This resource is a checklist, with commentary where experience suggests it matters. It's not meant to be read start to finish. The headings are the checklist; the explanations are there if you want them. Mediation is often a pivotal point in a case. This guide is intended to help you approach it thoughtfully, whether your goal is resolution or preparation for what comes next.

In no particular order, here we go:

Evaluate Whether Now is the Time to Mediate: I get that mediation is court ordered in many cases and that affects mediation timing. If that is not a factor, take a minute to assess whether now is really the time. Most cases are mediated once. Unless mediation is a speedbump to trial for you, it is worth assessing whether everything possible has been done to give you the best chance of success. Yes, this is a "duh" kind of question, but I am amazed how often people haven't thought about it before they arrive.

What do you need to know from the other side that will hang up your decision? What does the other side need to know from you that will hang up their decision? Can you fix it before mediation? Do you want to fix it? How will you deal with it if you can't? Is there a pending motion that will affect decision making (perhaps intentionally)? How will you address it to give mediation a chance of success? I don't know what the question is in your case, but working through it before mediation may be the difference between resolution and trial.

Really Think About Your Case: This seems counter-intuitive because lawyers always believe they know their case. Unfortunately, though, you see it in mediation fairly frequently that a lawyer hasn't really analyzed their case completely. Trial is down the road. They can think about that later, or can they? Better to identify a flaw or beautiful argument before going to mediation so that you can calibrate your position for negotiation purposes. Definitely better to have a revelation on your own than have opposing counsel give it to you through the mediator in front of your client.

Consider "Advocacy Bias:" Many experienced litigators already know, at least intellectually, that advocacy changes perception. Some don't. Either way, decades of psychological research show that once people adopt an advocate's role, their objectivity degrades quickly—often within minutes. How much it affects any given lawyer varies, but no one is immune.

One underappreciated benefit of mediation is that the mediator is also a lawyer, has now heard both sides, observed your client, and watched how the facts land with a neutral audience. Yet advocates rarely ask the mediator how they see the case to check whether their own view still holds up. That conversation does not require agreement—and it often produces information worth having before a jury, rather than after one.

Fill Out Mediation Paperwork: This one is obvious, but it still matters. Late or incomplete submissions compress preparation time for everyone and reduce the mediator's ability to be useful early in the day. If mediation is important enough to schedule, it's important enough to finish the paperwork on time.

Consider and Make the Mediator Aware of Any Needs at Mediation (think e.g. a Translator): Sometimes you may have a need for some extra amenity or assistance at mediation. Please ask. We will do what we can to help. Examples might include accommodating dietary restrictions, handicap access, or a translator.

Prepare a Detailed Mediation Statement: Before I started mediating, I would have thought everyone submitted a mediation statement like the ones I wrote. After all, mediation is an important inflection point for the case. There is so much information you take for granted knowing about the case that the mediator won't know unless you tell them.

I am much more effective (and able to work much quicker) when the lawyers have prepared a thoughtful mediation statement that gets at the heart of the case and describes the key facts and documents that will make the difference if the case goes to trial.

Consider Giving the Other Side Your Mediation Statement: This suggestion is not for every case or every strategy. Litigation is competitive, and some mediations are intentionally used as speed bumps to trial. If that is your approach, this may not be helpful. If, however, your goal is to give mediation a real chance to resolve the case, consider whether sharing your mediation statement—or a version of it—would advance that goal. Giving the other side a clear view of how you see the case often accelerates meaningful negotiation and reduces time spent posturing once everyone arrives. Even if you ultimately decide not to share it, it is worth asking what, specifically, you do not want the other side to know—and how you expect that information to surface later in the case.

Have a Pre-Mediation Conference with the Mediator: Not all mediators do it, but I think pre-mediation discussions are invaluable if they are structured. I want to know what you need me to know that you might not want to put in writing. Or, what you need me to know about opposing counsel before I talk to them the first time. Find time and do it.

Identify any Information Asymmetry: Information Asymmetry is a fancy way to refer to the concept of one-party knowing things the other doesn't about a subject they are addressing together. What do you know that the other side doesn't? Why haven't you shared it? Would knowing it potentially impact the outcome of mediation? Identifying these points and their potential impact has a value on its own in mediation.

Evaluate and Resolve Information Asymmetry: What are you going to do about this information asymmetry? Ferrari F1 isn't sharing its secrets with the Mercedes team because they are competing to win races. It makes total sense in the competition of litigation that you don't want to share secrets with the other side. There again, litigation is different than F1 racing. We often come together with the other side and reach an agreement to avoid the trial whereas F1 teams always have the race. When should that information be revealed? It depends on your goals. If you are mediating as a speedbump to trial, maybe it makes sense to keep the secret. I certainly will not try to force you to share it. If you are mediating to seriously resolve the case, will sharing the secret help you get a better outcome? At least thinking about it and deciding how to address it in mediation avoids having to address it in the moment.

