ADR

Committee

AMERICAN BAR ASSOCIATION

Defending Liberty, Pursuing Justice

Guide to Effective Negotiation Strategies Employed in Mediation of Large Dollar Disputes

ADR COMMITTEE

Guide to Effective Negotiation Strategies

Employed in Mediation of Large Dollar Disputes

Author
Steven N. Taurke Joseph, Esquire
Chair, ADR COMMITTEE – TIPS
Contributing Authors
Floyd J. Siegal, Esquire, Mediator
Ettie Ward, Esquire
William Lancaster, Esquire
Jerry Strachan, Esquire
Derek Lisk, Esquire
Brian Ade, Esquire
Peter A. Halprin, Esquire

American Bar Association
321 N. Clark St.
Chicago, IL 60654-7598
800.285.2221

Steven N. Taurke Joseph currently is an Associate Vice President for Western World Insurance Group in Franklin Lakes, New Jersey. He is a 1986 graduate of the University of Pittsburgh School of Law. He recently served as the Chair of the Alternative Dispute Resolution Committee of the Torts, Trial and Insurance Practice Section (2009-2010). Previously, he served as Co-Chair of the Professional Liability Litigation Committee from 1999-2002 in the ABA's Litigation Section, and the Attorney Liability Subcommittee from 1997-1999, also with the Litigation Section. Mr. Joseph has lectured on negotiation techniques for the Professional Liability Underwriting Society, Practicing Law Institute, American Bar Association, and the New York City Chapter of the Corporate Counsel of America.

Floyd J. Siegal is a partner in the law firm of Spile, Siegal, Leff & Goor, LLP., who currently serves as a private mediator in Los Angeles and surrounding counties. Prior to transitioning to mediation, Mr. Siegal was a civil litigator, from 1996 through 2008, whose practice was primarily devoted to the defense of professional liability claims. Mr. Siegal began his career as a criminal defense lawyer in 1978, after graduating from Loyola Law School. As a criminal defense attorney, Mr. Siegal was privileged to serve as a commentator during the O.J. Simpson trial, appearing regularly on "Rivera Live" and other similar programs.

William R. Lancaster is an attorney with Alford, Clausen & McDonald, where he practices in complex litigation, and defense of nursing home, medical malpractice, workers' compensation, and employment law claims. Mr. Lancaster earned a J.D. degree from The University of Mississippi School of Law and a B.S. degree from Millsaps College. After practicing in Mississippi for 9 years, he moved to Mobile and has practiced here since 1991. Mr. Lancaster is a member of the Alabama, Mississippi, Texas, and Tennessee State Bars, as well as the Mobile Bar Association, the Defense Research Institute, the Alabama Defense Lawyers Association, and the American Bar Association. He is co-author of "Traps and Pitfalls of Medical Malpractice Litigation," Voir Dire, May 1988, and the author of "A Practical Approach to the Punitive Damages Trial: How, When, Where, and Why" MDLA Quarterly, Spring 2006. Bill has been named as an Alabama "Super Lawyer" in Employment Litigation Defense in 2008 and 2009. Bill has also been a member of the Alabama State Court Mediator Roster for a number of years, and is a qualified Appellate Mediator.

Derek J. Lisk, a Partner at Shook, Hardy & Bacon LLP, is a trial lawyer and mediator who is experienced in business, product liability, toxic tort, and environmental litigation. He has led or served on litigation teams for Arthur & Gallagher & Co., Tyco Fire & Security companies, DuPont, Pharmacia & Upjohn, Lockheed Martin, and other national and international companies. In addition, he has spoken and published on a variety of legal topics, including alternative dispute resolution, internet law, professional ethics, bioterrorism, and environmental litigation.

Brian R. Ade is a Partner at Rivkin Radler, resident in the New Jersey office. He holds the designation "Certified Civil Trial Attorney" from the New Jersey Supreme Court, and is admitted to practice in New York, also an experienced trial attorney with expertise in complex civil and commercial litigation, much of Mr. Ade's time is devoted to construction defect, product liability, toxic tort, professional liability and insurance coverage cases. His experience in mediation dates back to the mid-1980's. Mr. Ade has lectured on topics relating to insurance coverage at Seton Hall Law School and for the New Jersey Institute of Continuing Legal Education.

Gerald Strachan, a graduate of Rutgers School of Law- Camden, is a Managing Attorney for Chartis Insurance. He serves on the Board of Directors of the New Jersey Defense Association and as Chair of the Insurance Law Committee, he is also Chair of the Pennsylvania Bar Association Staff Counsel Committee, Vice Chair of the Association of Corporate Counsel, Law Department Management Committee, Vice Chair of the ABA TIPS, ADR committee and an Editor of the Comprehensive Guide to the CGL policy. the ABA plans to publish the guide this fall.

Ettie Ward, a graduate of Columbia Law School, is a Professor at St. John's University School of Law in New York City. She teaches and writes primarily in the areas of federal civil procedure and court process. Before joining the law faculty at St. John's, she was a litigator in a major New York law firm. She has been active in the Federal Bar Council, the American Bar Association, the City Bar of New York, and the New York State Bar Association. She is a member of the Program Committee of the Federal Bar Council and is a Director of the Federal Bar Foundation. She is currently a Vice-Chair of the TIPS ADR Committee and is Chair-Elect of that Committee. She is also a member of the Executive Board of the AALS Dispute Resolution Section and is Chair-Elect of the AALS Litigation Section. In addition, she is a practicing mediator and serves as a pro bono mediator in federal district court.

Peter Halprin is an attorney in the New York office of Anderson Kill & Olick, P.C. He has published several articles including the February/March 2010 cover story for Executive Counsel entitled "Will Policyholders Be Compelled to Arbitrate International Disputes?" While attending the Benjamin N. Cardozo School of Law, Mr. Halprin was an Articles Editor of the Cardozo Journal of International and Comparative Law as well as a participant in the Sixteenth Annual Wilhelm C. Vis International Commercial Arbitration Moot in Vienna, Austria.

I must give a special thanks to Dan Goldwasser of Vedder Price whose support and guidance has made this project a possibility.

Steven Joseph

The opinions and statements expressed herein are solely the opinions and statements of the writer and shall not be construed to be opinions, positions or statements of Western World Insurance Group or American International Group.

Table of Contents

PREFACE

This book on mediation refers to strategies employed in large dollar disputes so obviously, there is a question; are the strategies also relevant for those disputes that are not "large dollar." Also, what do we mean by "large dollar."

These are fair questions, and many of the strategies discussed in this book certainly apply to disputes that involve small dollar amounts, which are certainly subjective, by the way. Note that the book is written with a focus on "mediation", and does not stick a "large dollar dispute" stamp each step of the way.

The reason that I refer to "large dollar disputes" is because extra care and thought has to be taken into consideration when you have a lot at stake. These days, practically every jurisdiction has some institutionalized mediation program and every case, at some point, may simply be ordered to mediation. So, when you have a larger dollar amount dispute, it may be natural to do what you have always done. Get the mediator who is available, prepare the two-page submission, show up and argue your case, make unreasonable demands and offers, and have the frustrated mediator try to split the baby.

This book refers to "large dollar disputes" because here too much is at stake to do business as usual. We are dealing with differences of hundreds of thousands, and sometimes millions of dollars, and where you end up in the mediation process may hinge on what kind of mediator you have selected, what kind of submissions you have agreed upon, whether you bring your expert, whether you have opening statements. The list goes on and on.

So, what we attempt to do is take the process and break it to down to bits and pieces with stories, pointers, and tips thrown in along the way. What we hope you come away with here is an enjoyable and informative read, but most importantly, understand that when it comes to large dollar disputes, it is not a business as usual situation.

Steven N. Taurke Joseph

Chair, TIPS ADR Committee

WHY MEDIATION

I was faced with a very interesting paradox fifteen years ago after I got home from a settlement conference in Hartford, Connecticut. The settlement conference had ended with the parties coming to a resolution with neither side too happy with the result. The parties were only able to put aside their differences after the settlement judge commented, "Principles are a nice thing to have until they get in the way of reason."

I drove home that day impressed with that comment from the settlement judge. But that feeling was short lived. Telling my wife this line from the judge, she immediately responded by saying. "Without principles, there is no reason."

Though we hear all the time how the mediation process is both a more time and cost efficient process, perhaps the best reason to choose mediation as the means to resolve a dispute between parties is that, when done correctly, the mediation process can be the only way that each of the disputing parties, based on their own set of principles, can find a reasoned approach towards resolving their dispute.

This can be seen in how mediation is defined. Mediation is a process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting a voluntary agreement (or "self-determination") by the parties to the dispute. A mediation facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement.1

Typically, when I employ mediation, it involves rather complex litigation matters. Using the above definition as our guideline, it can easily be seen why litigation arising from complex claims may involve the kinds of matters best suited to the mediation process. By their very nature, these cases involve complex issues that a jury may find very difficult to grasp. These cases often are very document intensive, and thus, make the analysis for a jury even more difficult. Too often, neither side has a compelling or appealing witness. Neither side has a witness or group of witnesses who can act as a storyteller for the jury. The battle of experts may come down to which expert can better keep the jury awake.

The other option too often is the process mentioned at the beginning of this writing, that is, trying to settle a matter before a settlement judge or worse, after years of discovery, before the trial judge on the eve of trial (or as people in the business say "on the courthouse steps"). The settlement judge and trial judge each have an interest, first and foremost, in moving their docket along. Thus, when a settlement judge says "principles

are a nice thing to have until they get in the way of reason," you can be very certain that it is your own principles and his or her own reason that they are referring to.

We settled the case. We paid more than we wanted to pay, and the opposing side accepted less than they wanted to get. We all looked very forlorn. So the Judge commented: "This settlement had all the markings of a good settlement." So, I asked the Judge what these markings may be. He commented that that this had the markings of a good settlement because neither side was happy with the result! In other words, a good settlement will be the one that my boss really gets pissed off at me when I get back to the office!!

Insurance Adjuster

Those are my principles, and if you don't like them... well, I have others.

Groucho Marx
U.S. comedian with Marx Brothers (1890 - 1977)

WHY MEDIATION IS DIFFERENT

While every litigator is likely to have engaged in settlement negotiations at one or more times during his or her career, such negotiations that do not involve a mediator provide little guidance as to how to approach mediation.

As more fully explained below, mediation differs greatly from settlement negotiations, even those negotiations conducted with the assistance of a judge or magistrate. As such, we need to explore the mediation process and the role of lawyers in the context of a mediation.

Many litigators who have a "take no prisoners" approach will not only view mediation with skepticism, but also with disdain. Their clients retain them to vindicate their rights and actions and the very goal of mediation is *compromise*. Even more disheartening is the fact that they have been trained to take discovery, to engage in motion practice and to present cases to a jury; and these skills have little or no place in the context of a mediation. In short, they find the very notion of compromise as a sell out of their client's interest and a mark on their record as a successful litigator.

AND THE WINNER IS . . .

Negotiation as a necessarily competitive process that paradoxically requires cooperation in order for the parties to reach their shared destination, i.e., resolution.

The process is competitive in that each party understandably desires to be the "winner" by obtaining the most favorable outcome that is possible, but the process requires cooperation because a negotiated resolution cannot be achieved without concessions and compromise.

Sometimes, the competitive nature of negotiation thwarts the process from the very start, with each party staking out an extreme position, thinking it will enhance the likelihood of that party being the "winner." All too often, however, the strategy fails and negotiations end abruptly.

A better strategy will usually be to take a more measured approach to the negotiations, sending a clear message of cooperation, i.e., that you want to work together to achieve a mutually acceptable compromise.

Sometimes, the need to be the "winner" thwarts the process at the very end, with each party refusing to make the final concession – often leading to the suggestion that the mediator assume responsibility for the outcome by making a mediator's "proposal"

A better strategy may be to let the other party be the "winner" that day, especially if you think that you might someday find yourself involved in future negotiations with the same person and that you might want or need that person to return the favor.

The point to remember is that when each party insists on being the "winner," it may not be possible to reach a resolution – and when the parties fail to reach a resolution that might otherwise have been possible, everybody loses.

Floyd Siegal

Unfortunately, we live in a culture that celebrates winners and hates losers. Also, in a mediation setting, you don't want to present yourself to your client as a loser unless you want to lose the client. So, I understand that it is very hard to give up the temptation of trying to be a winner.

But, in mediation, there is a way around this dilemma. When I mediate, I intentionally hope that I can convince the other side that they are the "winner". There is the public position number one – where I am willing to go to resolve the case as my winning position. This is also the position that I know will not resolve the case.

Then, there is my private or "real" winning position. I let the mediator work to get me off the "public winning position" to go to my "private winning position." My opposing side thinks that they beat me, and I ended up exactly where I wanted to be.

Steven Joseph

While such thoughts are not unusual, they are also the product of a different era. The fact is most clients are primarily interested in pursuing their businesses and personal activities, and litigation generally is a distraction from those endeavors. Thus, the client in most cases would like to have the dispute resolved so that he or she can again concentrate on making a living. It is for this reason that most clients would gladly forego the pleasure of watching their attorney embarrass, if not demolish, their adversary in a brutal cross-examination. Moreover, the rising costs of vindication at trial have led the vast majority of clients to implore their attorneys to find a more cost-effective way of resolving their disputes.

Even those attorneys who accept the fact that mediation is gradually replacing litigation as their clients' preferred dispute resolution process still view mediation as simply another forum in which to argue their client's case. They present their arguments in the same "take no prisoners" and "winner takes all" approach that they customarily use in their closing arguments. Indeed, they are loath to make concessions of any kind.

Unfortunately, this ultimately conveys the impression that they are entrenched in their position, which, in turn, encourages their adversary to become equally entrenched. This will cause a mediation to fail as neither side will be willing to budge.

Another recipe for failure at mediation is approaching mediation looking only for a good deal and being prepared to walk away if an advantageous resolution cannot be achieved. This approach is built on the hope that the other side will come to the mediation, consume a large dose of reality and acknowledge the weaknesses in its position.

Whereas the former approach may be seen as excessively aggressive and the latter as excessively passive, a combined passive-aggressive approach is the one that is probably used the most often by attorneys.

I gave a seminar on negotiation to a group of lawyers and gave them an assignment. The assignment was to assume that someone you are close to is angry at you, and the goal is to make that person who is fuming mad no longer angry. What do you tell this angry person?

Some Responses (Ear Shutting Tactics):

You shouldn't be angry! I am the one who should be angry!!

You shouldn't be angry because I've done a lot of other good things.

You shouldn't be angry because I didn't understand what I was supposed to do.

You shouldn't be angry because you mess up too!

You shouldn't be angry because I'll fix it.

Reflective Responses:

Wow. I can understand that this would be very upsetting to you!

So, I understand that you are mad at me because of ….. Yeah. That's something to get mad about.

Steve Joseph

This approach is also flawed since it simply looks for the win. While there is the chance that an attorney may get lucky or may be adept at getting the other side to unilaterally compromise, the risk of this approach is that it most likely will result in no resolution of the dispute.

Even worse, it may invite the frustrated mediator to move away from a facilitative role into a very assertive and evaluative role that lays bare the weaknesses in your case. If both sides go into a mediation looking for a win, the mediator may likely feel justified if one side goes home with a loss.

In the landmark and widely read book on conflict resolution methodology, *Getting to Yes* by Roger Fisher and William Ury,2 a cooperative negotiating approach is advocated in order to reach a win-win resolution between the negotiating parties. Fisher and Ury emphasize four basic points: separate the people from the problem; focus on interests, not positions; invent options for mutual gain; and insist on using objective criteria.

Mediating a conclusion to a litigated dispute is very different from negotiating a potential business transaction or even mediating instead of litigating. Such disputes are likely to be resolvable only by dollars and the parties, already bruised from the ongoing litigation, are likely to be highly entrenched in their positions. In that context, the cooperative problem solving approach to negotiation has been criticized as being both unrealistic and fraught with problems. The adversarial nature of the dispute makes it difficult to adopt the attitude of partners-in-a-side-by-side-search-for-a-fair-agreement that is the hallmark of a *Getting to Yes* negotiation.

Putting it in another way, against the backdrop of the irreconcilable positions frequently taken by the parties in a bitter dollar dispute, it is hard to find the kind of shared and compatible interest that *Getting to Yes* seeks to build upon.3 Indeed, it may be difficult to even hold a reasoned discussion of those interests by two implacable adversaries.

While brainstorming about options with the other side, refraining from criticizing an adversary's proposed solutions and trying to help the adversary solve *its* problems are all laudable techniques, they are unlikely to be utilized in the heat of a commercial dollar dispute.

And while the joint search for mutually agreeable objective criteria, fair standards and impartial procedures is not out of the question, it may seem like a Utopian dream in the context of a dispute that has been litigated for the past 30 months. Just watch as each side brandishes its own standard of objectivity, insisting that *it* be used as the basis for a resolution.

In truth, successful negotiation techniques used at mediation combine both the aspects of cooperative negotiating skills, as espoused in *Getting to Yes*, as well as the adversarial skills that lawyers possess in their zealous representation of their clients.

To be able to negotiate successfully on behalf of a client at mediation, an attorney must be able to address the adversary with the adversary's interest in mind. This is in line with *Getting to Yes*. Since the attorney will be viewed as the adversary, he must know <u>how</u> to speak to the other side, and how to convince the adversary, as opposed to a third-party trier-of-fact. This requires an understanding of the concepts of choice and risk. It also requires an understanding of the mediation process itself in order to map out a strategy for presenting the choices and the risks which the adversary faces.

At mediation, do not expect the other side to accept a deal because it is the best deal for your client. Certainly, opposing counsel will not approach you in the beginning of a mediation to let you know how he plans to make you look good. Obviously, he will be looking out for his own client's interests. Accordingly, you can only expect to reach an

agreement if you are successful at making arguments that convince the other party that the offer being made is their best deal. Similarly, you should encourage your adversary (through the mediator) to convince you of the same. When both sides are focusing on what is the best deal for the other, both parties can now work towards a win-win resolution.

To be able to do this, settlement proposals should be presented in the context of the choices available to the other side, and the risks of rejecting the choices that are being offered. The reason that pre-mediation offers and demands are never initially accepted is because the mediation process itself offers the likelihood that more reasonable offers and demands will be made during the mediation.

Thus, the very prospect that a better deal lies ahead precludes a resolution of a dispute; and the prospect that no better result can be achieved is what drives the parties to a resolution.

Getting to Yes suggests that a negotiated agreement can be obtained by exploring the best and worst alternatives to a negotiated agreement (BATNA/WATNA).4 However, in a mediation setting, this can result in failure if the other side is led to believe that it can get a better deal at a later date.

While it is unlikely that any attorney would be so foolish as to so inform his or her adversary, that notion can also be conveyed by unrealistic offers and demands. It can also be conveyed by the lack of seriousness displayed by a party in the mediation process. The best way to avoid having the opposing party conclude that a better deal lies in the future is to couple each offer with any analysis of the opposition's choices and risks.

Because you do not want to convey to the opposing party that it can do better in a month or two, you must emphasize that the only choices are to accept the offer on the table or to pursue the matter through trial and appeals. Since the opposition will in fact accept a mediated resolution if it is perceived as the better choice, you have to use the mediation to educate the opposition on the risks of going to trial, and why those risks make the trial option a distinctively less attractive choice.

Why don't more litigants mediate? A case study.

The opportunity to craft a solution to litigation is a reason many parties opt to mediate their dispute. The mediation process is creative, flexible and guarantees that the resolution will be acceptable. Mediation also provides more control over the timing and cost of resolution.

Therefore, mediation is a good choice when litigation would be long, costly and the likelihood of a successful outcome would be hard to quantify. Mediating earlier in the case life cycle helps litigants see that there are two sides to the story and reduces their emotional investment in the outcome. Unfortunately, these are precisely the reasons it is hard to mediate instead of litigate.

Why?

Successful litigators earn their living by systematically reducing uncertainty. Generally, they are reluctant to engage in dispositive discussions unless they have put their case together or perceive that timing presents more leverage to their side. Factual discovery can take years.

Clients want their attorney to be careful and deliberate. Of course, putting a case together brick by brick to reduce uncertainty takes time and money while also decreasing the advantages of mediation. This systematic case management approach is a substantial barrier to mediation in many cases.

This systemic barrier does not affect a large number of cases where the parties agree on the basic case facts and the dispute is solely about the inferences or conclusions to be drawn from the facts. Initially it seems mediation is an ideal forum for resolving these cases. Looking at one case may provide insight on why even in these situations the parties do not mediate.

The case

After 10 years of trying to have a child a couple interested in adopting called an adoption agency. The couple was concerned that two prior misdemeanor arrests might prevent them from adopting. The agency receptionist indicated that misdemeanor crimes would not preclude adoption.

Weeks later the couple scheduled an appointment with another agency to begin the adoption process. During the application process the couple did not disclose the misdemeanors and the agency did not make an in-depth inquiry of their prior criminal history. The adoption application asked open-ended questions.

The couple was given little instruction on how to answer the application questions. They gave vague answers to some questions. The application did not require a chronology so the gaps in the timeline caused by the crimes were not apparent.

The agency supplemented the application with information obtained from their review of the couple. The agency showed the couple a draft report it was submitting to the government. The report stated that the couple did not have any criminal history. The couple also authorized the government to conduct a fingerprint search.

The couple became concerned and told the agency of one prior misdemeanor. The agency did not think this minor infraction would cause a problem and did not amend the report. The fingerprint search revealed the second crime. The State made a preliminary denial of adoption certification based on the discrepancy between the fingerprint check and the application.

During the appeal period, some common ground was established. Both sides seemed to agree that if they had correctly reported the two misdemeanors, the couple would have been approved as adoptive parents. The denial was based on the failure to report, not the minor criminal offenses.

However, the agency and couple became suspicious of each other. Each side thought the other's conduct had caused the initial denial. The animosity grew. Ultimately they could not agree on how best to gather and explain the additional documentation required. Neither party completed the appeal. The adoption certification denial stood.

Two years later the couple filed suit seeking direct and punitive damages. Each side felt that their reputation had been damaged. Neither side was interested in settlement discussions during two years of discovery. Each side wanted a jury to vindicate their position.

The result

Finally, during trial, the sides exchanged settlement proposals. The proposals were $500,000 apart and neither side was interested in exploring common ground. The trial was upsetting and grueling for both sides. The jury deliberated until late on a Friday afternoon despite nice summer weather.

Both sides were disappointed with the verdict, which seemed to find fault with everyone. The jury appeared to conclude that the parties should have taken more responsibility for their own conduct. Each side spent more in legal fees than the jury award. No reputations were repaired. No child was closer to a good home. Four years of conflict left everyone worse for the wear.

The litigants sought to vindicate their reputation. While juries have an uncanny ability to make the right decision, that decision is frequently disappointing to parties seeking vindication. A jury is never going to view a litigant's reputation the same way the litigant does.

Clients seeking to clear their reputation or enforce a right deserve the opportunity to craft their own resolution in mediation. Mediation simply offers each party more options to justify their conduct. Naturally, the give and take of mediation also promotes absolution.

Jerry Strachan

THE MEDIATION PROCESS

The typical mediation consists of opening presentations to the mediator with each side present in the room, followed by a series of private caucus sessions that the mediator will hold with each party separately. The mediator will travel back and forth between the two parties until there is either a resolution or an impasse. In some mediations, a mediator may decide to hold face-to-face negotiations or have the parties meet to discuss a particular issue later in the process.

Each phase of the mediation has a distinct purpose; and effective advocacy in mediation requires an understanding of those purposes. In the opening joint session, the mediator will explain the ground rules of the mediation and that he or she will respect any party's request for confidentiality. As more fully explained below, most of the information that a party provides to the mediator will be conveyed to the opposing party in an effort to convince the opposition to alter its position.

A. Mediation From The Mediator's Perspective

The mediation process consists of a joint session of the mediator and the parties, often followed by a series of private caucuses in which the mediator shuttles backs and forth between the parties in an effort to move the parties toward a resolution of their dispute. Occasionally, the mediator will call for subsequent joint sessions if he or she feels that they can be of assistance. To understand the attorney's role in mediation, it is helpful to know what the mediator will be trying to accomplish at each stage of the process.

Although the mediation formally begins with a joint session of the parties, in reality the mediation commences when the parties seek to agree upon a mediator. While, on occasion, a mediator may simply be assigned by the administrative body (i.e., the court, JAMS, American Arbitration Association or other agency through which the mediation is being arranged), just as often, the mediator is selected by the parties. This can involve an interview process in which the mediator is questioned about his or her experience and general approach to dispute resolution. This process, while frequently conducted jointly, can be done via unilateral contacts, especially where one side has previously used the services of the mediator and is already comfortable with the mediator's style and skills.

Once the mediator has been selected, the mediator is likely to request that the parties make pre-mediation submissions that will provide the mediator with a general understanding of the dispute and the positions of the parties. The mediator may even

contact the parties to seek additional information and their suggestions for resolving the dispute. In this way, the mediator can move right into the resolution process, without unnecessarily wasting the time of the attorneys and clients who are sitting around the table while the basic facts of the case are being ascertained.

The initial joint meeting serves several purposes. First, it is used to introduce the mediator to the parties. In this regard, the mediator will explain the ground rules of the mediation and how he or she prefers to work. This is designed to begin the process of winning the confidence of the parties, as it is critical to the success of the mediation for the parties to view the mediator as a truly neutral party. Indeed, one of the most important functions of the mediator is to serve as a reality check for the positions being taken by the parties. Without the trust and confidence of the parties, that important function would not take place, diminishing the changes of a successful resolution.

The mediator will then ask the parties to make a presentation of their positions. While this presentation can be made by the attorneys, most mediators will want the clients to participate. This serves a dual function. First, it gives the clients an opportunity to look their adversary in the eye and tell why they believe they have been wronged (a general term which includes emotional as well as physical harm).

Secondly, it gives the mediator ammunition to use against the other party in the caucuses that will follow. Indeed, mediators prefer not to be perceived as having raised issues for the first time, but rather as merely seeking answers to issues that are already on the table. In this regard, the mediator may, in the most neutral manner, ask a party to elaborate on a point that the mediator finds compelling or may try to lead a party to further arguments that thereafter can be exploited in the caucuses.

After the initial joint session, the caucuses begin. While it may appear that the caucuses are simply a series of meetings designed to bring the parties closer together, they can be divided into three distinct phases, with each phase consisting of one or more meetings depending upon the complexity of the dispute and the gap between the parties.

The first phase is largely a learning phase, with the mediator seeking to learn more about the parties, what motivates them, what are the real limits of their ability to act, and how they believe the dispute can be resolved. At the same time, the mediator will be trying to further win the confidence of the parties. It is for this reason that the mediator is unlikely to challenge a party on any issue during this phase, although the mediator might say “I’m not sure I understand your point, maybe you could explain it a little better.” For the most part, however, the mediator will be seeking to gather information that can later be used to bring the parties closer together and to fashion a resolution to their dispute.

In the second phase of the caucuses, the mediator will try to move the parties closer together. Now, the mediator will seek settlement proposals from both sides and begin to question the underlying assumptions to their positions. In doing so, the mediator will focus on the points elicited in the joint session, probing the parties for their response to these points. Even so, the mediator is likely to avoid expressing his or her view as to the merits of these points or the party’s response. At the very most, the mediator is likely to

say, "I can see where a jury might be persuaded by such an argument." In effect, the mediator is expressing the position that in a winner-takes-all trial on the merits, there is no such thing as a sure winner and the parties must factor that reality into their bargaining positions.

In the final phases of the caucuses, the mediator will be trying to bridge the remaining gap that divides the parties. In this phase, the mediator may utilize a number of different techniques to move the parties toward a settlement.

B. Mediation From The Attorney's Perspective

In many respects, mediation presents greater challenges to a litigator than the judicial process. In a trial, an attorney has only to convince a passive jury of the merits of his or her client's position. In a mediation, however, the attorney will not only have to convince the mediator of the merits of his or her client's position, but also convince the opposition. Moreover, this latter task must largely be accomplished indirectly through the mediator. Moreover, unlike a passive jury, the mediator will have an opportunity to ask questions and explore issues that the attorney might prefer to be left unexplored.

It should also be remembered that the mediator's job is to convince the parties to take actions that they undoubtedly would prefer not to take. He or she, therefore, will be trying to manipulate the parties in an effort to achieve a settlement of the dispute. At the same time, the attorneys for each side will be trying to manipulate the mediator to proceed in a manner that will achieve a satisfactory result for their clients. This means that the mediator will be only as good an advocate as the counsel for each side equips the mediator to be by providing the information and arguments to be presented to the opposing party. Once information is imparted to the mediator, the information will likely be reshaped by the mediator before being delivered to the other side.

An attorney should decide in advance of the mediation exactly how to effectively share the role of advocate with the mediator. This requires an understanding of how the mediator likes to conduct a mediation, something which the attorney should ascertain in advance of the mediation. Some mediators prefer to utilize a facilitative approach; others use an evaluative approach. The facilitative approach tends to ignore the merits of the parties' contentions and focuses on the alternatives facing the parties; i.e., what are the best and worst alternatives to a negotiated settlement. Thus, the facilitative mediator will try to demonstrate that the offer made by the opposing party is better than the most favorable outcome the party is likely to achieve by proceeding with a trial of the dispute.

The evaluative approach requires the mediator to carefully examine the merits of the case and then to convince the parties that their views of the likely outcome at trial are unrealistic. This approach requires more time and effort on the part of the mediator and requires the mediator to express views that could impair his or her appearance of neutrality, which could jeopardize settlement discussions. It is for this reason that most mediators prefer to take a largely facilitative approach, delving into the merits of the case only when a resolution cannot be achieved without addressing the merits or at the request of the parties.

In determining how to share the advocate's role, an attorney should not think in terms of the stages of the mediation process as outlined above, but rather in terms of the types of information to be imparted to the mediator. Thus, an attorney should consider who can most effectively present each of the following classes of information to the opposition:

a. presentation of the strengths of the client's position;

b. presentation of the weaknesses of the adversary's position;

c. presentation of the risks associated with the weaknesses in the adversary's position;

d. presentation of the client's settlement position; and

e. presentation of the risk of rejecting the client's settlement option (choice).

An attorney should maintain the primary responsibility of presenting the strengths of his or her client's case. The mediator should have the primary responsibility to present the weaknesses of the adversary's position and the risks associated with those weaknesses. This is the mediator's role as devil's advocate. Using the mediator as the messenger, the attorney should then present his or her client's settlement offer, the rationale for this offer, and the risks associated with the adversary's rejection of the offer.

The reasoning is as follows: In your role as advocate, it is expected that you will argue the strengths of your client's case. You can choose to attack your adversary's case, but such a tactic will only cause the opposing party to immediately become defensive and launch a similar attack on the weaknesses in your client's positions. By not attacking the weaknesses of the opposing party's position, you are also showing respect for your adversary. This may even engender a corresponding show of respect from your adversary. The mediator by playing devil's advocate can with greater effectiveness, get the other side to examine and confront their weaknesses on their own. Once the mediator gets the other side to come to their own self-realization, in your role as advocate, you can now more effectively present your client's settlement proposal and the risks associated with a rejection of this proposal.

Thus, we need to examine how the advocate's role can be effectively shared with the mediator.

C. <u>What Makes a Good Mediator?</u>

The characteristics of a good mediator is a topic for discussion because for those who mediate, there will be good and bad mediators. We love the process when we have a good mediator. We are frustrated by the process when we have an ineffectual mediator.

This frustration has nothing to do with a mediator getting me "the number" I want, or the mediator making me look good. I much prefer having a mediator address weaknesses in a case of which I had not been aware causing me to pay a higher settlement value than a

mediator who is a great cheerleader for my position, and we do not settle because neither the mediator nor I understand that I had a lousy position.

Clearly, the mediator should follow a set of standards that will give each side some level of comfort that the mediation will be conducted in a fair and impartial manner. Yet, a mediator may strictly follow the concept, and fail as a mediator because the parties, on their own, can't bridge any gaps in their negotiation. A mediator can be completely impartial, and fail as a mediator because he or she didn't effectively point out weaknesses to each side. A mediator may be an expert in the field, and fail as a mediator because his or her own knowledge also forces the mediator to have too strong an opinion about one side's case.

The question then becomes what makes a good mediator. These nine characteristics, I believe, the best mediators exhibit:

1. A good mediator will first get the reluctant party committed to the process.

Though the parties may agree on mediation, one party may do so only reluctantly. The reluctant party will not be forthright in discussing the strengths and weaknesses of a case. Nor will a reluctant party be willing to move towards closure and resolution.

A good mediator will sense this right away and spend some time in an early private caucus session getting that party committed to the process. The first discussion that the mediator may have with the reluctant party will be on the reasons people mediate in the first place; and the possible consequences for that reluctant party if the case fails to settle at mediation.

2. A good mediator will show optimism throughout the process.

There will be times during the course of a mediation when it may appear to the parties that they are stuck in the negotiation process and the matter is destined to go to a jury.

When there is a feeling that the process is beginning to be a waste of time, the mediation process can become a very tiring one. Since a party does not know what is going on in the other room, that party will look to the mediator's every word, gesture, and body movement to try to make their own guess at whether progress is being made towards settlement. If the mediator walks in the room with a depressed and exhausted look on his or her face, it does not present much hope for the side wanting to settle. If the mediator has a look or uses words that indicate hope in the process, the parties will follow very quickly.

I had a case with one particular mediator who had the reputation of being able to settle the unsettleable case. Because he was so good, the only days we could get were on Saturday and Sunday.

We started and the other party had an initial demand of $10,000,000. The mediator made numerous trips between the two rooms during the course of the day, and each time, we

asked if there was a new demand. However, the response was no movement. They were unwilling to come off of $10,000,000.

Finally, at 9PM, the mediator came in, and told us to come back the next day. The other side had finally reduced their demand, and he was now highly confident that the case would settle.

