Finding Peace of Mind:
Settlement Conference Guidance for Special Masters

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PART I

A Distinction with a Difference: Settlement Conferences Are NOT Glorified Mediations

Part 146: An ADR Framework for Settlement Conferences – What Is It?

"Part 146 is a rule of the Chief Administrative Judge that establishes qualifications and training for mediators **and neutral evaluators** (emphasis added) who serve on court rosters throughout New York State."

A Part 146 mediator who is on a court roster must have completed a minimum of 40 hours of mediation training, 24 hours of which must be in "basic training" and the other 16 in subject-specific mediation techniques, as well as recent experience mediating cases. **Part 146 neutrals must have completed at least 6 hours of neutral evaluation, be lawyers admitted to practice law for 5 years, and have 5 years of case-specific experience in the cases they are assigned to evaluate**.

Source: New York State Unified Court System, *Part 146 Frequently Asked Questions (FAQ's)* (http://ww2.nycourts.gov/ip/adr/Part146_FAQs.shtml) and *PART 146. Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters* (http://ww2.nycourts.gov/rules/chiefadmin/146.shtml)

Mediation Is the Primary Focus of NYS UCS Court-Annexed ADR

"A process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator's role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties."

Source: Nassau County Bar Association, *Mediation & Arbitration: Alternative Dispute Resolution Through the Nassau County Bar Association* (Brochure) (updated as of Feb. 3, 2017 and available at https://www.nassaubar.org/wp-content/uploads/2018/01/Mediation_Arbitration_Brochure_2_3_2017.pdf)

But Neutral Evaluation Is Also in the Proverbial Picture

22 NY Codes, Rules, and Regulations ("NYCRR") 146.2(c):

"Neutral evaluation" shall refer to a confidential, non-binding process in which a neutral third party (the neutral evaluator) with expertise in the subject matter relating to the dispute provides an assessment of likely court outcomes of a case or an issue in an effort to help parties reach a settlement."

Source: New York State Unified Court System, *PART 146. Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters* (http://ww2.nycourts.gov/rules/chiefadmin/146.shtml)

Unifying Rule 3 in Supreme Court's Commercial Division

22 NYCRR 202.70 R. 3(a) explicitly invokes mediation and neutral evaluation.

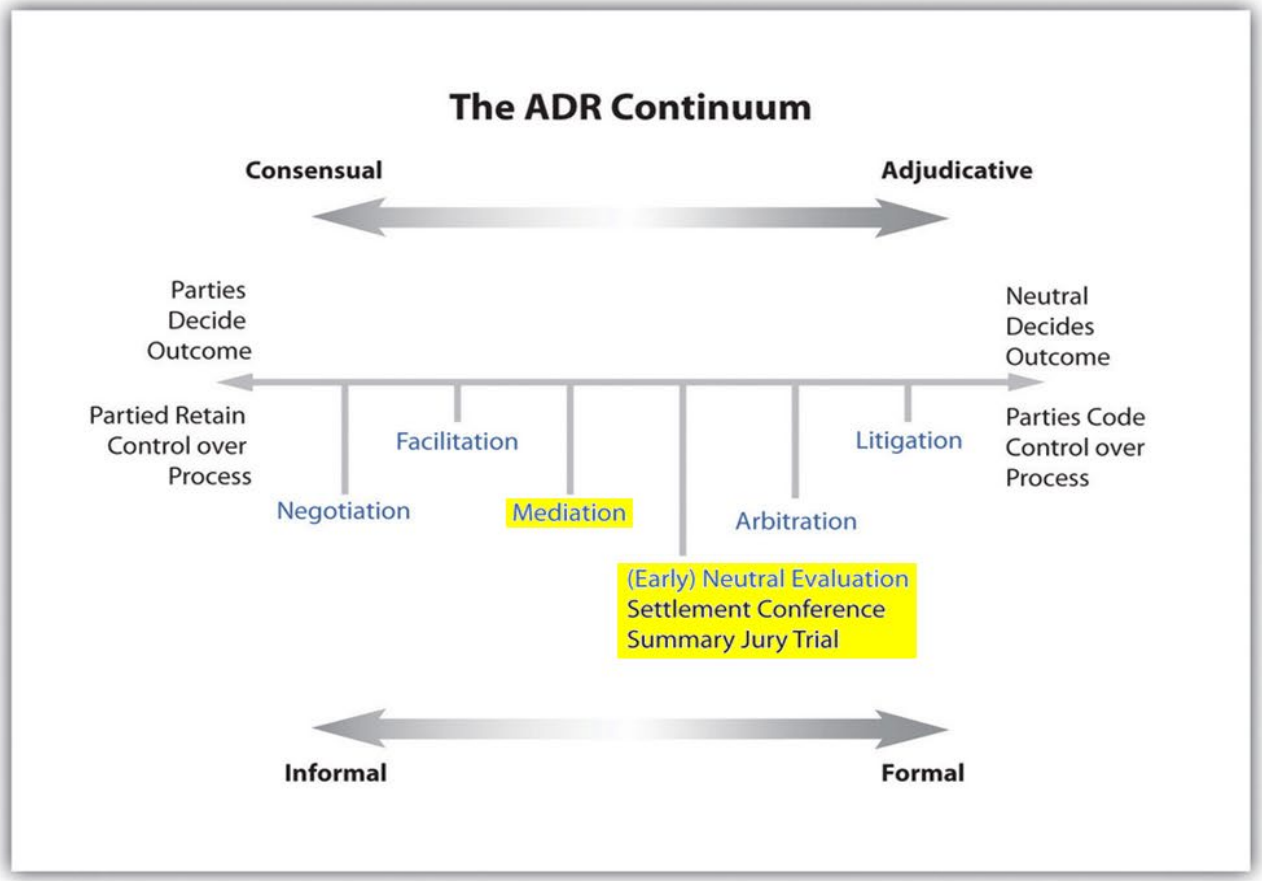
"Rule 3. Alternative Dispute Resolution (ADR); Settlement Conference Before a Justice Other Than the Justice Assigned to the Case.

(a) At any stage of the matter, the court may direct or counsel may seek the appointment of an **uncompensated mediator or neutral evaluator** for the purpose of helping to achieve a resolution of all or some of the issues presented in the litigation. Counsel are encouraged to work together to select a **mediator or neutral evaluator** that is mutually acceptable and may wish to consult any list of approved neutrals in the county where the case is pending. . . .

(b) Should counsel wish to proceed with a settlement conference before a justice other than the justice assigned to the case, counsel may jointly request that the assigned justice grant such a separate settlement conference. This request may be made at any time in the litigation. Such request will be granted in the discretion of the justice assigned to the case upon finding that such a separate settlement conference would be beneficial to the parties and the court and would further the interests of justice. If the request is granted, the assigned justice shall make appropriate arrangements for the designation of a 'settlement judge.'"

Source: New York State Unified Court System, *PART 202. Guidelines For Qualifications And Training Of ADR Neutrals Serving On Court Rosters* (https://ww2.nycourts.gov/rules/trialcourts/202.shtml#70)

The ADR Continuum



Source: Adapted from New York State Unified Court System, http://www.nycourts.gov/ip/adr/images/continuum2.jpg.

Image Source: Lumen Learning, Terence Lau et al., *Business and the Legal and Ethical Environment* (Online Undergraduate Course), (https://courses.lumenlearning.com/masterybusinesslaw/chapter/alternative-dispute-resolution-2/)

B.A.D.G.E.R.

A Mediation Process Summary

- **B – Begin the Mediation (Introductions, Rules)**
- **A – Accumulate Information (Case Statements)**
- **D – <u>Discuss Needs & Interests</u> and/or Develop Agenda**
- **G – Generate Movement / Options (Party-Driven)**
- **E – ESCAPE to Caucus (if necessary) –**

  E – Explore settlement options; S – Signal warning signs; C – Confirm movement;

  A – Attack recalcitrant party's BATNA ("Agent of Reality"); P – Pause; E – Evaluate
- **R – Resolve the Dispute**

Source: Prof. Joseph B. Stulberg, *Taking Charge Managing Conflict* 58 (1987) (and Prof. Lela P. Love (informally))

P.A.(C.D.I.)E.S. – ENE Process Summary

- **P – Pre-Joint Session Videoconference and Tech Check [with at least Counsel and Parties]**
- **A – Accumulate Information (Case Evaluation Statements)**
- **C, D, I – Claims, Defenses, and Issues Discussed in Joint Session:**
  1) **Presentations by Counsel from All Sides on Case Merits**
     - **Document Use and Fact/Expert Witness Statements Recommended**
     - **Rules of Evidence Do Not Apply**
     - **No Cross-Examination**
  2) **Evaluator Questioning and Identification of Common Ground / Stips.**
  3) **Evaluator Identifies Key Issues (Factual and Legal "Center" of Case)**
- **E – Evaluate the Case Via a Prepared WRITTEN Case Evaluation**
- **S – Settle (Either Dispute or Future Litigation Process) Via Combination of Joint Sessions and Private Caucuses Either or Both Before and/or After Evaluator's Presentation of Evaluation with Possibility of Additional Session**

Source: Brazil, Wayne D., *Early Neutral Evaluation or Mediation - When Might ENE Deliver More Value?*, 14 Disp. Resol. Mag. 10, 15 (Am. Bar Ass'n - Fall 2007)

Mediation vs. *Neutral Eval. / Settlement Conf.*

* *

Mediation	*Neutral Eval. / Settlement Conf.*
❖ Rarely Evaluative Initially	❖ *Always Evaluative Initially*
❖ Lowest Cost vs. Litigation	❖ *Lower Cost vs. Litigation*
❖ Distinct from Litigation (More Informal)	❖ *Intertwined with Litigation (More Formal – ENE Frame)*
❖ Focus on Needs and Interests	❖ *Focus on Legal Positions*
❖ Favors "Process Expert"	❖ *Favors "Substantive Expert"*
❖ Unrestricted Ex Parte Comms.	❖ *Restricted Ex Parte Comms.*
❖ Parties in Control	❖ *Court Verging on Control*
❖ Lawyers Optional	❖ *Lawyers Required*
❖ No Appearance of Judgment	❖ *Appearance of Judgment*

* *

Sources: (1) Brazil, Wayne D., *Early Neutral Evaluation or Mediation - When Might ENE Deliver More Value?*, 14 Disp. Resol. Mag. 10, 15 (Am. Bar Ass'n - Fall 2007); and (2) Timken, Nelson E., *Court Negotiation vs. Mediation* (Apr. 2021 - e-mail nelson.timken@verizon.net).

Mediation is Much Broader in Scope Than Settlement Conferences and Litigation

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DISTRIBUTIVE VARIABLES	EXPANSIVE VARIABLES
❖ **R**ights	❖ **I**nterests
❖ **O**bligations	❖ **V**alues
❖ **R**emedies	❖ **I**dentities
❖ **I**ssues	❖ **P**ower
❖ **P**ositions	

* *

"Rights – *Entitlements granted by law, custom, and agreement*; Obligations – *Duties required by law, custom, and agreement*; Remedies – *Legal solutions available in adversarial proceedings*; Issues – *Questions or topics that give rise to disputes*; Positions – *Opinions regarding an issue*; Interests – *Needs, desires, fears, preferences, priorities, beliefs, and motivations for the positions that people take*; Values – *Beliefs and principles that govern a person's behavior and choices*; Identity – *Characteristics that define a person, including groups the person feels she belongs to, such as Christian, Democrat, or baby boomer*; Power – *The need to win or at least feel that the outcome is fair*."

Source: Victoria Pynchon & Joseph Kraynak, *Success as a Mediator for Dummies* 208 (John Wiley & Sons, Inc. 2012)

Litigation vs. Mediation

Litigation = Legal Fees + Damages + 18 (min.) Months of Depositions, Discovery, Trial Prep + Trial

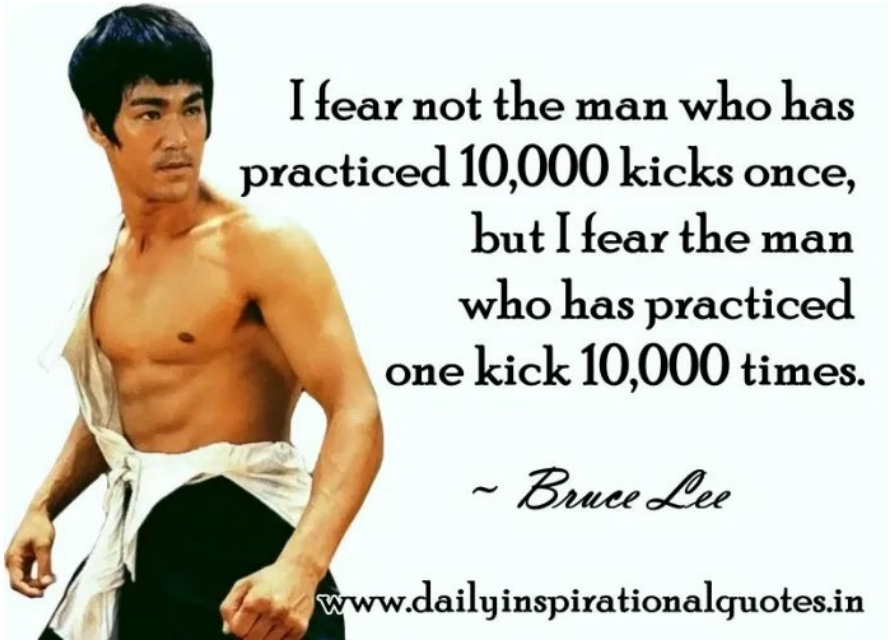
Mediation = 2 to 30 Days of Mediation Sessions/Caucuses – Fees – Public Relations Risk + Confidentiality

Source: Ricardo Granderson, E-mail dated Aug. 18, 2017 to NYC-DR Listserv (John Jay College)

PART II

Preparing for the Settlement Conference:
Neutral Evaluation Procedure + Mediation Techniques (see Part III) = One Powerful ADR Combination

All Types of Dispute Resolution **REQUIRE** Preparation!



Two Videos to Watch at Least **TWICE** to Prepare for Settlement Conferences

I. ***2020-05-07 - NYCLA ADR Committee Mock Mediation with Susan Guthrie***
(available at https://www.youtube.com/WeinreblawPLLC/videos and
https://vimeo.com/user27287947/review/420096804/5229c15407)

II. ***2020-06-25 – Anatomy of a Virtual Mediation (Nassau County Bar Assoc.)***
(available at https://vimeo.com/432986905)

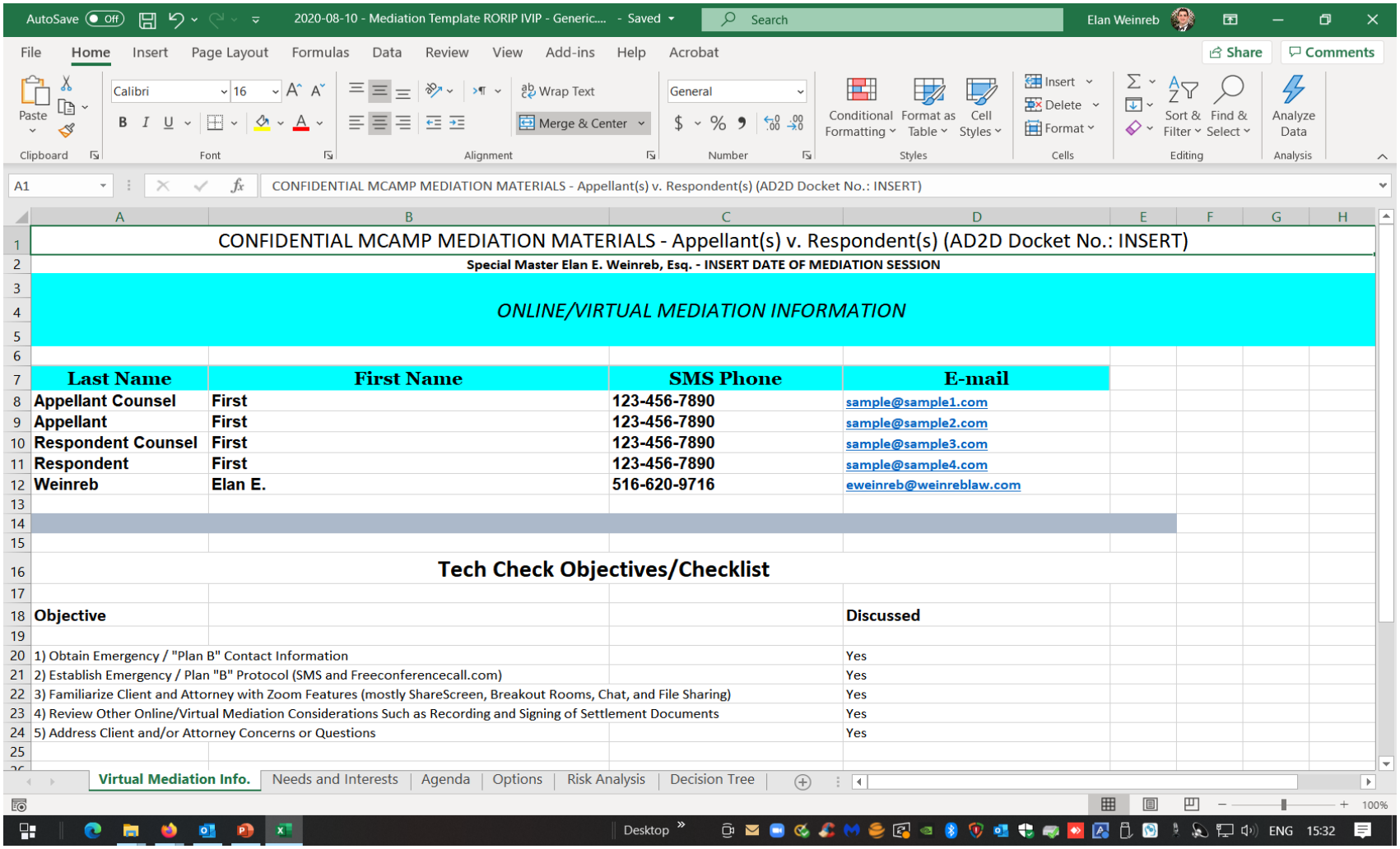
Performing a Tech Check (1)

IMPORTANT: All steps below apply to ANY form of Dispute Resolution conducted by videoconference!

1. **Obtain Emergency Contact Information (SMS/Text Phone Numbers)**
2. **Establish Emergency Protocol (and then DRILL, DRILL, DRILL!)**
3. **Familiarize Dispute Resolution ("DR") Session Attendees with Videoconferencing Features (ShareScreen, Breakout Rooms, and Chat)**
4. **Discuss File Sharing / Production of Additional Documents**
5. **Review Any Relevant Mediation or Other DR Process Agreements and Establish Understanding as to Recording and E-Signing Settlement Documents**
6. **Set Date(s) for Initial DR Process Session, Submission of Pre-Session Statements, and Document Productions**
7. **Address Any Concerns or Questions (and explain that in mediation and some other DR processes, *ex parte* communications are permitted either initially or after certain events occur)**

Performing a Tech Check (2)

USE A TEMPLATE AND FILL IT IN REAL TIME



CONFIDENTIAL MCAMP MEDIATION MATERIALS - Appellant(s) v. Respondent(s) (AD2D Docket No.: INSERT)

Special Master Elan E. Weinreb, Esq. - INSERT DATE OF MEDIATION SESSION

ONLINE/VIRTUAL MEDIATION INFORMATION

Last Name	First Name	SMS Phone	E-mail
Appellant Counsel	First	123-456-7890	sample@sample1.com
Appellant	First	123-456-7890	sample@sample2.com
Respondent Counsel	First	123-456-7890	sample@sample3.com
Respondent	First	123-456-7890	sample@sample4.com
Weinreb	Elan E.	516-620-9716	eweinreb@weinreblaw.com

Tech Check Objectives/Checklist

Objective	Discussed
1) Obtain Emergency / "Plan B" Contact Information	Yes
2) Establish Emergency / Plan "B" Protocol (SMS and Freeconferencecall.com)	Yes
3) Familiarize Client and Attorney with Zoom Features (mostly ShareScreen, Breakout Rooms, Chat, and File Sharing)	Yes
4) Review Other Online/Virtual Mediation Considerations Such as Recording and Signing of Settlement Documents	Yes
5) Address Client and/or Attorney Concerns or Questions	Yes

The New York County Rules (1)

IMPORTANT: Every county Supreme Court in the State of New York has its own ADR rules and procedures concerning civil disputes. I've included the rules for New York (discussed below) and Nassau County Supreme Courts (for comparison) as accompanying materials to this presentation. All rules should be studied closely.

A. The Supreme Court, New York County Rules and Procedures of the Alternative Dispute Resolution Program, revised as of 11/18/2021 ("Rules") are at http://ww2.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml (which also includes a great overview of the Court's ADR Program).

B. Rule 2 – Panel of Neutrals: 10-year (double that of Part 146) experience requirement for neutrals in the practice of commercial law or comparable experience as an accountant or business professional.

C. Two Paths to Case Assignment to ADR –

- Rule 3 – Determination of Suitability; Order of Reference: The assigned Justice refers a case to ADR via an Order of Reference.
- Rule 15(b) – Designation of Cases in Mandatory Mediation Pilot Project: Court staff will assign certain cases to ADR via NYSCEF.

The New York County Rules (2)

D. Rule 8 – Confidentiality of Mediation and Neutral Evaluation: Here are the major points to note (all taken from Rule 8(a)):

- **Strict Confidentiality of Proceedings** – "An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant."

- **Motions to Compel or Other Attempted Compulsion of Documents or Testimony Prohibited** – "No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party or the Neutral concerning communications made during the proceeding."

- **Settlements Must Be in Writing**

- **Indemnification of Neutral for Expenses (Including Reasonable Attorney's Fees) Should a Party Attempt to Compel the Neutral's Testimony**

The New York County Rules (3)

E. Rule 8 – Confidentiality of Mediation and Neutral Evaluation (cont.): And here are the **EXCEPTIONS** to confidentiality (all taken from Rule 8(b)):

- **Disclosure Required by Law or to Prevent Illegal Act** – "A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act."

- **Unethical Conduct** – "A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority."

F. Rule 9 – Immunity of the Neutral: "Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving."

G. Rule 10 – Procedure: The Pre-DR Session Statement – Each side is required, pursuant to Rule 10(b), to submit to the Neutral copies of each side's pleadings and "a [Neutral's eyes only] memorandum of not more than ten pages . . . [covering] that party's opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved."

The Pre-DR Session Statement

I ask the parties/counsel to address these items, but there is no mandate to follow this form or order or any other form or order.

1. The name and title of those attending the conference with counsel.
2. A **detailed statement** of the factual and legal issues involved in the case.
3. The main "sticking points" preventing settlement (*which will help the neutral identify the "center" of the case*).
4. A description of any important rulings made or pending motions in the case which may affect settlement.
5. The status of settlement negotiations, including the most recent settlement proposals (if any) exchanged between the parties.
6. A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of litigation.
7. Key documents necessary (*should be attached*) to understand the case.
8. Why should you prevail and by what amount?
9. Why should the other side prevail and by what amount?

The New York County Rules (4)

- **Attendance at Initial ADR Session(s) for 3 Hours Required by Parties Having Authority to Settle, Counsel of Record, and Potentially Insurance Carriers** – Rule 10(c) establishes a minimum three-hour mediation session attendance requirement by: (a) parties having knowledge of pertinent case facts and possessing authority to settle; (b) counsel of record for the parties familiar with the case facts; and (c) insurance carriers at a Neutral's discretion.

  While Rule 10 is silent as to the length of a neutral evaluation session since neutral evaluators are entitled to compensation from the first second of a neutral evaluation session, since Special Masters are volunteers, they can theoretically compel a three-hour session by having the Court order it as a "mediation under the New York County Rules to be conducted in the Special Master's discretion." The authority for the Court to do so is the Order of Reference discussed previously (see Rule 3).

- **"Discovery in Aid of Mediation"** – Rule 10(f) empowers the Neutral to "help the parties to provide such focused discovery as may assist in the ADR proceeding" but stops short of giving Neutrals the power to order discovery (except for arbitrators, who are granted such power by, *inter alia*, CPLR 7505)). However, for Special Masters, arranging Court-ordered discovery is always a possibility.

Preparing for and Conducting the Initial Session (1)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

1. Let's start with the "CDI" in P.A.(C.D.I.)E.S. Review the case pleadings, any dispositive motion papers, and any key documents previously filed or submitted to you to get a handle on the claims, defense, legal issues, and relevant law. Note that pattern/model jury instructions, practitioner periodicals and legal treatises, and court library staff are wonderful resources.
2. Arrange some time to have a conversation at a convenient time ideally with your judge and/or his or her staff, perhaps over lunch or a mid-afternoon snack if you're able to meet in-person.
    - ❖ DO: (a) discuss how the Court and sister courts have handled previous cases like yours in terms of both procedure and substance; (b) explore which, if any, of these cases have settled and why (even if only on general terms); and (c) ascertain what the Court's case management timetable is for your particular case.

Preparing for and Conducting the Initial Session (2)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

- ❖ DO NOT: (a) discuss, NO MATTER HOW TEMPTING: (i) the merits of the case; (ii) matters of credibility; and (iii) anything else that would impact your impartiality as a neutral evaluator; or (b) mention, even indirectly, any statements or other information previously disclosed by counsel in the pre-session videoconference unless you have received explicit **written or recorded** authorization to do so.

3. Prepare—for your use only—a chart listing all major litigation events that have occurred and which have yet to occur in the case. Prime examples here include the Court deciding motions to dismiss, summary judgment motions, and any other key motions, the conclusion of fact and expert discovery, and, of course, the potential outcomes of the case going to trial, including but not limited to appellate review scenarios.

Preparing for and Conducting the Initial Session (3)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

- ❖ **Tip**: Unless you have experience in using risk analysis charts and decision trees (see https://www.decisiontree.kleinmediation.com/), **AND** like doing so, **DO NOT** attempt to use such devices at the initial joint session. You will likely cause more harm than good.

4. Time for the initial joint session! After a brief review of the overall neutral evaluation process, invite counsel for the parties, the parties themselves, and any witnesses they have brought to make their respective presentations.
5. Once all sides have concluded their presentations, it's time to head to a quiet space where you will prepare a written evaluation. The chart which you prepared of all major litigation events that have occurred and which have yet to occur in the case is your framework for doing so. (Note that depending on case complexity, you may have to adjourn the initial joint session to a future date to have enough time and clarity of mind to prepare the evaluation.).

Preparing for and Conducting the Initial Session (4)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

- Ask yourself for each event yet to occur: (i) "Is there a greater than 50% chance—basically the preponderance of the evidence standard—that at least one party here will **NOT** 'advance' to the next event?"; and (ii) "What reasons support your conclusion?"
- Once you have matched "terminal events"—those where there is a greater than 50% chance that litigation will terminate as to at least one party based upon motion decision, inability to obtain key discovery, outcome of a trial or an appeal, etc.—to every party, draft a reasoned evaluation (ideally, less than 2 single-spaced pages) that summarizes and then charts the proverbial course of the litigation for every party. In performing this task, make sure to clearly declare the party or parties who you think will prevail and by how much. This should not be overly-complicated and can be as simple as follows:

Preparing for and Conducting the Initial Session (5)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

CONFIDENTIAL Evaluation of *Smith v. Jones*, [Insert Case No.]
Prepared by [Insert Name of Neutral] – [Insert Date of Evaluation]

Via a Summons and Complaint e-filed on December 13, 2021, Plaintiff homeowner Jacklyn Smith asserts claims of breach of contract and negligence against contractor Defendant Davy Jones arising from plumbing services allegedly performed at Ms. Jones' Manhattan residence from January 3, 2000, through and including January 3, 2003. Mr. Jones has asserted multiple defenses, of which the Neutral has found the statute of limitations and statute of frauds to be the only two relevant here. No motions have been made to date.

Even though witness testimony and documentary evidence presented by the parties and their counsel establish that Defendant performed certain plumbing services at Plaintiff's residence, these services were performed well over six years from December 13, 2021, the date upon which Plaintiff filed suit. Plaintiff further concedes that these services could not be performed within one year and were in fact performed over the course of three years as one large block or set of services, with one payment of $300,000 due to Defendant upon their completion. Plaintiff made this payment.

CPLR §§ 213(2), 214(4), and 214(6) establish a six-year statute of limitations timeframe to be the most expansive available to Plaintiff, thereby establishing her claims here as time-barred. GOL § 5-701(a)(1)—New York's Statute of Frauds—also bars Plaintiff's breach of contract claim. For these reasons, it is the Neutral's opinion that this litigation will probably terminate via a decision on a motion to dismiss in Defendant's favor such that he will prevail against Plaintiff, resulting in no recovery for her.

[INSERT SIGNATURE HERE]
[Print Name of Neutral]

Preparing for and Conducting the Initial Session (6)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

- ❖ Note that in complicated multi-party cases, your evaluation may have to factor for multiple terminal events at different points in time. For example, in a ten-party case, if a motion to dismiss is likely to result in dismissals as to only six parties, your evaluation must ascertain when terminal events will likely occur as to the remaining four.

6. Place your completed evaluation into a sealed envelope.

7. Regardless of whether you were able to prepare the evaluation during the initial session or had to adjourn it to do so, the next step is the same: recall the parties and their counsel to a joint group session. There, inform everyone—and hold up the sealed envelope as you do this—that you have the evaluation in hand (literally). Then, ask those present whether they would like to: (a) discuss settlement either with or without your assistance before you reveal your evaluation; or (b) whether you should proceed to open the envelope.

Preparing for and Conducting the Initial Session (7)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

- ❖ **Tip**: In a multi-party case, consider insisting upon unanimous agreement for settlement discussions to commence at this point.

8. If the session attendees decide to proceed to settlement discussions and request your help, then it's time to transition to a mediation/B.A.D.G.E.R. paradigm. (*See* Part III).

9. If they instead decide to have you reveal your evaluation, proceed to open the envelope. Then, read the evaluation aloud before providing everyone with hardcopies or digital copies of same.

