

# Ready, Set, Mediate!

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# First, Some Terminology

- “Pre-mediation” is common usage
  - But it implies that preparation isn’t part of mediation or isn’t very important
- “Pre-session” or “pre-mediation-session” corrects misimpression

# **Caveat re Variations**

**Mediations vary greatly based on many factors including but not limited to:**

- **Type of case**
- **Language and literacy of parties**
- **Sophistication of parties**
- **Participation of attorneys (if any)**
- **Practice culture and organizational requirements**
- **Amount of time before and during sessions**

**Any preparation varies accordingly**

# Benefits of Preparation Generally

**Increased likelihood to:**

- Perceive process as fair
- Feel opportunity to express views
- Perceive mediator impartiality, understanding, and respect
- Settle
- Perceive settlement as fair

**Decrease likelihood to experience settlement pressure**

Roselle Wissler, Representation in Mediation: What We Know From Empirical Research, 37 Fordham Urban L. J. 419 (2010).

# Common Goals of Preparation

## Ready to be productive at start of mediation session

- Help mediator and participants understand dispute
- Identify participants and check conflicts of interest
- Educate participants about mediation process
- Provide opportunity to customize process
- Build rapport and trust
- Plan pre-session activities (e.g., calls, memos, information gathering)
- Plan session logistics, including technology

# Failure to Prepare

## Studies demonstrating failure to prepare:

- In one study, in about 23% of civil cases and 30% of family cases, mediators could have helped prepare parties but didn't do so
- In another study, at least half of parties weren't considered prepared
- More than 25% of parties represented by attorneys were not considered prepared

Summarized in John Lande, How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions? Journal of Dispute Resolution (forthcoming 2024).

# Potential Consequences of Failure

- Mediators don't understand parties or dispute
- Parties don't understand mediation process
- Mediators can't customize mediation process
- Mediation may be less efficient and effective
- Unnecessary use of parties' and courts' resources in prolonged litigation and possible trial

# Courts Can Help – Practically For Free

Many courts DO help, with rules:

- Providing clear, accessible information about mediation
- Requiring attorneys to consult with clients & counterparts
- Requiring attorneys & parties to prepare before sessions
- Requiring attorneys & parties to communicate with mediators before sessions
- Helping self-represented litigants manage mediation
- Using DSD to periodically update ADR rules

# For Details

- How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?
- Takeaways From 'How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?'

in conference materials or on SSRN

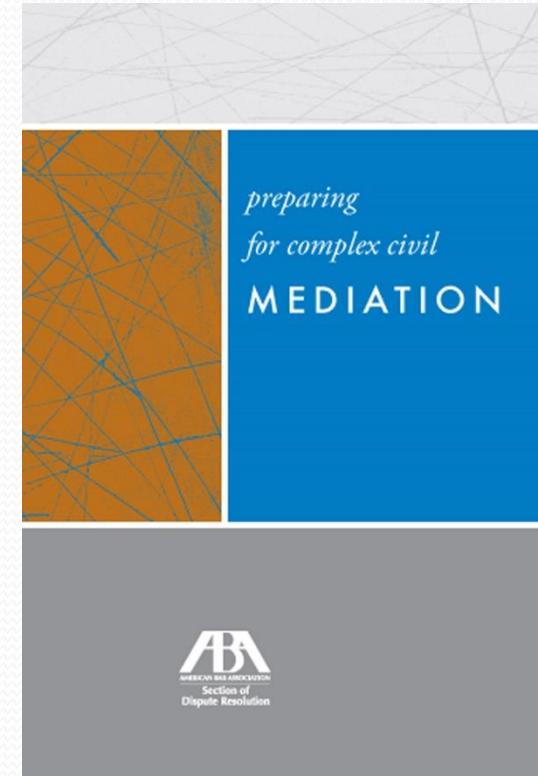
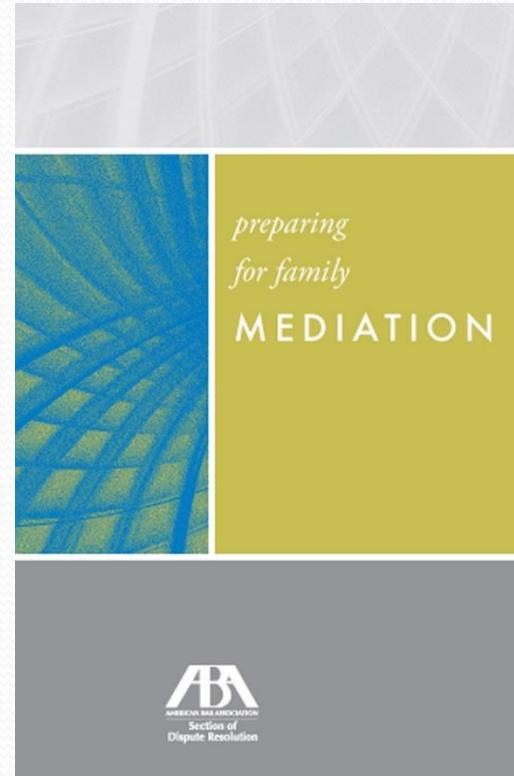
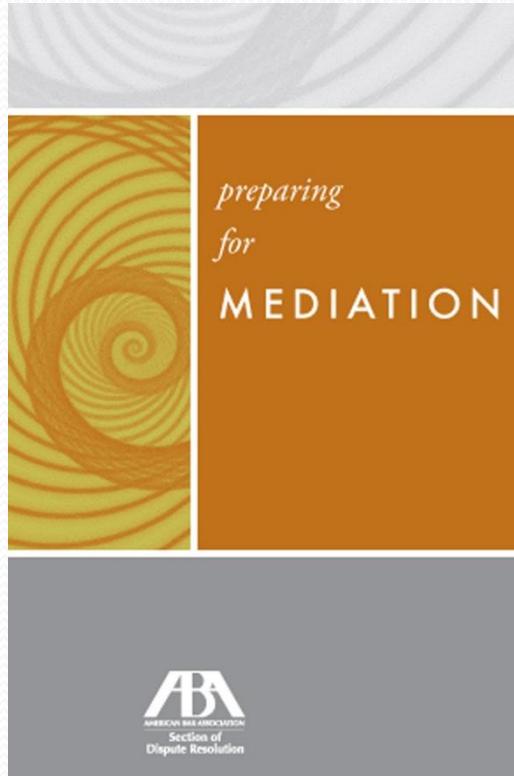
# Recommended Solutions