We asked the mediator what was the new demand. He said, "$9,999,995."

We were absolutely stunned. The case did settle a week later at the Delta Crown Royal Conference Room in the Atlanta Airport for $5,000,000.

Steven Joseph

3. A good mediator will get parties to move off of their positions by asking questions.

Mediation is a process that works best when it is left completely to be a process of self-determination. A good mediator accomplishes this by posing questions to each side that are phrased in a neutral manner, yet are designed to allow each party answering the questions to uncover possible weaknesses in its position. By acknowledging weaknesses on their own, the parties will then have their own justifications for coming off of the previous position that they had taken.

4. A good mediator avoids giving early opinions on the ultimate issues of the case – liability and damages – and will volunteer opinions later in the process when requested to do so by the parties.

No matter how thoughtful a negative opinion of a mediator may be or how well-intentioned the mediator may be in giving the negative opinion, it is very rare that such an opinion will be well received if it is early in the process.

At this point, there is simply too wide a difference in the knowledge level between the mediator and the attorneys. The attorneys have looked at the law, deposed witnesses, and sometimes have lived with the case for a number of years. Yet, there are mediators who will want to give the impression early in the process that they have a superior wealth of knowledge of the case.

The big danger here is that the mediator may quickly lose credibility with the side not agreeing with the opinion. The most common reaction parties will have when they have such opinions presented to them is that "the mediator just doesn't understand my case."

If the party does not believe that the mediator understands his or her position, the mediator will be ineffective in getting that party to make the compromises necessary to get a resolution.

A mediator who volunteers wrong crazy opinions on the case can make me pull my hair out. I have lived with the case. I know all the arguments that the other side may make.

Sometimes, I even know better arguments that the other side has ignored. Then, the mediator comes in, and gives an opinion that even the other side would never agree with. If I start giving bad arguments credibility, what chance do I have when I have to start negotiating when good arguments are thrown my way?

Steven Joseph

5. A good mediator will focus the parties on the choice between settlement at mediation and a resolution at trial.

If the mediator presents a choice of settlement today or settlement tomorrow, a party may take a chance that it will get a better deal tomorrow. But the good mediator will have each side decide whether the better deal is through a mediated settlement or through a trial.

Because of this, a good mediator will move the focus away from the novel legal theories an attorney may want to present or even his or her persuasive spin on the facts. The good mediator will explore with each side how they plan to try the case. By doing this, one side may discover that their witnesses do not present the very neat and tightly told story that the attorney would like to believe. Each party can learn that the facts can look very different when they do not have their own attorney testifying as a witness.

6. A good mediator may have meetings with separate groups or individuals that make up one side to learn about that party's group dynamics.

A good mediator knows that when he or she asks questions to a group of people, there will likely be a controlled group response. However, within that group, there are varying opinions and ideas that individuals may only want to voice in private. Sometimes, a mediator may want to have a one on one session with the different members of a side to determine who has the decision-making power in the group. Most often, a mediator may ask an attorney for permission to speak privately to his or her client outside the presence of the attorney.

7. A good mediator knows how to be a good listener.

Since each side has opted for having a mediation instead of going through the trial process, if the matter gets resolved through mediation, this will be the only opportunity for each side to be heard.

In the beginning of the mediation process, there will be a significant amount of venting. People want to state the case that they truly believe in and they want to have the feeling that they were heard and understood.

If the mediator comes across as someone who is not interested in what they have to say, the parties will feel their frustrations grow and will be less likely to put aside their differences.

On the other hand, if a party believes that the mediator listened to and understood their position, they will be more willing to accept compromises that the mediator has requested that they make.

There is an important distinction here that should be made. Listening to a position is not the same as agreeing to that position. But, people find that it is sometimes more important that someone hears them than even necessarily agreeing with them.

"….A good listener really hears what a person is saying and is not thinking of what the reply should be. It takes a great deal of energy to be authentically present and truthfully listening. Such listeners have a quiet mind and a very good memory because they are only hearing the conversation, not mixed with other thoughts of their own."5

Jamie Sams, Earth Medicine, p.143 (Harper Collins 2003)

8. A good mediator freely takes advice from the two parties mediating.

It is my experience that no matter how good a mediator can be, a mediation can still get thrown off track. That is why the best mediators will seek advice from the parties when the mediation gets close to an impasse.

This works because a good mediator understands that no matter how good he or she might be at mediating settlements, the parties themselves have created a history with the case, and they will know the dynamics, relationships, and personalities much better than the mediator meeting with the parties for the first time.

Ultimately, the parties themselves hold the key as to how the dispute can be resolved.

9. A good mediator will commit to the process after the mediation sessions are over.

All settled cases do not get settled at mediation. However, in almost all instances, the parties can move closer towards resolution at mediation. A good mediator can have the parties decide not to declare an impasse, and may suggest that each side look at different issues with the hope that by each side doing their homework, the parties will have new justification to move off of their position.

PAGE 18

CRITERIA AND TIMING FOR MEDIATION SELECTION

Most mediators attempt to sell their services passing along brochures that primarily sing their self praise in providing a process that saves parties time and money. However, as mediation becomes more and more commonplace, it should be seen as a strategic tool that is both part of the litigation process and a principal means of bringing a matter to a favorable resolution on behalf of the parties involved in the dispute.

The problem that has arisen is that, because the process has been institutionalized practically in every court system, less care is often employed when approaching the process. Too many lawyers go to mediation giving the mediator too much power, and let the mediator give an opinion as to what a case is worth. Plaintiff lawyers may use the mediation as a crutch. Even a frivolous lawsuit can be filed, and if they can state a colorable claim to a mediator, they can't count on the mediator to push the other side to come up with some money. Both the plaintiff and defense side can fill their client up with thoughts of how good a case they have and then allow the neutral mediator to give the client the real facts of life.

Filing a complaint by itself, should not give any plaintiff's counsel the right to be automatically offered the opportunity to mediate by the defendant as well as a substantial amount of money to resolve the claim once they get to mediation. On the other hand, there can be occasions when mediation will be very appropriate even before a lawsuit is filed, such as when both sides to a dispute recognize that a colorable claim can be made, and have a sufficient understanding of the facts surrounding a dispute to pursue an intelligent discussion of the issues in an attempt to resolve the dispute.

Ultimately, the mediations that are the most successful and satisfying to the lawyers and their clients are not those where the parties are told to go to mediation on some arbitrary date when neither of the parties is even familiar with the issues, but rather, when all sides – both lawyers and their clients – recognize that it is in their mutual interests to do some serious problem-solving.

Nowadays, it seems like every case gets ordered to mediation whether the parties are ready or not. Does anyone keep a record of successful mediations when the parties are not ready to resolve their dispute?

The parties cannot necessarily control *whether* a court will order mediation nor may they be able to control the *timing* of such court-ordered mediation. However, how the parties proceed before the court may affect both the likelihood and timing of mediation. In some instances parties may welcome the court's decision to send the parties to mediation or have directly or indirectly suggested that option.

Nevertheless, if ordered to mediation you should not waste the opportunity. Proper preparation will maximize the likelihood of a successful resolution in mediation. At worst, if the mediation fails, you will have completed some preparation for trial and have learned more about the other side's positions and evidence.

A. Criteria for Mediation Selection

When both sides agree to take their dispute to mediation, it is generally because each side to the dispute believes that the process would be in the best interests of their client. Each side in its own judgment has developed its own criteria in determining whether the case is suitable for mediation. In determining criteria for mediation selection (and throughout the mediation process), it is helpful for both sides to consider a trial setting as the only alternative to the mediation process.

There are "neutral" criteria – factors that indicate benefits to both sides of a dispute, and there are "partisan" criteria – factors that are particular to one side of a dispute which are either seen an non-factors to the other side or even "negative" factors which would serve as a reason for that party to be against mediation.

The more "neutral" criteria that the parties have in common, the more likely both parties have something to gain by the process, and thus, there will be a greater likelihood of success of resolving the dispute at mediation.

The more "partisan" the criteria one party identifies in finding itself choosing the mediation process, the greater potential that party has to benefit from the process. Each side should have both neutral and partisan criteria in mind when choosing the mediation process. It will result in increased likelihood of success of a win-win resolution for both sides.

Below are a sampling of both neutral and partisan criteria that may be used in mediation selection. Note that in some cases, neutral criteria may not apply to one party and may actually be considered partisan.

A Sampling of "Neutral" Criteria for Mediation Selection

- ✓ Continued litigation poses significant future legal costs for both sides.
- ✓ The nature of the case will require a lengthy trial and probable appeal, regardless of whether plaintiff or defendant prevails at trial.

- ✓ Neither side has witnesses that have particular jury appeal.
- ✓ Neither side makes a sympathetic plaintiff or defendant.
- ✓ Facts of case are such that a jury will likely have a compromise finding.
- ✓ Neither side wishes to have the negative publicity of a trial.
- ✓ Both sides continue to have a business relationship that would be damaged by the litigation process.
- ✓ Each side has both strengths and weaknesses and neither side has the perfect case.

A Sampling of "Partisan" Criteria for Plaintiff's Choice for Mediation Selection

- ✓ Case has significant damages, but liability is questionable.
- ✓ Case is one of probable liability, but the actual damages are questionable.
- ✓ Client will be satisfied with a compromise resolution.
- ✓ Case is one in which arguments at mediation are more persuasive than if the same arguments were made at trial.
- ✓ Defendant has an insurance policy with limited assets, and defense costs will use up a substantial portion of available policy limits.
- ✓ Client has a strong present financial need.
- ✓ Client is not desirous or patient enough to wait years till case gets to trial.
- ✓ There are coverage issues between a defendant and his carrier.
- ✓ Continued discovery may enhance the other side's defenses.

A Sampling of "Partisan" Criteria for Defendant's Choice of Mediation Selection

- ✓ Plaintiff and/or plaintiff's counsel have unrealistic views of the case; the mediation can be used to educate them on the weaknesses of their claim.
- ✓ Damages claimed may potentially exceed available policy limits.
- ✓ Claim is one in which accruing interest during litigation becomes part of the damage claim.

- ✓ Claim has possible punitive damage exposure.
- ✓ Case has multiple parties who are more likely to make significant contributions towards settlement in the early stages of the litigation.
- ✓ Arguments made at mediation are more persuasive than if the same arguments were made at trial.
- ✓ Case is filed in a jurisdiction that has a reputation for large plaintiff verdicts.

One of the best reasons for mediation is that it is private. It is a forum in which the discourse is confined to the parties and the mediator, and the result is confidential. This is particularly attractive in disputes among insurance companies. Instead of risking the chance of creating bad law for the industry, insurers are well advised to resolve disputes over coverage in a private mediation.

Brian Ade

B. Timing a Request for Mediation

On occasion, when a defense counsel receives the suggestion from a claims adjuster that the plaintiff's counsel be approached with the offer that the case go to mediation, the response may be hesitancy out of fear that it may show weakness on the defense side. The case ultimately will be ordered to mediation so isn't it just better to wait until the order from the court is issued to mediate? Why force the issue at all?

Certainly, if the case is in limbo gathering dust and plaintiff's counsel is showing little interest in their client's case, that interest shouldn't be perked up by giving that attorney a call offering to send the case to mediation. Similarly, if the client just finished a deposition by admitting to lying, cheating, and stealing, an offer to mediate might bring you a gleeful acceptance, but you can't expect to fare too well.

As such, timing an offer to mediate will be very crucial to the strategy of your case. Mediation can be pursued when both parties have sufficient information to intelligently evaluate a case. However, that point in time may come before the other side deposes a witness that may be damaging to your case. Alternatively, it may come after you take a deposition exposing the weaknesses in their case.

Another point in time to offer the option of mediation is after a motion for summary judgment is filed. One word of caution, though. If you believe that there is a strong chance that the motion will be granted, word of the offer to mediate will likely get to the judge ruling on the motion, and because of the perceived ongoing settlement negotiations, the judge may be dissuaded from granting the motion. You may decide to wait and see whether the motion is granted before making such an offer.

Another strategy that is related to timing is simply to make an offer. When the response is an amount demanded for settlement, it may be the first demand to settle you have received in the case. If this is then followed up with a new counteroffer to mediate, you

have now established the likely ceiling that a mediator will recognize at mediation. You may even be surprised to receive a rejection of the offer to mediate, but then receive a further reduction in the demand that leads to an eventual settlement without the need for mediation.

Probably the most often used approach is the "fork in the road" approach. This is where both sides agree that they are about to begin a course of protracted discovery that once they begin, will pass the point of no return. Having agreed that they have reached such a point gives both sides pause to sit down and consider the possibility of resolving their dispute.

I have mediated many cases over the last 25 years, and found that there is no bright line test for when the request should be made. Some cases have settled in mediation after paper discovery, others only after the completion of fact and expert depositions. While it is critical that each side has enough information to make intelligent participation in the process possible, the means of exchanging that information can be tailored to the circumstances. On several occasions, I have had a mediator play the additional role of special discovery master, sequencing the discovery in a way to maximize the exchange of information critical to the mediation process, but keeping costs under control by limiting the discovery to that which is truly central to the key issues.

Brian Ade

C. <u>What if the other side says no</u>?

Not every offer to have a case go the route of mediation is responded to with an acceptance. Let us suppose that the other side rejects this offer, but because of either the weakness of the defendant's case, the future cost of litigation, or simply the desire to have the matter resolved, you still wish to pursue the possibility of mediation. At the same time, you do not want to exhibit signs of weakness to the other side. The question is what to do now.

The first thing you have to do is ask why the other side rejected mediation. A very likely reason for the rejection is that the other side may believe that it will be a waste of time. They have presented their point of view of the case and it should be obvious to everyone what a just cause they have, and the opposing side should just submit, and get out the white flag.

Here, the attorney may also feel more comfortable having the court order them to mediation. That way, there is no need to justify to the client agreeing with proposals that come from opposing counsel.

Sometimes an adversary possesses an attitude that whatever you see as good, he or she must see as bad. The other side sees itself in a pure adversarial relationship and will reject everything short of full capitulation on your part.

In this situation, timing becomes very important. If the case is already in litigation, the weaknesses of the other side's case should be established to the extent possible. The offer

to mediate then could be made best with the assistance of the settlement judge or the judge who is responsible for the case. Since a judge's interest is to get the case resolved, a judge will usually take whatever steps are necessary to convince the non-agreeing party to mediate.

This is a problem if you have the kind of case that you would be exposing your own client's weaknesses as opposed to the other side. Here, to get the other side interested, you have to remind them that the case will end up in mediation regardless, and it would be a lot better if this was accomplished earlier as opposed to later.

If weaknesses are in fact a concern, the offer of mediation together with an opening settlement position may show that you are serious and will approach the mediation in good faith.

You can also show that you would take the process seriously by letting them know who will attend the mediation. If you can present mediation together with the promise that the "Vice President of Claims" will attend the mediation as opposed to the adjuster sitting by the telephone, you will certainly get someone's attention with the offer.

The most difficult type of case to get to mediation, however, is the case involving multiple parties. Unfortunately, multiple party litigation tends to be the most expensive. But, in multiple party litigation, chances are that one party or another may be unwilling to mediate or the plaintiff's counsel may be unwilling to mediate the case on a piecemeal basis.

As suggested above, the best chance to get the case to mediation may well be the judge closest to the case. However, in a situation when you have more than just one party unwilling to mediate a case, a judge may be a little more hesitant to push a case into a mediation setting. However, in certain cases, you might want to entertain the idea of making an offer to either pay for a greater share or the total cost of the mediation. Since a mediation is non-binding, if you present the mediation proposal to the judge with the offer to pay for the additional cost of the mediation, you can now present the mediation proposal as a no risk offer to the side rejecting mediation. At this point, a judge may be very hard pressed to turn down a suggestion that the case be ordered to mediation.

I am afraid of looking weak! Different Angles to Use in Discussing Mediation

I have been in the situation on many occasions where I want defense counsel to propose mediation, but there is trepidation on the other end of the phone because of the fear of "looking weak." However, there are a number of ways to make the offer, and it does not in the least bit make you look weak. In fact, in many of these cases, by proceeding further with litigation, the weaknesses of the case becomes exposed, and you are now sitting in a mediation setting looking much weaker than you would have at the time you were afraid of looking weak.

1. *"Before we go off to war" approach*

This is always an approach that shows you are being reasonable but not weak. Since war produces casualties on both sides, point out that it is in your adversary's best interests to go to mediation. This can be amplified when there are interrogatory requests, deposition notices and motions that your adversary will need to respond to.

2. *Point out some of the obvious deficiencies in your adversary's position.*

The offer to mediation sometimes is made in response to an initial letter setting forth the basis of a claim against your client. By "coupling" an offer of mediation with some obvious deficiencies in the claim being made, you establish that you are prepared to negotiate from a position of strength.

3. *Offer mediation as a learning tool for both sides of the dispute.*

I never like to completely let on to the other side about how much I may know about a dispute. However, since the point of mediation is for each side of the dispute to get justification for their decision-making, the education process is the key towards justification. Again, this is not showing weakness, but the offer of mediation is simply a request for the parties to act grown-up and try to work out the problems in a constructive manner.

4. *Shift the burden of "being weak" to your adversary.*

If you adversary rejects mediation, it is now your adversary who is reluctant to expose their client to hear the perspective of a neutral party.

5. *We have "nothing to hide" approach.*

You can be very clear that you are prepared to put all of the issues on the table. Certainly, this is showing "strength" and not "weakness."

6. *Since it is non-binding, you have nothing to lose.*

I am always amazed that the most common reason for a rejection of a proposal for mediation is that "it will be a colossal waste of time and money for my client." Obviously, your adversary doesn't include the hours, months and years that would otherwise be spent in litigation as a colossal waste of time and money.

7. *Get the mediation service to make the offer.*

Believe it or not, this actually gets done, especially when you have a multiple party dispute.

8. *Make the offer in writing.*

If you are dealing with an adversary who tends to be difficult on the phone, and may not present his own client with all the options, you can memorialize the offer in writing. You can even state the reasons that mediation would be beneficial for your adversary.

9. *You can indicate that this is the point where your client would be most reasonable.*

I have had cases where an offer to mediate was made early in the process, but was soundly rejected. We then spend the next two years litigating, and my client's position looks a hundred times stronger than when we initially took on the case. My adversary then sheepishly agrees to that offer of mediation that had been made and rejected two years ago, and intimates that they expect the same kind of money they would have had two years earlier. Unfortunately, that train came and left the station.

10. *You can simply request a meeting to discuss the case.*

We are happy to meet, sit down with you and listen to what you have to say. I do not think such a proposal has ever been rejected. What can they say? "I don't want you to listen to me?" It just doesn't happen. You now have an opportunity to express a different side to the story. Hey. You listened to them. They should listen to you. Since there are two sides of the story, it only makes sense to have a neutral party work with the two sides to reach a resolution.

11. *You have just received answers to interrogatories.*

This is a good excuse to say that now you have gotten some information, we now have an opportunity to see if we can sit down and talk.

12. *You have just received a demand or an offer.*

Usually, this will be after a demand is made. If mediation is then accepted, you have already gotten a commitment to having your adversary move off of the demand, and you have not compromised your negotiation position.

13. *Make the offer at a court conference.*

The judge is not far away. If you are making the offer with the judge present, you can have a forceful ally in getting the case to mediation. The judge may simply end up ordering the case to mediation.

14. *Offer to pay for mediation.*

This can be the subject of hot debate. Opponents of offering to pay will quickly point out that you want the parties invested in the process, and the best way to insure that this is the case is to have each party write a check to the mediator.

While this is true in a "perfect world," I have to deal with the reality of living in an imperfect world. Sometimes, as the client, my need to mediate is much greater than the other side's need. I may have information that says the case will get worse, the longer it drags on. I may have just gotten a budget for fees over the next six months. This also may be a very difficult case, and I will need a high-end, very expensive mediator that I may

know will settle the case, but the other side is only willing to pay for the free court-appointed mediator.

I am making a business decision here that I will get my greatest advantage to resolving the case simply by incurring an extra $5,000 in fees. Compared to a $1 million budget, I am getting quite a bargain.

I was involved in very complex legal malpractice and accounting malpractice action where my company insured two of the law firms and the accounting firm named in the action. The case was venued in the United States District Court in Lower Manhattan, and my office happened to be in Lower Manhattan. Legal fees for the three separate law firms defending the action were budgeted to be in excess of $5 million. I showed up at the next conference before the judge, and told the judge that I wanted to speak with him privately. I explained my situation, and told the judge that if he ordered the case to mediation, I would pay for the whole party. We got the order, and I got the case settled for three insureds for less than the cost of defense.

Steven Joseph

NEGOTIATION STRATEGIES

You and your adversary have now agreed to mediate the dispute. However, it is just like when you throw a party. You need to put a lot of planning into the party if you are going to throw a good one.

A. Selection of the Mediator

If you are dealing with a run of the mill small dollar dispute type of case where the parties on both sides are relatively close in their positions, and are both eager to resolve the dispute, the selection of the mediator will not be a big factor. However, if you are dealing with antagonistic parties and high stakes at both ends, great care and some due diligence is required when selecting or recommending a particular mediator.

- ✓ Select a mediator to fit your particular case.

The bottom line is that both sides together are hiring an advocate to present in a neutral fashion their own position to the other side. This being the case, it may be important to learn about the kind of mediator they are hiring: the particular mediator's methodology to mediating, the mediator's experience in a particular case area, how the mediator was able to get closure in similar cases, a list of references, the mediator's success ratio, whether the mediator has the reputation of "splitting the baby," whether the mediator tends to be more "facilitative" or "evaluative," and if the mediator is evaluative, at what point in the mediation will he or she take this tack?

- ✓ Who would carry a great weight of influence with the other side?

In one case I handled, the client on the other side was an elderly gentleman who happened to have been an alumnus of Harvard University. We knew that the mediator we would select would have to be someone that this gentleman - the "decision-maker" would listen to. It was no accident that we selected a retired judge who also had been a graduate from Harvard to be the mediator.

- ✓ Who would be able to control an "out of control" adversary or "difficult" client?

I had one case that involved an attorney who was known to walk out on mediations after making outrageous demands. I have had many cases where the other side admittedly had a difficult client, and really needed help from a strong mediator.

In the first case, we were able to get a mediator whom we knew would control the proceedings and not let the proceedings control him. In the latter situation, we paid particular attention to our adversary's choice of mediator who genuinely felt that the proposed mediator would have a substantial influence on his own client.

- ✓ Facilitative v. Evaluative

If you have a particularly strong case, but are met with consistently outrageous demands and positions, you may want to push the case to a mediator who is more evaluative. This type of mediator will not shun away from giving an assessment or prediction on what may happen if the case does not settle, and may also push the parties harder to accept a compromise resolution.

One particular situation where you may lean towards a more evaluative mediator is when you have an unsophisticated party in the other room. Here, think about using a retired judge who may have a strong opinion of the case that will benefit your client. This would give your client a significant advantage in resolving the case closer to the number that your client is willing to agree to.

A facilitative type mediator, who plays more of a devil's advocate role, will look more closely to determine where the parties' interests lie. This type of mediator may be more suitable in a case that has some weaknesses, but there are other factors in your client's favor that dictate a compromise resolution.

The best evaluative mediators are the ones who can avoid giving the appearance of being evaluative. Their questions may be followed up with a show of dissatisfaction in the response. "Do you really believe that?" It may be followed up with a tougher question. It may be an opinion taken from the mediator's past experience.

I attended a mediation once where the mediator sent everyone to dinner while he went to do research at the law library. He came back the next day with case law that neither side cited in their mediation briefs. He used the case citations to get both sides to the number that he felt the case should resolve at.

Steven Joseph

- ✓ Who would be able to bang heads?

Some mediators have the reputation of being a "head banger" or an "arm twister". You want to get the case settled for your client. The other side sees the litigation as a "cash cow" for their law firm, and obstructs any talk of reason. You may want to push for the mediator who bangs heads in this situation.

- ✓ Use the selection of opposing counsel's choice of mediator to your client's advantage.

If the other side insists on using only one particular mediator to the exclusion of everyone else, you should naturally be suspicious. There is no case so complex or so unusual that

would justify one side's position that God has created only one mediator with the ability to resolve your particular case.

However, in many instances, each side provides their own list of mediators to choose from. If you then do your homework on the mediators proposed, it can be to your client's advantage to select a mediator from your adversary's list.

a. Credibility. Your adversary's selection of a mediator will have credibility to get them to move off of their position. If their selection of a mediator presses them on their weaknesses, they cannot say that the mediator has any sort of bias towards your own position.

b. Strength. This is a great way to express confidence in your own client's case, and show that you are not afraid to present your position before a mediator of your adversary's choosing.

c. Good faith. It establishes that you are taking a step to negotiate in good faith, and your adversary may take this a signal to be more fair in their position. If the mediation fails because the other side walked away, this is something you have in your back pocket when you explain to the trial judge why the case has not settled.

d. Public relations. Even if this selection is fair and neutral, you still can attach to the mediator a stigma that this was your adversary's choice of mediator, implying some sort of unspoken bias. When a case is not settled, sometimes the judge wants to find out who has been the more reasonable party, and who has been the problem.

B. Establish Your Agenda Through a Pre-mediation Conference

Once the mediator has been selected by the parties, many of the other issues, i.e., time and place of the mediation, length of mediation, extent of written submissions, use of experts, etc. can be then be worked out using the mediator. Once the mediator is selected, the parties can have an initial meeting with the mediator or use a telephone conference to work out any outstanding issues between the parties.

- ✓ Pre-mediation Conference

If your case is complex enough or if your adversary is extremely difficult, you might suggest to the other side, to the mediator, or to both to first hold a pre-mediation conference. The line I most often use in explaining this request is to say "if you are going to climb Mount Everest, it might be a good idea to first take a look and see what the mountain looks like."

Surveying the mountain, the expert mountain climber can decide what strategies to employ to climb the mountain.

The same can hold true for mediators. If the mediator meets with both sides separately, and gets a sense of the personalities involved and the various conflicts that separate them,

the mediator can then put together a game plan to get the sides to resolve their conflict on "game day" at the mediation.

This is your first opportunity to suggest to the mediator ways for the mediator to be successful. It is in the mediator's interest to be successful, and if it is your side that continually provides the mediator with a blueprint for that success, the mediator, in all likelihood, will be more attuned to the position you take at the mediation.

In other words, if I am the one to suggest to the mediator how to climb this mountain of a dispute the mediator will likely be thankful that I was looking out for the mediator's interest in not falling off the mountain.

As such, this is an opportunity for you to help establish the game plan for the mediator so that the game is played on your home field. For example, I have a case where the damages that the plaintiff can claim are substantial. As part of the defense team, I believe that we have very credible defenses that need to be outlined, I may suggest that the submissions be somewhat more extensive than a two page summary because I want to make sure that the mediator fully understands our defenses, and will not get blinded by the large dollar signs that will get put on a powerpoint display at mediation.

If we are dealing with a complex case that requires more than one day, and I believe the other side is being unrealistic, I may want to have a strategy in which the mediator will have the entire first day spent solely discussing issues with no money put on the table.

You should never assume that it is only up to the mediator how he or she plans to run the mediation. When I make suggestions to the mediator on how the mediation may be run, though the suggestions are made to give my party an advantage, they are always put in the context on how the mediator can be successful, and how the mediation can end up with a successful resolution for both sides.

- ✓ Know the difference between adversarial and hostile negotiations. Make the mediator aware of any possibility of a hostile negotiation.

An adversarial negotiation and a hostile negotiation are two different things, and only bad feelings and splitting headaches can come from confusing the two.

An adversarial negotiation in the context of mediation is when both sides in the diligent representation of their respective clients have recognized that a facilitated resolution is in their best interests, but the two sides have varied differences of opinions on what conclusions can be drawn from the facts and the law of the case.

A hostile negotiation, on the other hand, is where one side wants to draw blood, and make the other side look bad. They want to approach the mediation by not conceding even an inch. Here, the other side will look at mediation no differently than a professional wrestling match. They would eagerly smash a steel chair over your client's head if that were permitted in mediation.

The pre-mediation conference can be used to make the mediator aware that the other side is likely to take such a hostile approach. The mediator can then be able to come up with ways to make the mediation an honest discussion of the issues as opposed to having the mediator acting as the messenger of threats, insults and attacks.

If you are faced with such a hostile situation, suggest to the mediator that it may be beneficial for the mediator to ask both sides questions after the opening presentations. The mediator can permit each side to comment on any one point made in response to a question. The questioning and interplay may assist the mediator on understanding the nuances on issues that will assist the mediator later in the process.

The hostile attorney will also look a bit out of place being hostile not only to an adversary, but to the neutral facilitator.

- ✓ Confidential v. Exchanged Submissions

Attorneys may quickly assume that the mediation submissions are no different from any pleading or brief that is filed with the Court, and because of this, either the submissions will be automatically exchanged or exchanged by whatever rules the mediator decides. However, this is not necessarily the case.

Certainly, if your goal is educate the other side on the weaknesses of their position, exchanged submissions can be the first step towards doing exactly that. However, in a confidential submission, you may answer the two most important questions for the mediator. In your opinion, why have the parties up to this point, been unable, on their own, to resolve their differences? Secondly, what do you think the mediator can do that would assist the parties in getting a resolution?

By addressing these questions in a confidential submission, you can better identify those issues that the mediator can more effectively present in a neutral fashion to get movement from the other side. You can also use the confidential submission to make the mediator aware of any personality conflicts or other issues that may cause a problem at the mediation.

The parties can even have the best of both worlds. You can have an exchanged submission, with a confidential memo to the mediator. You can even decide to send your own private letter without even consulting the mediator or the other side. You ultimately call your own shots here.

- ✓ Responsive Submissions and Limited Discovery

Mediation may be a good idea, but you are somewhat hesitant because the other side, invariably the plaintiff in this instance, has not provided you with any information about his or her case. Typically, the stumbling block in this situation is that you and your client do not fully understand the theories of liability or even the damages that they have laid out in a demand letter.

The way around this issue is to allow for limited discovery and responsive submissions. First, the parties can decide through the mediator what discovery may be needed not only for the defense but for the mediator as well. Once this is accomplished, the plaintiff's side provides their submissions first to both the mediator and to you. Now that you have their submission and the limited discovery, you can better assess what the claim is, and what view of the case you will be taking.

- ✓ Agreed Upon v. Disputed Issues of Fact

If the case is complex or if you believe that the other side needs an initial reality check, suggest to the mediator that the parties submit a joint statement of agreed upon and disputed issues of fact. While there may be haggling over the statement, the final draft will be extraordinarily helpful for the mediator to steer the mediation towards a discussion of what is really disputed between the parties.

- ✓ Expert Witnesses

In some complex cases, it may be a good idea to suggest that expert witnesses take part in the mediation process to assist the mediator with his or her understanding of the case.

Certainly, if you present the choice of resolution at mediation or through a trial, having an expert present at the mediation establishes that both you and your client are ready for either possibility.

This can also be an advantage if your side happens to have the superior expert. This can be a unique opportunity before a trial to have an expert explain to the opposing side why they may have problems with their case.

The expert's credibility may be less than the mediator's, but the expert opinions may have a greater influence on the other side's decision-making process than anything an adverse counsel may say about the case.

C. Preparation of the Client for Mediation

- ✓ Prepare the client to act as the decision maker.

The role that the attorney assumes at a mediation is that of an advocate as well as an advisor. The attorney will make the opening presentation, and in the private caucus session, highlight the legal arguments for the mediator. In private, the attorney will counsel the client on what position they may take in the settlement negotiations.

However, the attorney does not act as the decision maker. The mediator does not act as the decision maker. The client does. More importantly, most, if not all, mediators will look to the client as the decision maker.

And this may be a very unusual and a very difficult position for the client to be in. The court system places the decision making process in the hands of a judge and a jury. This may be the first lawsuit that your client has ever been involved with, and if not the first

lawsuit, then maybe, the first mediation. Also, both plaintiffs and defendants may be suffering from litigation intoxication. They go to the mediation consciously stating that they want to put the lawsuit past them and go on with their life. Subconsciously (or consciously), however, the lawsuit has become their life. They find that being in a lawsuit is exciting, and if they to decide to resolve the case through mediation, that excitement, even if exchanged for large sums of money, will be gone.

A client who is unfamiliar with the process, but who has ultimate faith in his or her lawyer may simply take the position "I'll do whatever my lawyer tells me to." This can be a mistake for both the attorney and the client. The attorney who had complete control over the client in the privacy of his or her own office will find the dynamics and the atmosphere created by the mediation process to be quite different. The client will hear negative things about their case from the adverse party. Very tough questions may be raised by the mediator that might not even have been anticipated by the attorney. Doubts in one's case that are raised by the mediation process can lead to doubts that the client may begin to have about their attorney. The attorney who assumes the decision making role will not get any warning when the client decides at 5:00P.M. that he or she wants to take over the decision making reins and settle against the wishes of the attorney. This is embarrassing for the attorney, and leads to bad feelings with the client.

If it is in the client's best interests to successfully resolve the case through the mediation process, the attorney should prepare the client to be the decision-maker at the mediation.

I have had a rash of mediations lately where we get late into the mediation process and the folks in our room get a sense that we are really making progress with opposing counsel. We sense from the mediator that opposing counsel senses the weakness in their position.

The mediator comes back into the room with our caucus, and with one sentence, takes all the air out of the room: "Opposing counsel has client control problems."

This happens with both sides, and sometimes, a lawyer can have problems controlling me too! It may involve an insurance policy with a consent clause, and an insured will not provide their consent. I'm very understanding of this issue.

When someone tells me that the other side had client control issues, it really tells me that I've evaluated the value of the case right. Now, I have to evaluate how expensive it will be for me to be right, and continue the litigation.

So, sometimes, I throw the other side a bone. Ok. I'm rewarding the unreasonable client.

