

PRACTICE ALERT

New ADR Professional and Ethical Requirements

Alternative Dispute resolution processes are firmly established under federal and state laws. Competent legal representation therefore requires attorneys to be familiar with those laws and ADR issues, and to advise clients as to ADR alternatives. See Rules 1.1, 1.2(a) and 1.4(b).

Rule 1:40-1 (effective September 5, 2000) provides that State complementary dispute resolution programs are an integral part of the judicial process, and states specifically that "attorneys have a responsibility to become familiar with available CDR programs and inform their clients of them."

Hot Tips for Attorneys Whose Clients are in Mediation

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Aside from knowing your case, the law, your client's needs and interests, and always being thoroughly prepared, here is my Top 10 List of what you should do when your client is in mediation:

10. PREPARE YOUR CLIENT FOR THE MEDIATION PROCESS.

Know, understand and explain the process to your client. There is nothing wrong with obtaining some mediation training to familiarize yourself with the process.

Your client should be prepared to play a major role in the mediation process. He or she should be prepared to discuss the facts and his or her needs and interests. The mediator will speak directly to the clients. Your client should be prepared for this.

Make sure your client knows that disputed facts and legal issues will not be resolved in mediation, and that your client will not be able to persuade the other party to abandon his or her case in mediation.

The only "victory" in mediation is resolution and closure.

9. GATHER AND ANALYZE FACTUAL INFORMATION.

Advise your client on how the law applies to the facts, including providing general legal information and information about litigation and its costs. Also provide specific information about legal issues.

Advise your client on what information is needed from the other party in order to evaluate the facts.

Advise your client on how factual information should be presented during the mediation sessions.

Advise your client on possible compromises and trade-offs, which could be made during the negotiations.

Advise your client about claims which he or she may wish to pursue, and about claims which the other party may pursue.

8. PREPARE A CONFIDENTIAL MEMO FOR THE MEDIATOR.

Identify the issues.

Summarize your client's position.

Cite applicable law and cases.

Summarize prior negotiations.

Provide relevant documents and identify particular problems which may need to be considered.

7. PREPARE OR HELP THE CLIENT PREPARE AN OPENING STATEMENT.

Prepare aids for use in the mediation to help the mediator and the other party to understand the client's perspective and his or her position.

Prepare summaries and copies of supporting documents for use in mediation. Make sure you have enough copies in advance for all parties.

6. ASSESS; BE PREPARED AND KNOWLEDGEABLE ABOUT THE STRENGTHS AND WEAKNESSES OF THE CASE.

Use mediation to educate yourself about the strengths and weaknesses of the other party's case.

Use mediation to educate your client about the strengths and weaknesses of his or her case.

5. IDENTIFY THE INTERESTS AND NEEDS OF THE PARTIES.

As you help prepare your client for mediation, ask your client to articulate clearly his or her needs and interests and to identify the needs and interests of the other parties.

4. ADVISE YOUR CLIENT ON NEGOTIATION STRATEGIES.

Use role playing in simulated negotiations to practice strategies and techniques.

Coach for negotiating possible outcomes with your client.

Advise the client on reasonable and appropriate ranges for settlements.

3. DEVELOP SETTLEMENT OPTIONS.

Be creative! Brainstorm with your client.

Ask your client to identify and list all the things the other party can do to satisfy his or her interests.

Ask your client to identify and list all the things he or she can do to satisfy the other party's interests. This includes listing all non-economic components of the settlement.

Remember, it is unwise to decide in advance on a bright line beyond which your client will not move.

The key is flexibility in helping to develop options.

2. PREPARE SETTLEMENT DOCUMENTS DURING THE FINAL MEDIATION SESSION, INCLUDING THE SETTLEMENT AGREEMENT.

Make a list of all necessary components that must be in the written agreement or prepare the agreement based on the Memorandum of Understanding drafted by the mediator.

1. THE MANNER, LANGUAGE AND TONE OF MEDIATION ADVOCACY IS CRITICAL FOR ITS SUCCESS.

Establish a working relationship with the mediator.

Use the mediator as an ally, not an adversary.

Avoid being confrontational.

Give the mediator tools with which to work.

Use the mediator as a resource.

Be professional and courteous and create a tone of compromise and conciliation.

Use the language of persuasion, not advocacy.

Establish your own credibility and trustworthiness in the eyes of the mediator. Work on problem solving. Show you recognize this as an opportunity for developing creative options aimed at settlement.

ADR INTERNET RESOURCES

American Arbitration Association

www.adr.org

American Bar Association Section of Dispute Resolution

www.abanet.org/dispute

ADR Resources

www.adrr.com

ADR World

www.adrworld.com

Association for Conflict Resolution

www.acresolution.org

CPR Institute for Dispute Resolution

www.cpradr.org

JAMS-Endispute

www.jamsadr.com

National Arbitration Forum

www.ARBITRATION-FORUM.com

The Conflict Resolution Information Center

www.crinfo.org

Mediation Information and Resource Center

www.mediate.com

State of New Jersey Judiciary Complementary Dispute Resolution

www.judiciary.state.nj.us/services/cdr.htm

NJ Association of Professional Mediators

www.njapm.org
