

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.