EFFECTIVE MEDIATION OF THE PERSONAL INJURY MATTER:

Grasping Victory with an Open Hand

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Caveat Lector

Welcome to this effort to present a thorough consideration of the mediation of personal injury matters. If you are of a pragmatic bent, seeking practice tips and eschewing theoretical considerations, you might choose to skip the first section of this essay and move directly to the section beginning with "Getting Down to Business – Practical Tips for the Representative in Mediation." You will be much happier.

On the other hand, should you, like this author, have a broader – and passionate - interest in mediation, we recommend reading from the start. The initial section reviews mediation in general, explores the depth of potential in the mediation process, and considers the place and unique function of personal injury mediation in the mediation arena in light of the special role of personal injury litigation in the American system of addressing life challenges and societal needs relating to the occurrence of personal injuries of this kind.

Sources of Mediation and its Introduction to the Personal Injury Field

One foggy day, John Smith slipped on Mary Jones's property. Mary came out of her home, asked John how he was, and offered him a cup of tea. She said she was sorry he fell and asked if there was anything she could do. He said: "don't worry about it; I am fine" and limped off. That was the end of that.

When thinking of the mediation of personal injury disputes, most of us trained in law and experienced with personal injury practice, visualize a session involving lawyers and the mediator discussing liability and damages, with consideration of notice, liability, comparative fault or contribution, hospital and medical records, bills of particulars, medical reports, economic damages, and assessments of pain and suffering. We foresee numbers going back and forth, starting with pie in the sky demands by the plaintiff's counsel and no pay positions by defendants and their insurance adjusters, proceeding in a march towards some center and ultimate deal. We generally do not envision John and Mary chatting over a cup of tea and ending with a "nevermind."

Yet, when thinking of how best to develop a Chapter offering guidance to personal injury practitioners, including insurers, it struck this author that, in the words of Ricky Ricardo to Lucy, we have a lot of explaining to do. Somehow, today, the mediation of personal injury disputes has grown from an aberrant occurrence twenty-five years ago, to a regular feature in the landscape of personal injury practice. In the process, mediation in this field has taken on certain characteristics that are different from its roots in the mediations that were conducted thirty years ago, and from mediations that are conducted in other fields today. To enable the personal injury practitioner on either side of the "v" to get the best and fullest use out of mediation, it pays to be familiar with the full range of potential in mediation and its deepest nature, perhaps including aspects of mediation that have fallen into the background. That enables any practitioner to be on the alert for opportunities in mediation to generate value and achieve the highest available satisfaction for one's client – whether it be the plaintiff or defendant, including the non-client party with a financial interest in the dispute: the insurer.

With this in mind, we will first explore the nature and potential of mediation in its depth, with a brief historical gander at the development of mediation to provide some context. From there we may develop a model of leading features of mediation for the personal injury practitioner. With that context we will move from the theoretical to the practical in a step by step guide for the personal injury practitioner at every stage of the mediation process.

What is Mediation*?*

In its purest form, mediation is an exercise in radical freedom. Parties come together in a confidential meeting where, with the help of a skilled neutral facilitator, they are encouraged to engage in dialogue. The parties are front and center in this model of mediation, which has as it first principle party self-determination. Indeed, the first of what are currently nine core principles in the most widely accepted Standards of Conduct for Mediators is Self-Determination.[1]

[1] In 1994, the American Arbitration Association (AAA), American Bar Association (ABA), and the Society for Professionals in Dispute Resolution (SPIDR) published their Standards of Conduct for Mediators, which have been the leading guide for mediator ethics to present. Standard I in the original rules began with Self

That parties engage directly and actively in the negotiation which is facilitated by a neutral third party has been a hallmark of mediation for the last thirty years. Putting parties front and center empowers parties to communicate directly, or through the neutral.

Another characteristic of mediation, along with party empowerment, is that the scope of what can be discussed is not limited to the parties' legal case. Parties, in dialogue or negotiation, are free to express their feelings, values, and principles – which might be rooted in sources other than laws and statutes -- their business interests, their family, social, and interpersonal concerns, and a host of other dimensions that are not defined by legal analysis. Both in theory and practice, mediation accommodates resolutions that consider a wide range of party interests and which may be

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Determination. Similarly, the first Standard in the revised, currently applicable Standards of Conduct for Mediators provides:

STANDARD I. SELF-DETERMINATION

A. A mediator shall conduct a mediation based on the principle of party self determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.

Model Standards Of Conduct For Mediators, American Arbitration Association (Adopted September 8, 2005), American Bar Association (Approved By The ABA House Of Delegates August 9, 2005), Association For Conflict Resolution (Adopted August 22, 2005). The Model Standards of Conduct for Mediators originally published in 1994 was revised by the AAA/ ABA/ ACR in 2005. ACR is the successor organization resulting from the merger of the Association for Conflict Resolution (ACR), Conflict Resolution Network (CReNet), and SPIDR. The Rules for Construction state: "These Standards are to be read and construed in their entirety. There is no priority significance attached to the sequence in which the Standards appear." Nevertheless, it is hard to ignore the fact that in each version the first rule shown was the rule of party Self-Determination.

designed to meet the unique configuration of party needs and circumstances – providing for outcomes and deal structures that can be different from the outcomes of a trial or judicial order. Essentially, the parties craft their own resolution, which may be anything, as long as it is not illegal.

Similarly, since parties are in the driver's seat, the values that are applied to determine the parties' deal may be different from those that govern legal outcomes. Parties may make concessions to preserve relationships, even though this might involve the loss of theoretical economic value or legal entitlements. They may make trades that make no economic or market sense, driven by personal, subjective values. There is even room for forgiveness in mediated discussions and outcomes. Mediated resolutions can also take into consideration parties' economic capacity, resulting in adjustments in the size or timing of payments that might be agreed. Trades of all kinds are permissible. A party may even, like John Smith, give up a claim in exchange for some kind words, a feeling of understanding, and a cup of tea.

Experienced personal injury practitioners, and even insurers handling personal injury matters, might blanch at this description of mediation. Apart from the dissonance engendered by comparing this picture of mediation with the practitioner's experience in personal injury mediations today, there is a structural reason for this discomfort. The personal injury field involves a compensation scheme that addresses certain societal needs in our American, democratic and capitalist system. One could imagine another system where injured parties are guaranteed healthcare and are backstopped with income from the state when their injury prevents them from working. While pain and suffering is a separate issue, one could also imagine a paternalistic government which attends to the interest of increasing public safety through its own investigations, and a mechanism of fines and other punishments. Here, in the US, by contrast, the plaintiff's bar armed with stare decisis, coupled with developed statutes and regulations, form a phalanx of private attorney generals promoting the development of measures to enhance and promote public safety. Rather than draw resources for healthcare and compensation from the public till, we have a patchwork quilt of insurers (and reinsurers), as well as corporate and private sources exposed to liability for personal injuries.

Given our existing system, it is difficult for a social engineer – or counsel or insurers accustomed to their role in the personal injury field – to be satisfied with a cup of tea and understanding as a means of addressing injuries and providing for compensation. Hence, personal injury mediations have developed today with an orientation towards certain expected outcomes. Practitioners in today's personal injury mediations tend to anticipate discussions meaningfully involving assessments of case risks and likely court outcomes, as well as calculations of damages along the lines of medical expenses, pain and suffering, and lost wages or income, and considerations of the transaction cost of ongoing litigation.

With this in mind, we will use a model of mediation that is appropriate for personal injury mediations and the societal needs they address. Yet we should not forget that there are other dimensions of meaning that can provide benefits to one's clients, and that a reasonable degree of direct participation might provide added party satisfaction. Accordingly, before we move to the model applied in this Chapter, we can take an historical look at the roots of mediation in the hope of finding additional dimensions that might be of value in today's personal injury mediation.

Labor, Community and Family Mediation -- Transformative, Understanding Based & Problem Solving Approaches

In the early 1990s, when mediation was first being introduced to the legal community, the process emerged from a background of use in community dispute resolution the labor and employment arena. As mentioned, mediation was touted as a party-centric process.

Transformative Mediation

Coming from the community mediation context, in 1996, Professors Robert A. Baruch Bush and Joseph P. Folger published the manifesto of the transformative mediation school: The Promise of Mediation – the Transformative Approach to Conflict. Proponents of transformative mediation see the chief role of the mediator as fostering party empowerment and recognition.[2] The mediator is seen as a neutral party whose task is not to settle a matter, tell parties who is right or wrong, or give predictions of who is going to win or lose. Indeed, for the transformatives, the mediator, as pure facilitator of the parties' own activities, is not even charged with solving the problem of the parties' negotiation. Rather, the chief focus is fostering effective communication which would enhance the quality of the parties' relationship. For the transformative school, conflict is a crisis in human relationship. When embroiled in conflict, parties tend to be uncomfortable, hunkered down, and seeking escape, like lobsters in a pot. Parties enter a defensive posture, concerned with their own interests and incapable of really recognizing the interests or perspective of the other. For the transformatives, party empowerment means helping parties recognize opportunities to makechoices – whether the choices were process choices of whether and when to speak and with whom to speak (or listen), or if they were the making or accepting of proposals to resolve the matter. As parties in conflict gain a greater sense of empowerment – seeing that they have a handle on the situation, and that their own behavior is well in their control – they gain enough confidence to, for the first time, grow open to understanding the other. This is the twin purpose of fostering recognition. This growth in empathy is the moral transformation that gave transformative mediation its name. With the growth in empowerment and recognition, through effective communication, the quality of the relationship is enhanced, and the conflict tends to resolve as a natural consequence of this change.