Other times, I'll stay very firm. I know that it will be just too expensive for opposing counsel to have client control problems. It's amazing how quickly someone can get control of a client when it will cost the attorney lots and lots of money!!

Steve Joseph

- ✓ By agreeing to mediate, the client should be made aware that he has already made his first decision.

Mediation is non-binding and the process is generally facilitative, and many attorneys rightfully use these factors in making the "you have nothing to lose" argument to get the other side to agree to the mediation. Yet, it is a mistake to advise the client that there is nothing to lose because it may be non-binding and the process itself is facilitative.

By agreeing to mediate, the client has made the decision to make compromises in the settlement position that they had previously held. It would be a ludicrous situation and a very short mediation, if the two parties in a dispute went to mediation with one side proclaiming that they had made their "final - not a penny less!" demand, and the other side had made a similar "final - not a penny more!" offer proclamation.

Even if the mediation does not resolve in a settlement, mediation will result in what will be considered a binding change in the parties' negotiation stance. If the parties go into the a mediation with a $1 million offer and a $10 million demand, they will have some difficulty in going back to these positions if the mediation ends with a $3 million offer and a $7 million demand despite whatever threats to take these offers off the table - once the mediation ends - are made. If you have offered $3 million at mediation, a retreat to a $1 million offer will not be taken seriously by the other side or the trial judge who may later attempt to settle the case.

- ✓ Help the client decide what change in their negotiation position they are willing to make at a mediation resulting in an impasse.

The above scenario can be extremely frustrating to a client. In the heat of the moment, the mediator got each side to go up and go down simultaneously - in the millions, no less, but yet, neither side has anything to show for it. In fact, even though the parties may be closer numerically, because of the impasse, they are even further apart.

If your client is the one offering the money or lowering the demand to settle, the two days of mediation cost them a $2 million change in their position. That is a very expensive result where the client may have originally been told they had nothing to lose!

Thus, before you go to a mediation, help the client be a decision-maker at the mediation by deciding before the mediation exactly what is the most the client is willing to change their position even if the mediation results in an impasse. Also, does that number depend on the move off of the offer or demand that the other side makes? Using the previous example, would the client have felt comfortable going up to a $3 million offer if the other side came down to a $5 million demand (as opposed to $7 million)?

- ✓ Prepare the client on what the other side will say.

Up until now, you may have told your client what a great case they have. Now, the client will have a chance to hear the other side's version. The client should be prepared to hear about the weaknesses in his or her position, and the client should also be familiar with

your response. You should also review with a client any issues that the other side may put on the table that would cause a change in your client's decision making process.

I attended a mediation held in a hotel conference room, and they had the coffee and hot water set up right behind the mediator. He walked into the room, and within ear shot of the mediator and the plaintiffs, said in a very loud voice; "Hot water!! Just like what I'm in!!"

Steve Joseph

- ✓ Prepare the client on what you will say and when you will say it.

The attorney should make sure that everything he or she plans to say in the opening presentation or in a private caucus session is accurate. You want to avoid a situation where the client corrects the attorney or vice-a-versa. You also want to let the client know exactly what issues will not be raised in the opening presentation, but will be discussed with the mediator in the private caucus sessions. You will also want to advise the client beforehand of any sensitive issues that may not be raised in either the opening presentation or the private caucuses.

- ✓ Prepare the client as to what to expect at the mediation

If your client is not familiar with the mediation process, he or she should be briefed on what to expect and have been prepared as to the role the client plays in mediation.

Your client should understand what is likely to happen, on what schedule, and who will be present at the mediation.

- ✓ Advise the client in advance on the projected trial date, the length of a trial, and your estimate for the cost of preparing and trying the case for the client.

Imagine what would happen in a mediation given this scenario: After you prepared the client on all the legal issues for the mediation, the client decides that an attempt should be made to settle the case at mediation somewhere in the range of $500,000-$700,000. At the mediation, the other side makes a demand to settle at $1.25 million, and gives a hint that they may be willing to settle for $1 million. The mediator makes an inquiry directed to you on how much you believe it would cost to prepare and try the case to verdict. Giving this question about thirty seconds of your thought, you reply $1 million as a very rough estimate. The face of the client shows shock and surprise.

This automatically creates an issue for both the mediator and the client. If the client is willing to spend $1 million and still face the risk of an adverse verdict, why wouldn't the client be willing to settle the case for the same amount without incurring such a risk?

Because of their complexity, whether it is on behalf of a plaintiff or a defendant, some cases are very expensive to put on before a jury. Especially when you and your client believe you have a very strong case, you want to avoid making the cost of litigation an issue that overwhelms any discussion of the merits of the case.

There are two ways in which you can deal with this issue when it comes up at a mediation. The first way is to discuss the projected cost with your client, and try to come up with an estimated range on the cost. When the mediator makes an inquiry as to the cost, the mediator should be given the low estimate. Make sure that the number given is a credible one.

The other way this can be dealt with is simply not to answer the question. A very credible response can be "This issue is irrelevant. Unless we can achieve a reasonable settlement, it is our company's position to try these type of cases."

Again, the message is to avoid having your client get surprised at mediation by what may appear to be a collateral issue. These issues should be discussed beforehand with the client, and a strategy should then be worked out on how it will be dealt with at the mediation.

Working on the claims side, the worst thing that could happen is that we get surprised by defense counsel. For years and years, and hundreds of dollars of defense costs, we hear how defensible the case is, and then we get to the courthouse steps, and defense counsel is now surprised. Surprised by the Judge, surprised by a witness, surprised by a ruling, etc., and now they need lots and lots of money to settle the case.

So, I tell defense counsel the story of Batman and Robin. The one with Adam West and Burt Ward. Week after week, Batman and Robin finds the bad guys hiding in the plush warehouse by the river, start beating up the bad guys, and all of a sudden, the net comes flying down, trapping them, and in the beginning of the next week's episode, they are tied up and about to be boiled to death in a vat of boiling oil.

This wouldn't be so bad, but last week with the Joker, it was the net. The week before with Catwoman, it was the net. With the Riddler, it was again the net. The moral of the story is that you need to be prepared and watch out for the net!!

The story isn't over. When Batman and Robin are tied up. Batman is cool and collected. Robin is screaming; "Holy deathtrap, Batman!!!" Why? Because if you look closely, Batman has a utility belt. Robin does not have a utility belt. Now, if you bring a boy wonder to fight battles, you give him a utility belt!!

In my world, defense counsel ends up being Robin, and they want me to go into my utility belt, and gets lots of money to settle a case on the courthouse steps. My one word of advice to counsel: you do not want to be Robin at the courthouse steps under any circumstances!!

Steve Joseph

- ✓ Advise the client that you will have your own private sessions with the client after the mediator's own private caucus.

After the opening presentations, the mediator will likely hold private sessions with the attorney and the client discussing the relevant issues of the case, and ultimately, the

settlement position of the client. If the mediator asks for a number to take back to the other side, there is no time limit to provide a response, and the client should not feel compelled to give one instantaneously. The proper response given by the client is to excuse the mediator from the room with the explanation that the client wishes to discuss what was said and how to proceed with their attorney. Only after such a discussion has taken place, will the mediator then be called back in and advised of the new settlement position.

- ✓ Advise and prepare the client for the possibility that the mediator will ask to meet with the client without you present.

This doesn't happen all too often, but it is a possibility. This is something that the mediator may choose to do when the parties are close to an impasse. However, the client can choose to decline. Make the client aware of such a possibility, and decide beforehand on doing what the client fees most comfortable with.

- ✓ Discuss the options that the client may have if it is determined that the two sides have mutually exclusive settlement ranges.

In some mediations, the mediator may learn that one side's acceptable settlement range may be from A dollars to C dollars, and the other side has an acceptable settlement range from C dollars to E dollars. In this scenario, the likely mediated outcome will be that the parties settle at C dollars.

A very common scenario, however, is when one side comes in with an acceptable settlement range of A dollars to C dollars, and the other side comes in with an acceptable range of F dollars to G dollars. The two parties reach an impasse with one side at C and the other side at F.

The client should understand that the mediator, in all likelihood, will try in some way to break the impasse by suggesting to the parties "split their differences." In the alternative, the mediator may suggest a creative settlement such as a high-low resolution that is based on the outcome of an outstanding motion, as one example.

The client should be prepared for this scenario as well and should have been prepared to make a decision on what to do when it occurs.

- ✓ Determine what time the client would like the mediation to both start and end.

In many instances, the time when a mediation starts and ends is dictated by when all the parties can fly in to a particular city, and what time the parties need to catch a flight out. However, if all the parties are in the same city, the mediator will not hesitate to start the mediation early in the morning and if progress is being made, extend the mediation well into the night.

If your client is comfortable starting the mediation at 10:00A.M., the mediation should not start any earlier. If you client does not want to mediate past 6:00 P.M., this should be

decided on and conveyed to the mediator before the mediation begins. The mediator and the other side will likely oblige.

The key is taking care of this issue before the mediation begins. Do not convey to the mediator at 5:58 P.M. that your client mediates only till 6:00P.M.. That will only get you charges of bad faith negotiating, and a mediator will not look favorably towards your client.

Managing Expectations

About a month ago, my son told me he was absolutely certain he had "aced" his geometry quiz. When the results came out a few days later and he informed me he had received a B+, I was actually somewhat disappointed. Last week, he had what he described as the most difficult quiz of the semester and he warned me that he might get a D. When, to our mutual surprise, he received a B-, I was rather pleased. How could it be that I was more satisfied with a B- than I had been with a B+? The answer lies in the fact that my son – unwittingly to be sure – had managed to manage my expectations.

Properly managing expectations is critical in the dispute resolution process, as well. For example, if your client expects to be offered at least $100,000 to resolve a pending dispute, a "take it or leave it offer" of $75,000 may be soundly rejected, whereas if your client expects to settle that same dispute for $65,000, a settlement offer of $60,000 might just do the trick.

Similarly, if your client expects that mediation will last three hours, he or she may become impatient if it runs longer, making it more difficult for you to resolve the matter. However, if your client expects that mediation will last eight hours, and the matter is resolved in six, he or she may be impressed with how hard you worked to get things done more quickly.

In order to best manage expectations, prepare your client well. Carefully explain why the mediation process can be so time-consuming; make sure your client is prepared for an initial demand or offer that may seem outrageous or offensive; discuss in advance a settlement range that is realistic, given all you know about the opposing party and opposing counsel.

Properly managing your client's expectations increases the likelihood that you will manage to resolve the dispute, which, after all, is really what your client expects in the first place.

Floyd J. Siegal

- ✓ Make sure that your client understands and is able to communicate to the mediator the key issues and facts important to the client's case.

Attorneys make the opening presentations. The clients generally can choose to make comments during the opening session, but they will most likely be somewhat limited. However, in the subsequent private caucuses that the mediator holds with each side, the

mediator will have open and frank discussions of the case that will make it very hard for the client not to participate.

Sometimes it is important to the client to have the opportunity to speak and be heard by both the other side and a neutral. Speaking at the mediation may be seen as a substitute for "having one's day in court."

Regardless of what the attorney may have planned beforehand, the mediator will look to the client as the decision-maker, and as such, the mediator will want to know what the decision maker thinks about their own case. The attorney should prepare the client to clearly communicate to the mediator their case just as an attorney would prepare a client to be convincing to a jury. If the client is able to talk with conviction about the case, that conviction will be taken with the mediator when he or she goes to discuss the case with the opposing side.

Note that the mediator will try to get as much movement off of your settlement position by posing to your client the various risks associated with going to trial. While your client can indicate a willingness to be reasonable, the reasonableness should be based on an intelligent discussion of the gray areas of both the facts and the law, and not based on a perceived or created fear of a courtroom.

Even if the client desperately wants the case to settle, the client has to give the impression that he or she is ready to have a jury be the trier of the facts, if forced to take that option. If the mediator and the opposing side gets any sense of lack of resolve, or worse-desperation to settle, your client can end up paying by severely compromising their position, or even have the mediation fail and the case end up before a jury.

However, if there is a business relationship to protect, the client will not want to tell the mediator that they are ready to take the case up to the U.S. Supreme Court. Presenting the client as someone who is there to listen and be as impartial as possible in evaluating the claim is the best way to attempt to get good will from the other side. The appearance of fairness and reasonableness will appeal to the mediator, and the mediator will likely try to get the other side to be fair and reasonable as well.

If the client clearly is in the wrong, you should consider the option of conveying an apology of some sort to the other side. This will go far in diffusing the other side's anger, and may allow them to be more reasonable as opposed to going out and looking for blood. In some situations, the other side rightfully can't understand why it has taken all these years allegedly wasted litigating the dispute when your client should have been at the table the first day the dispute arose. (Of course, many times, it may be because of an unreasonable demand, or just a fear of showing weakness.) At the mediation session, the client can convey how the situation has changed, and why "now" as opposed to "before" has become the appropriate time to resolve the dispute.

D. Opening Presentations

- ✓ Know who the primary audience is.

As noted in the preceding section, the mediator will begin the joint session with an opening statement. This statement will include how he or she intends to proceed and what is expected of the parties in order to accomplish a resolution at the mediation. The mediator will then invite each side to give a brief opening presentation of their case.

The common practice here is for the attorneys to give a short presentation directing their comments toward the mediator. This is a mistake. The mediator is there to listen, not to function as a decision-maker, but only as a facilitator. The mediator will already have received submissions from both sides, and thus, already has knowledge of each side's position. Moreover, the parties will be spending a substantial amount of time with the mediator in private caucus sessions attempting to convince the mediator that they have the stronger position.

The real audience here is the opposing party, and in particular, the client. Up to this point, that party has heard only what its own attorney has told it; and this will likely be the first, and possibly the only, opportunity to directly address the opposing party. Thus, it is important to phrase your comments in such a way that the client on the other side will be willing to listen to what you are saying.

To be sure, both clients will be given an opportunity to speak and most mediators will insist that each party speak in an effort to allow them to vent their feelings -- to excise the demons, so to speak. From the attorney's perspective, this may be viewed as an encroachment upon the attorney's turf, as most attorneys prefer (or even insist upon) being in control of what is being presented. They should, however, recognize the importance of allowing their clients to vent their anger and other feelings as it will make the dispute easier to resolve later. On the other hand, they should stress to their client the importance of showing respect for the other side which means that they should try to set aside personal attacks and remain silent while the opposing party is venting his or her anger.

I had one case where my client, the defendant, had a very weak position, but was adamant that he would not pay a penny to his former partner unless ordered to do so by a court. The plaintiff was just as unwilling to try to resolve the case prior to trial. Animosity between the parties was a factor in their respective decisions to devote their resources to trial preparation. Although the case should have been mediated or settled, neither side would consider it.. After opening statements to the jury had been made by both sides, the judge tried to get the parties to settle, but could only get them to agree to a procedure where the clients (without their lawyers present) would make presentations to a neutral who would then make a determination. The parties did not need a full-blown trial, but did need to be able to state their respective positions and vent their anger. Only then could the matter be resolved.

Ettie Ward

Setting the rules of the game. From a participant's perspective, I love when the mediator gives a short speech on the rules of the game. It shows that they really care, and will

work hard. The best rule I have heard a mediator give is to only give the mediator the power to declare an impasse. The speech goes a little bit like this:

"Now, there will be times in the mediation where you will think that the parties are miles apart and it is a hopeless cause. Now, understand that I will hear things that I may not disclose to the other side. So I will know more than you will. I will give you my word that I will not waste anybody's time. If I believe that the parties are far apart and that we have reached impasse, I will instruct the parties as such. But, we have all agreed to be here for the allotted time, and I want to have everyone's commitment up front that I, as the mediator, will be the only one to declare an impasse. Can I have that commitment from each of the parties?"

Steve Joseph

- ✓ Be respectful and conciliatory to the other side to the extent that it is possible.

It should be assumed that no matter how cordial the parties may appear, there will be a substantial amount of distrust and even bad feeling between the parties. Because of this, there will be resistance on the other side to much of what the attorney and his or her client says, and suspicion of their intentions to seek a fair result. Thus, in the opening presentations, the attorney should try to lower the resistance and lessen the suspicion of the opposing party, rather than launch into a vicious attack. In fact, the attorney should indicate an appreciation for the opposing party's willingness to listen to his or her presentation.

Attorneys who decide to vigorously defend ridiculously weak points in their case lose credibility with both the other side and the mediator, and it will only have a negative impact on the stronger arguments that are made in their case. Even worse, attorneys who try to personalize the process by using the opening presentation for negative attacks on the other side will likely cause a failed mediation with the parties even further apart. If an attorney shows respect for the other side, the chances are increased that respect will be reciprocated. If the attorney is conciliatory on the client's obvious weak points, the other side will feel inclined to be conciliatory on their weaknesses as well. In this way, the groundwork can be established for where the battle in a mediation should be -- right in the middle of the field.

Give Peace A Chance

All too often, the ferocity of today's legal wars creates obstacles to compromise and peace. Parties to the dispute and their respective counsel often assume the roles of combatants, determined to wage an epic battle until one side can claim victory over the other. To demonstrate loyalty to their respective clients and their strength as advocates, opposing counsel often treat each other with incivility or, worse yet, overt hostility.

Having established such an adversarial relationship, it's no surprise that opposing counsel and their clients often arrive at mediation prepared to perpetuate the battle, each viewing the other side to be the enemy and each viewing the mediator not as the potential peacemaker but as the de facto judge and jury – someone to be persuaded of the

correctness of a particular legal or factual position, rather than someone whose role it is to facilitate communication, negotiation, compromise and resolution.

To give yourself and, more importantly, your client the best chance to resolve a dispute at mediation, it is essential to give peace a chance. Consider taking a few moments at the outset of the mediation to meet privately with opposing counsel to establish a framework for peace. Make it clear that you are not the enemy, but rather a potential ally, eager to work together to help your respective clients find a way to stop the metaphorical bleeding. In addition, you may want to meet with the mediator privately to share any client-control or other concerns you may have, and to enlist his or her assistance.

During joint sessions, avoid making provocative or inflammatory statements that are likely to add fuel to the flames. Try showing the utmost respect and appreciation for the other side's position, while diplomatically offering your differing views. Concede points that cannot seriously be contested or that are of less significance to the principal dispute. Cooperation and compromise usually foster greater trust, which, in turn, often gives rise to even greater cooperation and compromise.

By giving peace a chance, you will have a better chance to establish a lasting peace.

Floyd Siegal

Years ago, I handled claims up in Canada. There were a few times when I would walk in to the mediation, and the plaintiff and plaintiff's attorney came to me bearing gifts. I had one mediation where the attorney offered me a box of Cuban cigars. I had another mediation that the plaintiff came in with all sorts of baked goods. She spent the whole night before baking cookies, scones, and muffins for the mediation, and in particular, me. After all, she was expecting me to write a very large "six-figure" check for her. It was the least she could do!

Now, I do not smoke cigars, and cannot accept bribes in my job, although I could not turn down the blueberry scone. But those actions certainly tamper down any thought of looking at the other side with any animus.

Steven Joseph

In a personal injury case, I cannot over emphasize the value of acknowledging the plaintiff's pain. Something as simple as "I am sorry for the loss of your mother and know that it must be extremely difficult for you" can go a long way in obviating the need for a pound of flesh. Sometimes a mere acknowledgement of loss can help the parties get down to the business of settlement.

William Lancaster

- ✓ Present to the other side the opportunity they have and the choice they will be making.

Since you will be attempting to convince the opposing side to accept what you consider to be their best deal, the mediation should be described in terms of an opportunity for both sides to choose: "The mediation presents us with an opportunity to resolve our differences today, or resolve them in a courtroom three years from now." "We can decide to resolve our differences today, or return (go) to a litigation that will be very costly for both sides."

A strong signal should be sent immediately to the other side that the alternative to resolution at mediation is not a settlement a couple months thereafter. The alternative is a long, difficult and very expensive road for the other side to take. Thus, the choices presented to the other side at the mediation should be taken very seriously.

- ✓ Mirror your opening presentation to the opening statement you would present at trial.

Since you are providing the trial option as the alternative, discuss the case in a manner similar to the way you would give an opening statement to a jury. Even if discovery has not been taken, you can tell the other side, "We believe that the evidence or discovery will show." By phrasing your opening presentation in this fashion, you send a signal to the other side that you are thinking about the trial option.

- ✓ Use visual aids to educate the other side.

Visual aids are particularly helpful, not only in educating the other side, but also signaling that your client is prepared for the trial option if the mediation does not result in an agreement.

If you do intend to use visual aids in your opening presentation, think about the need to advise the other side before the mediation directly or through the mediator. The reason for this is that you do not want to overwhelm your adversary to the point that he or she no longer feels that the mediation is a neutral forum. If your adversary is substantially less prepared than you, you may get a very good resolution. But, you also may prompt your adversary to retreat so he or she can fight a fair fight some other day, with the result that your adversary won't take the mediation seriously.

SHOW & TELL

Several years ago, before I began my transition from litigator to mediator, Orange County trial attorney Jim Kurkhill taught me a valuable lesson about the power of communicating "visually" in mediation – one I have never forgotten.

During an opening joint session, Jim used an exceptionally well-constructed computer presentation to preview what, in essence, he planned to show and tell the jury in his opening statement if the matter proceeded to trial.

Using photos, charts, graphics and computer-generated 3D models, Jim persuasively laid a foundation for an outcome far more favorable to his client than anyone else in the room had ever contemplated.

The impact was powerful and immediate – especially on the claim representative for my client. The matter was resolved by the end of the day.

Jim's effective use of visual aids altered the dynamics of that particular mediation before I had a chance to say a word. It was readily apparent that the mediator – a retired Orange County judge who was highly regarded by both sides – had found Jim's arguments to be compelling.

More importantly, the claim representative was so impressed with Jim's persuasive abilities and his command of technology that she immediately reconsidered the value she had placed on the claim (not withstanding her total confidence in my trial skills, I should add!).

While the use of a Power Point presentation with computer-generated models will always be an effective way to present one's case, one needn't be quite that technically sophisticated to accomplish the same objective. The use of enlarged color photographs, simple graphs and charts, or anything else that is visual in nature can have an immediate visceral impact on the way all the participants in the mediation evaluate the dispute and the way they gauge your ability to effectively and persuasively communicate your client's position.

One picture truly can be worth a thousand words. Whenever you have an opportunity to do so in mediation, consider putting on a little show because you never can tell what might happen.

Floyd Siegal

I was involved in a hotly contested architect's malpractice lawsuit where I felt we had very strong defenses, and the opposing party felt that they had lots and lots of damages. I instructed defense counsel to prepare a detailed and chronological power point presentation to give for his opening presentation.

Defense counsel told me that no matter how fancy and compelling a Power Point presentation he comes up with, it would do nothing to dissuade him in his belief in his case.

I replied that I did not expect a Power Point presentation to convince our opponents of the merits of our position. However, I did want to convince the other side that I was thoroughly convinced in the merits of our position.

Steve Joseph

- ✓ Avoid telling the other side what part of their case you believe does not have jury appeal.

Remember that you are presenting the merits of your client's case. You are not going out to attack the position of the opposing side, a task you intend to leave to the mediator. By discussing the trial option and what you believe the evidence will be, it is also very

tempting to point out in your presentation what part of your adversary's will not have jury appeal. This too is a mistake as the other side may become defensive and point out what parts of your case lack jury appeal. This will simply further embitter the parties and make resolution more difficult to achieve.

The lack of jury appeal can always be pointed out to the mediator in your private caucus session. The mediator can then discuss it with your adversary from a more neutral position. This way, the mediator can use this point to solicit some movement off of the adversary's settlement position, rather than a point that ends up in a wash for both sides.

The "lack of jury appeal" issue can be thoroughly discussed in the private caucus sessions. I handle many cases brought by banks that made bad loans, and are suing third parties, attempting to hold them solely responsible for these loans. I was at one mediation where the mediator himself said that "if juries didn't like banks before the taxpayer bailout, they certainly would not love a bank asking for a second bailout!"

Steven Joseph

Questions & Answers

Perhaps nothing generates greater resistance during settlement negotiations than aggressively advocating one's position and/or criticizing the other side's position in the presence of the other side, whether during direct negotiations between the parties or joint sessions in a mediation. When one side goes on the offensive, the other side's natural impulse is to become defensive, thereby closing the door to active listening and reasoned discussion about the issues that stand in the way of settlement. One way to avoid falling into that particular trap is to focus on asking questions and eliciting answers.

Questions are not generally perceived as criticism – at least when posed with sincerity and diplomacy – and therefore tend to be disarming. When people are presented with a question, as opposed to an assertion of something as fact, they are more prone to listen, to reflect and to then provide a thoughtful response.

For example, instead of dismissing certain witnesses as utterly lacking in credibility, consider asking opposing counsel what evidence he or she might be willing to share that supports the witnesses' credibility; instead of characterizing a settlement demand as outrageous and unreasonable, consider asking how opposing counsel would recommend that you present the demand to your client and/or insurance carrier so as to further the negotiation process; instead of arrogantly "guaranteeing" a seven-figure verdict in favor of your client, consider asking what additional evidence might persuade the opposing party to increase its offer.

Asking questions and eliciting answers invites the other side to collaborate with you to find solutions. At the same time, asking questions and eliciting answers underscores potential weaknesses in the opposing party's position, but does so in a way which is instructive rather than argumentative, thereby creating an environment in which the opposing party may be more willing to reconsider its position. An additional benefit of

asking questions and eliciting answers is that you and your client might learn new and valuable information which may lead you to re-examine your own positions.

Perhaps as important, asking questions and eliciting answers often keeps the dialogue going, and as long as the parties continue to talk there's a better chance they'll discover the answer to the ultimate question – how to get the matter resolved.

Floyd J. Siegal

I was in a mediation where counsel for a co-defendant opened with "How dare you sue my client. This case is a travesty." Needless to say, it did not go well from there. What was particularly ridiculous about this tactic was that they ultimately put up money to settle the case. If you are there to convince the other party that they will surely lose, offering them money on their case is not an effective way to do that. Moreover, all that statement did was anger everyone in the room – the parties, the lawyers and the mediator. The next hour was spent cooling everyone down enough to return to mediation. Even if the case is a travesty, temper your enthusiasm for your defense if you are going to mediate in good faith.

William Lancaster

Sometimes, I want to bag the whole opening presentation thing. We only have so much time!! We spent the whole morning just on opening presentations, and now we only have two hours to negotiate! That guy was so boring!!! Can you believe that presentation!! What a dog and pony show!!! I really had to pee!!! And, so did everyone else. Did you ever see the bathroom after opening presentations end? It's like half-time at a football game!!

Steve Joseph

Listen And Learn

Last month, during a visit to Jerusalem, I was privileged to meet several representatives of "Seeds of Peace" – an international program that brings together teenagers from regions of conflict to share in a three-week summer camp experience at a lakeside setting in the woods of Maine. The purpose of the camp is to allow "young leaders from both sides of major conflicts to meet their enemies face-to-face, often for the first time in their lives."

Among the representatives I met was a 17 year old Israeli, who – with wisdom and maturity far beyond his years – spoke articulately about his summer camp experience. He explained how he entered the program with a political point of view that was actually far to the right of his own parents, but that in meeting, talking with and ultimately befriending Palestinian youth, he began to understand and appreciate that there were other points of view that deserved to be heard and considered. As he himself put it, he listened and he learned.

He talked about how he listened as his Palestinian counterparts described their daily lives, and how he realized – for the first time – that the thoughts, feelings and experiences he shared in common with his newfound friends might just be greater than the differences. He talked about how he and other Israeli teenagers had been teamed with Palestinians in basketball games against current NBA players, and how they quickly learned it was necessary to cooperate with one another and work together in order to be successful.

Using words I was not expecting to hear from a 17 year old – words like "negotiation, "mediation," "compromise," and "resolution" – he reminded me, in a way I won't soon forget, that in our effort to resolve conflict, whatever its nature and whatever its source, we can never place too much emphasis on the need to listen and learn.

Floyd J. Siegal

In mediating disputes between businesses, it is important in the opening presentation, and in preparing your client, to emphasize that the mediation is an opportunity for the people that understand their business best to take control of the process, and arrive at the most rational, business-like resolution. A few years ago, I represented an uninsured consulting firm in a professional liability case involving a claim of approximately $10 million. Despite the best efforts of a skilled mediator, the case was not resolved and we went to trial. The mediator had included remarks in his introduction to the parties about the benefits of having control over the dispute resolution process. I don't think that point hit home with the president of my client until she saw the eight members of the jury, none of whom knew anything about the client, her profession or the nature of the services at the heart of plaintiff's claim. The case settled soon after the client realized she did not want the fate of her company decided by six strangers.

Brian Ade

E. <u>The Private Caucus Sessions</u>

- ✓ The feeling out process.

As noted above, after the opening presentations are completed, the mediator will break up the parties, and usually meet with each side separately in private caucus sessions. While most mediators will use the initial caucuses as learning sessions, some mediators may immediately attempt to probe exactly how much the plaintiff is willing to take, and how much the defendant is willing to pay. Since this is a mediation and not a settlement conference, unless the mediator comes in offering a substantial move off of the previous position by the other side, you should avoid the temptation of providing an answer to this question.

The clients on each side want to feel a sense of justification for any resolution that is achieved. They are also exchanging their "day in court" for this day of mediation. Therefore, you should allow your client to use the initial meetings to vent any outrage and frustrations he or she may feel that has been brought on by whatever wrongs the adversary has wrought.

A good mediator will patiently listen and show understanding to the frustrations your client may have brought to the mediation. This is all a part of the mediator's attempt to win the confidence and trust of the parties.

The early caucus sessions should not be used as a question and answer period with the mediator asking all the questions even though this is clearly going to be the mediator's primary agenda. This is also your opportunity to focus the mediator in the direction you want to go. In the initial private caucus session, you should point out the key "roadblock" issues that you believe the other side will have difficulty addressing. Always assume that the other side comes in with a firm position, and the mediator alone will not know how to move the other side off of that position. Direct the mediator to the weaknesses of the other side's positions. If these points are presented by the mediator in a "neutral" manner, you may be successful in achieving movement from the other side.

You have now set the groundwork to have the other side make the first move in the negotiating process.

I was at a mediation in Minot, North Dakota on a case that was venued in Indian Court. So, in the initial private caucus session, I started explaining to the mediator what a defensible case we had. He looked at me with his head shaking, and told me to stop.

"There's never been a defense verdict in Indian Court."

Never?

Never?

Not one?

Zero.

Oops!! I guess we better get this one settled.

You guessed right!"

I turned to defense counsel, and asked:

"And how come I find this out now?"

*(*The plaintiff also happened to be the daughter of the Chief Justice of the Indian Court!)*

Steve Joseph

- ✓ Educate the mediator on any difficulties the other side may have with the trial option.

If the mediator were put in the position of decision-maker, the focus of your presentation would be solely on the merits of the case. However, since the mediator's primary role is that of a facilitator, any factors that would make the trial option unattractive or even

unrealistic for the other side should be identified for the mediator. These factors were undoubtedly the reasons that the other side accepted (or made) the offer to mediate. The case may be one that is too expensive to litigate. The opposing party may be in dire financial straits or is advanced in age and doesn't have the patience or ability to wait a few years for a trial date. The trial may be one that would take four weeks; and the opposing party can't be away from his or her business for that long a time. A trial may bring on unwanted negative publicity to the opposing party.

These arguments, which have nothing to do with the merits, may be the ones that persuade the other side to accept a deal substantially less or substantially more than what their own mediation resolution goals may have been.

Deal Or No Deal

On those few occasions – okay, more than a few occasions – when I indulge in the guilty pleasure of watching "Deal or No Deal," I'm always fascinated by the contestants' decision-making process when offered the choice of either accepting a large sum of money or opening another briefcase, knowing the offer will go up if the briefcase happens to contain a small denomination. Seemingly oblivious to the fact that the offer will drop dramatically if the briefcase contains a large denomination, contestants routinely ignore the risk and – more often than not – go home with a mere fraction of the best offer he or she had earlier rejected.

A recent study appearing in the Journal of Empirical Legal Studies [Volume 5, Number 3, September 2008] suggests that litigants may well be prone to making the same mistake as the contestants on "Deal or No Deal." The study, authored by Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, analyzed "2054 California civil cases ultimately resolved through trial or arbitration, following unsuccessful settlement negotiations."

According to the study, 61.2% of the cases resulted in an outcome in which plaintiff failed to do better than the best offer plaintiff had rejected, while 24.3% resulted in an outcome in which defendant failed to do better than the lowest demand plaintiff had made. In only 14.5% of the cases did both parties "win" – i.e, defendant paid less than plaintiff had wanted, but plaintiff recovered more than defendant had offered.

In opting for trial, defendants made the wrong decision much less frequently than plaintiffs, but the study also found that defendants' mistakes proved to be far more costly. On average, plaintiffs recovered $43,100 less than the highest offer they had rejected, whereas defendants, on average, paid a whopping $1,140,000 more than plaintiffs' lowest demand.

One lesson to be learned from the study is that the parties to a dispute must carefully assess the potential upside <u>and</u> the potential downside before rejecting a settlement proposal. Unless the parties are so far apart that <u>both</u> sides are reasonably certain to obtain a better outcome by going to trial, resolution short of trial will <u>always</u> be a better option for one of the parties.

If you and your client cannot predict with reasonable certainty that opting for trial will result in a better outcome, the best advice you can give is to shout "deal" rather than "no deal" when the opportunity presents itself.

Floyd J. Siegal

- ✓ Do not make a potential favorable ruling on a summary judgment motion the focal point of your position.

Many attorneys go in to a mediation and make the mistake of arguing that if the other side does not agree to their settlement proposal, it faces having a summary judgment entered against it. While this certainly can be made a part of your negotiating strategy, it should not be the focal point.

