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MEDIATION CHECKLIST

1. Pre-Mediation Preparation.
 - a. Complete fact gathering pre-mediation, including discovery of important factual information. Mediation confidentiality allows other party to claim anything. Get it under penalty of perjury before mediation where possible.
 - b. Consider early mediation in order to keep expended litigation costs from preventing a deal.
 - c. Analyze case to be prepared to calculate Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA) and Reasonable Alternatives to a Negotiated Agreement (RATNA.)
 - d. Select mediator to convene mediation or negotiate the mediator selection with adversary.
 - i. Pick mediator with tools and flexibility to have the best chance to achieve results.
 - ii. Decide whether retired judge or mediation-trained attorney is best for case.
 - iii. Decide whether evaluative, facilitative or transformative mediator is best.
 - e. Memorialize mediation agreement that will include:
 - i. Location, role and compensation of mediator, presence of parties with authority and time parameters of mediation.
 - ii. Consider pre-conditions to mediation (i.e., pre-mediation offer, briefing exchange, expert presentation, exchange of data, etc.)
 - iii. Consider whether just getting the parties to sit down is enough.
 - f. Circulate and execute mediation agreement.
 - g. Pre-mediation meeting with client to:
 - i. Pre-condition client to the process;
 - ii. Determine reasonable objectives of mediation;
 - iii. Discuss opening settlement positions, possible principled concessions and reservation number (last, best and final settlement position.) Consider using decision tree analysis to assist in this process.
 - iv. Consider what the settlement agreement needs to include aside from main deal points.
 - v. Decide who needs to be at the mediation.
 - vi. Give client jobs to do during mediation process.

- vii. Prepare client for the potential that the mediator may ask the client direct questions and that mediation may include brainstorming sessions where the client is asked to propose all possible solutions to all or a portion of the dispute.
 - h. Prepare and Finalize Mediation Brief.
 - i. Prepare Mediation Presentation.
 - i. Consider approach with adversary that will best accomplish client's goals.
 - ii. Realize that adversary, not mediator is your audience.
 - iii. Familiarize yourself with graphics or other presentation aids for smooth and persuasive delivery.
- 2. The Mediation Session.
 - a. The Introductions.
 - i. Make introductions with purpose consistent with pre-determined style. (e.g., Conversational, cooperative, game-face adversarial.)
 - ii. Consider adversary demeanor and attitude in determining negotiation tactics.
 - b. The Opening Session:
 - i. Make well-prepared and persuasive presentation consistent with pre-determined style.
 - ii. Pay attention to adverse parties during your presentation.
 - iii. Have your client note reactions by both attorneys and clients to presentation.
 - iv. Note issues/facts in opponent's presentation that require response.
 - v. Consider asking for caucus for discussion with client and/or experts after presentations before responding.
 - vi. Listen and note information that indicates adversary's interests – what they might want, need or seek and the importance they seem to place on the interests.
 - vii. Consider finding opportunities to have parties speak, eliminating the shield of the attorney/presenter to uncover interests.
 - c. Brainstorming – Consider whether your client's interest would be advanced in a joint session that asks for all potential ways that the problems may be addressed as a way of uncovering interests. (Brainstorming is a frequently overlooked aspect of mediations, both by attorneys and mediators.)
 - d. Recap and Analysis:
 - i. Be prepared to list the major issues that are not in dispute and those that remain in dispute.
 - ii. Expect mediator to summarize positions and recap potential solutions.
 - e. Caucus.
 - i. Be aware that the mediator will not be surprised if you are negotiating with the mediator regarding settlement positions.
 - ii. Realize that the mediator is attempting to reduce expectations on both sides as a method of getting agreement.
 - iii. Pay attention to where the offers and counter offers are going and adjust approach as necessary.

- iv. Be flexible in your approach with the mediator, depending on your confidence in the mediator's ability.
- v. Consider at appropriate stages telling the mediator exactly what you are after and develop a joint approach to achieving that result.
- vi. Do not be afraid to use the skill of an effective mediator to help shape your settlement position to get what you want.
- vii. Remind the client that the mediator's opinions are just that – they have no weight other than their persuasive value.
- viii. Be ready to coach the mediator on how to deal with the other side and give the mediator the ammunition to be effective.
- ix. Be mindful of the client's interests and do not fail to achieve the client's objectives by trying to "win" the mediation.
- x. Depending on client's interests, be prepared to consider this mediation session just one part of a longer negotiation. Conversely, be prepared to counteract that notion.

f. Impasse:

- i. If negotiations stall, determine why impasse exists.
- ii. Try to identify nature of the impasse: (1) relational, (2) factual/legal (3) positional (4) structural or (5) values based.
- iii. Seek to overcome impasse by using methodology consistent with the basis for it. (i.e., objective criteria/third party evaluation to overcome factual/legal disagreement; reframing/time out/venting session/compassionate response to relational impasse; change in party representative for relational or structural impasse; appeal to pragmatism for relational/values based impasse.)

g. Conclusion:

- i. Make sure to sign a writing that says the agreement reached is binding and enforceable.
- ii. Prepare in advance to settle everything that day, including non-monetary settlement terms – there may be no tomorrow.
- iii. Consider preparing a settlement agreement in advance and even circulating to be sure all issues are covered.
- iv. Make sure you leave with an original of the signed agreement.
- v. Where the session ends in impasse, consider proposing additional steps to change attitudes as a predicate to a further session.
- vi. Consider allowing the mediator to make telephone calls to keep the dialogue going.