Facilitated Problem Solving – Harvard Negotiation Project

The practice of mediation was also heavily influenced by the work of the Harvard Negotiation Project, which generated contemporary negotiation classics like Getting to Yes or Getting Past No. The message of these books and related teaching is that a cooperative approach to negotiation offers a more efficient and user-friendly process with less *Sturm und Drang* and greater gains to all parties. The job of mediators applying these insights is again that of a facilitator of the parties' own creative deal making. Mediators can help parties communicate more constructively, reflect on their own feelings, perceptions and interests, identify core issues at the heart of their dispute, identify the interests of all parties, seek options to satisfy the parties' interest, use standards to help them in their efforts to understand and develop solutions, and consider alternatives to deals on the table. In short, the mediator helps parties do their own analysis of what is important, what might happen if they do not make a deal, and of the facts and circumstances that led to their dispute; and works with parties to help them develop and assess the value of proposals to resolve their issues.

[2] The manifesto of the transformative approach to mediation is found in Bush, Robert A. Baruch, and Folger, Joseph P., The Promise of Mediation – the Transformative Approach to Conflict (1996).

Understanding-Based Model – Himmelstein & Friedman

Forty years ago, Jack Himmelstein and Gary Friedman founded the Center for Mediation in Law which, years later, they renamed the Center for Understanding in Conflict. They see building understanding as the heart of mediation. The mediator's role, for Himmelstein and Friedman, is to help the parties go beneath the "v" in their dispute to gain a fuller awareness of their common situation, including their varying views, values, need, interests, and life circumstances. The mediator uses an active listening technique they term "the loop of understanding." Speaking with one party in the presence of the other, the mediator listens deeply, repeats what has been said, and waits to have the speaker affirm that the mediator is getting the speaker's meaning. The speaker is encouraged to correct the mediator or amplify the meaning or story, and the mediator continues looping, feeding it back to that party, until finally the party exclaims that the mediator really gets it. In this manner, the mediator models one who is interested in fully understanding the other. As understanding is fostered among the parties, eventually the deepened mutual understanding leads to resolution.

Unlike many models of mediation, in the spirit of transparency the understanding-based model employs only joint session. The caucus – a private session of the mediator with only one party – is avoided on the theory that it reinforces the rift between the parties and gives the mediator undue centrality. The mediator, in a caucus model, may act as a filter, bringing messages from one room to the next. But meanings, messages, and enhanced relationship can be lost. Conversely, if certain information is given in confidence, the mediator is then in the awkward and untenable position of being urged to tell the other party that Party A has some strong points, but the mediator is not permitted to explain what they are. Power, for Himmelstein and Friedman, should be in the parties, not the mediator. Thus, the challenge for this model is to conduct communications in a way that induces reflective contemplation and appreciation of the views and differences of all. Parties "contract" at the inception to participate in this process with an aim of building understanding.

Sub-Optimal Models of Personal Injury Mediation

As it came to be used in the personal injury arena, a much more constricted form of mediation came into vogue. Mediations took on the character of settlement conferences held with a judge in court. They could occur over just an hour or two, rather than the full day affairs that we see in commercial or other settings. The mediator is treated as a *quasi* judge, or a neutral evaluator, and often is expected to give his or her opinion on the strengths and weaknesses of the case, to generate a "number" – the thought of the appropriate deal terms – and to urge the parties and counsel to resolve on those terms. Where mediation in the community or labor and employment field stressed party empowerment and self-determination, personal injury mediation sessions often place the parties – particularly the plaintiff – in the back seat. This was starkly highlighted during one personal injury conducted a number of years ago. Throughout the first hours of the mediation, the plaintiff sat slumped in her chair, still wearing her overcoat, chin in hand. The discussion was conducted entirely by her counsel. At times, when this mediator asked her a question or two, she seemed surprised by the notion that she might have something valuable to contribute to this discussion.

The Growth in Use of Personal Injury Mediation

When mediation was initially introduced to the personal injury field, there were varying degrees of receptivity. At a NYSBA CLE program on dispute resolution conducted over ten years ago, a leading representative of personal injury claimants quoted another lawyer's saying: "the heat of the

trial melts the gold." Similarly, defense counsel and insurers were reluctant to enter early settlement discussions. Many believed that more information needed to be developed through discovery, and that the parties' testimony needed to be nailed down through depositions before folks sat around the table discussing the case. Otherwise, once theories and information was revealed, testimony might change at deposition or trial in order to conform to, or circumvent, facts and defenses learned during the settlement discussions. Some insurers held the view that it was preferable to send the message to the plaintiffs' bar that the battle would be long and hard fought. This might act as a deterrent to lawsuits in general or support early and low cost resolutions.

Eventually, counsel on both sides of the table, as well as insurers, came to see real advantages in mediation. Mediation in general has grown to be commonplace in all areas of law: trusts and estates, intellectual property, real estate, partnership, family business, commercial disputes of all shapes and sizes, construction, insurance and reinsurance matters, both first party coverage as well as third party matters, including personal injury. Hence, where it was a rare occurrence in the 1990s, today, mediations are regularly conducted in the personal injury arena. Plaintiff's counsel understand the cost/ benefit calculation in early resolution, and are able to resolve the cases under reasonable terms that benefit their clients, providing certainty and the present value of cash in hand. Defense counsel and insurers have recognized the benefit, where feasible, of saving funds that might be used to pay claims rather than spending them in costly defense only, ultimately, to settle on the courthouse steps.

Given the ubiquity of mediation in the personal injury arena, it behooves counsel for both plaintiff and defense – and sophisticated claims handlers and counsel within insurance companies – to know how to make the best use of mediation. This Chapter offers a guide to counsel on all sides of the personal injury equation. Our approach is to develop a "taxonomy of mediation" presenting the core dimensions of mediation pertinent to personal injury matters, and then to walk the practitioner through the phases of mediation in light of this taxonomy. Generally, in application, we will consider personal injury mediation as it is currently conducted, yet with an eye towards best practices. Where appropriate, we will highlight ways to deepen or enhance the use of mediation even beyond the manner in which it is most commonly practiced today. Thus, we blend the pragmatic and the ideal leaving it to you, the practitioner to decide what might work best or offer the greatest value to your clients, be they individuals or corporate parties. It is good to keep in mind that even the most abstract of legal entities – the large insurer – is made of human beings, with their time constraints, aspirations for job continuity and success, desire not to be shamed, values and principles, loyalties, emotions, and goals. Mediators realize that the domain in which we work is humanity itself. Humanity is the *prima materia* in which we swim, and understanding people and interpersonal dynamics is key not only for the mediator but also for the effective representative in the facilitated negotiation which is mediation.

A Taxonomy or Teleology of Mediation for the Personal Injury Practitioner.

For purposes of offering guidance for the effective representation of parties in personal injury matters, we may adopt a centrist view of mediation as a confidential negotiation, or dialogue, facilitated by a neutral third party – the mediator. The role of the mediator is distinct from that of a judge or settlement master. Fundamentally, the mediator neither makes evaluations that parties must follow nor tells the parties what to do. Unlike a judge, who wears the mantle of judicial power, representing a legal system and supported by the authority of the state, including its sheriffs and

marshals, mediators are powerless. We work by agreement and trust. The mediator's chief effort is to foster and build understanding and deal-making.

With this in mind, counsel in mediation will be most successful if they too are guided by the twin goals of building understanding and deal-making. While highlighting understanding, our model makes use of both joint session and caucus. Moreover, while emphasizing the mediator's role as facilitator, it does not exclude the potential of the mediator to help parties engage in effective risk and transaction cost analysis that can include a keen look at case strengths and weaknesses as well as the costs associated with proceeding through trial and possible appeal.

Understanding in mediation is a very broad concept. It can embrace understanding of self, other and circumstances. As will be developed more in our review of negotiation theory as applied to mediation, a good negotiator should be aware of his or her own interests, and representatives should have the interests of their principals well in view. In addition, understanding the interests of the other party is key to enabling negotiators to address the other party's interests and come to a deal. Further, understanding what might happen if the parties are not able to come to a deal is also important. This can embrace not only case evaluation but also recognizing parties' needs for immediate cash, reputational impact of a continuing public litigation, and ongoing costs of litigation.

Understanding goes deeper still. It includes getting a read on parties, counsel and insurers, including the history of their interactions. For instance, a history of cooperation among counsel smooths the path of communication, understanding and deal-making. By contrast, a history of acrimonious discovery disputes, gamesmanship, sanctions motions and related name-calling – eroding trust – can set up a different dynamic for the mediation. Understanding where you are in interparty dynamics is also key to working effectively with this human reality to move through mediation to a deal. Understanding insurers includes recognizing that some need information in order to authorize funds to resolve the matter. Some might need a demand from the plaintiff, setting out the damages. Others might need to take depositions. Still others might require an independent medical examination ("IME"). There is real value in knowing what is required to enable the party on the other side of the table to pay money or make a deal.

One can see that there are many dimensions to understanding in mediation. It pays to be aware of all levels: emotions, values, principles, stories and histories, business context and pressures, organizational hierarchies, case assessments and risks, interparty dynamics – the works. All of these constitute moving parts impacting the parties' negotiations, whether underground or exposed. Transparency, or, conversely, the x-ray ability to discern deal and communication drivers enables parties to address or make adjustments for the factors that are driving the negotiation and conditioning the deal.