There are two problems with making this the focus of your negotiating position. The first is one of credibility. If you try to present yourself as having overwhelming confidence that you will be successful with this motion, the mediator may rightfully question, "why are you here?"

The second problem is that it is unlikely that you will be persuasive enough to convince the other side of your perceived chances of success. If the other side believes that you, in fact, will not be successful, but feels that you are only negotiating with discounted numbers that reflect potential success, it may decline to negotiate seriously until after this motion has been decided. If the motion is then denied, the other side will rightfully expect that your client will negotiate in the settlement range it originally proposed at the mediation.

If you do bring up a motion for summary judgment, make it part of a larger picture that you are painting. The point you are making is that you get a lot of bites at the apple, and the fact that you can even file a summary judgment motion shows that you will be taking big bites!

I went against my own rule a few years ago at a mediation in Seattle. Here's what happened. We had filed a summary judgment motion, and a day before the mediation, the Judge who had our motion indicated that he was not going to rule on our motion until the following Monday.

We had thought that this was an excellent sign. If the Judge did not like our motion, he could have simply denied it, and wished us the best at mediation.

The mediation involved a number of professionals including our insured. The mediator came into our room, and made an inquiry "All the other professionals offered their policy. Where's yours?" Of course, I had to explain to the mediator that we felt pretty good about our summary judgment motion.

He didn't want to hear anything about that, and of course, the case did not settle.

Our summary judgment was granted the following Monday.

Steven Joseph

- ✓ Focus your discussion on facts you can prove to a jury.

It is more important to focus your arguments to the mediator on those factual issues that you believe you can prove to a jury. Moreover, it is important to express your position in this manner. This will present your side as one that has considered the trial option; it also addresses a challenge to the other side to convince the mediator of facts that suggest the contrary. If you have selected factual issues that cannot be disputed, you have placed a significant burden on the other side to move closer to your settlement position.

If I am trying a case, I would love to be able to have the case that I can tell a jury the promises I can keep, and of course, I am not the finder of fact. The folks on the jury are, and if I keep my promises, they should find for my client, and if I can't I want them to find for the other side.

And of course, after I tell them the promises, I will tell them that these promises are iron clad, rock solid, and that I am so confident that I will keep my promises, that I am inviting opposing counsel to stand up during my opening statement and tell the folks on the jury that I can't keep them. And, of course, he ain't standing up!!

In a trial, I am making promises that I know 5000% that I will keep. In a mediation, I have more leeway. I believe I can keep these promises. It's a good faith belief, but it doesn't have to be a 5000% belief.

Steve Joseph

The "promises" speech deals with the Opening Statement at a trial. But there is the "common sense" speech that mirrors the Closing Argument. You like to have the kind of case where you can tell the jury that the case is your favorite case to try…not because of fancy experts or complex legal issues…but rather, it is about plain and simple common sense. Whenever I can rely on the common sense of a jury, the jury will always do the right thing!

Steven Joseph

Shades of Gray

One of the most common obstacles to the resolution of disputes is the natural tendency of the parties, and/or their respective counsel, to each view the factual or legal issues giving rise to the dispute as having only one possible interpretation – an interpretation, of course, that is most favorable to their position. This "black and white" approach to the underlying dispute often renders compromise impossible.

While there are undoubtedly occasions when the facts or law are indeed either "black" or "white," most disputes actually come in shades of gray. The ability and willingness to see disputes in shades of gray is usually a prerequisite to resolution. If one thinks of "black" and "white" as opposite extremes on the continuum of compromise, it becomes

readily apparent that resolution is not possible until all parties are willing to move into the gray area. Once one sees the dispute in shades of gray, it becomes much easier to move from one shade of gray to another that may be a bit closer to the opposing party's point of view.

The capacity of counsel to see a dispute in shades of gray – and, more importantly, to help his or her client to do so – generally makes for more effective advocacy in the mediation process. The ability to persuade one's own client to view the dispute from another perspective is often the catalyst needed to move the process from impasse toward compromise.

Equally important, a willingness to acknowledge – to the mediator, to opposing counsel and to any opposing parties – that a dispute is not necessarily "black" or "white" and that there may be potential merit in some of the positions and arguments advanced on behalf of an opposing party is not a sign of weakness, but rather lends credibility to one's own advocacy, which can be an invaluable asset if a line in the sand later has to be drawn.

Floyd J. Siegal

- ✓ Identify to the mediator in the early caucus sessions those issues or items that are either "not negotiable" or that limit your ability to negotiate.

It was pointed out above that in the early caucuses the mediator will be trying to ascertain the negotiating latitude of the parties. The mediator will use this information in trying to formulate the various ways in which the dispute might be resolved. This process begins before the mediator even starts to solicit settlement proposals. Thus, it is important for the attorneys in the early caucuses to advise the mediator of those points that are "non-negotiable."

Such issues or items should be identified from the outset for two reasons. First, if you allow such issues to become part of the discussion, you give the issue credibility for consideration as to what the ultimate settlement number may be.

For example, suppose you represent the interests of an insurance company. The plaintiff's damages may encompass both insured and uninsured portions of a recovery that would be collectible after a judgment taken at trial. If the discussion of the issues at the mediation include the topic of what uninsurable damages may be recovered at trial, the plaintiff and the mediator will rightfully assume that this uninsured portion of a recovery is being given serious consideration as part of your settlement offers.

An example from the plaintiff's standpoint is the problem of existing liens on any monies that are eventually recovered. A plaintiff may have unpaid medical bills or a worker's compensation lien that will have to be satisfied before the plaintiff will realize any benefit from the settlement. The plaintiff's counsel will need to address the issue that any settlement amount will have to be greater than the existing liens if the plaintiff is to have any incentive to settle at mediation.

The second reason that this is so important is that you want to be able to steer the discussion into "your ballpark" as much as possible, and away from what you may consider to be collateral issues that would be unfavorable for your client.

For example, your client may have an honest fear of negative publicity that would result from a trial. The other side realizes this, and of course, during the mediation, will bring this up as an issue, and a reason for your client to accept what you believe is an unreasonable demand. In another example, the plaintiff may be advanced in age. The defendant will want to use this issue to its advantage by arguing that the plaintiff may not be in sufficiently good health to endure the rigors of battle in a courthouse that may be years away.

The "non-negotiable" card must be used with substantial forethought and should be supported by factual statements. This is because the other side is likely to question why a settlement cannot be reached that encroaches on a "non-negotiable" matter. The mediator must be given ammunition that not only satisfies the mediator, but will be sufficiently convincing to the other side to cause it to back away from the issue and seek other ways of resolving the dispute.

"When It's Not About Money"

While most litigated matters tend to involve claims in which one party seeks to recover monetary damages from another, there are a wide variety of disputes about which it can genuinely be said that "it's not about money." Whether it is a bitter squabble between former business partners, an emotional feud between estranged siblings, a heated quarrel between bickering neighbors, or a myriad of other examples, many disputes can be best described as "relationship" driven.

Disputes that are "relationship" driven are frequently, though not always, grounded in distrust. Without trust, there is little chance the parties will cooperate with one another in the dispute resolution process. Unless the parties are willing to cooperate with one another, any suggestion that they collaborate in an effort to find possible solutions is likely to be met with resistance. Unless the parties collaborate in solving the problem, resolution becomes virtually impossible.

When it's not about money, counsel can often play an even more pivotal role in resolving the underlying dispute. Freed from the need to focus primarily on the competitive nature of distributive bargaining, there is greater freedom to shape ongoing discussions in a way which promotes building – or rebuilding – a relationship of trust between the parties. In order to do so, of course, it's important to avoid adopting an adversarial or confrontational tone.

It's also important to remember – and to remind the parties – that establishing or reestablishing the necessary level of trust is usually an incremental and painstakingly slow process that requires great patience and persistence. Often times, it may also require that each party remain open to: (1) acknowledging the other side's feelings and

point of view; (2) offering an apology; and/or (3) helping the other side find a way to save face.

When it's not about money, the personal satisfaction that comes from having helped the parties to resolve their differences is unique and somewhat difficult to describe – suffice it to say that it's a feeling money just can't buy.

Floyd J. Siegal

- ✓ Draw a negative inference to any "new" surprise information but be prepared to give a small discounted value to "new" surprise information.

By the time you get to the mediation, hopefully both parties have carefully evaluated each other's position, the evidence that has been presented, and based on the information at hand, each of these parties have hopefully come to a logical reasoned based decision on the value they have put on the case, and are ready to negotiate in this range.

However, surprises can happen at mediation. For example, one party comes in, and has an additional $100,000 in special damages, and while they may have conveyed a lower settlement range prior to the mediation, the demand is now substantially increased in view of this new information.

You now have a few choices. You can tell the mediator that based on this new information, we have to declare a temporary impasse, review the information, possibly even take a number of depositions based on this new information, and reconvene at a later date.

That may be a good negotiation threat if you can look at the new evidence and quickly determine that the evidence is rather questionable. You are calling their bluff. However, it may be difficult to determine the quality of the information in the small amount of time allotted at the mediation. If it turns out that the new evidence changes the case, you can expect to return to the mediation months later negotiating at a new higher (or lower, if evidence comes from the defense side) range based on the confirmation of the evidence.

The new surprise information should be strongly challenged based on the timing that the evidence was disclosed. Find out exactly when this new information was obtained by your opposing party. Chances are that the information was available a substantial time prior to the mediation, and was not disclosed timely.

Now, the next step is to ask the question as to why the information was not provided. Answer your own question. If this information is a "game changer" as the other side would want you to believe, it is your experience that it would have been provided exactly at the time it was available to your opposing side. The fact that this information was only first provided at the mediation calls the new information into question.

Be careful here not to give the new information absolutely no value (unless what you have been provided with does not have any information of merit). If you do, that may put the other side in a deep corner in which they may have no choice to declare an impasse,

and you can end up spending a lot of money doing the additional discovery and simply coming back months later, and negotiating in a completely new higher (or lower) range.

Turn this into an advantage. The reason that new surprise information is provided on the day of the mediation is that it takes away the attention from other weaknesses in your opposition's position. Make it clear to the mediator that this is exactly what your opposition is trying to do.

Also, indicate that you are willing to give it some small consideration in your negotiation. So, you are taking control of the issue, and setting the terms of the negotiation back close to the range you have in mind. At the same time, you are allowing the opposition that they have gained something for themselves by providing the new evidence.

- ✓ Set the pace of the negotiations.

The mediator's primary and continuing objective is to get one party to gradually pay a little more money, and the other side to gradually agree to take a little less. If the parties each begin with reasonable offers and demands, the negotiations on dollars can begin right away to neither side's displeasure. However, it is more likely that the two parties will enter the negotiations far apart, with both sides seeing the other's position as unreasonable or even outrageous. In this scenario, the danger of getting into the numbers game too quickly is that both sides increase the chance that the resolution, if one is achieved, will end up "splitting the baby." It is for this reason that many mediators do not even seek to elicit settlement positions at the outset.

Because of this danger, you should try to control the pace of the negotiation instead of having the mediator do it for you. If the mediator presses your side to come up with a number before the parameters of the negotiations are established, your response should be: "While we come to the mediation to negotiate in good faith, and we are prepared to make a substantial move off of our negotiation position, we do not believe it would be advisable for us to make such a move at this time. The other side has not made a reasonable offer/demand, and we believe that, after you have had an opportunity to discuss the weaknesses of the other side's position as well as exploring the key issues with us, we may then know whether there is a basis for modifying our position."

Attorneys should not assume that they are required to rush into making proposals in order to keep the negotiations going. Indeed, it is not uncommon for there to be little or no movement in the positions of the parties through the early rounds of caucuses. In fact, many mediators don't even press the parties for concessions until after several hours of negotiations.

On the other hand, they will try to end each caucus session by posing an issue to the party, requesting that the party reflect upon it while the mediator is speaking to the other side. This technique not only may help to prompt a further concession during the next caucus, but also keeps the party focused on the job of resolving the dispute while the mediator is engaged in discussions with the other side.

It's Your Move

Much like chess, settlement negotiations begin when one of the parties makes the first move. But which party should that be? Intuition might suggest that having the opposing party make the first move will work to your advantage because it will give you greater information about that party's strategy, expectations and level of confidence. However, research suggests that those who make the first offer or demand frequently end up with a better result.

Human nature is such that we tend to determine something's value by first considering the value placed on that same thing by someone else. In one experiment, for example, real estate agents who were asked to estimate the fair market value of the very same home were more likely to place a greater value on the home when it was listed at a higher asking price than when it was listed at a lower asking price. This mental process is often referred to as "anchoring," in that the first number we hear tends to psychologically pull or draw us toward that number, thereby establishing that number as an anchor for further negotiations – i.e., the number against which future concessions will be measured or compared.

When two sides have relatively equal knowledge and bargaining strength, the side that chooses to make the first offer or demand establishes the anchor, thereby gaining a potential advantage – provided, of course, that the first move is within the range of reasonableness. For that reason, the party making the first offer or demand should not be afraid to be more aggressive in doing so, thereby establishing a more favorable anchor – assuming, again, that the first move is within the range of reasonableness.

The corollary to the above is that a party lacking knowledge and/or bargaining strength may be better off choosing not to make the first offer or demand, in order to avoid revealing his/her lack of knowledge or appearing to be too eager to settle.

Although making the first move will often prove to be a wise negotiating tactic, whether you should do so in a particular case necessarily depends upon all of the circumstances. Therefore, carefully consider the potential risks and benefits before making your decision. In other words, whether you decide to make the first move or await the first move of your opponent, make sure it's <u>your</u> move.

Floyd J. Siegal

- ✓ Understand that no movement may be better than making a very small move.

Sometimes, a mediator may attempt to elicit a substantial concession from your client. If you are not ready or willing to make such a move, you may make one that is insignificant in an effort to send the message that your client cannot be persuaded into making a major concession.

Such an insignificant move could be counterproductive, as the other side may conclude that you are not negotiating in good faith. In the alternative, the opposing party may be encouraged to make its own meaningless gesture. The mediation process can then

quickly disintegrate, with the parties concluding that the process is a waste of time. Thus, any bad feelings that existed before the mediation will now be hardened.

On the other hand, if the mediator asks that your side to make a small, insignificant move, you could set off the same chain reaction. In either case, you should ask the mediator what he or she thinks will be gained from such a move and why the move should be made at this time. The mediator may have discovered that the other side has become unduly frustrated and is about to walk out or that the other side is closer to your settlement position than you think.

If the mediator does not come up with a good answer to this question, advise the mediator that you do not believe that such a move will be productive at this time, but that you will be prepared to make the requested move after you hear more about certain issues that concern you.

THE CONCESSION SPEECH

"I'm not going to bid against myself."

From the perspective of a mediator, few things pose a bigger challenge during mediation than hearing those words. However, even the most skillful negotiator will sometimes paint himself or herself into a corner, leaving only two options: (1) make what Professor Barry Goldman, author of The Science of Settlement, refers to as "a consecutive unreciprocated concession,"

or (2) refuse to do so, thereby leading to a premature and perhaps unnecessary impasse.

When those are the only viable choices, it may be time to consider "the concession speech."

In order to reach a settlement, those involved in the negotiating process must cooperate with one another even as they compete with one another. Occasionally, one party undermines cooperation by being overly competitive – i.e., by making a demand or offer which, though designed to maximize that party's bargaining position, is viewed by the opposing party as

being so extreme and outrageous as to not merit a response. Once cooperation has been undermined, the surest way to reestablish cooperation is to accept responsibility for having been overly competitive and to then make some further concession.

The concession speech can take many forms. It can range from the humorous ["believe it or not, sometimes that actually works"] to the contrite ["that was an unfortunate mistake on my part"] to placing responsibility elsewhere ["my client insisted"], but it must sincerely communicate a desire to reestablish cooperation and engage in further negotiations.

Contrary to what many believe, the concession speech – when handled correctly – is not a sign of weakness. In fact, it can be rather disarming, often yielding unexpected benefits. For example, those with the confidence to bid against themselves may be viewed more credibly when they later indicate they have reached their "true bottom line." Similarly, those willing to bid against themselves are sometimes able to extract greater concessions from their

opponent toward the end of the negotiating process, by reminding their opponent of the consecutive unreciprocated concession made earlier in the process.

When the choice comes down to bidding against yourself or engaging in an unwanted trial, the concession speech may prove to be your most winning strategy.

Floyd Siegal

The "consecutive unreciprocated concession" can be done successfully, but it should not be done unless it is done with great care.

First and foremost here, if I am doing this, I have to be in a position where I still have a lot of room to move even after the consecutive move. Usually, this comes when the parties are still far apart so even after this move, the parties will be far apart. So, if this is your last move, you may be wasting your time, and you can simply say that you are at an impasse.

When I do make the consecutive move, I won't suggest it on my own. The mediator suggests that I make the move. I question the mediator on what he or she will do with it, how it will be presented, and make it absolutely clear what my expectations are if I go ahead and make this second concession.

I am having the mediator sell this to me so I want to see what the mediator is offering. Quite often, the sale is made when the mediator will tell me up front that if I make this move, he or she will work very hard and feels quite confident that there will be a reciprocal move on the other side.

Once I am absolutely satisfied what I am being sold by the mediator and with the message that the mediator will take to the other side, I will make the move.

I find that the mediator will come back with what was promised to me – a substantial move on the other side. This makes sense because think about the pressure that is on the mediator now. If the mediator comes back with nothing, the mediator may rightfully believe that he or she has lost credibility for later sessions when approaching me with further concessions.

Steven Joseph

- ✓ Take full advantage of a good client and your opposition's bad client.

Trials quite often are popularity contests, and who the jury likes better can be more important than the facts. There are two questions you should think about. First, will the jury have a strong desire to compensate this particular plaintiff? If the plaintiffs are widows and orphans, they will likely have that desire just to put money in their pockets.

The second question is, "will the jury have a strong desire to see this particular defendant lose?" Sometimes, the jury award can reflect the fact that they just didn't like the defendant or worse, they just couldn't stand the attorney who was making arguments that might belong on a law school exam, but not in a courtroom.

In many instances, the demands and offers being made in a mediation reflect the view that a jury will love their client and hate the opposition's client. Too often, this is far from being the truth. Make sure this fact is recognized, and insist that the negotiation should be with numbers that are more reflective of a realistic popularity contest.

- ✓ Never respond to threats that the other side is prepared to leave unless your side makes a substantial "next move."

Sometimes when an adversary becomes unhappy with the concessions you are making in the mediation process, it sends a message through the mediator that "unless your side makes a substantial move off of your settlement position, we will walk out of the mediation."

Always respond to this tactic by calling the opposition's bluff. However, do it tactfully. Indicate to the mediator that you cannot make response to threats the basis of the negotiation. The issues, and only the issues, should be what move the negotiation. Remind the mediator that it is his or her job to keep the parties focused on the issues, and away from unilateral threats. You may also indicate that there is still room in your settlement position, but that you are yet to receive justification for making a move. Lastly, indicate there is still plenty of time for the parties to reach a mediated settlement of this matter.

Of course, the mediator may, in fact, be correct in his or her assessment that the other side will terminate discussions if a significant concession is not forthcoming and that the other side is not prepared to make any similar concession until after your client has modified its position. This assessment should be probed to determine whether or not it is realistic or whether the mediator has been taken in by a "grandstanding" tactic of opposing counsel.

If you conclude it is the latter, you have little choice except to call this bluff which you can do by pointing out that even the last offer you have made is better than a litigated result, taking into consideration the time, the additional costs and the uncertain outcome.

Even if you conclude that the other side may be becoming frustrated with the seeming futility of the process, you should not feel constrained to respond with a significant concession. Instead, you should ask the mediator to convey your willingness to make a substantial concession if the opposing party will address how it plans to overcome certain specified strengths in your case. In this way, you are conveying your willingness to make

the concession the opposition is looking for while at the same time sending the message that concessions are won by addressing the issues and not by making threats.

- ✓ Indicate that you are negotiating their best deal, not your best deal.

I never expect to make a deal if I am making arguments why it is my best deal. For some reason, I have never had opposing counsel walk into the room, and tell me how good they are going to make me look. For some reason, I find that it is their job to make me look as bad as possible.

That is why I have to make arguments why whatever number I am offering can be considered their best deal. While I am doing this, I challenge the other side to do the same thing. If we are trying to negotiate each other's best deal, we can usually find room for resolution at the end.

Note that many times, a negotiation results in failure because this is not done. The plaintiff's attorney is demanding $5 million when the best they can do at trial is $1 million. Well, the other side doesn't have to do a lot of thinking on that one. The better deal is to try the case.

Similarly, a very low offer is made. "We will pay you $5 thousand to settle. Not a penny more." Well, the other side will know that it will cost you $20 thousand to try, and the worst they think they will do is get an award of $50,000.

Neither party will get a deal if they are not cognizant of the other side's best deal.

- ✓ Clearly identify to the mediator the issues that, if clarified by the other side, will most likely result in movement by your side.

Some attorneys may be reluctant to put any of their cards on the table since they believe, by doing so, they will disclose their trial strategy which could be detrimental to their client in the event that the case does not settle. While there is no expectation in a mediation that an attorney will provide his or her trial plan, it is also not reasonable to expect one side to make a substantial concession if the other side has nothing to show.

Equally important, you must be prepared to show that you have given serious thought to the trial of the dispute and have fully assessed that alternative. It is difficult to convey that impression or the impression that you have even assessed the case if you are not prepared to discuss the merits. Thus, if you are unwilling to reveal the issues that you intend to present at trial, you are likely to be condemning your client to such a trial.

In addition to educating the mediator on the weaknesses of the other side's case, you should identify for the mediator those issues that need to be clarified by the other side, and which, when clarified, may result in movement by your client.

This is an effective negotiating technique if the issues you intend to establish, for the purpose of getting the other side to move, are issues that are easier to establish than those

issues that your adversary may attempt to establish to obtain a concession from your client.

- ✓ Review the message.

After the mediator has completed the discussion with your side, and just before he or she proceeds to begin discussions with the other side, review with the mediator the issues that you wish for the mediator to initiate on his or her own behalf, and what messages or issues you want to direct to the other side on your client's behalf.

The messages that you are sending, and the issues that you are identifying for the other side to address, should focus on the rationale for the position you have taken. You have indicated what information your client has based his or her decision on. You can identify issues for the other side which suggests that if additional information is given, you would consider moving off of your position.

For the mediator, you are providing the ammunition that, in the role of devil's advocate, the mediator can question the premises on which the other side has come to its position. If the mediator can persuade the other side that its own reasoning is faulty, the mediator can get movement from the other side on this basis.

"Arguments vs. Facts"

I recently had a conference call with defense counsel in preparation for what we felt was going to be a very contentious mediation. The attorney spent a full half an hour going over each of the arguments he was preparing to make.

When he was done, I told him that the arguments he was going to make are all excellent, but I asked him to restate the arguments as "facts" he thought he may be able to establish.

When he was done, I asked him what he thought was the more powerful presentation. He admitted that by presenting his argument as facts, the arguments had a greater level of authority that it had just 20 minutes before when they were just plain arguments.

There will be, of course, contested facts, but when you verbalize facts as arguments, you create an inference with the mediator that there is a hidden concession in your words. You concede that you just may be wrong.

Steven Joseph

- ✓ Identify the "home run."

In the joint meeting of the parties, you will have laid the groundwork presenting the merits of your client's position and in the initial private caucus sessions you will have identified the weaknesses of the opposing side's position with the mediator. There may have even been initial moves off of the settlement positions that the parties took going

into the mediation, but the moves have been in such small increments that it suggests to both parties that the mediation is beginning to look like a waste of time.

This is when you may want to talk in baseball terms. Remember, you should always be presenting your settlement position as an alternative to a lengthy trial down the road. As such, you may want to propose that both sides should examine the issues that will be presented to a jury, and try to figure out what damages, if any, a jury may award if the plaintiff wins. This is what can be called the "most likely home run."

The "most likely home run" will be very different for both sides. The plaintiff's attorney's home run will include prejudgment interest and punitive damages. The defense attorney's home run will include a reduction of any award because of the plaintiff's comparative negligence. The plaintiff may take a chance at losing some credibility if its attorney tries to argue a number well above the range of an award that would be likely given by a jury; and similarly, the defendant can lose credibility if he argues that the likely award, if any, is unreasonably low.

The mediator can then form in his or her own mind the range of where a reasonable home run for the plaintiff may be. The parties can then focus their discussion with the mediator how big the "strike out" zone may be that creates the risk for the plaintiff that there will be no recovery.

No one on the defendant's side can reasonably be expected to recommend that the plaintiff simply be given a home run. Instead, the defendants should argue that if the plaintiff wants a home run, the plaintiff and his or her counsel should walk over to the ballpark (courthouse), put on their uniforms, grab the bat and try to hit one out.

At the same time, the plaintiff's attorney's position is that it is unlikely that his or her client will strike out and that it is not reasonable for the defendant to expect that the plaintiff will agree to strike out without even taking a swing at the ball. Thus, the scope of the negotiation should focus on the area between what a reasonable defendant might conclude the plaintiff might take and what a reasonable plaintiff might think that the plaintiff might win.

After the strike out zone is determined, the next issue is what it will take each party to get to the ballpark. What is it going to cost? Both the plaintiff and the defendant will have to confront the time and money that will be spent to get there. The ticket to the ballpark can be very expensive for both sides. These cost considerations, thus, should narrow the strike zone, or the range for negotiation.

Whether it is a plaintiff or a defendant that you are representing, by using this analysis, you are beginning to make the argument that the resolution you are going to propose at mediation will be the best net result the other side can hope for.

In this regard, it should be appreciated that mediators will try to assess the reasonableness of the parties' offers and focus their energies on the party whose offer seems to be the less reasonable. It's somewhat like an appellate argument. If the mediator is spending a lot of time with you and your client, it's not because the mediator prefers you or your

position to that of your adversary, but rather, it's because the mediator believes that you and your client are more in the need of a reality check. Some mediators put it this way, "The party that makes the first truly reasonable offer achieves an upper hand because it causes me to focus my attention on the opposing side."

When I talk about the "reasonable home run," I am quick to always point out that it presumes that the attorney on each side will do a fine job for their client. It is never about my attorney is better than your attorney.

However, when I talk about the reasonable home run, I do talk about the case in terms of what position it would be in the line-up. Are we talking about Barry Bonds in the clean-up spot, or is this the weak hitting number eight hitter?

If we have the number eight hitter, it is a different case than number four. However, we are focusing on the case, and not the abilities of opposing counsel.

Steven Joseph

In discussing the home run, I am also reminded on the questions they ask to mock juries when doing jury analysis: "Do you have a strong desire to compensate this particular plaintiff?" The thought here is that with a very sympathetic plaintiff, a jury may not care about the facts, but would just want to put money in their pocket. The second question is "whether there is a strong desire to see this particular defendant lose"? Here, a jury may just want to stick it to a jury. Roles and questions can be reversed depending on the case. But, this is something to think about when presenting "home runs and strikeouts".

Steven Joseph

- ✓ Prepare some arguments that you believe will not be anticipated by the other side, and save them for the later caucus sessions.

Just as you and your client have thought about what an acceptable range of the settlement amount may be, the other side will have thought about their own acceptable range. If the two ranges overlap, little creative thought may be required to resolve the case. However, if the two ranges not only do not overlap, but are far apart, you have to think of arguments that may cause the other side to shift their acceptable range closer to your client's acceptable settlement range.

The other side will undoubtedly be aware of all the arguments that could have been learned through the discovery that has taken place, or that may have been briefed for a motion. Thus, the most creative arguments are likely to be found in collateral issues that affect the other side's decision-making process, but which have nothing to do with the merits. This might include time or monetary pressures affecting the other side, or the increasing likelihood that key witnesses may become unavailable.

Other creative arguments may be found through surmising what future discovery may do to the other side's position in the case. If the other side learns of something new, it should be expected that it will reassess its settlement position.

Again, the focus is on what makes the settlement position being offered a better alternative to the other side than a litigated solution. Thus, any fact that decreases either the likelihood or magnitude of the victory being sought by the other side is likely to move that side closer to accepting your client's offer. While it is perfectly appropriate in the early stages of negotiation to allow the other side to believe that more favorable offers will be forthcoming as the mediation progresses, as more fully discussed below, at some point the attorney must convey the impression that the offer on the table is the only alternative to a litigated solution.

- ✓ If there is another day scheduled for the mediation, do not allow the mediator to caucus well into the night unless substantial progress is being made.

Even if there is a second or third day of the mediation scheduled, some mediators may try to push the caucus sessions well into the late hours of the night even if little or no progress is being made.

This extra effort can be counterproductive. The attorneys and their clients will grow hungry, tired, and weary. Tempers will become very short, and frustrations will grow. The parties can end the evening no closer towards reaching settlement, and they will not look forward to the next day of the mediation. In fact, the parties may grow so jaundiced that they will give up on the process altogether, and ditch the notion of a second or third day of negotiation.

If there is little progress being achieved in the settlement negotiations, instruct the mediator that your client wishes to call it a night. Indicate to the mediator that you believe it will be more productive for the parties to have a good meal, a good discussion with their respective counsel, and a good night's rest before an additional day of mediation. There's always time to negotiate the next day when all the parties, and especially your client, can come back with clear heads. The mediator will usually accept this request.

Experienced mediators recognize the importance of giving the parties an opportunity to step back from the bargaining and view their positions more globally (which usually means "can we really afford to blow this opportunity to settle the case.") It is for this reason that the mediator, rather than allowing the parties to become frustrated and entrenched in their positions, is likely to welcome such a respite. It will also give the mediator an opportunity to reassess the situation, review his or her notes and try to fashion new approaches to achieve movement toward a resolution.

The mediator, however, is not likely to simply bid the parties a "good night" and send them on their way. Instead, the mediator is likely to give them issues to consider, including at what point does a negotiated solution cease to be better than returning to litigation. In this regard, the mediator may ask the parties to reflect upon the future course of the litigation, its costs and duration and the input on that equation if the other side chooses to appeal any favorable verdict that might be achieved. Here, the mediator is likely to indicate that he would like to explore these issues in depth in the next session to ensure that the parties give them ample consideration.

I was recently at a mediation in which the mediator insisted working into the evening. It was Friday night, no less. Not only that, he declared in the beginning of the process that it was his wife's birthday.

Now, he then proceeded to make the biggest mistake a mediator could make. Knowing that the parties are tired, frustrated and hungry at this point, a mediator really has to show great care and understanding when trying to get movement in the parties' positions.

Instead, this mediator, tired and frustrated himself, just came in and echoed old arguments that did not work and was dismissed by our side six hours earlier. Instead of getting the parties closer, his failed attempt caused further entrenchment in the positions.

He should have sent us home and taken his wife out to dinner!!

Steven Joseph

- ✓ Make sure the mediator follows his or her own standards or guidelines.

Every attorney who does mediations on a regular basis can tell of an experience when they had felt that the mediator was not acting impartially or was overly coercive. If you feel this is the case, you have every right to challenge the mediator. Mediators generally follow the standards that have been set forth jointly by the American Arbitration Association and the Society for Professionals in Dispute Resolution6. Two guidelines that are common to all such standards are that:

1. A mediator shall recognize that mediation is based on the principle of self determination by the parties; and

2. A mediator shall conduct the mediation in an impartial matter.

Especially when a mediator is just starting out, it becomes very tempting for that mediator to use whatever tactics he or she can muster in order to build up a won-loss record. If a mediator can claim that he or she has a 90% or 100% success rate at getting parties to settle, it arguably can be used as a good marketing tool to get more business. However, a mediator should not coerce one side to take less or pay more than the mediator honestly believes should be paid solely in order to give their won-loss record a boost.

The truth of the matter is that attorneys will like mediators who bang heads when necessary. However, you will want any banging of your own client's head kept to a minimum.

- ✓ Remember that it's okay to get a bit excited.

To the unfortunate dismay of many judges, the private mediators getting hired to settle a lot of their cases get paid much more than those judges that have their offices filled with pleadings and briefs in those very same cases.

The fact of the matter is that the mediator's job is more difficult. The judge is armed with the force of law and has the power to compel the parties to act as he or she orders. The mediator has no such power and must use the forces of reason and persuasion to cause the parties to act. It's like trying to land a 200 pound fish using a 20 pound line. Because of this, where you may show enormous restraint and respect in a judge's chambers, those rules don't necessarily apply when you're in the presence of a mediator.

Although most mediations can and should be cordial affairs, at times, tempers and emotions can flare up. And sometimes, it is to your benefit that you don't try to hold it in. Although an attorney should not walk in to mediation, and immediately begin jumping up and down, some mediators may take calmness throughout the process as softness in your position. It is in this situation that you may choose to accentuate the way that you see the case. Tell the mediator if, in fact, you are not satisfied with the process and that you believe a change in the mediator's strategy may be required. Your anger will have a much greater impact if you have previously displayed calmness in the face of unreasonable action by the opposing side.

"You can't make chicken soup out of chicken feathers!!"

Anonymous

Sometimes, I think the best way to show that I am getting to that "line in the sand" number is to start showing that I am getting a bit frustrated and angry. If I come across as very calm and relaxed when I am getting close to my number, that can be construed by the mediator that I still have a lot more room. The last thing I want the mediator to have is an incorrect impression as to where I may want to end up.

Steven Joseph

F. Negotiate the Number.

THE ART OF NEGOTIATING: PAINT WITH NUMBERS

As you ponder your next move during the mediation process, remember that every demand or offer you make will be analyzed by the opposing party and opposing counsel in an effort to deduce your negotiating strategy. Be mindful, therefore, to choose numbers that paint the picture you want the other side to see.

An unreasonable opening demand or offer may, unintentionally, paint a picture that serves to impede rather than promote further negotiations. Similarly, a move during negotiations which is too substantial may paint a picture that completely alters the expectations of the other side and, as a result, the overall dynamics of the negotiating process. Conversely, a move that is too small may paint a picture which, though perhaps not your intention, brings negotiations to a grinding halt.