10. Once everyone has received your evaluation, ask again whether the attendees would like to discuss settlement either with or without your assistance. If at least one party responds in the affirmative and requests your assistance, proceed to transition to a mediation/B.A.D.G.E.R. paradigm. (*See* Part III).

Preparing for and Conducting the Initial Session (8)

We now are up to the point in preparation for the initial settlement conference session where at least the expectations of counsel have been set and any technology issues should have been resolved in the pre-session videoconference. In addition, the parties' counsel should have already submitted pre-conference statements and key documents. What comes next?

11. If at least one party does not wish to discuss settlement, inquire about any potential case management issues likely requiring future Court intervention such as anticipated motions (and especially those for provisional remedies like a preliminary injunction), current or future disagreements concerning discovery, and the availability of fact and expert witnesses for trial. Unless your judge or his/her staff have explicitly authorized you to attempt resolving such issues, do **NOT** attempt to do so. Rather, simply take notes on these issues and report their existence to the Court later.

12. Thank all present for their time, effort, and participation in the settlement conference, and inquire as to whether the parties wish to schedule a follow-up session (which may be after a future litigation event has occurred). If so, try to set a firm date for that conference. Congratulations on reaching the finish line!

PART III

The Endgame: Using Mediation Techniques to Overcome Impasse and Achieve Settlement

Instill Process Confidence: Mediation Works

"Mediation is highly successful, with more than **85%** of mediated business cases resulting in settlement agreements."

Source: David J. Abeshouse, Esq., *Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases* (June 18, 2013) (emphasis added) (available at http://www.avvo.com/legal-guides/ugc/business-adr-arbitration-and-mediation-vs-court-litigation-for-commercial-cases)

The Position Prison

"When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so. Your ego becomes identified with your position. You now have a new interest in 'saving face'—in reconciling future action with past positions—making it less and less likely that any agreement will wisely reconcile the parties' original interests."

Source: Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books 3d ed. 2011) (Kindle Location 363 of 3669)

Needs and Interests

Keys to the Position Prison

- **Needs and Interests Are Broader Than Positions**
  - **The "Orange" Dilemma**
    (with $ being just a green orange)
- **Creative Option Generation Using Objective Standards**
- **Relationships by Focusing on Problem(s) at Hand and Not the People Associated with Them (i.e., the Parties)**
- **Strategic Future Relationships**
  - **Avoids "Bridge Burning": Today's Adversary May Easily Become Tomorrow's Ally**

Source: Culled from Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books 3d ed. 2011)

Learning How to B.A.D.G.E.R.

- ✓ ***Success as a Mediator for Dummies*** **by Victoria Pynchon & Joe Kraynak (Apr. 2012) ("SAM-D") (available off Amazon)**
- ✓ **Shadow/Observe or Co-Mediate with Experienced Mediators**
- ✓ **Attend Part 146 40-Hour Basic/Advanced Mediation Trainings (frequently advertised on NYC-DR listserv by S. Baum & S. Hochman, S. Stalder, and others)**
- ✓ **Remember Polonius in *Hamlet*, Act 1 Scene 3: Do What Works for YOU (and not what works for others) – "This above all: to thine own self be true."**

SAM-D Success Sheet

- ✓ **Grasping the Mediation Process**
  - ❖ **B.A.D.G.E.R. Expanded**
- ✓ **Exploring Mediation Fundamentals and Techniques**
  - ❖ **Anchoring**
  - ❖ **Appealing to Higher Values**
  - ❖ **Asking Diagnostic Questions (and Active Listening)**
  - ❖ **Bracketing**
  - ❖ **Distributive Bargaining (a/k/a "How Much Pie Per Party?")**
  - ❖ **Forming Contingent Agreements**
  - ❖ **Framing (and Deflection)**
  - ❖ **Interest-based Negotiation**
  - ❖ **Logrolling**
- ✓ **Generating Business as a Mediator**

Source: Victoria Pynchon & Joseph Kraynak, *SAM-D Cheat Sheet*, (formerly available at https://www.dummies.com/careers/career-planning/changing-careers/success-as-a-mediator-for-dummies-cheat-sheet/)

Mediator Techniques – Active Listening: Beyond Reflection

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While there are many topics and areas in mediation upon which even expert mediators disagree, there is one skill that all mediators (as well as arbitrators) have come to revere, and that is one's ability to:

LISTEN (anagram for "SILENT")

Listening at a basic level involves comprehension and retention of that which is heard, what is often referred to as "passive listening."

At a more advanced level, **active** listening involves four steps (VECS):

1) Validate
2) Empathize
3) Clarify
4) Summarize (and Expand)

"**With active listening, we use open ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth**. A classic formulation is **VECS: validate, empathize, clarify and summarize**.

By this approach, the other party feels less alone and more willing to open up. **This is the royal way to learning their interests**. With that information, one can look for ways to create value in a deal – ways to satisfy the other party's interests and achieve satisfaction of one's own."

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Source: Simeon H. Baum, *Tips on How to Negotiate and Acquire Negotiation Skills* (Resolve Mediation Services) (available at https://mediators.com/news-resources/tips-on-how-to-negotiate-and-acquire-negotiation-skills/4/)

Mediator Techniques – Reframing

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"Perhaps the single most powerful tool of the mediator, reframing is the subtle but effective technique used to lessen conflict and reorient participants towards constructive conversations. While litigators use language as a sword, mediators can use it as a shield. You can utilize the comforting effects of reframing to minimize rather than heighten conflict in the discussions. . . . .

A classic reframe (or 'positive reframe', as it's sometimes called) is an intervention in which the mediator repeats back the sense of a statement or position of a person in slightly altered terms, designed to distill out the negative connotations and emphasize the positive. An example is when a divorcing spouse declares 'I insist on keeping custody of my child!', and the mediator reframes it by saying 'Okay, so I understand parenting is important to you...'"

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 122 (2020) (available for purchase directly from the author)

Mediator Techniques – Deflect / Pivot

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"A gentle response deflects wrath; a harsh word provokes anger."

Proverbs 15:1

30. PIVOT

WHAT: There are two types of pivoting used in mediation -- the micro maneuver of "Affirm & Pivot", and the macro move called the "Progress Pivot".

WHY: To transmute the negative energy from the past into positive momentum for the future.

HOW: ***Affirm & Pivot*** – Acknowledge the emotions expressed about the past, and then use the energy to gently point their faces towards the future: "Given the real difficulties I'm hearing this has caused in the past, how might you structure things so that it works differently going forward?"

Progress Pivot – Announce: "Okay, we've done a good job of exploring the issue of fault; now, let's get to the business of solving the situation."

WHEN: On the microscopic level, whenever someone's stuck discussing how difficult or painful interactions have been on this point.

On the macroscopic level, after the participants have had an adequate time to make their opening statements, tell their stories, and vent ...and you determine it's time to move on to working towards a solution

"מַעֲנֶה רַּךְ יָשִׁיב חֵמָה וּדְבַר עֶצֶב יַעֲלֶה אָף"

משלי טו: א

* *

Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 132 (2020) (available for purchase directly from the author)

Mediator Techniques – Re-Voicing

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38. RE-VOICE THE DIALOGUE

WHY: The way you phrase a question can -- and does -- subtly influence the answer provided… as well as how the recipient perceives your fairness.

HOW: Rephrase everything in a passive voice, so that "Henry is offering you $1,500 a month" becomes "Would $ 1,500 per month be a workable number, Wendy?"

Also, work around the inherent limitations of the English language. Don't ask "With whom will the child live?" when it's really not a binary question, but one of "When will the child be with you… and when with *you*?" Don't pose "Which of you will claim the child for the tax credits?" since implicit in that query is that it will be one OR the other; instead, craft the question as "How will the two of you handle the annual tax benefits from the child?" Don't put it as "Which of you will get the kids for Thanksgiving this year?", but rather "What's the family's plan for celebrating Thanksgiving this year?", avoiding the binary, win/lose competition.

WHAT: Re-present problems in the passive voice, and discuss solutions without attributing them to any particular author. Also, edit out any word choices in your questions that implicitly incorporate (or can be taken as pointing to) a limited answer.

WHY: People embroiled in a marital fight will tend to discredit any idea, proposal, or suggestion emanating from "the enemy" as worthless -- regardless of how brilliant, perceptive, or useful the comment might actually be. (The technical psychological term behind describing this instinctive rejection of "whatever you say, I'm against it" is "reactive devaluation".) Sometimes a messenger is considered so toxic that the message is discarded without even being heard, much less considered.

WHEN: When one or both members of the couple appear to be set in rejecting any ideas.

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Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 140 (2020) (available for purchase directly from the author)

Mediator Techniques - Generating Options

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26. GENERATE OPTIONS

WHAT: Articulating possible solutions to a given issue or impasse, by either eliciting them from the couple or stating them yourself.

WHY: As one not embroiled in the controversy, it may be easier for you to spot possible solutions; as one with more experience with such issues, you may be able to share answers others have come up with for that problem. And, as the couple with the problem, they are uniquely situated to come up with creative solutions.

HOW: **YOURS:** Always put forth your ideas as hypotheticals about what they "might" do -- NEVER as statement of what they "should" do, remembering that anything *you* even suggest will tend to carry undue weight as the "right" thing to do. Always propose an idea in a manner that makes it clear that it's perfectly acceptable for either or both of them to reject it. The best approach is to list *all* the possible options and let the couple rank them as brilliant, acceptable, or terrible. Introduce your ideas with "There are three ways that I know that couples handle this..." or "Might you think about..." or "Have you ever considered...", or the all-time favorite: "What if you were to...?" Preface your first such suggestion with a disclaimer that "I generate good ideas and bad ideas -- only you two can identify which are which". Under extreme circumstances, you might even want to utilize the therapist's tool called a "paradoxical intervention"; it's a powerful, but tricky, technique of articulating a deliberately bad idea or suggestion -- just to stimulate their rejection of it and induce their own discussions of a better approach.

THEIRS: Channel negotiations so that each is invited to suggest what they – and not their spouse – might do to resolve the issue. Then keep asking for more possibilities – "And what else...?" until they've have truly run out of suggestions.

WHEN: Only when they seem to have exhausted their own abilities to come up with proposed solutions.

Only after you have asked each one what he or she (and NOT the other) might do that would provide a solution.

Only after you have waited for A FULL TEN SECONDS after the moment that you determine it appropriate and acceptable for you to offer a solution...

* *

Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 128 (2020) (available for purchase directly from the author)

Mediator Techniques – Strategies for Breaking Impasse (1)

* *

- ❑ **Ask diagnostic questions.** Ask questions like, "What do you believe would be the best solution for everyone?" or, "What could your opponent do to signal progress?"
- ❑ **Bracket your way to compromise.** Ask each party, "If the other party were to offer _____, would you be willing to offer _____ in return?" This approach often helps a party move into the range of reason without requiring the other party to move there first.
- ❑ **Encourage a party to make a concession and the other party to reciprocate.** When you name the concessions the parties have made and recite the reciprocal moves by the other, the parties feel more satisfied about the progress they're making and more hopeful about their ability to close the deal.
- ❑ **Perform a cost-benefit analysis.** Calculate the costs and benefits of any proposed solution as compared to the costs and benefits of the parties' failure to reach agreement.
- ❑ **Reframe the possible outcomes.** When a party refuses to make further concessions, to save face or avoid the impression that he's lost, reframe the resolution from loss to victory by stressing, for instance, that resolution is control over the conflict.
- ❑ **Soften a hard offer or demand.** Ask diagnostic questions to learn the reasons why a party refuses to make further concessions or is standing by an unreasonable offer or demand. Explaining the reasons for one party's intractability to her bargaining partner can soften what seems to be a hostile or unnecessarily adversarial position.
- ❑ **Use a decision tree.** Draw a flow chart illustrating the possible outcomes of the choices the parties have.

* *

Sources: Victoria Pynchon & Joseph Kraynak, *Strategies for Breaking Impasse* (culled from SAM-D) (formerly available at https://www.dummies.com/education/law/strategies-for-breaking-impasse/); Norval D. (John) Settle & SETTLEment Associates, LLC, *Tips and Techniques: Helping Parties Move Ahead and Overcome Roadblocks,* The Brief (ABA – Nov. 6, 2014, Vol. 43, No. 2) (https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2013_14/2014-winter-mediation-tips-move-ahead-overcome-roadblocks/)

Mediator Techniques – Strategies for Breaking Impasse (2)

* *

32. COMFORT

WHAT: Comment directly on the emotions both people may be experiencing, and assure them it's perfectly normal and expected.

WHY: To ease their pain.

HOW: Point out that it's normal and acceptable to feel anger, despair, love, hatred, and fear during a divorce. Observe that many -- if not most -- couples working through a separation experience not only disagreement, but powerful emotions of both sadness and anger.

Establish through eye contact, by the tone of your voice, through your hand gestures and body language, that you empathize with what each is experiencing. Utilize "active listening" techniques to assure participants that they're being heard.

WHEN: Whenever the opportunity arises...

* *

Source: Robert Kirkman Collins, *Divorce Mediation: Common Sense and the Crisis of Divorce* 134 (2020) (available for purchase directly from the author)

Concluding the Settlement Conference

If, notwithstanding what will undoubtedly be Herculean efforts on your part, the case does not settle, proceed to inquire about any potential case management issues likely requiring future Court intervention such as anticipated motions (and especially those for provisional remedies like a preliminary injunction), current or future disagreements concerning discovery, and the availability of fact and expert witnesses for trial. Unless your judge or his/her staff have explicitly authorized you to attempt resolving such issues, do **NOT** attempt to do so. Rather, simply take notes on these issues and report their existence to the Court later.

Thank all present for their time, effort, and participation in the settlement conference, and inquire as to whether the parties wish to schedule a follow-up session (which may be after a future litigation event has occurred). If so, try to set a firm date for that conference. Congratulations on reaching the finish line!

Questions or Comments?

COURT NEGOTIATION VS. MEDIATION

Nelson Edward Timken, Esq. - April 20, 2021
Principal Court Attorney, Justice Lance Evans

Judicial Settlement Techniques

Law Clerk Teaching an Attorney the Law

So about four years ago, I began to think about what I could do for a living when I left the court system. I had conferenced thousands of cases and negotiated many of them to settlements. I knew how to hammer out a settlement, even if sometimes, a little blood was spilled. So that meant that I already had the requisite skills and could become a mediator, right? Wrong. Most "old school" court attorneys settle a lot of cases. But they do so by being pushy, evaluative, talkative, argumentative, and sometimes, by telling attorneys what they do not want to hear. They listen, only to the extent necessary to come up with their next retort. These attributes, while effective in a time-challenged, face-paced environment where you have a limited amount of time to spend on each case, are not those of a mediator. The court negotiator wants to move cases, satisfy the mandates of the judge and the court system. The mediator wants to satisfy the needs of the

parties. Court negotiation is the court's process. Mediation belongs to the parties.

Court attorneys supervise high-pressure settlement conferences. They have to, that is their job. They let the lawyers argue the case and present their evidence, let the other party do the same, and guide them to the settlement they feel is fair and one that their judge would like you to accept. They essentially do what their judges would, they issue "directed settlements." That is, they decide legal and factual issues, and, if necessary, do what they see their judge do, which is to bang the parties over the heads until a settlement is reached. In court, it's often better for them to do that. Very often, acceding to a settlement proposal by the court attorney is better for some people than paying the full emotional and financial cost of going to trial. But that isn't mediation. Court attorneys who approach a mediation as though it was an in-court negotiation, are going into the situation unarmed, because they don't have the authority of the court behind them.

My first foray into training was extremely disappointing. The parties began to argue with one another, and, reflexively, I raised my hands like a traffic cop, indicating that they should stop talking at one another. Wrong. Let them talk to one another and get it out, I was told. But that was counterintuitive to me, I was used to maintaining control, giving an air of authority, the imprimatur of the court. I didn't want to have a court officer rushing in to see what was going on, or if I needed help. Only, in mediation, people argue. There is heat. There is face-to-face confrontation. These people have likely not had the chance to speak to one another about their dispute. Their lawyers have shielded them from a direct showdown. And often, these showdowns are just what the parties need to feel vindicated, to resolve their differences, and move on. A few of the community mediations I have done have become extremely heated, and I have let both sides express themselves, after which the matters resolved themselves.

Court attorneys are naturally bad mediators, unless they take enough training to learn the skills of becoming good listeners, curious questioners, modest learners, and patient and persistent Samaritans. One course won't do it. Depending on who you are, and how ingrained your work habits are, five might be too few to reinforce your new role. I hit ten long ago, and I am still taking courses and reviewing the ones I have taken before each mediation so as not to forget what I learned in the previous one. The words "I know" don't exist in mediation, as they do in court negotiation. Instead, they are replaced by the words "tell me about" or "explain to me" or "it seems that." These skills must be constantly practiced and reinforced. The words "this case is a loser" are replaced with "what do you see as your best possible outcome in this case" and "how likely do you think that is?" You extract information, you don't gratuitously offer it.

Mediation offers attributes that in-court settlement conferences do not. Mediation offers self-determination, which means that the parties to the dispute are free to choose how to settle their dispute. Each party makes free and informed choices about the process and outcome. In court, the court attorney or judge often tells the parties what they should agree to, and that is not mediating. Moreover, the court attorney or judge sometimes agree with one person's side in a dispute, whereas a mediator is impartial. Courts are mandated to settle cases. Mediators are mandated to facilitate discussions between the parties.

On the other hand, litigants often settle cases in court, not because they necessarily want to, but because they are about to be required to try them and take their chances with a jury. If they get a worse jury determination than what they could by settling, everyone knows it, including their client. It's a gamble. All but the most daring attorneys (or those who are focused only on doing trials and billing their clients for them), are cognizant of the risks. As a court attorney, it is my job, and my duty, I feel, to report to the party on what I have seen a jury do under similar circumstances to help them to make their decision whether or not to settle. As a mediator, I generally would ask the party what he or she feels might transpire, not

necessarily giving my opinion or knowledge of past experiences but asking them to search their own and consider the risks involved.

Attorneys generally remain silent at these court-settlement conferences, not listening intently to what the other party is saying, but formulating a response, or a counterargument. This is why mediators are taught to reframe what the parties have said. It gives the parties a chance to actually listen to what the other side has said, rather than formulating a response. It also lets the speaker know that they have been heard.

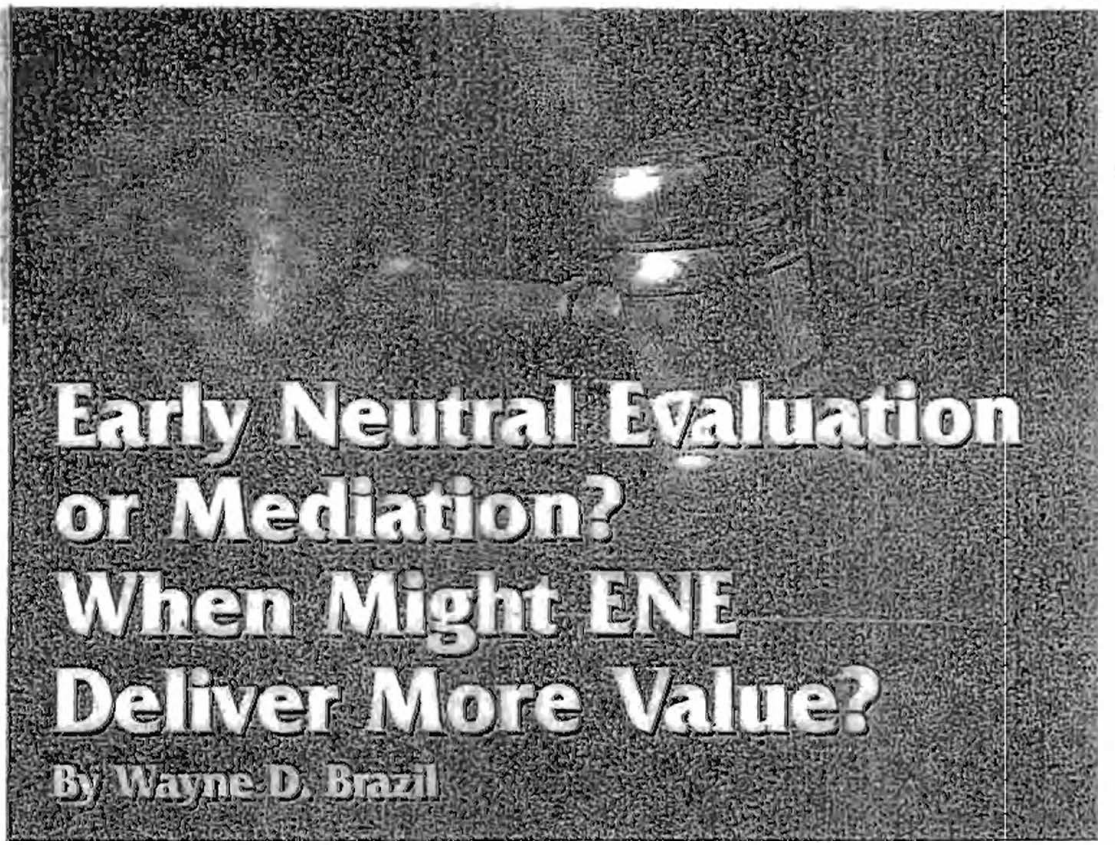
Mediation is a client-driven modality, where the client speaks, hopefully to the other client, and lets the other party know what their interest is. Negotiation is lawyer-driven. That reminds me, mediation is about interests, whereas negotiation is about positions. Mediation involves sharpening and focusing the issues, whereas negotiating settlements is about posturing and litigating.

There is no shame if the mediation doesn't produce a settlement because the goal is to let the parties speak to one another. That is as long as the parties attend the mediation with an honest desire to resolve the matter. Obviously, if you have one party coming to the mediation offering the other side $500, the filing fee, for the case, and attending to get them to discontinue their case, or coming with less authority than both sides feel the case is worth, because they "really don't want to settle," then you are going to be wasting your time and raising your frustration level. It would be unusual for a judge or court attorney to tolerate that in a court situation.

Once you realize the differences, and are skilled at the skills that mediation has to offer, then and only then can the mediator/court attorney expand their approach to include more evaluative techniques in certain substantive areas of the law where they are called for, and even expected by the parties. But that only occurs after the skills of mediation have become familiar, and there is a conscious choice to diverge to a more pointed

approach. For example, in a custody mediation, there generally must be a co-parenting situation, and the parties must be approached with a more evaluative approach, by making them realize that is going to be the case. In a commercial case, it is generally about the numbers, so once you have established a rapport with the parties, that is your next step. It isn't your first step, as it would be in court, but it does arise pretty quickly once the parties have expressed their interests and feelings.

Attorneys too, should recognize and appreciate the differences between negotiating in court, especially where a trial is imminent, and a mediation. Many assume the approach is the same, and it isn't. Clients play a pivotal role in a mediation. So much so that it is much more difficult to resolve a matter in a mediation where the client is not present to express themselves to the other side.



Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value?

By Wayne D. Brazil

Among ADR processes, mediation is sweeping the field. Even when other forms of ADR are available, mediation is the process of choice in the vast majority of circumstances. But should this be so? How thoughtful and well-informed is this most commonly made "choice"? Do parties too often end up in mediation as a result of little more than subcultural inertia, or because mediation appears (to the superficial eye) to be the least demanding and least threatening form of ADR? Do litigants and lawyers "choose" mediation because they assume that they know what mediation is—because it feels familiar and comfortable—while passing over other ADR processes largely because they are less familiar and less malleable in our imaginations?

If we are to be good counselors, we must seek more solid bases for making important process choices. Toward that end, this article identifies factors or circumstances that could commend early neutral evaluation (ENE) (for more description of ENE, see the sidebar titled "ENE: Key Purposes and the Process") to more careful consideration. It is no part of my purpose to denigrate mediation or to discourage its use. Mediation can be a wonderful process, and in many circumstances, mediation will most likely meet the needs of the parties. But in a time of expanding process pluralism it is not wise to consider mediation the only available option.

When trying to decide between mediation and ENE, we must begin by asking ourselves two big questions. First, at this specific juncture in the litigation, what are the most important needs we want to meet, or objectives we want to achieve, through an ADR process? Second, to which kind of mediation are we comparing ENE?

There are many different objectives that we (as litigants or lawyers) could use an ADR process to pursue. Which of those objectives is most important—or most feasible—can change at different junctures in the pretrial period. Settlement may not be our primary objective in some situations, or it may not be feasible at some points. But even if our goal at a given juncture simply is to get the case settled, we need to determine what the principal barriers to settlement are and how best to attack them. In other words, we need to identify the things that we could do through an ADR process that are most likely to enhance our chances of getting a deal. Then we need to select the ADR process that holds the most promise for accomplishing those things.

And before we slide into choosing mediation, we better be sure we know what kind of mediation we would be getting. Some mediators purport to offer you the full range of forms of mediation, from the truly transformative, through the facilitative (or "elicitive"), all the way to the most aggressively evaluative (or "directive"). Some mediators also will say you can choose from a variety of

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formats: all group session, all private caucusing, or some combination.

Beware of such promises. In some regions, mediation subcultures have drifted primarily in one process direction, often toward the evaluative end of the spectrum with a heavy emphasis on private caucusing. If that is the situation in your area, you might have difficulty finding a mediator who is really practiced in and comfortable with, or good at, any form of mediation that is outside his or her subcultural mainstream. Habits are hard to break. And skills not regularly practiced get rusty.

In a variation on this theme, if you were to list the principal benefits that ENE might deliver in your situation, some mediators might respond by assuring you that their "mediations" can deliver all those same benefits—that you can do everything in one of their mediations that you could do in any ENE. For reasons I hope to make clear, you should be skeptical of any such assurance.

So what are the factors or considerations that should move us to give serious consideration to using ENE?

1. *How important to achieving your goals at this juncture is a credible evaluation of the merits of the case from an impartial and knowledgeable source?* For progress to be made toward settlement in your case, is it essential to persuade one or more of the parties that their view of the merits may well be misplaced? Does a party or lawyer need a reality check? Or, to move forward, does a party or lawyer need to feel appreciably more confident that he or she has an accurate understanding of the law and the gist of the evidence?

For several reasons, ENE may be superior to mediation for achieving these kinds of goals. Evaluation is the center of ENE. The core purposes of an ENE session are to (1) identify the legal and evidentiary center of the case, (2) develop as reliable an evaluation of the merits as the circumstances permit, and, when needed, (3) craft an efficient plan for developing the information the parties believe is sufficient to make responsible judgments about what a litigated outcome would most likely be. ENE also offers parties an opportunity to try to settle their case, but that opportunity arises after the evaluative table is fully set.

Mediations, on the other hand, have multiple and sometimes mobile purposes, some of which have little to do with the merits (under the law and evidence) of the case. Even in "evaluative" mediations, the play of competing purposes can compromise, in some measure, the reliability and credibility of the "evaluation." Mediators are likely to think that the "mediation" component even of an "evaluative mediation" is quite important and should occupy a significant segment of the process. And many mediators are primarily interested in process values, so they may concentrate more of their energy on the nature and spirit of the dynamic between the parties than on analysis of evidence and law. For these and other reasons, there is a risk that the "evaluative" component of a mediation will be underdeveloped, fragmented, partial, nonlinear, or indirect.

An ENE, by contrast, is structured to assure that the bases for the evaluative component of the process are systematically developed, fully visible to all parties, and as comprehensive as the parties' knowledge permits. The evaluator knows that his or her primary assignment is to provide the parties with as reliable a second opinion of the merits as possible, so he or she works hard to identify the legally pertinent analytical matrix and to bring to the surface, to the fullest extent feasible, the evidence that that matrix makes material.

Moreover, in ENE, unlike mediation, the neutral host of the process must have subject-matter expertise. The evaluator understands the relevant law in advance and knows what kind of evidence is most germane and where that evidence is most likely to be found. The requirement that the evaluator have subject-matter expertise improves the likelihood not only that his or her evaluation will be sophisticated and as reliable as the circumstances permit, but also that the evaluation will be so perceived by the litigants. In short, evaluative feedback from a substantive expert is likely to

Early Neutral Evaluation: Key Purposes and the Process

ENE provides litigants with a free, nonbinding, confidential opportunity to reduce cost and delay, to improve the quality of justice, and to explore settlement. A confidential ENE session is held before expensive discovery and motion practice are completed. Lead counsel and their clients must attend the session; key witnesses, including experts, may attend. Clients may participate actively.

Face to face, in the presence of an evaluator with subject matter expertise, the parties present evidence and set forth their positions. The evaluator clarifies and probes with questions, identifies the key issues, then retires to a separate room to prepare a written evaluation. After the evaluation is written, the parties may choose to engage in settlement negotiations with the assistance of the evaluator. If no settlement is reached, the evaluator helps the parties develop a focused case development plan.

The ENE process expands the parties' information base for decisions about case development and about settlement, improves the quality of parties' analyses, and sharpens the joinder of issues. It also provides litigants with valuable impartial feedback from an expert about the merits of their positions, and with suggestions about how to acquire efficiently any additional evidence the parties need to engage in more productive settlement discussions.

have more credibility with the litigants and their lawyers than evaluative feedback from a process expert.

There are two additional reasons that evaluation from an evaluator may well have greater credibility than evaluation from a mediator. The first arises out of assumptions the parties are likely to make about the agenda of the host of the proceedings. When parties begin a mediation in a case that is being litigated, many are likely to assume that the mediator's primary goal is to get the case settled. Many litigants will assume that the mediator has his or her eye on that main chance at all times, and that the mediator will manipulate how he or she behaves and what he or she says in order to preserve or enhance his or her relationships with the parties. These parties assume that the mediator will take great pains not to alienate anyone, lest he or she lose effectiveness as a lubricator of the movement that will be necessary to get a deal.

These assumptions can compromise parties' confidence in the reliability of a mediator's evaluative feedback. On the one hand, the parties may fear that their mediator is straining to retain their goodwill by not being frank or thorough in assessing the merits. On the other hand, the parties may fear that their mediator is exaggerating their legal or evidentiary vulnerabilities to induce them to be more flexible about settlement.

These threats to the credibility of a mediator's "evaluation" can be even greater if the mediation features private caucusing. In that setting, litigants may worry that all parties are not receiving the same "evaluation" when they meet separately with the mediator. The secret meetings may intensify the parties' fear that the mediator is manipulating the assessments that he or she offers each side privately in order to build a sense of connection or to capitalize artificially on the parties' risk aversion.

