

## TIPS FOR NEGOTIATORS IN MEDIATION

- Preparation of the Client for Mediation
  - Actively listen to your client's story
  - By recognizing your client, you will "empower" the client
  - By recognizing your client, you will help him/her to understand his/her goals and underlying interests
  - Help your client to see the common interests that are shared with the other party
  - Make sure your client understands that patience and timing are crucial in a competitive mediation
    - The other side will not give you their best dollar offer early in the mediation
    - The early stage is about framing of the issues
    - Next usually comes a major concession from each side
    - Then comes the "dance"
    - Rarely is it safe to short circuit the dance and move to your bottom line too quickly
  - If appropriate, prepare your client to speak to other side in joint session during the mediation
  - Prepare your client to offer some "recognition" to other side
  - Prepare a negotiation strategy and target range for settlement taking into account your client's BATNA (Best Alternative to a Negotiated Agreement)
  - Emphasize the importance of remaining flexible because you will learn things you did not know before the mediation
  
- Leading Up to Mediation, Treat Opposing Counsel as Your Most Important Ally
  - Always remember that you have to convince opposing counsel of the merits of your position, not the mediator
  - Look for ways to build a positive working relationship with opposing counsel
  - Liberally sprinkle courtesies that do not compromise your client's position but build reciprocity
  - Share information: witness statements, expert analysis, etc.
  - Always be true to your word and actively strive to build your credibility
  - Avoid jabs and criticism of opposing counsel in front of the parties or mediator
  - Convey a cooperative tone and attitude and a real desire to work toward settlement
  - Manage the expectations of the opposition before the mediation

- Other Considerations in Preparing for Mediation
  - Use a pre-mediation conference call with mediator to frame the issues to be mediated
  - If your client's settlement position changes prior to the mediation, let other side know why prior to the mediation
  - Do not speak loosely about settlement numbers with opposing counsel or the mediator
  - Always convey to the other side that you are willing and prepared to try the case, if necessary
  - Use your opening statement to show your preparedness to the other side
  - Avoid excessive rhetoric in your opening statement: be "hard on the issues" and "soft on the people"
  - Allow your client to tell his/her story if the client is credible and convincing
  
- Common Mistakes By Attorneys in Mediation
  - Mediating too early or too late in the case
  - Revealing or going to the "bottom line" too soon
  - Setting aside insufficient time for the mediation
  - Failing to adequately prepare the client for mediation
  - Requesting the mediator to be evaluative too early in the mediation
  - Making overly aggressive initial demands or offers
  - Missing opportunities to create value through collaboration
  - Failing to realize that the parties' expression of emotions is often needed to overcome the underlying emotional obstacles to settlement