If your goal is to resolve the pending dispute, your moves should be calculated to narrow the gap that separates the two sides without creating false expectations, while simultaneously communicating a willingness to continue negotiating. When necessary,

your moves should also be calculated to communicate that you are approaching the limits of your settlement authority.

Even when you become convinced that settlement is unlikely, further negotiations can still be invaluable if they enable you to discern the other side's true bottom line. Only when you and your client know the amount that really separates the parties can you make an informed decision as to whether it would be better to settle or proceed to trial.

Floyd J. Siegal

In the early caucuses, you will have identified for the mediator those issues that should compel the other side to move off of their original settlement position. Since it takes at least two parties to negotiate, it is now the time for you and your client to decide how much you will move off of your original position. The same attorneys who complain that mediation too often splits the baby quite often tend to negotiate in a manner that just mirrors whatever move the other side makes. If they move up $5, I'll move down $5. If they move up $10, I'll move down $10. And, so on. However, if you are looking to get the best result possible for your client that doesn't end up splitting the difference, there is a substantial amount of thought that must go into making settlement moves at mediation.

Learning To Dance

Each week, my 12 year old daughter and I join approximately 20 million other viewers and watch – with unabashed and unapologetic enthusiasm – as professional dancers and their celebrity partners compete on "Dancing With the Stars." From the time the program first aired four years ago, I've marveled at how quickly the celebrities learn to dance – more often than not with surprising rhythm and grace, usually earning rave reviews from the trio of judges.

Learning to dance also has its place in the negotiating process. The "dance" – as those in the dispute resolution field describe the ever-narrowing series of demands and offers made by opposing parties – is a necessary component of settlement negotiations because of what Professor Barry Goldman, author of "The Science of Settlement," refers to as "the winner's curse." Without the "dance," there is a psychological tendency on the part of both sides to wonder whether each was able to negotiate the best possible outcome.

As Professor Goldman points out, if one party accepts an opposing party's first offer, the latter is likely to assume he or she made a mistake and that a much better deal could have been struck. On the other hand, when a negotiated settlement is the result of a series of reciprocal concessions, both sides are more likely to walk away from the process believing they have negotiated the best deal they could. Even when a settlement is not reached, the "dance" may enable the parties to discover their opponent's bottom line.

Like its physical counterpart, the "dance" should be carefully choreographed. The first step should be designed to capture the opposing party's attention, without being too extreme in either direction. The next several moves may be likened to the Viennese Waltz, with the parties circling the dance floor, taking generally larger steps at a more

moderate rhythm, gliding slowly – but naturally and with a degree of predictability – toward what is often referred to as the "Zone of Possible Agreement" or "ZOPA."

Once within the ZOPA, the rhythm is likely to change as the "dance" picks up its pace. At that point, the "dance" may be likened to the Quickstep, with the parties taking smaller but faster steps, often in sync with one another, until, finally, the "dance" reaches its logical conclusion.

Learning to dance does require a bit of practice – but once the steps have been mastered, those rave reviews won't be far behind.

Floyd J. Siegal

- ✓ Send message that new offers and demands are based on what information has been presented "so far" by the other side.

By the second and third private caucus sessions, you have already begun to identify to the mediator the problems and weaknesses that you believe the other side will have with its case. As the mediator leaves your private caucus to discuss the case with the other side, the hope is that the mediator will confront the adversary with these issues that you have identified.

If you learn through the mediator that the other side's responses have consisted only of "we'll win!" proclamations, such announcements should not be rewarded with a substantial concession by your client.

On the other hand, if the other side in good faith responds to your concerns and counters with its own attacks on your client's position, you can indicate to the mediator that your change in position was based on the strength of adversary's contentions. In other words, give justification for each of your client's concessions.

You can now challenge the other side that any further moves by your client will require even further justification given by the other side.

- ✓ Create a rationale for numbers that represent new offers and demands whenever possible.

You will be more persuasive to the mediator and the other side if the number being offered or demanded is not an arbitrary number pulled out of a hat. If you present to the other side through the mediator the method you used in calculating your offer or demand, the likely response will be that the move from the other side will have to have its own rationale. When the other side has more difficulty articulating a credible rationale, there will be greater pressure to accept your number.

By attaching a rationale to each change of position as well as to your initial evaluation of the case, you not only force your adversary to provide you with a justification for further concessions by your client, you also send a message that you are bargaining in good faith and expect that he or she will do likewise. This is important because an adversary that

perceives that you and your client are acting arbitrarily is likely to react in kind, which will likely lead to an impasse in the negotiations.

There are those cases that seem simple enough so that the mediator thinks he or she clearly understands the issues, and assumes both parties all know the respective positions so the attitude is why bother discussing the issues at all, and we should all just go straight to trading numbers in a quick back and forth.

I had a mediator recently who wanted to go that route, and after he presented his strategy to us in the first private caucus session, I immediately explained to him that this was not how I worked. With each number, there was a rationale, and by going straight to a numbers only negotiation, I was conceding that everybody actually agreed on all the facts of the case, and the only disagreement was the value.

The problem with this approach is that if we think we agree on the facts of the case, there will be two opinions as to what those agreed facts are. My opposing side will naturally presume that I agree to their version of the facts and that will be far from the truth. If I do not clarify what those agreed facts are, my opposing side will next rightfully presume that I also agree with the value my opposing side has placed on the case.

Steven Joseph

Algebraic Negotiation: "X + WHY > X"

Forgive the title, but I've been helping my son study for his Algebra II course the last few days and it suddenly struck me that the inherent logic of algebra might be a clever way to both illustrate and emphasize the power of "why" in the negotiating process.

An example from outside the world of litigation may help demonstrate my point. Imagine you have been in line at the pharmacy, waiting patiently for five or so minutes. Just as you reach the front of the line, a teenage boy with long hair and the first traces of a goatee – wearing beltless jeans that reveal his boxers – rushes toward you and asks to cut in line. My guess is that your first reaction will be to tell him to wait in line like everyone else, perhaps using some choice four letter words in the process.

Now imagine that the same teenager asks to cut in line, apologetically explaining that his mother asked him to run in and quickly pick up a prescription for his younger sister, who'd fallen asleep in the car on the way home from the hospital, where she'd spent the last two weeks recovering from a serious case of pneumonia. Although the resulting delay to your own plans will be identical in both scenarios, I suspect that your immediate reaction is likely to be more favorable to the latter request than the former.

Negotiations in the context of a litigated dispute are not really that different. An unexplained settlement offer of $20,000 in response to a $200,000 demand is likely to evoke a different response than an identical settlement offer accompanied by an explanation that the maximum value of the claim, assuming stipulated liability, is perceived to be $100,000 and that the question of liability is viewed to be, at best, 20-80.

The latter offer, even if not accepted, is likely to establish a different and better framework for further negotiations.

In short, explaining "why" often serves to alter the reaction to "x" – usually making "x" more acceptable, or at least less objectionable – and that's an integral part of any equation for successfully resolving disputes.

Floyd J. Siegal

- ✓ Prepare in advance the moves in your settlement position that you will make in response to weaknesses in your case addressed by the mediator.

Throughout the mediation process, you will be attempting to provide the mediator with the ammunition in the form of weaknesses in the other side's case in order to cause the other side to compromise its negotiating position. It should come as no surprise that the mediator will try to do the same thing to you. You must, therefore, anticipate the weaknesses in your client's position, and have a substantive response prepared that addresses both how you plan to deal with this issue in a trial setting, and how such weaknesses, now identified by the mediator, change your settlement position.

If this is anticipated and prepared for in advance, you will be prepared to show to the mediator that your client is the more reasonable party throughout the mediation process. This, in turn, might cause the mediator to concentrate more on seeking concessions from your adversary. Sound planning will also make it unlikely that your client will be forced to make an unforeseen change in its settlement position. This can often happen when a client is confronted with a weakness that was not anticipated before the mediation began.

I was at a mediation in Brownsville, Texas, and the mediator came into our private caucus room, and recommended that we offer what we had felt was an unreasonably large amount of money.

I turned to my defense counsel, and asked; "If you tried this case, and the jury awarded that much money, what would your response be? Would you want me to throw you a party? Send you flowers? Give you a large bonus, and many more cases?"

He replied; "No. I would quit the practice of law and seek a new profession!!"

To my knowledge, they only have steel cage retirement matches in professional wrestling. But, wouldn't it be interesting, if…..

Steve Joseph

Give Until It Hurts

Having just celebrated the proverbial "season of giving," it seems apropos to share a few thoughts about the virtues and value of "giving" as it relates to the mediation process.

For those whose goal is truly resolution – as opposed to "winning" the negotiating battle, whatever "winning" may mean in that context – it is worth remembering that giving usually begets giving. Small concessions or information-sharing by one party, whether monetary, factual, legal or procedural in nature, tend to result in concessions or information-sharing of a similar size or kind by the opposing party. Not surprisingly, more substantial concessions or information-sharing by one party typically result in more substantial concessions or information-sharing by the other party. If each party is willing to give something of value every time the other side is willing to do so, the parties will eventually reach an agreement.

The corollary to the above, of course, is that a party should refrain from giving whenever it appears that making a concession or sharing information might prejudice that party's bargaining position. If the opposing party, hoping to gain an advantage, refuses to reciprocate in a manner that is reasonably proportional, it is important to send a message that giving will only continue if and when the other side cooperates and reciprocates.

If one's response to a failure to reciprocate is measured, rather than punitive, the opposing party is likely to conclude there is more to be gained by cooperating. If the opposing party reconsiders its options and then decides to share additional information or make a further concession, it is important to immediately return the favor, thereby reinforcing the notion that cooperation will be mutually beneficial whereas a failure to reciprocate will inevitably result in impasse.

When a party to a mediation gives until it hurts to do so, and then shows a willingness to forgive and resume giving again, there is a greater chance of reaching that critical point in the negotiating process where the parties realize they are so close it would be better to shake hands than to turn and walk away.

Floyd J. Siegal

- ✓ Negotiate the case based on the facts of the case you have when it is helpful to do so. However, sometimes it is more helpful to negotiate the case based on similar cases.

On a personal level, I was involved throughout the 1990s in dozens of legal malpractice mediations. The mediator would spend a substantial amount of time with the plaintiff and the plaintiff's attorney, and after an hour, the mediator would come into our caucus room, say that he discussed the case with the other side, and they say that "juries don't like lawyers" and therefore I should come up with a large sum of money.

I found this tact very humorous. For years, I had been handling legal malpractice actions, and this bit of information was not exactly a revelation My response was "That's every case I have!! Tell me about this one!!"

Years later, I found myself handling cases against nursing home and assisted living facilities. When we would receive a very large demand, I made sure to advise the mediator that we have settled a lot worse nursing home cases for a lot less.

In the first situation, I was negotiating on specific facts and the plaintiff's counsel wanted to focus on the general nature of the case. In the nursing home situation, the roles were reversed.

We both knew what we were doing, trying to negotiate to what would be to our advantage.

- ✓ When you begin to seriously negotiate, use numbers that are in graduated but diminishing increments.

Every plaintiff's lawyer wants to feel he or she has obtained the last possible dollar for the client, and every defense lawyer wants to settle the case for what he or she believes is the plaintiff's rock bottom figure. Many attorneys will not resolve their dispute unless they are convinced of that. Thus, it is very important for you to convince your adversary that he or she is doing just that. And the way to do it is to make your offers and demands in graduated, but diminishing increments.

Assume that you are a defense lawyer at a mediation, and your goal is to settle the dispute for somewhere under $1 million. Under this principle, your first offer may be $400,000. The next is $600,000. The one after that is $700,000. After that, $750,000. Notice that the increments are decreasing. If you negotiated only a dollar at a time, you would have frustrated both the mediator and the other side, and the mediation could quickly end up as a waste of time. By putting out your largest increment first, you are sending a signal to the mediator that you are negotiating in good faith, and you are certainly more likely to have the other side become interested in a good faith negotiation as well.

Because the increments are getting smaller, not larger, you are sending a signal to the other side that you are slowly running out of bargaining room. Thus, opposing counsel gets the impression that he or she is getting the best deal for his or her client. Moreover, the opposing party is shown that he or she is not likely to get a better deal through continued negotiation and now must seriously consider whether the proposal you have made is better or worse than a litigated solution.

BRAKE PROBLEMS

Good drivers and good negotiators share a number of things in common. Both are able to anticipate the actions and reactions of others, and make necessary adjustments accordingly.

Both recognize that sudden and unexpected maneuvers and/or changes in speed can lead to a loss of traction or, worse yet, send things careening out of control. Perhaps most importantly, both fully understand and appreciate the importance of communicating their intentions before coming to a stop, and the risks inherent in failing to do so.

As is true with driving, slamming on the brakes abruptly during settlement negotiations can lead to unintended consequences, delaying or even preventing you from reaching your ultimate destination.

Usually, the better approach is to gently but consistently apply more pressure, letting those around you know – well in advance – that you are preparing to stop.

For example, if you have only $10,000 with which you are willing or able to negotiate, putting it all on the table at one time – essentially declaring "take it or leave it" – is not likely to lead to resolution. Despite your insistence to the contrary, the opposing party will probably assume that you still have more room to negotiate.

Similarly, moving uniformly in $2,500 increments until your $10,000 has been exhausted, and then refusing to budge any further,

is equally likely to communicate the wrong message to the opposing party, potentially frustrating your efforts to reach a resolution.

Unlike the above examples, moving $4,000, then $3,000, then $2,000 and then $1,000 sends an unmistakable signal – well in advance of the limit line – that you are planning to stop, giving your opponent ample time to figure out how to best avoid an impact impasse.

If you want to sit in the driver's seat during settlement negotiations, it helps to know the most effective way to apply the brakes.

Floyd Siegal

- ✓ Leave some room for the "lunge and squeeze."

If graduated but diminishing increments is getting the parties close, but is not achieving a resolution to their dispute, it may be time to change strategy.

Reverse the example above. Assume that you are a plaintiff's lawyer, and you have decided that a very good settlement is $5 million. Your first demand was $10 million. The next was $8 million. The one after was $7 million. After that, $6.5 million.

By diminishing the increments in such a way, the defendant is now convinced that you are looking to settle the case for $6 million. The defendant's counsel, however, feels compelled to show how tough a negotiator he is, and is determined not to settle at that amount. That's okay by you since you were not shooting for that number anyway.

You now do the "lunge." Instead of coming back with a $6 million demand, your new demand is $5.75 million. You have now given the mediator some ammunition and a little credibility with the other side. The mediator can claim some victory for the other side, and say to the other side he or she really fought for them to get that extra $250,000 off of your demand. The other side, feeling very satisfied by this, agrees to settle for $5.75 million, and you and your client are very happy.

The "squeeze" comes after the "lunge" if the lunge is not successful. Here, you again decrease the increments of your moves signaling that you have reached the lowest acceptable amount.

I attended a mediation seminar a few months back and one of the speakers suggested that in a negotiation, you should always ask for $256 more than your ultimate goal, and he predicted that you will get that additional $256 a majority of the time you ask for it.

This reminded me of a situation many years ago when I was just starting out and had my first very big negotiation. In the heat of the negotiation, I had offered what I had thought was an already generous number, and the mediator wanted me to offer an additional $10,000 to close the deal. I refused, and the case did not settle.

The attorney supervising me pulled me over and had this conversation with me:

"How much did you offer?

$750,000.

So, in other words, you were ready, willing and able to pay $750,000 to settle the case?

Yes.

And, how much were you trying to save?

$10,000.

And, how much will it cost to defend this case going forward?

About $350,000.

And, what is the exposure in the case if we lose the case?

About $10 million.

My next question is why should I not fire you right now?"

Of course, I did not get fired, and the case did settle. But it does make the point that sometimes when we get so stuck in the forest of the negotiation, we can lose sight of the trees.

That does not always mean that we pay the extra $256 or $10,000 every time. But, the story told above works both ways. You know it when you need to put a little more on the table. You will also know when someone can't walk away from what has already been offered, and you can just stay firm in your position.

Steven Joseph

- ✓ Client control problems, imaginary or real, may assist in getting your number.

Towards the end of a mediation, the parties may be at an impasse, and the sense is that the mediator is agreeing with the other side's settlement position, a bit more than your

side. Of course, there is now the pressure to take that number. You may even agree with the mediator that, yes, in fact, that it is a good number.

Well, it doesn't always settle for that number. Why? Because of client control problems. It is not me. It's my client. After testing the waters on the issue of client control, you can sense how bad the other side wants to do a deal. Even though one number may have been the right number, the better number will come when you feel that the other side just wants to settle no matter what the cost.

And, how did you get there. You had some client control issues.

Client control issues can play to your favor not just from the plaintiff side, but from the defense side as well. The issue of "principles" come into play, and the client wants to draw a line in the sand. I have had many professional liability actions where the "consent clause" comes into play. The insured is willing to consent to a settlement at one number, but not another. On many occasions, the result was a settlement at the lower number at which the insured was willing to settle, even though the insurance company had been prepared to pay more.

Steven Joseph

On the "getting personal" side of things, one story I like to tell is that when I did legal malpractice actions, I would get calls from the insured attorney, and the conversation went like this:

Insured: I got a call from the plaintiff.

Me: This is very interesting. The plaintiff or the plaintiff's attorney?

Insured: The plaintiff.

Me: What did the plaintiff have to say?

Insured: He said that I shouldn't take it personally. He only wants the insurance money.

Me: That's quite nice of him. So, are you taking it personally?

Insured: Well, for a second, no. Then, I remembered that my firm has a deductible of $100,000. The case costs me $100,000 but this guy doesn't want me to take it personally. And our premiums are going up because of this!!

Me: That's a lot of money.

Insured: And, then, I thought. TIME. I have to spend all this freakin' time with attorneys going over documents, and depositions, and interrogatories. But he doesn't want me to take that personally.

Me: I know you have spent a lot of time on this case.

Insured: And then, I thought...my reputation. I have to answer questions from my fellow partners. I have to report this to the bar association. Clients ask me if I have been sued and I have to say yes. It's very frustrating.

Me: So. What did you tell the plaintiff.

Insured: (NOTE THAT THE ANSWER CONTAINED INAPPROPRIATE LANGUAGE AND HAS BEEN LEFT OUT HERE. YOU WILL NEED TO USE YOUR IMAGINATION.)

I have a lot of situations over the years when someone gets sued, and the reaction is strong. "I have been practicing for forty years, and I have never been sued. I want my day in Court". Unfortunately, when they get to the courthouse steps, the day in court is not next Tuesday at 2:00PM, but it is the month of July three years later. They can't take that vacation in Disneyland, or get those billable hours in. So, now, the desire may have changed, but the case may become more difficult to get settled because so much more has been invested in the case.

Still, the outrage and the fact that it is personal should be used as part of your strategy especially when the feelings are very real and very present.

Steven Joseph

Many insurance policies have "consent to settle" clauses. This means that the insurance company cannot settle without the insured's consent. So, if I am seeking the consent to settle from an insured, I may just want to have the consent only up to a certain dollar amount. Then, even if, in private, it is clear that I can get consent for a greater number, I can still represent to a mediator that I only have the consent to settle from the insured for a particular amount, and not a dollar more. Then, if necessary, I can go back and get consent for a higher amount, if necessary.

Steven Joseph

- ✓ Consult with the mediator on what the next move may be.

Unfortunately, it is against the rules of mediation to plant electronic bugs in the room the mediator is using to discuss the case with the other side. The mediator can spend a substantial amount of time discussing the case in private with one party. There's always someone in the other room commenting, "I wish I knew what they are talking about for so long."

After the mediator has finished the private caucus session with the other side, the mediator will not be coming in and telling you the other side's bottom line. This is because it is highly unlikely that the other side has revealed that fact; and even if it did, it would never permit the mediator to reveal it. If anything, the other side may have imparted misinformation regarding its bottom line position.

Notwithstanding such gamesmanship, the mediator may have a good sense of what may be an acceptable number for the other side to resolve the case. That's why it's never a bad idea to ask the mediator what he or she believes an appropriate next move may be. If the number is too much a move for your client, the mediator's suggestion can always be rejected. Chances are just as great that the mediator's suggestion may be less of a move than you may have been considering.

- ✓ Present your number in relation to the ultimate "home run" and "strike out" of a case. Avoid sharing with the other side specific "risk analysis" numbers you have devised to come up with settlement proposals to make on behalf of your client.

The settlement proposals made at mediation should always be contrasted with what the other side may do at trial. Whether the offer is for a dollar or the demand is for a million, there is always a risk that one jury may award zero and another will award a couple of million dollars. Thus, even if your initial proposals start out very low or very high, by presenting those proposals together with the risks that a trial presents, you can always make the argument that your settlement proposal is the best choice for the other side. As the numbers move closer towards the center of the bargaining spectrum, the argument becomes more compelling.

However, some attorneys go to mediation, and at some point, present a detailed risk analysis to come up with a number they believe the other side should find as acceptable. Well reasoned percentages are assigned to the different strengths and weaknesses that each party's case may have. The percentages are plugged into a formula, and voila, there is the settlement number. Who said mediation was hard?

There are certain dangers to this approach. The most obvious danger is that you risk boxing your client in with a number that the other side will most likely view as unacceptable. While your analysis may carry a logic supporting your position, it also becomes a red flag in front of a bull. The other side will hone in on your assessment of the probabilities of success on each issue as well as the methodologies that you have employed. Using this approach, the opposition will justify a resolution that is far different than you had originally perceived. In effect, you have changed the focus of the negotiation from whether your proposal is superior to a litigated solution to whether your number represents a fair evaluation of the other side's case at trial. Whereas the former takes into consideration the cost of litigation and the time value of money, the latter does not.

You have also diminished the mediator's ability to be your client's advocate. The mediator will convey the percentages you have assigned to the other side's weaknesses, but because the mediator will want to give the appearance of neutrality, the mediator will be unable to state any opinions he or she may have on the percentages that you have assigned. The mediator will, however, still be able to be the other side's advocate, questioning you in a neutral fashion on what factors may make your risk analysis faulty.

In mediations, it is sometimes effective to get the other lawyer alone and get him to tell you his "homerun." Something along the lines of, "if you've got something that my

client needs to know, tell me now, while there's money on the table. If I am going to recommend a settlement value, I need to know." The "help me, help you" approach works because often, there is "no homerun" and, on the rare occasion where there is, it avoids surprises at trial and facilitates settlement.

William Lancaster

Some Rules of Thumb To Keep In Mind

It's 10:30 p.m., and the parties have finally agreed to a settlement. Having spent more than twelve hours in mediation, everyone is exhausted. Not wanting to take even more time to prepare a handwritten settlement agreement, the decision is made to quit for the evening and document the settlement later. Everyone shakes hands and departs. The next day, one of the parties has second thoughts and refuses to proceed with the proposed settlement.

The above describes a far more common scenario than many might expect, but one which can be avoided by following a relatively simple rule: always carry a "thumb" drive, also known as a "flash" drive, on which you have downloaded the template of your preferred settlement agreement form. Alternatively, bring a pre-printed template with you, and fill in the blanks by hand once the parties have agreed upon all of the terms of the settlement.

For those who may not be familiar with the expression, a "thumb" drive is a portable memory device about the size of a thumb – hence the nickname – which can be inserted into the USB port on any computer and from which one can download any data stored on the device. Given that most mediators have computers and printers readily accessible, it is relatively easy and quick to download an acceptable template, make the necessary revisions, print the settlement agreement, and have everyone sign off before departing.

Bear in mind, however, that a written settlement agreement prepared in the course of, or pursuant to, a mediation is not admissible in court in the event of a later dispute unless it expressly states that it is "admissible or subject to disclosure" or "enforceable or binding," or other words to that effect. California Evidence Code Section 1123. 7

By remembering to bring your "thumb" drive to mediation, and by including the language set forth above, you might just avoid an unexpected "thumbs down" the next morning.

Floyd J. Siegal

Getting A Written Agreement May Not End The Story

Attacks on mediated settlement agreements generally fall into two main categories. First, someone may dispute whether the parties actually settled or what they settled. In other words, someone may claim that a valid contract was never formed or the contract does not include what the other party says it does. Second, someone may claim that the

agreement is unenforceable. In other words, the party may assert an affirmative defense to enforcement of the agreement.

Getting a written agreement may take care of many attacks in the first category. Of course you have to watch out for such things as the dreaded "agreement to agree." See Liberto v. D. F. Stauffer Biscuit Co., 441 F.3d 318 (5th Cir. 2006) (the court found that a settlement agreement concerning a license for the design of animal crackers packaging was an unenforceable agreement to agree).8 You must be careful that the agreement includes whatever your jurisdiction considers to be the essential terms of an enforceable contract.

A written agreement does little or nothing to prevent attacks in the second category. A party may claim, for example, that the agreement was based on fraud or coercion. In Randle v. Mid Gulf, Inc.9 the plaintiff said that he settled under duress, because he was told he could not go home, even though he had not taken his prescribed heart medication, was tired, and had chest pains during the mediation. 1996 WL 447954 (Tex. App. Aug. 8, 1996). In Allen v. Leal, the plaintiffs said they felt that the mediator "coerced and intimidated" them into settling. 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998).10

How Does Confidentiality Affect the Agreement?

When disputes arise over mediated settlements, the courts sometimes have to balance the interests of finality and confidentiality. Many jurisdictions have statutes or rules that make mediations confidential. The statutes or rules may be written broadly enough so that they could be read to include mediated settlement agreements. Texas, for example, makes confidential "any record made at an alternative dispute resolution procedure." Tex. Civ. Prac. & Rem. Code § 154.073(b).11 The statute or rule may preclude inquiring into the circumstances surrounding the agreement. It may also include specific requirements for making a settlement agreement admissible in an enforcement proceeding. The Uniform Mediation Act provides an exception to confidentiality for a signed "agreement evidenced by a record." Unif. Mediation Act 6(a)(1) (2001)12. As Mr. Siegel mentioned in his "Rules of Thumb," some jurisdictions may require the agreement to not only be in a signed "record," but also to include magic language.

Derek Lisk

D. <u>When the mediation is close to an impasse.</u>

It's late in the mediation, and the parties for whatever reasons, are still far apart. While you and your client have steadfastly contended that a litigated solution with all its costs and uncertainty remains superior to the opposition's last proposal, in private, you and your client both have decided that the case is not one that should be tried. The question now is what approach should you take that would get the case settled without having to wave a white flag and accept the other side's demand.

Stay, Just A Little Bit Longer . . .

Unlike many people I know, I tend never to leave a ball game before it's over nor walk out of a movie theater before the credits have ended, convinced that I might miss something. After all, who knows what might happen if I'm willing to stay, just a little bit longer? Consider these examples:

(1) On September 19, 2006, the Los Angeles Dodgers staged what may well be the greatest comeback in baseball history, slamming four consecutive home runs in the bottom of the ninth to tie the San Diego Padres. The Dodgers went on to win the game in the bottom of the tenth on another home run. Close friends were at that game and would have witnessed the historic comeback if only they'd been willing to stay, just a little bit longer. Instead, as L.A. fans are prone to do, they left at the end of the eighth inning and heard the climactic events on the radio, as they maneuvered their way through the traffic-jammed parking lot.

(2) Films such as "Ferris Bueller's Day Off," "Pirates of the Caribbean" and "Ironman" have shown "bonus" scenes after the credits, while countless other films, including the recent "Hangover" and "Up," have shown additional scenes as the credits were playing. Those in the audience who chose not to stay, just a little bit longer, missed some memorable cinematic moments – some that were hilarious and others that were especially touching or dramatic.

In mediation, the best way to learn the opposing party's bottom line is to stay until the very end, letting the process play itself out until the case settles or the mediator declares an impasse.

Those who become frustrated with the slow pace of settlement discussions and decide to leave, thereby bringing the process to an abrupt end, are usually left to wonder just how much more the opposing party might have been willing to compromise. In contrast, those who are willing to stay, just a little bit longer, often find themselves signing settlement agreements when only moments earlier they were convinced that resolution was impossible.

If your client grows impatient and wants to end the mediation process, do everything you can to persuade him or her not to do so. After all, who knows what might happen if everyone is willing to stay, just a little bit longer?

Floyd J. Siegal

I was recently at a mediation that involved a publicly traded bank and I was growing impatient with the process, and was getting close to missing a dinner reservation at Disney World, of all places.

We had offered what we felt was a very reasonable number for our party, and it was clear that if the case went to trial, we would not be in the case, and the Bank would have to go to trial against a party that was essentially judgment-proof.

We posed the question through the mediator as to why the Bank was not more reasonable and willing to take what we were offering. The response was that they wanted to make an example out of this judgment-proof defendant.

The Bank representative lost any credibility he had with me since I knew that the Bank has dozens of these cases against judgment-worthy defendants, and they were not about to present to their shareholders that they were spending money for empty moral victories.

Sure enough, we declared an impasse, and defense counsel called up the Bank's attorney first thing the following Monday morning. He told the attorney that he had an obligation to get his (our) client out of the case, and would pay it to the other party against whom the Bank was planning to get its moral victory.

It got a concession that the Bank representative at the mediation was not their ultimate decision-maker, and they were in fact willing to consider a number in the range we were negotiating.

We walked away from the table, but we knew that we were not negotiating with the person who was going to get us the deal, and we had a game plan in place, once we walked away from the table.

Steven Joseph

- ✓ Discuss the case with the mediator in private.

If the negotiation is close to an impasse, that usually means two things. First, the parties are still far apart from reaching some resolution. Second, if there is more room in your negotiating position, you are becoming more and more hesitant in making the additional moves that will not bring a settlement, but rather, only will serve only to compromise your negotiation position further. If this is the case, speak to the mediator in private. Address your concerns. Indicate where you may be able to go, but that you do not want to convey further offers that may not reach a settlement.

The mediator knows what is going on in the other room. In private, the mediator will be able to give you greater insight on whether the other side is unmovable at a number you do not want to go to, or whether additional movement on your part may yield a settlement. The mediator may also have ideas on how to get the negotiations moving from that point without the need, at least initially, for you to move off of your last settlement position. In turn, after getting some additional insight from the mediator, you may have your own ideas on how to get the negotiations on track.

When I refer to discussing the case with the mediator in private, I am not referring to just having another private caucus session. I am talking about one on one. I represent the insurance company, and in my room, there will be people with varying opinions, and varying interests. I find it to be very productive to simply have a conversation alone with the mediator. I can disclose certain things in private with the mediator that I may feel uncomfortable saying in the private caucus with the different parties. I also find that the

mediator will be more open with me, and disclose more about what is going on in the other room that what was previously disclosed.

I also find that by having the private meeting, I have created a bond with the mediator. We both want to get the case settled, and with that one singular goal, it becomes clear at this point that we have formed a strong partnership with that goal in mind.

Steven Joseph

- ✓ Identify to the mediator any issues that have not been addressed.

When the mediation seems to be going nowhere, it may be a good time to take stock of what is happening. To do this, you can review with the mediator all of the weaknesses that you have pointed out in the adversary's case and the responses the mediator has received to each of those points. Mediators, while generally good note-takers and methodical, have been known to gloss over important issues in the course of trying to deal with difficult individuals. Thus, this exercise could reveal gaps in the discussions between the mediator and the other side. If this has happened, the mediator should be dispatched to meet with the other side and see if additional movement might be generated.

Such discussions with the mediator may also reveal that the mediator has been taken in by a bogus argument that can easily be rebuffed with further input from you. Thus, the mediator may have an additional basis upon which to try to wrest a further concession from the other side.

Dare To Be Different

Disputes come in more than one kind and size, so the strategies for resolving them need to be tailored to fit the situation at hand. Every so often, a dispute cries out for a strategy that dares to be different – one that seems, at least at first blush, to be completely outside the box.

A few memorable mediations illustrate the point. Several years ago, before beginning my transition from litigator to mediator, I represented one party in a very emotional business dispute. After spending more than half a day in a mediation which was clearly going nowhere, it became apparent to me that opposing counsel was the obstacle. I took the mediator aside and suggested that he propose a meeting between the parties and the mediator, without counsel present, which the mediator agreed to do. After initially resisting the idea, opposing counsel acquiesced and the mediator proceeded to moderate a private discussion between the two parties, resulting in the breakthrough that was needed not only to resolve the dispute but to re-establish an ongoing business relationship, as well.

Recently, the same strategy was used to great effect in a professional liability dispute between a plaintiff and her former therapist. Sensing that the plaintiff needed to "release" her feelings of betrayal by venting directly and honestly with her therapist, the suggestion was made to clear the room of everyone but the plaintiff, the therapist and the

mediator. For the next 3½ hours, the plaintiff and therapist engaged in a cathartic therapy session, with the mediator a quiet observer. Though time constraints and other extraneous circumstances made it impossible to settle the dispute that day, huge emotional barriers were eliminated, increasing the likelihood that the matter will be settled when the parties reconvene.

Yet another example is a case from several years back, in which a real estate agent allegedly failed to disclose known defects to the buyers. During the mediation, it was suggested that the agent purchase the property from the plaintiffs, who were clearly suffering from buyers' remorse. The agent agreed, corrected the defects, rented out the property for several years, and eventually sold the property at the top of the real estate market for a substantial profit.

If you think it might help pave the way toward a settlement, don't hesitate to propose a strategy that might seem a bit unusual or unique. In the world of dispute resolution, daring to be different can sometimes make all the difference in the world

Floyd J. Siegal

I had a legal malpractice case in Anchorage, Alaska that arose from an attorney's failure to file a medical malpractice case within the statute of limitations for a paraplegic client. The Court found that his client had walked into the hospital and came out paralyzed so the attorney might have been able to determine if something wrong happened in between.

We had made an offer of $500,000, and I flew out to Anchorage from New York in the middle of January. I arrived 14 hours later, and called up defense counsel. He told me the case had settled. They accepted the $500,000!!