In addition, when ex parte communications are part of the process, no party can be sure that he or she knows all the information or considerations that influence what the mediator says about the merits of the case. Each party may worry that some secret (about evidence, about a legal argument, or about something extraneous to the merits of the case) that some other party has shared with the mediator is affecting the evaluative feedback he or she is providing. Some litigants may fear that their mediator, being more concerned about determining what terms of settlement the parties might accept than about what entitlements they might have under the law, will permit his or her sense of where a litigant might be willing to move in the negotiations to color the views the mediator might otherwise articulate about the relative merits of the parties' positions.

In ENE, by contrast, every participant in the session is privy to every communication that reaches the mind of the neutral before he or she prepares the evaluation. Ex parte communications with the neutral are strictly prohibited until the evaluator has committed the evaluation to a writing that each party is entitled to see before the ENE session may move into settlement discussions. There may be no ex parte phone conversations with or email or letters to the neutral before the session. The parties exchange their pre-session written statements. During the session, every party is present for the substantive presentations and every party hears the evaluator's questions and the answers they elicit.

Thus, in ENE, every party and lawyer knows every piece of evidence and every argument that goes into the neutral's mind before he or she commits the evaluation to writing and memorializes the reasoning that supports it. This visible, rule-based requirement can increase the parties' confidence in the intellectual and moral integrity of the neutral's evaluative feedback. It also can reduce the parties' fear that the neutral's feedback is being distorted by some secret consideration or some privately developed sympathy.

However, if what would best serve your client's interests is a reality cold shower from a neutral source on the viability of your client's side of the case, but you don't want your opponent to watch as the frigid water washes over your client's head, an evaluative mediation that features private caucuses might be appreciably more attractive than an ENE session. Just be sure to let your mediator know that she will be doing more harm than good if, in private caucus with your client, she pulls her substantive punches.

2. *How important at this stage is focusing and expediting the case development process?* Sometimes opposing counsel and litigants aren't sure where the center of the case is, especially early in the pretrial period. Sometimes it is difficult to identify the claims or counterclaims on which an opponent intends to rely most, or which of many affirmative defenses really matter. And even when counsel have a pretty good idea where the center of the dispute is, the case development process, through discovery and motion practice, can be painfully slow, wasteful, and expensive. In fact, in many cases it is pretrial proceedings—which too often are discursive and fractious—that impose the most expense and frustration on the parties.

In theory, parties could use case management conferences with a judge to streamline the case development process. But in practice it can be difficult to get detailed guidance in these legally unsexy arenas from busy judges.

Moreover, because judges must be so circumspect in expressing views about the merits of a case early in the life of the litigation, they often cannot offer substantive feedback at case management conferences. Similarly, they may feel reluctant to offer specific suggestions about case development planning that might appear to be rooted in instincts about the relative viability of the litigants' positions.

Evaluators are not similarly cabined. They usually will have more time to devote to exploring a dispute in depth early in its life and they may be more confident that, because of their subject-matter expertise, they can reliably help with the details of pretrial planning.

In theory, parties also could use an early mediation to help locate the issues that really matter and then to develop a focused plan for uncovering the evidence that is likely to be most useful for predicting the outcome. But many lawyers resist going to mediation until they have completed most (or all) of their discovery or until a judge has ruled on most (or all) of the potentially significant motions.

Early neutral evaluation, unlike at least some mediations, is easier. A principal reason it is early is to press the litigants to identify the center of the case and to cut through the indirection and delay that so often accompany formal discovery and motion activity. Evaluators are trained to capitalize on the information base that an ENE session can build by helping the parties agree on a focused case development plan that would remove, as efficiently as possible, the informational excuses for not proceeding with serious settlement negotiations. Mediators are more likely to be process specialists than evaluators, while evaluators are more likely to be experts in the substantive issues on which the case will turn.

Mediators are likely to work hard to try to get a deal, but some may lose some interest and energy when it becomes clear that no deal can be reached. In ENE, on the other hand, there is no risk that the neutral will drift into relative passivity when the merits seem to loom too large as an obstacle to progress in negotiations. An evaluator understands that a core aspect of his or her role is to be sure the parties don't overlook or gloss over the legal or evidentiary issues that the applicable law makes pivotal to their dispute.

In mediation there also is a risk that case development planning won't get detailed attention once the mediator concludes that no agreement is in the works. Good mediators don't just give up when the parties won't settle, but if it appears that the main chance (settlement) will elude them, many mediators will find it difficult to muster the discipline and energy that is necessary to contribute meaningfully to case development planning. And some mediators will not have the subject matter expertise to offer reliable assistance in that arena. Evaluators, by contrast, are taught that an important part of their job is to use their subject-matter expertise to help the parties fashion a cost-effective plan to position the case for critical motions, trial, or more promising settlement negotiations.

Thus, there may be much to recommend ENE if you are having trouble getting your opponent (or even your own client) to focus on case development planning, or if you fear that the pretrial process could be stalled by procrastination or could degenerate into expensive and time-consuming meandering through discovery and motion practice.

Problems ENE Can Address

- Uncertainty about where the center of the case is—what the key issues that separate the parties are
- Poor communication (across party lines or between counsel and client)
- Procrastination
- Difficulty seeing case comprehensively or through opponent's eyes
- Unfocused/unnecessary discovery and motions
- Unrealistic clients
- Clients lacking confidence (in their lawyer as bases for decisions)
- Alienated clients
- "Meter-running"
- Unrealistic lawyers
- Lawyers lacking confidence (or who are overconfident)
- Parties' reluctance to be the first to breach settlement

3. How important to achieving your objectives at this juncture is face-to-face interaction with the other side? In some local legal cultures, mediation has come to be dominated by private caucusing. Group sessions have not been abandoned, but in many mediations most of the time is spent and most of the significant work is done in private caucuses. Sometimes, however, the advantages that private caucusing can offer are outweighed by benefits that can be achieved only through group sessions. Because ENE guarantees an extensive group session, it can be an attractive option when what you need most can be achieved only through substantial consideration of the merits face-to-face with the other side.

The group-session in ENE is always substantive. It is in the group session, the core event of ENE, that the parties set forth the merits of their claims and defenses and present or describe the core evidentiary and legal underpinnings of their positions. Lawyers make presentations. Clients can tell their side of the story, provide information, ask questions, and respond to inquiries. Retained experts can present their views. When the evaluator probes, everyone can see and assess the responses. These features can make an ENE session very useful when it is important that (1) your client or you (or both) see the other side's presentation, or (2) the opposing litigant or lawyer (or both) see your side's presentation.

Your client may need to see the other side's presentation directly to feel more centered in his or her decisions about

how to proceed, or to develop more confidence that you are accurately assessing the relative strengths and weaknesses of the parties, the lawyers, and their positions. Or your client may need to see the other side's presentation in order to appreciate how strong its case is, how sympathetic as a witness the spokesperson for your opponent may be, how persuasive an opposing expert's testimony will be, or how able opposing counsel is. You might even feel that, in order to make the most intelligent decisions about settlement, your client needs to see the opposing party's presentation directly in order to develop more empathy for him or her, or at least to understand more clearly that his or her side of the story has some fairness appeal.

Regardless of what your client might need to see, you (as counsel) may feel that you need to see the other side's presentation directly. Communication across party lines may be poor, leaving you unsure about what your opponent's primary claims, lines of reasoning, or evidence might be. You may not want to spend a lot of your client's time and money trying to use motions and discovery to assess the strength of the other party's case, or trying to get a read on your opponent's personality, ability, and likely rapport with a jury. You may want to get an informal, inexpensive look at your opponent's expert witness and theories, perhaps before deciding how much to invest in experts for your client.

In some situations, you may feel strongly that you don't want to rely on a mediator's assessment of the other side and its case; you might want to see as much of the other side as possible, so you can make your own assessments. A mediator might not be as good at making these kinds of judgments as you are, perhaps because he or she has not had as much experience as you have had with this kind of case. Or you might be concerned that the drive to get the case settled might lead the mediator to overstate your opponent's strengths in order to induce your client to be more amenable to settlement.

The flip side is that it might be very important for the other side to see directly your client, his or her side of the case, and how you perform. You may feel that your side has strengths that a mediator would not be able to communicate adequately. Your client might have very strong jury appeal—something that you want your opponent to see directly. Or you may fear that the power of your reasoning or the implications of your evidence will be diluted in the process of translation by a shuttling mediator. In short, you may want an unimpeded "persuasion-shot" at the opposing litigant and lawyer—something a mediation might compromise.

In a more elevated variation on this theme, it might be important to use direct interaction with the people on the other side to try to humanize the dynamic across party lines and to put to the best use the assets as human beings that players in your litigation pageant possess. Direct interaction across party lines might be the best way to desensitize the disputing process, to convert it from a struggle that is dominated by abstractions or institutions into a dynamic between human beings. Direct interaction may be the best way to make it difficult for the other side to demonize you or your client, to ignore what you have in common, or to use generalities or preconceptions to dismiss you. You might feel that an ENE session offers the best opportunity to try to explain to the people on the other side your client's views about why things happened as they did, and thus to give your opponents a feel for your people as people. Substantial direct interaction might even offer the best chance to show your opponents that your people are principled and trustworthy.

In theory, much of this could be achieved through a mediation—at least if the mediation were dominated by a group session and if the mediator removed himself or herself most of the time from the communication loop. But mediators are trained and inclined to mediate. For many, that means making sure they remain in the communication loop by "actively" listening, "feeding back" to the parties to demonstrate understanding and to build trust and connection, "framing" and "reframing" the parties' inputs and views, and gently (or otherwise) guiding the substance and character of the communications into the forms and zones that the mediator feels are most appropriate and promising. Thus, in practice, even if the bulk of the time in a mediation were spent in a group session rather than in private caucus, much of the interaction between parties would remain "mediated"—less direct, less unmuted, more diluted. Sometimes this can be a good thing. But not always.

4. *How important is it for your client (or an opposing litigant) to feel he or she has had something like his or her day in court?* The center of an ENE session consists of the parties presenting the best evidence and argument they can muster (at the time) in support of their claims and defenses. It is, to be sure, a telescoped and informal proceeding, but it is a proceeding. It provides each litigant with an opportunity to see and hear the presentation of his or her case alongside a competing presentation of the other side's case, and then to receive a direct assessment, by a neutral person with considerable experience

and subject matter expertise, of the relative merits of the parties' positions.

Many clients feel the need to be heard. For some, it is very important that the principal listener be the opposing party, not some stranger to the dispute. Such clients will value the opportunity that ENE guarantees to speak directly to the other side about the merits.

But even clients whose "need to be heard" can be satisfied by speaking to a stranger may not find being heard by a mediator as satisfying as being heard by an evaluator. Many parties will assume that a mediator's overriding goal is to get the case settled. That assumption may lead parties to believe that the "listening" that a mediator seems to undertake so sincerely is really an artifact of training and role, a mere tool for inducing litigants to change their settlement positions. Such parties may find it almost impossible to feel that a mediator is really absorbing their story and their feelings, especially if they believe that the mediator is proceeding in exactly the same manner when he or she meets privately with the opposing party.

Ironically, some clients may feel that a neutral whose role is to pass judgment, rather than to lubricate or engineer changes in the parties' settlement positions, is more "real" as a listener, more likely to take in honestly a person's story and to react genuinely to it.

Moreover, there probably are clients who will not feel ready to move on (toward serious consideration of settlement) unless and until both parties' conduct has been the subject of judgment. For some parties, the passing and pronouncement of judgment may be necessary to clear a psychological block, to experience vindication and erase guilt or second-guessing, or to begin weaning themselves from unrealistic hopes or avaricious expectations. For such clients, ENE may contribute more than mediation to clearing a path forward.

The Promise of ENE

I am a big fan of mediation. The spirit that animates it, and its malleability, can yield a beautifully constructive process and magnificent fruits. The purpose of this article is not to dull mediation's well-deserved luster, but to encourage lawyers and litigants who are thinking about using an ADR process to identify the most important objectives that they hope to achieve through the ADR process they select and then to consider carefully which process holds the most promise, in their specific circumstances, for achieving those objectives. Even if the immediate goal is no more elaborate than to get the case settled, before we select an ADR process, or decide how much of the process should be devoted to group session, it is important to determine what the primary obstacles to settlement are likely to be, and then to identify the kinds of input from a neutral and the kinds of interaction with other players that are likely to contribute most to overcoming those obstacles. In some cases, we might find that ENE promises to deliver the most of what we need. ◆

Essentials of the ENE Process

- Presession conference with all counsel (usually by phone).
- Exchange and submit to evaluator confidential written evaluation statements (not filed).
- The Confidential ENE Group Session (everyone present):
  1. Evaluator describes process and explains its purposes.
  2. In group session, parties make structured but informal presentations of their claims and defenses (e.g., through documents, statements by parties or key witnesses, proffers of testimony, etc.); rules of evidence not applied; no cross-examination.
  3. Parties make responsive presentations re: merits.
  4. Evaluator asks questions to clarify, probe.
  5. Evaluator identifies common ground and possible stipulations.
  6. Evaluator identifies key disputed issues (issue clarification).
  7. Evaluator privately prepares written evaluation (qualified or limited as availability of evidence makes necessary).
  8. Evaluator returns to group session and asks if parties wish to explore settlement before the evaluation is presented; if so, evaluator offers to help (private caucusing permitted only with everyone's agreement).
  9. If parties do not wish to explore settlement at this juncture, or if parties try to negotiate but fail to reach agreement, evaluator presents evaluation.
  10. Evaluator asks (again) if parties wish to explore settlement.
  11. If no settlement, evaluator helps parties develop an efficient case development plan.
  12. Participants consider utility of various types of follow-up to the session (e.g., reports to or phone conversations with the evaluator); evaluator schedules a second session only if all parties want one.
- Follow-up.

http://www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml

COMMERCIAL DIVISION

SUPREME COURT, NEW YORK COUNTY

RULES AND PROCEDURES OF THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM

A. GENERAL PROVISIONS

Rule 1. Program. The Alternative Dispute Resolution Program ("the Program") of the Commercial Division of the Supreme Court of the State of New York, County of New York, shall be applicable to commercial cases referred by Justices of the Commercial Division and other Justices of the Supreme Court as permitted by order of the Administrative Judge.

Rule 2. Panel of Neutrals.

(a) Requirements to Join Panel. The Administrative Judge shall establish and maintain a panel of Neutrals ("the Panel") for the Program. To be eligible to join the Panel as a Mediator, a person shall have a minimum of ten years of experience in the practice of commercial law or comparable experience as an accountant or business professional and shall satisfy the training and experience requirements of Part 146 of the Rules of the Chief Administrator. To become a Neutral Evaluator on the Panel, a person must be an attorney or former Judge who has the background and the training required by Part 146.

(b) Term of Membership. The Panel shall continue in existence for a term of two years from the date the Administrative Judge certifies the Panel as provided in Section 146.3 of Part 146. Further, each Neutral shall serve at the pleasure of the Administrative Judge, who may

terminate membership at any time.

(c) Obligations of Membership: Each member of the Panel shall, in the event that the caseload of the Program requires it, serve as a Neutral in three matters annually in the Program. Members shall comply with these Rules and Procedures and with the continuing education requirement set forth in Section 146.5 of Part 146. Information on the members of the Panel is accessible on the New York County home page of the website of the Commercial Division, the address of which is www.nycourts.gov/comdiv.

Rule 3. Determination of Suitability; Order of Reference. Except as provided in Rule 15, cases are referred to alternative dispute resolution ("ADR") in the Program by the Justice assigned to the case. The assigned Justice may order parties to undergo ADR in the Program where the Justice finds that it would be in the interest of the just and efficient processing of the case to do so or upon consent of the parties. The suitability of an action for ADR shall be determined by the assigned Justice after considering the views of the parties insofar as practicable. If a case is referred to ADR, the Justice shall issue an Order of Reference. Such Order shall not stay court proceedings in the case unless otherwise specified therein.

Rule 4. Form of ADR. Cases referred to the Program shall be mediated unless otherwise agreed by the parties.

Rule 5. Initiation Form. In cases referred to ADR, the parties shall sign an ADR Initiation Form (accessible on the website of the Commercial Division at the following address: www.nycourts.gov/courts/comdiv/ny/ADR_overview.shtml), in counterparts if necessary, and, except as otherwise provided in Rule 15, shall, within four business days from the date of the Order of Reference, contact the ADR Coordinator and submit the Form to the Coordinator.

Rule 6. Selection of Neutral; Private ADR Providers.

(a) Designation of Neutral. An action referred to the Program shall be assigned to a Neutral from the Panel who shall in the first instance be designated by the ADR Coordinator. The Coordinator will endeavor to distribute assignments widely among all members of the Panel. The Coordinator may, however, select a particular Neutral if the nature of the matter in question calls for special expertise on the part of the Neutral, if difficulties are encountered in locating an available Neutral, or for other administrative reasons. Each Neutral contacted will advise the Coordinator as to his or her availability and, prior to serving, will conduct a conflicts check as required by subdivision (d) hereof. Within ten business days from receipt of the Order of Reference, or, in cases governed by Rule 15, within five business days after the filing of the Initiation Form, the Coordinator shall inform the parties of the identity of the designated Neutral. The date of this communication shall constitute the Confirmation Date (subject to subdivision (b)).

(b) Selection of Alternate Neutral from Panel. Once informed of the identity of the

Neutral, the parties shall have five business days within which to select an alternate Neutral from the Panel. The parties shall agree upon the alternate Neutral and contact him or her directly to ensure the Neutral's availability to handle the matter and the absence of any conflict on the Neutral's part, and shall inform the Coordinator of the alternate selection within the five-day deadline. If the parties select an alternate Neutral pursuant hereto, the Confirmation Date shall be the date on which they inform the Coordinator of that selection.

(c) Other Person as Neutral. Notwithstanding subdivision (a), the parties may designate as the Neutral a person who is not a member of the Panel or proceed to ADR through a private ADR provider and in accordance with the rules thereof, but the parties must nevertheless complete the ADR process within the deadlines set forth in these Rules.

(d) Ethical Standards. Prior to confirmation as the Neutral in any case, a prospective Neutral shall conduct a check for conflicts with regard to parties or related entities. The Neutral shall decline to serve if he or she would not be able to do so fairly, impartially, and in accordance with the highest professional standards. Neutrals on the Panel shall comply with the Standards of Conduct for Mediators of the Commercial Division or, if applicable, the Standards of Conduct for Arbitrators and Neutral Evaluators (accessible at the Internet address listed in Rule 5). Unless all parties consent to the Neutral's service after having been advised of all disqualifying facts, the Neutral shall decline the appointment and another Neutral shall promptly be selected.

Rule 7. Compensation of Neutral.

The Neutral designated pursuant to Rule 6 (a) or (b) shall be compensated by the parties as follows.

(a) Mediators Designated by the ADR Coordinator. The Neutral designated as a mediator by the ADR Coordinator under Rule 6(a) shall serve in that role at no charge during preparation for the mediation (e.g., scheduling conference and review of documents in preparation) and for the first three hours of the actual mediation session or sessions. At the conclusion of the three hours, any party may bring the ADR proceeding to an end, but, if the parties agree to continue, they shall compensate the mediator for his or her time thereafter at the rate of $ 400 per hour.

(b) Mediators Designated by the Parties. If the parties designate an alternate mediator from the Panel pursuant to Rule 6(b) and that person is available and willing to handle the matter under the circumstances, the parties shall compensate the mediator at the rate of $ 450 per hour commencing from the outset of the initial mediation session.

(c) Agreements of the Mediator and the Parties. Notwithstanding subdivisions (a) and (b) of this rule, the mediator and the parties may agree upon a rate in excess of the otherwise applicable rate specified in those subdivisions based upon factors such as the complexity of the

case, the number of parties involved, and the experience of the mediator, and may also agree to compensate the mediator for preparation time. All such agreements shall be in writing.

(d) Arbitrators and Neutral Evaluators. If the parties agree that the form of ADR to be undertaken shall be arbitration or neutral evaluation, the Neutral(s) shall be compensated at the rate of $ 400 per hour from the commencement of the initial session. Preparation time will not be compensable.

(e) Party's Share of Compensation. Unless otherwise agreed, each party to the ADR proceeding shall pay an equal share of the Neutral's compensation.

Rule 8. Confidentiality of Mediation and Neutral Evaluation.

(a) Confidentiality. An ADR proceeding in the Program, other than a binding arbitration, shall be confidential and, except as otherwise provided hereafter, any document prepared, or communications made, by parties, their counsel or a Program Neutral for, during, or in connection with the proceeding shall not be disclosed outside its confines by any participant. No party to the proceeding shall, during the action referred to ADR or in any other legal matter, seek to compel production of documents, notes, or other writings prepared for or generated in connection with the ADR proceeding, or the testimony of any other party or the Neutral concerning communications made during the proceeding. A settlement, in whole or in part, reached during the ADR proceeding shall be set forth in a writing signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the Civil Practice Law and Rules shall not be shielded from disclosure merely because they are submitted or referred to in the ADR proceeding. Should a party attempt in any legal action to compel the testimony of the Neutral concerning the substance of an ADR proceeding in the Program, that party shall hold the Neutral harmless against any resulting expenses, including reasonable legal fees incurred by the Neutral or the reasonable value of time spent by the Neutral in representing himself or herself in connection therewith.

(b) Exceptions. Notwithstanding the foregoing:

(1) A Neutral shall disclose to a proper authority information obtained in mediation if required to do so by law or rule or if the Neutral has a reasonable belief that such disclosure will prevent a participant from engaging in an illegal act.

(2) A party, the ADR Coordinator, or the Neutral may report any unethical conduct during the proceeding to a proper authority.

(3) The Neutral and the parties may communicate with the ADR Coordinator about administrative details of and the schedule for the proceeding, including as provided in Rule 10; the ADR Coordinator may communicate with the assigned Justice in accordance with Rule 10 (h); and the Neutral may make general reference to the fact of services rendered in any action

to collect an unpaid fee for services performed under these Rules.

Rule 9. Immunity of the Neutral. Any Neutral from the Panel who is designated to serve pursuant to these Rules and Procedures shall be immune from suit based upon actions engaged in or omissions made while so serving.

Rule 10. Procedure.

(a) Deadline for First Session; Scheduling. The first ADR session shall be conducted no later than 30 days from the Confirmation Date. Immediately after confirmation, the Neutral shall contact all counsel and parties to discuss the matter and schedule all proceedings, typically by conducting a conference call. All counsel and parties shall promptly communicate with one another and the Neutral and take all steps necessary to schedule the first proceeding in compliance with said deadline. Failure of any party or counsel to respond to communications in a timely manner or to participate in scheduling the mediation session may subject counsel to sanctions.

(b) Preliminary Submissions. At least ten days before the first session in cases being mediated or undergoing neutral evaluation, each party shall deliver to the Neutral a copy of its pleadings and a memorandum of not more than ten pages (except as otherwise agreed) setting forth that party's opinions as to the facts and the issues that are not in dispute, contentions as to liability and damages, and suggestions as to how the matter might be resolved. This memorandum shall not be filed in court nor, unless otherwise agreed by the parties, served on the adversary, and it shall be destroyed by the Neutral immediately upon completion of the proceeding.

(c) Attendance Required. Attendance of the parties is required at the first three hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter. Where necessary to an effective mediation, the Neutral may require the insurance carrier of a party to attend. In addition, counsel of record for each represented party shall be present at each session. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to take all steps necessary to a meaningful mediation process.

(d) Adjournments. Once a session of the ADR proceeding has been scheduled, it may be adjourned only at the direction of the Neutral and not beyond 45 days from the Confirmation Date.

(e) Reporting of the Status to the Coordinator. On the 40th day from the Confirmation Date, the Neutral shall report to the ADR Coordinator the status of the proceeding.

(f) Discovery. Subject to any applicable disclosure order of the court, the Neutral may help the parties to provide such focused discovery as may assist in the ADR proceeding.

(g) Failure to Comply with Rules. If a party or counsel fails to cooperate in making arrangements for the mediation or to take steps preliminary thereto, as provided in subdivisions (a) and (b) of this rule, fails to appear at any scheduled session, or otherwise fails to comply with these Rules, the Neutral shall advise the ADR Coordinator, succinctly specifying the nature of the infraction. If the Neutral reports that an infraction has occurred, he or she may recommend the imposition of sanctions, or, where such a report of the Neutral is silent as to sanctions, the ADR Coordinator may recommend the imposition of sanctions based upon that report.

(h) Communications with Justice**.**

(1) Communications In General. The ADR Coordinator may communicate with the assigned Justice about administrative details of the processing of any case referred to the Program by that Justice, but shall not identify the Neutral designated or disclose any substantive aspect of the ADR proceeding. If a proceeding is terminated after three hours without a settlement, the Coordinator shall not reveal to the Justice which party brought the proceeding to an end. The Coordinator shall report to the Justice at the conclusion of the proceeding whether a resolution of the case in whole or in part was reached.

(2) Reporting Violations of the Rules; Sanctions. The Coordinator shall report to the Justice, on an appropriate form, a copy of which shall be forwarded to the parties, any violation of these Rules as reported by a Neutral pursuant to subdivision (g) of this Rule and any recommendation for sanctions by the Neutral or by the Coordinator based upon the report of the Neutral. The Justice may impose sanctions or take such other action as the Justice may find to be necessary to ensure respect for the court's Order and these Rules.

Rule 11. Completion of ADR; Report.

(a) Conclusion; Continuation; Monitoring by Coordinator. The ADR process shall be concluded within 45 days from the Confirmation Date. If the matter has not been entirely resolved within that period, but the parties and the Neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward for an additional 30 days. The ADR process shall be completed within 75 days from the Confirmation Date unless the assigned Justice, upon request presented by the ADR Coordinator, specifically authorizes the process to continue beyond that date. The ADR Coordinator will monitor progress of ADR proceedings to ensure that the deadlines set forth herein are complied with.

(b) Report of Outcome. Except as provided in Rule 12, the Neutral shall report the outcome of the proceeding to the ADR Coordinator no later than three business days after its conclusion. If the ADR process is successful, the parties shall forthwith submit a stipulation of discontinuance to the County Clerk (with fee) and transmit a copy to the Part of the Justice assigned.

Rule 12. Arbitration. Parties who choose to arbitrate shall agree upon appropriate procedures to govern the process to the extent not herein provided. If the parties are unable to so agree, the matter shall either be mediated, or, upon consent, arbitrated pursuant to procedures issued by the ADR Coordinator. An award shall be issued within seven business days after conclusion of the arbitration proceeding.

Rule 13. Conversion of Mediation to Binding Arbitration.

(a) Arbitration Permitted. Mediation may be converted to binding arbitration in the Program upon consent of all parties at any stage in the mediation process. Any such arbitration, however, must proceed before a Neutral different than the one who presided over the mediation session(s), unless the mediator did not receive any information from a party *ex parte* prior to the time an agreement to proceed to arbitration was reached.

(b) Stipulation; Identification of Arbitrator(s); Fee. Within five days from conclusion of the mediation proceeding, parties who wish to undergo arbitration pursuant to this Rule shall deliver to the ADR Coordinator a written stipulation submitting the case to arbitration under this Rule. There shall be a single arbitrator unless the parties agree to have three. Together with the stipulation the parties shall transmit the name of the person or persons they have agreed upon to serve as arbitrator(s). If the parties are unable to agree upon the person or persons who shall serve, the Coordinator shall select the arbitrator(s). Each arbitrator shall be entitled to a fee as provided in Rule 7 (d).

(c) Deadlines. The arbitration shall be completed within 45 days from the date on which the Coordinator advises the parties of the confirmation of the selection of the arbitrator(s).

Rule 14. Further ADR. After completion of a mediation, upon request of a party or upon its own initiative, the court, in its discretion, may issue an order directing a second referral to mediation, which shall proceed in accordance with these Rules. In any such case, the parties shall compensate the Neutral as provided in Rule 7 (b) with respect to alternate mediators.

B. MANDATORY MEDIATION PILOT PROJECT

Rule 15. Procedures in the Pilot Project.

(a) Cases Subject to Mandatory Mediation in the Pilot Project. By an Administrative Order or Orders of the Administrative Judge of this court, a pilot project ("the Pilot Project") shall be established for the mandatory mediation of certain commercial cases filed outside the Commercial Division as defined in the Order or Orders.

(b) Designation of Cases. As provided in any applicable Administrative Order of the Administrative Judge, the staff of the court shall identify all commercial cases that are subject to mandatory mediation in the Pilot Project upon the filing of the Request for Judicial Intervention ("RJI"). In each such case, the court will provide notice to the parties through the New York State Courts Electronic Filing System of the designation of the case as one subject to the Administrative Order. All parties and counsel shall proceed to mediation in accordance with that Order and these Rules and Procedures. Failure to comply with that Order and these Rules and Procedures may result in the imposition of sanctions.

(c) Preliminary Conference Part. The initial Administrative Order shall establish a Preliminary Conference Part to handle such conferences in the kinds of cases that are subject to mandatory mediation in the Pilot Project. The preliminary conference in all such cases shall take place in this Part before the Justice assigned to the Part. Other proceedings in such cases shall be handled by the Justice to whom the case has been assigned upon filing of the RJI. The Justice presiding in the Preliminary Conference Part shall address all discovery issues in each case that are pending as of the time of the conference and shall also make any directives with regard to discovery that may assist the parties to have a productive and successful mediation.

(d) Exemption. A case otherwise subject to mandatory mediation in the Pilot Project may be exempted from such mediation upon a satisfactory showing that the applying party would be subjected to unreasonable hardship or burden by participation in the mediation. A party seeking an exemption shall apply therefor at the preliminary conference. Failure to seek an exemption as provided in this subdivision shall constitute a waiver of any objection to the mediation.

(e) Initiation Form and Other Procedures. Within four business days after the preliminary conference, the parties shall submit an Initiation Form to the ADR Coordinator as provided in Rule 5 hereof. The parties shall comply with all subsequent procedures of the ADR process as set forth in these Rules, including the deadlines set forth in Rule 10.

