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THE POWER OF PREPARATION: MAXIMIZING MEDIATION OUTCOMES IN COMPLEX LITIGATION

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Mediation has become a mainstay of modern litigation. Courts encourage it, insurers rely on it, and parties treat it as a practical path to resolution without the staggering cost of trial. Yet despite its ubiquity, many lawyers and claims professionals still approach mediation as an informal discussion, a chance to see where things stand, or worse, a fishing expedition.

This mindset is a mistake, especially in complex litigation. For sophisticated, high-exposure cases involving multiple parties, coverage disputes, layered insurance programs, and overlapping liability theories, mediation is not a casual exercise. Rather, it is a structured opportunity to advance the client's position, test negotiation strategies, and if handled with discipline, achieve resolution in fewer sessions and at lower cost overall.

A successful mediation requires preparation that is rigorous, forward-thinking, and multi-dimensional. This article explores why thorough preparation is critical to a successful complex litigation mediation, what that preparation should include, and how such preparation facilitates both a more meaningful mediation session and more favorable outcomes.

The Strategic Role of Mediation in Complex Cases

In complex litigation, mediation serves not merely as a checkpoint on the road to trial, but as a decisive stage in the overall case strategy. It offers a forum for confidential evaluation, creative problem-solving, and information exchange under the protection of privilege. Unlike trial, where outcomes rest in the hands of jurors and judges, mediation allows the parties to retain significant control.

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A well-prepared advocate uses this opportunity to shape perceptions, reframe disputed issues, and clarify the financial realities that drive settlement.[i] For insurers and risk managers, mediation often serves as the most efficient vehicle to assess exposure across multiple policies, insureds, and defense teams. When approached with strategic forethought, mediation can achieve not only complete resolution of the matter short of a trial, but alignment among co-defendants, carriers and counsel, reducing the risk of a fractured defense or costly peripheral disputes.

Preparation as Leverage

Preparation is the foundation of leverage in mediation. The attorney or claims professional who arrives armed with a clear command of the facts, a realistic valuation, and a well-supported liability and damages position holds the advantage. Conversely, those who appear uncertain, uninformed, or underinformed risk signaling weakness, which can immediately lose credibility with the mediator, stall progress, and embolden adversaries. [ii]

Effective preparation requires early collaboration. Counsel, clients, and carriers must be aligned on objectives, risk tolerance, and negotiation parameters ahead of a mediation session. Pre-mediation meetings should address potential sticking points, coverage questions, authority levels, and contingency strategies if the case does not settle.

Written submissions should reflect both advocacy and persuasion. A brief that blends legal analysis with pragmatic insights, helps the mediator understand not only the merits of the case but the personalities, dynamics, and pressures influencing settlement. Confidential submissions can further outline sensitive issues or negotiation history the mediator should know but opposing counsel should not.[iii]

Preparation Beyond Monetary Terms

A well-prepared mediation strategy extends beyond the dollar figure. Non-monetary terms often make or break a settlement, particularly in complex or high-profile matters. Counsel who identifies and addresses these positions in advance, position their clients for success and mediators appreciate the forethought.

1. Bonds, Claims & Releases

In construction disputes and surety matters, bond obligations and corresponding releases must be addressed prior to mediation. Failing to identify who will release such bonds, or how claims will be extinguished, can derail settlement at the eleventh hour. A comprehensive term sheet that outlines bond discharge, indemnity obligations, and claim releases ensures that all parties understand the full scope of the resolution.

2. Liens

In personal injury matters, it is crucial to understand whether there are any medical liens, worker's compensation liens, or other types of liens. These liens will have an impact on the settlement value. Additionally, they could derail settlement negotiations if their handling is not discussed early in the process.

3. Confidentiality and Non-Disparagement.

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These clauses are not afterthoughts. For many clients, particularly in high-profile disputes, confidentiality and non-disparagement are as important as monetary terms. However, if these expectations (or outright requirements) are not made clear from the get-go, parties risk wasting valuable time and resources mediating a number just find themselves unable to reach a resolution due to the terms. Addressing terms and conditions such as confidentiality and non-disparagement up front and early avoids impasse when parties later disagree on the breadth or inclusion of such clauses.

4. Structured Payment Schedules.

Not all settlements are paid in lump sums. Creative payment structures, such as staggered installments, escrow holds, or conditional future payments, can unlock resolution when cash flow constraints exist. Identifying feasible options before mediation allows flexibility when negotiations stall.

5. Future Cooperation

Agreements to provide testimony, share documents, or indemnify co-parties in related matters can be critical in multi-case environments. Anticipating and drafting these provisions before mediation helps ensure that any settlement is truly comprehensive.

By thinking beyond dollars, counsel can resolve disputes more efficiently and effectively, preventing the need for follow-up litigation over collateral issues.

The Coverage Dimension: The Silent Driver of Settlement

Complex litigation rarely exists in a vacuum. Insurance coverage is the silent but ever-present backdrop against which all negotiations unfold. Defense lawyers sometimes hesitate to foreground coverage in mediation, viewing it as a separate issue. That approach ignores reality.

Coverage affects both parties' negotiating positions and the mediator's ability to broker settlement. Liability plus damages plus coverage equals money. If the mediator does not understand the coverage dynamics such as who has paid, who has reserved rights, and which tenders have been accepted or rejected, the negotiation risks becoming unmoored from financial realities.

Defense counsel must zealously represent the insurer's interests while also educating the mediator about coverage. This does not mean turning mediation into a coverage arbitration. It does mean briefing the mediator in advance about the status of tenders and responses, indemnity disputes among co-defendants, reservation of rights positions, excess layer concerns, and the implications of ongoing coverage litigation.