Getting Down to Business – Practical Tips for the Representative in Mediation

Having considered the history, theory, and a variety of approaches to mediation – and settling on a model centered on understanding and deal-making – let us now take a walk through the mediation process. At each step, we can consider best practices and tips for the representative in personal injury mediation.

Decision to Mediate

Gateways to Mediation

Personal injury matters can enter mediation in a number of ways. Some insurers or large companies might be sufficiently disposed towards mediation that, in rare instances, they might encourage claimants to mediate even before filing a summons and complaint. Within the last decade, some large products liability corporate defendants have set up protocols for truncated disclosure over the space of two to three months, followed by mediation resolving the matter.

In the vast majority of instances, however, there is no move to mediate until a summons and complaint has been filed and issue has been joined. Cases can move into mediation as the result of court-annexed programs, where mediation might be either voluntary or presumptive, or where, out of a court conference, a specific case is ordered to mediation. Beyond this, at any time, counsel or the parties can conclude that the matter might benefit from their holding settlement discussions with the aid of a neutral party.

Benefits of Mediation

Independent from the gateways to mediation is the question of which matter merits mediation. On either side of the equation – plaintiff's or defendant's – there are generally great benefits in mediation for nearly every case. Mediation offers the chance to resolve a matter years before it is likely to go to trial. For plaintiffs, this is cash in hand – present value of money and its immediate utility – and certainty. For plaintiff's counsel on a contingent fee, this offers a far better hourly rate of return. For defendants, or insurers, there can be major savings in defense costs, which can be used instead to fund the indemnity pot. Beyond this, mediation offers control over the outcome. No deal is required unless each party finds it acceptable, and better than the alternative of waiting for trial, with attendant risks, disruption, and cost. Outcome control includes fashioning deal terms that work for parties. This can include annuities or other structures that might maximize financial returns or create controls for parties who might benefit from them.

While far less pertinent in most personal injury matters than in matters involving ongoing business, community, or family relationships, mediation also offers the opportunity to be understood by the other party and to augment the parties' relationships. Where, for instance, the action might involve claims between fellow car passengers or with fellow construction workers or employers (who might have been brought into the action as third party defendants), relationship enhancement or preservation might, in fact, be a real value.

Additionally, the direct, informal manner of communication in mediation can be a relief from the formality of communication in the litigation context. People can get right to the point and address a far broader range of meaning than in litigation. Mediation offers process control, as well, with opportunities for any form of caucus or joint session.

While there might be benefits for virtually any matter, certain matters might uniquely aided by mediation. If there if friction between counsel or the parties, the mediator might smooth and sustain communications. If there is trouble getting the insurer to focus or negotiate, the mediator might bring the busy claims person's attention to bear, with the mediation date surfacing as a "must do" event. If a party on either side of the table, or counsel on the opposite side of the table, has trouble accurately assessing case value, the mediator can help parties move through a process where

matters get clarified and reality enters the room. All of this occurs without any party's being compelled to make a deal he or she prefers not to accept.

If information is still needed before a deal can be made, the mediator – during preparations for mediation and throughout the mediation process – can help develop truncated disclosure in a confidential setting, without the tedium or cost of elaborate discovery or lengthy depositions. If depositions are needed prior to mediation, the mediator can help the parties sort through disclosure and scheduling, again to reduce time and cost.

Mediator Selection

Court-annexed mediation programs often have panels of mediators ready to mediate matters. At times, the program administrator might select a mediator for the matter. More often than not, the parties are given the option to select their own mediator either privately or off the panel roster. Even where a specific mediator is selected by the administrator, many programs provide the option for parties nevertheless to select their own mediator in lieu of the appointed mediator. Outside court-annexed panels, it is common for parties who decide to mediate to choose a mediator from private providers or to review existing court panels and independently seek out a mediator to help in resolving their dispute. There are also times where insurers might require that the mediator be drawn from a panel of approved mediators.

Where in nearly all instances some level of choice is afforded to parties and counsel, there are a number of things to consider when selecting a mediator. It should be clear from our introduction that the mediator's role is different from that of a judge; and the mediation process itself differs from what happens in court. Therefore, the skills and orientation of a mediator are different from those of a judge. Judges are accustomed to having power, and to making decisions that involve evaluation. Judges are pros at fact finding and application of the law. Many lawyers, as well, have good experience with assessing case strengths and weaknesses, gathering facts, testing evidence, analyzing materiality and relevance, judging causation, considering the trustworthiness of experts, and identifying and applying the law.

Yet mediation is more than this. One of the primary functions of the mediator is to work with people. Helping people communicate, organizing their discussion, facilitating the parties' and counsels' own reflection and decision making is a big part of what mediators do. Indeed, at times the best thing a mediator might do is act as a background player, letting parties and counsel forget for a moment that the mediator is there as they engage in productive discussion, consider what is important to them or the other party, or perform their own case risk or transaction cost analysis. Where judges have power, mediators are powerless. We work with the trust that parties repose in the mediator. We also work to bridge the trust deficit that is endemic to disputes.

Accordingly, the mediator's process skills, and ability to generate trust and confidence, are paramount, and of far greater importance than expertise in an area or evaluation. This is supported by two studies by mediators Margaret Shaw and Steve Goldberg from 2007[3], one of mediators –

[3] Goldberg, Stephen B., Margaret L. Shaw and Jeanne M. Brett. 2009. *What Difference Does a Robe Make? Comparing Mediators with and without Prior Judicial Experience.* Negotiation Journal, 25(3): 277-305. *See also*, Goldberg, Stephen B., Margaret L. Shaw, *The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three.* Negotiation Journal, 393 (October 2007)(hereinafter "*Secrets of Successful Mediator*s").

some of whom were judges and others non-judges - and the second drawing responses from 291 advocates who used these mediators, addressing the question of what makes for a successful mediator. Interestingly, 60% of the attorney representatives identified confidence building skills as the chief quality that accounts for the mediator's success.[4] Another slightly lower showing highlighted process skills as most significant. Only 33% of the users who responded identified skills at evaluation as paramount; and these skills were attributed both to mediators who were former judges and to mediators who were attorneys.

The essential message here is that representatives are well advised to be clear on the range of skills, experience, and orientation that they seek in their mediator. Is there friction among counsel? This might call for a mediator who can manage interpersonal communications and defuse adversarial combat. Do you have a client who is not getting the risk? Here, perhaps, a revered Judge might have impact when analyzing risk. Yet, if the same client is not getting it because of life challenges, financial needs, or frustration with the other party's denial of the claim, perhaps a mediator with good active listening skills – who can validate, empathize, clarify and summarize – might enable that party to have the satisfaction of feeling understood and then become more capable of moving on to a reasonable resolution.

Good mediators have an abundance of patience and persistence, warmth, empathy, openness, interpersonal relatedness, and deep listening skills. Many times, where parties are at odds in their case assessment or willingness to come to a deal, it takes time to have parties talk together, or with the mediator in alternating private caucus sessions, until, gradually, each group makes a variety of successive adjustments and comes within range to make a deal. It does not help here to use a mediator who expects to be obeyed or who quickly comes to a firm view on the "right" outcome and then feels charged to press that view on the parties. Ideal mediators generate active involvement of parties and counsel in reflection, communication, assessment of the significance of each bit of information, identification of their core interests, analysis of cost and risk, and the generation and consideration of each proposal that eventually brings the matter to resolution. Of course, while these might not be the central features of a judge's wheelhouse, there are certainly former judges who have excellent process skills, deep patience, profound respect for parties and counsel, a sense of humor, lack of ego, and the subtle flexibility that enables them to put parties first and nurture the participants engagement in the mediation process. Good mediators do not force issues. Rather, they let the process happen. In lieu of control, they participate in a process that is out of their control. Yet, somehow, while participating i through their warm attention and engagement, they support the parties and counsel in the process offering encouragement, observations, and some guidance that enables them to cross the goal-line to a deal.

One of the mediator's greatest values is keeping parties at the table, not letting the thread of negotiation snap. Thus, look for a mediator who not only will not call it quits, but who also helps parties see the value of continuing and the light at the end of the tunnel. Find the mediator who metaphorically bolts the door and effectively encourages parties to continue bargaining even when the passage of time and the other party's last move or communication makes them feel like bolting for the door.

[4] Elaborating on the meaning of confidence building skills, 60% of the users described the mediators' traits as friendly, empathetic, likeable, relating to all, respectful, conveying sense of caring, wanting to find solutions. Another 53% highlighted the following qualities: high Integrity, honest, neutral, trustworthy, respecting/ guarding confidences, nonjudgmental, credible, and professional. 47% added: smart, quick study, educates self on dispute, prepared, knows the agreement/ law. Goldberg & Shaw, *Secrets of Successful Mediators*, *supra*.

In practical terms, when selecting the mediator, it pays to do some research. Read the court-annexed mediator's bio on the Court's website. Turn to your friend Google. Visit the mediator's website and review any publications or video clips. Contemplate Linked-In. Counsel can ask other lawyers in one's firm or legal community for recommendations, or whether they have experience with the mediator under consideration. Counsel are also free to call the mediator and ask about that mediator's orientation and approach to mediation. Does the mediator tend to be evaluative or facilitative? How much experience does the mediator have with the type of matter going into mediation? If helpful, can the mediator supply references?

