

TIPS FOR NEGOTIATORS IN 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

- **Preparation of the Client for Mediation**
 - Take the time to truly listen to your client's story
 - Listen not just for evidence to support your case theory, but also for clues as to your client's broader underlying interests
 - Help your client understand those broader interests
 - Help your client to see the common interests that are shared with the other party
 - Help your client to see the interests of the other party that can be accommodated with little harm to your client's interests
 - Make sure your client understands that patience and timing are crucial in a mediation
 - The other side will not give you their best 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 quickly
 - If appropriate, prepare your client to speak to the other side in joint session during the mediation
 - Prepare your client to offer some "recognition" to the 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

- 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 the other side know about this prior to the mediation
 - Be cautious about making unguarded comments to opposing counsel concerning settlement numbers
 - 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