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# PREPARATION:

## GETTING THERE IS MORE THAN HALF THE FUN

By Joan Stearns Johnsen, Esq.

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## Getting There is More Than Half the Fun[1]

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Joe Paterno said "The will to win is important, but the will to prepare is vital. Litigators will often use the analogy of "The Tip of the Iceberg" to describe the portion of the trial that plays out in front of the jury. The more thought and preparation that goes into getting ready for trial, the better the presentation is likely to be. Very few litigators would consider walking into a courtroom without having given some thought to their opening statement, their order of witnesses, their cross examinations. They will have spent time with their witnesses in advance of trial…*preparing* them. Why then do some advocates still arrive at the mediation with no idea as to what their opening offer or demand is likely to be? Why would some lawyers waste any opportunity with the other side by rocking in their chair, hands in pockets, searching the ceiling of the conference room for divine inspiration rambling on semi-coherently? Why would any attorney allow his party to arrive at the mediation totally *unprepared*? These questions are obviously rhetorical and apply to no one taking the time to read this. Since we are agreed that preparation is essential, what is meant by preparation for mediation?

While you do not have to be ready to walk into trial and litigate to mediate, preparation is nevertheless essential. This article will consider four aspects of mediation preparation: 1) Preparing your negotiation strategy; 2) Preparing your pre-mediation submission; 3) Preparing your client and determining whom to bring; 4) Preparing for or avoiding a Joint Session and Opening Statement.

All of these issues can and should be discussed with your Mediator during your pre-mediation conversations. Depending on whether you have mediated with this particular mediator before, you may have one or several calls. Your mediator may speak with you and your client before the mediation or have an in-person meeting. Once you have engaged your Mediator use that person as a resource to help you to conduct your preparation. Pre-mediation conversations with the Mediator can be an important aspect of your preparation

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## 1) PREPARING A NEGOTIATION STRATEGY

Do not arrive at the mediation without having given some thought to your "game plan." You cannot predict with certainty nor control what will happen at the mediation. You can anticipate some likely scenarios.

Before arriving at the mediation, reflect on the strengths and weaknesses of your case and those of your adversary. Examine the evidence both favorable and not and be as objective as you can. Think about what your client would like to see as the result. Then give some thought to what your client needs. In the words of the Rolling Stones, "You can't always get what you want…but if you try some times you just may find you get what you need." Or to paraphrase Harvard's Roger Fisher and William Ury identify interests as opposed to positions. Give some thought to what the other side is looking to achieve. You need to think about what the other side wants. Not because you care about them, but because it will help you devise your own strategy.

When you are a mediation advocate as opposed to a litigation advocate, it is advisable to anticipate what your adversary will be seeking. Sometimes you can think of some way to address your adversary's needs while fulfilling your own. It may help you prepare your opening remarks. It may provide objective benchmarks for you to present your offers or demands persuasively to the other side. Understanding is not agreeing. Unlike in litigation, in mediation anticipating and acknowledging your adversary's interests may be the best way to redress your own.

For cases that are purely distributive, and many commercial cases are, it can be helpful to address what the dollar figure represents to the other side. Is it symbolic? Is there a specific financial need to be addressed? Are there constituencies who are influencing the decision maker's abilities to reach agreement on a number?

In preparing your negotiation strategy try to anticipate the negotiation style of your adversary. In all cases, do not expect your adversary to negotiate the way you do or the way you want them to. You may not have negotiated with this individual before and may not know their style, but thinking about who they are in advance of the negotiation will help you avoid reacting emotionally. You can never make someone negotiate the way you want him or her to. Your best approach will be to remain engaged intellectually and to rely on your wits not your reactions. Is this someone likely to begin with an unrealistically reacting to a high/low number? Why might they negotiate in this way? Might they really believe in this number? Might they try to get you to show your hand before they do? Are they purely positional negotiators? Are they insecure about the true value of their case?

Give some thought in advance to who you think will be sitting on the other side of the table so you and your client will not be thrown off your game by their tactics. Negotiation is a tennis match. Not a wrestling match. Tactics and skill will win out over force.

## 2) PREPARING YOUR PRE-MEDIATION SUBMISSION

In preparing for mediation, you need to consider how to help your mediator help you. (apologies to "Jerry McGuire.") It may come as a surprise to some that an effective pre-mediation submission is more than a copy of the complaint and answer. While these documents are important and should be provided, they do not serve the same purpose as a Pre-Mediation Submission. A Pre-Mediation Submission is your opportunity to provide your Mediator with the ammunition he or she will need to engage in risk analysis with the other side as well as to engage in risk analysis with you to help you see what you may be missing.

