PREPARATION FOR MEDIATION

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INTRODUCTION

After facilitating over 6,000 mediations, I would like to share some methods that a lawyer and his or her staff might do to prepare for and execute an effective mediation. Preparation facilitates positive results!

WHAT IS MEDIATION?

Mediation in law refers to a form of alternative dispute resolution (ADR) in which parties to a lawsuit meet with a neutral third-party in an effort to settle the case. The third-party is a mediator. Under Texas law, the mediation process is confidential. That confidence must be protected for the system to properly work. ***Held as a business meeting***, it is possible to enable the adverse parties to face reality, permitting sound judgment rather than emotion to enter the equation. Thus, a settlement of the dispute is possible.

FACTS:

MOST disputes go to mediation.

ALMOST 90% of all disputes settle in mediation.

LESS than 10% of disputes go to trial.

QUESTION: Considering the above facts, why do litigation teams do so well preparing for a trial but very little time in preparation for mediation?

1. Mediation is a ***business meeting.***
2. For sure, the decision to settle or not will be made.
3. People make the best business decisions when they have ***adequate information***. Actually, with correct and adequate information, the decision may become obvious.
4. ***One seldom wins arguments at mediation***. Without a judge, a winner is not declared. Then why "argue" your case as if some judge or jury is around?
5. The dialogue in mediation should be similar to that of businesspersons and business lawyers: ***The parties are trying to sell their view*** to each other.

6. ***Your client will be the one to decide*** what to do. The legal team needs to have the client prepared to make a rational and wise business decision.
7. Before you can properly advise your client, ***you need to know as much about the facts and law*** of the case as is available. That is what you are good at, and you need to do this to be prepared for the most effective mediation.
8. There are ***four sides to every story*** (Your mother was wrong when she said there are two sides.):
   i) What your client says;
   ii) What the other side says;
   iii) What is actually true; and
   iv) What a fact or law finder might determine.
9. ***The ultimate issue at mediation is "What a fact or law finder might determine."*** This maxim is the most overlooked truth by client and lawyer alike. The mediation can do nothing about the past and neither can the judge or jury. In our finite world, we can do nothing about the past; we can only put a value on something, return something, or rearrange something. "The past may not be changed, and the viewed culprit will not be hanged." (Civil court).
10. **Understanding** the first two views of truth and looking to documents and other sources will assist a lawyer in seeing the third view of truth, but only ***seasoned litigators have a reasonable view, faulty but best, of the fourth view of truth: "What a fact or law finder might determine."***
11. As a professional, you are obligated ***to investigate*** the facts and the law based on the documents and sources outside your client's allegations. If you are limited to what your client tells you, you have only one view of the four views in any legal dispute. Unless you do further investigation, you may not be in a position to fully advise the client concerning the current value of a claim.
12. **Different cases require different degrees of investigation** to better understand the first three of the four views of truth. In a tort between strangers, a great deal of discovery may be needed. In a family dispute or business dispute, most of the parties may know the facts, which grew out of the personal history of the relationship between the parties; so less discovery is needed to be able to advise a

client well. A real professional needs to do what is necessary, with the resources available to be able to advise his client on what is the reality in fact and in law. The issues are not usually black or white. Risk and reward will vary with degrees because the risk is in the fourth truth. The fourth truth depends upon provability, presentation, competence of the fact or law finder, and the first three truths. There are other elements in risk consideration, but the point is that so many of them are not in the control of the client or the lawyer.

13. **Be sure that the client understands** that mediation is not a place to win or lose. This comment assumes a good case. If the case is of poor quality, then anything might be a win. At mediation, one seeks a resolution that he is **willing to accept**. By willing, I mean a loss which one is willing to accept. There is a sense of victory in getting more or paying less; so, to that extent there is winning at mediation.
14. Of course, there are **various reasons to mediate**: 1. Resolution; 2. Value discovery; and 3. Fact discovery. A prepared professional is not only ready, but can execute his goals for the mediation, which may be all or some of the reasons for mediation.
15. **Resolution** is the usual objective of mediation. At this point, we all should have that understanding.
16. **What is Value discovery?** I have seen seasoned veterans of litigation find out from the defendant if the defendant takes the case seriously or not at an early mediation. Such discovery then justifies the expenditures of sums needed to obtain the optimum settlement at another mediation. On the other side, I have seen defendants see if the plaintiff will sell "cheap" before accruing greater preparation expenditures.
17. We all know what **fact discovery** is. Using mediation to find facts is done and sometimes successfully. Witnesses are mentioned. A document might show up. Undisclosed mitigating factors may appear. To mediate for discovery purposes only, is at best expensive; and at worst, it is wasteful.
18. Are **value and discovery** meditations "bad faith" mediation? I am a neutral.