This raises the question whether substantive expertise is critical. The Shaw/ Goldberg studies suggest that process skills are far more significant than substantive expertise. Nearly 20 years ago, your author mediated to resolution a matter involving the Warsaw Convention. Counsel for one of the parties wrote a note of thanks to the Court stating: "this matter would never have been resolved but for Mr. Baum's expertise with the Warsaw Convention." In fact, this mediator first learned of the Warsaw Convention from the parties' pre-mediation submissions. We entrust judges to handle a wide scope of criminal and legal matters even though their pre-judicial experience was in a far narrower area of the law. All the more so, where mediators are not making decisions binding on the parties, but, rather, are helping parties go through the process of evaluating cost and risk, considering the drivers and elements of a deal, and communicating effectively to bring the matter to closure, a lack of substantive expertise does not prevent an intelligent, diligent and open-minded mediator from obtaining and reviewing information from the parties to come up to speed with the issues and significant details impacting decision-making. Indeed, expertise can bring the deficit of closed mindedness in a neutral who thinks he or she knows better than parties or counsel what a case is worth or what the best deal should be.

Nevertheless, there is something to be said for the ease of establishing rapport with parties and counsel. A personal injury mediator who does not trip over "BP"[5] or "IME"[6]; who understands the importance of coverage limits, Worker's Compensation or Attorneys liens; and who knows the difference between Bronx or Kings County and Richmond or Dutchess County, can make early inroads in credibility with counsel and bring focus to the discussions. Still, there can be a benefit to slowing things down. Like Peter Falk's television character Colombo, a mediator's polite request for an explanation can bring talks into a simple, respectful, unpressured modality that facilitates mutual understanding and steadies deal-making. Acknowledging ignorance pulls the flurry of assumption laden repartee into a pace and transparency that diminishes anxiety and defensive escalation of arguments. Requesting jury verdict reporters for the county in question, however variable reports may be, can serve the goal of creating a range of potential damages values for the parties to contemplate, without the need for the mediator to make a Delphic pronouncement of how a double amputation will fare in the Bronx.

Initial Communications – the Joint Pre-Mediation Conference Call

Once the mediator has been selected, it is good practice to hold a joint, pre-mediation conference call of counsel with the mediator. This affords the mediator the opportunity to learn from counsel in a nutshell what the matter is about. This is not for the purpose of duking it out.

[5] Bill of Particulars.
[6] Independent Medical Examination.

Rather it enables the mediator and counsel to consider what, if anything, needs to be done prior to mediation to be sure it is a fully productive session. Highlighting the key issues and providing an historical factual and legal background makes it easier to identify areas to be developed or trigger or leverage points that might impact the parties' bargaining and case evaluation at the mediation session. Following are a number of issues that tend to be discussed during the pre-mediation conference call. It is worth bearing in mind that when these issues become overly sensitive, the mediator or counsel might suggest leaving discussion of this issue for a separate, private call, akin to a confidential pre-mediation caucus.

Outstanding Information

Information is the medium of exchange in negotiation. Often, we can find a route to resolution in reducing informational asymmetry. Rather than view the negotiation as a game of hide and seek, counsel can make progress by sharing key information. This enables the claims person to recognize risk and liberate dollars for the settlement pot in advance of the mediation.

There are times when the insurer might need additional depositions, expert reports, medical or hospital records, or and IME before conducting the mediation. The initial joint pre-mediation call offers a chance to assess whether core information is still needed for adequate pricing of the case.

There is often a tension between saving dollars for settlement rather than spending them on discovery and reducing the available settlement pot under an eroding insurance policy. Mediators can be helpful in working with parties to develop truncated methods of disclosure that can speed up delivery of the most essential information. If there is something you need, or you believe the other party will need to be adequately prepared, the initial joint call is a good opportunity to arrange for these disclosures. It is far better to arrive at the mediation with each party's being well informed than to have done inadequate development of information and watch each party stare across the table at the other making contrary assertions with vigor simply due to the lack of shared information.

Need, if any, for Demand

There are some insurers who require a written "demand" in which the plaintiff lays out his or her view of damages or simply states what payment would be required to settle the matter. If this is the case, it is good to learn this in the initial joint pre-mediation call, and to arrange to deliver this demand. This approach is far more efficient than having the claims person come with no authority, or scramble to increase settlement authority after having heard a demand for the first time on the day of the mediation session.

A countervailing consideration is resistance to making the first move in negotiation. Bargaining parties rarely know the full authority level, or reservation point, of their bargaining counterparty. Negotiation theorists have referred to the range within which a deal can be made as the ZOPA –the Zone of Possible Agreement. Thus, if one makes too low a demand, it is possible that one has prematurely sliced off a piece of the ZOPA, conceding ground where a higher settlement payment had been possible. Or, even if the insurer's highest settlement authority were below the first demand, there is a concern that one's demand is too close to the insurer's authority level, leaving too little movement remaining for the dance of negotiation. Moreover, at times a strong demand is made more palatable by coupling it with in person talk, after forming rapport, and with an

understandable and credible presentation on one's case strength, causes for sympathy with the plaintiff, and the appropriateness of a higher payment. Where the insurer or the defense lawyer appears to hold a strongly negative view of plaintiff's claims, it might be preferred to defer making a demand until people have had the chance to speak with the help of a mediator during the course of the mediation.

All of these considerations make the initial joint pre-mediation conference call a good opportunity to explore whether a demand is essential or whether it might best be deferred.

Bargaining History

Little is quite as disruptive as commencing bargaining during the mediation session with a proposal that goes in the reverse direction from that indicated by the bargaining history. A first demand that is higher than the previous one, or a first offer that is lower than the previous, are guaranteed to roil the waters of negotiation. Thus, it is helpful to the mediator for maintaining expectations to learn the parties' bargaining history. At times, hearing discussion of the bargaining history during this first call can provide a perceptive mediator with clues on the scope of the matter, the tenor of negotiations, and the areas that might provide avenues for resolution at the planned mediation session. The mediator might also invite the parties to add a section to their pre-mediation statements that addresses bargaining history as well as their thoughts for resolution.

Party Attendance

The initial call is a good opportunity to be sure that all parties with full settlement authority will be in attendance at the mediation session.

As a general rule, matters are more likely to be resolved on the mediation day if all parties with full settlement authority are present. Mediators thus tend to prefer to have all parties with full authority in the room.

At times, the insurer is out of state or deems the matter too small to merit the time and expense of making the trip. Effective counsel for plaintiffs can use the mediator to push for attendance by the insurance representative. Yet there is a balance to be struck between having the claims person present and not alienating the defense counsel or insurer. After all, negotiations are consensual processes where good will enhances the likelihood of coming to a deal.

Although less of an issue in personal injury matters than in commercial mediations, there are times when it pays to ascertain where the other party's representative falls in the corporate hierarchy in order to avoid hierarchical imbalance that might cause one party to feel offended by the other party's lack of hierarchical status. This might occur in self-insured scenarios or with certain contractors in actions arising out of construction activities.

The value of the plaintiff's presence should not be overlooked. Not only is the plaintiff the ultimate decision maker on resolutions, but there might be times when it is particularly helpful to achieving resolution for the plaintiff to be an active participant. A classic example is the plaintiff with high expectations and low likelihood of success on either liability or damages. Where there

might be limits to how far plaintiff's own counsel may go in exploring case risks without appearing to be less than a zealous advocate or "on the plaintiff's side", information and observations by the other party, its counsel, or the mediator can be helpful in getting the message across. This is not selling one's plaintiff down the river. Rather, as wise counselor or advisor, it is capturing the doable deal rather than tilting at the windmill of a deferred and likely unsuccessful trial.

Pre-Mediation Statements

It is helpful for the mediator to be up to speed with parties and counsel prior to the day of the mediation session. That enables the mediator to focus on the parties' communications and bargaining, as well as on any new information that arises during the mediation day.

In the initial call, the mediator can give counsel a good sense of what could be shared with the mediator in advance to help that mediator prepare. Quite typically, the mediator will request a pre-mediation statement. This is presented in the form of a letter, rather than a brief.

Typically, the mediation statement is submitted to the mediator in confidence, for mediator's eyes only. The advantage of this approach is that counsel can confide in the mediator thoughts for resolution, case weaknesses, process challenges, and even issues with one's own client. The writing can be freer, and more conversational, without concern for offending the party or losing bargaining strength. The chief function of this statement is to bring the mediator current on all dimensions of the matter – legal, historical, bargaining, party interests, and deal possibilities.

An alternative is for parties to exchange the pre-mediation statements. A driving principle here is that mediation is effectively a facilitated negotiation. In a negotiation, the understanding of all parties matters far more than the understanding of the neutral who is helping the parties negotiate. Thus, if certain information is driving a party's insistence on an anticipated settlement package, it makes sense to share that information with the other party, so that they, too, can see the light.

A drawback of the shared approach is that counsel tend to posture more in those statements, they tend to be more constrained, and certain information that might have been communicated in private to the mediator is withheld. A third, hybrid approach, is to have one part shared and another part submitted in confidence to the mediator. This is a bit more costly and cumbersome, and produces a less integrated written product, but has advantages of addressing both the concern of sharing key information with the mediator and of reducing informational asymmetry.

Following are useful components of a pre-mediation statement:

Facts. It generally contains the core facts.

Law. It can present not boiler plate law, but rather law to the extent it is pivotal to the negotiation or to an assessment of the case value as it impacts the likely deal. It might also be useful to share insights on interparty dynamics that might impact negotiations on the day of the mediation, or that might be fueling the flames of the underlying dispute, in disagreements with counsel, or even driving the thinking of the insurer. All of this is material the mediator might work with during the mediation.