- Context and resources matter
- For self-represented litigants and attorneys:
  - Informational videos
  - Online guided interviews
  - Templates
  - Phone / video conversations pre mediation sessions
- For mediators:
  - Training on initial communications and info sharing
  - Templates
  - Practice groups that address initial process

# More Solutions

- **Artificial Intelligence: Uses and Warnings**
  - **Tips: free v. fee platforms, practice**
  - **Multiple uses**
  - **Hallucinations and other hazards**
  - **BAH!!**
- **Resources**
  - **Dispute Resolution Section website resources**
  - **Mediation preparation guides**

# DR Section Mediation Guides



# Intern Assignment: Slip and Fall Memorandum

**ChatGPT was asked to provide a template for this memo**

## **Prompt in ChatGPT**

**You**

Please provide me with a draft memorandum that summarizes a slip and fall product liability dispute. Include sections for the demand, questions presented, short answer, discussion, and conclusion.

# Slip and Fall Memorandum

## Memorandum

**To:** [Name], Partner

**From:** [Your Name], Associate

**Date:** [Today's Date]

**Subject:** Summary of Slip and Fall Product Liability Dispute

### Demand

The plaintiff, [Plaintiff's Name], demands compensation for injuries sustained from a slip and fall incident attributed to the alleged failure of [Product Name], manufactured by [Manufacturer's Name]. The plaintiff seeks damages for medical expenses, lost wages, pain and suffering, and any additional compensatory damages applicable under [State's] law.

### Questions Presented

1. Does [Manufacturer's Name]'s failure to provide adequate warnings about the potential slip hazard of [Product Name] constitute negligence under [State's] product liability laws?
2. Is there sufficient evidence to establish a causal link between the use of [Product Name] and the plaintiff's injuries?
3. Can [Manufacturer's Name] be held liable for the plaintiff's injuries under a strict liability theory?

### Short Answer

Yes, [Manufacturer's Name] may potentially be found negligent if it can be proven that they failed to provide adequate warnings about the slip hazards of [Product Name]. If the plaintiff can demonstrate a direct causal link between their use of the product and their injuries, [Manufacturer's Name] could be held liable. Furthermore, under [State's] strict liability laws, if [Product Name] is found to be unreasonably dangerous and this condition led to the plaintiff's injuries, [Manufacturer's Name] could be held strictly liable, regardless of fault.

### Discussion

The core issue revolves around the adequacy of warnings provided by [Manufacturer's Name] concerning the slip hazard of [Product Name]. In [State], manufacturers are required to warn users of non-obvious dangers associated with their products. The plaintiff alleges that [Manufacturer's Name] failed in this duty, directly leading to their injuries.

Under [State's] product liability law, a manufacturer can be held liable for negligence if it fails to exercise reasonable care in warning about the dangers of its product. The evidence presented, including testimonies and the product's labeling and marketing materials, will be crucial in establishing whether [Manufacturer's Name] breached this duty.

Furthermore, the plaintiff must establish a causal link between the product's use and their injuries. Medical reports, expert testimonies, and accident reconstruction analysis may serve as critical evidence.

In terms of strict liability, the plaintiff does not need to prove negligence if they can show that [Product Name] was in an unreasonably dangerous condition when it left [Manufacturer's Name]'s possession and that this condition was a direct cause of their injuries.

### Conclusion

Given the information available, [Manufacturer's Name] faces potential liability for the plaintiff's injuries under both negligence and strict liability theories. The outcome will largely depend on the ability of both parties to present compelling evidence regarding the adequacy of warnings and the causation between the product's use and the plaintiff's injuries. Further investigation and analysis of the evidence are necessary to assess the strengths and weaknesses of the case and to formulate an effective legal strategy.

# Please Reach Out!

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