

PRE-MEDIATION CHECKLIST

- Evaluate case for appropriateness for mediation.
 - Are there relationships involved that should be preserved?
 - Does the client have interests that would be better served through settlement than trial?
 - Does the client have the financial and emotional strength to afford litigation through trial?
 - What is the attitude of the other party and counsel to early case resolution?

- Raise client awareness of mediation.
 - Treat litigation as but one of the alternative ways of resolving disputes.
 - Explain ADR options to client.
 - Provide literature to client regarding mediation.

- Create a climate of cooperation in dealing with the “other side.”
 - Extend courtesies to opposing litigation team.
 - Show respect toward the opposing party.

- Determine appropriate timing of mediation.
 - Is discovery (formal or informal) far enough along that each side is ready for meaningful negotiations?
 - Medical records.
 - Essential depositions.
 - Defense medical review or examination.
 - Other forms of expert analysis.

- Appropriateness of other forms of negotiation prior to or instead of mediation.
 - Is there a risk of “reactive devaluation”?
 - Are there client control issues that indicate the need for the involvement of a third-party neutral?
- Selection of the right mediator for the case.
 - Balancing “process” skills against substantive knowledge.
 - Dealing with “difficult” personality types.
- Preparation by the attorney for the mediation
 - Prepare a detailed analysis of special and general damages.
 - Make a survey of the jury verdicts and opinions regarding settlement value of similar cases.
 - Make sure the carrier’s file is complete (medical records, wage loss verification, documentation regarding other special damages).
 - Interview client regarding factors that contribute to “general damages,” i.e., the effect of the injury on the person’s life.
 - Look behind the positions of the parties to determine their underlying interests.
 - Look for creative solutions that advance the interests of all parties.
 - Consider both the strengths and weaknesses of the case and risk analysis.
 - Determine what information to disclose to the other side in the mediation brief and what to reserve for disclosure only to the mediator in a confidential brief.
 - Avoid springing surprise changes of position on the other side.
 - Help the mediator by thinking of ways to change the perspective of the other side – what is the other side missing?

- Preparation of the client for the mediation
 - Make sure the client understands the process.
 - Discuss with the client his or her BATNA (Best Alternative to a Negotiated Agreement) and analysis of the risks of litigation vs. settlement.
 - “Actively listen” to the client.
 - Develop a strategy for the opening proposal taking into account the concept of “anchoring.”
 - Make sure the client understands the multi-step process of distributive bargaining.
 - Encourage the client to adopt an attitude of flexibility and the formation of no absolute, preconceived “bottom line.”
 - If appropriate, prepare the client to tell her or his story at the mediation. Ask the client, if you could say one thing to the other side, what would it be?
 - Prepare client to offer “recognition” to other side
 - Consider ways of framing proposals in terms of protection of gains instead of avoidance of losses – both for your client and the other side.