Some mediators may initially push back, insisting they do not need to know about coverage. Counsel should respectfully but firmly disagree. A mediator who is blind to coverage cannot grasp the incentives driving each party's position, or the limits on what each can offer. Educating the mediator equips them to navigate the negotiation terrain with realism and precision.^[iv]

Negotiation Techniques for Complex Mediations

Complex negotiations are not linear; they are chess matches. Success depends on disciplined strategy, situational awareness, and adaptability. Several techniques can enhance effectiveness:

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- **Pre-mediation briefing:** Provide the mediator with a clear roadmap of key issues, valuation metrics, the status of negotiations among co-defendants, and the identification of all conditions or clauses that your client or carrier will require to be included in any settlement agreement.
- **Client Alignment:** Ensure all decision-makers including insureds, carriers and counsel, understand the plan as well as authority limits and desired outcome before the session begins. Discuss all conditions or clauses that the stakeholders will require to be included in any settlement agreement, and emphasize the importance of identifying them prior to the mediation session.
- **Anchoring and Bracketing:** Use thoughtful anchors or brackets to set a realistic negotiation range, managing expectations while signaling flexibility.[v]
- **Leverage and Risk Transfer:** Identify opportunities to shift or share risk among parties, especially in layered coverage scenarios or indemnity chains.
- **Anticipate Pushback.** Rehearse responses to common objections or settlement barriers so you can pivot quickly during negotiation.
- **Consider Filing Dispositive Motions Prior to Mediation.** If mediation is to occur toward the end of discovery, and you believe your Client has strong legal arguments in support of a dispositive motion, filing such motions to be pending at the time of mediation could potentially provide leverage during mediation.

Strategic negotiation is preparation in motion. It demonstrates professionalism, instills confidence in clients, and communicates credibility to mediators and opposing counsel alike.

The Role of Technology in Virtual Mediations

Virtual mediations have become an established part of modern practice. While they can be efficient, they magnify the consequences of poor preparation. Counsel must treat the virtual environment with the same gravity as in-person proceedings.

- **Professional Presentation.** Good lighting, reliable sound, and a neutral background convey competence and credibility. Technical fumbling and poor presentation distract from strong advocacy and undermines confidence.
- **No Multitasking.** Mediation requires full engagement. Avoid checking emails or performing other tasks during sessions; inattentiveness can be misinterpreted as disinterest or weakness.
- **Room Management.** Ensure the platform allows for private breakout rooms and secure caucuses. Designate a point person for communication to prevent confusion.
- **Screen Sharing Mastery:** Be prepared to share exhibits, photos, or damage analyses seamlessly. Practice beforehand, as technical difficulties can break momentum and dilute presentation and persuasion.[vi]

Well-managed virtual sessions save time and maintain professionalism, while poor execution can erode credibility and delay resolution.[vii]

Zealous Advocacy Within a Collaborative Process

Mediation is collaborative, but that does not mean it is a suspension of advocacy. Defense counsel remain bound by the duty of zealous representation. The key is to blend advocacy with problem-solving to firmly yet diplomatically represent the client.

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Tone matters. The lawyer who arrives prepared, respectful, and persuasive gains the mediator's trust and influences outcomes more effectively a reactionary presentation. Professionalism, credibility, and focus on resolution reflect both skill and preparation.

Preparation is your competitive advantage. It signals seriousness of purpose, earns respect from adversaries, and gives clients confidence that their interests are protected at every stage of the process.

Post-Mediation Follow-Up

Preparation does not end when the mediation adjourns. Counsel should debrief with the mediator and client team to analyze what worked, what did not, and what follow-up steps may be required. If settlement was not achieved, this is the time to identify remaining gaps that must be bridged prior to the next session.

Promptly documenting progress, memorializing negotiation history, and updating valuation models maintains momentum and positions the case for resolution. Many mediations that initially fail have a higher likelihood to succeed later if the parties continue to prepare and refine their positions between sessions.

Conclusion

Preparation is not an administrative step. It is the decisive factor that distinguishes routine participation from strategic success. In complex litigation, where stakes are high and dynamics are fluid, disciplined preparation enables counsel and claims professionals to lead rather than react. Thorough preparation builds credibility with the mediator, strengthens negotiation leverage, and often reduces the number of sessions needed to achieve resolution.

Those who treat mediation as a "check-box" risk squandering opportunities, prolonging litigation, and inflating costs. Those who prepare with precision, collaboration, and foresight turn mediation into a powerful tool of resolution - one that protects clients, conserves resources, and advances justice through professionalism and strategy.

Key Takeaways

- Preparation is leverage: Knowledge, data, and coordination create negotiation power.
- Go beyond the money. Address bonds, releases, liens, confidentiality, payment structure, and future cooperation early.
- Educate on coverage. Mediators must understand coverage dynamics to guide realistic negotiations.
- Strategize the negotiation. Plan anchors, brackets, and responses in advance.
- Master virtual mediation. Professional and technical fluency enhance credibility.
- Blend advocacy and collaboration. Protect your client's interests while advancing resolution.
- Follow through. Document progress and sustain momentum after each session.

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[iv] Cook, Philip E., Esq. *Fundamentals of Mediating Insurance Coverage and Bad Faith Claims*. Daily Journal. (March 1, 2025). <https://www.jamsadr.com/blog/2025/fundamentals-of-mediating-insurance-coverage-and-bad-faith-claims>.

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