Supplement Discovery Responses: This is information asymmetry lite. These are not secrets you can or intend to keep, just information the other side hasn't gotten yet. If it is something they need to make an intelligent decision, perhaps you should provide it beforehand. Moreover, it will at least let the other side know they don't have to be making decisions at mediation wondering what they don't know.

File for Summary Judgment: As we all know, litigators often use summary judgment as a form of Damocles' Sword to hold over the other party at mediation. If you intend to do so, please file early enough to give the other side the opportunity to review the motion before mediation. Very recently, I had a party try to use an MSJ filed the day before mediation as a bargaining chip when the other side hadn't even evaluated it. Needless to say, the strategy lost most of the effect it might have had at mediation.

Consider a Decision Tree: Many litigators already do some version of this informally. A decision tree is simply a way to make that thinking explicit—for you and for your client—by breaking risk into component parts rather than relying on a single global estimate.

All litigators are asked to estimate the likelihood of success and potential outcomes, but those estimates are often

compressed into one number that masks important assumptions. Decision trees force those assumptions into the open by assigning probabilities to key events along the way, surviving dispositive motions, prevailing at trial, or losing on appeal. Whether the precise percentages ultimately prove accurate is less important than the discipline of examining how different paths change the expected outcome. Clients often understand risk better when they can see it laid out, rather than hearing it summarized.

Do "Plaintiff's Math": If you are dealing with a contingency case, spend a moment thinking about how much it is likely to require to be put in the plaintiff's pocket over the lawyer's fee to induce the plaintiff to resolve the case. Don't forget to estimate the expenses. More importantly, don't forget to educate your client on the subject so they have the proper frame of mind going into mediation.

Prepare an Estimate of Costs Going Forward: It is surprising to me how often parties come to mediation without an idea of how much they are going to spend between mediation and trial. Insurance companies usually force this point, but outside of that context there is no requirement. For clients to seriously consider whether to settle, they need to understand how expensive it will be to go forward.

Estimate Your Chances at Trial: Clients need to know what their odds are at trial to make an intelligent decision at mediation. I often use an estimating process during mediation and clients are probably better off hearing it from you before I do it.

Estimate Your Chances of Appeal: Clients often fail to realize that verdicts and judgments are challenged on appeal. They think the case will be over or money paid at the end of trial. They have no idea that appeals are used as negotiating tools, add cost, and create delay. This is an important consideration in the context of whether to resolve a case.

Estimate Your Chances of Collecting: Clients tend to believe that the other side will miraculously open their checkbook right after a final judgment in their favor. Surprisingly, some lawyers don't give a lot of thought to whether they can actually collect a judgment. For those of you who do think about it, make sure your client understands what that looks like in your case rather than hearing the bankruptcy threat from the other room for the first time at mediation.

Anticipate Impediments to Settlement: What is standing in the way of settlement, if that is something your client seriously wants? Yes, opposing counsel is a factor. What is a factor that you can control or influence? What factors can you have an impact on during mediation if you plan for them?

Identify Your Most Important Points: Most cases come down to a few points. What are the things that you have to convince a jury of to win? Not the elements of your cause of action, what are the key story points you have to win on? How can you help influence the other side's opinion about those points going into mediation or during mediation? What ammunition can you give the mediator to help influence those points?

Identify the Opposition's Most Important Points: Yes, this is the reverse of the prior statement, but what questions does the other side really need to answer for you if they want to influence you and your client's thinking on the case? You won't be able to conduct a "deposition" during the mediation, but a question or two you would ask the other side to help you answer about their case? You might be able to get constructive discussion going with those points.

Prepare "Exhibits" for Mediation: What are the documents that you need to show the mediator; or, more importantly, the opposing party? When I was litigating, I always brought a notebook with highlighted cases that the other side might need to see and the most salient documents that might have an impact on mediation.

Consider a Mediation Presentation (if Appropriate): With less joint sessions, there have been less presentations by parties about the strengths of their case, but I have seen printed "slides" used with decent effect when prepared for me to deliver to the other side and go over with them. It may not be appropriate or effective in every case, but it is worth considering.

Prepare a "Full and Final" Settlement Draft: There are a lot of strategic and practical reasons to prepare a full and final settlement draft before mediation. It will help you think through aspects of your case, consider all the points that you really want in the final settlement, and avoid a fight with the opposing party over what is meant by "prepare a more formal agreement" after mediation when using a short mediation settlement agreement.

Investigate Your Judge: It is surprising to me that some lawyers do not poll their colleagues and look at the wealth of information now available through litigation analytics – particularly on federal judges. I found this particularly helpful in dealing with opposing parties if I could show a judge has a statistical probability of handling a matter in a particular way. This takes the information from anecdote they can discount to cold hard data.

