The Overall Checklist:

- Preparing the Client
- Preparing the “Shape of the Table”
- Preparing the Mediation Team
- Preparing the Format
- Preparing to Avoid Impasse
- Preparing for Closure

“PREPARATION” IS THE KEY

- Mediation is a process to resolve the client’s dispute
- Mediations should not be allowed to just “happen”
- ACCTM survey cites “lack of preparation” a theme of most failed mediations
Mediation Advocacy: Effective Legal Representation in Mediation

**Step One – Preparing the Client for Mediation – Overview**

- Client must understand the **mediation process** – how it works
- Client must understand **mediation goals** – what “winning” really means
- Client must understand **range of mediation outcomes** – what can happen

**Preparing the Client for Mediation – Process**

The client should understand... mediation is a **reconciliation process, not an adjudication process**.

- Reconciliation vs. Adjudication:
  - Mutual accommodation vs. positional debate
  - Problem solving vs. fault finding
  - Outcome is an agreement vs. a judgment

**Preparing the Client for Mediation – Goal**

The Client should understand the **mediation goals**: How do we “WIN” at mediation?

- “Winning” doesn’t mean “Making the other side lose”
- Mediation (reconciliation) is not a “win-lose” contest
- Object is “win-win” – an agreement
Preparring the Client for Mediation

- **Goal**
  - "Winning" at Mediation (The Real Goal): Making A Good Decision.
  - We are here to make a decision – “Do we litigate or settle?”
  - “Winning” means getting in position to making a good decision.
    - A fact based, reality based, informed decision.
    - Reality of the lawsuit AND reality of the settlement.

1. “Winning” means getting that number out, on the table, available.
2. Then we’re in the position to make the “good” decision.
3. WE WIN!

Preparring the Client For Mediation

- **Goal**
  - The “reality” of the settlement is their number … their “final” number.
  - “Winning” is getting that number out, on the table, available.
  - Then we’re in the position to make the “good” decision.

1. “Winning” means getting that number out, on the table, available.
2. Then we’re in the position to make the “good” decision.
3. WE WIN!

Preparring the Client for Mediation

- **Goal**
  - It’s not about your number – it’s about their number and your decision.
Preparation for Mediation

Outcomes
The client should understand the range of mediation outcomes:

- A complete settlement agreement
- A partial settlement agreement
- A process to reach a settlement later
- A better understanding of the case

Step Two – Preparing for mediation: “Shape of the Table” Issues

- Initiating the Mediation Process
- Selecting the Mediator
- Pre-Mediation Organization
- Scheduling, Location, Duration
- Format
- Mediation Ground Rules

Shape of the Table Issues

- Initiating the Process –
  - Blame it on the judge (Court ordered it)
  - Blame it on the economics (fees, costs, time)
  - Ignore it (aren’t we past all that?)
Shape of the Table Issues

1. Selecting the Mediator
   - Early better than late
   - Consider style, technique, availability
   - “Who will the other side listen to?”
   - Subject matter experience (?)
   - Interview, network, research
   - Persistence, tenacity, willingness to work

   Take the time to make the right choice.

2. Pre-Mediation Organizing Conference
   - Pre-mediation meetings – counsel and the mediator
   - Plan agenda for mediation session
   - Letter Agreement (from mediator)
   - Case Management Order (from court)

3. Scheduling, Location, Duration
   - When is the best time to mediate?
   - Where is the best place to mediate?
   - For how long shall we mediate?

   Give the mediation a fair chance to succeed!
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Shape of the Table Issues

- Format for the Mediation
  - Pre-mediation submissions — open, closed or both?
  - Attendees — Who should be there?
  - Opening Presentations — timing, players, rebuttal, interactive?
  - Caucuses — timing, players, sequence?
  - Closure — special requirements?

Mediation Ground Rules

- three essential elements:
  - Confidentiality will be maintained
  - Parties will participate in the process
  - Authority will be present

A Word About Authority . . .

- Lack of Authority major cause of mediation failure
- Insurance authority
- Corporate authority
- Governmental authority

Get the right players to the table
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Step Three – Preparing the Mediation Team
- **The Team:**
  - Opening Presentation Players
    - Counsel, Principals, Experts, Techies
  - Caucus Players
    - Information Sources
    - Negotiators
  - Decision Makers
    - The **REAL** authority

Preparation the Mediation Team
- **A word about Experts . . .**
  - Experts can take over the case
  - Expert input or "Spin Doctors"?
  - Another agenda!

Step Four – Preparing the Opening Presentation
- Tell the client's story for the client
  - the venting function
- Tell the opposition “the other side of the story”
  - the evaluative function
- Right tone and demeanor to communicate
- Visual aids
  - Give them a reason to change their minds.
Preparation of the Opening Presentation
- Address the defenses
- Separate facts from contentions
- Itemize damages
- Minimize argument
- Eliminate exaggeration
- Hit the high points – sell your case

Remember your audience!

Step Five – Preparing for Caucus Sessions
- Most under-prepared area
  - Purpose:
    - Mediator "probes vulnerabilities"
    - Reality check on claim and defenses
    - Mediator explores settlement options
    - Brainstorms settlement scenarios
    - Mediator facilitates negotiations

Caucus Sessions
- Exploring the Settlement Options
- Brainstorming the Settlement Options
  - Define the interests to accommodate
  - Both sides' interests
  - Let the Mediator do his job
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Caucus Sessions
- The “Money Questions”
  - Know the cost of the litigation
  - Know the cost of the remedy
  - Know the value of the case
    
    Damage analysis
    Jury verdict data

Know where you want to go

Caucus Sessions
- Settlement Options – other than money
  - Future business arrangements
  - Iron out joint undertakings
  - Indemnity protection

Only limit is your creativity.

Step Six – Preparing for Closure
- Have the “special clauses” on hand or in mind:
  - Lien waivers, satisfactions,
  - Releases, indemnifications, hold harmless terms
  - Structured settlement programs
  - Letters of reference, employment confirmation
  - Confidentiality, non-disparagement, covenants not to compete

Devil is in the detail...
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Closure
- Date, time and place for government approvals
- Court approvals, required pleadings, dismissals.
- Handling the funds, escrow accounts

The Drafting Stage
- Monitor the temperaments
- Bullet point accords vs. final draft
- List of concepts vs. detailed provisions
- Pre-printed forms – good and bad
- Use the mediator

Protect the deal

Step Seven – Prepare to Avoid Impasse
- Anticipate settlement blocks – issues of fact or law
  - Pre-think ways to un-block the blocks
  - Pending motions – Hearings – real or advisory
  - Continuing settlement discussions
Mediation Advocacy

ADR Re-Defines the Role of The Trial Lawyer in Conflict Resolution
- Negotiator
- Deal Maker
- Diplomat
- Problem Solver

The new role requires new skills...

Mediation Advocacy

Effective Advocacy in Mediation

Presented by:
Philip Reich
preich@uww-adr.com
Upchurch Watson White & Max
Mediation Group