ROLE OF ADVOCATES IN THE MEDIATION PROCESS
A party who chooses to resolve a dispute through mediation may or may not be represented by an advocate at any point in the process. At the option of the party, for example, a party may:
• Be represented by a lawyer from the moment that party's first pleading is filed;
• Enter the case unrepresented and secure representation at some point later in the case prior to or during the mediation process;
- Complete the mediation process and consult a lawyer only to review the terms of the mediated agreement; or
- Complete the mediation process and enter an agreement without a lawyer’s assistance.
• ROLES OF AN ADVOCATE IN MEDIATION
Before Mediation

- By assisting the party in making informed decisions about the mediation process before the process begins.
- The lawyer encourages the party to take responsibility for resolving the dispute, consistent with the principles of mediation.
• The lawyer explains to the party the nature of the mediation process, what to expect during mediation and how the mediation process complements the court procedures.
• The lawyer helps the party make an informed choice of a mediator.
• Selecting a mediator can be the easiest step in litigation or it can be one of the hardest.
• If you are new to mediation, new to an area or mediating a special case, the following are useful steps to follow.
a. Appropriate experience. - Look for a mediator with appropriate experience in the area in conflict, not just "experience."

b. Appropriate training. - Again, look for mediators whose training is appropriate to the conflict to be resolved.
c. Fee schedule. - In choosing a mediator, review the fee schedule.

d. Appropriate site. - The site of the mediation should generally be a neutral place.
e. Conflict of interest check.

- Watch to make certain that the mediator's partner or relative doesn't represent one of the parties or that some similar conflict of interest does not exist.
a. Agreement of parties on mediator. - Enter a written agreement on the mediator (a simple document stating that the parties have agreed to mediate the case before the mediator at such and such a time and place) that is signed by all parties and advocates.
Preparing Confidential Pre-Mediation Papers for the Mediator
The **pre-mediation papers** often provide the advocate and the parties with essential summaries to guide them into the mediation process and are very valuable to the parties.
A. CONCISE STATEMENT OF ISSUES AND POSITIONS.

What positions have the parties taken and what are their issues or reasons for those positions. It often helps to approach each point as follows:
- **Position**
  - issues that support the position
  - legal elements for each issue/cause of action/defense/etc.
  - uncontested facts for each element.
  - contested fact for each element.
This will often disclose positions that have little factual basis, which will help in evaluating them for settlement purposes as well as helping you focus on important areas.
B. IDENTIFY STRENGTHS AND WEAKNESSES

- Usually fully identifying the issues and positions will illustrate the strengths and weaknesses as well. This is also the time to consider legal trends, how strong and how certain your witnesses are on the facts and all of the related issues that come to mind in deciding if a case is strong or weak.
C. PROVIDE TIMELINE FOR CASE AND FOR NEGOTIATIONS.

• Sometimes a timeline is quite complicated. If the timeline is complicated this is a red flag that the mediator will probably need a road map to keep track of where and when the parties are discussing and may prompt you to prepare one for the mediator even if a road map has not been requested.
D. DETAIL WHO WILL BE PRESENT AND THEIR RELATIONSHIP TO THE CASE.

- This is important to make certain that the appropriate parties attend -- including everyone necessary to make a binding settlement. Remember, of those mediations that fail, 24% fail because of a lack of settlement authority.
PRE-MEDIATION CLIENT CAUCUS

After all of that preparation, meet with your client and prepare the client for mediation.
A. EXPLAIN MEDIATION PROCESS.

- Explain step by step the process of mediation. If the mediation stretches over several weeks or months, prepare the client to know when and where and which sessions will include the other parties and which sessions will exclude advocates or parties.
Sophisticated clients need little, if any explanation. Some clients need a great deal of explanation.
B. REVIEW PRE-MEDIATION PAPERS (WITH THE CLIENT).

This helps you and your client understand just what and where the case is. This may be the first time your client has ever had the legal side of his or her case fully explained to them.
C. EXPLAIN POSSIBLE BENEFITS OF MEDIATION.

- Let the client know why you are mediating. Make certain they understand that mediation is a place where they seek their own self-interest and that the process exists for their benefit.
D. EXPLORE INITIAL UNREALISTIC POSITIONS AND SENSITIVE ISSUES.