Interparty Dynamics. Moreover, insights into interparty dynamics can impact process choices, e.g., whether to have the parties begin with an in-depth joint session, with all parties and counsel in the same room, or whether to emphasize work in caucuses, private meetings with fewer than all parties together in the same room. At times a spouse or close relative are actively involved in decision-making about the case; or might have a steadying (or inflammatory/ anxiety producing) influence. It is helpful for the mediator to know this when considering who will attend or take an active role in the negotiations.

Bargaining History & Thoughts for Resolution. In addition to seeking the bargaining history, it is helpful to the mediator to know each party's thoughts for settlement. It is always a question whether to share this or not. There is some concern that the mediator will follow the path of least resistance. If one party presents an extreme bargaining position and the other is more moderate, the concern is that the mediator will press for a compromise that effectively favors the extremeparty. Given this concern, and observations about the ZOPA, it is natural for counsel to engage in strategic withholding of disclosure on this front. As a consequence, many responses to this question in mediation statements are read by the mediator with a grain of salt.

An alternative consideration is that counsel who present candid responses, which are also reasonable under the circumstances, tend to gain credibility and be read as "friends of the deal." Where all the parties are engaged in a common activity – undertaking efforts to resolve the matter – being perceived as someone who gets it and is truly helping generates good will that can only help one's client. Similarly, credibility is always a strength when bargaining. It gives weight to one's assertions and proposals.

Process Recommendations. This is an opportunity for counsel to share views with the mediator on what might work best. Does it make sense to have a full initial opening joint session? Would it be better for the opening session to be just a "meet and greet", taste the Danish and move directly to caucus? Would it be helpful to encourage the mediator to give evaluative feedback – either to knock some sense into the other party or counsel, or at the right time, to help educate one's own client? Some of these recommendations might be best made in person or by private phone call in advance of the mediation. But the statement is an opportunity for this, as well.

It is also possible that there are coverage issues which could be highlighted for the mediator. To the extent that these are likely to impact the effectiveness of the session, it might make sense to bring these up as soon as possible. This enables the mediator to work the phones in advance to try to clear this up; or to make the coverage issue part of the mediation itself.

Exhibits. While mediators vary, this author urges counsel to err on the side of inclusion in providing any information that is helpful in bringing the mediator up to speed with counsel and the parties. For personal injury matters, this means anything that helps with an assessment of liability and damages, not to mention any other issues, such as coverage, financial challenges, and party interests. On the liability side, incident reports, or other records are helpful. Photos and videos are welcome. Deposition transcripts are invited – either key excerpts if they are extensive, or the entire set, ideally in manuscript and searchable ASCII format. Key motions and decisions on motions to dismiss or for summary judgment can be useful. Spreadsheets on damages, where applicable, can be helpful, comparing plaintiff's and defendants' view on each item. Hospital and medical records, as well as expert reports, if available, are typical. Tax records or other support for economic damages can be valuable as well. Counsel should not overlook the value of jury verdict reporters from the

appropriate county and covering on point injuries and even causes, if available. The mediator is not a medium summoning the right settlement number from the ether. Materials that provide an objective basis for views on value are helpful not only for the mediator, but, eventually, if permitted to be shared, in helping the other party see the value of this case.

Logistics – Time and Place

Unless the court or one's scheduling paralegal has already set the date for mediation, another typical topic for the joint call is selecting the time and place. Generally, the mediation is held at the mediator's office, assuming he or she has access to adequate facilities. It is not unusual, though, alternatively to hold the mediation at the office of counsel for one of the parties. Years ago, some counsel expressed anxiety about not holding the mediation on neutral ground. Today, however, as counsel have come better to understand the mediator's role as facilitator, and the process as potentially cooperative, there has been greater comfort with having any party's counsel host, assuming they have appropriate facilities. Your author will confess to the good fortuneof having an office with multiple high quality conference rooms and an excellent caterer. We serve coffee, Danish, and a variety of other items for breakfast, and have lunch automatically brought in for everyone just after noon, so that there is no interruption of the mediation flow. We work on the theory that it is better to make folks comfortable reflecting, talking and bargaining, rather than making it so uncomfortable for them that they need to get a deal done and get out as soon as possible. So, while we are flexible, our default tends to be on the neutral's home ground.

One message delivered during the initial joint call is to let the parties know to leave the day wide open. Some personal injury mediators line up four cases a day on the assumption that each should take only one to two hours to resolve. This model is closer to the settlement negotiations one might find in court, with the judge or the court's clerk or law secretary – with swift shuttle diplomacy. Yet settlement conferences are not mediations. There is far lower party involvement, the neutral tends to be more heavily evaluative and directive, there is little exploration of parties' needs and interests, and there is the trial sword of Damocles hanging over thelitigants' heads.

While it is great to resolve a matter in an hour or two, a good number of our personal injury mediations might take an entire day to resolve. Accordingly, it is wise for counsel to be sure that the client and all party representatives know to have no impediment to continuing talks into the evening if needed. Similarly, if someone will be consulted or participating by phone, it is wise to be sure that counsel have their cellphone numbers in addition to home or office phones.

Initial Joint Session or other Procedural Choices

Once parties in the initial joint pre-mediation conference call have discussed the nutshell, outstanding disclosure, the demand, bargaining history, attendees, the mediation statement, and general logistics, it is helpful to consider processquestions.

There has been a growing tendency these days among counsel, starting from the West coast, to avoid anything more than the most cursory joint session. The concern voiced is that, if parties or counsel make opening statements that sound like the opening statements at trial, they will just anger the parties on the other side of the table, reinforce each party's adversarial stance, and make it harder to make a deal.

While this dynamic might occur, it is avoidable. Rather than throw out the baby with the bathwater, effective representatives in mediation can take approaches that will advance their goals in mediation. The joint session might be the first opportunity for plaintiff's counsel to speak directly with the claims adjuster without going through the filter of defense counsel. The key is to communicate in a way that builds understanding and dealmaking, and not to shut people down or push them away from the table.

The mediator might give counsel a "heads up" and guidance on the joint session or other process choices during that first call. Conversely, if counsel have a concern on this front, the joint call is a good opportunity to raise it and flesh it out.

Private Pre-Mediation Conference Calls

During the initial joint call good mediators might make a practice of inviting counsel to feel free to speak privately by phone with the mediator in advance of the in person mediation session; and to know that the mediator might also initiate these calls. The mediator is a facilitator, not a judge or arbitrator who might make a binding decision. Thus, there is no rule against ex parte communications. If the mediator does not raise this, counsel should consider suggesting private calls during the initial call.

These pre-mediation caucuses – confidential discussions with fewer than all participants – are great opportunities to bring the mediator up to speed on any background, issues, interpersonal dynamics, or special informational needs, and to work with the mediator to prepare for an effective session.

If, for instance, counsel could use the mediator's help in getting through to a client who has overly optimistic expectations, the private pre-mediation call is a perfect opportunity to welcome the mediator to provide candid evaluative feedback in caucus during the in-person session. If counsel has concerns that the defense will be unprepared with sufficient authority, or will not appear with the claims person, this is an opportunity to encourage the mediator to follow up with defense counsel on these points, and insure the in-person session will be a productive one. If there is certain sensitive information or case weaknesses that counsel would like to keep confidential, this is a chance to share concerns with the mediator, and seek to be sure certain issues are not unwittingly raised in joint session.

If there is a complex story to tell, the private pre-mediation call provides an unpressured opportunity to walk the mediator through the highways and byways of the tale. This mediator has had some pre-mediation calls go for a long as an hour.

Here is a trade secret. Perceptive mediators know that their stock in trade is building trust and confidence. Good mediators therefore seek to cultivate trust and rapport with parties and counsel. The reverse can also be true. Effective representatives can use the private pre-mediation call to build credibility and rapport, letting the mediator see that you are a "friend of the deal" – someone who is helpful in sharing useful information and is oriented to making the mediation session a productive one that will lead to a deal.

Client Preparation for Mediation

It pays to prepare in advance with one's client for the mediation session.

Describe the Process

Counsel can be guardian and guide for the client in the mediation process. If the client is given a good understanding of the nature of mediation, including the goals of building understanding and dealmaking, then the client is less likely to feel underrepresented when counsel does not act like a gladiator or Clarence Darrow during the opening statement or in mediation sessions.

Develop Needs and Interests

Preparing for a mediation is to prepare for a facilitated negotiation. Applying Fisher/ Ury tips from Getting to Yes, counsel can develop a clear understanding of the needs and interests of one's own client, and begin thinking about ways to meet these needs and interests. The analysis does not end here, though. Is the client strapped for cash, looking for a quick resolution to resolve current debt issues? Does the client have longterm health care concerns? Is the client likely to be out of work for years, and in need of a reasonable income? Does the client have multiple dependents; or, conversely, is the client well supported by a spouse or others? Is there insurance coverage that has been, and might continue to be, helpful?

Beyond this, there are psychological and cultural needs that can drive a party in negotiation. For instance, in one mediation, the plaintiff came from a wealthy community, although he was not personally swimming in lucre. This created a higher expectation level for the return from the case to be satisfactory, without regard to whether the case was strong or weak, or whether the injuries were permanently debilitating. It was further complicated the financial condition of this plaintiff. His convenience store had been adjacent to, and heavily dependent on serving those working in a large, active business which closed. Thus he was particularly seeking a substantial recovery that might have had little real bearing on case value from the standpoint of liability and damages.

