COMMERCIAL ATTORNEY’S GUIDE
FOR PREPARING THE CLIENT FOR MEDIATION

1. **Know Your Case:**
   - Consider mediation after you have sufficient information to evaluate your client’s case for settlement.
   - Understand your client’s needs, interests and goals.
   - Know which facts and issues are disputed.
   - Know which facts and issues are critical to a successful outcome.
   - Understand all of the elements of your cause of action.
   - Know and be prepared to define your damages or other desired relief.
   - Understand the elements of any counter-claims and defenses.
   - Research comparable bench and jury verdicts.

2. **Mediation Preparation:**
   - Consider timing of mediation:
     - Pre-filing.
     - During document exchange.
     - Following document exchange.
     - Before or immediately after depositions.
     - Before or immediately after motion practice.
     - Before trial.
     - Even mid-trial.
   - Re-identify the needs, interests and goals of your client.
   - What settlement options will satisfy some or all of your client’s goals?
   - Conduct a risk analysis--analyze strengths and weaknesses of both sides.
   - Prepare your strongest arguments.
   - Anticipate the other party’s strongest arguments.
   - Identify the barriers to settlement:
     - Lack of information.
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- Client or opposing party poor communication or negotiation skills.
- Good faith disagreement about the facts or the law.
- Emotion sufficient to disrupt the negotiation process.
- Wrong people at the table.

- Plan your presentation:
  - Consider what information you want to disclose to the mediator.
  - Consider mediator contact—pre-mediation.
  - Consider what information you want to disclose to the opposing side.
    - Opening statement at mediation.
    - Information provided through the mediator.

3. Prepare Client for Mediation:
- Meet at a reasonable time prior to the mediation to educate your client and prepare as a team.
- Re-confirm that the client understands that there is no requirement to reach an agreement at mediation.
- Explain the strategic difference between the attorney’s role at mediation and at trial.
- Explain the mechanics of mediation:
  - Mediator’s introductory remarks.
  - Opening statements by plaintiff and defendant (if any).
  - The use of caucus (private meetings) conducted with the mediator with each side separately.
  - Close of mediation:
    - No requirement for settlement.
    - Written documentation of any settlement.
    - “Next steps” should there not be a settlement at mediation.
- Explain the mediator’s role as a facilitator of communication, not a judge.
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• Discuss the advantages of mediation confidentiality.
• Discuss client’s participation:
  ➢ The importance of client’s positive first impression.
  ➢ Opening statement (if any).
  ➢ During the caucus (discussions with mediator).
• Re-confirm client’s goals and interests.
• Discuss a reasonable range of settlement, including initial financial offer or response.
• Explain the need to attend mediation with an open mind and the willingness to consider creative resolution of the dispute.
• Discuss the time and expense of proceeding to trial.