Now, you don't fly back to New York and tell folks that you flew to Alaska in the middle of winter for nothing. "I gave him a left hook! A right jab! Bang!!

They bought it! "Steve…That's great. We have another mediation in Anchorage next week. Can you go?

Off I went. Another 14 hours. In the dead of winter. We mediated late into the night. The Insured was the same attorney who accepted the $500,000, but had never met me.

The mediator came into our room, and said; "They won't accept anything less than $800,000!"

Our insured leaped into the air and said; "I've settled cases for paralyzed clients for less than that!!"

Later that night, I cornered the mediator and asked her if I could buy her a beer at the bar in the Anchorage Hilton. I told her the story. The next day, she settled the case for $500,000.

I approached her, and asked; "Yesterday, you said that the case could not settle for anything less than $800,000, and today, it settled for $500,000. What happened?"

She told me; "Well, when the plaintiff's wife went into the bathroom, I did what women do, and I joined her there. I then found out who had the power in the relationship, and settled the case for $500,000."

You never know what works.

Steve Joseph

- ✓ Explain to the mediator how your case may get better with additional discovery.

Up to now, you have been setting forth arguments why a mediated resolution may be the other side's best deal. However, since the other side has not made any substantial move off of its position, you must now point out that the mediated resolution that the other side is proposing is not the best deal for your own client. Indicate to the mediator what additional discovery you may take or motions you may file that will enable your client to get a better deal.

The best way to accomplish this is to point out to the mediator positive inferences that might be drawn from discovery you plan to take if the mediation is not successful. Try to demonstrate that the depositions of witness A and witness B have been favorable to your client's position, and because of this, you believe that a positive inference can be drawn for the likely testimony of witness C that will be taken only if the mediation fails to result in a settlement.

A number of years ago, I handled a bodily injury action that involved a five year old female claimant who fell through the balcony railing at our client's apartment building. The child fell approximately 10 to 15 feet, and she suffered a non-displaced skull fracture as a result of the fall.

At a first mediation, we had been provided with an expert neuropsychologist's report who diagnosed the claimant with a traumatic brain injury resulting in intellectual deficits and impairments which will require her to receive special attention and help in academic pursuits.

The attorney for the child was unwilling to reduce the demand to any number that did not reflect taking the expert's opinion at face value.

We responded by indicating that we would have to declare a temporary impasse so that we could complete an IME on the child to either corroborate or refute their expert's findings. I had indicated to the mediator that while there are instances when defense counsel will advise that an IME would likely corroborate an expert, this was not the situation we were presented with in this instance.

The child's attorney demanded that the IME be videotaped. Though we had objected, the law required us to allow the videotaping of the exam to go forward. The IME concluded

that the child did suffer a mild uncomplicated brain injury, and the results of the testing were much less dramatic than that of the expert retained by the child's attorney.

At the second mediation session, the child's attorney attempted to argue that the IME report confirmed their expert's findings and would thus justify a settlement closer to the demand made at the first mediation.

We responded by indicating that the IME report was the best kind of report we could have received for the purposes of taking the case to trial if necessary. Had the IME totally refuted their expert's finding, it would not have had credibility, and would just send a signal that our client, who had in fact failed to properly maintain the premises which resulted in the fall, was also not prepared to take responsibility for the injuries. This would turn off a jury, and likely support a large verdict.

However, because the IME did find some brain injury, it would allow us to portray the client as a party that is taking responsibility and willing to do right for the child, and to argue that it is the claimant's mother who is motivated by greed.

We also had the advantage of arguing that the child's attorney made a significant error in videotaping the IME. We pointed out to the mediator that if the case went to trial, the child's attorney would attack the IME's findings and that would allow us to show the entire IME exam to the jury.

The jury would then have ample evidence to see that the child did not suffer from the kind of injury our opposing counsel wanted to portray.

We were then able to negotiate a settlement in the range we had evaluated the case to have.

Steven Joseph

- ✓ Make it clear that any momentum towards settlement that has been gained so far will be lost once the mediation ends.

When the numbers proposed at mediation are not what the parties had hoped for, it is very tempting for the parties to begin thinking that if they wait it out for a few weeks or months, the other side will become more conciliatory as the trial becomes more imminent.

If the other side begins to balk at further movement, have the mediator try to dissuade it from thinking this will happen. Whether you are representing the plaintiff or a defendant, tell the mediator that you are convinced that they no longer are bargaining in good faith and, that once your side walks out the door, you will proceed to do whatever is necessary to get the case ready for trial.

- ✓ Determine through the mediator whether there is a number from each party that would unlock the negotiation process.

It is not uncommon for a negotiation to get bogged down after a long period without any significant move from either side. On your end, your client still has substantial room to negotiate, but your client does not want to make such a move if it will only precipitate limited movement from the other side. If the client makes a substantial move, and the mediation ends in an impasse, the client's negotiating position will be substantially compromised.

To get around this problem, discuss the possibility of a conditional offer or demand with the mediator. You indicate to the mediator that he or she has no authority to make such an offer or demand, but you would like to find out whether if you went up to x, would the other side come down to y (or vice-a-versa). The mediator then can meet with the other side, and talk about negotiation ranges. If the other side is not set on one number, but is looking at a settlement range, this strategy can then unlock the negotiating process.

Consider using brackets to both tacitly convey your settlement value and to determine how the other side views their settlement value. For instance, in a mediation where you value the case at $3,000,000 and the demand is currently $10,000,000. If you are at $500,000 try offering a bracket of "we'll come to $1,000,000 if you come to $5,000,000." A counter-bracket would likely get proposed, but I've settled numerous cases this way. It's a good way of looking at the mid-point of the bracket to get a good estimate of what each party is really looking at to settle the case. A good mediator will help both sides with the bracket process to get down to a mutually acceptable bracket, or oftentimes, no bracket is accepted, but an agreeable settlement number comes out.

William Lancaster

I am very careful about brackets. Perhaps, it is because my exposure to "brackets" was from a mediator in Charleston, South Carolina who proposed a bracket of $695,000 and $700,000. (True story!!!)

But, Bill is exactly right in how you do it. I'll go to x, if you go to y. It has to be phrased exactly like that. Also, the low or the high number, depending on which side you are on, should not be a number that has already been put out as an offer or demand. If you simply say that you want a bracket between $100,000 and $500,000, it may convey an incorrect perception that you are willing to offer $500,000 when that may not be your intent.

Steven Joseph

- ✓ Negotiate your number without compromising your negotiation position.

Sometimes, the negotiating parties are far apart in the process itself, but in reality, they are really much closer. Neither side wants to simply compromise their negotiation position if it does nothing more than compromise their negotiation position.

One way around this is to suggest to the mediator that you do not want to make an additional move off of the last number provided to the other side. But, you can suggest to the mediator the settlement range you may be willing to entertain at the end of the day.

Instruct the mediator that she cannot disclose this number as an offer or demand, but the mediator can relate to the other side the following; the mediator believes that if there was another eight hours in the mediation, she may at the end of the day, after twisting arms and breaking legs, get the other side to go to *x* dollars. The question now becomes if I can get the other side to move to *x*, would you be willing to go to *y*?

Neither side has compromised their negotiation position, but the mediator now knows the real gap between the parties that separates them from a settlement.

I've been to many mediations where we have been stuck. The last demand was $800,000 and the last offer was $75,000. We're just too far apart, and I do not want to offer my last dollar if it isn't going to settle the case.

So, I go to the mediator: "Look, I don't want you to offer any more money, but I would like to tell you in confidence because I have a great deal of trust in you that at the end of the day, I was going in willing to go to $300,000. Now, I am not giving you authority to offer $300,000, but you can tell the other side that I'm stuck at $75,000, and not willing to make any further move, but you can say that given your talent as a mediator, having done five million mediations, that you think, you don't know, you are not sure, and you could be wrong... that if you spent the next ten hours beating Mr. Insurance Man up, twisting his arm, throwing him out the window, and putting gum in his hair, you think, you don't know for sure, and you could be wrong, but you do think that if you did all that, you could get Mr. Insurance Man to go up to $300,000. Now, if I got him to go to $300,000, can I get you down to that range?"

Steven Joseph

Reaching The End Zone

Back in April, with opening day approaching, I took the opportunity to acknowledge the contributions of Major League Baseball to the dispute resolution process. With the start of the NFL and college seasons just around the corner, it seems only fitting to now use a football metaphor in discussing mediation.

In order for opposing parties to resolve any dispute through negotiation, they must first succeed in reaching the "end zone" – i.e., the zone or range of values between "X" at one end of the continuum and "Y" at the other within which <u>both</u> sides might be willing to enter into a settlement and end their dispute.

Reaching the "end zone" in mediation isn't always that easy, however. Just as in football, each side battles to gain better field position, hoping to secure a more favorable outcome. To do so, one side may make a demand or offer which is viewed by the other side as being extreme and unreasonable. Not surprisingly, the strategy for defending against this tactic often results in a response that is equally extreme and unreasonable, polarizing the parties' positions and leading the parties to become frustrated and less cooperative with one another, thereby threatening to bring negotiations to a grinding halt.

When faced with a dispute in which the parties' posturing threatens to thwart further negotiations, the mediator is often required to call time out and serve as dual head coach, helping both sides adjust their game plans to reach the elusive "end zone." To prevent the parties from giving up too soon, I will frequently attempt to elicit an acknowledgment from defendant – privately, of course – that he/she would be willing to pay "X' if doing so would absolutely resolve the matter. Armed with such a concession, I then privately seek to elicit a similar acknowledgment from plaintiff that he/she would be willing to accept "Y" if offered.

If both parties privately acknowledge these concessions, I then suggest that each agree to move to those positions, thereby re-establishing cooperation and simultaneously establishing a new playing field with an "end zone" that is bracketed by "X' on one side and "Y" on the other – an "end zone" which offers both sides the realistic hope of an acceptable compromise. When the parties agree to the suggestion, they usually find their way from "X" and "Y" to their mutual goal line: resolution.

Whether engaged in settlement negotiations or playing football, those who succeed are those who refuse to give up before reaching the end zone.

Floyd J. Siegal

Face-to-face negotiations.

When the parties are no longer able to continue to move toward a resolution, a common suggestion of many mediators is to have the parties get back together and have a face-to-face discussion of the case. This is a high-risk maneuver. Usually, this is done with little structure, and because of this, the face-to-face negotiations becomes a free-for-all, with both sides throwing accusations at each other, and with the result that the parties become more entrenched in their positions than they were before.

Therefore, before you agree to have the mediator propose a face-to-face negotiation with the other side, have the mediator come up with an issue to discuss, and a purpose or reason for the face-to-face meeting. The mediator should also then agree to meet separately with the parties after the joint discussions are completed.

If there is only one issue to discuss, the discussion will more likely be focused, and not the free-for-all that will get both sides frustrated. Having a purpose to have such a discussion is extremely important. When no purpose is given, one side may feel that the purpose is to push that side into a corner. The correct stated purpose for the mediator to give is that he or she is hearing diametrically opposed views on an issue, and the face-to-face discussion will help educate the mediator. After the discussion, the mediator can then declare he or she is better educated, and proceed to use the discussions to try to generate further movement from each of the parties.

- ✓ Break some bread.

Some mediators may go into the process announcing that they are ready to work as long as it takes even if it goes well into the night to get a resolution. However, if the parties

are not making any progress, the negotiation process can become an exhausting affair with tempers getting shorter as the hours get longer.

It is not a bad suggestion at this point to have the adversaries sit down together and have some dinner. There should be no requirement to talk about the case. With the pressure taken off, the parties can now relax, and possibly learn what their interests may be. By discovering each other's interests, the parties may then be able to get a resolution.

I had one mediator who would do this to great effect. After the first day, he would take us all out to dinner, and I would be seated right next to the plaintiff's attorney. The mediator immediately asked for the "reserve" wine list, and ordered some spectacular bottles of wine. By the end of the night, we were all best friends, and we actually hugged on the way out. What was a hard negotiation on day one became a very cordial affair on day two.

Steven Joseph

- ✓ Let the mediator decide.

Although the mediation starts out as non-binding, at any point in the process, the two sides can mutually agree to make it binding with the mediator deciding on a number between the settlement positions. While this will resolve the case, it is a potentially dangerous way of proceeding as you may not like the result and will have no basis for an appeal. The only real advantage to this approach is that it will bring the dispute to an end (albeit not necessarily a happy one).

A somewhat better alternative is to have a mediator render a "conditionally" binding determination. Here, the mediator will meet separately with each party, and provide a number that he or she believes that the case should settle at, together with a rationale for that number. Each party then writes on a piece of paper a "yes" or "no", indicating whether the proposed number is acceptable. If the mediator gets two "yes" votes, the case is settled for that number. If the mediator gets one or two "no's", the case remains unresolved. Since the mediator does not disclose whether the number was unacceptable to one or both of the parties, both sides preserve their last negotiation position.

Having the mediator act as arbitrator may call for checking the rules in your jurisdiction. Ethical guidelines in some jurisdictions indicate that the same person should not serve as mediator and arbitrator. A Texas court of appeals, for example, relied in part on the state's Ethical Guidelines for Mediators to hold that a trial court abused its discretion by appointing as arbitrator the person who had previously acted as a mediator for the parties' dispute. In re Cartwright, 104 S.W.3d 706, 714 (Tex. App. - Houston [1st Dist.] 2003, orig. proceeding)13. In that case, one party objected to the appointment, and the court's primary concern seemed to be the use of confidential information. Id. Similarly, an Ohio appellate court found that an arbitrator who first tried to mediate a settlement exceeded his authority when he partly based his arbitration award on the failed

mediation. Bowden v. Weickert, 2003 WL 21419175, at 3-4 (Ohio Ct. App. June 20, 2003).14

Of course, if all parties consent to the mediator acting as arbitrator, then it should not be a problem. On the other hand, if there is a dispute about consent later, it may be difficult to pierce the veil of mediation confidentiality in order to prove that all parties consented.

Derek Lisk

- ✓ Propose a high-low settlement.

This can most often be offered when there is an outstanding motion that the court has not yet decided. If one side argues throughout the process that they are convinced they are going to win (or you are going to lose) a summary judgment motion, propose a high-low range for settling the case based upon the decision on the motion. In this way, the party balking at making further concessions is forced to carefully assess just how good its chances of success really are.

- ✓ Propose a "last offer" arbitration.

Here, you can suggest to the mediator that each party make one last move towards settlement. If this does not get the parties to a resolution, the parties can then agree to put their last offer and demand on the table for the mediator or a "brought in" arbitrator to decide between the two numbers.

When such "win or lose" proposals come from you instead of the mediator, you are expressing confidence in your position. You are winning the psychological battle that goes on silently in a mediation.

Play Ball!

With opening day less than a week away, now seems like a particularly appropriate time to acknowledge the contributions of Major League Baseball to the dispute resolution process.

As many of you probably know, "baseball arbitration" – which derives its name from its use in resolving certain types of salary disputes between players and owners – is a form of binding arbitration in which each side presents an arbitrator (and each other) with a specific dollar proposal. After considering the evidence, the arbitrator must choose one proposal or the other. The arbitrator is not permitted to award an amount that differs from the proposals presented by the parties, so there are only two possible outcomes.

Another form of "baseball arbitration" – often referred to as "night baseball" – differs slightly in that the arbitrator is "kept in the dark" as to the parties' proposals. After considering the evidence, the arbitrator issues an award. The party whose proposal is closest to the award is deemed to be the prevailing party and that party's proposal becomes the amount awarded.

The beauty of "baseball arbitration" is that it compels the parties to present their most reasonable proposals to one another, because an unreasonable proposal makes it more likely that the arbitrator's decision will favor their opponent. In other words, both forms of "baseball arbitration" force the parties to "close the gap" in order to increase their odds of winning. Having been forced to close the gap, the parties – who generally continue negotiating up until the time of the actual arbitration – often find a way to reach their own settlements.

A variation on the "baseball" theme can be a useful tool when the parties reach an impasse during mediation. When impasse occurs, each party can be asked to confidentially advise the mediator of their best offer, with the understanding that the mediator will inform the parties if they are within an agreed upon percentage or dollar amount of one another. If so, the parties can choose to disclose their offers to one another and continue negotiating. If the parties' best offers are not within the agreed-upon range, the mediator informs the parties of that fact and they can decide whether to reconsider their positions. Like "baseball arbitration," this process tends to further close the gap, thereby increasing the likelihood of settlement.

When it looks like there's nothing more that can be done to resolve a dispute short of trial, it might just be time to play a little baseball – after all, as Yogi said, "it ain't over 'til it's over."

Floyd J. Siegal

- ✓ Offer to have a "mock" presentation.

In cases where the dispute is over millions of dollars, some attorneys recommend that the client invest in a mock trial to learn how a jury made up of the same demographics as a real jury would decide the case. Since you are arguing at the mediation that the alternative to settlement at mediation is a trial, it may be a very good investment to get an idea how your client would do at trial.

Let us say you are defense counsel and your hunch was right. Two "mock" juries came back and gave defense verdicts. The questionnaire and study by the group hired to perform the mock trial shows that both juries found the plaintiff's case as unsympathetic. You can now use this information to buttress your point with the mediator that you have explored the trial option and, in fact, it appears that this option is the better deal for your client, given the favorable results.

Of course, if these results are then shared with the other side, they will come under immediate attack as invalid. Your adversary will point out that the results would have been different if he or she had presented the case for the opposing party.

You now have the opportunity to be bold and make such an offer. As in the hi-low settlement and last offer arbitration proposals, this is an opportunity for the other side to "put up or shut up", and determine whether the other side is really serious in having a good faith negotiation.

- ✓ Simply call it quits.

You cannot credibly take the position, on one hand, that you are ready, willing, and able to try the case, and on the other hand, give the appearance to both the mediator and the other side that you are desperate to settle. To be successful at mediation, you have to able to show both the mediator and the other side that you are willing to walk away from the process.

Evaluate what you have accomplished thus far in the mediation, how much time is left in the scheduled session, and what you hope to accomplish in the remainder of the session. If you've spent the first day and a half of the mediation making little progress towards a settlement, it is highly likely that you may not make all that much progress in the last three hours. You may also decide that any further negotiations will not lead to a settlement, but a further compromise of your own settlement position will achieve very little.

At this point, advise the mediator that you and your client wish to end the session. Be respectful, thanking the mediator for his or her time and effort, and indicate that the sessions were very useful in setting out the relevant issues of the case. If the mediator doesn't take it upon himself or herself to do it, suggest that the mediator get the parties back in the room together so that the mediation can end both cordially and respectfully. Also, consider inviting the mediator to continue to be available in the event that the parties decide to continue the settlement discussions at a later date.

Declaring an impasse on your own rather than having the mediator do it or just allowing the mediation to end when everybody has to catch a plane can be a very powerful strategic tool. You send a signal that you were serious when you represented that you will try the case if you have to. The other side may have decided on a waiting game strategy to sit back, and let you come up or down as much as possible before it engages in serious negotiations. The other side may have decided on a strategy that avoids putting any of its cards on the table deflecting any issues that are raised in the mediation. You have just declared that you will not play under those rules.

Finding Exits / Opening Doors

On occasion, your opponent in a mediation may take a position that threatens to thwart further negotiations. For example, he or she may present you with an insulting opening demand or offer. Unless and until your opponent demonstrates that he or she is willing to negotiate in good faith, you may be inclined to respond in kind or, worse yet, end the mediation. However, your opponent may be unwilling or unable to present you with a reasonable demand or offer for fear of looking weak or losing face in front of his or her client.

Other times, your opponent – frustrated by the slow pace of negotiations – may prematurely present you with a "take-it-or-leave-it" demand or offer which you are not authorized to accept. When you reject it, your opponent may feel he or she cannot continue to negotiate without losing credibility and, therefore, bargaining strength.

Still other times, your opponent may adopt an inflexible view of the facts or law, leaving no room for further discussion or compromise concerning the core issues which frame the dispute.

When your opponent takes a position that threatens to close the door to further negotiations, consider working with your mediator to find a graceful exit strategy for your opponent, i.e., one that will allow your opponent to continue negotiating without losing face. When you are able to help your opponent to save face, negotiations often resume with greater cooperation and flexibility, which, in the end, will generally benefit your client.

Floyd J. Siegal

PAGE 93

SPECIAL STRATEGIES FOR SPECIAL SITUATIONS

Up to this point, we've talked about providing the alternative to resolution at mediation as going to trial. However, in certain case situations, if you walk into mediation, and take the position that the choice is between a mediated settlement or a resolution through trial, it just won't fly. A trial is the last thing your client wants, and it's the last thing you should ever say. This commonly occurs in two situations: (1) when your client wants to preserve a business relationship; (2) and when your client has such a bad case that is very apparent to the other side that you simply can't take it to trial.

There are other situations where you may feel emotionally inclined to take a case to trial, but understand that it is the best business situation to settle a case. This may happen because there are simply too many parties in the case, and it will drag on forever. It may have "bad faith" implications for an insurance company. You may find yourself "negotiating with the king"…someone who has unlimited resources, and can take unreasonable positions.

There are particular strategies that can be implemented in each of these situations so that your client will not feel that the mediation process turned out to be a legalized "stick-up."

A. Preserving the Business Relationship

In many instances where the client wants to preserve a business relationship, a claim can be resolved without the need for mediation. A wrong is acknowledged, and monetary and other steps are taken by the client to avoid any bad feelings and allow the relationship to continue. Attorneys are never retained. Lawsuits are never filed.

However, real life situations are generally much more complicated. The client may believe that no wrongs were committed. There may be a big dispute on what the damages may be. The business relationship may be held over your client's head as a threat; "If you want the relationship to continue, you'll meet our demand." The loss may be one that is covered by insurance, and the client's carrier may have a big question on either liability or damages.

All these scenarios can lead to each side retaining its own counsel, and the business relationship then becomes threatened. Mediation is an effective way of attempting to preserve the relationship. However, the message your client wants to send to the other

side is that we are looking to avoid a trial instead of we are ready, willing, and able to go to trial. While many of the strategies may and should be implemented, there are additional strategies that should be given serious thought going into the mediation.

1. Opening Presentations

✓ Indicate the goal, not the choice.

Since your client's private goal is to preserve the business relationship, it makes little sense to make any comment in your opening that implies, settle now, or three years from now after a bitter fight in a courtroom.

This is not a good choice for your client, and should not be made a choice for the other side. Instead, provide what your goal is. "We are here today to be fair, and to do the right thing." By stating this goal, you are making an appeal to the mediator to seek out fairness. In your comments, you are also attempting to set a standard for the other side to follow.

✓ Questions of fact and law are "honest" differences of opinion.

As stated previously, always show respect for the other side. The other side should be referred to in your remarks as "good people." Give validity to the claim being made. "In view of the long relationship between the two parties here today, we are certain that the other side did not bring this claim without a lot of thought, and would not have brought this claim unless they were convinced that they were damaged by my client."

However, this does not mean that your client is prepared to roll over. The differences that your client has are honest differences of opinion. By referring to your defenses as honest differences, you are avoiding the other side from developing bad feelings based on a sense that your client is avoiding responsibility. There is now a greater chance that the opposing party will try to listen to what you believe these honest differences actually are.

✓ State the agenda for the mediator.

At the end of your opening remarks, you can express what you hope to accomplish. Since your goal is to avoid paying a premium for a settlement just to preserve the business relationship, it is likely that you want the mediator to take on a more evaluative role. Thus, you can, in a very subtle way, suggest this in your opening: "We thank you for your assistance and hope that you can help us resolve this honest difference of opinion." By using the word "resolve," you are indicating to the mediator that you want him or her to decide.

2. Private Caucus Sessions/Negotiating the Number

✓ Stick to the merits. Identify the weaknesses of the other side for which further information may provide additional movement.

Since you want the mediator to be evaluative, your discussion should focus on the merits of the case. Indicate that you want to go out of your way to be reasonable, and even to give a benefit of the doubt here and there.

You have stated to the mediator in private your client's intention to be reasonable, that your side is "willing to listen and learn" and "do the right thing." You are now free to present through the mediator what you perceive the other side's weaknesses to be. Since you are presenting your side as taking on the evaluative role, you do not have to rely on the mediator as devil's advocate to be the sole presenter of the weaknesses of the other side. Your side is there in good faith, and if the other side proves clarification for what your client believes is a weakness, your client will provide movement off of its position.

- ✓ Have the mediator present the risk of "complexity."

You are not there to talk about the risk that the other side faces if it rejects your offer. You're there to avoid litigation, and it is clear that your client wants a resolution to the dispute.

While the mediator recognizes this and can't focus the discussion on a possible trial, the mediator can have a discussion with the other side on how complex their case is. Thus, the mediator can be the advocate who presents risk. "This is a real mess. If you don't settle today, you put yourself in the hands of these lawyers who will spend a whole lot of time and money sorting out some very complex issues!"

- ✓ Focus the "numbers" discussion on "hard and soft." Avoid talking "baseball."

You have proclaimed that you want to do the right thing. The opposing party, with whom your client wants to preserve a business relationship, might not take too kindly to your perception of the "right thing" if you're talking about settling for an infield single.

Identify what damages you believe are the "hard" damages. Since you are there to be reasonable, you are willing to resolve the case for whatever substantiation has been given. Any damages that may be somewhat "mushy", the other side may need to provide you with additional information before you make an additional move in your negotiation position.

- ✓ If the case is close to an impasse, offer alternative solutions.

This is a case your client very much wants to resolve. Because of this, if the mediation is not moving towards a resolution, offer to the other side the option of an alternative solution, such as last offer arbitration.

Business Before Pleasure

Reading the briefs, the dispute appeared to be a rather simple breach of contract claim. Plaintiff, a wholesale distributor, alleged that various products delivered by Defendant had been defective and that Defendant was therefore liable to Plaintiff for damages in an amount which far exceeded any balance that Plaintiff otherwise may have owed on

unpaid invoices. Defendant, a small manufacturing company, denied Plaintiff's allegations and alleged, in a cross-complaint, that Plaintiff was indebted to Defendant for tens of thousands of dollars.

At mediation, it became readily apparent that the dispute was really a bit more complicated. Plaintiff was extremely angry because the allegedly defective products had compromised relationships with several of its largest customers. As a result, Plaintiff was no longer willing to do business with Defendant and was unwilling to reduce its claim.

Further complicating matters, Defendant lacked the financial ability to pay Plaintiff anything. More importantly, Plaintiff just happened to be Defendant's largest customer and essentially controlled Defendant's future. Defendant's ability to meet its financial obligations was virtually dependent upon whether Plaintiff was willing to continue doing business with Defendant. Unless someone was able to convince Plaintiff to abandon its lawsuit and place new orders, Defendant would have no choice but to file for bankruptcy protection.

Given the situation, it was obvious that both sides faced difficult business decisions and that neither was likely to find much pleasure without compromise. The optimal solution for both required that Plaintiff resume doing business with Defendant, but Plaintiff refused to do so. In order to persuade Plaintiff to even consider the idea, Defendant would almost certainly need to make a sizeable monetary offer, but it lacked the financial resources to do so.

Despite its reluctance to continue working with Defendant, Plaintiff conceded to me privately that forcing Defendant into bankruptcy was akin to cutting off one's nose to spite one's face. From there, I was able to help the parties negotiate a settlement whereby Plaintiff agreed to resume doing business with Defendant and Defendant agreed to provide Plaintiff with quality assurances as well as a substantial discount until Plaintiff's monetary claim was satisfied. The result was a true win/win solution – an outcome that brought both parties the pleasure not only of ending costly litigation but of a renewed and improved business relationship.

The lesson to be learned is that resolving disputes usually requires one or both sides to make carefully considered business decisions, but the parties will almost always find greater pleasure resolving their dispute than battling it out in court.

Floyd J. Siegal

B. The Bad Case

1. How do we define it?

For the purpose of this discussion, I must first comment that there are a lot of bad cases that would not fit in as part of this discussion. In fact, there are many cases where one side goes into the mediation thinking that because they have a great case, you wouldn't possibly allow the case to go to trial. They then proceed to negotiate from this assumption, and make few, if any concessions. However, in a majority of such bad cases,

there are a lot of good issues that could be picked out and discussed at mediation using the strategies identified in the previous section.

The bad cases that are referred to here are the plane crashes, the plant explosions, and the oil spills. The client is concerned about negative publicity that may result from the embarrassing facts that would be publicized in a trial. The facts of such cases would likely inflame a jury, and may lead to a punitive damages award. Also, in such cases, the main point of the opposition's opening presentation will be how disastrous a trial will be for your client.

2. Opening Presentations

✓ Sympathize, but indicate that you have strong differences of

opinion.

As always, be respectful. State your sympathy for the damages the other side may have suffered, but send a message right away that you do not intend to simply go to the mediation to raise a white flag. Indicate at the outset why you're at the mediation. There are strong differences of opinion. If you and your client agreed with the positions that the other side has taken, the case would have already been resolved.

Sorry Seems to Be the Hardest Word

Most of you probably recognize the above to be the title of an Elton John / Bernie Taupin ballad from the mid 70's, but to me it is an apt description of a seemingly universal truth – one which often undermines the most determined effort to resolve disputes, whether in the world of litigated claims or personal relationships. The aversion so many people have to offering an apology, expressing remorse or even acknowledging another's pain often proves to be a major obstacle to the resolution of disputes.

Where liability is undisputed, a simple apology – offered with the utmost sincerity – can be a powerful tool and an exceptionally effective way to earn the respect and forgiveness of the opposing party, often planting the seeds for much more fruitful negotiations concerning the issues that remain, whether the value of a claim, the nature and scope of remedial measures to be undertaken or any other issue yet to be resolved.

Even when liability is contested, the willingness to say "I'm so sorry for your loss" to a grieving spouse in a medical malpractice action, or "I'm sorry I found it necessary to dissolve our partnership" to a disgruntled former business partner, or "you were always a valued employee and we regret we couldn't find a position for you once we realized we had to downsize" to the plaintiff in a wrongful termination suit may prove to be the difference between continued hostilities and the ability to find a peaceful resolution.

Though most of us find it hard to say "I'm sorry," taking a moment to do so will almost always make it easier to work things out.

Floyd J. Siegal

A hospital was being sued for malpractice resulting in the death of a patient. . The patient had been terminally ill and it was unclear to what extent, if any, the malpractice contributed to the patient's earlier death. The plaintiffs, the deceased patient's mother and brother had made a demand for a lot of money and the parties were very far apart. Over the objections of some of his advisors, the hospital director apologized to the family members and expressed sympathy for their loss. In response, the mother indicated that she had been particularly upset because the hospital's procedures had limited her time with her daughter and because she felt that her needs and concerns and her daughter's wishes were not given effect. She wanted to make sure that other families did not have the same devastating experience. This led to a discussion of what changes the hospital could make in its procedures. The mother agreed to work with the hospital staff in implementing policy and procedure changes. After further discussions, the family reduced its demand by more than 60%. The apology opened the door to productive discussions exploring issues that went beyond dollar amounts to address the plaintiffs' underlying emotional needs and concerns. The hospital's willingness to take those concerns seriously reduced the desire of the plaintiffs to "make an example" of the hospital and convinced the family to become, in effect, a "partner" who could work with the hospital. The matter settled.

Ettie Ward

- ✓ *Goal* = Choice.

Because your client and the other side have strong differences of opinion, it should be indicated that there is no expectation that all of these differences will be resolved. However, you can indicate a hope that the mediation process will produce a rational discussion of the issues and an amicable resolution as opposed to what both sides would have to do if the mediation results in failure.

- ✓ State the agenda for the mediator.

The bad case is the kind of case that you would least want the mediator to take on an evaluative role. In this kind of case, you want the mediator to be purely facilitative. Your remarks at the outset should suggest just that. "While we do not expect that we will be able to resolve our strong differences of opinion, we do hope that an amicable resolution can be facilitated between the parties."

3. <u>Private Caucus Sessions/Negotiate the Number</u>

- ✓ Discourage threats and personal attacks.

Express to the mediator the importance of keeping the negotiations on a civilized level. The more civilized the discussions will be, the more likely that the negotiations will stay focused on attempts at persuasion, and the less likely there will be threats and attempts at coercion.

If personal attacks and threats of what will happen at trial are conveyed to you by the other side, indicate to the mediator that such tactics make it very unlikely that the mediation process can continue.

- ✓ Advocate the weaknesses of the other side's position. Have the mediator advocate the risks of "time" and "wasted assets."

In these cases, the other side will likely attempt to beat you into submission. You have also indicated at the outset that there are strong differences of opinion. Because of this, it is acceptable to counter punch, pointing out the problems that the other side may have with their case.

In many of these cases, it may take years to get to trial. The case may involve an insurance policy that gets reduced with any legal fees incurred and as a result, is a wasting asset. These are facts of life in many of these cases. However, if the other side hears this coming from you, it comes across as bad faith and coercive negotiating. "We are aware that your case is worth *x*, but since I have the power to keep the money away from you by litigating for three years, we only should pay you *y*. "

If the point is made by the mediator, it is more likely that this can be a valued point for the other side to take into consideration.

- ✓ Discuss the issue of "expectations" with the mediator.

Find out what the other side's expectations are for the mediation process. If its expectations are that the mediator will be evaluative (or in other words, agree that the other side is right), direct the mediator to try to adjust the other side's expectations to allow for a facilitative process. If the other side can accept the idea that the mediation is truly facilitative, its expectations will be lowered to accept a compromised result. Often this is, or should have been, addressed when the parties first agree to mediate or, even if ordered to mediate, select a mediator.

C. Multiple Party Mediation

Multiple party mediation is clearly the most difficult type of mediation to succeed, simply by definition. It requires an agreement between a number of parties greater than two.

However, a case that involves a number of parties is the type of case for which there would be the greatest justification for a mediated resolution. The more parties that are in the lawsuit, the more witnesses there are to be deposed. More legal theories will have to be defended, and more documents will have to be reviewed. In addition, more lawyers, will be on the phone juggling schedules with other lawyers, drawing out the proceeding and further increasing the costs. Thus, these cases are simply very expensive for everyone.

