**Preparing for Mediation**

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A mediation is a critical and common step in a civil proceeding. All lawyers conduct more mediations than trials. What a party achieves, after months or even years of litigation, is in large part a function of what happens on the day of mediation. It is usually the best opportunity for the parties to attempt to settle the case. Most cases settle at mediation. Mediation is the most important day for these cases.

**Role of the Mediator:**

This is a non-binding process in which an impartial third party, the mediator, facilitates the negotiation process between the parties. As the mediator has no decision-making power, the parties maintain control over the substantive outcome of the mediation.

In mediation, the mediator controls the process with the help of the parties. With the parties’ consent, the mediator will set and enforce ground rules for the mediation process and facilitate the negotiations and settlement.

**How to Prepare for Mediation?**

It is the lawyer’s role to assess the strengths and weaknesses of the case and the opponent’s case and to make the critical decision at the mediation of “Is this a case I want to take to trial?”.

All parties should give consideration to what is important to them in the dispute and how the issues in dispute relate to broader issues of relevance to them. An important goal in preparation should be to enter the mediation process confident enough in one’s own understanding of the situation to be open to other parties’ point of view and to options that may arise in the course of the mediation process.

Parties should also give consideration to what will happen if the case does not settle. What is the risk that the litigation will be unsuccessful and what would be the consequences? Parties need to consider the time, cost and disruption of further litigation and whether success in the litigation will end the dispute.

Mediation efforts can involve enormous amount of work and one would prepare for a mediation as one would prepare for a trial in terms of a solid understanding of the facts, the issues in dispute, and how to apply the law to the case.

1. Productions, Reports and Documents

Consider what export reports you will need. Whether you have all the productions required for those reports. Have all your undertakings been fulfilled, has the other side fulfilled their undertakings.

2. Research  
Ensure that the research needs have been identified before the mediation and that up-to-date case law is included. It will become necessary for tasks to be assigned to the appropriate level of authority.

3. Up to Date Information from Client  
Ensure that you meet with the client in advance of the mediation brief being prepared. I like to meet with the clients just before I start preparation of the brief but after I have reviewed the file to identify whether I need any further or updated information from the client.

4. Transcripts  
I like to ensure that transcripts of the examination for discovery are available prior to my completing the mediation memorandum.

5. Assessable Disbursements  
It is important to have a list of assessable disbursements together with supporting invoices at every mediation.

**Drafting the Mediation Memorandum**  
Each lawyer has his or her own format for the memorandum. Some prefer to include copies of all the reports and documents that are referred to in my memorandum. Others prefer to include only the most pertinent document in the memorandum. This will largely depend on the case and your strategy.

Lawyers should have a written mediation memorandum that appears neutral, has the correct information and is not overly long and technical. The mediator is going to read all summaries for probably an hour or two the night before the mediation, so use your space wisely. The mediation memorandum should include key facts, claims and defences, and the status of discovery. It should comment on expert witnesses, dispositive motions, related litigation, prior litigation between the parties, prior negotiations, offers or proposals for settlement.

The memoranda are sent to other counsel, your client and the mediator. You will also receive a copy of the opponent’s mediation memorandum which I suggest you carefully read through for points of emphasis, point of agreement, and issues which separate the parties and means in which to bridge that gap.

**Meeting the Client**   
It is helpful at the beginning of the process of preparing for your mediation to get any updates and to meet again in the days leading up to the mediation. Immediately before the mediation, you will have had all the up-to-date material for your own mediation. In addition, you will have received and read the other party’s memorandum. You can then review the salient points in the opponent’s memorandum with the client. This is a good time to manage expectations, review the mediation process, explain the risks of trial, nature of the jury, cost consequences. It also will provide an opportunity to discuss settlement figures.

**Going to Mediation**

**Make A Good Opening Statement**

At the start of the mediation, your opening statement should be persuasive but should not cross the line to offensive. If the delivery is so caustic that even the mediator is uncomfortable, the lawyer needs to tone it down. Lawyers should stick to the facts of the case and not speak to relative abilities or experience of counsel. The mediator will probably be looking at how the opposing parties react when a lawyer makes their statement. The lawyer’s client may love the opening statement, but the mediator may look to see if the other party is fidgeting or passing notes. The audience for the opening statement is the opposing decision maker as the “one chance I have to speak to you informally”. It is acceptable to involve your clients to say something if they wish, as long as you believe it will be productive. There is no need to repeat the same legal arguments that the other side has heard many times already. The best statements include a new “thunderbolt” and use it as the opening of the negotiation. Even though the opening statement may long be forgotten at the end of the day, it is very important to setting the negotiations on the right track.

**Negotiations**

People who ask for more generally get more, but you should also heed the expression, “pigs get fat, hogs get slaughtered” (ie. Asking for a big number can be rewarding but demanding an outrageous sum can kill the negotiations before they start). At some point in the case the plaintiff has probably already demanded all amounts potentially recoverable. At mediation, it does not help to ask for mor than your best case at trial, but it may be wise to start with your best case. You should then move slowly off that number, adapting to new information and making the smallest concessions possible while keeping the other side in the game. If they shut down, then you failed. It may be helpful to give a rationale for the starting number, and possibly the number after that, but over time, it often becomes unproductive to give a rationale. Just submit a number and don’t explain it, because it reflects nothing more than a negotiated compromise.

**SUMMARY**  
It may be too simplistic and naïve to say preparing for mediation is like preparing for a trial – however it certainly is a useful analogy. A lawyer who is well prepared when going to battle in mediation will certainly have the upper hand in the complex set of negotiations that are to follow