Knowing the client's needs and drivers not only provides a basis for thinking about options for meeting these interests, but also helps counsel anticipate where there might be a need for help in bringing the matter to a reasonable resolution.

Of course, parties are not bargaining in a vacuum. It is important to develop a sense of the needs and interests of the other parties to this negotiation as well. Fisher and Ury teach that a good deal involves meeting the needs and interests of all parties. If not, the deal will not only generate less collective value, but will also be harder to achieve. Providing one's client with a conceptual negotiation framework, like the Fisher/ Ury model, will legitimize one's actions during the negotiation, and smooth the path – through understanding – to greater client acceptance and appreciation of one's methods. Having laid out the conceptual framework for bargaining and discussing how it works, coupled with identifying the other party's needs and likely expectations might make it easier for the client to accept the moves and adjustments that will be required when the mediation day arrives.

Gather Key Information

Beyond learning about the parties' interests, it makes sense to be current on information pertinent to case assessment. This can include recent medical treatments, as well as information pertinent to economic damages, such as tax returns and employment status.

Beyond this, just as one might prepare for a deposition, one can prepare the client for the likelihood that the client will be sharing his or her story with the mediator in caucus – to the extent one does not opt for a full client presentation in joint session.

Plan Bargaining Benchmarks

Some negotiation strategists recommend preparing three types of deal proposals. The aspiration level deal is a reasonable home run. This can be arrived at with the benefit of a risk and transaction cost analysis. What can one reasonably expect to receive if one wins at trial? On top of this, what is the defense likely to spend on the case? Subtract one's own uncompensable projected costs through trial, and that might be close to this proposal. One might increase or decrease this number based on the strength of the liability case and damages risks, and on the need both to give oneself bargaining room to move down, and also the need to keep the defense at the bargaining table by "hanging the meat low enough for the dogs to jump at it."[7]

The next type of proposal is the reasonable outcome. This genuinely, realistically and comprehensively fully contemplates risk and cost for one's own client. It might also meaningfully factor in the time value of money and the utility to all of coming to a deal at present rather than going through the risk, time, cost, uncertainty and disruption of waiting for trial.

Finally, the lowest proposal is developing one's "walk away." This is the proposal below which it makes sense to leave the bargaining table rather than accept the deal. Arriving at this package involves understanding what Fisher and Ury call the BATNA – the best alternative to a negotiated agreement. It could also be thought of as the WATNA or MYLATNA – the worst or most likely alternatives to a negotiated agreement.

It is important to keep in mind, and to communicate with one's client, that each of these types of proposals is not written in stone. One should be open to reassessing these during the mediation session, as new information about the matter and the other parties continues to develop, and as one has a chance to reflect further upon and refine one's understanding of the case, costs, and party interests. Moreover, while termed the "walk away", it is wise not to stop negotiating if the other party makes a proposal that is lower than the BATNA, or seems stuck at an unacceptably low level of offers. One just need not accept this proposal. Patience and persistence in the face of frustrations can ultimately lead to a better proposal from the defense in the range of acceptability.

Divide Roles

It is helpful to prepare the client to know how much or how little he or she might need to take an active role in the bargaining and storytelling at mediation. Decisions on role division might be influenced by one's sense of how much the plaintiff might help through delivering a compelling

[7] This phrase has been attributed to mediator David Geronemus at JAMS, and can also be found on the weblog of Texan mediator John DeGroote: *Settlement Perspectives*.

story, or for engendering sympathy. This can impact whether to prepare for the plaintiff to speak in the joint session or to share background and thoughts with the mediator in caucus.

The decision might also be impacted by the degree of natural agency and capacity of the client. Some parties might insist on taking an active role and have excellent bargaining skills. Mediation is, after all, originally a party-centric process, guided by the norm of party self-determination. When it comes to negotiation, counsel are agents directed by their principals, the clients. Nevertheless, we are all familiar with the human reality that it is difficult to stay objective and disciplined when bargaining for one's own interests. Moreover, counsel have years of specialized substantive experience negotiating, assessing, and litigating personal injury matters.

It is wise to spend some time weighing the benefits and risks of deciding when and where the attorney or the client will take the lead in storytelling and bargaining. One may be guided in this decision by the question of what will generate the greatest value and satisfaction for the client, while respecting that party's freedom and dignity. Joint discussion with one's client on this question might actually enhance the attorney client relationship, generating a sense of joint interest and mutual respect.

Set Signals

If one has determined that the client will speak or have an active role during the mediation process, it might make sense to work out a strategy, with signals, for calling for a time out, or for having the client stop talking, in case one is entering dangerous waters. For instance, there might be certain facts or theories that one has determined are not strategically advantageous to share with the other party, or even, perhaps, with the mediator. Similarly, one might not wish to signal that a particular offer or demand is acceptable, depending on the stage of the bargaining, or on one's sense of how this information might be used. It the client is straying into dangerous waters, it is wise to have prepared the client in advance for use of the "cane" to pull the client off the stage.

Other Preparation for Mediation

Many of the core elements of preparation for mediation have been reviewed above in consideration of the initial joint pre-mediation conference call and private calls with the mediator. Following are a few additional observations or refinements.

Pre-Mediation Statement

Where the pre-mediation statement is submitted for mediator's eyes only, it is a tool for the mediator to get up to speed with counsel and the parties on all aspects of the matter – historical, legal, interpersonal, economic, medical, bargaining, and all. This is counsel's opportunity to help the mediator help you.

With this in mind, despite the business of practice, make efforts to provide the mediator with the pre-mediation statement well in advance of the mediation. This enables the mediator to review it sufficiently in advance to make follow up calls if he or she observes a need for additional information, spots issues that might benefit from development or preparation in advance of the mediation session, or sees process issues that benefit from clarification. Process issues could include, e.g.: whether special considerations need to be taken for joint session, whether evaluative

feedback might be welcome, whether a demand has timely been made, or clarifying the bargaining frame (the bid and the ask), if any, going into mediation.

Let the style of your pre-mediation statement be more of a letter than a brief. Consider creating subheadings for the various components you address, e.g.: Legal, Damages, Coverage & Liens, Bargaining History & Thoughts for Resolution, Interpersonal Dynamics or Process Issues. Be considerate of the mediator's time, but do not stint on valuable detail. Despite the demands of practice for speed, try to avoid cutting and pasting boilerplate from the pleadings. Craft the letter to tell your story and help the mediator understand what needs to be done to bring this to resolution.

On not stinting with detail, be sure to supply the mediator will all helpful exhibits reviewed during our earlier consideration of pre-mediation statements for the initial joint pre-mediation conference call, above. The mediator can always choose not to read everything, but it is helpful to have this at hand if the mediator has a question or is particularly diligent. The key is not to dump these on the mediator. Rather, it is helpful to weave reference to them into ones pre-mediation statement, identifying them by letter or number. For deposition transcripts it is helpful also to provide them to the mediator in searchable digital format or manuscript.

Case Evaluation; Risk & Transaction Cost Assessment

As discussed above when preparing the client for mediation, it is helpful to be aware of the strengths and weaknesses of the case prior to arriving at the in person mediation session. Mediation is certainly not a trial. Nevertheless, although one is entering a bargaining session, it is vital to understand that personal injury mediations are replete with case evaluation and risk and transaction cost analyses. As Robert Mnookin has said, negotiation takes place in the shadow of the law.

Therefore, it helps to have a good handle on the case. Have an ordered set of materials at the ready that enable the practitioner to pull up references in an orderly way, to elements of the liability picture and of the damages. This can include all sorts of documents, deposition transcripts, hospital and medical records, expert reports, jury verdict reports, spreadsheets on damages, photos, videos and anything else that can be helpful.

It is key to enter the mediation clear-eyed. While one should be capable of effective advocacy, as counselor and advisor one should also understand case risks. When the early stages of mediation call for it, one should be able to summon and integrate case strengths in an effective manner. Yet, as the day proceeds, and the other party or mediator, returns with reflections on challenges with one's case, one may gain credibility – and develop useful rapport – by acknowledging these challenges rather than appearing to be an ostrich with one's head stuck in the mud. Of course, just as there is an art to knowing when and what to disclose or withhold, there is always a balance between showing commitment level and developing credibility and rapport.

A realistic case assessment helps counsel develop the aspiration level, reasonable goal, and walkaway or BATNA proposals referenced above in connection with client preparation. When developing these proposals as part of advanced planning, it is helpful to understand both one's own probable costs and expenses – depositions, experts, and the like – as well as those of the other parties. This can feed into a realistic assessment of case value.

Counsel can anticipate that, as the various stages of mediation unfold, the mediator might seek to provide or invite counsel and one's client to develop a risk and transaction cost analysis. Having done one's homework – entering with analytic clarity as well as well-ordered information and support – will be very helpful at that time. Should the mediator not initiate a risk analysis, a good representative in mediation might raise if oneself. This can help the mediator develop a sense of what might be a reasonable zone for resolution, and, if one authorizes that it be shared, can provide the mediator with useful information for helping the defense to adjust its own assessment and offers.

No matter how thorough one's case risk and transaction cost assessment might be, it is important to keep an open mind entering mediation. New information, different analytic emphases, and further development of the parties' interests might lead to a different acceptable outcome than one initially envisioned. Both flexibility and commitment level have their due place in the bargaining session.