Despite this very obvious incentive, it remains very difficult to get cases involving multiple parties into the mediation arena. The reason is that usually there is no one brave

enough to suggest it. Defendants generally are broken down into primary and nominal defendants; stated another way, real villains and window dressing.

The nominal defendants will not suggest mediation because they're sitting in a corner and don't want any attention focused on them. The primary defendants will not suggest mediation because they fear that mediation will be a convenient forum to have four or five sets of fingers pointed at them; and they will then be forced to pay a premium to get out of the case. Plaintiffs' counsels usually love mediation, but they do not want to show any weakness or indicate that they are afraid or unable to try the case. Even if plaintiffs' counsel would suggest mediation, there is little chance that all the defendant parties would agree to mediate in good faith.

This leaves the principal villains -- those main defendants who are likely to end up paying a lot in both indemnity and legal costs down the road -- to be the sole proponents of the mediation process. There are particular strategies that can be followed where you can favorably resolve the case and limit the risk that the client ends up feeling that he or she has been mugged in a dark alley.

- ✓ Form an alliance with plaintiffs' counsel.

Remember that there is nothing that plaintiffs' counsel would like better than to be able to quickly and neatly resolve the monstrosity of a case that he or she had the chutzpah to bring in the first place.

Since you and your client can be the ones to bring plaintiffs' counsel to the promised land, you can use the offer of a "good faith" mediation to get as many concessions as possible from plaintiffs' counsel. The request for concessions (or incentives) is reasonable since you are going to use your political clout and capital to pull the other parties to the mediation bargaining table.

The first concession is a reasonable demand. You are going to spend a lot of effort getting the other parties to agree. It is a reasonable request that your client be given the incentive of a good faith reasonable demand. Otherwise, your client certainly would not permit you to waste your time and its money in this effort.

Also, seek out the number that would settle the case separately for your client and what a global demand may be. By knowing what the settlement demands for both your client and for all defendants will be at the mediation, you will have a better idea of the contribution you will need from the other defendants to reach a global settlement. You now can begin to determine how to use the mediation to settle the case at an amount that is substantially less than the demand made against your client separately, but at an amount that is close to the demand made for a global settlement.

You will then want to discuss the possibility of settling out separately with the plaintiffs if a global settlement cannot be reached at the mediation. You also should point out to plaintiffs' counsel the thought of using this possibility as a way to structure a global settlement with the less culpable parties. Since your client has been the primary defendant in the case, it is likely that your firm was carrying a disproportionate load for

the other defendants as well in defending the action against the plaintiff. The prospect of leaving the other defendants to assume the costly responsibilities that your own firm may have been taking on may be a potent weapon with which to induce a more substantial contribution from the nominal defendants.

- ✓ Have a pre-mediation conference at which it is decided that decision-makers are required to be present at the mediation sessions.

You will never be more justified in suggesting to the mediator that he or she should look to see what the mountain looks like than when there are multiple parties involved. A premediation conference can be used to get the nominal parties more invested in the process.

More importantly, it is here where you can suggest to the mediator that he or she require that the decision makers for all parties be present at the actual mediation sessions. Counsel for nominal defendants will generally not want to have their clients present. If they don't have their clients at the mediation, the nominal defendants' counsel can take a firmer nuisance value settlement position, and it will be very unlikely that you will be able to get any real meaningful contribution from these defendants. While they may rebuff your suggestion that their clients be present at the mediation, they will take a mediator's requirement more seriously.

Secondly, you can use the pre-mediation conference to dissuade the mediator from having opening presentations at the mediation. If there is going to be a large number of parties taking part in the mediation process, and they all gave opening presentations, it would take a large chunk of time out of the mediation and provide very minimal benefit to anybody. After the second presentation, people in the room can slowly start to doze off. Moreover, if your client is seen as the primary defendant in the case, your client will not get any great enjoyment hearing from four or five parties for three to four hours how he or she is the true and only culprit in the case.

- ✓ Make a reasonable offer early in the process.

Since your client will likely be the primary focus at the mediation, you should be thinking of ways of shifting the mediator's focus on your client to the other defendants in the case. The best way to do this is to make a good faith first offer. After this first offer is made, you can then send the signal that your client has put significant money on the table, and that it is time for the other parties to ante up. You can then hold off from making a second move until the other parties come back with their own offers to settle.

- ✓ Continue your alliance with plaintiffs' counsel at mediation and be prepared for anticipated arguments from less culpable parties.

As stated above, the biggest danger that less culpable parties face at a mediation is that the most culpable party settles out leaving them to carry a now greater proportion of the litigation load should they fail to settle with the plaintiff. At the mediation, not only do you want to present this as a real danger to the less culpable parties, but you also want to

be prepared to respond to the arguments that these parties will make to the mediator when they are faced with this possibility.

If, in fact, your client settles out of the case alone, each jurisdiction will have different rules regarding the use of a settlement as an offset to any judgment against the remaining defendants in a case. The mediator will not know such rules; and the other defendants' attorneys may not know the rules at the mediation. If you are holding out the possibility of your client's settling out of the litigation alone in order to extract the greatest contribution from the other defendants, you have to be prepared to explain what the effect of your settlement will have on the remaining defendants.

The two arguments that the less culpable parties use most often in tandem in this situation are (1) the plaintiff will not be interested in continuing the litigation against the nominal defendants if there is a settlement with the primary defendant, and (2) if the litigation does continue, they will get out of the case on summary judgment. Work with plaintiff's counsel before the mediation so that there are credible and persuasive responses given to the mediator when these arguments are made.

- ✓ Leave open the possibility of additional sessions.

As stated earlier, a mediation that involves a number of parties may also be a prime candidate for one to last a number of days. If the mediation is scheduled for a number of days over a few weeks, the parties will look at the mediation as a serious attempt to resolve the case as opposed to a one time "shot in the dark" affair. The more the parties are invested in the process, the more the parties are likely to take the process seriously.

D. The Bad Faith Card

Introduction

Consider this situation: You are the managing partner of an accounting firm, its personal counsel, or counsel for the firm retained by the insurer to defend a pending accountant liability lawsuit. A thorough investigation reveals that negligence is certain, damages have also been established and are well in excess of the firm's available policy limits. Plaintiff's counsel recognizes that the legal fees for the defense of the case would be substantial and, under the firm's policy would significantly reduce the available policy limits. Therefore, plaintiff's counsel makes a demand to resolve the claim for the remaining limits of the accounting firm's policy.

These facts will almost always result in a settlement. Wearing any of the above three hats, you will likely pick up the phone, call the insurer, and then send a follow up letter requesting that the demand made by the plaintiff's counsel be accepted. The insurer, recognizing its duty "to act in good faith" toward its insured, will likely accept this request and agree to settle the claim.

However, such "black and white" coverage situations in the real world are rare, and with various type of professional liability claims, are exceedingly more complex. A far more common example might be as follows:

You are counsel retained by the insurer to defend an accounting firm in an accountant liability lawsuit. The actual lawsuit was filed and reported to the insurer two years earlier. At the time it was reported, the letter sent to the insurer enclosing the complaint included a denial of any wrongdoing on the part of the accounting firm and a request that the lawsuit be vigorously defended. This position was echoed to the insurer's underwriters at the firm's annual renewal review.

It is now two years after the lawsuit was filed. A vigorous discovery schedule is in place with a trial date looming on the horizon. Plaintiff's counsel writes a letter to both you and the firm's personal counsel indicating that the plaintiff will accept the remaining limits of the accounting firm's policy. The letter does not indicate any deadline for the acceptance of this demand, but does suggest that it may be withdrawn after the parties recommence the discovery process. Plaintiff's counsel also volunteers the opinion in the letter that if the demand is not accepted, the insurer would be acting in bad faith, and plaintiff would proceed accordingly against both the accounting firm and its insurer to collect any judgment that exceeds policy limits.

As defense counsel, you have determined that though a motion for summary judgment may be filed resolving some issues in the accounting firm's favor, it will not completely eliminate the lawsuit, and a jury trial is inevitable. Overall, you have determined that the lawsuit is defensible, but not without some risks. Your opinion is that though you strongly believe that you can win the case, a jury still may not understand the accounting issues and may enter a verdict against the accounting firm. Ultimately, you assess the chances of winning at 50-50. You also opine that if there will be a verdict against the

accounting firm, a likely award given by a jury would be within the accounting firm's policy limits. You believe that such an award would be reflective of a significant reduction from the actual damages being sought by the plaintiff due to "lack of causation" and contributory negligence defenses. However, you cannot completely rule out a "worse case" scenario in which a jury awards a judgment in excess of the available policy limits.

While the managing partner of the firm still believes the firm did not do anything wrong, she is becoming more and more involved in the case. In fact, it is becoming a major distraction from the day to day obligations she may otherwise have. Also, she finds that her fellow partners now recognize this distraction. Some of these partners, having seen the plaintiff's counsel's demand, are worried about the potential of an excess verdict with the plaintiff going after their personal assets, and are now asking the managing partner, "What did we buy insurance for?"

Though she is outraged by the thought of the plaintiff receiving anything out of this lawsuit, she is now resigned to the fact that life should go on, and some money will need to be paid to get rid of the lawsuit. However, she is convinced that the plaintiff certainly does not deserve to receive the firm's remaining policy limits. She is also very concerned that a large payment to the plaintiff may result in a correspondingly large increase in the firm's insurance premiums and may encourage future plaintiffs to file their own lawsuits.

Personal counsel for the accounting firm has been retained to evaluate the lawsuit for the firm and to represent its interests to the extent they may diverge from those of the insurer. Personal counsel has been advised by the firm of its resentment of the plaintiff because of the claims made, as well as its resignation about the fact that the case should be settled with some money being paid to the plaintiff. Personal counsel has received plaintiff's demand and is very much troubled by it. He knows the firm wants the case settled for as little as possible. But, he is equally concerned that if the demand is not accepted, there may not be any future opportunity to try to resolve the case short of a jury trial – with its concomitant risk of a judgment in excess of policy limits.

Depending on what decisions are made from this point on, there are three usual outcomes: (1) the case ends up settling for the remaining policy limits; (2) the case ends up going to trial resulting in a defense verdict with the likelihood of an appeal, a plaintiff's verdict within the policy limits, or a plaintiff's verdict in excess of policy limits which, if affirmed on appeal, will likely result in a bad faith action against the insurer; or (3) the case ends up settling for an amount that is substantially below the remaining policy limits.

What many attorneys (and the professionals they represent) fail to realize is that the ultimate objectives of a professional organization (in this case, an accounting firm) and its insurer actually will become very similar. Assuming they are rational and acting without any other motives, they should both want to have the case settled below policy limits. This article discusses the strategies that may be employed by the professional organization, its counsel, and the insurer to reach this favored and mutually beneficial outcome.

WHAT IS "BAD FAITH?"

The problem that lawyers and their clients (both insureds as well as insurers) face is that cases that lead to bad faith claims often arise from complicated factual scenarios and, accordingly, the case law can vary dramatically among states and fact patterns.

In New York, for example, a case of notoriety on the topic of the insurer's obligation to make a "good faith" effort to settle on behalf of its insured is Pavia v. State Farm Mut. Auto Ins. Co., 82 N.Y.2d 709, 626 N.E.2d 24, 605 N.Y.S. 2d 208 (1993).15 In Pavia, the court distinguished "good faith" from "bad faith" by recognizing the conflict between the insurer and the insured when it is the insurer's interest to minimize payments and the insured's interest to avoid liability beyond the policy limits. The court held that, in order to establish a *prima facie* case of bad faith where an insurer can be held responsible for a verdict in excess of policy limits, the plaintiff must establish that the insurer's conduct constituted either (a) a "gross disregard" of the insured's interests, or (b) a reckless failure to place the interests of the insured on equal footing with its own interests when considering a settlement offer. Pavia, 605 N.Y.S. 2d at 211.16

The court in Pavia noted that the mere evidence of the existence of an unaccepted settlement offer is not dispositive of an insurer's bad faith, since an insurer cannot be compelled to concede liability and settle a questionable claim. Id. at 212.17 Rather, the plaintiff must show that the insured lost an opportunity to settle the claim when all serious doubts about the insured's liability were removed. Id.18 However, the following "bad faith equation" set forth by the Pavia court shows how complex bad faith litigation can become:

"The bad-faith equation must include consideration of all of the facts and circumstances relating to whether the insurer's investigatory efforts prevented it from making an informed evaluation of the risks of refusing settlement. In making this determination, courts must assess the plaintiff's likelihood of success on the liability issue in the underlying action, the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle. Additional considerations include the insurer's failure to properly investigate the claim and any potential defenses thereto, the information available to the insurer at the time the demand for settlement is made, and any other evidence which tends to establish or negate the insurer's bad faith in refusing to settle. The insured's fault in delaying or increasing settlement negotiations by misrepresenting the facts also factors into the analysis."

Pavia, 605 N.Y.S.2d at 21219

Even in those states that are considered more favorable to the insured than New York, the exact state of the law is often uncertain. In New Jersey, for example, the case of Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 323 A.2d 495 (1974)20 is frequently viewed as the standard defining an insured's duty to settle. There, the court held that an insurer has a positive fiduciary duty to take the initiative and attempt to negotiate a settlement within policy limits. Rova Farms, 65 N.J. at 49621. Under Rova Farms, an insurer may be held liable for an excess judgment unless the insurer

demonstrates not only that there was no realistic possibility of settlement within policy limits, but also that the insured would not have contributed to whatever settlement figure above that sum might have been available. Id.22

However, this duty was recently defined more favorably toward the insurer in Pickett v. Lloyd's, 131 N.J. 457, 465-6, 621 A.2d 445 (1993)23:

"[T]he relationship of the Company to its insured is one of inherent fiduciary obligation. A necessary corollary of that fiduciary duty to act on behalf of the insured is that a decision not to settle within the policy limits must be an honest one. It must result from a weighing of probabilities in a fair manner. To be a good faith decision, it must be an honest and intelligent one in light of the company's expertise in the field. Where reasonable and probable cause appears for rejecting a settlement offer and for defending the damage action, the good faith of the insurer will be vindicated."

Other jurisdictions follow variations of the standards adopted in New York and New Jersey. In Texas, for example, the insurer's duty is defined in G.A. Stowers Furniture Co. v. Am. Indemnity Co., 15 S.W. 2d 544 (Tex. App. 1929)24. Under this case, the insurer must be held to that degree of care and diligence that an ordinarily prudent person would exercise in the management of his own business when settling a claim against the insured. If an ordinarily prudent person, in the exercise of ordinary care (as viewed from the standpoint of the insured) would have settled the case and failed to do so, then the insurer should be liable to the insured.

However, in the case of Transportation Ins. Co. v. Monel, 879 S.W. 2d 10 (1994)25, this duty appears to have been relaxed. In Monel, the court noted that when a policyholder alleges bad faith, it must prove that the insurer has no reasonable basis for denying payment of the claim and that the insurer knew or should have known that.

As this case law suggests, bad faith litigation is somewhat of a moving target and is very fact specific. Such cases often pose their own substantial risks for both the insured and the insurer. An insured may face the possibility of having to pay an excess verdict and potentially incur a substantial amount of additional legal fees in order to bring a bad faith action against its insurer, which may ultimately be unsuccessful.

Similarly, an insurer may face the possibility of having to pay an excess verdict and additionally incur a substantial amount of legal fees to defend a bad faith action, which may ultimately be successful. In some jurisdictions, if the insurer loses, it may also face liability for punitive damages and legal fees incurred by the insured in the bad faith action.

Because bad faith litigation poses enormous risks for both the insured and the insurer, it is in both sides' interests to avoid this outcome. These risks increase if the relationship between the insured and the insurer is viewed as in the Pavia case – *i.e.*, one of necessary conflict where it is the insurer's interest to avoid making payment and the insured's interest to avoid liability in excess of its policy coverage. The key to reducing this risk is

a cooperative relationship between the insured and the insurer in recognition of the fact that the interests of both the insured and the insurer are ultimately aligned.

GET MORE BY SETTLING FOR LESS

In the factual scenario discussed above, the managing partner has no particular affinity for the plaintiff. Other than protecting the firm from excess exposure and the partners from personal liability, and otherwise getting on with business as usual, she has no interest in seeing that the plaintiff gets any money. Although most settlements involving professional organizations may be kept confidential, she is also justifiably concerned about the effect such a settlement may have on putative plaintiffs or disgruntled clients that learn of it. Moreover, she may be concerned that a large payment by the insurance company for a settlement can result in a large increase in the firm's premiums or, even worse, loss of coverage. Therefore, it is in the firm's best interest to settle for the lowest possible amount.

It can be a mistake if, upon receipt of plaintiff's demand, the firm's personal counsel merely fires off a letter to the insurer requesting that the case be settled within the policy limits. Such a demand is not necessarily reflective of the firm's best interests. While there may ultimately be a "worst case" scenario in which there would be a judgment above the firm's policy limits, the insurer, having experience in handling similar claims, may honestly evaluate the settlement value of such a claim well below the firm's policy limits. Yet such a letter, by itself, can create the mutually detrimental conflict described in the Pavia case.

It can be an even bigger mistake when personal counsel takes it upon himself to begin "sympathy" discussions with plaintiff's counsel. In extreme cases, such discussions may constitute a violation of the "cooperation clause" of the firm's policy. Such a clause may read as follows:

"The insured shall cooperate with the Company and upon the Company's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of acts, errors or omissions with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, admit liability, voluntarily make any payment, assume any obligation or incur any expense without the consent of the Company."

Additionally, such discussions play right into plaintiff's hands. Plaintiff, having learned of the firm's eagerness to settle, will be less willing to move off of his or her policy limits demand. Even worse, plaintiff may now believe that he or she can recover an excess verdict against the insured, and raise or withdraw the demand. The insurer, having the honest belief that the settlement value is well below the policy limits and that it is acting in good faith, may determine that it no longer has any incentive to negotiate when plaintiff is showing no willingness to be reasonable. By overprotecting against the "worst case" scenario, personal counsel can ensure that his client gets exactly what it wanted to

avoid: a jury trial, an excess judgment, and the expense of a potentially unsuccessful bad faith lawsuit.

In contrast, it can also be a mistake if you as defense counsel stand idly by as if your only role is to defend the litigation. Having been retained by the insurer as well as having established a relationship with the firm, you can now become the bridge of communication between the firm, personal counsel, and the insurer. Whether the case ultimately settles or goes to trial, you have a primary role and should be at the forefront to ensure that a coordinated response is given to an inappropriate policy limits demand.

If they have not yet already done so, this will be an opportune time for the insured, its counsel, and the insurer to evaluate the case collectively and map out a strategy for settlement. The evaluation should consist of much more than simply a discussion of "will we win or will we lose?" There should be an examination of whether the timing of the demand makes sense. For example, where are the parties in the discovery process? Does the plaintiff have weaknesses in the case that can be exploited by further discovery? On the flip side, are there weaknesses in the defense that may be exposed by further discovery? Has an expert been retained to evaluate damages alleged by the plaintiff? Has anything recently taken place that has prompted the plaintiff's policy limits demand? If much can be done in investigation, discovery, or motion practice to expose weaknesses in the plaintiff's claim, the risk of withdrawal of any early policy limits demand may be worth taking.

Plaintiff's counsel probably had one of the following two objectives in issuing the demand. The first may simply have been to prompt a responsive settlement offer. Under this scenario, plaintiff's counsel has no real interest in pursuing an excess verdict or a bad faith claim. Frequently, plaintiff's counsel has a client who may be tired of the case, who may be tired of spending money on the case, or who merely wants to see some quick results. In this situation, the best strategy may be to make a prompt but lower offer before plaintiff's counsel actually starts to have serious plans for an excess verdict.

The second and more dangerous of the two possible objectives is that plaintiff's counsel believes that potential damages are well in excess of the policy limits, and he is seriously attempting to set up a bad faith case so that he can collect an excess judgment. If so, it is in the insured's and the insurer's best interests to dissuade plaintiff's counsel that excess damages or a bad faith claim exists.

It is often relatively easy to determine which of the two objectives plaintiff's counsel is pursuing. Defense counsel may be aware of plaintiff's counsel's reputation of pursuing bad faith claims. Defense counsel may have had a frank conversation with plaintiff's counsel in which defense counsel determines that there is some reasonableness in plaintiff's negotiation position. Defense counsel may also be authorized to extend a lower offer to see if it induces a reduction in the plaintiff's policy limits demand.

Despite what desires may be expressed in correspondence between the firm's personal counsel and the insurer (and despite what plaintiff's counsel's objective is), a show of a united front to the plaintiff's counsel is always the best strategy for settlement purposes.

If you, as defense counsel, can convince plaintiff's counsel that your client and its insurer stand together in their firm belief that the case is defensible, plaintiff's counsel may come to the conclusion that the strategy to pit the insured against its insurer has failed. Plaintiff's counsel will have to examine seriously whether there really is a chance to collect on any excess judgment. Plaintiff may then focus on how much future defense costs will reduce the available policy limits.

"*There are times when I am in the position representing the insurer, and we see the case differently than the insured. It is these times that I will want to sit down with the insured and give them my one rule: "In private, you are free to beat me up, throw me out the window, yell at me, and put gum in my hair. In public, we are a united front." I have never had an insured break that rule.*

Steven Joseph

Since both the insured and the insurer are interested in seeking a reasonable settlement, that viewpoint should be conveyed to plaintiff's counsel. This is part of the effort to show a united front and part of the effort to dissuade plaintiff's counsel from the belief that there may be an excess verdict that can be ultimately collected.

If the insured and the insurer determine that there is no better time than the present to open negotiations, an attempt should be made to convince plaintiff's counsel to accept this belief as well. The best way to do this is to talk about how the plaintiff's case may get worse through discovery and/or motion practice. The worst way (though it may work in getting the negotiations started) is to start telling plaintiff's counsel how much you will spend in fees and costs in the defense of the action. Plaintiff's counsel may then automatically assume (often reasonably so) that those fees and costs will comprise at least a "cost of defense" settlement.

Even when negotiations between counsel are conducted in good faith, those negotiations can get bogged down. Mediation can be a way for a neutral third party to act as a facilitator and sounding board. If plaintiff's counsel accepts the idea of mediation, it usually is a signal that the plaintiff's counsel will negotiate in good faith. If the plaintiff's counsel refuses, consider the idea of getting the judge handling the case to order it to mediation or a mandatory settlement conference. Judges love to see cases fall from their dockets, and if the insured and insurer show good faith in their commitment to mediation, a judge may grant the request.

If the plaintiff's counsel opposes mediation, it will diminish any argument he or she may have that plaintiff provided a reasonable opportunity to settle. Even if a case goes to mediation against plaintiff's counsel's wishes, a good mediator will identify and articulate weaknesses in the plaintiff's claim. This identification will exert pressure on the plaintiff's side to be reasonable. Finally, mediation provides defense counsel and the insurer a means of gauging their evaluations of the value of the case.

POLICY LIMITS OR TRIALS?

Occasionally, the "united front" approach has been presented, the weaknesses in the plaintiff's claims have been identified, a reasonable offer to settle has been made, and still, plaintiff's demand for policy limits remains firm. Alternatively, plaintiff withdraws the offer and indicates that he or she will proceed against both the accounting firm and the insurer to collect any excess judgment.

The united front could now show some stress at its seams. The partners in the accounting firm are unfamiliar with the process, and they are growing impatient and nervous. The managing partner is getting pressured to consider paying the demand. The insurer is getting frustrated by the unreasonableness of plaintiff's position and is resigned to the fact that the case will have to go to trial. Defense counsel is alerting all involved to the costs and risks of the trial. The question at this point becomes whether any joint strategies between the insured and the insurer can be employed to get the case resolved.

Sometimes, it takes twelve strangers staring disapprovingly at the plaintiff's table to breed reasonableness in a plaintiff. Sometimes, it takes a strong judge who is not patient enough to listen to weeks of testimony on accounting methods to convince plaintiff of the weaknesses in his or her case. If the accounting firm, in this case, is patient enough, and the insurer is willing to pay for defense counsel and their experts to prepare for and attend trial, the firm and the insurer may jointly decide that the only way to obtain a reasonable demand is to demonstrate that they are ready, willing, and able to try the case.

While some cases may need to be tried, it may not be practical or a trial may simply carry too much risk for a particular party to bear, and settlement becomes the only practical choice. However, coming in and waving a settlement flag too strongly may invite an unreasonable demand, and end up making the desired goal more difficult to obtain.

Steve Joseph

In certain "bad faith" situations, an insured may assign a bad faith action against the insurer to the plaintiff who receives an excess judgment against the insured. *See, e.g.,* Allstate Ins. Co. v. Kelly, 680 S.W. 2d 595 (Tex. App. 1984)27

However, this can be done in a creative way by both the firm and its insurer prior to a judgment being entered where the insurer insists on trying the case in the following manner:

1. The insurer and the firm together assign the bad faith claim to the plaintiff in the event of an excess judgment;

2. The offer to assign the bad faith claim is made on insurance company letter head and signed by both an insurer and insured representative;

3. The insurer waives any standing issues so that the plaintiff can proceed directly against the insurer in the event of an excess judgment;

4. The plaintiff agrees not to proceed against the accounting firm or its partners to collect an excess judgment;

5. It is stipulated that the agreement cannot and will not be admitted into evidence in any future bad faith action against the insurer; and

6. All settlement offers are withdrawn.

This kind of assignment has many benefits. It sends a signal that the plaintiff may not get a very cooperative witness in the accounting firm representatives in a future bad faith action. It makes the accounting firm and its partners more cooperative and willing to try the case, since they face no excess judgment. Finally, it gives the insurer a less sympathetic plaintiff than the accounting firm in any resulting bad faith litigation. If plaintiff's counsel refuses this form of assignment, plaintiff's counsel still has another daunting factor to consider – the likelihood of success in any future bad faith litigation.

This "out of the box" offer actually was something that I did about fifteen years ago handling a contentious accounting malpractice case. Plaintiff's counsel were very aggressive, and they took the depositions of all the firm's partners asking questions about their personal assets and their first born child.

They were making noise about getting an assignment of any judgment and going after the insurance company, and personal counsel for the accounting firm indicated that they were considering such an assignment,

So, I thought that if the worst case scenario actually happened, and they got an assignment, why don't we just go ahead and give them the assignment up front, and stick that assignment on the insurance company's letterhead.

The benefit here was that the whole point of the noise they were making is that they didn't want to try the case. They wanted to intimidate, and get the largest amount of money doing the least amount of work. Now, they couldn't reject the offer without having some ramifications later. If they accepted the offer, any pressure they wanted to exert through the insured would now be removed.

The offer did lead to a more serious settlement discussion that centered on the merits of the case.

Steve Joseph

If both the firm and its insurer are comfortable with a "high-low" binding arbitration, this method can also be used to present the ultimate "put-up or shut-up" show of good faith to plaintiff's counsel. Under this process, the "high" can be set at the remaining available limits of the policy and the "low" can be set at a reasonable valuation of the case from the insurer's perspective. Plaintiff's counsel may be very hard pressed to accept such an offer because of the risk of an arbitrator picking the low number. Plaintiff's counsel will also be hard pressed to say that there is a potential bad faith claim when the plaintiff has been offered an efficient method to show that what he or she says is in fact true – *i.e.*, that the

case is worth the firm's policy limits. This may ultimately be the point where plaintiff's counsel ends the game playing and starts talking about what constitutes a more reasonable settlement.

WORKING WITH MUTUAL INTERESTS IN MIND

When a professional entity and its insurer understand that they both share the same interests, objectives, and adversary, they can mutually benefit one another. By cooperating, the insurer and the insured can defeat one of the most potent weapons in the plaintiff's counsel's arsenal – the technique known as "divide and conquer." Unreasonable and poorly handled claims of "bad faith" against an insurer can work directly against the insured; cooperation with the insurer should always be considered. Both sides' attorneys have also given their client the opportunity to learn about the case and may have possibly dispelled some of their own biases. Both sides can now better assess the risks of a trial. Even if the case does not settle at mediation, both sides have been given some food for thought so that the re-evaluation process may continue after the mediation and that could then result in a settlement later on.

F. Negotiating With the King Wearing No Clothes

This is probably the most difficult type of case to deal with because the ultimate resolution can have the largest settlement range differential from the very low to the very high.

My mother used to tell me; "Don't be a Moyshe Groyce with tsrissenah gatkas!"

It means; "Don't be the great Moses with torn underwear!!"

Steve Joseph

- ✓ Who is the king with no clothes?

The king with no clothes has had a lot of success in the past. The success was based on using every intimidation weapon available. After all, he is the king. The king has made the current litigation more complicated than it should be. Unnecessary motions have been filed. An extraordinary number of depositions have been taken. A lot of smoke and mirrors fill up the room.

But, you get through all the smoke and mirrors. The position bears no real sense of reality. The king, though, pushes and pushes the position, and you hear it so often, you start to believe it. You ask yourself; "Am I crazy or is he crazy?" What makes this even worse is that while you see the king wearing no clothes, there are others who cannot stop raving about the beautiful garment his position represents.

However, you are not crazy. The king is about as naked as a newborn baby. There are strategies that can be employed at mediation to ensure you don't pay the king's ransom so he can then go out and buy a really fancy wardrobe.

- ✓ Recognize the king for what he is.

The first step for dealing with the king is to recognize him for what he is: a bully. Plain and simple. Throughout the course of the litigation, the bully will try to bait you and get under your skin. The bully will try to make the case personal. When the bully succeeds in doing that, you can't see the case in the clear way that you need to.

So, you have to start the process by not letting the bully succeed in any tactics that will take you off your game plan. If the bully takes action expecting a certain reaction, think about how you can react differently.

- ✓ Retain a mediator experienced with dealing with bullies.

The choice of a mediator is particularly important when your opposing side is deemed a bully. You worked hard not to get pushed around so you do not want to retain a mediator that will be pushed around.

There are times when I have wanted the mediator that can settle the unsettleable case, and of course, that mediator is booked solid for three months. Do I settle for the second best? Not necessarily. I have contacted the mediator and inquired if that date can be bought out. The parties for that date get rescheduled and get 50% off and that may be worthwhile for them to do so. I now get my mediator who will know how to deal with the king.

Steve Joseph

- ✓ Present Yourself As King.

Face it. The king does not show any respect for you. You are a mere serf, a peon. He looks at you and he thinks he will squash you like a bug.

However, there are many kingdoms out there so he does not have to be the only king. There also happen to be openings for king positions. Your adversary took up the role of evil and mean king. Make sure you take on the role of just, wise and noble king.

- ✓ Come Prepared To Do Battle.

If there was ever a mediation for which you really need to come prepared, the mediation with the king is that mediation. You need a power point presentation? Get it. Want to come in and show the mediator that you did a focus group, or mock mediation that got great results? Do it. You have cases? Bring them.

Expect smoke and mirrors from the king? Have a plan to deal with them. Have some smoke and mirrors of your own? Get them all packed up and ready to go.

The king will be prepared to put on a show. You have to be prepared to match it.

The best way of explaining this point is to watch some professional wrestling on television. Some wrestlers come out from the curtains, and they have their music. They have their fireworks, and they are wearing some fancy tights.

Sometimes, these kings of wrestling go to the ring, and some poor schlub with a regular guy name, boring tights, and a hundred pounds lighter is standing and waiting in the ring. You know what he is waiting for? He is waiting for a nasty and quick beating.

I can go to the bathroom for that match. But then there is the match where the opponent has even better music, more fireworks, and the crowd erupts into a pandemonium. The king has your respect, and he knows he will get a serious battle.

Steve Joseph

During the course of arms control treaty negotiations, the negotiators for the former Soviet Union were notorious for their tactics and strategies.

Typically, they viewed negotiating as a zero-sum game where what one party wins, the other party loses. As a result, their tactics were very aggressive and included the use of rage, anger, and threatening to pull out of the negotiations entirely.

In the face of such intransigence, it is important to remain calm, allow the anger to dissipate or blow over, and to stress the benefits of mutual cooperation. In doing so, you can convince the other side that the situation is, in actuality, a positive-sum game in which both parties can come away better off. For example, a speedy resolution through mediation will avoid costly litigation and save both parties from expending significant sums in attorney's fees and expenses; costs that could very well exceed the liability of liable party or the recovery of the party seeking relief.

Peter Halprin

- ✓ Be Prepared to Respond to the Smoke and Mirrors of Cost

If you are doing battle with someone who presents himself as the king, you have to expect that the king will present the case as one that he will employ all the resources of the kingdom in any battle. In other words, it will cost a lot of money to fight this battle, so just surrender.

But, stay focused. Remember that if the king truly wears no clothes, ultimately it makes no sense for the king to do battle naked. The point is that he can walk out today, and still be king. Or, he can do battle and lose the entire kingdom.

In other words, the king with no clothes has a lot more to lose than you do.

- ✓ Consider Bypassing the Opening Presentation.

The king loves any kind of royal ceremony. So, it comes as no surprise that the king will use the opening presentation as a coronation of the wonderful case he has and any doubt

that existed before the opening presentation will immediately be erased. You sit through this, and you think that the verdict already came in. They are already lining up afterwards to kiss the king's ring and throw him flowers.

Your presentation is short and simple. You simply disagree. Even worse, your opening statement starts out with the words "I don't need to rehash all the facts of the case"..or "I don't want to take any more of the mediator's time getting into the case…" (after opposing counsel had no problem doing both!) Thank you very much.

If that is the presentation, forget it. You can come in with a sign on your back that says "beat me", and that would be more effective.

Avoid this situation at all costs. Think back to the professional wrestling example.

- ✓ Use Pessimism as an Effective Negotiation Tool.