(f) Compensation of Mediator. The mediator shall be compensated as provided in Rule 7 hereof.

C. ADMINISTRATION OF PROGRAM

Rule 16. Administration of Program. The Program shall be supervised by the Clerk-in-Charge of the Commercial Division Support Office. The conduct of ADR proceedings shall be coordinated by an Alternative Dispute Resolution Coordinator or Coordinators.

Effective Date: May 1, 2017

COMMERCIAL DIVISION
ALTERNATIVE DISPUTE RESOLUTION PROGRAM
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Revised: 11/18/2021

Supreme Court of the
State of New York
Nassau County

Rules of the Civil Case Alternative Dispute Resolution Program

Effective November 3, 2021

SUPREME COURT – NASSAU COUNTY
Rules of the Civil Case Alternative Dispute Resolution Program

SUPREME COURT – NASSAU COUNTY

Rules of the Civil Case Alternative Dispute Resolution Program

INTRODUCTION

Alternative dispute resolution ("ADR") refers to a variety of processes other than a trial that parties use to resolve disputes. ADR offers the possibility of a settlement that is achieved sooner, at less expense, and with less inconvenience and acrimony than would be the case in the normal course of litigation. The principal forms of ADR include arbitration, neutral evaluation and mediation. The Court will offer mediation as the default ADR option, however parties are encouraged to determine the most appropriate form of dispute resolution for their case.

Mediation is a confidential dispute resolution process in which a neutral third party – the Mediator - helps parties identify and narrow issues, clarify perceptions and explore options for a mutually acceptable outcome as to some or all issues. In this process, parties have an opportunity to communicate with each other, focus on what is important to them, and to come up with individually tailored solutions. During mediation, each party relates his or her understanding of the dispute. The Mediator may ask the parties clarifying questions. The Mediator will not give legal advice or force solutions on the parties.

Mediation often involves non-legal as well as legal issues. Represented parties are strongly encouraged to discuss the proposed mediation process with their attorneys. Parties may choose to attend sessions without counsel, if all participants agree. Although the mediation process can, and often does, result in an agreement, whether to reach an agreement, and on what terms, is up to the parties themselves. A mediator will not impose a solution on the parties or attempt to tell them what to do; if the parties cannot reach agreement, the case will be returned to the referring Justice.

The Court will also offer neutral evaluation as an ADR option. Neutral evaluation is a confidential, non-binding process in which a neutral third party with expertise in the subject matter relating to the dispute hears abbreviated case presentations by the parties and counsel, provides an informal assessment of the strengths and weaknesses of the arguments and may offer an evaluation of likely court outcomes in an effort to promote settlement. Their assessments and opinions may help parties to analyze the case, facilitate discussion and generate a settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

The following Rules shall govern cases sent to mediation and neutral evaluation by Justices of the Nassau County Supreme Court, as well as cases referred upon consent of the parties. Parties whose cases are the subject of an Order of Reference are free at the outset to use the services of a private ADR provider of their choosing, at their own expense, in lieu of taking part in this Program. After a case has been submitted to the Program, parties can terminate the process and proceed to ADR elsewhere.

Rule 1. The Program:

The Supreme Court of the State of New York, Nassau County, operates the Civil Case Alternative Dispute Resolution Program ("the Program"). Cases qualifying for referral to the Program include all civil cases that are not already included in a separate ADR program within this District (i.e. commercial and matrimonial). Personal injuries matters are particularly suitable for the Program.

Rule 2. The Roster:

(a) The Administrative Judge shall establish and maintain a Civil Case ADR Program Roster of neutral evaluators and mediators ("the Roster") who shall possess the qualifications and training required by Part 146 of the Rules of the Chief Administrative Judge (see http://www.nycourts.gov/rules/chiefadmin/146.shtml) as either a mediator or neutral evaluator.

(b) In order to be eligible to serve on the Program's Roster, a person shall possess the following qualifications as either a Neutral Evaluator or Mediator, and such other requirements as may hereafter be promulgated:

1) Neutral evaluator. Neutral evaluators must have successfully completed at least six hours of approved training in procedural and ethical matters related to neutral evaluation and be: (i) a lawyer admitted to practice law who has at least seven (7) years of substantial experience in the area of Civil Practice; or (ii) an individual who has served at least five years as a judge with substantial experience in the specific subject area of the cases that will be referred to them.

2) Mediator. Mediators must have successfully completed at least 40 hours of mediation in a training program sponsored or recognized by the New York State Office of Court Administration ("OCA"), as follows: at least 24 hours of training in basic mediation skills and techniques; and at least 16 hours of additional training in advance mediation techniques. Mediators must also have recent experience mediating Civil cases.

(c) Every member of the Roster, and any other person, who serves as a mediator pursuant to these Rules, shall comply with the Model Standards of Conduct for Mediators (adopted and approved by the AAA; ABA; and ACR).

(d) Every member of the Roster shall complete at least six hours of additional approved training relevant to their respective practice areas every two years in compliance with the Continuing Education requirement of Part 146 of the Rules of the Chief Administrative Judge.

(e) Continuing presence on the Roster is subject to review by the District Administrative Judge. Every member of the Roster serves at the pleasure of the District Administrative Judge, who may terminate a designation to the Roster at any time.

(f) The Roster will be available through the Nassau County Supreme Court's ADR website.

(g) The 10th Judicial District—Nassau County serves a wide variety of litigants, including persons of varying age, race, ethnicity, national origin, gender, sexual orientation, physical or mental ability, religion, socioeconomic and family status. Neutrals with a wide variety of cultural and life experiences enrich the alternate dispute resolution process by bringing diverse perspectives to resolving disputes. To better serve our District's population and instill confidence in participants in the ADR process, Nassau County is committed to attracting and retaining court-approved neutrals who represent a range of personal and professional backgrounds. Qualified applicants of diverse backgrounds and experiences are encouraged to apply for admission to the Roster by submitting a NYS UCS Office of ADR Application to Mediate for the NYS Trial Courts available on the NYS UCS ADR website (https://ww2.nycourts.gov/ip/adr/Application.shtml), and a resume.

Rule 3. Procedure:

(a) **Referrals.** Cases shall be referred to mediation or neutral evaluation as early as is practicable and appropriate. If the assigned Justice decides to refer a case to the Program or if the parties consent to a referral at a conference or in a written stipulation, the assigned Justice shall issue an Order of Reference requiring that the case proceed to mediation or neutral evaluation in accordance with these Program rules. A case not deemed appropriate for referral at its outset may be referred to the Program later in the discretion of the assigned Justice.

(b) **Order of Reference.** The Order of References shall direct that within five (5) business days from receipt of the Order of Reference, the parties shall confer and determine whether they choose to mediate with either an outside ADR provider or a party-selected neutral from the Roster to be paid by the parties, or a court-assigned neutral from the Program's Roster. During this time, the parties shall also execute and submit to the Court the "Civil Case ADR Program Assignment Form" (hereinafter "Assignment Form"), which can be obtained from the Nassau County Supreme Court's ADR website https://ww2.nycourts.gov/courts/10jd/nassau/ADR.shtml. The Order of Reference shall establish a date upon which the parties are to return to Court.

(c) **Assignment of Neutral.** If the parties do not elect to use their own neutral as set forth in Subdivision (d) of this Rule, then within three (3) days of receipt of the parties' executed Assignment Form the Court or its designee shall assign a neutral or Co-Mediators from the Roster and provide the parties with a Court Assignment of Neutral form. Within five (5) business day of the time a neutral is either agreed upon by the parties or assigned by the Court, the parties shall jointly contact the neutral to schedule an initial session. Counsel shall provide the neutral with copies of the Order of Reference and Assignment Form.

(d) **Party-Selected Neutrals.** Parties may select their own mediator, whether they are on the Court's Roster or not. If the parties elect to use a party-selected neutral they shall include on the Assignment Form the name and contact information of the neutral selected and the date of the first session, if known, which date shall be no more than forty-five (45) calendar days from the

date of the Order of Reference. A Party-Selected Neutral shall not be required to, but may agree to, provide the initial ADR session without compensation.

(e) **Substitution of Neutral.** Any neutral selected pursuant to this rule must comply with the conflict check procedures in Rule 8 below. Should the assigned neutral be unable to serve as the neutral, due to a conflict of interest or other circumstances, the parties shall promptly request a substitute neutral. The substitute neutral shall be assigned by the Court or the Court's designee and shall be bound by all the provisions of the Order of Reference, including providing the first ninety (90) minutes of the initial ADR session without compensation.

(f) **Initial ADR Session.** A referral to mediation or neutral evaluation under the Program consists of, but is not limited to, a free ninety (90) minute initial session. The initial ADR session must be conducted within forty-five (45) calendar days from the date of the Order of Reference. This deadline is important and must be met. In the event of any extraordinary difficulties, the neutral shall contact the Court and, if necessary, intervention will occur to expedite the process. If the case is not resolved at the conclusion of the initial session, the parties and neutral may agree to continue the ADR process. Neutral compensation for any additional time beyond the initial ADR session is governed by Rule 6, below.

(g) **Pre-ADR Conference Call.** The neutral may initially request a conference call with both parties regarding any preliminary matters. If the neutral and the parties have agreed to proceed by a remote virtual online platform, the neutral shall, prior to the initial session, discuss the following with the parties: privacy expectations; confidentiality; prohibition on recording; participants' ability to access and use virtual technology, including the availability of a secure internet connection; whether the participant needs an interpreter or other accommodation; safety concerns; any other requests by participants, including a participants' request to have a support person present for the session (to be discussed and agreed to by the other participant).

(h) **Party Participation.** Unless exempted by the neutral for good cause, every party, including counsel must attend and participate in good faith in the initial ADR session either in person or remotely if agreed upon in advance, or, in the case of a corporation, partnership or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and authorized to settle the matter. Any attorney who participates in the ADR process shall be fully familiar with the action and authorized to settle. If an insurance carrier is involved, a representative with full authority to negotiate a settlement must appear or be available by phone at the time of any ADR session. Notwithstanding the foregoing, if a party or counsel fails to schedule an appearance for an ADR session in a timely manner, appear at any scheduled session or otherwise unreasonably fails to comply with these Rules, the neutral may advise the Court and the Court may impose sanctions.

(i) **Pre-ADR Statement.** Unless otherwise directed by the neutral, at least seven (7) business days before the initial session, counsel for each party shall deliver directly to the neutral a concise confidential statement of not more than three pages (12 point font, doubled spaced) setting forth: the essential issues presented; relevant facts, including injuries; assessment of value and

applicable law, if any; the status of settlement negotiations; why the parties are at an impasse; suggestions as to how the matter might be resolved; and any other information concerning the litigation necessary for the effective negotiation and resolution of the issues. Unless otherwise specified by the party, the pre-ADR Statement shall not be served on the adversary or filed in court, shall be read only by the neutral, and shall be destroyed by the neutral immediately upon completion of the proceeding. *Pro se* litigants shall not be required to provide a pre-ADR Statement. Instead, they shall speak directly to the neutral to answer any pre-ADR questions the neutral might have. Such information shall be given to the neutral and treated with the same confidentiality as a pre-ADR Statement.

(j) **Pre-ADR Disclosure**. If requested, counsel must be prepared to provide to the assigned neutral any materials directly relevant to the issues of liability and damages. Counsel are encouraged to provide to the neutral and exchange with opposing Counsel, if not previously exchanged, any documents they believe would be helpful in resolving the dispute. Such documents may include:

1. Documents sufficient to establish the subject contract, statutory cause of action (including the alleged violation), or the relationship between the parties;
2. Preliminary evaluation of damages, including for counterclaims, crossclaims, and third-party actions;
3. Proof of any insurance (including excess) available to satisfy any cause of action, as well as proof of any reservation of rights or disclaimer of coverage;
4. Documents sufficient to show any dispositive affirmative defense;
5. Plaintiff's medical records and examination reports;
6. Bills of Particulars;
7. Relevant photographs, video recordings or accident reports;

(k) **Conclusion of ADR.** Within seven (7) business days after the ADR process has concluded – whether by agreement, or the refusal of one or more parties to continue – the neutral shall complete the Confidential Report of ADR Neutral indicating settlement or lack thereof and transmit the same, along with any written agreement, to the Court and ADR Coordinator. If the ADR process results in a settlement, the parties shall submit an appropriate stipulation to the Part of the assigned Justice.

At the end of an ADR initial session mandated by Subdivision (f) of this Rule, any party or the neutral may terminate the ADR process. If the ADR process has been terminated by one party only, the identity of that party shall not be reported.

Rule 4. Confidentiality:

(a) The ADR process shall be confidential. All documents prepared by parties or their counsel and any notes or other writings prepared by the neutral in connection with the proceeding - as well as any communications made by the neutral, parties or their counsel, for, during, or in connection with the ADR process - shall be kept in confidence by the neutral, the parties and any individual present

during the ADR process, and shall not be summarized, described, reported or submitted to the Court by the neutral or any individual present during the ADR process. No party to the ADR process shall, during the action referred to the ADR process or in any other legal proceeding, seek to compel production of documents, notes or other writings prepared for or generated in connection with the ADR process, or seek to compel the testimony of any other party concerning the substance of the ADR process. Any settlement, in whole or in part, reached during the ADR process shall be effective only upon execution of a written stipulation signed by all parties affected or their duly authorized agents. Documents and information otherwise discoverable under the New York Civil Practice Law and Rules shall not be shielded from disclosure merely because the documents and information are submitted or referred to in the ADR process (including, without limitation, any documents or information which are directed to be produced pursuant to Rule 3 [j] herein).

(b) No party to an action referred to the Program shall subpoena or otherwise seek to compel the neutral or any individual present during the ADR process to testify in any legal proceeding concerning the content of the ADR process. In the event that a party to an action that had or has been referred to the Program attempts to compel such testimony, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or reasonable sums lost by the neutral in representing himself or herself in connection therewith. However, notwithstanding the foregoing and the provisions of Rule 4 (a), a party or the Court may report to an appropriate disciplinary body any unprofessional conduct engaged in by the neutral and the neutral may do the same with respect to any such conduct engaged in by counsel to a party.

(c) Notwithstanding these confidentiality provisions, communications and information may be subject to disclosure in any present or future judicial or administrative proceeding in any of the following circumstances:

1) Attendance: Whether the parties and their counsel attended the initial ADR session will be reported to the Program Coordinator who may notify the Court.

2) Session Information: The neutral may report to the Court whether the parties are requesting additional ADR sessions as well as the date of any ADR session and whether the parties reached partial, complete, or no agreement on the issues.

3) Waiver: Parties to the ADR session and the neutral agree in writing to waive confidentiality. The waiver must specify the individual communication(s) and writing that will be disclosed, the person or entity to whom the disclosure will be made, and the purpose of the disclosure. All waivers shall be in writing or on the record. Nothing herein shall be construed to require a neutral to appear in any court.

4) Written Agreement: A writing signed by all parties embodying a negotiated agreement submitted to the court for review. Only those agreements that have become court orders

or decrees may be admissible in any present or future judicial or administrative proceeding.

5) Threats of Imminent, Serious Harm: If communications or information constitute a credible threat of serious and imminent harm to any person or entity, the appropriate authorities and/or the potential endangered person shall be notified.

6) Allegations of Child Abuse or Neglect: The communication or information relates to an allegation of child abuse or neglect as defined in Family Court Act § 1012(e) and (f) and Social Services Law § 412, and for which disclosure is required pursuant to Social Services Law § 413, appropriate authorities may be notified.

7) Mediation Survey: Mediation surveys that elicit participant satisfaction with the mediation process may be shared with the local ADR Coordinator or Administrative Judge. These surveys may be shared to evaluate the program, to determine whether to approve a neutral to join or remain on a roster, to counsel a neutral, if necessary, or to remove a neutral from a roster.

8) Unprofessional Conduct: A party, counsel to a party, or a neutral, may report unprofessional conduct to an appropriate disciplinary body or to the local ADR coordinator.

9) Collection of Fees: The neutral may make general references to the fact of ADR services rendered in any action to collect an unpaid authorized fee for services performed under local court rules.

Rule 5. Immunity of the Neutral:

Any person designated to serve as a neutral pursuant to these Rules shall be immune from suit based upon any actions engaged in or omissions made while serving in that capacity to the extent permitted by law.

Should a party attempt in any legal action to compel the testimony of the neutral concerning the substance of an ADR session, that party shall hold the neutral harmless against any resulting expenses, including reasonable legal fees incurred by the neutral or the reasonable value of time spent by the neutral in representing himself or herself in connection therewith.

Rule 6. Compensation:

(a) **Initial Session.** Parties shall not be required to compensate the Neutral assigned by the Court from the Program Roster for services rendered during the ninety (90) minute initial session, or for time spent in preparation for the initial session. Either prior to or at the beginning of the initial ADR session, the assigned neutral shall disclose to the parties either in writing or verbally the

specific time at which the non-compensable ninety (90) minutes of the initial ADR session will conclude and advise that continuation beyond that time will be billed by the neutral at the agreed upon rate against those parties who continue ADR beyond the initial ninety (90) minute session.

(b) **Amount of Compensation**. Should the parties agree to continue beyond the Initial Session or to schedule additional sessions with the court-assigned Neutral, the court-assigned Neutral shall be entitled to compensation for time spent conducting any mediation session that follows the initial session and time spent reviewing materials submitted by the parties for purpose of subsequent ADR sessions. Should the parties choose to continue beyond the initial session, a neutral shall be compensated at a rate agreed upon between the neutral and parties, which shall not exceed a rate of $450 per hour. A written agreement setting forth the neutral's rate to be charge for compensable time beyond the initial session shall be executed by the parties prior to the start of the initial session and a copy shall be provided to the parties. Neutrals on the Program's Roster are strongly encouraged to work on a sliding fee scale taking into account a party's financial circumstances.

(c) **Continuing or Terminating ADR.** At the expiration of the first ninety (90) minutes of the initial session as previously defined, any party may elect not to continue with ADR, which decision must be immediately communicated orally or in writing to the neutral and all parties. In such situation, despite the fact that one or more parties have opted out of ADR, ADR can continue as to those parties desiring to continue, to the extent that the ADR can be meaningful without participation by the party or parties that opted out. The parties shall promptly advise the referring Justice of the date of any continuing ADR session that is scheduled beyond the next scheduled Court date.

(d) **Allocation of Compensation.** All neutral fees and expenses beyond the initial session shall be split evenly among the parties who continue ADR beyond the initial ninety (90) minute session, unless otherwise agreed upon in writing.

(e) **Agreement of the Neutral and Parties.** Notwithstanding the foregoing, the neutral and the parties may agree upon a rate in excess of the rate for services set forth herein, based upon factors such as the complexity of the case, the number of parties involved, and the experience of the neutral, and may also agree to compensate the neutral for preparation time. All such agreements shall be in writing prior to the initial session.

(f) **Co-Mediation.** The presence of more than one appointed neutral shall not increase the cost of the mediation to the parties. When a case is co-mediated by two appointed Roster Neutrals, the neutrals shall share the agreed hourly rate for services beyond the initial ADR session.

Rule 7. Stay of Proceedings:

(a) Unless otherwise directed by the Justice assigned, referral to an ADR process will not stay the court proceedings in any respect.

(b) Parties committed to the ADR process who conclude that additional time is required to fully explore the issues pertaining to their case may make a request for a stay of any proceedings to the referring Justice. Regardless of whether a stay is granted by the referring Justice, if informal exchange of information concerning the case will promote the effectiveness of the ADR process and the parties so agree, the neutral shall make reasonable directives for such exchange consistent with any pre-existing disclosure order of the Court and in compliance with the deadlines set forth herein.

(c) If the matter has not been entirely resolved within the 45-day period as provided in these rules (see Rule 3 [f]) but the parties and the neutral believe that it would be beneficial if the ADR process were to continue, the process may go forward. However, the ADR process should be completed within 75 days from the date of the Order of Reference unless the assigned Justice specifically authorizes the process to continue beyond the 75 days.

Rule 8. Conflicts of Interest:

(a) **Conflict Check.** In order to avoid conflicts of interest, any person tentatively assigned to serve as a neutral shall, as a condition to confirmation in that role, conduct a review of his or her prior activities and those of any firm of which he or she is a member or employee. Any such conflicts review shall include a check with regard to all parents, subsidiaries, or affiliates of corporate. The neutral shall make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the neutral, including a financial or personal interest in the outcome, and an existing or past relationship with a party or their attorney or foreseeable participant in the ADR session. The neutral shall also avoid an appearance of a conflict of interest.

(b) **Disclosure.** The neutral shall disqualify him or herself if the neutral would not be able to participate fairly, objectively, impartially, and in accordance with the highest professional standards. In the event that any potentially disqualifying facts should be discovered, the neutral shall fully inform the parties and the Court of all relevant details. Unless all parties after full disclosure consent to the service of that neutral in writing, the neutral shall decline the assignment and another neutral shall be assigned in a manner consistent with Rule 3.

Rule 9. Neutral Communication with Referring Justice:

The neutral shall submit a Confidential Report of ADR Neutral to the referring Justice and ADR Coordinator within five (5) business days of the conclusion of the proceeding whether the proceeding produced a resolution of the case in whole or in part. If the parties have utilized a party-selected neutral, within 24-hours of completion of the ADR session(s), the parties shall advise the referring Justice and ADR Coordinator of any settlement reached during ADR. The neutral may communicate with the referring Justice or the referring Justice's staff about administrative details of the processing of any case referred to the Program by that Justice, but shall not discuss any substantive aspect of the case. Upon termination

of the proceeding by a party pursuant these rules, the neutral shall not reveal to the Court which party brought the proceeding to an end.

Rule 10. Further ADR:

(a) While early attempts at alternative dispute resolution may not necessarily result in settlement, follow up attempts at a later date are consistent with the goals of this Program. Accordingly, upon request of a party or upon its own initiative, the assigned Justice may in his or her discretion issue an order directing subsequent referrals to the Program.

(b) Any case subsequently referred to the Program shall proceed in accordance with these Rules. For example, the parties shall not compensate the neutral for services rendered during an initial session or for time spent in preparation for an initial session conducted pursuant to a subsequent Order of Reference to the Program.

(c) Nothing in this Rule shall prohibit the parties from proceeding to mediation, neutral evaluation, arbitration, or another ADR process, without Order of the Court, and at their own expense.

Rule 11. Administration and Assessment of Program:

The Program shall be supervised by the Administrative Judge of the Tenth Judicial District – Nassau County. The Program contact is Yvonne Marin, Esq., ADR Coordinator for the 10th Judicial District, Nassau County, ymarin@nycourts.gov.

To assist in the continued development of the Program, we ask the parties and counsel, if applicable, complete a Post-Mediation Survey within fifteen (15) business days after the final ADR session. The Post-Mediation Survey may be easily completed and submitted online at: https://mediationsurvey.questionpro.com/?custom1=20

Once submitted, the online survey is automatically routed to the Nassau County ADR Coordinator. Neutrals are encouraged to share the survey link with the parties via email or by inserting it into the chat feature at the end of a virtual ADR session.

NEW YORK STATE SUPREME COURT, CIVIL BRANCH
10TH JUDICIAL DISTRICT, NASSAU COUNTY
Effective date: November 3, 2021

Mediation Tips and Techniques: Helping Parties Move Ahead and Overcome Roadblocks

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November 06, 2014 DISPUTE RESOLUTION

Helping Parties Move Ahead and Overcome Roadblocks

It is common in mediation to encounter rough spots or outright impasse. Of course, the core value of self-determination means that the parties each may choose not to resolve the dispute and to walk away—but there are many things a mediator can do, without being coercive, to help the parties reflect before giving up. In my experience, parties appreciate a mediator who brings a little help and a touch of persistence to the parties' negotiations. At the same time, the material below is not the core of mediation, but merely a collection of aids to process that may occasionally be useful depending on the situation. Thus, before delving into the tips and techniques for a successful mediation, reflect on these three rules:

1. Facilitate. You, the mediator, are a facilitator of the parties' journey to their own resolution. The parties have the right and responsibility of self-determination— use the tools below only to assist. In particular, the early parts of mediation involve critical elements such as introducing the parties to this very different process, developing their trust in you and in mediation, helping them hear and be heard in new ways, helping them begin to feel the power of this process to resolve their issues, and helping them obtain new perspectives on each other's situation. Take time to build a foundation that will enable them to work—until you have achieved a good start in the basics, you are not ready to use most of the techniques below.

2. Rely on your intuition. Your most powerful tool is your intuition about what the parties may benefit from at any given moment, based on your experience and thorough understanding of mediation. Reliance on tips like those below, rather than the basics of good mediation, is wrong. This list is only an adjunct to good basic mediation. And sometimes the answer is thinking less, not more.

3. Avoid becoming part of the problem. Parties sometimes get stuck because they are consciously or unconsciously resisting something that was more your idea than theirs. Always check in with yourself: are you contributing to an impasse without realizing it? Do you find yourself resisting or reacting to one party differently? Are you telegraphing an "answer" to the problem that is yours, not theirs? Follow the parties. It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going where you think best, you shouldn't try to go there!

The "in principle" technique helps frame a possible solution, reduces fear of unknown consequences, and allows an orderly and productive engagement on secondary details.

Engaging the Issues

Ensure all necessary parties are present. Consider whether the problem is the absence of someone from the mediation—a family member, a trusted advisor, someone with more authority to create options, etc. Where possible, it is useful to explore these kinds of questions (particularly on authority to resolve) before the mediation session.

Don't misuse "issue identification." Some trainers and mediation programs require specific, even written, identification of what "the issues" are, early or in advance of mediation. Of course, it is good to prepare by broadly bracketing what brings the parties to the table, and it is important to help the parties explain and explore what they want and need to work on. But the danger is that a facile identification of "issues," particularly early, may actually encourage parties to both frame the mediation, and to continue to bracket how they proceed, in terms of their positions. The issues often are relabeled positions, and in mediation we want to make it easy to transition from the positions to underlying or common interests.

Don't get too specific too early. Once you move from convening to engaging the issues, start gently and with

generalities. Moving too fast may invite the parties to get stuck on positions, rather than delving further. Use your listening skills and segue into problem solving by linking to issue identification and setting a smooth pace. As you begin to approach ideas for options, you should still be in the mode of listening much and saying little—e.g., "It sounds like you may need a redefinition of the job and a fresh start. Do you want to work on those goals now, or is there something else we need to talk about first?"

Focus on the future. As you begin to get into problem solving, look for opportunities to emphasize the future and deemphasize the past. This provides a nice transition for the parties to move from the "same old, same old" into working on possible solutions, and allows the parties to recognize and affirm the change. For example, at some convenient point, perhaps after a break, say, "We've spent some time exploring where we are and how we got here, and that's important to help us understand the problems and concerns. [Shift your physical position slightly.] I'd like to suggest we now begin to focus on the future—where you'd like to be [X] months from now and how we can get there. Is that something you'd like to do?" Sometimes one or both parties seem stuck in the past like a broken record, even with your active listening. Remember that repetition may signal that the repeater feels unheard so far, or that the subject is exceptionally important. Thus, your first step is to do a "self-check" to make sure you're not getting ahead of the parties. Then, you might pause, lean forward, look directly at the parties and use a different tone of voice (to signal a change in direction), and say, "It is clear how strongly you feel about what happened. I think I've got a pretty good understanding of the problem, and I get the sense that [the other party] does, too. At this point in the mediation, it sometimes is good to change direction a little and commit to working on ways to solve the problem. And what this means is that we would need to keep focused on the future—not the past. That may not always be easy, but it often works. Would you like to try it this way?"

If a party agreed in principle to "futuring" but continues to wallow in the past, you might remind the party of the agreement, and suggest a "ground rule" that will allow you to bring him or her back to a focus on the future. This kind of ground rule frequently becomes self-enforcing, as the party's own return to the past will trigger his or her own immediate recognition about the "violation."

If all else fails, you might take ownership of the process: "I want to spend the rest of our time today talking about where we go from here."

Focus on solutions. A variation of future focusing is to invite the parties to focus on options or solutions rather than "the problem." Explain that a "problem" is a narrow focus, while "solutions" is broader and therefore more likely to produce ideas for resolution.

Break a problem into parts. "A journey of a thousand miles begins with a single step." See if the parties can agree to work on a piece of a difficult problem—any part, just start somewhere. Even a small victory can yield results. If a party appears anxious about agreeing to the element, you can remind him or her that "nothing is agreed to until everything is agreed to—but at least we have a start!"

Follow the parties. It has been suggested that sometimes people in mediation go through a process not unlike Dr. Kübler-Ross's stages of grief—anger, denial, bargaining, etc.—until they may reach a point of acceptance. The prospective finality of a mediated outcome may inhibit this process of "mourning" a loss (such as the loss of hoped-for revenge). This adds another perspective on why the mediator needs to slow down, be sensitive to what the party is going through, and follow the party's pace.

Exploring the Options

Use visuals. An easel or blackboard is a powerful tool—a way to display information and options visually and to organize and simplify them, and a way to have both parties focus jointly on the same page. Many people benefit from hearing and seeing information. The easel lets you decide how to most positively display and reframe the information, too—but be careful to be true to what the parties are saying, not just your preference or substantially different "spin." One way to do this is to draw from the parties' own words and phraseology, or to ask if you captured it accurately. It is a good idea not to identify an idea with its source—mix things up so that people are less likely to defend their own ideas and find it easier to work with an idea from their counterpart.

Focus on relative priorities. Get the parties to focus on relative priorities of what they want/need, and do so visually with your easel paper. One model is to draw two visual pie charts that show the relative priorities each side assigns to things. Or, you might ask both parties to assign a one to five priority.1

Brainstorm. Where the options seem ossified or there's an absence of ideas, consider brainstorming with the parties. This means the parties are encouraged to suggest as many ideas as they can create, without evaluation, criticism, or obligation. Later they return to the ideas and eliminate or develop them. Encourage them to be creative, and even help them get a little bit crazy! This works particularly well with parties who have used brainstorming in organizations.

