Mediation Preparation

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This outline is a step-by-step guide to preparing for mediation, intended to be a helpful guide to review as you get ready for a mediation. You can literally walk through this listing one item at a time to ensure that you are ready for the mediation.

Know Your Case. The first step to preparing for mediation is to know the facts and law. There is no substitute for knowing the evidence cold and completing research of *all* significant legal issues. New factual information is usually uncovered in the mediation, and knowing the record is the way to know whether someone is trying to snow you and confronting you with a problem you had not considered. Because the mediation often represents the first full-fledged confrontation of the opposing viewpoints on the case, the decisive legal point may not be obvious until the mediation is actually underway. Often one side has worked out a twist on one of the legal issues in the case that the other side needs be concerned about but does not recognize as a problem before the mediation. Come armed with your precedents, because the other side will discount everything you have to say about the law, but may modify its view upon reading the cases themselves.

If there is information that the other side has and that you need to review to be in a position to settle, immediately advise opposing counsel and the mediator and ask that the issue be addressed before the mediation. Even if it is not, it increases the chances you will get the information at the mediation. If you do not get what you need to make a decision, and there is no good explanation, you have every reason to "draw an adverse inference" in your negotiation.

Draft A Settlement Agreement Beforehand. As the saying goes, "begin with the end in mind." Having a draft agreement ensures that you have thought through what you want to see in the agreement, which should generally be on the table from

the start. Even if you do not ultimately get everything you wanted, you will not lose out simply because you waited too long to put the item on the table. Having a form ready to complete or mark up at the mediation also speeds up things at the end when you are documenting the agreement. A good mediator will encourage you to have something in writing to document the agreement, so being in a position to draft the final agreement right on the spot is an advantage.

Assess Settlement Incentives. There is always more to the settlement decision than just the merits of the case. Assess your own, and the other side's, risk profile. Consider also any other factors that could affect the incentive to settle. Then turn the analysis around: what factors unrelated to the lawsuit should affect our side's willingness to settle?

Know Your Negotiating Partner. It is important to know what to expect from the players around the table. Most negotiators are remarkably consistent in how they respond in a negotiation. It pays to educate yourself about the negotiation style and habits of the opposing party and counsel through a review of how they have behaved in past negotiations, regardless of what the negotiations have been about. Don't ignore the need to know the mediator, his or her usual *modus operandi*, and how flexible the mediator will be in modifying the approach if things are not going well.

Identify The Other Side's Interests/Emotional Issues. The next consideration is the most important one, but also the most difficult to uncover. Do everything you can to figure out what it is that the other side is *really* after. Think hard about emotional considerations described above and the clues you already have about them.

Some individuals and some attorneys need to put on a show of aggressiveness. If so, don't take the bait, prepare to listen respectfully. Some people simply have a need for some drama before they are able to accept a compromise. Do all you can to figure these emotional needs out, so that you can address the issues they present, so you can educate the mediator and so you can ensure that your negotiating plan does not exacerbate the problem.

Be Able To Prove All Significant Assumptions. In about half of the cases that are mediated, someone comes into the mediation with firm beliefs and expectations about the case or the negotiation that will need to change if the case is to settle. This possibility must be anticipated. The preparation for such a confrontation consists of identifying the key assumptions (about facts, law and

negotiating situation) on your side and on the other side. Prepare to back up each assumption about the case with hard evidence or case law, and prepare to shatter the illusion under which you believe the other side is laboring. On the critical points, where the assumptions of the two sides are direct contradictions, be prepared to support your position, and your fall-back position, convincingly.

The key is not proving a case that will convince the judge or jury. Nor is the object to convince the mediator, although that can help. The purpose is to convince your adversary or at least induce uncertainty. Focus on the argument that will be easier for the other side to accept when choosing among different key points. That is the one where you might actually do some meaningful convincing.

Do The Damage Calculations. Analyze and calculate the "hard" and "soft" numbers on the damage side of the case. You should arrive at the mediation having already crunched the numbers in a credible way, not just with a view to coming up with the most favorable totals possible. Numbers are powerful persuaders, but far less likely than legal issues to provoke emotional responses. It is surprising how often parties are so focused on liability issues that the importance of the damage calculation has been completely overlooked. A detailed spreadsheet showing reflecting all relevant factors can become the starting point for negotiations for the other side, thereby defining the negotiating range.

Consider Both Parties' "BATNA." Assess your "Best Alternative To A Negotiated Agreement" (BATNA) and that of the other side. Developments during the mediation may prompt you to revise this calculation, which identifies the point at which you are indifferent between settlement and no settlement.

This employer's BATNA number will likely be considerably higher than it would ever consider going in negotiations, just as the employee's BATNA will likely be considerably lower than the employee will actually accept. But the exercise provides several things. First, it helps you to stop and think about what is going on if the negotiations seem to be approaching your BATNA. You may be getting too eager to make the deal and need to take a more recalcitrant posture. Second, when you come down to making a final decision on a settlement and you are preparing to walk away, review this calculation, as revised by developments during the mediation, and ask if you are acting logically.

Prepare And Distribute A Mediation Statement. It is virtually always best to prepare a mediation statement summarizing your view of the case. The statement speaks to the merits of the case, sets out your negotiating posture and calls to the

mediator's attention the weaknesses and unreasonableness of the other side's approach.

