



PROGRAM MATERIALS

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How Attorneys Can Prepare Themselves and Their Clients to Maximize an Effective Mediation Process

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How Can Attorneys Prepare Themselves and Their Clients to Maximize an Effective Mediation Process

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What Does it Mean to be an Advocate?

- Is this different than being a litigator? Yes!
- When does the role start? At the start of the process.
- What should your goal when representing a client be? To facilitate a positive result for your client.

Determining When and If You Want to Mediate

- Advantages and Disadvantages
- Types of disputes appropriate for Mediation
- Too early?
- Do you need discovery?
- Timing
- Obligation to inform/discuss with Client that mediation is an option
- Agreement to Mediate
 - Confidentiality
 - Applicable Rules

What to Consider When Selecting a Mediator

- Mediator Style
 - Facilitative, Evaluative or Transformative
- Credentials
- Training and Experience
- Subject Matter Expertise
- Personality Traits
- Selection Process

What to Consider When Selecting a Mediator, *cont.*

- One size does not fit all
- Choosing the right mediator is a key part to achieving a good result
- Advocates should feel free to:
 - Interview a mediator
 - Seek recommendations from participants in past mediations
 - Consider the mediator's personality traits to see if they are a good fit for the parties in this process
 - Consider your own client's personality and perhaps contrast it with those of your particular adversary and their clients
 - Examine whether the mediator has familiarity with the relevant area of the law governing the mediation

What to Consider When Preparing Your Case for Mediation

- Identify Your Client's Interests (what do they really need versus just want)
- Establish Goals
- Risk analysis how to do you evaluate goals and what will happen
 - BATNA- best alternative to a negotiated agreement
 - WATNA- worst alternative to negotiated agreement
 - LATNA- likely alternative to negotiated agreement

Preparing Your Client's Case for Mediation

- Goal is to educate the mediator so that they have at their disposal all of the key facts and case law germane to the issues at hand
- Convey any concerns your client has about the underlying litigation and concerns about the mediation itself
- Identify possible key stumbling blocks to the process
- Highlight certain "personality" issues or raising a concern that the presence of certain parties in the process could be constructive or destructive
- Be sure to impart your "institutional" knowledge of the dispute

The Mediation Statement in General

- Don't waste the opportunity to utilize this statement to advocate for your client and to forth their position
- Time should be spent on preparing an appropriate mediation statement
- The statement should be focused and designed to educate the other side and the mediator on the key points of strength in your position
- Keep in mind that you are not arguing your case to the mediator

What Should Be In A Pre-Mediation Statement?

- It should tell a story (settlement focused)
- Focus on Strengths
- Clear and Concise Critical Points of Fact and Law
- Procedural History and Prior Efforts at Settlement
- Awareness that This May Be Other Parties' First Look at Your Arguments
- Where Statement is Confidential for Mediator Eyes Only:
 - Acknowledge Weaknesses
 - Potential Solutions
 - Economic
 - Non-Economic
 - Any prior negotiations / key restrictions or parameters

What Should Be In A Pre-Mediation Statement? *cont.*

- Identify prior efforts at settlement so the mediator has a true scope of what has transpired to date as well as any upcoming key court dates
- It is possible this may be the first time, that the other side is learning your key arguments, your interpretation of the facts and/or case law
- If the mediation is occurring pre-discovery, the other side may have little information to balance their own views of the likelihood of success for their side or yours

Preparing for the Mediation: Pre-Mediation Tasks

- Pre-Mediation Calls with the Mediator (One-on-One or Joint)
 - Style
 - Case Analysis
 - Analyze the Case from Both Sides
 - Identify the Key Legal/Factual Issues
 - Strengths/Weaknesses
 - Potential Solutions
 - Economic
 - Non-Economic
 - Motivations/Impediments to Settle
 - Key Participants –who needs to be there
 - Timing
 - Insurance Coverage
 - Information Exchange

Confidential "Mediator Eyes Only" Statements

- Strategic considerations in not sharing every key legal point in shared statement
- Consider sharing some of these with the mediator in a separate confidential statement Great opportunity to also educate the mediator about any of the kinds of issues that may have, or should have, come up during in the pre-mediation call
- After you review the other side's mediation statement there may be a critical point or two that you want the mediator to focus on during the mediation, so do not be afraid of supplementing confidential statements

Preparing Your Client for the In-Person Session

- Explain the Process and Logistics (what to expect)
- Generate Options and Think Creatively (based off risk analysis)
- Set Expectations
- Prepare Strategy
- Opening Remarks by Counsel and/or Parties
- Attendees
- Assess Options for Settlement