Use hypotheticals. Hypotheticals are a creative, nonthreatening, and noncoercive way for you to introduce or reframe ideas for parties to consider, and can be part of brainstorming. A classic hypothetical is the "what-if"—e.g., "I was just wondering, what if the employer were to provide a retroactive within-grade salary increase. Might that help because they

can't seem to see their way clear to a promotion?" However, while what-ifs are an important mediator tool, be careful of two things: (1) don't become so aggressive in what-ifing that the parties stop being creative themselves and look only to you; and (2) don't cross the line between merely seeding ideas to be developed or rejected (which is assisting creativity) and pushing your own pet ideas (which is coercion).

The what-if hypothetical can also prove helpful when a party is anxious about displaying an offer in development to the other side, but it would be nice to know whether it is remotely possible. Generally, you should help the parties develop enough trust in each other that they are willing to take some risks in exploring options. However, in exceptional cases, you might relieve a party of the perceived burden of ownership of an idea by offering to test it as a "what if" with the other party.

A variation of the hypothetical is the "some folks"—e.g., "I've seen some folks in child custody situations like yours exchange Thanksgiving for Easter. Would you like to explore an approach like that?" or "Sometimes people in your situation look at opportunities for developmental assignments or training—want to talk about that kind of thing?" Here, you are offering a model to prompt discussion as part of the creative process, not to dictate a result.

Use parallel option development. Help the parties develop two or more options on separate tracks at the same time (particularly, mutually exclusive options). This can improve the efficiency of how the parties organize, develop, clarify, and evaluate each option. Each option can be developed on its own track but alongside the others, and eventually each can be weighed more knowledgeably. For example, in an employment dispute, label the charging party's possibility of leaving the organization as "A" and the possibility of staying in the organization in a reorganized job as "B" (or "leave" and "stay"), and then develop all aspects of each option. Help the parties remain open in principle for as long as reasonably possible to both "A" and "B" and variations that may develop. Use an easel to display the options, and cross off one option when it has been eliminated. This technique helps parties deal with the indecision arising from the psychological "approach/avoidance" conflict that sometimes arises.

Use the "in principle" technique. Parties faced with a new settlement option may display discomfort about details and the unknown, although the core idea is good. On the other hand, some parties may move too fast to embrace an attractive idea—and the devil is in the details! Either way, there is a constructive tool to deal with this: the "in principle" technique. For example, "I know there's a lot of important considerations and details to work through, but in principle, if Bob could get the right kind of job for you in that other division, do you think that might work for you?" Once on the plateau of a tentative commitment to the core principle, you can transition to working through details.

Also, you can help parties resolve the core of an issue involving complex secondary details "in principle" and temporarily move on. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement—you can suggest that they come back later to the exact wording of the letter (so as not to get bogged down in secondary details and to build on the positive movement of the core agreement). Once you get used to it, you will likely find that the "in principle" tool is useful in most mediations, and the parties themselves may start using it on their own.

Remind the parties that concessions breed concessions. One factor related to parallel option development is the negotiation principle that concessions breed concessions. Sometimes it is useful to remind parties of this.

Maintain a sense of fairness. Studies show that most people have a subjective emotional preference for an appearance of fairness—to be perceived as fair as well as to be treated fairly. As a mediator, be sensitive to parties' terminology around fairness, and to the potential for a quid pro quo balance. Sometimes, you need to inquire about what "fairness" means to a particular party before you can evaluate options.

Addressing the Parties' Emotions

Use the details to distract. Where "zingers" or emotions get in the way of working on a multipart set of money or other issues, set a robust ground rule about respectful listening and communication and delve into the minutiae of facts or calculations. With luck (and your help) the parties may get so caught up in parsing the details that they forget to "zing" each other—and, of course, with each agreed-upon detail or concession, the going gets easier!

Look for the best person to deliver a message or offer. Often, there will be more than one representative of management present for an employer or company. Occasionally, as mediation proceeds, the aggrieved party will telegraph a greater degree of trust or liking, or perhaps some positive personal experience, with one of the people on the management side. If you see this, caucus with the management side and explore whether and how to use that specific person's heightened personal trust. For example, the next joint session might be between just that one person and the aggrieved party. The trusted management representative might then be more successful than others on the team in delivering an offer or "tough" message about valuation one-on-one with the aggrieved party. The reverse is true as well—sometimes, you may need to remove a person who is aggravating the other side.

Use a "time-out" mini-intervention. When it is clear that the parties are talking past one another or not listening, or when one party has a way of provoking the other through certain behaviors, comments, or styles of expression, you can say, "Time out. I wonder if it would be good to focus for a minute on what just happened here. Bob, when you said [X], Jane, you

appeared to react like [Y]. Frankly, I've seen this happen a couple of times, and it seems to get in the way of things. Can we talk about it for a minute?" You can then ask Jane to talk about her reaction of a few seconds earlier, clarify with Bob what his substantive message content was meant to be, discuss how Jane might have been able to hear such message content if delivered differently, ask Bob to try the different approach, etc. You can use the football "T" sign with your hands to signal the time-out. This is a vehicle for a sidebar conversation on details of the parties' interaction, which can be very productive by getting the parties to do little things differently with big results. You can even set a "ground rule" about the behavior changes they recognize.

Consider separating the parties. In a case where the ongoing relationship is not very important and the parties are aggressively averse, consider separating the parties. Particularly when you are potentially on track toward a settlement both parties can live with, the parties' sniping at each other can derail something that they actually can make work. Keeping the parties separate while you develop the last details with each side can keep them from "snatching defeat from the jaws of victory." Be truthful with them about why you are doing this. But, as indicated, if the continuing relationship is important, this approach is not the answer.

Try being blunt. If the parties continue to engage in nonproductive patterns of behavior (sniping, insults, non-interest-based approaches), you can be blunt about their choices—e.g., "You can choose to continue the same old stuff that hasn't worked so far, or you can try to do something that's more productive. What do you want to do?"

Reframing

Transform the parties' utterances. Help the parties convert their statements, ideas, and even their objections or fears into things that they and other people can work with positively—sometimes in joint session, sometimes in caucus.

Here are some examples:

• "Would you like to propose that idea as a solution?" or "Can I take that to [the other party] as an offer?"

• "So ideally you would like [X]. Is there a way we can develop that idea into a plan?" or "How can we get from here to there?" or "What can we do to make that into something that [the other party] is likely to consider?"

• "I see you have some concerns about how that proposal would work for you. What would it take to make that into something you could accept?" This may be a place to use the technique of "parallel option development" of two or more ideas, discussed above.

• "What do you think it will take for [the other party] to accept your proposal?"

• "Let's spend some time [in caucus] on how to 'sell' your solution to [the other party]." It need not be a violation of self-determination or neutrality to work with or coach parties on how best procedurally to present offers or options to each other (discussed further below).

Try role-reversal. Say, "If you were [the other party], why do you think your proposal [would/ wouldn't] be workable?" or "If you were [the other party], would you accept your proposal?" This hopefully will get them to focus on the needs and interests of the other side. Follow up as needed with questions about how the proposal might be modified to be acceptable to the other side.

Another role-reversal technique is to ask each party to briefly assume the other's role and then react to the matter under consideration. You also can ask each party to be a "devil's advocate" and argue against his or her own position. Be careful that your parties are flexible enough to be able to engage in this creative exercise. Some people aren't.

Encourage active listening. Ask one party to restate what he or she just heard the other party say, and then ask the other party if the repetition was accurate. Help them talk about miscommunication and how to avoid it. Continually listen and look for opportunities to help them clarify or learn insights about communication styles or other dynamics of their interaction. For some parties, you may want to provide some literature on the subject.

Refocus the parties on something else. Ask them to describe how they might feel at the end of the day if they come to some kind of resolution. Occasionally, this may disclose an ambivalence or unacknowledged fear or interest that will give you a new avenue of inquiry. Ask each of them to say something good about the other! Ask them to talk about their power and choices: "Do you feel you have the power to resolve the issues in front of us? Do you want to resolve these issues?" Ask the parties, or either of them, to put aside everything for the moment and focus on the ideal future. For example, ask, "Where would you like to be [concerning the matter in impasse] a year from now?" Follow the answer with questions about how to get there.

Propose a content free challenge. A curious psychological phenomenon is the persuasive power of nothing, or a "content free challenge"—a "think again" opportunity. Simply asking (actually or impliedly) people to reexamine their views sometimes results in a change in those views, even if nothing else has really changed. Stated another way, the implied

challenge of a question about prior views, in and of itself, may lead to a modification of the prior views. This may be most true for positions in which the person is not greatly invested. The practical application of this for mediators is connected to use of the global summary (see below) with broad questions such as, "Considering everything we've heard and talked about so far, do you want to revisit [a particular position or demand]?"

Help the parties redefine "loss." People generally want to avoid a loss, and what a "loss" is for each individual can have subjective and objective aspects, in different proportions. Based on what you have learned about the person in front of you, how can you help them gain additional perspectives on loss? For a risk-averse individual mulling whether to accept a lower-than-ideal offer, you might ask, "One way to look at this is—do you want to 'spend' that amount in what basically is a 'lottery' to see what a judge might give you instead?"

Dealing with difficult issues. Sometimes, there are difficult, potentially explosive messages that need to be articulated if parties are going to achieve a level of understanding that helps resolution; and sometimes you will need to forthrightly, if tactfully, restate or reframe a difficult matter. Examples include an employee who appears to be unaware of performance issues (because a supervisor failed to
provide feedback and constructive criticism); someone oblivious to personal behaviors that annoy associates; and a family member with a firm but unstated perception of another's alcoholism. While you may not need to "go there" to reach resolution in some cases, sometimes the difficult subject needs to be broached to move people to a new and productive level of understanding or to "clear the air." Don't be afraid of the truth—the challenge is how to tell the truth tactfully and in a way that is constructive. Sometimes, a predicate statement—"I think it is important for you to hear something that you may not like and may disagree with"—is a good entry.

Overcoming Impasse

Impasse can be an opportunity. View the possibility of impasse not as a problem, but a portal—"a crack where the light can get in."2 Visualize, for yourself and your parties, that impasse may be an opportunity to abandon the pursuit of some perspectives and look at other, unconventional ones. Parties might even be told up front, "We may get stuck at some point, and that's okay—we can work through it!"3

Parties share the burden of impasse. When faced with general resistance, ask the parties, "What would you like to do next?" and pause expectantly. Or say, "Frankly, it looks like we're really stuck on this issue. What do you think we should do?" These questions remind the parties (and you) that they actively share the burden of the impasse.

Ascertain the parties' perspectives. Ask the parties to describe their perspectives on why they appear to be stalemated and/or how they can try to overcome their different perspectives on valuation. Parties sometimes need to internalize and focus consciously on their deadlock, and both you and they also may need a reminder that it is their dispute. Also, this provides a psychological time-out and change of pace, which may lead to new insights. A time-out can also be helpful when a party seems a bit inarticulate, fearful, or confused to give him or her the opportunity to write down what he or she would like to say.

Avoid the premature caucus. Don't go to caucus too soon just to deal with resistance or a perceived impasse—it can deteriorate into a "ping-pong" match where the parties merely conduct a debate or auction through you as intermediary. Parties need to grapple jointly with their issues as much as they productively can. Generally, think of the caucus as a tool to be used, not a routine process step. Sometimes, attorneys are too fond of caucusing, and depending on the issues in the case, the mediator may need to help them see the benefits of beginning and working substantially together. Further, you may want the parties (or their counsel) to take responsibility for their ideas, rather than hiding behind you.

Take a break. One of the most basic techniques for overcoming impasse is to simply take a break. Tensions may be reduced, and often things have a way of looking different when everyone returns. Perhaps suggest that the parties try to return with new ideas. During the break, change something—take off your coat and roll up your sleeves, move to another room, rearrange the room you are in, provide food, candy, or soft drinks, etc. Suggest a "fresh look" when they return, or do a global summary (see below).

Move on to another issue. A simple and very useful technique in the face of resistance is to ask the parties if they would like to set aside the issue temporarily and go on to something else—preferably an easier issue. When you settle some issues, you build momentum toward resolution of other issues. Getting agreement on something (anything, even process details) creates positive psychological ambiance.

Use reality checking questions. For example, "What do you think will happen next if this isn't resolved here [or if this goes to court]?" Draw out, through questions and your general information, the emotional, financial, and other costs and risks of delay, litigation, or doing nothing. If a party appears naive about his or her rights and positions, you might suggest the party take a break to check with his or her attorney, accountant, etc.

Consider caucusing with the representatives alone. If both parties are represented in the mediation, and there appears to be resistance linked to different views of the merits or worth of the case, consider a caucus with just the representatives. It may be easier to speak frankly in the absence of the parties. Given the representatives' considerable

influence with their clients, the session may prepare the representatives to "reality check" with their clients after they frankly reflect on the merits and valuation of the case without the clients present. You might ask each to summarize the relative strengths and weaknesses of the case, and facilitate a discussion of a fresh perspective on what the clients need to come to resolution. Sometimes, this will produce a discussion of how to deal with client perspectives, and new opportunities for creativity may be presented. Don't be surprised if one or the other attorney asks your help in reality checking with his or her client. However, don't spend too much time with just the attorneys without bringing the clients back "into the loop."

Politely handle a dominating representative. If one of the problems is an attorney or other representative who dominates the conversation unproductively, try attending the client frequently to give him or her a full opportunity to speak. Look at the client with an inquiring facial expression occasionally while the representative is speaking, or ask occasionally of the client, "Do you have anything to add?" or "Is that the way you see it?" If the representative is impairing the mediation, take a break and ask to speak with the representative one-on-one (explore how the dynamics are unfolding, how the other side is responding, and how things might be improved). Remember, however, that it is up to the client and the representative to choose who speaks. It also important not to humiliate anyone or threaten the attorney's perception of his or her power.

Ask parties to describe fears. Ask each party to describe his or her fears about proceeding (but don't appear condescending, and don't make them defensive).

Clarify that interim issue resolutions aren't final. You can sometimes assuage fears about resolution of one of several issues by making it clear that no issue is finally settled until there is resolution of all issues. This will manage expectations and avoid perceptions of bad faith. A party may need to reconsider a supposedly settled issue in light of the proposed resolution of a later one. Generally, however, don't make it too easy to reopen settled issues.

Give a global summary. Try a global summary of both parties' positions/interests and what they've said so far, telescoping the case and the mediation so that the parties can see the part they're stuck on in overall context. Sometimes, the tough issue will seem less important. The global summary can be part of a content free challenge (see above).

Summarize areas of agreement. State all the areas the parties have agreed to so far, praise them for their work and accomplishments, and validate that they've come a long way. Then ask whether they want to let all that get away! A variation is to suggest (if true) that the parties probably have reached a point where they are more likely to settle the case than not settle—which may help them redouble their efforts toward how to resolve things rather than whether to resolve things.

Accentuate the positive! Studies show, and common sense would indicate, that when faced with two options that actually involve identical outcomes, one of which is phrased positively (e.g., "vaccine A should save the lives of 200 of the 600 people in this village if this disease hits") and the other negatively (e.g., "vaccine A should hold deaths to 400 of the 600 people in this village if this disease hits"), people usually will choose the positive.

Develop criteria for an acceptable outcome. Sometimes it is helpful to take a time-out from developing options per se and help the parties define something more basic in the form of criteria for an acceptable outcome—e.g., "Before we focus on specific options for settling this matter, would you like to try to define the qualities that any good outcome should have?" Usually, these general criteria will track reasonable and joint interests like fairness, acceptability to ratifiers, etc. They give the parties something positive to agree on. Later, you can test options against the criteria.

Be a catalyst, and be creative. Shake things up a little! Offer a "what if" that is only marginally realistic or even a little crazy, just to see if the parties' reactions help them to get unstuck.

Ease tensions with humor. But be careful, as the parties might misinterpret. Generally, your self-deprecating humor is safest.

Use homilies. "As long as you stay flexible, you can't get bent out of shape!" "If there is a will, there is a way." "Remember that courts produce decisions, which may or may not be justice." "All polishing is done by friction." "Let's keep our eyes on the donut and not on the hole!" Some mediators provide parties with a written list of homilies or quotes from famous people that describe the wisdom of resolving conflict.

Suggest the use of chance. Sometimes, a coin flip may be a good way to resolve a sticking point. Or, the thought may be absurd enough to help the parties focus afresh on what really is at stake or what other creative possibilities might be.

Express your own frustration. Once in a while, it may be useful to let the parties see your own anger or frustration at the impasse. Particularly if you have been a good and patient guide so far, the parties may be quite struck or even shocked at your perspective—and that kind of shake-up may be just what's needed to foster new perspectives.

Use the clock. Occasionally remind the parties what time it is and how long everyone has agreed to be together today. As you get within an hour or so of the "deadline," let folks know this—not coercively, but as a means of helping them sharpen their focus on dealing with what is important.

Remember that it's okay not to settle. Keep in mind that your job isn't to overcome a roadblock per se, but to help the

parties engage, analyze, and negotiate positively and constructively. The parties are free to stick with a position—they have a right to act on their own choices, and you have no business coercing the parties into a settlement. Sometimes, paradoxically, reminding the parties that "it's okay not to settle" gives them freedom to take a fresh look.

Likewise, sophisticated negotiators think they know when not to settle—i.e., when the better strategy is to let things stew awhile or proceed into litigation. They have learned to resist psychological pressure to settle now lest the deal get away, as "another deal is always around the corner." If you appear to these negotiators to be pushing resolution, they may lose respect and trust for you and the process. Offer these negotiators a full opportunity to reflect on options, but do not oversell resolution.

Propose ending the mediation. You can always propose ending the mediation yourself if things don't appear to be going anywhere, and add, "but as long as you are willing to work on this and consider movement, we can continue." Parties who have invested in the mediation (and who have internalized the "settlement event" mentality discussed above) often don't want it to fail, and may be remotivated to find ways to come unstuck. This approach is particularly useful where one party may unconsciously enjoy the attention the process provides, or enjoy the other party's discomfort. On the other hand, it is the parties' right to end the mediation, and sometimes they need to be reminded of that—so don't fight the parties.

RecognizingMediator Behavior Influence

Check your personal influence. Remember that during mediation, parties develop trust in you and your process, which means you have considerable influence that can be used for good or for evil. A party may follow you a long way down the road on an idea that is bad for them, simply because they trust you. Particularly if a party seems cautious about developing an idea, check with yourself to assure that you aren't merely pushing your own ideas too hard.

Stay positive. In addition to being personally positive, maintain positive momentum in the mediation. Look for opportunities to remind the parties (particularly when things look bleak) of their interest in resolution, the importance of "keeping at it," etc. Most mediators find that your general, personal positive attitude helps the parties be productive. It is useful to have the overall mediation be perceived as a potential "settlement event," meaning that participants develop a sense that the dispute can be resolved, that things generally are headed in a positive direction, and that if they persevere, resolution can happen. You can remind the parties of how far they have come, and suggest: "At this point, I suspect you can see that we probably are going to settle this! We just have to figure out what it's going to take." Offer a break, and when they come back, be in a renewed and positive mood to overcome final hurdles. However, do not cross the line from being positive to becoming an aggressive salesperson for a particular resolution.

Be persistent. Sometimes, your optimistic persistence influences the parties to develop their own sense that "there must be a way to work this through." Be a bulldog; keep working the details and twisting and turning the combinations and the "what ifs."

Impatience is always your enemy. In fact, as you grow more experienced as a mediator and become more able to predict outcomes (or so you may think), impatience becomes an ever more subtle enemy. Be on guard. If that impatient feeling comes on, take a break and reflect.

Approaching Settlement

Resolve valuation differences. Particularly in cases where valuation is imprecise, parties may be anxious about "going first" with an offer. The first step may be to help the parties focus consciously on their concerns and see if they can find a way to develop offers they are comfortable making. In some cases, the parties might authorize you to disclose a midpoint or midrange between them. Alternatively, both parties could write their best and final offer on a piece of paper and give it to you. After reviewing the two pieces of paper, with the parties' authorization you would advise them of (1) whether the parties are reasonably close, (2) a settlement point or range between them, or (3) whatever else the parties invent. A variation would be to identify an agreed-upon midpoint value between the parties. Each party would submit a "bid," and the bid closest to the midpoint would be accepted by both parties—and if the parties are equidistant, the midpoint will be accepted.4

A more formal and structured way of dealing with substantial differences between the parties' demands or lack of clarity about valuation is "decision analysis." Although details of this technique are beyond the scope of this article, briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop their "best case" and "worst case" scenarios, both in terms of dollar valuations and percentage likelihoods of success/failure on motions for summary judgment and other steps likely to be encountered in case development. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes substantially. Then, discuss with the parties how they would like to use or share the information developed (e.g., by allowing you to disclose overlapping valuations or a midpoint).5

Reflect on the parties' bargaining model. Try reflecting with the parties on the bargaining model that they are using (particularly if it is an "offer-counteroffer" model), to get outside their mental "set." For example, describe a "zone" model in

which you display a Bell curve and suggest that cases generally don't settle at the margins, but more likely within a "zone of settlement" between the two end zones of the curve. Together or in caucus, help them eliminate the end zones, and this becomes their zone of settlement. A variation is to treat the first, broader zone identified as a "zone of negotiation," which everyone will then try to whittle down to a zone of settlement.

Avoid "nickel-and-diming" and "auction" tactics. For example, if you suspect these tactics, you might test an offer by asking whether the offer is likely to be acceptable to the other side, and why or why not. Focus the discussion on what it is likely to take to resolve the matter and how to get there, and help parties avoid what can end up looking like game-playing to the other side. Attorneys who are used to the incremental, offer-counteroffer model of negotiation may benefit from a joint conversation of how they might use the very distinctive mediation setting to proceed differently.

Have the party justify the position. If facing a rigid or problematical offer or demand in caucus, suggest that it would be best for the party (or counsel) to take the position to the other side, and then help him or her develop a plan for justifying the position. Compelling the party to take personal ownership and responsibility for justifying the position may encourage him or her to reconsider or to invent other options. Just as important, it may make the person face the challenge of how best to present the offer. This can be an opening for you to provide some "process coaching" on communication dynamics that the party can use.

Consider "process coaching." This is helping a party to develop the best way to present an offer, demand, or option to the other side—basically, good negotiation technique ("how to make it easy for the other side to see things your way"). This helps a party take charge of his or her case, and provides some constructive assistance on how to do it. It is not coercive to help a party see that he or she can be more persuasive by changing a tone of voice, providing some positive feedback to the other side, respectfully explaining how he or she arrived at a figure, etc.

Avoid devaluation. Help parties avoid devaluing their own offers or concessions—e.g., resisting the urge to say that they are happy to offer "X" because "X" is something they could have done anyway. This is a common rationalization people use to avoid appearing to be giving up something, but it devalues the offer, when what is needed is just the opposite.

Determine the parties' flexibility. Test the margins of positions to introduce flexibility. If someone demands $5,000, ask, "Does that mean you wouldn't take, say, $4,750?" Do something similar with the other party. Get back to interests by, for example, asking, "How would your life change if you got that $5,000 and not the $4,500 they offered?" or "What does that extra $500 you're demanding mean to you?" Use this not to sell a specific amount, but rather to help the party avoid rigidity and be open to considering options and what is really important.

Explore options to setting precedent. Sometimes, one party (often an employer) is concerned about setting a precedent of paying money or providing something of value. While mediation does not set court-type precedent, it may establish practical expectations. Some options to explore include: a clause specifying the agreement's nonprecedential nature; a confidential agreement (note that these may be difficult to develop and enforce); narrowing/isolating/removing a particular issue; writing the agreement to make the case unique (or helping the parties see that it is); reality testing with questions to help parties consider whether a precedent is actually such a "big deal"; and contrasting the risk of no agreement.

Disaggregate gains and aggregate losses. People generally prefer to maximize their gains and minimize their losses. Therefore, it can be useful to disaggregate (split up) gains, to make them look more substantial altogether, and aggregate (join) losses, to make them look less substantial. For example, if a disgruntled employee seeks four objectives (including a new job in another organization) and management will provide the new job but not the other three items, it may be useful to present the package to the employee by breaking down the positive aspects of the new job—its benefits, salary, location, hours, etc.—while weaving the "other items" into a single whole.

Ascertain the value of money. Keep in mind the potential for varying perceptions on valuation— money is not merely money. Be prepared to consider the perceptional and emotional connections related to the meaning of money for particular parties. Money may represent retribution, respect, guilt, or other things. Plus, how money deals are packaged affects perceptions. Forty-one cents a day may be more palatable than $145 a year. A package of products or services worth $4,000 may be easier to obtain than an equivalent or lesser amount of cash.

Consider nonmonetary value. If one side won't come up with more money to resolve an issue, explore whether that side has access to nonmonetary things of value that might be put on the table as part of an offer of settlement. For example, a company that owns hotels might offer a week at a resort, a theater might offer season tickets, or an auto dealer might consider a discounted car or a service package; an apology may also affect value.

Consider an alternate payment option. If a party strongly resists providing what he or she perceives is a direct benefit or "reward" to the other party, explore payment options that do not go directly to the other party, such as a donation to an agreed-upon charity.

Consider a structured settlement. If part of the problem is anxiety over the future on the part of a payee, consider a structured settlement (e.g., where an employer buys an annuity designed to pay the charging party over time).

Consider a payment plan. If a payor is concerned about the short-term "hit" of a large payout, explore how to segment payment of the sum (e.g., a time-payment schedule).

Suggest a trial period or plan. Where there is concern about commitment, the unknown, or the future, suggest a trial period or plan—e.g., "What if you tried this approach for three or six months or so, and then met again to discuss how it's working?" Also, you can link a desired outcome (like changing a performance rating) to successful performance under the new agreement for some period. You can offer your help in reconvening with the parties, at their option, or in identifying some other trusted intermediary they might consult.

Explore enforcement/resolution options. Creatively explore enforcement/resolution options, if a party is anxious about compliance. For example, the parties might be interested in designating a mutually trusted third party (e.g., an employer's ombudsman, a different manager, or clergy) as someone to assist with implementation or future disputes. If an employee reevaluation is part of a deal, the employee might like the idea of a different manager doing the evaluation. You also can consider typical provisions included in agreements that void the agreement if one party doesn't perform.

Translate options into a party's personal language. For example, if dealing with someone in the insurance business, say, "In effect, this settlement represents a premium you would pay to avoid a loss in court later." You can see how a similar approach might work for an auto mechanic, a roofer, or a health care professional.

Ascertain the parties' best and final offer. Ask each side to stretch themselves to develop a "best and final" offer as a very last step before mediation is ended. Urge them to take a break to work on their best and final offer. Emphasize how important it is for each side to "sharpen their pencils" and do their very best in crafting this offer.

Determine who should convey the offer. Psychologists say that people tend to react suspiciously to any offer or information presented by an adversary ("reactive devaluation"). Couple this with "selective perception" (i.e., the tendency to screen out data that do not fit preconceived views), and you can see why disputants need mediators. You, as the trusted neutral, sometimes can carry exactly the same messages, and offers and counteroffers, without the same negative burden. In practical terms, it means you can display or reintroduce and examine ideas that the parties otherwise reject. Also, you may find it useful to help parties understand this principle when they feel bleak about resolution. However, don't let parties with a superficial knowledge of reactive devaluation glibly assume that it means your function is to sell their positions.

Concluding without Settlement

Present a global summary. If the parties decide to end the mediation, suggest that before you end, you do a summary and overview so everyone understands where they are. Then, do just that—a global summary. Focus on the positives of anything they did accomplish or clarify. Be clear and frank about the matters that separate them, but don't dwell on negatives. Offer to "keep the door open" and suggest they do so, too. End on as pleasant and positive a note as you can, and try to keep them on a friendly and respectful footing with each other. If they don't burn their bridges, there's a good chance they may settle later with or without your help. Plus, as indicated above, sometimes the summary will produce a last-minute breakthrough before they leave.

Follow up. Depending on the case, consider a follow-up call a few days or weeks after the mediation. You can ask if the parties have had any further thoughts or if anything has changed. Occasionally, this effort will act as a catalyst to reopen the matter.

Conclusion

The tips and techniques above merely scratch the surface of the possibilities. The best tools are your imagination and creativity, adapted to the specific needs of the parties in the circumstances before you. Mediation is the most complex endeavor most of us will ever engage, because it deals with the variability of the hearts, minds, emotions, and intellects of people. If you mediate a thousand cases, you surely will still be learning new things on the thousand-and-first.

Notes

1. See Robert A. Creo, A Pie Chart Tool to Resolve Multiparty, Multi-Issue Conflicts, ALTERNATIVES TO HIGH COST OF LITIG. (Int'l Inst. for Conflict Prevention & Resolution, New York, N.Y.), May 2000.
2. Robert Benjamin, The Joy of Impasse: The Neuroscience of "Insight" and Creative Problem Solving, MEDIATE.COM (Feb. 9, 2009), www.mediate.com//articles/benjamin44.cfm.
3. See id.
4. Interview with John A. Wagner, Former Dir., Alt. Dispute Resolution (ADR) Servs., Fed. Mediation & Conciliation Serv. (FMCS) (date unknown).
5. See Marjorie Aaron & David P. Hoffer, Decision Analysis as a Method of Evaluating the Trial Alternative, inDWIGHT GOLANN, MEDIATING LEGAL DISPUTES (1996).

Norval D. (John) Settle

SETTLEment Associates, LLC - President

Norval D. (John) Settle, president of SETTLEment Associates, LLC, is a retired member of the Virginia Bar and a Virginia Supreme Court certified mediator and mentor-mediator. He specializes in the mediation of equal employment opportunity and workplace disputes, teaches managers and supervisors techniques for avoiding and dealing with workplace conflict, and speaks widely on ADR subjects. He may be reached at nsettle@comcast.net. The author wishes to thank his colleagues who have shared ideas for this compilation over the years, as well as all the parties who unknowingly provided the many mini-lessons reflected herein.

Original URL: https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2013_14/2014-winter-mediation-tips-move-ahead-overcome-roadblocks/

Why Use NCBA Mediation or Arbitration?

A backlog of cases in our courts frequently causes litigants to wait years for the final resolution of a case. Coupled with the fact that increasing costs to litigate in court may even exceed the amount in controversy, the legal relief originally sought may no longer be needed, or the value of the case might be permanently lost. Throughout the country, there is a growing recognition that court-based litigation may not offer the best remedy for all disputes. This fact has resulted is an increasing use of mediation or arbitration—the most commonly used alternatives to traditional litigation.