Interest Assessment

Even the personal injury matter can involve more than simply case and transaction cost when assessing what deal makes sense. Clients can have special needs that merit adjustment in ones assessment of the acceptable deal. These interests can be anything from a need for immediate cash, financial challenges, a need for closure, anxiety about depositions or trial, or even concern for the relationships among the parties. Ultimately counsel is an agent serving one's principal, the client. While these might not properly affect the way judge or jury assess a case, the client's needs and interests are legitimate factors to consider when assessing and preparing for the deal.

Preparing an Opening; Developing the Story

It is helpful to arrive at the mediation session with a good sense of how one will open the mediation session. It is typical for the mediator to give some introduction, setting the tone, orienting the parties, and clarifying the process. Following the mediator's opening, quite often the mediator might turn to the plaintiff and counsel, and invite them to discuss the matter and their thoughts for the day.

There is no set formula for the parties' opening. Different counsel might have different approaches, and the unique configuration of parties, counsel, case, circumstances, procedural posture, and the mediator him or herself might all influence how one presents an opening. It is good to keep in mind that one is opening a bargaining session that is aimed at building understanding and arriving at a deal. Thus, one is not asked to open a mediation the way one delivers an opening at trial.

Whether it is during the opening joint session or later in caucuses with the mediator, it is helpful to understand that part of ones effort in mediation involves storytelling. While much less formal or structured than trial, nevertheless counsel should know what core elements of the client's story need to be developed for the mediator, the defendants and their insurer to understand the impact of what occurred leading to the personal injury case. Core elements of liability and damages should be clear and comprehensible.

As mentioned in considering client preparation, one might give thought in advance of the mediation to whether the client will present all or some of the opening, and how the client will tell his or her story during caucus sessions.

Knowing the Players

Where possible, it is helpful to know who will be at the mediation table. Is it a hard bitten claims person, a design professional with a large self-insured retention and control over whether the matter will be resolved? Is it a self-insured religious or eleemosynary institution, a municipality with a joint insurance fund ("jif") or complex insurance structure, or a party with serious reputational concerns? Are the attorneys for the defense persons with whom one has developed a civil relationship or have interactions been fractious?

Depending on who will be at the bargaining table, one might prepare to educate on case strengths and weaknesses, endure a long siege focused on incremental offers and concessions, or maintain the engagement of a skittish, adversarial competitor who might grab the chance to bolt prior to a deal. Having a sense of the others' bargaining styles, interests, approaches, and orientations might help one think of what to emphasize, communicate, or propose during the upcoming mediation.

Of course it is important to bear in mind that a history during litigation need not be a harbinger of difficulties during the mediation. Litigation postures can feed into unfounded projections. The mediator might be helpful in sorting through the feint and the real in this regard.

Multiparty Concerns

Certain types of personal injury claims, such as construction or particular medical malpractice matters, often involve multiple defendants. These can bring with them their own unique challenges. In the construction arena, with multiple defendants and multiple insurers, the phenomenon of mutual finger-pointing can gum up what otherwise could be a productive bargaining session. There are scenarios where defendant A's insurer authorizes payment of a 15% share on the condition that defendant B pays a 25% share, while defendant B's insurer has given the inverse instruction. Or, there are times when all defendants agree that defendant C – otherwise known as the scapegoat or target defendant, depending upon whom one asks –bears the brunt of the liability. This too can create issues with developing a settlement pot.

Mediators have ways of helping with these snags.[8] It is helpful to give the mediator advanced warning on prospective roadblocks, and to think of ways to help the mediator help all parties overcome these impediments and reach a deal. This might involve a choice early in the mediation session to share with the mediator one's real reasonable goal, or even something close to the walk-away, so that the mediator is free to spend the time productively untangling inter-defendant imbroglios. It is also helpful in these scenarios to have a good dose of patience.

[8] *See, e.g.*, S. H. Baum, *Sausage Making Laid Bare – Multi-Party Mediations and a ConsensusBased Risk Allocation Model,* Chapter 15, M. Klapper, Definitive-Creative Impasse Breaking Techniques (NYSBA publication).

Where matters are particularly complex, the mediator might work with parties and counsel during the initial joint pre-mediation conference call to structure the process efficiently with sequenced multiple mediation sessions.

Liens & Coverage

In addition to having tallied all paid or incurred case costs and expenses, it is helpful in advance of mediation to gather information on all liens – Workers' Compensation, Medicaid, Attorneys' fees, or otherwise. Calculating outstanding costs and liens aids in assessing the net recovery to the plaintiff. This can be helpful during crunch time when deciding whether to take a deal on the table. In addition, having this information at the ready can help in expediting arrangements for payment. Knowledge that payment can be made and disbursed swiftly also enhances the appeal of a proposed deal. At times, this information can be conveyed to defendants when memorializing the deal, if it is fully available.

Where most defendants are insured – and, thus, where most sources of funding for personal injury payments are insurers – it is critical not only to be sure that the insurer is actively involved in the mediation, but also to know the coverage picture. This includes not only knowing the limits and availability of excess or other insurance, but also clarifying whether there are serious coverage disputes that might interfere with resolution or funding of the settlement payment.

Beyond this, inter-insurer squabbles can increase exponentially in multiparty matters. At times, experienced mediators can conduct mediations within the mediation addressing coverage issues. The mediator can also help with the unique dynamic of competing insurers whose risk assessment varies from defendant to defendant. Thus it is wise to keep the mediator informed early of any issues of this kind.

Tips for the Day

As with many things in life, preparation involves many of the principles, roadmaps, and skills of the activity for which one prepares. Now is the opportunity to bring to bear the recommendations presented in the preceding sections.

Opening & Joint Session

The mediator is likely to have two or more conference rooms available, to enable parties to meet privately. One might meet privately with the client in advance of the joint session to reorient each other for the day. This is also a chance to meet with the mediator to address unique issues that might have arisen or bear highlighting before conducting the joint session.

During the initial joint session, it is typical for the mediator to begin with an opening statement introducing all parties and counsel to the process. This is likely to set the tone for constructive communications aimed at building understanding and deal making. It will likely highlight the confidentiality of communications both in joint session and in caucus. Confidentiality makes it possible to increase disclosures without fear of consequence should the matter not settle. It also facilitates brainstorming and reality testing in caucus – the private meetings one party or group with

the mediator – without the risk of offending the other parties or losing bargaining strength through acknowledgement of case weaknesses or revelation of potential deal concessions.

Party Opening

Following the mediator's introduction, the mediator might invite parties and counsel to begin discussing what has brought them into the room, and what they would like to see coming out of the day. Typically, the plaintiff's "side" kicks off these opening remarks.

There are a number of ways to open. This mediator's favorite is consistent with the title of this chapter: grasping victory with an open hand. With this approach, counsel might choose to make the opening remarks, but might also have the plaintiff express what happened, if that is helpful. Assuming counsel is speaking, the core attitude is twofold. First, counsel metaphorically extends an open hand offering to give any information that might build understanding and deal-making, and signaling a willingness to make peace. At the same time, the other metaphorical hand is an iron fist in a velvet glove. In a non-hostile, reflective manner, oriented towards solving a joint problem of the parties, counsel can indicate the strengths of the case. This message is coupled with a complementary one: while we are confident of the trial outcome, we are here to be pragmatic and to make a reasonable deal in light of the probable outcomes and attendant costs of litigation.

While it is not necessary for the Plaintiff to present at this juncture, the principle of party-centric mediation, and the opportunity to empower parties, opens the door to having one's plaintiff speak. One thought is for the plaintiff not to go deeply into the liability picture, but, perhaps to give a thumbnail sketch of what happened and how the plaintiff has suffered with injuries and life impacts. Counsel might judge, in advance, whether one's client is particularly sympathetic, credible and articulate. If so, this is a wonderful chance to give the claims person present at the joint session a glimpse of what might happen if this matter went before a jury.

As referenced during our discussion of the initial, joint pre-mediation conference call, there are varying views of the value or risk of addressing liability and damages during the initial joint session. Where a claims person is in the room or listening on the phone, joint session might be plaintiff's first opportunity to make one's pitch directly to the claims person without the filter of defense attorney's report and assessment. Without attributing bad motives to defense counsel, there are natural inhibitors on any defense counsel's communication with the insurer. It is natural for defense counsel not to want to appear like a weak or ineffective advocate. Moreover, cognitive barriers identified by social psychologists might come into play. One of these is confirmation bias – the tendency to find and read facts in a manner that is consistent with one's belief in reality. Advocacy bias has been observed by many mediators. Group think, the tendency for people on a team to confirm one another's given views, is another force that impedes clear vision and decision making. Thus, with the help of the mediator's introduction, setting the scene for a thoughtful, problem solving approach, a non-hostile, sympathetic presentation that presumes, and is accessible to any person of, intelligence and good will, can serve as a break through opportunity. It would be a shame to miss it by moving directly to caucus.

Addressing Joint Session Anxiety: Ulysses Strapped to the Mast

As mentioned in our discussion of the initial, joint pre-mediation conference call, counsel might have reservations about making substantive presentations in the joint session. Typical concerns are

that the parties might hear strong advocacy by their own counsel and grow attached to an unrealistic goal, making resolution, which generally requires some adjustment by all parties, more difficult. Additionally, counsel might fear that their parties could be offended by the arguments, or lack of caring, expressed by the other counsel or party representatives. Preparation of one's client in advance for the benefits of joint session, and for what is likely to be expressed can mitigate the impact of these communications. Moreover, jointly working with all counsel and the mediator to strike the appropriate tone during joint session can be helpful.