Before you consider what to put in your Pre-Mediation Submission, clarify with your Mediator what his or her policy is with regard to sharing your Submission with the other side. Some Mediators treat the Pre-Mediation Submission like a Court Submission and require that they be served on the other side. I believe that defeats the purpose of the Mediation Submission. Mediation is a largely Ex-Parte Proceeding. It relies on Parties sharing information and on the Mediator maintaining the confidentiality of that information. In my opinion, there is no reason why that should not begin with Pre-Mediation Submissions. However, it would be wise to confirm your Mediator's approach in advance.

Occasionally, Parties have concern about reducing sensitive matters to writing. In spite of your Mediator's representation that he or she intends to maintain the confidentiality of the submissions, Parties may worry about their Adversary attempting to defeat the confidentiality of the process. In this case, ask to discuss sensitive issues with your Mediator on the telephone.

Ask your Mediator about their document retention policy. It has been my practice for over fourteen years to destroy all documents related to the Mediation at the conclusion of the Mediation. Confirm whether or not this is the case. If you would like documents returned at the conclusion of the mediation, let your Mediator know as soon as possible.

Even when confidentiality is not a concern, Parties may worry about being candid with their mediator. They fear that if they expose their weaknesses, the Mediator will use them to their disadvantage. Obviously, your weaknesses will be used against you in the mediation. And your adversary's weaknesses will be used against them as well. Of course there will be risk analysis. But the time to take strong positions is during the trial. It is far less helpful during the Mediation. That is not to suggest that you will not engage in "Devil's Advocacy" at the Mediation. Your Mediator will most likely discover the weaknesses in your case regardless of your candor in your submission. And of course the other side will be eager to help.

The Pre-Mediation Submission should include a factual summary of the case. It is best if this is as objective as possible. This will be a challenge for many litigators. This exercise, if done properly, will be helpful to the Advocate as well as to the Mediator. The

Submission should also identify what the lawyer perceives to be the most contested legal and factual issues, your positions and interests as well as what you believe are those of your adversary, the negotiation history, and likely impediments to settlement. The lawyer should identify whom he or she intends to bring to the mediation and their role in the litigation. In addition, to this written statement, each advocate should provide the mediator with copies of the most significant documents.

Selecting documents for the mediator is a matter of exercising good judgment. Do not send banker's boxes full of everything you have. But also try to anticipate and avoid that moment where you say to the Mediator, "… but you haven't seen this." To which, your Mediator will answer "Why not?"

A well considered and written Pre-Mediation Submission does more than inform the Mediator. It is an exercise in self-examination and a form of preparation. It helps each side appreciate the complexities of their case somewhat more objectively. It begins the process of self-examination and risk analysis. It helps each side set realistic expectations for the Mediation. If you spend the time preparing a Pre-Mediation Submission, remember that if it is not candid, its value will be marginal.

**3) PREPARING YOUR CLIENT AND DETERMINING WHOM TO BRING**

Everyone knows that you should not mediate unless the Parties with settlement authority are present. Determining who that is can be problematic.

Ask questions of your client to probe the extent of their settlement authority. Even in the case of an individual there may be a "Phantom Party."[3] A Phantom Party is someone who may be able to influence the decision maker. If possible, they should be included in the process. In one of my cases an individual was suing a corporation. After the individual made his first demand, the corporation countered. Before the individual plaintiff could respond, he called his girlfriend. It was clear that this man's girlfriend was a phantom party. Although the gentleman was the named plaintiff, his girlfriend was the actual authority. I insisted she attend the mediation. She arrived and controlled her boyfriend's negotiation. The case settled. Had she not been present, the case would not have settled.

When you have a corporate client, determine the extent of the authority the representative will have. For the success of the process, it may be necessary to substitute someone else, or to have them participate by telephone. It is a waste of time to have someone show up and participate in a process when they have no authority and cannot in any way react or respond to anything they learn throughout the course of the mediation.

Even when the corporate representative does have real authority, it is important to know who that person's constituencies are and whether your corporate representative has limits on their authority and whether they will be able make adjustments should they learn

[3] Attribution to Suzanne Mann Duval a brilliant Texas Mediator.

something during the course of the mediation. Understand the corporate hierarchy and the interests of your client beyond settling the case. Make certain, in advance of the mediation, that you can reach others who may need to approve an increase in authority. Explore before you arrive at the mediation whether you might need to have that person available or even need to include that person telephonically during the course of the mediation.

Prepare your client for the mediation. Tell them what to expect and who will be present. Let them know whether there will be a Joint Session and they may have to sit across the table from their adversary. Do not assume that there is no value in having your client speak. If you determine that he or she would be an excellent witness on their own behalf, prepare them to address the other side. Let your client know about the pace of mediation. Make sure they are prepared to stay for the entire mediation and have made arrangements for childcare or with their employer.