19. There has been a lot of talk about **"lying**" at mediation. If there is a distinction between "lying," "misrepresentation," and "justified misinformation," then one might better understand what is lying and what is not lying. Is it wrong to lie to someone in a relationship that requires truth? If one breaks in my front door and says: Is your wife here, I want to rape and kill her? The relationship with that person is such that to say "no", when I know that she is in the closet hiding, is not a lie. It may be misinformation, but justified misinformation. But, if one's spouse asks: where have you been? That requires truth and nothing else but the truth so help me dog house.

20. What about **the art of negotiation**? I suggest there is a duty of honesty. Without it, the process will fail. Non-disclosures and careful demands and offers are legal, but to say that some fact or law is so, when one knows it is not, that is equal to fraud. If it misleads the advocate with falsehoods: that is just what fraud is all about. Such would be an intentional misrepresentation or lie. One does not owe a duty to be sure that the other understands the truth, but he should not say something that is not true to mislead one to act to his detriment. Mediators are asked to do such from time to time. I hope that they just do not do it.

21. There is a discussion in our profession about **lying**. I suggest in the most vigorous way that one should not ever, ever, ever do it. It destroys the profession and the society we desire to preserve. Some clients require lying. *I suggest you fire that client*. You will be blessed for your courage. Integrity is why we love Atticus Finch. I have watched too many "older lawyers" put their integrity ahead of their client's cause to believe that situation ethics prevail over pure unadulterated integrity. Note: I am talking of lying as set out above. One added note: Like national security, integrity must prevail against each attack; because like glass, lose it once and the whole windowpane is broken, i.e.: A crack in the window means the window is broken. Consequently, take great care in the use and protection of **your** integrity.

22. So, **how do we mediate and not lie?** ***Talk less***! Remember, this is a business meeting. Therefore, you put forth your reasons why your case should be considered a risk before the finder of the fourth truth. This can be done without

lying. Point out the things that add risk for the other side. On the things that hurt your case, move on and do not push those items. This is "sales" and not misrepresentation. There is a valid difference in the two. The relationship between the lawyers and the clients expect such activity in an adversarial system. Such one - sided presentation is part of the mechanism of the adversarial system itself. The process gets the full story out after all parties are heard.

23. I have watched some advocates present their case in opening session in a matter of fact way that causes the defendants to re-evaluate their view of the risk. The offers go beyond what was first intended. Why? Because **a good lawyer had properly investigated his case, presented evidence and/or law that must be respected** as to how it would play before the fourth "truth" finder of fact or law. And they paid more. On the other hand, I have seen good defense lawyers lay out facts and/or law before the plaintiffs so effectively, but without antagonism, to cause the plaintiff to be glad to get what he could.

24. That brings us to **PowerPoint**. In one case between two different entities, one presented a PowerPoint to the other in a way that was arrogant, even rude, and gave no credence to the other's view. It upset the "defendant" so much that at the end of the day, the plaintiff collected $500,000.00 less than the payer had come to pay. PowerPoint is a very good way to communicate, but if it is done in a way that is too one-sided, irritates more than sells, or has known untrue statements in it, it can ruin or delay the success of a mediation. **Remember we are in a sales meeting—a business meeting**. So one PowerPoint may be effective because of the grace in which it was presented or ineffective because of rude, arrogant, and one-sided or factually incorrect way of presentation. Some examples of what I mean may be:

i) You lied to my client …
ii) You wanted to hurt your sister …
iii) It seems that the evidence might show the jury that what you told my client is not so …
iv) It may be that the jury will think that what you did was for the purpose of hurting your sister, but either way she feels hurt …

25. You can be helpful to the mediator by **keeping up with the offers and demands**. Moreover, by keeping a list of the various settlement terms that come up from time to time throughout the day is useful. The mediator is balancing many balls in the air. It is helpful for you to ask if he has mentioned to the other side some of these terms or not. In mediation, timing is very important. Therefore, the mediator may not have felt that it was the right time to bring up a point. Later the mediator may have forgotten about it. You can help very much by bringing it up from time to time. In addition, in the settlement agreement you will have a list to check off as you see the drafts of proposed settlement agreements.