Investigate Verdict Information for Your Tribunal: There are varying sources for verdict data and there is less verdict data than we would all like since 97% of all cases settle, but the data out there is likely to be somewhat more persuasive than what you or I can tell a client or the opposing party. Moreover, you don't want your client to hear this information for the first time at mediation from the other side.

Tabulate the Damages Available: It is interesting to me how little credence people give to tabulating damages for mediation. It is as if people discount their tabulation because they know the parties will end up negotiating in numbers that do not reflect the actual damages. Attorney fees are ignored and particularly interest. As interest rates rise and cases take longer to get to trial, I find that pre and post interest is less well evaluated (or researched) than it should be. But perhaps more important than the effect on the negotiating numbers, clients need to see a complete damage calculation to evaluate settlement. If, for example, the interest on a $500k outcome over three years of litigating is $127k at 8.5%, that represents a 25% swing in value and could be more if the case goes on appeal for a year. A client who might be willing to consider fighting over $500k at trial might be more circumspect if the number is that much higher.

Consider Areas of <u>Agreement</u> on the Facts and Law: This is an important exercise. It doesn't just help ascertain the issues that you won't need to convince your adversary of at mediation, it helps determine exactly what you will have to prove a trial and I find it always gave me pause about how easy or hard I thought the case would be to try . . . winning was always less certain than it seemed before I really thought about it.

Consider Areas of <u>Disagreement</u> on the Facts and Law: Like the prior point, this is a valuable exercise, but I separated it for a reason. These are the things you may need to touch on during the early phases of mediation and things you may want to come prepared to prove to your adversary through the mediator and may be worth considering bringing "exhibits" to support.

Make an Offer: There are a lot of theories about making the "first offer" at mediation or in negotiation. We could debate them for a long time. Whatever your theory, one way to move a mediation along (which seems to be a thing a lot of lawyers want mediators to do) is to make a pre-mediation offer to put the ball in the court of the other side right off the bat. I am not saying it is right in every case, but it is worth thinking about.

"Prime" Your Client on the Mediator: Clients arrive at mediation with assumptions—sometimes unhelpful ones—about what mediators do and how the process works. Regardless of the mediator selected, taking time to explain the mediator's role, style, and function can reduce unnecessary friction early in the day. When clients understand that

the mediator is a resource rather than an adversary, substantive negotiation usually begins sooner.

Anticipate and Address Client Expectations: It doesn't happen all the time, but I have seen clients come into mediation with no idea of what to expect in terms of possible outcomes at mediation. While this isn't always catastrophic to resolving the case, it adds to the time we will have to spend educating the client before we can start negotiating. You will get a lot further a lot faster (and kick the mediator out less often) if you handle some of this in advance. Moreover, if you can share these expectations with the mediator in advance, it will help him or her tailor their presentation to the client's particular needs.

Explain the Mediation Process to Your Client: Again, it doesn't happen all the time, but I have found myself explaining the mediation process to clients in more detail than I would normally need to meet the needs of uneducated clients.

Confer with Your Client about What Happens if You Don't Settle: This may be one of the biggest gaps I have seen in mediation counseling and preparation. As we all know, plaintiffs file cases generally because they are angry about how they've been treated and out of alternative options to resolve the matter short of litigation. Often, they are not experienced with the litigation process and have no idea what the end of the line looks like on the path they've chosen. And, even if they are experienced, they may or may not have had counsel that offered a thorough explanation of what happens during the remainder of the litigation process, trial, and appeal. I don't ask parties to settle cases because I want to pressure them to do so. I educate parties about what their alternatives are to the best of my ability so they can make an educated decision about what they prefer to do next. This is a lot easier when they have an understanding about that journey before they arrive at mediation.

Confer with Your Client about What Happens if You <u>Win</u> at Trial: To the extent it is not a natural outgrowth of discussing what happens if you don't settle, make your client understand what happens if you win, how you collect, the risk of appeal, what appeal looks like.

Confer with Your Client about What Happens if You <u>Lose</u> at Trial: Again, to the extent it is not part of explaining the post-mediation litigation process, clients need an appreciation of what happens if they don't win at trial or hearing. This includes all the damages that are possible (with pre-judgment and post-judgment interest factored in). Explain the cost of appeal, the likelihood of an appeal being possible and using appeal as a bargaining chip to negotiate a settlement on the outcome of the hearing.

Confer with Your Client about Their Willingness to Proceed: You would expect this discussion to arise as part of explaining what happens after mediation, but it is important to ask the client, before they are trying to make a decision in the moment at mediation, whether the remainder of the process seems like something they are really prepared to do. A lot of gung-ho clients start to lose interest at the thought of testify or sitting in trial for a week or two. Of course, this sometimes doesn't happen until the eve of trial, but at least at that point they will have been warned back at mediation when the opportunity to take a different path was the focus of the day.