Most important, preparing a client is about setting realistic expectations. The worst thing you can do for your client is to promise the moon. Not even you have a prayer of making good on that promise. Obviously it is easier to tell them what they want to hear than what they need to hear, but it is poor game plan. If you set unrealistic expectations, you will be adjusting them at the mediation. Yes, of course you want your mediator to bring your client down to earth (or up, as the case may be,) but at some point your client will look to you for the advice they are paying for. If you have arrived at the mediation promising what you have known all along could never be delivered, you will have painted yourself into a corner. Tell your client to disregard the risk that the mediator has identified and proceed to trial, or agree with the mediator and adopt a new more reasonable stance than you had previously counseled. Neither will be pleasant.

Fighting for your client is more than just arguing what they want you to argue. Fighting for your client is negotiating skillfully and effectively. Let your client know that you may have adjusted your own assessment of their case based on what you learned through discovery. As part of your preparation, identify the risks you legitimately see and prepare your client for the tough negotiation he or she is likely to experience. Let your client know that although the actual value of the case may be around X, you will aim higher. Fighting for your client has nothing to do with promising more than you can deliver.

Prepare your client in advance of the mediation, not during the mediation. It is human nature for the bad news to take time to sink in. Let them have time to ask questions of you, with the understanding that they will probably ask the same questions at the mediation. Let them have the time it takes to adjust their expectations.

**4) PREPARING FOR OR AVOIDING A JOINT SESSION**

I believe in Joint Sessions. There I have said it. I know it is controversial, but I think Joint Session should be the default position, not the other way around. I believe that when handled properly it is an effective tool. It is also part of the ritual of the mediation. Ritual is important. It is the opportunity for the Mediator to establish the ground rules and

to present them at the same time to both sides so it is clear that all rules will be applied to everyone equally. It is the only opportunity Counsel has to address the Party on the other side prior to the trial. It is the only chance the Parties have to speak where what they say cannot be used to compromise their position at trial. It is also, in many commercial mediations, the only time everyone is likely to be in the same room. If the mediation is successful, the Joint Session is also the closest thing to a "Day in Court" that the Parties will experience. I believe there are many more reasons mitigating in favor of a Joint Session than against.

During the Joint Session, Counsel for both sides should have an opportunity to present an opening statement. This is not the sort of statement that should be presented to an arbitrator, a judge, or a jury. The audience is the Check Writer or the Plaintiff/Claimant. People fear opening statements, because the unsophisticated abuse this opportunity by delivering their Litigation Opening Statement. They slant facts; they characterize their adversary in some unflattering light; they try to persuade the other side with their litigation arguments. They should be setting a conciliatory tone, apologizing for whatever it is that they can reasonably and honestly apologize for, identifying clear problems with their adversary's case, conceding undeniable problems with their own. Much can be accomplished in a Joint Session. I agree that often the Joint Session is a waste of time. However, when done properly, much can be accomplished.

Most important of all, if you will be giving an opening statement, prepare in advance. Mark Twain said it took him three weeks to prepare a good ad-lib speech. Do not throw away this opportunity by planning only to ad lib. Even though the other side knows the facts. This is not intended to be a restatement of what the other side already knows. Help them to see why it is in their interest to settle. This does not mean try to persuade them that your version of the facts is the correct one. It means that you should help them see that even though they will never believe your version of the facts, the jury may.

The decision whether or not to have a Joint Session should be explored in advance of the mediation so that both sides can prepare. The Client should be told whether or not he or she will be asked to sit across from the person they most dislike. Give them time to prepare emotionally. They should know whether or not they will be called upon to speak and what their response should be. Counsel should know what to expect from their mediator in a Joint Session. I never ask questions during the Joint Session. Some Mediators do. Regardless, it is better to avoid surprises especially when everyone is in the room together. Discuss this with your Mediator in advance so you will know exactly what to expect.

## CONCLUSION

The most important part of the mediation can be what happens before the mediation begins. Careful preparation can help you anticipate where the likely impasse will occur so you can make sure you never reach it. Use your Mediator as a resource to conduct your preparation. Explore which documents your Mediator needs to see in advance. Raise any concerns about discovery or Client control. Discuss whether or not a Joint

Session is appropriate in a particular case. Find out how your Mediator likes to conduct the Joint Session. Let your Mediator know in advance about any concerns you may have about the other side or even about your Client. Approach the mediation with the same seriousness you do in approaching the courtroom.

Advocates make a difference to the success and outcome of the Mediations in which they participate. Preparation can make all the difference in your experience and in your outcomes.