26. **Humor** is an essential element of mediation. It keeps the parties from losing perspective. It helps the lawyers say things that they may not feel comfortable saying in an over emphasized battle scene. In cases of grief (death, serious injury, or great economic loss due to another's alleged intentional acts), it can bring the meeting to business and away from vengeance. It is very difficult to pull off; therefore, let the mediator do this. A lawyer can prepare his client for this by reminding the client that we are dealing with the fourth truth.

27. **What do we do to prepare the Mediator for the mediation?**

i) First, someone needs to call the mediator to set up the mediation.

ii) Things you need to know and that the mediator or the mediator's staff need to know are:

(1) Go to the web page of the mediator. I am confident that all mediators have a web page. Some provide a calendar. I do. Always confirm with the mediator the reliability of the online calendar. They are subject to human error and there is plenty of that to go around.

(2) Determine a location for the mediation taking into account the number of people and parties that will attend. Mediation for a large group needs planning. Determine if any of the lawyers' offices are available, the need for a neutral location, and in what city should the mediation occur. Most mediators will travel as requested.

iii) Here is a suggested list that assists in getting needed information to the mediator:

MEDIATION/ARBITRATION INTAKE SHEET

DATE: _____ TIME:_____

FULL/HALF DAY:_____

Location:_____

No. of Parties:_____ Fee per party:_____

Cause No:_____

Style:_____
_____

Plaintiff Attorney/s:

Name:
Firm:
E-mail:
Address:
Phone No:
Fax No:

Defendants Attorney/s

Name:
Firm:
E-mail:
Address:
Phone No:
Fax No:

28. Experienced lawyers and staff further provide to the mediator a letter of explanation concerning the procedural position of the case, the personalities of the various parties and lawyers, and some history in the case. These letters are priceless for good preparation of the mediator, which is not discoverable. Sometimes, there are motions for summary judgment that are useful. Their fact statement is usually even-

handed and helpful. Providing the mediator multiple pages of evidence is usually not helpful. However, should there be copies of evidence, please mark the paragraphs and sentences to be considered. A mediator is not going to read all the documents as legal assistants and lawyers do. A mediator just does not need that detail. Many times a copy of current pleadings are helpful. Even orders by the court can be helpful.

30. The better the mediator is informed; the quicker he or she can engage the participants on challenging issues and risk, i.e.: the mediation process may begin.

31. Helpful attachments:

a) Attorney's Information Sheet and Request for Mediation.
b) Mediation Article: Prepare for Something Important.
c) Rules For Mediation.

ATTORNEY'S INFORMATION SHEET AND REQUEST FOR MEDIATION

Re: Cause No.

(Please provide as accurate an attendance count as possible to ensure space accommodations and catering needs are sufficient.)

Number of party expected to attend mediation in your party_____

1. Mediation referral to John W. Hughes initiated by:_____

2. Type of Case:
_____

3. Names, addresses, and telephone numbers of Plaintiff parties (identify authorized representatives, if known) and attorneys of record:

4. Names, addresses, and telephone numbers of Defendant parties (identify authorized representatives, if known) and attorneys of record:

5. Names, addresses, and telephone numbers of other parties (please specify, "Intervener", etc and identify authorized representatives, if known) and attorneys of record:

6. The nature of Plaintiff's claims and the Defendant's defenses and counterclaims:

7. What relief is sought by parties:

8. What are the primary disputed issues of law or fact in this case from your perspective:

9. What is the status of discovery: (1) little or none; (2) some discovery done, but substantially incomplete; (3) complete or substantially complete?