The Nassau County Bar Association's (NCBA) Mediation and Arbitration panels provide a way for attorneys and clients to benefit from these expeditious, time-saving, and cost-effective alternatives to resolve disputes that might otherwise be litigated in court.

The NCBA's Mediation and Arbitration panels are available to the public as well as to all legal professionals. Members are trained, highly skilled and qualified attorneys who have been admitted to the New York bar for a minimum of ten (10) years and screened by the NCBA's Judiciary Committee.

Rules and Applications

The NCBA mediation and arbitration rules and forms for commencing a mediation or arbitration proceeding are available online at www.nassaubar.org.

For further information, contact NCBA at 516-747-4070 or info@nassaubar.org.

Costs & Fees

Administrative Cost (per case)	$500
Non-refundable	
Arbitrator/Mediator Fees (per hour)	$300

In mediation, all costs and fees are shared equally by all parties unless the parties or their governing agreement provide otherwise. In arbitration, the claimant customarily advances the non-refundable administrative fee of $500. Arbitrator costs and fees are then usually shared equally by the parties unless the governing agreement provides differently, the parties agree otherwise, or the arbitration award allocates costs and expenses differently.

A deposit of $1800 is required in all cases to cover the first six hours' worth of mediator or arbitrator time devoted to the case. Where fewer than six hours are spent on the case, any unearned deposit is refunded. Where more than six hours are spent, the parties pay the mediator(s) or arbitrators(s) directly.

Deposits are refundable for up to three days prior to a scheduled date for a mediation session or an arbitration hearing.

Recommendations

Federal, state, and local judges encourage arbitration and mediation as alternatives to court litigation.

NASSAU COUNTY BAR ASSOCIATION
15th & West Streets • Mineola, NY 11501
516-747-4070 • 516-747-4147 (fax)
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Mediation & Arbitration

Alternative Dispute Resolution Through The Nassau County Bar Association

NASSAU COUNTY BAR ASSOCIATION

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What is the principal difference between mediation and arbitration?

Mediation is a process in which a neutral, third-party (the mediator) works with the parties to reach a mutually agreeable settlement of their dispute. The mediator may assist the parties and their counsel in formulating the terms of their settlement. The mediator's role is to aid in facilitating a settlement agreeable to the parties. The mediator does not have authority to impose a resolution on the parties.

By contrast, in arbitration, the arbitrator (or a panel of three arbitrators if the parties wish) acts like a private judge, hearing testimony, receiving evidence and then rendering a binding award. A court can confirm that award, which can become an enforceable judgment.

What kinds of disputes are handled by the NCBA's Mediation and Arbitration panels?

Mediation or arbitration may be used to resolve disputes capable of being decided by a court. The subject matter of cases appropriate for mediation or arbitration is broad and includes commercial, breach of contract, product liability, labor, medical malpractice, negligence, divorce, estate and trust, and employment disputes, guardianship contests, and many others.

Who are NCBA's mediators and arbitrators?

NCBA's mediators and arbitrators are highly skilled, qualified attorneys who have been admitted to the bar for a minimum of ten (10) years and screened by NCBA's Judiciary Committee. The parties and their counsel are presented with a list of trained and experienced mediators or arbitrators whom they mutually select.

What are the benefits of NCBA MEDIATION?

√ Mediation is informal and confidential. The parties meet with a mutually selected impartial and neutral person who assists them in reaching a resolution of their differences.

√ Mediation is an alternative method to resolve a dispute quickly and satisfactorily, without the expense and delay associated with most court cases.

√ A mediation can be conducted at any time, whether before, during, or even after a court determination if the parties agree.

√ The mediator does not determine who is right or wrong and does not issue a decision in the case. Instead, the mediator works with the parties in seeking to resolve their dispute by developing their own solutions to their differences.

√ Mediation allows the parties to create their own solutions in ways which may not be available from a court of law.

√ A successful mediation can result in a binding agreement between the parties that permanently resolves their dispute.

What are the benefits of NCBA ARBITRATION?

√ Arbitration is generally considerably less time-consuming and more cost-effective than traditional litigation in resolving legal disputes.

√ The expenses associated with jury selection and appeals are eliminated.

√ Costly discovery proceedings are minimized and/or truncated.

√ The arbitrator's decision is final, legally binding, and can be made enforceable as a court judgment under federal and New York law.

√ Arbitration hearings can be scheduled at times and places convenient to the parties and their attorneys.

√ While usual legal rules applicable to trials in court are generally observed, arbitrators have greater latitude in the conduct of arbitration hearings.

√ The NCBA arbitration rules are designed to be user-friendly.

√ Under the NCBA arbitration rules, a decision must be rendered within 30 days after hearings are closed (unless the parties agree otherwise).

dummies

A Wiley Brand

Cheat Sheet

Success as a Mediator For Dummies Cheat Sheet

By Victoria Pynchon, Joseph Kraynak

To achieve success as a mediator, you need to be able to talk the talk, walk the walk, and show everyone in your market just how good you really are. You'll need to understand the mediation process and the fundamentals of being a good mediator. As with any business, you need to generate business, so follow some basic tips on finding new clients.

Grasping the Mediation Process

Having a structure in place helps ensure that parties stay on track and progress toward a resolution for their dispute. The process isn't always linear, but it does have several stages that go something like this:

1. **Convene the mediation.**

   Contact all stakeholders and their attorneys if they have legal representation.

2 **Introduce the participants.**

Have the parties and other participants introduce themselves.

3 **Explain confidentiality and your role as a neutral.**

Assure the parties that nothing they say in mediation can be used against them in the court of law and that you will remain neutral.

4 **Set the ground rules.**

Establish guidelines for polite conversation, or help the parties establish their own.

5 **Make an agenda.**

Help the parties draw up an agenda that breaks down the issues to be resolved and the interests to be served.

6 **Let each party tell her side of the story.**

In a litigated dispute, this may be the first time the parties have had the opportunity to tell their stories.

7 **Ask questions to clarify the issues.**

After each party tells his story, ask open-ended questions to obtain more details that will illuminate or reveal unspoken party interests.

8 **Brainstorm solutions.**

Assist the parties in coming up with possible solutions that serve each party's interests. Your goal is to "expand the pie" so the parties have more options than money alone.

9 **Choose or negotiate available solutions.**

Using the available solutions, help the parties come to an agreement that serves as many of each party's interests as possible.

10 **Close and memorialize the agreement.**

Assist the parties in putting the terms of their agreement in writing to make the agreement more durable.

Exploring Mediation Fundamentals

To be a master mediator, you need to master certain fundamental skills, strategies, and techniques.The following are all traits of a well-trained mediator:

- **Anchoring:** An *anchor* is any relevant number (or idea) that enters the negotiation environment. The party who puts the first number on the table, for example, anchors the negotiation in her favor throughout the course of the negotiation.
- **Appealing to higher values:** Using shared beliefs or principles to reach agreement, such as both parents' desire to do "what's best for the children."
- **Asking diagnostic questions:** To get the whole story, probe each party with open-ended questions that call for narrative (as opposed to yes/no) answers.These questions always begin with *Who? What? When? Where? Why?* and *How?* or *Tell me more about that.*
- **Bracketing:** The use of hypothetical offers and demands to narrow the gap that separates parties without requiring either party to commit to a number. For example, "If Party A were to increase his offer to $75,000, would you be willing to lower your demand to $100,000?"
- **Distributive bargaining:** A negotiation in which the parties bargain over who gets the biggest portion of a fixed pie of benefits. Even if you're facilitating an interest-based negotiation, eventually the enlarged pie of benefits must be distributed among the parties.
- **Forming contingent agreements:** Adding "If ...then ..." language to a contract to alleviate a party's concern over a future event that may undermine the party's interests.

- **Framing:** Change the parties' perspective to something more positive. Mediators often reframe the parties' dispute from an adversarial contest to a problem-solving exercise and from the identification of who's right to the search for solutions that make everyone happy.
- **Interest-based negotiation:** A negotiation in which the parties identify each other's interests (needs, desires, preferences, priorities, fears, and appetite for risk) and then seek to reach an agreement that serves as many of those interests as possible.
- **Logrolling:** Giving something that's low-cost for one party but high-value to the other party in exchange for something that's high-value to the first party but low-cost for the second party.

Generating Business as a Mediator

To be a successful mediator, you need to be successful, commercially. Consider the following strategies for generating business as you begin your career as a mediator:

- **Attend conferences and events that expose you to your mediation and market communities.** Attend at least one group event every other month.
- **Claim your online business listings.** Make sure you have a listing on Google Places and Yelp, claim the listings, and then flesh them out with additional content, including your website or blog address.
- **Join and serve in organizations that expose you to your mediation and market communities.** These may be mediation, industry-related, or community organizations. Be active in the organization. Take a leadership role to raise your profile.
- **Keep in touch with your clients.** The best place to look for new clients is through your current clients. Keep in touch with them via e-mail or regular phone calls. Checking in once or twice a year is usually sufficient.
- **Launch a website, blog, or both.** You need to have an online presence, and having a website or blog is an important first step.

- **Pass out and collect business cards.** Pass out business cards to everyone you meet, and collect their cards. Ask if they want to receive your newsletter and whether they prefer e-mail or standard postal delivery.

- **Post press releases and distribute newsletters.** Write articles that are relevant and of value to your market and use the Internet to post and distribute them.

- **Spread the word via social networking.** You should have a Facebook page dedicated to your mediation business, along with a Twitter and LinkedIn account. Get involved in LinkedIn discussion groups relevant to mediation and your market.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

HIGHLY CONFIDENTIAL – MEDIATOR "EYES ONLY" AND NOT TO BE SHARED OR DISCLOSED WITH ANY OTHER PARTY

Pre-Mediation Statement of PLAINTIFF

March 1, 2016

INSERT CASE (Sup. Ct. Nassau County)

1. The name and title, if any, of the client or authorized representative who will be attending the conference with counsel.

Client: INSERT CLIENT NAME, Plaintiff and Counterclaim-Defendant in the above-referenced Supreme Court action.

Counsel for Plaintiff: Elan E. Weinreb, Esq., of The Weinreb Law Firm, PLLC

Defendant is pro se.

2. A brief statement of the key factual and legal issues involved in the litigation.

Plaintiff contends (and has more than sufficient proof to support her contentions) that personal property at issue is effectively being "held hostage" by Defendant, especially in light of the latter's prior refusal to obey a court order to permit Plaintiff to retrieve her property. Plaintiff also has admissions from Defendant (and who has admitted in pleadings as well) that he intended to marry her and would pay her back for direct or indirect loans in the approximate amount of $30,000.00 made or extended to him on account of Plaintiff's assumption of some of his financial obligations.

3. The main "sticking points" preventing settlement.

Defendant has simply refused to give Plaintiff what is hers and what he promised to repay to her, regardless of his intent to marry her (which he did have). He is rather entrenched, largely because he maintains an erroneous belief that any

personal property in his domain automatically becomes his, notwithstanding that he did not purchase such property.

In addition, Defendant is perceived to be resentful of Plaintiff on account of the fact that Plaintiff has a pending parallel New Jersey family court proceeding and a soon-to-be-commenced New York child support proceeding that both involve Defendant. The general facts and circumstances of these proceedings will not be discussed here, insofar as they are not directly relevant to the commercial litigation that is the primary focus of mediation (i.e., the above-referenced action).

Defendant's current and short-term-future financial status/condition—he claims not to have any money available to compensate Plaintiff such that in his mind, he is judgment-proof—may also be a sticking point.

4. *A description of any important rulings made or pending motions in the case which may affect settlement.*

Defendant's initial Answer was stricken for failure to comply with CPLR pleading requirements. He revised his Answer and interposed four counterclaims. Two of those—the Third and Fourth Counterclaims for defamation per se and prima facie tort—have been challenged in a motion to dismiss currently pending before the Court. As Defendant did not submit opposition to this motion and has unequivocally defaulted on a stipulation that extended his time to submit opposition, it is expected that these two counterclaims will eventually be dismissed. The Court has adjourned the return date of the motion to dismiss to April 1, 2016.

5. *The status of settlement negotiations, including the last settlement proposal made by you and to you.*

No proposals have been discussed. Plaintiff is willing to engage in good-faith settlement negotiations.

6. *A settlement proposal that you would be willing to make in order to conclude the matter and stop the expense and turmoil of litigation.*

A) Plaintiff requests the return of the following personal property:

- Plastic Stratosphere cups still in the plastic cover under the kitchen sink to the right inner corner.
- Nikon D7100 24.1 MP DX-Format CMOS Digital SLR Camera, accompanying 18-140mmf/3.5-5.6G ED VR AF-S DX "NIKKOR" Zoom Lens, and Nikon WU-1a Wireless Mobile Adapter
- Ipod
- Dyson Hand Vac (or money to buy a replacement)
- Canon Photo Printer
- 3 "App Controlled" Light Bulbs (special light bulbs that can be controlled from a computer or smartphone)
- Power Washer (stored in garage) (or money to buy a replacement)
- Ladder (or money to buy a replacement)
- Leaf Blower (or money to buy a replacement)
- 2 Black Chairs (stored in basement)

B) Plaintiff requests compensation or restitution for:

- PC Richard & Son Items (See Exhibit 2 to the Complaint)
- 27-Inch Apple "IMAC" Computer and Keyboard
- Apple TV and Remote Control (The subscription associated with this item is still under Plaintiff's name, and the item is still situated in Defendant's residence)
- Defendant's Tuition and Other Education-Related Expenses that she undertook to pay (and did end up paying)

C) Finally, Plaintiff also requests Defendant to sign baby passport papers so that JEFFREY [NOT REAL NAME] can receive a passport.

While this settlement proposal sacrifices much when compared to the relief sought in the Complaint, Plaintiff does not want to lose more time from work than she already has dealing with litigation and does not want to have to expend the resources that further steps in the litigation process would entail. She also realizes that in light of JEFFREY being Defendant's son, she (and eventually JEFFREY) will have to have a relationship with Defendant on some level going forward such that even a "cold truce" between the parties would be welcome.

7. *Key documents necessary for the mediator to understand the case:*

Pleadings, receipts, text messages, and credit card and bank statements. Plaintiff's counsel has already provided a copy of the pleadings. The remaining documents referenced here may or may not be disclosed at one or more mediation sessions, depending upon Defendant's willingness to proceed with the mediation process in good faith.

THE RESOLVER

TURNING CONFLICT INTO RESOLUTION

Published by the Alternative Dispute Resolution Section of the Federal Bar Association

Negotiating Justice: Anchoring, Bias, Dad, and Sotomayor

by Victoria Pynchon

I do not recall the day on which I learned I spoke with an "American" or "West Coast" accent but I remember it coming as a surprise to me. As Cristof, the director of *The Truman Show* says of his "creation," the happily oblivious Truman Burbank, "We accept the reality of the world with which we are presented."

The fact that people question whether a woman, an African American, a Latina, or (gasp) a gay, bi-, Lesbian, or transsexual, jurist would be "biased" by his or her unique perspective is dispiriting to anyone who is not (you'll forgive my use of the term) an old white man. As many people in high (*The New York Times*, CNN) and low (Twitter) places rightly pointed out during the nomination hearings for Sonia Sotomayor, no one asks whether a white man will bring his prejudices to the bench. Why? Because white men "have no accent." The dominant culture does not think of itself in terms of race (it doesn't have to) and the people with power do not need to ask themselves thorny questions about their attitudes toward their own race and gender.

Here's an example from *The New York Times*: "Speeches Show Judge's Steady Focus on Diversity, Struggle"

> *WASHINGTON—In speech after speech over the years, Judge Sonia Sotomayor has returned to the themes of diversity, struggle, heritage and alienation that have both powered and complicated her nomination to the Supreme Court.*
> *She has lamented the dearth of Hispanics on the*

NEGOTIATING *continued on page 6*

Message from the Section Chair

by Simeon H. Baum

Over the last two quarters, since the launch of the first issue of *The Resolver*, the Board of the FBA's Alternative Dispute Resolution Section has convened monthly to reflect on the state of ADR and opportunities for the section. From the fortunate vantage point of this section's chair, I would like to share with *The Resolver* readers some reflections on the significance of ADR, a brief report on the activities of the past two quarters, and some observations and visions on the promise of the section and of the dispute resolution field.

The Promise of Dispute Resolution

A host of reasons drew us to law school. Of course, we all want to make a good and honorable living. But at the core, a healthy number of us hoped to *help others* through the practice of law and perhaps gain wisdom in the bargain. We *juris* doctors, like our medical counterparts, aim to relieve suffering, but through work on our social "mechanism." We repair breaches of faith, correct breaches of contract, and shift property or money to compensate wrongs and help those who have suffered from acts or omissions of others.

Labor in law, however, reveals life to be messy and multi-variegated. We find odd variations in the ladder of statute and *stare decisis*, and also observe that the wants and circumstances of parties do not necessarily fit into neat classifications of right and wrong, tort or breach.

Live parties in dispute call into question the uniform objective "mechanism." We also see the human, subjective realm all too often overlooked. Not hornbook black and white, or case law grey—human life is in living color. And the most significant enterprise might be not developing the objective legal structure (which, of course, remains critical), but helping the people involved.

How we practice law also matters. For years, the bar has highlighted the importance of civility in legal practice. Beyond the tone of siblings at the bar, there is also the question of consequence from litigation of disputes. We benefit mightily from the adversarial system. But do our goals *always* entail fighting oppression? Does pursuit of justice necessitate corpses on the floor?

CHAIR *continued on page 2*

WINTER 2010

Tips on How to Negotiate and Acquire Negotiation Skills

by Simeon H. Baum

When attempting to address the modest subject of how to negotiate and acquire negotiation skills, I am reminded of the narrator's comment in *Moby Dick*:

> One often hears of writers that rise and swell with their subject, though it may seem just an ordinary one. How, then, with me, writing of this Leviathan? Unconsciously my chirography expands into placard capitals. Give me a condor's quill! Give me Vesuvius' crater for an inkstand. Friends, hold my arms! For in the mere act of penning my thoughts of this Leviathan, they weary me, and make me faint with their outstretching comprehensiveness of sweep, as if to include the whole circle of the sciences, and all the generations of whales, and men, and mastodons, past, present, and to come, with all the revolving panoramas of empire on earth, and throughout the whole universe, not excluding its suburbs. Such, and so magnifying, is the virtue of a large and liberal theme! We expand to its bulk. To produce a mighty book, you must choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it.[1]

Hundreds of books have been written on this theme.[2] Moreover, all of us go through life negotiating in myriad circumstances. Thus all of us are experts in this area. What can one add that is meaningful for a brief article on this hoary forebear of all ADR processes?

What follows is an effort to capture key ideas and approaches that appear to have nearly universal applicability and to put them into a helpful, simplified framework. For starters, the simplest format follows and expands upon the advice of the ancient Greeks: know yourself, know others, know the world. It then turns Taoist and adds a fourth component, recognizing that negotiation is very much a process: "the Way."

NOSCE TE IPSUM (KNOW YOURSELF)

This phrase, inscribed above the entrance to the ancient temple of Apollo at Delphi, captures a core injunction for negotiators.

Know Your Interests.

In their well known negotiation model, Fisher and Ury—and the vast majority of proponents of joint, mutual gains, cooperative bargaining models—suggest that ideal negotiation involves the identification of the interests of each party, a search for options that will best satisfy those interests, and consideration of alternatives to any proposed deal in light of those interests. At the outset, in order to be effective, a good negotiator must be familiar with the interests that he represents—his own, his group's or his principal's.

Before starting any negotiation, it is useful to be clear on what one needs, and to give thought to how best one might satisfy those needs. "What do we need? What are we trying to accomplish?" should be expressly asked in advance. Are we trying to maintain a client base? Are we trying to avoid damage to good will or a reputation? In the labor context, are we trying to stay within budget in light of other material costs; increase productivity; cut down on health costs; improve our risk picture for experience rating by insurers; improve morale? Knowing the needs can direct the strategy and also can keep one alert to opportunities that might arise in the course of negotiations.

Keep a Tab on Your Emotions & Inner Life.

Beyond this, it is vital to be in touch with ones actual feelings, thoughts, and impulses at any point in time. In *Getting Past No*, Ury advises negotiators not to react to provocative actions or comments by one's negotiation counterparty. Reactions can lead to escalation. They can also cloud chances to learn about the other and can prevent the negotiator from responding positively to the needs and feelings of the other in a way that enhances the quality of communication, cultivates relationship, smoothes the bargaining, builds trust, and captures opportunities for mutual gain. The prerequisite for preventing undue reactions is sufficient self awareness to identify ones emotions and inner responses, including value judgments, before they are given expression.

Cultivate a Disciplined Self Consciousness.[3]

A disciplined self-consciousness is a negotiation treasure. Part of the discipline in not reacting is to know that there is a difference between having a feeling, thought, or even conviction, and acting on it. Knowing oneself is a first step in keeping the ego under control.

SKILL ACQUISITION: As with other functions in the practice of law, such as interviewing, client counseling, research, drafting, analytic thinking, and trial advocacy, effective negotiation requires the honing of particular

[1]Melville, *Moby Dick*, Ch. 104.

[2]Some recommended reading includes: Fisher & Ury, Getting to Yes; Ury, Getting Past No; Mnookin, Beyond Winning; Shell, Bargaining for Advantage; ABA Section on Dispute Resolution, The Negotiator's Handbook.

[3]The phrase "disciplined self consciousness," coined by John Ross Carter, Professor of Philosophy and Religion; Robert Hung-Ngai Ho Professor of Asian Studies, Colgate University, for use in connection with the comparative study of religion, has wide applicability in the context of negotiation as well.

skills.

Try Mindfulness Meditation.

How do we develop and increase the type of self-knowledge that optimizes our negotiation efforts? There are a range of activities and even exercises that enhance cultivation of self-awareness and promote self-knowledge. For nearly a decade, Professor Len Riskin[4] has been promoting mindfulness meditation as a way not only of reducing stress but also of increasing awareness of one's inner processes on the theory that this improves capacity as a negotiator or mediator. Sitting quietly, following the breath, being aware of bodily sensations, noticing and then letting go of thoughts and emotions as they arise—again, sensing the freedom of awareness without compulsive action—and, with bare attention, gaining a greater sense of presence and the richness of just being are all part of this type of exercise.

Catalogue Interests.

Reflective cataloguing of ones needs and interests in advance of a negotiation, and reconsidering needs and interests throughout the course of the negotiation, puts in the forefront of one's consciousness matters that should be addressed or that might enable one to seize opportunities for gain in the bargaining process.

Observe the Mirror of Others.

Beyond awareness of one's impulses, feelings, thoughts, judgments and interests, there is another type of self-understanding, all too often elusive, as expressed by the poet Robert Burns: "O would some power the giftie gie us to see ourselves as others see us."[5]

Particularly where one is engaged in negotiation, it is important to observe not only one's inner workings, sense of self, and recognition of one's own interests, but also the impact one is making on the other. How do they see us?

Catch Cultural Differences.

Understanding the perspective of, and our impact on, others becomes even more critical in negotiations between members of different cultures. Scholars like Professor Hal Abramson, who speak or write on cross-cultural understanding in the mediation context, identify unexpected differences between cultures in the most basic interpersonal expectations – such as eye contact. In certain South American cultures, *e.g.*, eye contact is seen as rude; yet for us, failure to make eye contact might be read as dishonesty, disrespect or a lack of self-confidence.

Be Alert to Conflict Handling Styles.

Even without major cross-cultural differences, there can be a substantial discrepancy between the way one believes one is behaving and the way others perceive it. Classic examples are disconnects between people with different styles of handling conflict. These often are classified in five groups: competitors, compromisers, collaborators, accommodators, and avoiders. Being aware of our conflict resolution "style" can alert us to reflexive responses and free us to try out different approaches. Understanding these modes leads to a better understanding of the negotiating counterparty, and also to an appreciation of how that party might perceive us.

SKILL ACQUISITION:

Test Drive the Thomas-Kilmann Conflict Mode Instrument.

The Thomas-Kilmann Conflict Mode Instrument[6] is a series of questions that reveals one's preferred style of handling conflict. The basic premise is that people vary in the degree to which they seek to assert their own interests even at the expense of others (compete), or to cooperate and promote the interests of others (accommodate). Some prefer to avoid conflict altogether, neither asserting their own interest in the particular dispute, nor satisfying the other's. Some seek a moderated satisfaction of their own interests and those of the other, through the shared sacrifice of compromise. Yet others maximize the promotion of both their own interests and those of the other through collaboration. Despite the apparent preference of negotiation theorists for collaboration – as the way to reach the Pareto optimum—the TKCMI advises that each of these modes of handling conflict has its own utility and drawbacks. It is a fascinating study, worth investigating.

For our purposes, in addition to the knowledge of self and other gained through familiarity with the TKCMI and its principles, there is an added insight into the way people of different mode preferences interact and understand each other. A classic example is the competitor matched with

TIPS *continued on page 10*

[4]*See, e.g.*, Leonard Riskin (C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) "The Contemplative Lawyer: On the Potential Relevance of Mindfulness Meditation to Law Students, Lawyers, and their Clients," Harvard Negotiation Law Review (May 2002). This was the centerpiece of a symposium entitled Mindfulness in Law and Dispute Resolution. Professor Riskin has provided training in mindfulness in law and dispute resolution at a wide range of venues including the Harvard Negotiation Insight Initiative, Harvard Law School, Straus Institute for Dispute Resolution, Pepperdine University School of Law, and Benjamin N. Cardozo School of Law.

[5](O would some power the gift to give us to see ourselves as others see us.) Robert Burns, Poem "To a Louse," verse 8. In this poem, Burns, who was the Scottish national poet (1759 - 1796), paints a scene of a haughty beauty at Church, unaware of the louse on her bonnet and of others' awareness of same.

[6]Thomas-Kilmann Conflict Mode Instrument—also known as the TKI (Mountain View, CA: CPP, Inc., 1974–2009), by Kenneth W. Thomas and Ralph H. Kilmann; *see*, kilmann.com/conflict.html.

TIPS *continued from page 9*

an avoider. Competitors like to seal deals. Avoiders prefer to take time. The result can often be an odd mix where competitors offer up a series of increasing offers, just to be frustrated by further delays by hesitant avoiders. Judgments can be added to the mix, with competitors thinking avoiders are not trying or not appreciating their efforts and avoiders thinking competitors are pushy and self-interested.

Try Being Proactive—Understand One's Impact

Awareness of differences in styles and preferences can help with self-understanding, as well. Beyond this, there are a host of behaviors and expressions that can have an impact on others and lead them to perceive us in manner different from the way we perceive ourselves. To the extent we are seeking to accomplish the goal of building an agreement that maximizes everyone's interests, we need to encourage the other to feel safe making disclosures about their interests, and to feel it is in their own interest to maximize ours.

NOSCE ALIUS (KNOW THE OTHER)

The dance of negotiation by its nature involves partners. The advice given for self-knowledge above, applies across the board to ones counterparties as well. Both to prepare for negotiation and throughout the course of negotiations, it is helpful to be alert to what is going on for the party across the table. What are their interests? How are they feeling? What is important to them? What are their cultural assumptions? What is their conflict style? What is their context? What is their sense of self, their hopes, dreams, and aspirations?

Only by understanding the interests of the counterparty can a negotiator work to develop options that can meet everyone's needs. One can learn these interests indirectly, through the application of logic, but even better through direct communication. The best way to learn of the other's interests is from what they say and do. The degree of disclosure by the other party will be influenced by the tone at the bargaining table.

SKILL ACQUISITION:

Set a Tone Conducive to Candid Disclosure; Be Effective as an Active Listener.

Active listening is a buzzword in ADR circles for good reason. Targeted questioning calls for answers to questions we already have, to promote our pre-existing goals. Active listening, by contrast, is more open-ended. The other party can drive that conversation.

With active listening, we use open-ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth. A classic formulation is VECS: validate, empathize, clarify and summarize.

By this approach, the other party feels less alone and more willing to open up. This is the royal way to learning their interests. With that information, one can look for ways to create value in a deal—ways to satisfy the other party's interests and achieve satisfaction of ones own.

Communication is Key.

Even First Amendment case law recognizes that communication occurs not only with words and speech but also in nonverbal ways. The effective negotiator is alert to, and uses, all forms of communication to advantage. Body language—the handshake, eye contact, posture, tone of voice—all communicate messages or attitudes. It is fundamental to communicate in a manner that builds trust and rapport.

Build Relationship & Trust.

Understanding that it takes two to tango in deal making and that we must learn what will satisfy the other in order for the other to meet our own needs, nothing goes so far as a relationship of trust to foster disclosure. To enhance relationship, people from various cultures give gifts or serve food prior to commencing talks, to signal good will and create a common bond. Shell, in *Bargaining for Advantage*, tells of an executive who gave his counterparty a gold watch prior to initiating merger talks.[7] This signaled a valuing of the other and, to paraphrase Claude Rains at the end of *Casablanca*, "the beginning of a beautiful relationship."

Watch for Dynamics of Escalation and De-escalation.

We have all seen it happen. An even toned conversation suddenly goes out of control. Tempers flare, people leave the room. Often these scenarios can be altered if the participants are aware of the factors escalating tensions as they arise. Points are made, counterpoints asserted, one-upmanship takes place, voice tone changes, expressions change, the pace of speech accelerates. If one sees this happening, there is no loss in taking a break, changing tone, slowing things down. Much can be said for the pause that refreshes. Silence is a gift.

Control the Spigot of Disclosure.

At the heart of communications in negotiation is the flow of information. This can range from communicating ones own interests, eliciting and confirming the interest of the other, learning about context, developing principles for fair resolutions, exchanging offers, discussing alternatives, assessing and evaluating legal options and even possible litigation outcomes.

There is a balance in disclosure. Social scientists have observed that disclosure by one party encourages disclosure by the other; and the opposite is true as well. It pays to be clear in advance of what are one's confidential facts, interests, concerns and analyses, and also of what one would like to learn from the other. These views should be revisited throughout the negotiation.

Disclosure Choices are Informed by Competitive or Cooperative Strategy and Behavior.

[7]G. Richard Shell, *Bargaining for Advantage—Negotiation Strategies for Reasonable People*.