The mediator wants to settle the case because that is how the mediator feels successful. The king may not want to battle at trial, and the whole intimidation and bullying game is not because the king is a bully. It is because the king does not want to do battle at trial. The king is genuinely a big scairdy cat!!

So, we have to test this guy. Is he really as tough and rough as he makes himself out to be? There are many ways to test the king here. One way is just keep saying how pessimistic you are about the likelihood of settling the case because, quite frankly, you just see the case very differently so while you are here, participating in the mediation, you are also busy getting ready for trial.

The mediator comes back and brings back the growls from the other side, and you don't get excited. You yawn. It's getting more boring by the minute. You want to know when you can leave already.

- ✓ Keep the Debate Focused on Your Winning Issue.

The reason that the king has no clothes in a particular case has to do with a certain weakness, a certain issue. Have the mediator go back and forth about that issue.

The reason that you stay on the same issue is because you really want to present a sense of confidence in that one issue. Imagine if you have a great issue. You threw it out in the beginning of the mediation, got a small move from the other side, and you don't bring it back because you think that you played that card.

That is a mistake. If it is a strong point, beat it into the ground. Imagine if you never came back to that issue after the first small movement. It may show a lack of confidence in your strongest point.

- ✓ Identify for the Mediator All the Areas Where the King Is Overreaching.

One thing that the king will be very good at is overreaching. The king sees an inch and wants to take a foot. At trial, overreaching can work if you try it once, but if a lawyer keeps going back to the overreaching well too often, that will begin to grate on the jury, and the king starts undressing himself by all the overreaching.

At mediation, the more I hear positions that overreach, the stronger my position gets. That should be made very clear to the mediator.

The Other Side Just Doesn't Care…..or This is Just a Game to Them

I have had numerous cases in mediation where I have been faced with the situation that the other side will not move off of their position because of their position as "king", they can afford whatever consequences a "non-settlement" or trial may bring.

One case in particular strikes me here. The plaintiff was left in the room with us and was dropping names and events. He just got back from the Masters. He is off to go sailing in the Hamptons. He had dinner with Bill Clinton.

This "king" had a rather weak case. In fact, the Complaint itself would open himself up to a searing cross examination. The case was tangled up in complex issues that would guarantee an appeal and a second trial. When all was said and done, because of cost and complexity, this "king" who just doesn't care would face a month of sitting in a court room, and millions more in fees. That is lots of time and money for someone who is sailing in the Hamptons, and having lunch with the Clintons.

The ones who say they just don't care are very successful people who know how to make good decisions. These are the people who care the most.

Steven Joseph

If you do not change your position, we will just simply roll the dice.

We have all heard that line. "I'll just roll the dice." Think about this statement. If all the opposition has to do is to roll two dies, the odds of hitting a number is 11-1. You may not feel that comfortable with even 11-1 odds. But, how about 50-1, or 100-1? My experience is that whenever I hear that line, the odds are much greater than that.11-1. The value of a case is much different if there is a 11-1 chance of succeeding or if there is a 50-1 chance of success.

Steven Joseph

- ✓ Be Prepared to Not Settle at the First Mediation.

The king will be testing you in every way possible. So, it is very important that you hold your ground. This may include allowing the mediation, or the first mediation session to fail. Once you have established that you are holding ground, the king may find a way to get you back to the table. Once you get back to the table, you will be in a much stronger position.

- ✓ Offer Alternative Means to Resolving the Case

The king talks a good game, and he's not backing down. Consider alternative "put up or shut up" offers of settlement: a binding arbitration, a high-low, a take it or leave it, or a mediator's proposal. Throw in a deadline.

When the Mediator is King! (Or The Mediator in the King's Lair)

Those of us who show up at a mediation on a regular basis expects that the mediator will play devils advocate and point out the weaknesses in our position. Sometimes, the client will panic, and those in the room who are experienced at the game gives assurances that the mediator is doing the exact same thing with the other side.

But, once in a while, the line is somewhat crossed. The mediator pays no attention to your arguments, or quickly dismisses them as having no value. The mediator shuttles back in to your room with the same message, essentially that opposing counsel is right and you are wrong, and you should try to resolve the case at whatever is being offered or demanded.

Something is wrong here. The mediator is no longer being a devil's advocate, but rather, the advocate for your opposition.

This is a dangerous situation. If you allow the negotiation to go on and on by the mediator's views, they can slowly solidify, and take over the entire dynamic in the negotiation. This can quickly happen if you just follow the mediator's requests for movement which will likely be substantial moves on your end with little movement from your opposition in return.

You have two options here. The first is to declare an impasse on your own. Now, there's a way to do this if you want to continue the negotiation. You state that the parties are too far apart, and we see the case very differently, and while we were prepared to make a substantial movement, we do not feel that the negotiation will bear any fruit.

The mediator may then moderate downward or upward the negotiation, and see if the mediation can continue with sights set a bit lower or higher than what was previously thought. I literally get the feeling here that the mediator was trying to hit a homerun for the other side, and once I said we would walk away, the mediator thought about it, and decided he would try to get a "double: instead.

A second strategy may be employed if you have a particular specialty, and see the same kind of case over and over again. For example, I have handled dozens of cases involving bad loans made by banks who then sue the appraiser, blaming an inflated appraisal as the reason for the bad loan.

When you handle the same case over and over again, you can expect a particular result or range where the case will be resolved. If a mediator devalued an argument that always gets traction, I will not allow the mediator to get away with that. I have a particular expertise in these kind of cases, and I will not let the mediator devalue that expertise.

Just remember that this can happen. Mediators are human. They have biases. They may get a lot of cases from opposing counsel. If we look back to your opposition who may act like a king, the mediator may simply be a loyal subject of the king. Be prepared if this happens.

Steven Joseph

WHEN THE CASE DOES NOT SETTLE AT MEDIATION

This section is not titled "When the Mediation Fails" because the mere fact that the case was not resolved at the mediation, in and of itself, does not make the mediation a failure. Hopefully, the mediation will have provided you with an opportunity to think about the case in a way that you could not have done sitting alone in your office. You have had the chance to have a neutral give you his or her unbiased impressions of your case. You may have seen the other side's client for the first time. You may have gotten a sense of how your adversary may perform before a jury. Both sides' attorneys have also given their clients the opportunity to learn about the case and may have possibly dispelled some of their own biases. Both sides can now better assess the risks of a trial. Even if the case does not settle at mediation, both sides have been given some food for thought so that the re-evaluation process may continue after the mediation and could then result in a settlement.

Consider this situation, however. The mediation ends with your side making what it honestly considered to be a good faith offer or demand. This does not result in a settlement. The other side's last offer or demand is thought to be outrageous, and not in good faith. Sometime thereafter, the case ends up settling for close to or at the very same number that your side had thought was out of touch with reality at the end of the mediation.

What happened here? What was the dramatic change in the case that resulted in this dramatic change of heart by your side?

In all likelihood, nothing at all happened after the mediation, but a whole lot happened during the mediation. If your side sends the signal that the best alternative to a negotiated settlement at mediation is a better deal later on, the other side will surely pick the better deal that lies ahead. There are things that you can do both during and after the mediation to avoid this kind of result.

- ✓ Make sure the other side knows that the decisions made by your side are being made by the person with the ultimate authority to cut a deal.

Imagine the impact on the other side when it learns that the person it had believed was the decision-maker for your side, clearly conveys the impression that <u>he or she in fact is not the ultimate decision-maker</u>. This thought can be conveyed by revealing that he or

she has only limited authority to accept or reject a deal or that he or she is not familiar with the case. Also, if this is conveyed to the mediator, the mediator will not be deceptive and attempt to hide this fact from the other side.

The other side will rightfully think, "Why should I make the deal with someone with only limited authority? This person is the first line of defense (or offense). It is better to cut the deal with the person who truly is the ultimate decision-maker. Only then, can I be convinced that I am getting the best deal for my client."

People will always assume that they get their best deal from the person with the ultimate decision-making power.

I have more than once been at mediations at which one side either came with limited authority or otherwise for some reason had a strict limit to work with. Then, no doubt thinking they were just being honest and "cutting to the chase," that side announced in the first round of offers that x dollars was all they had. Sometimes this may even happen in the opening session. The other side never believes that the first offer is really all there is. So they make a counteroffer. Then both sides are stuck. The first party can't move because they have already put everything they have on the table. And the second party can't move without bidding against themselves. The obvious solution is perhaps a corollary to one of the rules above -- never put everything you have on the table in the first round.

The other aspect of this is that the first party immediately let everyone know that the attending representative had a strict limit. If he or she had not put everything on the table at once, then the other side did not need to know that. You should have a bottom line number in mind before you go into mediation, but you do not want to immediately share that with the other side. To do so ruins the "dance" and makes the other side believe they are not getting all they could get.

However, one of my colleagues relayed to me an experience in which he broke the proposed "rule" by putting his final offer on the table right away. Under the circumstances, it was a successful strategy for him to do that -- he had only a small amount to offer in a death case in which his client had significant defenses. He did not want to insult the plaintiff by opening with a tiny amount and then bargaining up from a tiny amount to a small amount. Reflecting on that, however, it seems that there are always unique situations where any rule does not apply. In general, it still seems to me that it is important not to put everything you have on the table at the outset.

Derek Lisk

- ✓ Never make more than one move in your settlement posture at the mediation that may be significantly greater than the settlement moves that the other side may be making at the mediation.

Imagine what the other side may be thinking under this set of circumstances. They have come into the mediation with a $10 million demand. Your side has opened up with a $1 million offer. Your side has gone up to $2 million, then $3 million, and then $4 million.

Conversely, the other side has gone down to $9.5 million, then $9.25 million, and then to their final resting place of $9 million. Your side then makes a final lunge at settlement with an offer of $6 million that is the most you were hoping to spend.

Here, all the significant moves have been coming from your side of the table. You are literally sending the signal to the other side that they do not have to move too much, and the longer they wait you out, the better the deal that they will eventually end up with.

Certainly, at times, it may be appropriate to make a significant move off of your original position to get the ball rolling. However, if you make two, three, or four significant moves without the same kind of movement from the other side, you will find that you are the only one pushing the ball.

- ✓ Never end with the last "final offer" or "final demand" move you are willing to make unless you have confidence that it will result in a settlement.

In the above hypothetical, $6 million was the most that your client wanted to spend to resolve the case. It was put on the table despite the fact that the other side was not showing any signal that they were ready to approach that number.

It is always appropriate at any point in the mediation to suggest to the mediator that he or she is only allowed to offer that number to the other side if: (a) the other side makes a proportionate move, or (b) that number results in a settlement.

It is always appropriate to suggest that the last offer or demand made at the mediation was your final move. This is not meant to be deceptive. Based on the information provided at the mediation, you have evaluated that the last number that you put on the table was the appropriate settlement amount. Should additional information become available after the mediation ends, you would be open to reevaluate your settlement position.

- ✓ Have a litigation game plan ready in the event that the mediation fails to result in a settlement.

You never want to walk out of the mediation knowing that you have already taken all of your best shots at the other side, and that it's all downhill from here. You should position the case for mediation to the extent that you are able to identify the other side's weaknesses at the mediation. Any discovery you can take or motions that you can file after the mediation can be used to further expose those weaknesses you have identified.

There are two things that you should consider. First, if there is a settlement conference that the trial judge is planning to hold shortly after the mediation, a motion may be appropriate to not only put pressure on the other side, but to educate the judge as well. But, you do not want to go overboard. The judge may not be too happy with the side that dumped banker boxes into his or her chambers.

Second, if you go overboard restarting the litigation, you may give the impression to the other side that everything you are doing is not because you are ready to try the case, but

you are afraid to try the case. While it is appropriate to send out a few flares as warning shots to the other side, you do want to continue your preparation of the case towards trial almost as if the mediation had never even occurred.

- ✓ Consider whether you wish to continue to retain the services of the mediator.

The mediation may have failed to resolve the case because the mediator was ineffective in getting the parties to move closer to each other. If this was the case, there is no need for the mediator's services once the mediation ends.

The more likely reason that the case did not settle at the mediation is that one or both of the parties has to reassess what was both said and learned at the mediation. If this is the case, it is appropriate to request that the mediator be available either by phone or to schedule an added mediation session if the parties choose to continue their settlement discussions. The mediator may have gotten very close to getting the other side to accept your last offer or demand at the mediation, and the mediator may be the most effective person to propose a new offer or demand on your client's behalf.

- ✓ Consider setting forth in writing your last position at the mediation, and the reasons for such position.

The other side may have gone back home to reassess their position. They may have taken on an overly cautious approach to the negotiation at the mediation. They may not have even had their ultimate decision-maker present at the mediation or the mediator may not have been effective in explaining your position to the other side.

For all these reasons, consider putting together a letter directed to opposing counsel setting forth your settlement position, the rationale for your position, and whether any additional information may provide additional movement. You also want to explain what you may be prepared to do in a continued litigation battle that would explain why the continued litigation battle would be a worse alternative to a negotiated settlement (WATNA). If you left the mediation unsure of whether you got your message across to the other side through the mediator, you can be certain that the message will get through in a letter.

- ✓ Consider making an offer of judgment.

Whether you are representing a plaintiff or defendant, offers of judgment can be an effective way of putting the other side on the spot, and otherwise keeping the pressure on to settle.

In many jurisdictions, if an offer of judgment is filed with the court, and the other side rejects this offer, the other side may be responsible for paying your attorney's fees if the judgment at trial is less or greater (depending on who makes the offer) than the amount of the offer.

This may be the most effective time to make such an offer. You have just spent time at a mediation presenting why the case should be resolved for the amount of your last offer or

demand. By making the offer of judgment, you can determine whether the other side's negotiation strategy was mere posturing or whether it honestly rejects your analysis of the settlement value.

- ✓ Agree or make an offer to continue negotiations after the completion of some event or after discovery is completed in the litigation.

The mediation stalled because the two sides failed to agree on particular issues that obviously can be later clarified through additional discovery or through the decision of a judge on a pending motion. If this is the case, don't wait for the completion of such discovery or the decision on a motion to start approaching the other side. Get the side to agree right at the moment you reach the impasse.

Since you are the one suggesting the time for continuing the negotiations, you are also expressing confidence in your position that you believe your client will have the better hand at that time. The other side may then have second thoughts on whether it wants to wait so long. The other side may also feel a little pressure to come closer to your last settlement position.

- ✓ Think about how you are going to win the public relations war at the next settlement conference.

There has never been a judge that did not like clearing cases off his or her docket. So, when a judge holds a settlement conference after a failed mediation, he or she will try to determine who can be blamed. If the judge doesn't try to blame one side, it is because the judge wants to blame both sides.

Your goal then is to get the judge to place the blame on your adversary. Be ready to elaborate on how your side acted in good faith and what issues the other side tried to shy away from. You may want to offer that you are willing to go back to the mediation to have a focused discussion on that issue alone. A judge will also be very impressed if your side made a "put-up or shut-up" offer that the other side rejected.

Even Without Settlement, Mediation Can Be Invaluable

Looking back at the hundreds of mediations in which I've participated, first as advocate and now as mediator, I can only think of a handful that may not have been worth the time and expense invested. That's not to suggest that nearly every mediation resulted in a global settlement before the parties went home for the day. Rather, it is to suggest that even those mediations that did not result in resolution provided invaluable information which enabled the parties to make intelligent decisions about strategy and risk.

In some instances, the progress made during mediation paved the way for resolution down the road. In some instances, the information gathered during mediation helped clarify the issues in dispute, enabling the parties to focus their attention solely on the further discovery and investigation that were truly necessary. In some instances, mediation allowed certain parties to later carve out a piecemeal settlement. And in some instances, mediation made clear that going to trial was the only viable alternative

because the other side's position was so unreasonable as to make incurring the cost and risk of trial an easy choice to make.

Those who approach mediation with only one mindset – that anything less than resolution means the mediation was a failure – often overlook the value inherent in the process itself. And those who pack up their belongings and leave at the first sign of possible impasse often squander an invaluable opportunity to learn as much as possible about the opposing party and opposing counsel.

If you approach mediation believing that the process itself has intrinsic value – settlement or no settlement – you often increase the odds of resolving the dispute, if not that day then perhaps another.

Floyd J. Siegal

There once was this attorney, Mr. Schmegegi, and he had a case going to trial for his client, Mr. Schlemiel. Now, it was a pretty good case because before the case went to trial, Mr. Schlemiel got an offer of $5 million to settle his case.

Mr. Schlemiel was very excited about the offer.

"Mr. Schmegggegi! Please let's settle the case. I don't see $5 million every day."

"Mr. Schlemiel. That offer is an insult to my reputation. We will take the case to trial, and get many times more than $5 million."

So, it went to trial. Apparently, they weren't doing so hot. Jurors rolled eyes. Some yawned. But, Mr. Shlemiel still got an offer to settle for $3 million. He was very excited.

"Mr. Schmegegi. Please take the money. I don't think we are doing so hot, and I do not see $3 million every day. Let's settle!"

"Mr. Schlemiel. We will reject the offer. My plan is to kill the jury with my closing argument."

So, the case went forward. All the jurors were fast asleep during Mr. Schmegegi's closing except for one who was kept awake by the snoring. Still, Mr. Schlemiel got an offer to settle for $1 million. He was very excited.

"Mr. Schmegegi, when you said you were going to kill the jury in your closing, I didn't think that you meant it literally. Please take the money. I don't see $1 million every day!"

"Mr. Schlemiel. I have a duty to protect the interests of my client, and the interests of my client is to take the case to verdict!!"

It went to verdict. Defense verdict.

The next day, Mr. Schlemiel picks up the phone and calls. "Hello. I would like to speak to Mr. Schmegeggi."

"Oh. Mr. Schlemiel. Mr. Schmegeggi was very upset and very distraught over losing your case. He climbed to the top of the tallest building. He jumped off the top of the tallest building. Mr. Schmegeggi is dead."

"OK."

The next day, Mr. Schlemiel gets on the phone and asks for Mr. Schmegeggi.

"Mr. Schlemiel. Like we told you yesterday. Mr. Schmegeggi was very upset and very distraught over losing your case. He climbed to the top of the tallest building. He jumped off the top of the tallest building. Mr. Schmegeggi is dead."

"OK."

The next day, Mr. Schlemiel again calls up asking for Mr. Schmegeggi.

"Like we explained to you the last two days, Mr. Schmegeggi was very upset and very distraught over losing your case. He climbed to the top of the tallest building. He jumped off the top of the tallest building. Mr. Schmegegi is dead."

"Ok."

So, for the next seven days, Mr. Schlemiel kept calling asking for Mr. Schmegeggi, and finally Mr. Schmegeggi's partner got sick of it, and picked up the phone.

"Mr. Schlemiel. For the last 10 days, you've called up Mr. Schmegeggi and we have told you the same thing. Mr. Schmegeggi was very upset. He was very distraught over losing your case. He climbed to the top of the tallest building. He jumped off the top of the tallest building. Mr. Schmegeggi is dead!!!! Why do you keep calling?"

"I like to hear the story."

Steve Joseph

TAKING POWER IN THE NEGOTIATION

Whether you are involved in a face to face negotiation, or negotiation through mediation, in both situations, you will have one thing in common with your opposition: you both want to do a deal. Even if one party thinks that the negotiation will be a complete waste of time, they want to do a deal, but they have a belief that their partner in negotiation will not take a realistic view of the case. On the other end of the spectrum, parties may be very agreeable and have very little to negotiate. It is a rare case of a very easy negotiation.

However, most negotiations fall in a huge middle. Each party has a goal of where they want to end up at the end of the negotiation. Some negotiators have a range of where they want to go. The number or the range may be based on similar cases they have handled. It may be based on other factors: the desire of a client to settle, the lack of desire to do battle in a hotly contested litigation, or the cost of the litigation itself, or knowledge of a bad witness or damaging evidence that may later come up in a case.

In many of these negotiations, one side finds out or decides from the initial back and forth that the negotiation range – the goal that they had set at the beginning of the negotiation - will become impossible to achieve. Because of what has been said in the "back and forths" in the first go-arounds of the negotiation, the negotiator knows that this goal that he or she had said out is completely "out the window." Yet, the negotiator does not walk away, but now continues to negotiate in a new range – the one that had been set by the other side.

This happens in a majority of negotiations because one party took power in the choice of words that were used. One party took power in the mannerisms – the body language, or the tone. One party was more certain. The other party was tentative. One party was successful in identifying "negotiation shifters" to get the opposing side to give up on their goal for the negotiation.

Arguments Do Not Work.

The biggest difference is that while one side negotiating would argue and argue till they are blue in the face and completely frustrated, the other side calmly stated a position. I am reminded of the days when I played raquetball. I was a very bad player. I would play against people way worse in their physical condition. I would get a good workout running all around the court. My opponent would stand still and calmly place the ball where I couldn't reach it. I got killed in raquetball.

Arguments rarely work in a negotiation. Whatever argument you can come up with, I can come up with a counter-argument. We can volley back and forth with our arguments, and at the end of the day, it may look like an excellent tennis match, but neither side will score many points.

Arguments do not have the same weight as facts. The more you argue a point, the more power you lose in a negotiation. However, the same arguments can be stated factually. You then can take an additional step of identifying the conclusion you reach because of this fact you have presented.

Here's an illustration of how one fact can be made into argument, and the same fact and conclusion method can lead to a different outcome. In one scenario, one party is arguing, and the other side states facts and positions, and then we reverse it:

The negotiation here is over a slip and fall claim. There were no witnesses to the fall. Further, the plaintiff did not seek medical treatment until two weeks after the fall occurred.

Here's a negotiation that occurs when the defense tries to argue those facts, and the plaintiff's attorney states facts and positions:

D. I will make you an offer of $15,000.

P. Well, that is unacceptable. I have a client with a sever stress fracture and medicals of $50,000. You will need to get into six figures.

D. That's crazy. Your client has no witnesses, and didn't even see a doctor for two weeks after the accident!!

P. Look. I have a client who is a very sweet lady. A jury will love her. I will get my doctor to testify that it is the result of the fall. I will have pictures of the sidewalk that was in disrepair, and I have my medicals. Given what I have, I will need something in the six figures.

D. How about if I offered you $50,000?

Now, we reverse the negotiation. The defense side will state the facts and position:

D. I will make you an offer of $15,000.

P. That's not even in the ballpark!! My demand to settle is $250,000. I have $50,000 in medicals here!! You have to get me something better than that!!

D. The problem here is that your client did not have any witnesses, and did not seek medical treatment until two weeks after the fall. We have lots of these cases, and the value you have put on this case is probably in the range of cases where we have witnesses, and there was immediate medical treatment. Without those two factors in play the case has a lower value.

P. Well, can you get me $100,000. My lady is a very sweet lady!! She's in bad financial shape.

D. Unfortunately, all the cases in my office involve sweet ladies. But, with these facts, it does not have the value you have put on this. The best we can do here is $25,000.

In the first dialogue, the defense side was making valid arguments. However, no matter how valid an argument may appear, it leaves an opening for the other side with facts and conclusions drawn from those facts. The plaintiff's attorney took power.

With the first situation, the response could have even been: "Quite frankly, I am not worried about that." "I don't care." If you put out your best argument and that does not concern the opposing side one teensy bit, where does that leave you? By stating the facts as an argument, it gives the opposing side to take power in the negotiation.

More importantly, once power is taken in this manner, it is hard to take it back. One side made a very valid argument. But if the other side just dismisses the argument, and provides a reason why it is being dismissed, you can't just go back and make the same argument. This is where a lot frustration sets in with negotiators.

Threats and Scare Tactics are Opportunities to Take Power.

There are numerous pronouncements that can be made in a negotiation that suggests an attempt at taking power. "It will cost you a lot to litigate this matter." "I have a very emotional client." "We are not afraid to try this case." "This is a matter of principle." "If we do not settle, we will file a motion for summary judgment." "This is a case with a large punitive damage exposure." These are all threats to get you to move off of your position. Each statement says "I want to shift the negotiation."

While these can have an effect on shifting a negotiation, they are statements that merely test the opposing side. They can be, but do not have to be "negotiation shifters." However, they do have to be recognized as an attempt to take power. Once you recognize the statement as an attempt to take power, you then have to devise a response that sends a stronger signal back, and it can actually result in you having the ability to take greater power, and become the "negotiation shifter."

Using the examples taken above, most of these attempts at taking power are threat based. They have been picked because of other weaknesses in their case. In fact, it is rare to have a perfect case, and even with a good case, there may be insecurities involving time, money, control of witnesses. As such, it is rare to have any negotiation without one party and usually both parties partake in these sort of attempts to take power and shift the negotiation. There's actually some giving up of power with this attempt.

But, think of what happens if you can completely douse the fire on a threat-based attempt to take power (or any attempt to take power for that matter). The opposition has made an attempt, and they see that it has provided no value. If you succeed, you have taken power, and made a negotiation shifting move.

Here's an example of an attempt to take power, and how you can shift the negotiation:

"Unless you make a more substantial offer, I will advise my client to roll the dice at trial (or file a lawsuit)."

Everyone who does what we do have heard someone saying how they will roll the dice.

Here, plaintiff's counsel is trying to take power. The comment says that "I am not afraid," or "I'll make you spend lots of money defending this case,." or "I am challenging you."

But, once you see this as an attempt to take power, you can see this comment in a much more interesting and useful way. Just look at the word "dice". There's an implication here that when this comment is made, the attorney is only talking about two dice. If a case is completely frivolous and wouldn't get beyond a summary judgment motion, the case can be a thousand to one shot, so by this reference to the dice, the attorney is trying to take power by knocking it down to eleven possibilities (or a 36-1 shot, I believe).

But, there's some giving up of power. The statement says "I concede that I have a weak case."

We can react in a number of ways here...by giving power, by taking power, or both giving and taking.

One way is to give all the power the attorney was trying to take here. We go ahead and make the substantial move, or a quasi-substantial move. Issues are dropped, and it is all about the fear of rolling those dice.

Here, we may give a little power by making a nominal move, but we do want to take full advantage of the power that has been handed to us. "I have a weak case." We literally can have a conversation on what "rolling the dice" means in this context. We can again go through the hoops that the attorney on the other side will have to jump through. The reference to "rolling the dice" may not be a reference to two, but rather 8, or 12, or 20 dice.

In the 1000-1 shot, identify both the attempt to obtain power, as well as the attempt to obtain what may be undeserved power. The attempt at taking "undeserved power" is your opportunity here to take power of your own.

Using Surprise to Take Power

We previously talked about one party showing up at the mediation, and for the first time, they advise the opposing side that they have new damages that they did not previously disclose.

Even more suspect, there is the announcement that they have now obtained an expert who will provide the necessary testimony to make the case look a lot different than either side had previously thought. There was no mention of this expert in the mediation brief, but the party shows up with the expert report at the mediation.

The first natural reaction of a lawyer is to indicate that the new evidence has to be evaluated. This may end the mediation quickly, and the parties go off to another round of depositions.

They then reconvene two months later at a new mediation, and there are three possibilities here: One, discovery determines that there is no merit to the new evidence; two, discovery shows that there is some merit to the new evidence and new settlement position; or three, discovery confirms the new evidence and that there is merit to a new settlement position.

It is rare that the new discovery will establish that there is a complete lack of merit to the surprise evidence. Even if it is questionable, it ends up as another question of fact, or swearing contest for a jury to decide. There is going to be value allotted to the surprise "new evidence."

So, the best way to take power here may be counterintuitive for the lawyer. Attack the "newness" of the evidence. Why did they not have the evidence earlier? Do they believe that it is even a good faith negotiation to show up at the last minute? They may have not even fully evaluated the new evidence. Take an opportunity in the private caucus session to determine the weaknesses in the new evidence. If this is in fact "new", you will have a better opportunity to make arguments that stick than you may later have when a number of depositions are taken.

Looking at the three possibilities that you will face in agreeing to an impasse, try the 10-15% rule. Is it worth it to give the other party 10-15% additional value based on the new evidence? In most cases, if you consider the cost of a wasted day with a mediator, the cost of the additional discovery, and the risk that you may face an additional 25-100% change in the value on this new evidence presented, it is a bargain!!

Also, realize that you maintain control of the negotiation. Two months later, the opposing party will likely be on the offensive. They have now taken power. Use this "surprise" as an opportunity to take the power in the negotiation.

Using Experience to Take Power

The word "experience" brings up a lot of different implications that can be derived for a negotiator's benefit. The analogy I draw on is looking at a battlefield between an invading force and natives to the land. The invader goes into foreign territory. They are not familiar with the terrain. The natives are. The natives know where to hide, where to attack, how to exploit the weakness of the invader not being familiar with the land. The

natives are confident and calm. The invaders are nervous. The invader's morale is low. The supplies that have to be sent across many miles are running out.

If you were choosing sides in a negotiation, and you can pick between "invader": and "native" as described above, which side would you pick, assuming of course that the resources are equal. Most likely, you would pick the side of the native.

The reason that you picked "native" is that you probably believed that the native had the best chance of winning, and you just would like to be on the winning side. But, think what attributes the natives have here. They are familiar. They have experience with the land. They are prepared. They are confident. They are calm.

Bring all of these attributes to a negotiation. I am presenting my position backed with a lot of experience with this kind of case. I am prepared to discuss this case. I can draw on other cases that I have handled to support my position. My voice is calm. I am not rattled. My body language is relaxed. I also can show that I can walk away from the table if I do not get the deal I desire.

Here, I have the power in the negotiation. Ask yourself that if you can have all of these attributes, would you even be arguing with the other side? Is there any doubt that you will be negotiating in the range you determined as the correct settlement range? Now, stick a mediator into the situation, and you have to use the mediator to your benefit, and the other side is taking on the role of "invader". Who do you think will be able to sway a third party as to the correctness of their position?

Using Concessions To Take Power

I am facing a negotiation in a case in which my client has a number of problems. As a negotiator, I have two choices. I can make bad arguments or deny the problem altogether. Or, I can concede those issues that I will not be winning for my client.

I never want to pick the first choice. If I make bad arguments on the bad parts of my case, I also make the negotiation about the bad parts of the case. I lose that negotiation. I also lose credibility when I try to discuss the positive aspects of my client's case. Not only will I have no credibility, I have given up a chance to have the other side even listen and consider what I have to say. Even worse, I have created animosity with my negotiating partner, and now, the negotiation takes on a personal tone, and it's about me, and not the client's case.

If I concede on the weak points, I gain credibility and confidence as a negotiating partner with the opposing party. I show that I heard what they have to say, and this allows me to gain some traction on my issues.

It is also reflective of someone who is experienced and in control. I am a voice of reason. Since this is how I am viewed, I am more likely to be handed over power in the negotiation. I get to make my points. I get to be heard. I get to be trusted.

Looking at Every Negotiation Through the Power Telescope

This book presents many situations through the course of a mediation. It breaks the process down, and provides ways to handle and react to specific circumstances. However, it is all about the strategic use of taking and giving power. In other words, I want to control what is essentially an uncontrollable situation. We phrase positions in a certain way to take control over the negotiation. Our body language, our tone…is very intentional and serves a purpose. We give power and take power intentionally. More importantly, we are recognizing the opposition's attempt to take power, and we have to decide that we give them the power they shouldn't be getting, or is there a way to make that into a positive. Can we douse it and shift the negotiation completely? Do we give them something so we maintain control?

Now that you have thought about power in a negotiation, go back and reread this book from the aspect of taking and giving power. Ask yourself what are the choices that you have in each situation. Think about the choices in terms of taking and giving power. Think about the different outcomes depending on the choices made. Think about the huge difference this can make for your client.

Endnotes:

1. "Standards of Conduct for Mediators", Dispute Resolution Journal, pp.78-81, January 1995.
2. Fisher, Roger and Ury, William, Getting to Yes, Negotiating Agreement without Giving In, Penguin Books, 2nd Edition, 1991.
3. Friend, James, The Neutral Negotiator: Why and How Mediation Can Work to Resolve Dollar Disputes, p. 9, Prentice Hall, 1994.
4. id. 2
5. *Jamie* Sams, Earth Medicine, p.143 (Harper Collins 2003)
6. supra Friend, James, The Neutral Negotiator: Why and How Mediation Can Work to Resolve Dollar Disputes, p. 1.
7. *California Evidence Code Section 1123*
8. *Liberto v. D. F. Stauffer Biscuit Co., 441 F.3d 318 (5th Cir. 2006)*
9. *Randle v. Mid Gulf, Inc., 1996 WL 447954 (Tex. App. Aug. 8, 1996*
10. *Allen v. Leal27 F. Supp. 2d 945, 947 (S.D. Tex. 1998*
11. *" Tex. Civ. Prac. & Rem. Code § 154.073(b).*
12. *Unif. Mediation Act 6(a)(1) (2001)*
13. *In re Cartwright, 104 S.W.3d 706, 714 (Tex. App. - Houston [1st Dist.] 2003, orig. proceeding)*
14. *Bowden v. Weickert, 2003 WL 21419175, at 3-4 (Ohio Ct. App. June 20, 2003*
15. Pavia v. State Farm Mut. Auto Ins. Co., 82 N.Y.2d 709, 626 N.E.2d 24, 605 N.Y.S. 2d 208 (1993).
16. Pavia, 605 N.Y.S. 2d at 211
17. id. At 212
18. id.
19. Pavia, 605 N.Y.S.2d at 212
20. Rova Farms Resort, Inc. v. Investors Ins. Co. of America, 65 N.J. 474, 323 A.2d 495 (1974)
21. Rova Farms, 65 N.J. at 496
22. id.
23. Pickett v. Lloyd's, 131 N.J. 457, 465-6, 621 A.2d 445 (1993)
24. G.A. Stowers Furniture Co. v. Am. Indemnity Co., 15 S.W. 2d 544 (Tex. App. 1929)
25. Transportation Ins. Co. v. Monel, 879 S.W. 2d 10 (1994)
26. Allstate Ins. Co. v. Kelly, 680 S.W. 2d 595 (Tex. App. 1984)