10. Do you have sufficient information to form a realistic settlement position? If not, what else is needed?

11. What are the last offers of the parties?

ON BEHALF OF _____, ONE OF THE PARTIES IN THE ABOVE CAUSE, THE UNDERSIGNED ATTORNEY OF RECORD REQUESTS THAT JOHN W. HUGHES ACT AS MEDIATOR IN THE ABOVE CASE; AND WE AGREE TO BE BOUND BY THE RULES OF MEDIATION AND MEDIATION FEE CRITERIA PROVIDED BY THE MEDIATOR TO ME.

DATED: _____, 20____.

RESPECTFULLY SUBMITTED,

_____

This document is self evident on the kind of things you might help provide a mediator for the sake of a good mediation. If the mediator is not able to prepare before the mediation, then the mediator spends time at the first of the mediation learning about the case. It is delaying at best, and frustrating to clients at worst.

MEDIATION

Get Prepared for Something Important.

Like judges, mediators get to work with some of the finest lawyers. We get to see them exercise skill in the protection of and service to their client. I have said before and will say again: many times the mediator receives credit for results which the fine work of good lawyers produced. The truth is that a case without quality lawyers is the most difficult case, for the mediator lacks the aid of a wise litigant.

Often, however, the lawyers take the exercise of mediation in stride, cavalier, and unprepared. Never would a competent lawyer go to trial, hearing, or deposition without

adequate preparation. Last month we mentioned that 80 to 90 percent of the cases settle at mediation. Therefore, here we are with the opportunity to have a face-to-face meeting with the very person who makes the decisions for the other side, and we pass it off, amazing. Only 10% or so cases go to trial, but we prepare for that trial as if it were a certainty. The more certain event is the case will settle at mediation or soon after.

I respectfully suggest that the lawyer should prepare for mediation with similar quality one prepares for other litigation components. Here are several items I might suggest:

1. Think like a businessman, a salesman, even a promoter. Your client's attitude needs adjusting by you from that of a litigant to that of a decision maker. [Last month we covered the fact that mediation is a business meeting to come to a conclusion—settle or confirmed need to litigate.]
2. Even though lawyers are generally electing not to have joint sessions at the first of the mediation, I would suggest such election might cause the loss of a wonderful opportunity. If a lawyer prepares a presentation that is not threatening, adversarial, condescending, judgmental, accusative, he may succeed in getting the decision maker to more seriously consider the risks, costs, emotion, time, and effort before him/her in litigation. Granted, however, there are cases in which a joint opening session is not helpful. This might be where the emotions are just too great.
3. Have documents marked, in order of a good sales pitch (with a smile, so to speak) that can inform, not so much as threaten. Things like: This email might suggest to a jury that … We all realize that there are claimed understanding; but when a jury sees a document that says …, they may very well choose to believe what the document says and not what one claims is the understanding. Doing this kind of presentation without causing one to become defensive is critical to reaching a conversation of reality and not accusations of defeat. Some suggest it lengthens the mediation, but my experience is that it shortens the mediation. A great

deal of information communicated in a joint session would take some time for a mediator to carry back and forth.

4. Prepare the client to not take this time as a fight, but an opportunity to learn, evaluate, and consider the larger picture than "just my way." Prepare him/her for a business meeting.
5. Before the mediation, take the client through the process of mediation, pointing out its function, opportunities, and potential results.
6. The lawyer and client should have considered a desired result in light of best case, worst case, and probable case. Tell the client that added information in the mediation might cause one to change their position or expectations as reality comes into focus.
7. Think of some questions that may be asked, in the joint session or in caucus, that might help focus on the matter.
8. Think through and even prepare contractual terms that might be required to complete a settlement document. Do not risk leaving an important issue to memory in the middle of a negotiation. Be prepared to tell the mediator these terms early on when they do not have a cost associated with them. If left to the end, the worthy opponent may very well put a price on it. Seek to get to the point that the sums negotiated include all these items.
9. Prepare and provide to the mediator, before the day of mediation, the answers to his Attorney Information Sheet. If there are documents that will better inform him or her, provide them to him. However, mark the relevant portions. Do not expect a mediator to read piles of data that are not germane to the issues.
10. Pay the mediator.

I hope that this will improve the mediation process for you in the future.