In short, be artful in striking the delicate balance in disclosure. Share where possible, both to encourage sharing and also to enable one's counterparty to help think of options that might meet one's own needs. But be judicious as well, on disclosure of one's own weak points, points that give the other party leverage, feelings that might provoke, and arguments that might lead to escalation or corrective action shoring up the other party's position.

The fundamental difficulty entangled in the preceding consideration is the question of whether to engage in strategic behavior that is competitive or cooperative. Current negotiation theory has shown the greater advantages that can be gained by cooperative behavior. Only cooperation can enable both parties to learn and work together to meet the interests of all, and to maximize gain. A legitimate cause for hesitation in proceeding down the cooperative path is the view that one's counterparty is motivated by a purely competitive strategy or driven by ill will. The bind implicit in this assessment is that ill will or competitive approaches might change if one takes a risk and extends the olive branch. It takes courage and the ability to take a short term loss to make this long term advance.

There is no ultimate solution to this problem. In each instance one uses one's best judgment. But it pays to be aware of this set of choices and of the way the exercise by one party of choices to follow a competitive or cooperative strategy can itself be transformative for all parties.

Maintain Credibility.

Nothing can destroy trust and good will like the discovery that one has been lying or that one is operating with less than candor. Counterparties will clam up and be more inclined to resort to competitive approaches in self-defense if they perceive a negotiator to be dishonest or insincere. Crafty conduct can not only hurt one in the instant negotiation but also can wreak havoc on one's reputation in the long run.

Assess Commitment Levels & Risk Tolerance.

A classic image is the game of chicken. Imagine teenagers racing at each other in hot rods in some LA viaduct. Who will swerve out of the way? If I were driving, I know the answer. I tend to be highly risk averse. It is fascinating to watch commitment levels at play in negotiations. There is great strength in posing a credible threat. To the extent one is able to gage the counterparty's commitment to a certain course of action or deal element, one will understand whether a concession need be made. The capacity to understand the nature of one's own and the other's level of commitment, and also tendency to avoid risk in general and on the particular point at issue comes not only from understanding the person, but also from understanding their context. What happens to them if they give on a particular point? What interest is affected? What in the larger picture do they win or lose? This analysis should be applied for understanding of both self and others.

NOSCE MUNDUS (KNOW THE WORLD)

None of us lives in isolation. As indicated above, to understand ourselves, we must understand our context. This is true for understanding the other as well. An effective negotiator is sensitive to the context in which every party is suspended, recognizing the impact of context and using it as a strength.

Behold the Business Context.

Litigators in particular can be reminded to think beyond the case. Why did this case originate? What is driving the parties?

If one is negotiating a real estate deal, it certainly pays to understand the current real estate market, and even the broader economic climate as that affects property and resale values, demand for space, capacity to build, the ability to obtain loans, interest rates, and related issues.

More specifically, knowing a market enables the negotiator to arrive at more compelling standards for use when setting values. The uses of mutually acceptable standards is routinely recommended by proponents of principled negotiation. Once recognized, they give direction to a negotiation and support fair and doable deals.

Heed the Hierarchy.

The nationally recognized employment lawyer, Wayne Outten, when thinking about strategies for negotiating on behalf of employees, considers where those employees stand within the framework of their employer. Do they have political allies, "Rabbis," people willing to go to bat for them? Do they have "political capital," credibility with certain supervisors or others in management? Have they earned loyalty; would harm to the employee engender a sense of guilt?

Conversely, knowing where the opposing negotiator fits can be helpful. Is he or she trying to cover for their own mistake? Is he responsible for the P&L that is affected by this deal or litigation? Who in the chain of authority must be brought in to achieve closure? Is the negotiator at a level where he or she is trying to impress a superior, or trying to prove a point to a subordinate?

Assess Alternatives.

Any post-modern piece sketching the contours of the Leviathan of Negotiation would leave a lacuna larger than that great beast's blowhole if it omitted mention of the BATNA coined and popularized by Fisher and Ury. BATNA—the best alternative to a negotiated agreement—as well as its variants, all other alternatives, good, bad and ugly, can be used by negotiators to test whether a deal on the table is worth taking. If the likely, tangible alternative to that deal is superior, the rational negotiator keeps bargaining for something better or walks away.

The simplest example is of a currently employed party testing a proposal from a prospective new employer. If the job offer is for lower pay, at a shakier institution, doing less exciting work, with worse prospects for advancement, in a

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TIPS *continued from page 11*

less convenient location, with nastier colleagues, and a less impressive title than one's current employer, no rational worker will take that bait. When these and other similar factors begin to equal and exceed the appeal of those at the current job, then the new offer begins to seem worth taking. Of course, returning to self-knowledge, one still needs to be aware of one's risk tolerance. Even if the offer is better than one's BATNA, is one willing to move from the known to the unknown?

Analyze Risk.

Beyond the subjective condition of risk tolerance, in the context of pending or potential litigation, understanding alternatives to a deal requires an understanding of the probable consequence of litigation. This includes not only the like outcome after trial and appeal, but also the direct and indirect costs incurred along the way. These are often described as risk analysis and transaction cost analysis.[8] Careful counsel spend hours assessing the strengths and weaknesses of their case to guide clients in assessing the amount of payment that makes sense to put that matter to bed.

SKILL ACQUISITION:

Man Learns from Machine—Try the TreeAge Decision Tree Program.

As a general tool in decision making, it is helpful to identify areas of uncertainty and choice points that affect outcomes along the path of a predictable process. For example, in a case, there might be uncertainty on whether discovery will develop favorable or unfavorable information on a set of points; on whether the law characterizes a particular action or arrangement as legal or illegal; on whether one will win or lose on motions to dismiss and for summary judgment; on the range of damages that might be awarded under different standards at trial; and on likelihood of victory on appeal. Added to this mix, can be the litigation transaction costs—fees for attorneys and experts, transcripts, photocopying, preparation of exhibits and the like. These costs can be factored in along the way.

We all can rough out these factors and do our own math. If there is a 50/50 chance that we will win $1,000,000 after trial, we can loosely give that case a $500,000 value. Understanding it will cost the client $250,000 in fees to get there, we might reduce that value to $250,000 if that sum of cash were sitting on the barrelhead for the taking to end the suit.

When the factors get complex, we might explore a program that does the math on the factors of uncertainty and choices taken along the way—TreeAge. This software, available online at treeage.com, helps develop and test outcome through complex decision tree analysis.

Gather Information.

Across the board, information is the medium of negotiation. Information helps us identify our own and the other's interests. It is the basis of our understanding of the business, legal, or other risk context for assessing a deal. It is the *prima materia* with which we make any assessment of risk or value. Only with information can we discover and assess our leverage.

Assess Leverage; Engage in Logrolling.

Much has been written on leverage. When one controls the counterparty's access to a means of satisfying that counterparty's need, or if one can impede the satisfaction of that need, one has bargaining power. It is important to be clear on what those levers are on both sides of the table. It is further helpful to see if there are alternative means of satisfying, or jeopardizing, the need or interest in question; this liberates one from being hung up on a particular risk or issue.

There are a good number of times when it can cost one party little to satisfy a significant need of the other party. If each party can offer something of low value to the offeror and high value to the other party, this presents a wonderful opportunity for trading that will generate higher overall value in the deal. This type of trading, known as logrolling, can be a source of great satisfaction.

Crunch Numbers.

The risk analysis discussion above should already suggest that a good negotiator should not shy away from numbers. In deals there are often many moving parts, each with its potential economic value. It pays to try to price values, to calculate risks, to test principles and assumptions by working out their math.

Develop Principles and Standards.

At the heart of the Fisher-Ury model of negotiation—in addition to putting the parties into a cooperative frame of mind, focusing on the problem, identifying the issues, discovering underlying interests, and developing options to meet those interests, producing a deal that is superior to the BATNA—is the recognition that developing workable options and deals often depends upon arriving at principles which all parties can adopt. This fits into our "mundus" sec-

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[8]For helpful articles on decision trees and risk analysis, *see*, Douglas C. Allen, *Analytical Tools and Techniques: Decision Analysis Using Decision Tree Modeling;* Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice,* 11 Neg. J. 123 (1995); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy,* 40 Bus. Law 617 (1984-1985); Jeffrey M. Senger, *Decision Analysis in Negotiation, 87 Marquette Law Rev. 723 (2004);* David B. Hoffer, *Decision Analysis as a Mediator's Tool,* 1 Harv. Neg. Law Rev. 113 (1996).

TIPS *continued from page 12*

tion, because they are an effort at transforming the subjective into the realm of objectivity. Whether it is fair, doable, wise, legal, efficient, considerate, reciprocal, due—whatever the standard, it pays consciously to work to develop standards that can be discussed with and adopted by one's counterparty in order to address distributive issues or generally to work out a deal.

This can include finding an objective basis for assessments by turning to authorities in recognized texts—like the Kelley Blue Book for used car values—to experts, like appraisers or accountants, or to broader custom and usage in a particular industry or trade. The net result is bringing the discussion into an objective realm susceptible to shared, open analysis, and away from the subjective realm governed by the assertion of wills.

OPENING TO THE GREAT WAY

Having embraced the chiliocosm, framing out content and approaches through the vast domains of self, other, and the world, a comprehensive presentation on Negotiation Skills must finally recognize that we are dealing with what is fundamentally a process.

We recognize that there is a wide range of styles and approaches in negotiation that can differ and yet be both effective and legitimate. Having said that, I still might make a few recommendations. Since we engage in negotiation in all areas of life, there is something to be said for being bigger than the topic. Sometimes living with dignity and genuineness trumps a minor strategic gain. Moreover, with principled, joint mutual gains approaches, it is possible to hold one's own, and indeed improve the deal outcome, while still acting with decency and in a manner consistent with ones own values.

As we engage in this process, we can negotiate the process itself. If we find ourselves in a mode of interacting that seems inappropriate or unproductive, we can discuss our approaches with the counterparty. We are all too familiar with the frustration of negotiating the size and location of the table. Yet, while we do not wish to be hung up and frozen in our interactions, it can also be liberating—and good strategy—to be alert to process choices that might enhance relationships, information gathering, or the deal.

Negotiators should cultivate creativity, openness, and flexibility. We are participating in something greater than ourselves. Richer possibilities may emerge from a deal than we could have at first realistically have imagined. This attitude of openness makes us not only more humane and appreciative of others, it also opens us to reality and enables us to see and seize upon opportunities.

Along these lines, let a lively silence be your baseline. This helps in decision making on disclosure flow, preserves candor through eliminating impulsive misrepresentations, controls the expression of unhelpful emotional reactions, prevents reactive behavior overall, and encourages listening to others. It gives one a chance to consider before committing. Yet, this approach should not be at the expense of wholesome spontaneity and warm sharing.

Finally, negotiation, at its core, recognizes of the freedom and dignity of all participants. We all can take it or leave it, talk or walk. For this reason, it is a beautiful way indeed.

Simeon H. Baum, President of Resolve Mediation Services, Inc. (www.mediators.com), is chair of the FBA's Alternative Dispute Resolution Section. He has mediated over 900 disputes, including the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site and Trump's $ 1 billion suit over the West Side Hudson River development. He was selected for New York Magazine*'s 2005–2010 "Best Lawyers" and "New York Super Lawyers" listings for ADR. He teaches Negotiation Theory & Skills at Benjamin N. Cardozo School of Law and is a frequent speaker and trainer on ADR.*

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Strategies for Breaking Impasse

By Victoria Pynchon, Joseph Kraynak

When neither party is willing to make another concession to reach agreement, they are at *impasse.* To help break through impasse, a mediator should consider using one or more of the following strategies:

- **Ask diagnostic questions.** Ask questions like, "What do you believe would be the best solution for everyone?" or, "What could your opponent do to signal progress?"
- **Bracket your way to compromise.** Ask each party, "If the other party were to offer __, would you be willing to offer __ in return?" This approach often helps a party move into the range of reason without requiring the other party to move there first.
- **Encourage a party to make a concession and the other party to reciprocate.** When you name the concessions the parties have made and recite the reciprocal moves by the other, the parties feel more satisfied about the progress they're making and more hopeful about their ability to close the deal.
- **Perform a cost-benefit analysis.** Calculate the costs and benefits of any proposed solution as compared to the costs and benefits of the parties' failure to reach agreement.
- **Reframe the possible outcomes.** When a party refuses to make further concessions, to save face or avoid the impression that he's lost, reframe the resolution from loss to victory by stressing, for instance, that resolution is control over the conflict.

- **Soften a hard offer or demand.** Ask diagnostic questions to learn the reasons why a party refuses to make further concessions or is standing by an unreasonable offer or demand. Explaining the reasons for one party's intractability to her bargaining partner can soften what seems to be a hostile or unnecessarily adversarial position.
- **Use a decision tree.** Draw a flow chart illustrating the possible outcomes of the choices the parties have.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

Generating Business as a Mediator

By **Victoria Pynchon, Joseph Kraynak**

Part of **Success as a Mediator For Dummies Cheat Sheet**

To be a successful mediator, you need to be successful, commercially. Consider the following strategies for generating business as you begin your career as a mediator:

- **Attend conferences and events that expose you to your mediation and market communities.** Attend at least one group event every other month.
- **Claim your online business listings.** Make sure you have a listing on Google Places and Yelp, claim the listings, and then flesh them out with additional content, including your website or blog address.
- **Join and serve in organizations that expose you to your mediation and market communities.** These may be mediation, industry-related, or community organizations. Be active in the organization. Take a leadership role to raise your profile.
- **Keep in touch with your clients.** The best place to look for new clients is through your current clients. Keep in touch with them via e-mail or regular phone calls. Checking in once or twice a year is usually sufficient.
- **Launch a website, blog, or both.** You need to have an online presence, and having a website or blog is an important first step.
- **Pass out and collect business cards.** Pass out business cards to everyone you meet, and collect their cards. Ask if they want to receive your newsletter and whether they prefer e-mail or standard postal delivery.
- **Post press releases and distribute newsletters.** Write articles that are relevant and of value to your market and use the Internet to post and distribute them.

- **Spread the word via social networking.** You should have a Facebook page dedicated to your mediation business, along with a Twitter and LinkedIn account. Get involved in LinkedIn discussion groups relevant to mediation and your market.

About the Book Author

Victoria Pynchon is a mediator, author, speaker, negotiation trainer, consultant, and attorney with 25 years of experience in commercial litigation practice. Joe Kraynak is a professional writer who has contributed to numerous For Dummies books.

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OF NOTE

NCBA Member Benefit - I.D. Card Photo
Obtain your photo for Secure Pass Court ID cards at NCBA Tech Center
Only For New Applicants
Cost $10 • April 5, 6 & 7
9 a.m. – 4 p.m.
PLEASE NOTE: Existing Secure Pass holders do not need new photos and can now renew online at the OCA website www.nycourts.gov/attorneys/registration/securepass.shtml

NCBA COMMITTEE MEETING CALENDAR
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EVENTS

WE CARE
Dressed to a Tea
Wednesday, March 16, 2016
5:00 p.m. at Domus
SOLD OUT!

NASSAU ACADEMY OF LAW
Hon. Elaine Jackson Stack MOOT COURT COMPETITION
Tuesday & Wednesday
March 22 & 23, 2016 at Domus
Details pg 14

LAW DAY
Tuesday, May 3, 2016
5:30 p.m.
Details pg. 6

117TH ANNUAL DINNER DANCE
Saturday, May 14, 2016
Long Island Marriott, Uniondale
See page 6
Invitations mailed in March
For Journal Ad Information see INSERT

WHAT'S INSIDE

UPCOMING PUBLICATIONS COMMITTEES MEETINGS

Thursday, March 10, 2016 12:45 at Domus

Thursday, April 14, 2016 12:45 at Domus

Breaking Bread with the Bench

During the first luncheon between new lawyers and members of the Judiciary, NCBA President Martha Krisel asked District Court Judge, Hon. Andrew M. Engel, and all invited Judges, to speak to the lawyers on a variety of topics including practicing law, exploring other practice areas and becoming involved in the Bar Association. (Photo by Hector Herrera)

By Andrea M. Brodie and Jennifer L. Koo

One of the initiatives promulgated by President Steven J. Eisman was the creation of a task force to help foster connections between new lawyers (admitted less than 10 years) and the more active members of the Nassau County Bar Association, particularly the judiciary. This task force, now known as the Steven J. Eisman New Lawyer/Judiciary Relations Task Force, is co-chaired by the Hon. Jeffrey S. Goodstein of the Nassau County Supreme Court and Andrea M. Brodie, Esq. of Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP.

One of the programs created by the Task Force is a monthly lunch between new lawyers and members of the judiciary. The Task Force and the New Lawyers Committee held its first lunch at Domus with Justices of the Nassau County District and Supreme Courts on

See BENCH, Page 9

Canvas and Wine

Channel Your Creativity at the Bar

By Adam D'Antonio

Discover your inner Rembrandt on the evening of Thursday, April 14, 2016 at 6:30p.m. when a professional artist guides us in creating masterpieces on canvas. NO ARTISTIC EXPERIENCE REQUIRED!

Adult paint nights are the new craze and we've managed to line up one of the best artists in town. Even the least artistic will be amazed at what can be created with a paintbrush in one hand and a wine glass in the other. All you need to bring is your enthusiasm! We'll supply the rest including a 16" x 20" canvas, easel, apron and supplies to create a moonlit skyline suitable for hanging in your home or office. Refreshments, including wraps, music and other surprises will round out this casual and fun-filled evening.

Tickets are only $35 per person, but seating is limited, so reserve your easel now. A portion of each ticket will support the Steven J. Eisman Memorial Building Fund.

Moonlit Skyline

Canvas and Wine follows on the heels of NCBA's wildly successful Oktoberfest and is sure to be another hit with members and their guests. Don't miss out on having your firm featured as an event sponsor, too. Contact Valerie Zurblis for sponsorship details at (516)747-4070 x204.

For more information and to purchase tickets for Canvas and Wine, please contact Special Events (516)747-4070 x226, events@nassaubar.org or register on-line at www.nassaubar.org.

For NCBA Members
Notice of
Nassau County Bar Association
Annual Meeting
May 10, 2016 ● 7 p.m.
Domus

Proxy statement can be found on the insert in this issue of the Nassau Lawyer. In addition to the election of Nassau County Bar Association officers, directors, Nominating Committee members and Nassau Academy of Law officers, amendments to the Nassau County Bar Association By-Laws will be voted upon.

A complete set of the By-Laws, including the proposed amendments, can be found on the Nassau County Bar Association website at www.nassaubar.org. Copies are available at the reception desk at the home of the Association or by mail upon request.

Richard D. Collins
Secretary

One Size Does Not Fit All – Ten Reasons Why Commercial Litigators Should Consider Commercial Mediation

Most commercial litigators love to litigate. Their fondness for the art of advocacy, competitive instinct, keen interest in pre-trial and trial strategizing, drive for personal satisfaction, and—let's be honest—love of lucre all drive these warriors' dreams of "scorched earth" legal victory. In some cases, their pugilistic desires are fine, even commendable. However, in other cases, these desires can lead to an endless descent into needlessly protracted proceedings. The negative consequences of such trench warfare include, but are not limited to inefficiency, waste, reputational damage, and public distrust of litigators.

Elan E. Weinreb

There are just some situations where litigation is not an appropriate form of dispute resolution (and exactly what those situations are is a topic well beyond the scope of this article). In such circumstances, mediation—"an informal and confidential process wherein the parties meet with a mutually selected impartial and neutral person who assists them in the negotiation of their differences"[1]—can present itself as an optimal (at least initially) dispute resolution method for one or more of the following ten reasons.

10: Scheduling Flexibility

In any commercial litigation involving judicial intervention, the parties and their attorneys are at the mercy of at least one judicial schedule. In contrast, in commercial mediation, the parties and their attorneys generally remain in control of their respective schedules, rendering it a more attractive dispute resolution option.

9: Recognition for Problem Solving

According to one founder of a firm which specializes in representing entrepreneurs, the top reason why entrepreneurs generally hate to deal with lawyers is the perception that the latter cause problems instead of solving them: "Good lawyers are able to identify significant potential legal problems; great lawyers provide solutions to those problems.'"[2]

Commercial mediation defies this stereotype by its essence as an alternative dispute resolution modality controlled by the disputants, not their attorneys. As such, commercial litigators who support commercial mediation stand in support of "doing something"—problem solving—and not just "saying something"—problem identification.

8: Judicial Support

Judges abhor (at least) two administrative nightmares: (a) an out-of-control docket; and (b) reversal or significant modification of their decisions. Successfully mediated cases resulting in settlement prevent these nightmares from becoming reality. It follows that judges throughout the world ardently support mediation,[3] and commercial litigators who ignore this trend do so at their peril.

7: Speed

Mediation is simply faster. Business mediations "usually take between one and four months from start to finish, and many are completed with just one in-person session. Shorter duration = fewer billable hours expended (= fractional cost relative to adversarial proceedings)."[4]

6: Increased Law Practice Efficiency

The odds of a civil case ultimately proceeding to trial are not exactly high. "According to the National Center for State Courts, only about 7.6 percent of civil cases go to trial in the United States, and only 0.6 percent receives a jury trial."[5] In contrast, commercial mediation offers practically mirror-opposite odds: "more than 85% of mediated business cases result[] in settlement agreements."[6]

Considering these odds, allocating resources to mediation initiatives that can resolve more cases in less time is worthwhile and will likely increase law practice efficiency.

5: Confidentiality

In the Information Age, any case can be tried twice: once in the courthouse, and once in the court of public opinion. Blasting a 160-character text or tweet of trial testimony to cyberspace that "goes viral" can easily cost any client—regardless of mainstream media presence—thousands of dollars in reputational damage in less than 160 seconds. Such damage can even occur when a client prevails.[7]

However, unlike a public trial environment, with narrow exceptions,[8] commercial mediation is "entirely confidential."[9] While this designation of confidentiality is no guarantee against a wrongful disclosure of confidential information, it is certainly better than no protection at all. Furthermore, while the remedies for breach of mediation confidentiality are not particularly punitive,[10] courts do not take such breaches lightly.[11]

4: Neutral Assessment of Case Strengths and Weaknesses

The best commercial litigators recognize that an assessment of case strengths and weaknesses is an essential component of trial preparation.[12] A type of evaluative mediation known as "information centered mediation" is particularly useful in testing case strength.[13] This process involves the appointment of a mediator having practical or technical expertise who receives written submissions and significant documents from the parties in advance of meeting with them.[14] After reviewing these materials and hearing from the parties or their attorneys, the appointed mediator renders an opinion on "the likely outcome and value of the dispute," which he or she proceeds to defend.[15]

It is in the defense of the mediator's opinion that an astute commercial litigator can strike gold by exposure to the mediator's opposing perspectives on the case.[16] And even where a case returns to a litigation track, analysis of case strengths and weaknesses will have occurred as part of the mediation process.

3: Reduced Discovery Expenses

Clients often discover early that the discovery process "can be lengthy, expensive, intrusive, and frustrating."[17] While in commercial mediation, it is practically impossible to entirely eliminate discovery in advance of mediation sessions, "[e]ssential discovery can be conducted early, setting the stage for prompt resolution that saves the parties the vast bulk of fees and expenses that they otherwise would have incurred."[18]

2: "Win-Win" Potential

When judges, court attorneys, or even the parties' attorneys settle a matter without mediator assistance, it is often done in the limited framework of compromise—what is also known as a "win-lose" framework because the parties sacrifice items to gain others or avoid liability exposure.[19] This is largely because the restrictive structure of litigation limits available remedies and options. Courts, for example, are rarely able to compel parties to interact with each other outside of the scope of contractual arrangements that they have established or award remedies to them beyond those available at law.[20]

However, commercial mediators are not so limited and are often able to propose extra-legal, "out of the box" creative options that open the proverbial door to collaborative "win-win" conflict resolution.[21]

1: Client Retention Driven by Cost Savings

Finally, commercial mediation is often superior to commercial litigation because it offers a greater probability of client retention driven by cost savings.[22] In the United States, "parties spend $50,700 on average on each litigated case, [but] only $7,500 ($3,500 per party [in a two-party case]) for resolving their case by mediation, a cost-savings of approximately 85%."[23] Outside of the United States, the savings are similarly significant.[24]

Moreover, it is not only clients who stand in support of commercial mediation in light of these savings, but the transactional attorneys counseling them, who in turn affect the future retention of commercial litigators. Recently, Loretta Gastwirth, Chair of the NCBA's ADR Committee and a commercial litigator herself, advised that "inserting a mediation clause in a contract . . . is a no-brainer" in light of its potential to "save clients tons of money in the long run . . . ."[25] The proverbial stage for commercial mediation is thus now being set by clients' transactional attorneys prophylactically, well before any submission of pleadings.

Towards the Future

It bears emphasis that commercial mediation—or any dispute resolution process, for that matter—is no talismanic panacea. "One size does not fit all" applies equally to commercial litigation and commercial mediation such that either is optimal only in appropriate cases, not every case. It is for this reason that some practitioners refer to ADR as "Appropriate Dispute Resolution"[26] instead of "Alternative Dispute Resolution."

However, as ADR continues to grow in popularity, it is not a question of "if" but "when" commercial mediation replaces it as a "first-line" option for dispute resolution. And at the end of the day, even those commercial litigators who stubbornly cling to the gladiatorial mindset of days gone by may come to welcome the turning of the tide. After all, it was no less than the great Chinese general Sun Tzu who declared, "For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill."[27]

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See MEDIATION, Page 12

INSPECTIONS ...

Continued From Page 10

istration of taxes, can regulate businesses and individuals that engage in various commercial activities; it also has exclusive regulatory authority over businesses and individuals dealing in the wholesale and retail distribution of cigarettes and tobacco products, and regulatory oversight over the importation, transportation and sale of petroleum products, i.e., motor fuel (gasoline) diesel motor fuel,[6] and alcoholic beverages.[7]

In regards to cigarettes and tobacco products, Investigators have authority

> … to examine the books, papers, invoices and … records of any person in possession, control or occupancy of any premises where cigarettes or tobacco products are placed, stored, sold or offered for sale …as well as the stock of cigarettes or tobacco products in any such premises… (And), (t)o verify the accuracy of the tax imposed and assessed by this article, each such person is hereby directed and required to give to the commissioner of taxation and finance or his duly authorized representatives, the means, facilities and opportunity for such examinations.[8]

The Tax Department also has criminal enforcement authority with respect to certain taxes that it administers. In fact, Department Investigators are also police officers as defined under the New York State Criminal Procedure Law, regarding enforcement of such taxes.[9] Possession of unstamped, counterfeit–stamped or out-of-state stamped cigarettes 'for purposes of sale' is a crime and such cigarettes are seized whenever or wherever they are discovered[10] and vehicles if any, that were used to transport such cigarettes may also be seized for forfeiture.[11] The crimes of *Possession for Purposes of Sale or Sale of Unstamped or Illegally Stamped Cigarettes* range from Class D felony to Class A misdemeanor.[12]

In regard to sentencing, periods of incarceration or probation that may be imposed are based upon Penal Law criteria. However, under the Tax Law courts may impose fines substantially higher than those provided for in the Penal Law : for a felony, a fine not to exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $50,000, or, in the case of a corporation the fine may not exceed the greater of double the amount of the underpaid tax liability resulting from the commission of the crime or $250,000 and for a misdemeanor the court may impose a fine not to exceed $10,000, except that in the case of a corporation the fine may not exceed $20,000.[13]

In addition to the criminal fines, it should also be noted that the Department has the authority to levy civil fines varying in severity, depending upon quantities of unstamped or counterfeit stamped cigarettes or counterfeit stamps found in possession of the defendant,[14] (even if the defendant is not convicted of the above mentioned crimes.)

Case Law

The lead case in New York addressing the Department's authority to do administrative inspections involving cigarettes and tobacco products, and which had Fourth Amendment ramifications, was *People v. Rizzo*.[15]

There, the Tax Department received a complaint that a Ronald Rizzo had been arrested in New Jersey in possession of approximately 400 cartons of untaxed cigarettes, indicating two New York addresses connected with him. During surveillance at one of the addresses, an investigator observed the defendant in the garage in possession of 30 cartons of various brands of cigarettes. The investigator entered the garage without Rizzo's consent, seized about 90 cartons of cigarettes in the garage and about 54 cartons from the trunk of his car and arrested the defendant for the crime of Possession of Untaxed Cigarettes.[16]

The trial court suppressed the evidence of the cigarettes as an unconstitutional search and seizure. The Second Department upheld the trial court's decision and the Court of Appeals followed suit. The Court confirmed that the investigator lacked probable cause to believe that the storage or sale of cigarettes was taking place on the defendant's property prior to entering the premises. It also outlined three situations[17] that could be considered guidelines for Tax Investigators while conducting administrative inspections involving cigarettes and tobacco products, as follows:

- Where the dealer is open and notorious either by license or holding himself out to the public, Tax Department Investigators are authorized to inspect records and inventory of that dealer.
- Where a party is engaging in regulated activity out of premises which are not publicly recognized as those of a dealer in that commodity and investigators have probable cause to believe that regulated activity is taking place, they may lawfully enter the premises and inspect records and inventory pursuant to their statutory power.
- However, where the regulated activity is in fact occurring but the investigators have nothing more than a suspicion (as opposed to probable cause) to believe that such activity is taking place, statutory authority will not suffice as the basis upon which to enter the premises under investigation.

The Impact of Inspections

Notwithstanding inspections of unlicensed individuals and businesses, such as the Rizzo case, the majority of the Department's regulatory inspections involve businesses to which it has issued licenses and permits: cigarette stamping agents, wholesale and retail distributors. The Department is very proactive in its efforts to enforce the law. For example, for calendar year 2014 the Department had seized 2,017 cartons of cigarettes, 254,723 cigars, 2,059 pounds of loose tobacco, 14,738 counterfeit cigarette tax stamps and $35,658 cash.[18]

Consider the following example of a store that was found in violation of the law during an inspection: On June 25, 2015… Tax Department Cigarette Strike Force Investigators conducted a cigarette inspection at Stop & Go Friend Corp. located at 730 South St., in Peekskill. In total, the investigators seized 159 packages of cigarettes with counterfeit tax stamps. Sultan Ahmed Mosleh Ali, 28 was charged with criminal tax fraud and felony possession of counterfeit tax stamps. The defendant was processed at the Peekskill Police Department and remanded to the Westchester County Jail.[19]

As in the above case generally,

- The store owner is either arrested or issued summonses,
- untaxed cigarettes are seized, and

the store's permit (license) to do business (its Certificate of Registration[20]) is also seized.