Preparing Your Client for the In-Person Session, *cont.*

- Be sure that your client is educated about how the mediation process will work
- Explain potential time lags that occur during the separate caucuses
- Explain the purpose and meaning of joint sessions and separate caucuses
- Review and discuss confidentiality rules with the client
- While a good mediator should review all of this information in opening caucus, at the end of the day, you are your client's advocate and the ultimate burden rests on you

Preparing Your Client for the In-Person Session

Goal and Risk Analysis

- Review and prepare with your client their goals or wish list – what the client really wants, or needs to, get out of the mediation
- A strategic risk analysis should be performed
- Cost of litigation, expenses, and lost opportunity
- Be sure that the right party or parties are coming to the mediation
- Consider tax consequences
- Be sure you have access to, or bring with you, key documents or information reflecting or supporting your case or defenses

In-Person Session

- Mediator's Opening (go through what they will say, things that are covered, expectations, confidentiality)
- Joint Session, Caucus and/or Hybrid Approach (explain how this works why one over the other)
- Counsel and/or Client's Opening Remarks (decide who should say what and how to handle process)
- Making the Most of the Mediator's Approach (how to work with mediator, touch back on style)
- Term Sheet/Memorandum of Understanding (why you want one)
- What Happens Next/Other Options if Settlement Not Reached (keeping it open, don't close, maybe some additional informal discovery)

What Happens Next? End of Sessions Tasks

- If you meet with success during the mediation process – what then?
- Be sure to create a term sheet
- What if don't meet with success, other options?

Questions?



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LESLIE A. BERKOFF

Practice Areas - Alternative Dispute Resolution Bankruptcy & Creditors' Rights Litigation

- Leslie A. Berkoff is a Partner with the firm where she serves as Chair of the firm's Creditors' Rights and Bankruptcy Practice Group. Ms. Berkoff concentrates her practice in the area of bankruptcy and restructuring litigation and corporate workouts, and she represents a variety of corporate debtors, trustees, creditors and creditor committees both nationally and locally. Her practice also includes an emphasis on equipment leasing and healthcare law. Ms. Berkoff is also an experienced litigator and handles corporate transactions both locally and nationally. In addition, Ms. Berkoff has an active alternate dispute resolution practice and frequently serves as a mediator, and is also a trained arbitrator. She is on the Mediation Panels for the Eastern, Southern and Northern Districts of the United States Bankruptcy Courts in New York and the United States Bankruptcy Courts in Delaware and the Eastern District of Pennsylvania, as well as the Commercial Mediation Panel for Nassau County. Ms. Berkoff was recently selected by the American Arbitrators Association to serve on its National Roster of Arbitrators. She has also served as a court appointed examiner and guardian ad litem in several bankruptcy cases. She is currently the Chair of the Mediation Sub-Committee of the Chapter 11 Lawyers and Judges Advisory Committee for the United States Bankruptcy Court, Eastern District of New York and Co-Chair of the Mediation Committee of the New York State Bar Association. Ms. Berkoff also serves as a Member of the Dispute Resolution Section Advisory Council of the American Bar Association (ABA) of the Business Law Section.
- Prior to joining Moritt Hock & Hamroff LLP, Ms. Berkoff served as a law clerk to the Honorable Jerome Feller, United States Bankruptcy Judge in the Eastern District of New York, from 1991 to 1993 and to the Honorable Allyne R. Ross, Federal Magistrate Judge in the Eastern District of New York, from 1990 to 1991.
- Ms. Berkoff speaks and publishes extensively and is a recognized leader in her field.

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ELIZABETH J. SHAMPNOI

Elizabeth J. Shampnoi is President of Shampnoi Dispute Resolution and Management Services, Inc. and serves as a mediator, arbitrator, consulting expert and trainer. With 20 years of experience in the field of alternative dispute resolution (ADR), Ms. Shampnoi works with in-counsel, law firms, and executives providing strategic advice to develop and implement strategies to avoid and resolve disputes quickly and efficiently while achieving successful outcomes. Ms. Shampnoi regularly serves as a mediator and arbitrator in commercial and employment disputes and has successfully mediated and arbitrated over 200 disputes. She also provides trainings for companies concerning best practices in all areas of ADR. Ms. Shampnoi's dedication and focus in the area of ADR began early in her career when she served as the District Vice President of the New York region of the American Arbitration Association (AAA). Following her tenure at the AAA, Ms. Shampnoi served as a litigator and in-house counsel. Ms. Shampnoi is based in New York City and can be reached at (914) 522-0174 or elizabeth@shampnoiadr.com.