A mediation Statement may consist in whole or in part of materials prepared for other purposes (demand letter and response, summary judgment papers, etc.). But some things that are not provided to a court that will be especially helpful to prepare the mediator are:

- negotiation history
- specific proposed resolution
- major obstacles to settlement
- insights about parties or the situation
- specific business considerations
- client's primary objectives
- impressions about personalities

Give the mediator copies of any important documents (e.g., correspondence between counsel, investigation reports, charge of discrimination, position statement, witness statements, agreements, pleadings, motions for summary judgment & responses, substantive court opinions or orders in the case, etc.).

Give the mediation statement to the mediator and GIVE IT TO OPPOSING COUNSEL. It is an almost universal practice *not* to do this, and it is a mistake virtually every time. The phenomenon of "reactive devaluation" means that when you make a powerful point or present strong evidence at the mediation that the other side has not considered before, the reaction is not likely to be the fear and trembling that you are hoping to induce. The reaction is usually denial or at least extreme skepticism. Sometimes there is a powerful answer to your point and you are the one caught off-guard. The attorney is likely to disbelieve your evidence or legal argument simply because there is no opportunity to verify or critically analyze it. It is thus crucial to permit the other side, especially the attorney, to think your arguments over in a calm setting for a time and come to the realization that there is no good answer to your strong points. At most, keep one or two points (on which you have ironclad proof) in reserve—and be sure the mediator knows what they are. Those you can try to use during the mediation as circumstances dictate.

Your mediation statement begins the process of educating the most important and hard-to-educate audience: the opposing party and lawyer. If there is information

you do not want shared with the other side, you can put that in a separate confidential submission that the mediator agrees not to disclose without your prior approval. The only way you can be sure that a particular revelation will be taken seriously by the other side is to make sure that it does *not* come as a surprise.

Get Plaintiff's Best Case To The Insurance Carrier. If insurance coverage is in the picture, it is critical to educate the carrier about the dispute well in advance of serious settlement discussions. Settlement authority is usually set by a committee or through consultation, and the participants in those discussions can only operate on the information they have. This means that Plaintiff's counsel, regardless of the schedule set by the mediator, should provide defendant's counsel with a mediation statement three weeks to a month before the mediation.

Specialized Materials. You should also bring to the mediation or provide the mediator with information before the mediation, on more technical points that may require careful review:

- If tax or accounting issues are presented, describe them in writing to opposing counsel and provide the with information about those issues, along with authority (GAAP, Revenue Ruling, court decision, etc.) that you rely upon.
- If you have a form for settlement or a checklist of non-economic items that you anticipate will be "on the table" for discussion, provide that to the mediator and opposing counsel as soon as you can, and in any case, before the day of the mediation.
- If a financial recovery is sought, provide the other side with the elements sought, the amount sought, the calculation and supporting documentation for the amounts used in the calculation. This applies whether you are plaintiff or defendant.

Make A Negotiating Plan. The first few steps of the negotiation can usually be choreographed in advance, although there is a need to plan different second and third offers depending on the counteroffer. Doing this is important to unify your approach, at least in the early going, by forcing you to establish an objective. Studies consistently show that negotiators who have an objective going into negotiation achieve better outcomes, although they usually do not achieve that objective.

Your plan should identify some intermediate points after your first offer and provide rationales for why each makes some sense as a compromise offer. There is some value with even the most cynical and seasoned negotiator to provide some rational basis for an offer. Plaintiffs always complain that "I came down $100,000 and they only came up $10,000. That's bad faith negotiating!" In the same situation, employers will say "We went from $10,000 to $20,000—we doubled our offer. They came down from $1 million to $900,000, just 10%. That's bad faith negotiating!" These arguments are meaningless and not worth making. Far better to be saying, "Hey, I've got a good shot at summary judgment and $20,000 is four months' pay—that's a generous offer."

Don't Fall In Love With Your Plan Or Objective. No war plan survives first contact with the enemy, and no negotiating plan survives the first exchange of offer and counteroffer. To negotiate effectively, it will be necessary to maintain flexibility to meet whatever develops.

Most important, do not talk yourself into an advance "bottom line." This is a huge trap. Half the time, one side or even both will find out things that *should* significantly alter their assessment of the case. THAT'S ONE IMPORTANT REASON WHY YOU GO TO A MEDIATION! You are very unlikely to come out of the mediation process with a more optimistic view of your position than the one you started with. But it is in the nature of the process to affect the thinking of at least one side fairly frequently, so you should expect to have a less optimistic view of things as the mediation progresses. If your thinking is focused on a predetermined bottom line, it means you will not take into consideration what you learn in the mediation. So why bother to show up?

A "bottom line" is an arbitrary, largely emotional figure. Once you reach it, you will be affected by the phenomenon of "loss aversion," a universal human characteristic: people will risk about twice as much to avoid a loss as they will risk to achieve a corresponding gain. A predetermined "bottom line" establishes a point at which you begin to experience concessions as losses, and thus accept more risk of loss than is prudent under the circumstances.

Believe What You Are Saying. Convince yourself of your opening position. Sincerity is effective.