Confiscation of the Certificate of Registration translates into dire consequences for the business owner. Since Investigators have seized the store's Certificate of Registration, the store is prohibited from purchasing cigarettes from wholesale distributors or continuing to sell any such product (including existing inventory) to its customers. *Business is suspended*!!

- loss of customers!
- loss of income!
- financial loss in money spent for inventory of legally-stamped cigarettes that the proprietor cannot sell!

And, in some cases finality; the shut down and discontinuance of business.

Options After Suspension

A defendant whose Certificate of Registration has been suspended because of unstamped or counterfeit-stamped cigarettes discovered on its' premises has recourse. The Tax Law offers the business owner a procedure to apply for return of the store's Certificate of Registration and reinstatement of the store's authority to continue in business, i.e., the purchase and sale of cigarettes.

By filing a petition with the Department, the store owner has the right to have the seizure and suspension of the store's Registration reviewed. The Commissioner designates a Review Officer to hear the case. A hearing is conducted, during which the Petitioner may present evidence and witnesses in an effort to prove to the Review Officer's satisfaction a basis for lifting the suspension.[21]

Petitioner has the burden of proof, to prove by a preponderance of the evidence that the cigarettes were not unstamped or unlawfully stamped. However, based upon this writer's experience as a Department Review Officer, the Petitioner usually is unable to sustain this burden and the alternative is to present evidence of mitigating circumstances concerning the incident. Counsel's presentation of the case should include information such as:

- Period during which the petitioner operated 'in good' standing with the Department
- information identifying the distributors from whom the client regularly purchases product, with copies of invoices and receipts reflecting such purchases
- explanation as to how the untaxed product came to be on the premises
- and, if available, information the client may have concerning incidents of illegal trafficking in cigarettes.

The Review Officer will decide the period of suspension or revocation of the Petitioner's Registration and will submit findings to the Department's Commissioner. Thereafter, the Commissioner will issue a decision regarding the Petitioner's suspension. If the decision is to continue the suspension or revoke the Certificate of Registration, the Petitioner may appeal the Commissioner's decision by commencing an Article 78 against the Tax Department Commissioner, in Supreme Court in Albany, NY.[22]

Gary Alpert is in private practice and Of Counsel to Hein, Waters & Klein, Garden City, and formerly as an attorney with Tax Department's Criminal Investigations Division, supervised Tax Fraud Investigations and served as a Certificate of Registrations Review Officer.

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MEDIATION ...

Continued From Page 11

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The Official Newsletter of The Weinreb Law Firm, PLLC

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In This Issue:

The Chameleon Mediator

In this quarter's newsletter, Elan E. Weinreb, Esq., Managing Member of The Weinreb Law Firm, PLLC, focuses on his particular mediation style—what he calls "chameleon mediation"—and offers some tips for mediators who have adopted or wish to adopt this particular style.

What the Amazing Chameleon Can Teach Mediators

Of all of G-d's magnificent creatures, one of the most amazing and admirable in my opinion is the chameleon (such as the one which appears on the right).

Wikipedia tells us that the creature is a lizard that presents itself in a variety of sizes and colors and often has the ability to change colors. Chameleons live in a variety of habitats that range from rain forest to desert conditions and are found in the wild in parts of Africa, Asia, and Europe. Adaptability and versatility are clearly their trademarks.

Scientific research from 2014 has revealed something interesting about how chameleons change colors, often but not always for purposes of camouflage. From the "Chameleon" Wikipedia page, we learn:

"*Chameleons have two superimposed layers within their skin that control their color and thermoregulation. The top layer contains a lattice of guanine nanocrystals, and by exciting this lattice the spacing between the nanocrystals can be manipulated, which in turn affects which wavelengths of light are reflected and which are absorbed. Exciting the lattice increases the distance between the nanocrystals, and the skin reflects longer wavelengths of light. Thus, in a relaxed state the crystals reflect blue and green, but in an excited state the longer wavelengths such as yellow, orange, green, and red are reflected.*"

"What the Amazing Chameleon . . ." — *cont. from Page 1*

The chameleon's color change thus constitutes not one, but two separate reflections that are a function of changing circumstances: (1) the reflection of external light; and (2) the reflection of the creature's internal mood.

Yet, notwithstanding such dramatic changes, the chameleon still remains at its essence a chameleon: the lizard that it was originally born. It does not compromise upon its internal identity, notwithstanding that the world around it may have been misled to believe otherwise (even to the extent of not being able to visually perceive it anymore), with the blood flowing through its body, irrespective of any color change, remaining the same all along.

There are some mediators such as yours truly who have learned much from this information about our polychromatic reptilian friend. Consciously refusing to align with any of the "big three" styles of mediation—facilitative, evaluative, and transformative (and for more on this, see Zena Zumeta's excellent article, entitled "Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation" on mediate.com)—they choose to adapt rather than to adopt by choosing to use the techniques of all three styles at any time in the mediation process (and sometimes outside of it as well).

What determines their colors at any given time? At least three factors: (1) the personalities of the parties involved in the conflict; (2) the circumstances surrounding it; and (3) the potential for or prospect of creative solutions. Likewise, analogous factors determine the chameleon's colors: (1) the potential predators, prey, allies, or competitors in the field; (2) terrain and the relative strengths and weaknesses of the aforementioned players; and (3) the potential for survival opportunities.

Do the parties want to maintain their relationship(s) after the mediation process concludes? Best to use transformative and facilitative techniques. Do the parties want from you as a mediator an idea of how they would fare in court (what is sometimes termed a "mediator's proposal" or "reality check") so that they can adjust negotiation positions? Best to use evaluative techniques. Is there a power imbalance that is being exploited? Best to use facilitative techniques and caucuses (private meetings between the mediator and the party or parties on one side of the conflict).

And, of course, all of the aforementioned considerations and more can present themselves sequentially, simultaneously, or spontaneously in one or more mediation sessions. As such, the adaptive, evolving "chameleon mediator" has a distinct—and perhaps sometimes critical—advantage over mediators who rigidly follow only one mediation style.

Tips for the Chameleon Mediator

While being a "chameleon mediator" has advantages, it is not for every person. At the end of the day, Polonius' famous words in Act I, Scene 3 of Hamlet still ring true: "This above all: to thine own self be true." As such, if, for example, you are by nature facilitative and simply cannot bring yourself to be evaluative when the parties want you to be so, then don't force yourself to change. You will likely either fall short or—worse—be perceived by the parties as not being genuine. In this regard, the parties' trust of you as their mediator—somewhat analogous to the blood that runs through the chameleon's body—is paramount. Lose that, and all is lost.

Still interested in "chameleon mediation"? If so, here are three tips which I've found from experience to be helpful: (1) Solid Preparation — As is the case with many things in life, serious preparation for mediation sessions—meaning at the very least in-depth knowledge of relevant facts, occurrences, and transactions and a clear understanding of the strengths and weaknesses of all party positions—will allow you to better devote mental resources to appreciating the "flow of emotions" in the sessions and deciding when and to what degree to "change your colors" (i.e., your mediation approach); (2) Disclosure — To maintain trust and candor, tell the parties up front (without being too specific) in your introductory remarks that you will be using a variety of mediation techniques based upon several styles of mediation; and (3) Reflection (or Camouflage) — Without actually saying, implying, or doing anything to align yourself with party positions or interests, use active listening skills such as looping to slowly, accurately, and empathetically reflect back what the parties state to you (in both joint sessions and caucuses). There are times where reframing of statements will be necessary, but if possible, try to reflect your understanding of any statements before reframing them. With a little bit of practice, like the wisest of chameleons, you will soon learn to become virtually invisible and end up helping the parties help themselves all by themselves.

LEGAL GUIDE

Written by attorney David J. Abeshouse I Jun 18, 2013

Business ADR (Arbitration and Mediation) vs. Court Litigation for Commercial Cases

Business contracts (/topics/business-contracts/advice)
Business litigation (/topics/small-business-litigation/advice)
Business legal disputes (/topics/small-business-legal-disputes/advice)

The American court system has been our forum for settling disagreements. This mostly worked, for a century or so. Early in the 20th century, new alternatives arose in reaction to many of the defects of our judiciary, and others globally. Now, 90 years later, Alternative Dispute Resolution (ADR -- including arbitration and mediation) has a firm and deservedly growing foothold in our business dispute resolution landscape, domestically and globally.

The vast majority of recent United States Supreme Court decisions encourage greater use of ADR in business cases. However, ADR is not yet sufficiently widespread in the opinion of those who see it as a better way to resolve more business conflicts without enduring onerous court procedures before an overworked judiciary.

Let's define what we are talking about here. Arbitration generally is a more streamlined, faster form of adversarial dispute resolution with greater finality than court litigation. Like court, there is a trial, and arbitration is binding - the Arbitrator issues an award, similar to a court judgment, determining who wins and who loses, and in what manner.

Arbitrators hear cases only within their subject area expertise, whereas most judges are generalists, hearing a wide variety of matters. Most arbitration are private, unlike the public-record court system.

Mediation, in contrast, generally is a more consensual, voluntary, negotiation-based process, with no mandatory resolution forced upon the parties. Rather, in mediation, the parties present their thoughts to each other and the Mediator (either with or without counsel), and the participants work together to reach a settlement that benefits all to the greatest extent possible, including by preserving relationships; civility trumps combativeness. The presence of the impartial Mediator changes the settlement dynamic, as (s)he helps the parties explore the issues, their positions, their interests, and the creative options for resolution. The participants enjoy the most open opportunity to be heard (and even "vent"), unrestricted by the rules of evidence. In mediation, the parties themselves ultimately determine the resolution of the dispute, often in a customized, cost-effective, win-win fashion. Mediation can be used instead of, or even during, an arbitration or court litigation. Mediation is highly successful, with more than 85% of mediated business cases resulting in settlement agreements.

One of the principal advantages of ADR is the speed (and accompanying cost savings) of its streamlined processes. A recent statistical review of 100 business cases filed with the American Arbitration Association with claims seeking more than $500,000 shows the median completion time as just 13 months. AAA Commercial Bulletin, Issue 6, Dec. 2010. Those same cases if filed in court likely would have averaged between 3 and 4 years to complete. Longer duration almost always equals more attorney hours expended, which translates to significantly greater expense, even after adding arbitrator compensation.

So what should business owners and their contract-drafting lawyers do if they want to benefit from ADR? With a bit of advance strategic thought, they can include a dispute resolution clause in their business agreements. Unfortunately, all too often, negotiating arbitration clauses is an afterthought, if it's considered at all. Parties tend to negotiate them minimally after the rest of the contract has been negotiated, although an arbitration clause becomes a key provision when a dispute later arises.

Many different forms of dispute resolution clauses exist, as ADR is a creature of contract and is flexible almost without limit. So it is a shame that most lawyers use an old "standard" (actually sub-standard) form dispute resolution clause, thereby squandering the opportunity to create a truly customized and helpful provision. Many resources exist for obtaining assistance in drafting, including sample clauses on the websites of various ADR providers such as the American Arbitration Association (http://www.adr.org (http://www.adr.org)), JAMS, NAM, and others. Perhaps the best course of all is consulting a knowledgeable ADR expert, to learn about what specific components of a clause might be used to the advantage of a client in a particular situation. Some experts even offer free consultations for drafting dispute resolution clauses, because this enhances appropriate use of ADR to resolve business disputes, and that rising tide floats all boats.

Please note that I am licensed to practice law only in NY. This guide is provided for general educational purposes only, and no attorney-client relationship has been formed. It should not be relied upon as legal advice. To the extent unique facts may exist in any give situation, the considerations might possibly change. The response given is not intended to create, nor does it create an ongoing duty to respond to questions. As they say, "Your Mileage May Vary." Best of luck.

Additional resources provided by the author

For additional information, please visit the websites of the major arbitration and alternative dispute resolution providers and forums, such as the American Arbitration Association: http://www.ADR.org (http://www.ADR.org)

American Arbitration Association (http://www.ADR.org)

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BEFORE THE REAL NEGOTIATIONS BEGIN: USE GOOD FAITH DISCLOSURE AND PROACTIVITY TO PREVENT MEDIATION SABOTAGE

By: Hon. John P. DiBlasi, J.S.C. (Ret.)

New York Law Journal Alternative Dispute Resolution (ADR) Special Report

August 2019

The joint session of the mediation, where disputing parties speak directly to one another, is often considered the best opportunity for the parties to engage in a realistic discussion of the strengths and weaknesses of their case. However, joint sessions don't always end up with parties finding common ground. In many cases, the mediation process is often sabotaged during the joint session where a dispute arises with respect to communications between counsel prior to the mediation. These critical communications are usually informal, never reduced to writing and often lead to misunderstanding and mistrust between parties. In other words, the joint session could have the adverse effect of driving parties further apart. As a result, the mediator – in an attempt to move the resolution process forward – redirects valuable time away from the mediation in order to smooth ruffled feathers and to help to resolve an argument about what was represented prior to the mediation.

To avoid this scenario, the parties should always confirm in writing any understanding upon which their agreement to mediate is based, well in advance of the mediation. Further, it should be mutually agreed upon that the parties will disclose any change of circumstances that will affect that understanding prior to the mediation. The purpose is twofold: 1) it will allow counsel to reevaluate their client's settlement position and proceed with the mediation; or 2) adjourn the mediation to allow parties additional time to do so.

Below are a few additional suggestions in regard to the type of information counsel should disclose in advance of a mediation:

- A change in the demand or offer previously made;

- new evidence that substantially strengthens a claim or a defense that will affect opposing counsel's evaluation of same (unless there is some tactical reason to withhold this information);
- who will attend the mediation;
- insurance coverage amounts and any issues that involve a reservation of rights, disclaimer or erosion of coverage;
- lien amounts; and
- whether mediation submissions will be submitted confidentially or exchanged.

Communicating this information up front, as early as possible, will move the resolution process forward.

Demands, Offers and Settlement Terms

One of the most vexing problems that confronts a mediator is a dispute over discussions regarding monetary demands, offers, and settlement terms that took place prior to the mediation. This occurs in a large percentage of cases.

In a recent matter in response to a settlement demand of $38 million made a year prior to the mediation, the defendant offered $27 million. Yet, on the day of the mediation the offer was reduced to $14 million. The explanation given by defense counsel was that the passage of time had affected his client's willingness to pay that amount. The result was a quick impasse. Counsel for the defendant should have conveyed the change in his client's settlement position well in advance of the mediation. Counsel for the plaintiff should have been proactive and reiterated that the offer made a year earlier was still on the table.

The ethical duty of fair dealing in negotiations would require the disclosure of a change in a party's settlement demand or offer upon which the agreement to mediate was predicated. Counsel should be proactive and confirm in writing any such demands, offers or proposed settlement terms prior to the mediation to avoid any dispute arising from same which will only be detrimental to a successful mediation process. Counsel participating in mediations would be well advised to familiarize themselves with the *Ethical Guidelines for Settlement Negotiations* promulgated by the Section of Litigation of the American Bar Association.

Changes in Proof

Very often the underlying facts that the parties have been relying on to assess liability or damages, change prior to the mediation. If there are new witnesses, documentary evidence, or anything else that would significantly alter an assessment of liability or damages, this should be disclosed well in advance of the mediation. Parties come to a mediation with a settlement position based upon the information that was provided in advance. To surprise an adversary with new information that could materially affect their evaluation of the case is counterproductive. This will often result in the mediation being adjourned to allow for a reevaluation of the settlement position.

Persons in Attendance – Case in Point

In a contract dispute between two Fortune 500 corporations with billions of dollars in issue, one CEO travelled a great distance to attend the mediation. The other CEO whose corporate headquarters was in the city where the mediation was held failed to appear. The negotiation ended before it had a chance to begin as it was the understanding of one CEO that the other would attend.

Where there is an expectation that either a party, decision maker or an attorney will be present at the mediation, their failure to appear creates mistrust. Opposing counsel's perception will be that the mediation process is not being taken seriously. When counsel learns that a person of relevance who is to be present at the mediation will not be showing, opposing counsel should be given notice in advance of the mediation. This allows the adversary's attorney to consider whether they wish to proceed in the absence of this individual. If you have an expectation that a specific individual will attend the mediation, be proactive and confirm in writing that that person will be in attendance.

Insurance Coverage and Lien Information

Once again in a more recent case, the plaintiff's counsel and their clients travelled a great distance to mediate a complex matter. The dispute involved a default by contractors on a large construction project. At the commencement of the mediation, it was disclosed for the first time that the defendant's insurance carriers were proceeding under a reservation of rights and potentially could disclaim coverage. This information should have been disclosed prior to the mediation.

If there is a reservation of rights and/or a disclaimer under a policy of insurance, or the potential thereof, that should be disclosed well in advance of the mediation. Counsel should confirm, beforehand, that there are no such issues.

A separate issue pertains to the amount of available coverage. Typically, defendants are required to disclose the amount of insurance coverage pursuant to a discovery order issued by the court. Usually, the obligation is a continuing one. Initial settlement demands are often predicated upon this representation. At a mediation of a professional liability matter, there was a representation prior to the mediation and during the joint session that the available insurance coverage was $5 million. In the first break-out session, counsel for the defendant disclosed the coverage limit had been eroded to $3 million. This was due to legal fees and monies that had been paid out on separate claims during the same policy period. This conduct violated the discovery order of the court. Further it was clearly unethical, as there was misrepresentation of a material fact upon which opposing counsel relied, in entering into the negotiation. While disclosure may be made pursuant to court order there is no downside confirming, in writing, the coverage information previously disclosed.

Another issue relates to excess coverage. There are too many instances where, prior to the mediation, the amount of primary coverage is presented, but the available excess is not. When the excess coverage amount is disclosed at the mediation, plaintiff's counsel will immediately revise their demand. If a representation is made that there is no excess coverage, the best practice is to obtain an affidavit as to same prior to the mediation.

Finally, as to lien information, defendants will take the amount of a lien into consideration when determining settlement value. Liens, while often negotiable, can create an obstacle to settlement. It does not serve the process to surprise defense counsel with a large lien amount for the first time at the mediation. This again will often create a situation where the mediation will be adjourned to give defendant the opportunity to reevaluate the case.

Exchange of Mediation Briefs

One of the issues that parties rarely address is whether pre-mediation briefs will be submitted confidentially to the mediator or exchanged. Often one party will exchange and the other will not. Invariably, the party who did exchange feels that they have been prejudiced by what they perceive to be opposing counsel's ex parte communication with the mediator. The best practice would be to confirm in writing whether briefs will be exchanged or submitted confidentially before the mediation.

Conclusion

The basis for this article is the author's long experience as a neutral, observing the aforementioned scenarios, and how they negatively affect the mediation process. A successful mediation is predicated on trust. Transparency and professional courtesy go a long way in advancing negotiations. It will serve the process, and your client well, by the disclosure of any new information that may affect opposing counsel's case. At the same time, be proactive and confirm in writing any understanding that you may have upon which the mediation may be based. This will ensure that the mediation does not get off to a bad start and the negotiation process is not sabotaged by a lack of trust before it has even begun.

Hon. John P. DiBlasi is a retired Justice of the Supreme Court, Commercial and Civil Divisions, Westchester County, New York. He is a member of NAM's (National Arbitration and Mediation) Hearing Officer Panel and is available to arbitrate and mediate cases throughout the United States. In 2020, Judge DiBlasi was ranked a Top Three Mediator in the United States by The National Law Journal Annual Best of Survey for the seventh straight year (#1, 4 years in a row) and he was voted a Top Ten Mediator in this year's The New York Law Journal Annual Best of Survey for the eleventh consecutive year. He was also voted the #1 Mediator in the country by the 2018 Corporate Counsel Best of Survey and for the third straight year, was named a National Law Journal Alternative Dispute Resolution Champion, as part of a select group of only 46 nationwide. Judge DiBlasi has consistently been designated a Super Lawyer and holds an AV Preeminent Peer Rating from Martindale-Hubbell in both Alternative Dispute Resolution and Litigation – a distinction given only to those who possess the highest ethical standards and professional ability.

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EMBRACING TECHNOLOGY IN THE FACE OF THE CORONA VIRUS – VIRTUAL REALITY IN ARBITRATIONS & MEDIATIONS

By: Hon. John P. DiBlasi, J.S.C. (Ret.)

Several years ago, I served as a member of a tri-panel in a commercial arbitration. It consisted of three neutrals who were based in various locations on the East Coast. The attorneys were located on both the East and West Coasts. To accommodate the witnesses, a decision was made that the arbitration would be held in Los Angeles.

With that background, it is easy to see that the logistics involved were difficult and the expense significant. Before the commencement of the arbitration, there was the need for numerous teleconferences on a variety of issues. Additionally, oral argument was requested on various motions. The technology possessed by the ADR provider, NAM (National Arbitration and Mediation), made it relatively simple to handle this. Based upon a decision made by the panel on a Frye-Daubert motion, it also became necessary to take testimony from expert witnesses. It was suggested by NAM that, rather than have the panel and counsel travel to Los Angeles, we should use their technology to conduct the hearing virtually by videoconference. While all were a bit skeptical as to whether this could be done, lengthy direct and cross-examinations of two experts were conducted with the panel members, counsel and witnesses on both the East and West Coasts. The process was quick and efficient, saving both time and money. There was no qualitative difference in doing the hearing virtually as opposed to doing it in person.

Several months later, the arbitration took place in Los Angeles. After taking testimony for approximately two weeks, there was one remaining witness whose testimony was needed. However, there was no time left to do so. It was late in the day and all were scheduled to fly home due to other professional commitments. Difficulties immediately arose as to scheduling an adjournment date. Accommodating the schedules of so many people was daunting. All were concerned at the prospect of a lengthy delay. Returning to Los Angeles several months later to take the testimony of a single witness would have been a great inconvenience to the panel, a significant expense to the parties and simply made no sense. A decision was made to complete the arbitration virtually by videoconference as had been done with the experts at the Frye -Daubert hearing. The arbitration was completed “virtually” shortly thereafter.

Why Are we Hesitant to Embrace New Technology?

There have been many major technological innovations that have positively impacted the practice of law in the last 40 years: the word processor, fax machines, pagers, cell phones, the internet, email, and smart phones, to name a few. Acceptance of these new technological tools took time. There was resistance at the outset, much in the way there was to the ADR process when it was new. Everyone looks upon any major change with suspicion as they are unsure that it will work. People are afraid that they will not be able to master new technology. Sometimes, change becomes inevitable.

The Coronavirus as a Stimulus for Change

Necessity precipitates change. The Coronavirus has created a necessity that is going to force radical change in our society, business and government. The way in which we conduct ADR will evolve as part of that change.

The technology to conduct virtual arbitrations and mediations has been available for many years. It was developed to improve the delivery of ADR services. The acceptance of the technology has been slow. However, it has now become a necessity because of the Coronavirus. The alternative is to cease operations. As such, the current situation that we find ourselves in may lead to the widespread acceptance and use of this new technology.

The Technology

The first thing that consumers always ask is what will this cost me? The answer is nothing. That should be incentive enough to explore its use. The next question is how complicated is it to use? The answer is that it is very simple and anyone can use it.

Virtual technology creates the ability to host mediations and arbitrations while allowing participation from any location. Once you become familiar with it, there is little difference between conducting a mediation or arbitration in-person or virtually. The technology allows attorneys and their clients to continue with the ADR process even if their offices are closed and they are in self-quarantine due to the pandemic. This is not to say that it should entirely displace the face-to-face process. There is value in both.

With regard to the mediation process, the technology allows multiple participants to engage with the neutral in joint and break-out sessions by video or telephonically. Attorneys will be able to have private conferences with their clients, with or without the mediator. The technology allows for virtual private break-out rooms for party caucusing. The neutrals are fully trained to hear cases in this manner. The neutral serves as a host with the ability to control the creation of the various virtual rooms that are needed for the process. There is no need to worry about confidentiality as the neutral, through a fail-safe system, ensures that when the parties need privacy, whether by video or teleconference, they get it and it is absolute. For example, the neutral can leave you and your client to speak privately about a demand and/or offer and then give a knock on the door of your virtual room to check in and see if you are ready to speak. The mediator can bring the parties back together and separate them again as needed. Whether the neutrals or parties are working from their offices or from their homes, the quality of the video or audio-transmissions is exceptional.

The only equipment you need is a desktop, laptop, iPad, surface pro or a cell phone. It is simple to install a free download and familiarize yourself with the technology.

The Benefits of the Virtual ADR Process

Business Continuity

During this time, business continuity is paramount. The virtual technology allows the ability for all parties in the ADR process to continue their work. The neutral, counsel, and clients could be in their offices or in their home. As long as they have internet connectivity, the ADR process will continue as usual.

You Do Not Need to Cancel

The current pandemic is having a radical effect on the ability to conduct business. However, natural disasters, weather, strikes, accidents, equipment failure or a reduction of services interrupted our daily life long before the coronavirus. Anything that affects our ability to travel can disrupt business and result in the cancellation of a scheduled mediation or arbitration. With the benefit of virtual ADR, this need not happen.

Scheduling

A great deal of effort goes into the setting up of a mediation or arbitration. It takes time, especially in multi-party cases, to coordinate the schedules of the neutrals, the parties and their clients. A cancellation can result in the mediation or arbitration being adjourned for several months. The virtual ADR process dramatically reduces this possibility by creating greater flexibility. Some may choose to appear in person or others may appear virtually, making scheduling easier.

Savings in time

Whether you travel nationally or locally to attend an arbitration or mediation, significant time is spent getting to and from the physical location. If you are traveling from out of state, there can be a minimum of one to two days of time lost. Even if you are traveling locally, you will likely spend several hours commuting. Virtual technology can eliminate the need for travel, resulting in the savings of a significant amount of time.

Reduction of Cost

Whenever travel is involved, there is expense. As discussed at the beginning of this article, three neutrals and numerous attorneys were required to travel considerable distances to attend an arbitration. The use of virtual technology will give the parties the ability to reduce, if not eliminate, the cost of air travel, hotels, meals and other related expenses. Again, some parties may be present in person and others may attend virtually- it is a choice.

Conclusion

It is hard to think about silver linings when we are besieged by a pandemic that is causing us to stop and change our day-to-day lives. Hopefully, our society will be better prepared to cope with situations like this in the future from lessons to be learned now. For those involved in the ADR

process, the choice may be to postpone a mediation or arbitration indefinitely. However, as we try to carry on and find our new normal, this may be an opportunity to explore the use of a new technology which will make this unnecessary. It may be effectively utilized long after the current situation resolves. There is everything to gain and nothing to lose.

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THE JOINT SESSION – BENEFITS TO CONSIDER

By: Hon. John P. DiBlasi, J.S.C. (Ret.)

Recently, I was interviewed about the usefulness of joint sessions. In the article, published in the "Daily Report", *Mediators Talk 'East v. West' Split Over Use of Opening Sessions to Lay Out Disputes,* there were contrasting views given by three other mediators from different parts of the country. The premise of the article was that there is a difference of opinion based upon geography. My impression is that everyone is all over the map on this issue. Some are strongly in favor, some strongly against and some in the middle like myself. That is not a Solomonic cop-out. Attorneys who have been litigating cases for years are in the best position to judge whether a joint session is worthwhile or not. There is no rule that there must be a joint session at a mediation. Every case is different. A mediator should maintain the flexibility to always work in a way that will best serve the process.

With that introduction, attorneys often waive the joint session without considering the benefits.

Time

The most common reason expressed for not wanting a joint session is that both sides believe they know everything about the other's case. Nothing could be further from the truth. Where the parties have waived a joint session, inevitably it is revealed in the breakout sessions, that they do not fully understand the other side's position. There are facts or arguments that they are unaware of. The mediator is now acting as a conduit of new information. Valuable time is wasted clarifying positions in the breakout sessions and, in many cases, holding a belated joint session.

Attendance

If the joint session consists of nothing more than the parties introducing themselves, it is worthwhile. A common occurrence when the joint session is waived is not knowing who all the players are on the other side. A mediator is then asked who an unidentified person(s) is and their role. Often this is a key decision maker who is maintaining a low profile. You should know the answer before you begin negotiations. In many cases the parties have not met in person previously. This is an opportunity to at least some extent, assess your adversaries.

Mediator

Generally, the mediator prepares a written summary of the parties' submissions. This is then used to orally convey what he knows about the case during the joint session, without breaching confidentiality. The parties are given the opportunity to tell the mediator if he got it right or wrong and to highlight or add additional information. This also allows the mediator, again without breaching confidentiality or prejudicing a party, to clarify positions. The parties share their contrasting views, if not for their benefit, then for the mediator's. On a personal note, I have never viewed myself as infallible, either as a judge or as a mediator.

Information

One of the other reasons for waiving a joint session is that it merely becomes an opportunity for counsel to grandstand for their clients, and that it can often cause more harm than good. If counsel believes for any reason that the joint session could be harmful to the process it should be waived. If a joint session seems to be headed in that direction, a capable mediator will simply end it. Further, counsel has the option of doing so.

Without exception attorneys who grandstand, in their hubris, inevitably give up valuable information to opposing counsel. Those who are in love with the sound of their own

voice, inadvertently leak information to the benefit of their adversary. Further, one of the most basic strategies of negotiation is to gather information. Anytime anyone is willing to talk about their position, even if they think they know it all or have heard it all, must simply listen. There is no downside.

All too often attorneys are obsessed with advocating their position and simply do not listen attentively. Give your adversary the opportunity to speak. Sit quietly and listen even if what is being said may rankle you. A mediation is not a trial. It is a negotiation process that is based upon the exchange of information. You have two ears and one mouth. Listen twice as much as you speak.

Conclusion

As was stated in the beginning, there is no rule that a mediation must have a joint session. The mediator is not a judge who can compel counsel to do something that they believe is not in the best interests of their client. However, virtual communication has conditioned us to avoid direct communication such as in a joint session. Consider whether there is still value in looking someone in the eye and telling them what you think.

About NAM's author

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