- Discuss those issues, if any, that have emotional weight and the range of reasonable outcomes. Now is the time to understand and discuss the client's unrealistic positions, hopes or expectations and to help a client understand that their case is not going to turn into a fantasy.
E. DISCUSS AUTHORITY TO SETTLE.

- Make certain that the necessary authority will be there and obtain a commitment to settle if a certain specified range of conditions is reached during the mediation.
F. WARN OF POSSIBLE MULTIPLE IMPASSES.

Clients need to be warned that it is quite common for a mediation session to stall more than once and that they can often work through an impasse or two or three to a successful final settlement.
G. REVIEW THE STRENGTHS AND WEAKNESSES OF CASE.

- Go back over the pre-mediation papers (including what you did not put into them) so that the client has a realistic understanding of the case.
ATTENDANCE AT THE MEDIATION SESSION(S)

- Mediators must advise each party, in writing and at the commencement of mediation, that each has the opportunity to consult with an independent lawyer and is encouraged to do so.
A. INTRODUCE YOURSELF -- HUMANIZE YOURSELF. Short introductions can often be very useful in humanizing yourself. The lawyer on the other side knows your professional qualifications; his or her client needs to know your human qualifications.
B. INTRODUCE YOUR CLIENTS -- HUMANIZE YOUR CLIENTS.

- After humanizing yourself, humanize your clients (to the extent it is appropriate. In commercial litigation that might be a mistake -- but then it might make a positive difference
C. ACKNOWLEDGE A BELIEF IN THE PROCESS AND YOUR CLIENT'S GOOD FAITH.

- This is a "cost free" concession. For some types of negotiators it will build good will and it does not hurt or take much time.
D. EXPRESS SYMPATHY.

- Sympathy does not mean that you are giving in or that you are acknowledging responsibility. It does, however, continue to humanize you.
E. OUTLINE YOUR POSITION, THE BASIS FOR YOUR POSITION, AND AREAS OF GOOD FAITH DISAGREEMENT.

- This will help to create good will and it also helps to define (and thus control) the areas of negotiation and contention. It often will draw out and create areas of agreement and consideration.
DURING MEDIATION

- As before beginning the process, the lawyer continues to advise the party on the Substantive law relevant to the case, helping the party understand what information might be important to share or to learn during the mediation, the options that might be available, the potential consequences of each option, and the possible outcomes to anticipate if Agreement is not reached through mediation.
Throughout the mediation process the parties are encouraged to take responsibility for resolving the dispute. The lawyer's role is to assist the party in negotiating for himself or herself, bearing in mind the non-adversarial nature of mediation.
AN ADVOCATE HAS FOUR VERY IMPORTANT ROLES DURING THE MEDIATION.
A. TO PERSUADE AND NEGOTIATE.

- The advocate has the burden of framing the negotiations in a manner aimed at persuading the other side. Since mediation is consensual, all negotiation needs to be aimed at persuading the other side.
b. To communicate and persuade.

- Negotiation is underneath every action and is the reason for communicating. Again, communication should be aimed at being persuasive.
c. To protect the client and to appear reasonable and calm, in command and confident. The strongest presence in terms of being persuasive and supportive is to appear reasonable and calm, to be in command and to appear confident. The advocate should be the calm at the center of the storm to protect and shelter the party.
CAUCUS SESSIONS

- A mediation technique, which a lawyer may encounter if he or she attends the mediation session(s), is the caucus. A caucus is a separate session between the mediator and each party to the dispute, outside of the presence of all other parties.
Through caucus, the mediator explores privately with the party such matters as impediments to settlement and the consequences of various alternatives.
Extent of Lawyer Participation

The mediator, the parties and the lawyers each have roles to play in the mediation process.

- The mediator must control the process of mediation in order to focus the parties on their task and guide them through the problem-solving process.
The parties each must express their own thoughts and feelings, as well as the interests which each believes should be considered, in order to reach a satisfactory resolution of the dispute.

The lawyers must represent their clients' interests in order to fulfill their ethical obligations.
After Mediation

- The lawyer assists the party in reviewing the terms of any mediated agreement, testing the party's understanding of the terms, and in some cases, preparing formal agreements.
Enforcing the Mediated Agreement

• Because mediation is a voluntary process in which the parties take responsibility for and create their own solutions, parties are more likely to abide by the terms of any agreement reached. Thus, it is rarely necessary to take any action to enforce a mediated agreement.
END