

## FIVE THINGS YOUR CLIENT SHOULD KNOW AND YOU SHOULD DO BEFORE A MEDIATION

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1. A mediation is not a trial. Therefore, neither you nor your client should prepare for it as if it were. He or she should know that agreeing to a mediation is not a sign of weakness; to the contrary, it is a sign of strength because it tells the other side that you're confident enough in your case to present it to a mediator and realistic enough to know it could result in the end of a time-distracting, expensive, and uncertain undertaking -- for both sides. Alert your client that she will be called upon by the mediator to be present for the entirety of the mediation, and often will be engaged by the mediator to answer questions regarding the strengths and weaknesses of her case. **Thus, take the time before a mediation to prepare your client about the strengths and weaknesses, the costs of experts, the costs of electronic discovery, the likely twists and turns before a trial verdict and/or appellate decision, and the expectations of a mediated result.**

2. Before the mediation, have a frank conversation with your client as to the desired outcomes, but not necessarily the final bottom line. Emphasize to the client that a mediation is a fluid process and unexpected revelations or concessions -- on both sides -- will occasionally occur. **Explain to your client that the key ingredients of a successful mediation are patience, flexibility, and creativity. Game-play the mediation with the client, so the client understands the dynamic.**

3. In complex commercial mediations, most mediators set up a joint call with counsel immediately after being retained. The purpose is to learn enough so that the mediator will be able to recommend how to structure the mediation to maximize the likelihood of a resolution. Such issues as the history of the litigation, prior, if any, mediation or settlement efforts, prior court rulings, other business relationships between the parties or affiliates will affect the timing of the mediation and the intensity of pre-mediation ex parte discussions the mediator may hold with the parties. The mediator wants to know: is this case going to be a straight negotiation seeking a consensus monetary settlement, or is it going to be tailored in unique ways because of the present and future relationships or other special factors. **Be prepared in the first call with the mediator to tell him exactly what the case involves, including any unique factors or history or tailored discovery that is needed to help resolve an issue in the underlying case. Be prepared in private caucus with the mediator to tell him what special factors -- on both sides -- need to be known and evaluated.**

4. Mediation briefs are often submitted by the parties to the mediator. Their purpose is not to re-litigate prior motions to dismiss or prior motions for summary judgment; they are also not drafts of trial memoranda to the court or ultimate decision-maker. **The true purpose of a mediation**

**brief is to introduce and orient the mediator to the key issues, strengths and weaknesses, and possible outcomes of the mediation. Therefore, they should be written from the point of view of the result desired: a mediated outcome, not a victory at trial.** Refrain from name-calling, castigation of pre-trial tactics the other side has engaged in, or other ad hominem writings. Get to the point, including proposed monetary terms, if possible: a settlement is desirable in this case for the following reasons and a settlement incorporating these elements will have a likelihood of success.

5. Opening statements are helpful only if they do not inflame the relations between or among the parties. Many mediators dispense with opening statements if they have been able to have pre-mediation individual sessions with the parties. But if opening statements will be made, do not succumb to the temptation of using your draft trial opening statement as a quick substitute. **The purpose of a mediation opening statement is to reflect on the nature of the dispute, the likely costs and risks ahead for both sides, and the possible avenues, creative and otherwise, to resolution of the dispute. Opening doors, and, thus, dialogue, should be the goal of an effective mediation opening statement.**