak spots and bad facts of the case.

_____ Explain the negotiation dance

- Explain the sequential give and take process of most negotiations.
- Anticipate and prepare for initial unrealistic negotiating positions.

6. Mediation Memos

_____ Provide factual background, claims and defenses, procedural posture, status of negotiations.

_____ Attach exhibits if essential and excerpts of other relevant documents (depositions)

_____ Prepare carefully and avoid simply providing pleadings and briefs to the court. Accuracy of memo is key to avoid unnecessary and distracting disputes.

_____ Exchange memos for the mediator *and the other side* to understand your client's perspective.

_____ Share your memo early to help ensure full evaluation by insurance carrier or other "round table" process.

_____ Help the mediator and the opposition to fully evaluate the strengths and weaknesses.

_____ Have your client read the other side's memo.

_____ Consider a separate, confidential memo to the mediator.

7. Develop a Settlement Strategy

_____ Discuss WATNA and BATNA – worst and best alternatives to settlement

_____ Be flexible in your strategy to allow for modification of settlement value in light of new information or changed perspectives at mediation

_____ Avoid determining a hard and fast bottom line prior to mediation.

_____ Prepare your client for compromise.

_____ Fully explore your client's underlying interests and needs.

_____ Do not limit yourself to the types of relief sought in litigation. Be creative.

_____ Identify the underlying interests of the other side and develop offers that address those interests.

8. Prepare a Draft Settlement Agreement

_____ Identify material terms for final settlement agreement.

_____ Bring draft to mediation