RULES FOR MEDIATION

1. **Definition of Mediation.** Mediation is a process under which an impartial person, the Mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. The mediator may suggest ways of resolving the dispute.

2. **Agreement of the Parties.** Whenever the parties have agreed to mediation, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement to mediate.

3. **Consent to Mediator.** The parties consent to the appointment of the individual named as mediator in their case. The Mediator shall act as an advocate for resolution and shall use his best efforts to assist the parties in reaching a mutually acceptable settlement.

4. **Conditions Precedent to Serving as Mediator.** It is presumed that there is no conflict to prevent the Mediator from serving. If any party or the Mediator know of a conflict, it should be revealed and considered.

5. **Authority of Mediator.** The Mediator does not have the authority to decide any issue for the parties, but will attempt to facilitate the voluntary resolution of the dispute by the parties. The Mediator is authorized to conduct joint and separate meetings with the parties and to offer suggestions to assist the parties in achieving settlement. If necessary, the Mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expenses of obtaining such advice. Arrangements for obtaining such advice shall be made by the Mediator or the parties, as the Mediator shall determine.

6. **Commitment to Participate in Good Faith.** While no one is asked to commit to settle their case in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible.

7. **Parties Responsible for Negotiating Their Own Settlement.** The parties understand that the Mediator will not and cannot impose a settlement in their case and agree that they are responsible for negotiating a settlement acceptable to them. The Mediator, as an advocate for settlement, will use every effort to facilitate the negotiations of the parties. The Mediator does not warrant or represent that settlement will result from the mediation process.

8. **Authority of Representatives.** Party representatives must have authority to settle and all persons necessary to the decision to settle shall be present. The names and addresses of each person shall be communicated in writing to the Mediator.

9. **Time and Place of Mediation.** The Mediator shall fix the time of each mediation session. The mediation shall be held at the office of the Mediator, or at any other convenient location agreeable to the Mediator and the parties, as the Mediator shall

determine.

10. **Identification of Matters in Dispute.** Prior to the first scheduled mediation session, each party shall provide the Mediator with an Information Sheet and Request for Mediation on the form provided by the Mediator, setting forth its positions with regard to the issues that need to be resolved.

At or before the first session, the parties will be expected to produce all information reasonably required for the Mediator to understand the issues presented. The Mediator may require any party to supplement such information.

11. **Mediation Sessions are Private.** The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the Mediator.

12. **Confidentially.** Confidential information disclosed to a Mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the Mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The Mediator shall not be compelled to divulge such records or to testify in regard to the mediation in an adversary proceeding or judicial forum. Any party that violates this agreement shall pay all fees and expenses of the Mediator and other parties, including reasonable attorney's fees incurred in opposing the efforts to compel testimony or records from the Mediator.

The parties shall maintain the confidentially of the mediation and shall not rely upon, nor introduce as evidence in any arbitral, judicial, or other proceeding: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the mediation proceedings; c) proposals made or views expressed by the Mediator; or d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the Mediator.

13. **No Record.** There shall be no record recorded, handwritten notes, or any form of recording of the mediation process.

14. **Termination of Mediation.** The mediation shall be terminated: a) by the execution of a settlement agreement by the parties; or b) by declaration of the Mediator to the effect that further efforts at mediation are no longer worthwhile.

15. **Exclusion of Liability.** The Mediator is not a necessary or proper party in judicial proceedings relating to the mediation. Neither Mediator nor any law firm employing Mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

16. **Interpretation and Application of Rules.** The Mediator shall interpret and apply

these rules.

17. **Fees and Expenses.** The Mediator's fee shall be agreed upon prior to mediation and paid according to the fee policy of the Mediator. The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including fees and expenses of the Mediator, and the expenses of any witness and all the cost of any proofs or expert advice produced at the direct request of the Mediator, shall be borne equally by the parties unless they agree otherwise.

18. Any conflict between these rules and any court order, to which the mediation is subject, shall be controlled by the court order.

19. The mediator acts as a neutral intermediary for the parties. The mediator cannot and will not act as an advocate for any of the parties. Additionally, in the event the mediator assists in preparing a written settlement agreement pursuant to mediation, each participant should have the settlement agreement independently reviewed by the participants counsel before executing the agreement.