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Chart a Course for **Mediation** in **New York**

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If you practice law in New York City, you may be directed or ordered by a court to participate in the mediation of your case. Likewise, you may receive a call from your adversary suggesting that you engage in private mediation. When this occurs, there are specific steps you should immediately take to properly prepare for a successful settlement.

There are a number of court-annexed mediation programs in New York City, including those of the U.S. Court of Appeals for the Second Circuit; the U.S. District Courts for the Southern and Eastern Districts of New York; the New York Appellate Division (First and Second Departments); the New York State Supreme Courts and the Commercial Division of the Supreme Court, New York County. Similarly, there are also numerous private ADR providers.

While each of these program and providers has significant procedural differences, there are best practices that you should know and employ. Initially, it is critical that the lead attorney or partner be made immediately aware of any order, direction or request for mediation. Advise your calendar clerk and legal staff that any time they receive correspondence from any court regarding mediation, they must immediately notify the lead attorney. Likewise, notify the lead attorney if an associate appears in court and is directed to proceed to mediation; an interim order directs the parties to engage in mediation or refers the matter to a mediation part; or an email or call comes into the office from an adversary requesting mediation. These are time sensitive matters and court-annexed mediations are very serious obligations. Failure to comply with a court order or direction may result in sanctions.

An attorney should never decide or assume that counsel and client are excused from participation and need not comply with a court order or directive. Any mediator will attempt to bring about a global, total settlement of all claims, involving all parties. The mediation will not simply consider the discreet appellate issue or the issue in the latest set of motion papers. Similarly, while a client may presently be out of the case on a summary judgment motion, a successful appeal could reverse the status as could a separate new declaratory judgment action or third-party action. If there is any question whether your client is a necessary and proper

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party to the mediation, make a call to the court for its determination. Do not presume to make this determination yourself.

In some court-annexed programs and in private mediation, you will be able to select the mediator. It is imperative that any mediator you select provide a fair, neutral evaluation of the case and work collaboratively. They must know the relevant case law and apply it to the specific facts of the case in order to meaningfully provide a risk assessment. While it is the role of the mediator to act as a facilitator in a client-centered process, the mediator should have sufficient experience and confidence to ensure a respectful process in which clients are comfortable expressing their interests, objectives and concerns. Whether engaged in court-annexed mediation or private mediation, counsel and clients should be fully aware of all costs or fees associated with the process.

Once you and your client have decided to mediate and have selected the mediator, read the relevant rules of the private mediation service or specific court you are in and review any correspondence that you have received. As indicated, mediation procedures differ widely. Some mediators or courts will expect your client to appear for every conference. This is generally true in private mediation. Others expect clients only when they direct them to attend, or never. Depending on the venue, mediations may be held for minutes, hours or an entire day. Likewise, one full-day session, or several sessions with interim tasks assigned ("homework"), may be anticipated.

The myriad of procedural differences may appear confusing initially. Ultimately, the differences reflect the unique procedural posture and development of each case in each jurisdiction and are designed to get the case ready for mediation, and ultimately settlement. Again, you must know where the mediation will be heard in order to understand what, procedurally, will be expected of you and your client.

Once you are directed to mediation, immediately begin working with your client to prepare. If a trial judge has directed that you mediate, or if an appellate court has ordered the case into mediation, it is because a determination has been made that the case can and should settle. You are no longer on a multi-year path to trial. If this is a private mediation, counsel and clients have made the determination that the case is ripe for settlement. The same preparation is in order.

You must now master all the facts of the case as well as all relevant case law. Review all documents and testimony. Thoroughly discuss the case with your client. Without this knowledge, you cannot intelligently counsel your client or utilize the mediation process to you client's full advantage.

In speaking with your client you should also be asking probing questions. These questions should be designed to help your client articulate his or her interests and objectives and to help you understand what they are. With this information, assist your client to evaluate whether the interests and expectations are realistic and reasonable in light of your risk analysis. This is the time to discuss the likely trial or appellate result, monetary and emotional costs, time considerations, adverse publicity from a trial or published decision, impact on family members, the vicissitudes of a jury and other such issues. Listen carefully to both monetary and non-monetary objectives your client expresses. Explore also with your client what the interests and objectives of the adversary may be. Your client may have insight that you totally lack. The more you have to trade during actual negotiations, the better off you are. Try to help your client prioritize objectives.

You should determine whether the court or private mediator requires or permits the filing of a pre-conference mediation statement. If so, determine when it must it be submitted and whether it is confidential or must be served on your adversary. If the statement is confidential, determine the scope of that confidentiality. In preparing your statement, you will be guided by whether your adversary and the court will have access to it. Assuming that it is "Confidential—For Mediator's Eyes Only," it would be good practice to verbally confirm this with the mediator before providing the document and note on the document that it is confidential.

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Who attends the mediation should also be part of a considered plan. Obviously, individuals with full settlement authority should be in attendance, which includes both counsel and clients. Clients will generally want to see someone with equal stature across the table as a sign of respect and commitment to the mediation. Consider also how many clients and attorneys to bring—too many people or an imbalance can be intimidating and impede settlement. Consider the personal chemistry between clients and attorneys, both on your side and across the table. If you represent the non-monied spouse/wife in a matrimonial action, do you really think it is a good idea to bring her new boyfriend to the mediation? It is certainly better to discuss with opposing counsel who is planning to attend. If the mediation is confidential, all in attendance must be so advised and agree to honor that confidentiality.

You and your client should now be ready to engage in mediation. Mediation is the place where you can engage in creative problem solving. It is where you can "think outside the box" in order to achieve a positive result for your client. It is a process where a skilled mediator, with input from, and collaborating with, clients and counsel can facilitate a tailor-made solution and resolve conflict. Mediation is a rational process based on a legal, economic and procedural risk assessment, taking into consideration client interests.

Mediation is a process where value is reallocated. Value can be both monetary and non-monetary. Conceptually, think of a large pot containing client assets and value set in the middle of the mediation table. It is the job of the mediator to work with clients and counsel to identify and distribute these values. Values may include: monetary compensation for a tort or personal injury; a positive employment reference; the right to continued occupancy in a commercial property or apartment; or secured maintenance and child support. A good job reference may not cost an employer anything, but produces great value for the former employee looking for work. A tax deduction has little value for a low-income spouse working part-time, but has significant value for the high-salaried monied spouse paying support. Likewise, the willingness and ability of a debtor to obtain monies from a source the creditor would otherwise not have a claim against, or to set up a secure and regular payment plan, can avoid foreclosure and resolve conflict with a solution not available through court litigation.

After a settlement is reached in either private or court-annexed mediation, it is critical to stay in touch with the mediator until all settlement documents have been executed. In drafting, the devil is in the details. You should request additional conferences if you anticipate any issues in the drafting of your documents. At a minimum, telephone conferences should be held to monitor progress. If the case settles while litigation is pending, calls should be placed to the trial court when settlement is reached, and again when concluded, as a matter of professional courtesy and to assist the court in managing its overwhelming caseload. If you reach a private settlement before a court mediation, you should advise the court as soon as possible. Much time is spent by court mediators preparing to mediate a case and precious calendar time is wasted if held unnecessarily for your case. Be certain to timely return any paperwork required by the court to close its settlement files.

The skills that enable an attorney to well represent a client in mediation are different from those possessed by great litigators and transactional attorneys. These skills, together with a better understanding of the mediation process and actual mediation experience will certainly assist in your mediation practice.