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Concluding the Mediation: Counsel's Role

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Concluding the Mediation: Counsel's Role

A. As with all aspects of the mediation process, preparation is the key. Counsel should prepare, with client input, a draft of a binding term sheet before the mediation. This will save valuable time, usually at the end of a long and tiring mediation process. Such preparation also assures that all key settlement issues will be addressed before the parties adjourn; it gives counsel a checklist of all specific issues that need to be addressed in the settlement agreement. The exercise of drafting will require the consideration of the usual settlement issues such as releases, confidentiality, non-disparagement, and termination of any pending litigation. If counsel is technologically savvy, the draft term sheet might be placed on a laptop computer for possible revision and use at the mediation session.

B. Any settlement should be memorialized in a written, binding document reciting the essential terms agreed upon. This will avoid any possible remorse by one of the parties or any later disagreement concerning the settlement terms. Counsel should ascertain that the written document fully protects the client and resolves all of the client's concerns.

C. There are generally five parts to an agreement, which appear in the following order: (1) a statement of the parties' names and, if relevant, reference to any underlying litigation; (2) a preamble reciting basic background information; (3) a body addressing all issues raised, as well as the allocation of the expenses and the mediator's compensation (if any); (4) a closing declaring that the agreement is in full settlement of all claims and counterclaims resolved during the mediation; and (5) signature by all parties.

D. Plan and discuss any post-mediation agreements or exchanges necessary for implementation. Include them in the written agreement. The agreement might also include a clause providing that, if a dispute arises in the future relating to the agreement, the parties will attempt to resolve that future dispute through another mediation.

E. Decide, in advance, what steps you and your client will take if mediation does not achieve a negotiated settlement at the conclusion of the scheduled mediation. Even if the mediation does not yield an immediate resolution, the parties might agree to continue negotiations, perhaps with the assistance of the mediator, directed to the issues still in conflict. Counsel may want to initiate and help structure the mediator's continuing role. Alternatively, consider the advisability of arbitrating the dispute. Anticipate the measures likely to be taken by adverse parties if the dispute is not resolved. Counsel should also meet with the client immediately after the mediation to explore strategies.