Consider Who <u>Should</u> and <u>Should not</u> Attend Mediation on Your Side: While this often seems like an easy point, you should think about who is influencing the decision to act made by the person in mediation. Do they need their spouse? Is there a trusted advisor you need on stand-by that cannot directly participate because of privilege issues? What will be the impact of that person not being physically at the mediation?

Consider Who <u>Will</u> and <u>Will not</u> Attend Mediation on the Other Side: Is the other side bringing the right decision maker? Is there a person that knows important facts that will not be there but should? What if the person attending is the party alleged to have discriminated in an employment case? What effect will that have on whether you might

want a joint session at some point? Is there someone you should ask to be present for your client to potentially get emotional closure in addition to financial closure?

Ensure Your Representative has Adequate Authority (and Knows Who to Call if they Don't): This should go without saying. It is rare when someone learns new facts in mediation that materially change their negotiating posture, but the discussions during mediation sometimes cause people change their view on what to offer. This tends to have a direct correlation with how well prepared they are for mediation.

Ensure Your Client is Available for the Entire Session: It is often hard enough to get the parties to the point of agreement during the regular mediation session. Putting artificial limitations on one party's availability interferes with those chances of success. Though I have seen it done successfully to push the parties to agreement by one side, it often sends the message that the party with limitations doesn't value the other party enough to dedicate the full mediation session. This can hamper good-faith negotiations. Separately, please share these limitations with the mediator before mediation.

Evaluate any Tax Issues Related to Settlement: As the parties get closer to agreement in mediation, the question of tax treatment sometimes arises. The tax treatment in all but the most complicated cases is pretty standard. If it is not, please analyze those issues before you get to mediation and begin including any conditions related to taxes early in the negotiation process. If, for example, you need to treat some or all of a settlement as wages, let the other side know that early on. You may not negotiate a percentage until later in the mediation, but it is generally better to get those details out early.

Consider Mandatory Settlement Terms that Will Be Required: Sometimes there are none. Sometimes there are many. Often, they include confidentiality and non-disparagement. In employment cases, they often also include at least the tax treatment of back wages and re-hire provisions. It is better to think these things through and discuss them with your client in advance. I have seen a settlement negotiation last significantly longer because one of the parties announced a condition of settlement, they had not even shared with their lawyer up to that point in mediation. That threw a wrench into the works. Better to get with your client and think those out before you get to mediation.

Obtain Expert Information: Have you made expert designations? Should you do so before mediation? Would it help at mediation to get an expert report to the other side for consideration before mediation? Should you have your expert on stand-by in case something comes up during mediation that requires their counsel? Mediators are often challenged to be your advocate in the other room when saying "their expert will say . . ." rather than having it in black and white.

Consider How Your Opponent Will Negotiate: Lawyers tend to have styles of negotiation that reveal themselves over the course of several mediations with them. Clients are always a variable for the mediator. Thinking about how the lawyer and his client are likely to negotiate will give you more information about how best to negotiate. When the moment comes to choosing between bracketing or not (if that is a factor), you will handle it better if you have already evaluated and discussed with your client the other side's style.

Consider How Your Client Will Negotiate: Many clients negotiate in the style their lawyer affords them the opportunity to use. Some clients have their own views about how to negotiate and bring those to mediation. Discussing those with your client in advance will help you during the day and lead to kicking the mediator out of the room less.

Address the People Who Won't be There: This goes for both sides. Maybe a spouse has to work and won't feel the weight of all the points discussed in the mediation. If there is an important person on your side, how will you

address their absence? How will your decision maker hold up without them? How will your decision maker act differently? Will they be able to conclude a deal? Is there someone on the other side that you or your client feel is a key to the story and that the mediation would be unsuccessful without their voice? How can you resolve that with the mediator before everyone shows up?

Consider Non-Economic Factors in Settlement (Think Unresolved Emotions): What factors that might not otherwise be addressed in mediation will impact your client's ability to negotiate in good faith? How can you address those issues in advance with the mediator or the other side? Would it be helpful to get a monetary resolution if a person were able to confront someone on the other side particularly?

Consider Talking to Opposing Counsel: Mediation is a process that allows litigators to stay litigators. Mediators can be the soft party in the middle that works on a settlement. I find it difficult sometimes to maintain the posture of gladiator for my client and still negotiate with the other side. For that reason, I understand that any litigator-to-litigator discussion can be contentious. That is why I suggest you "consider" talking to the other side. If you can't do it in a way that will be helpful to mediation, stay away from it. If you can, however, it creates an opportunity to address many items on this list in a way that will be helpful to give the parties the best chance to make the best decision about how to proceed – whether to trial or through resolution.