One image to help oneself and one's client make fullest use of the potential offered by the opening joint session – or either later communications – is that of Ulysses strapped to the mast. In the Odyssey, Ulysses and his men have left Troy and are returning home to Ithaca via sea, when they approach the famed Sirens. The Sirens were beautiful women who sat on rocks by the sea. Their singing bewitched passing sailors, causing them to steer towards these alluring beauties, crashing their ships on the rocks and ending in a watery grave. Ulysses wished to hear the extraordinary Siren song. He had his sailors stuff their ears with beeswax and strap Ulysses to the mast. The ship safely passed the Sirens. While Ulysses was driven mad by the Sirens song, he had an extraordinary experience and learned something new and rare.

Counsel can take a lesson from Ulysses, to share with clients. One is free to sit in joint session, hear information from the other party that might be highly disturbing, and yet do nothing at the time. As a result, one has the rare chance to learn about case weaknesses, see opportunities to address the other party's misunderstandings, learn what is important to the other party, and find ways to meet those interests to arrive at a deal. Knowledge is power. Why not come prepared, with self-discipline, learn, and be empowered?

The Dating Game – Relationships Matter

One of the insights from Fisher & Ury's classic, Getting to Yes, is a corollary to the concept of separating the people from the problem: be soft on the people and analytically hard on the problem, by identifying and addressing the issues. Fisher and Ury observe that negotiation is much more efficient and satisfying – and greater information can be obtained, producing greater value in the deal – if the parties address each other without ad homina, insults and threats. Use of expressions of encouragement, signs of understanding and appreciation, and active listening can lower anxieties in the other parties and dispose them to engage in cooperative bargaining. This can produce fuller, more productive disclosures of information, potentially lessen gamesmanship, and even smooth the development of proposals to make a deal.

With this in mind, defense counsel and insurers can be encouraged to approach joint session with a minimum of hostility. It is natural, and even endemic, for defense counsel and insurers to approach case analysis and bargaining with deep skepticism bordering on cynicism. After all, one's professional life consists in finding the holes in the other party's case. There may be plenty of instances where defendants have discovered the golden video of the allegedly incapacitated plaintiff loading heavy cargo, shoveling snow, or jumping on and off the back of a flatbed truck. These experiences make an indelible impression cumulatively augmenting natural skepticism over the years.

To the extent plaintiff's counsel develops a decent relationship with one's counterparty, one might plan ahead to invite the defense to adopt a more open, encouraging attitude during joint session. Receptivity helps everyone. If the plaintiff speaks, he or she will feel heard. This can lower alienation and dispose the plaintiff to understand that people are negotiating in earnest and making a genuine effort to arrive at a rational deal that makes sense under the facts and circumstances of the matter. For the defense, both counsel and insurer, it might enhance the opportunity, like Ulysses strapped to the mast, to learn significant information that can help with effective case and risk assessment and other information that can lead to a deal. At times defense counsel and insurers themselves with come prepared with this insight. Other times, they can be helped by advance discussions. And other times the rift remains. One adjusts accordingly.

A Spoonful of Sugar Helps the Medicine Go Down

As Mary Poppins advised, if one is delivering information on case strengths or questioning asserted factual or legal propositions expressed or held by the other parties, wisdom dictates that these observations be delivered in a way that makes them palatable to the other party. Communicate to build understanding, not to shut the other party down.

Patience is a Virtue

From opening joint session throughout the entire mediation, good negotiators learn not to rush. Patience is the touchstone of truth. If one waits long enough, it is amazing what one can learn, what opportunities arise, what breakthroughs occur. Counsel and their clients are well advised to endure, to wait, to persist.

Mediation is not an individual sport. It is a group activity. People process information, adjust their assessments, handle interactions, and make decisions at varying speeds. In the dance of negotiation, it is key to have the patience to flow with group time and let constructive change occur.

Later Sessions – Caucus or Otherwise – & General Advice for Mediation

Following joint session, it is typical for the mediator, parties and counsel to move into caucus – confidential meetings with fewer than all participants. While there is no set rule, it is typical for the mediator to caucus first with the plaintiff. This provides the mediator the opportunity to learn more about the plaintiff's story. This is not limited purely to the case, but holistically open to anything that the plaintiff finds significant. Here, the mediator looks to identify core issues, and, during this phase and throughout, the mediator is keenly attentive to identifying and acknowledging the parties' needs, interests, emotions, values and principles. This goes well beyond case analysis. The initial joint session presents a chance for the mediator to establish the basic trust and rapport that is essential to building the confidence that is key to the mediator's ability to help generate enhanced understanding and adjustments needed to bring the parties to a deal.

Thus, it is important to allow the time for the mediator to engage in an open-ended discussion, particularly during the initial caucus. To the extent that counsel, or even the plaintiff, would like to get right down to bargaining, counsel are advised to be open here to following the mediator's lead and defer instant gratification that might lead to abrupt impasse.

During initial stages of the caucus sessions, it is typical to review case strengths and weaknesses, and for the mediator to engage in shuttle diplomacy. This can be a process for clarifying areas where parties might have a disconnect in views on risk or transaction costs. It is very much a process of developing and exchanging information – that medium of exchange in negotiation.

The Spigot of Disclosure

One of the greatest challenges in negotiation and mediation is the question of whether, when, and how much information one chooses to disclose. Social scientists have observed that disclosure by one party breeds disclosure by the other party. To the extent that information is power, one would wish to obtain as much information as possible. The converse question, though, is whether one cares to empower the other party with information about the plaintiff or one's case.

The Smoking Gun

Counsel on both sides of the "v," but perhaps particularly for the defense, tend to have mixed views on whether to share information that might be used to surprise and upend the other party at trial. At times, counsel prefer to wait at least until testimony is frozen by depositions before letting this particular cat out of the bag. The problem with withholding information is that, to the extent this smoking gun is a case strength, its use in negotiation might lead a reasonable party to adjust the demand in light of this risk. Withholding information in anticipation of trial can become a self-fulfilling prophesy. The party withholding information refuses a deal that fails to factor in this hidden case strength, while the oblivious party continues to hold an inflated sense of where a deal should be precisely because of a lack of this critical information.

Sometimes this is a matter of timing. There might come a time, early or late in the mediation, where an extra push is needed. While always a judgment call, counsel are encouraged to take a deep breath and dive into the chilly waters of uncertainty, sharing case strengths that can then generate an improved demand or offer from the other party.

Risk & Transaction Cost Analysis

Some mediators are skilled at leading counsel and parties through a semi-formal process known as risk analysis. Here, after having developed information during initial caucuses or even joint sessions, the mediator typically in caucus, together with parties and counsel can contemplate what might happen if the case were not to be resolved but rather went forward through trial. Should the mediator not initiate this process, counsel oneself might informally generate discussion along these lines with the mediator, in order to help move parties outside the room to greater clarity on case risks and transaction costs.

The gist of risk analysis, as mentioned above while considering preparation for mediation, is making transparent assumptions about case related information, and assessing the probability of certain outcomes at certain key events or decision points. One might, for instance, consider the odds of granting a motion to dismiss; the odds of locating a particular "smoking gun"; the odds of granting a motion for summary judgment; the odds of victory at trial; the odds of comparative or contributory negligence; the odds of certain theories of damages; the odds of appeal and outcomes on appeal; and the odds of collection related issues.

Layered on top of this risk analysis is a transaction cost analysis. Here the mediator, party and counsel consider the costs and expenses likely to be incurred in the event the matter does not settle in mediation or at any defined later point in time.

The beauty of risk analysis is that it pulls parties into a deeper and somewhat more clearly quantified understanding of case value. It shifts from seeking a Delphic pronouncement by the mediator to a collaboration of all in caucus in noodling through what might make sense in light of various assumptions and probabilities. It affords parties the opportunity to test what might happen if certain assumptions were changed or if different probalistic risk factors were applied. Characteristics of collaborative activity, math, adjustability, and objectivity generate a greater sense of control in the parties and counsel, and affirm the primacy of party freedom over mediator directiveness and evaluation.

Let's Get This Party Started – Deal Proposals, Anchoring, & the ZOPA

Following initial information gathering and disclosures, exploration of perspectives, identification of issues and interests, risk and transaction cost analysis and general consideration of other alternatives to deal-making, the time has come for one party to make a proposal to commence the economic phase of the dance of negotiation.

One characteristic of the dance at this point is the Alphonse-and-Gaston routine of each party's waiting for the other to make the first move. This sense that there is a strategic advantage in having the other make the first proposal is a natural consequence of the phenomenon of "anchoring"[9] in the context of what negotiation theorists call the Zone of Possible Agreement ("ZOPA").[10] Essentially the ZOPA is the range within which a deal is possible. If, e.g., in simplest terms, plaintiff were willing to accept $500,000 to settle the matter and defendants were willing to pay $1,000,000, there would be a fairly wide, $500,000 bargaining range, or ZOPA within which a deal is possible. If, by contrast, the plaintiff were willing to accept no less than $750,000 and the defendants were willing to pay no more than $800,000, there would be a much narrower, $50,000 ZOPA.

Where bargaining parties implicitly or strategically recognize that there might potentially be a wide ZOPA, there is a reluctance to be the negotiator who goes first and inadvertently slices the ZOPA, eliminating potential value that was available for the deal.

On the flip side is anchoring or focal illusion. Anchoring is the phenomenon where the first proposal or characterization of a situation generates a gravitational pull influencing how discussions proceed or how parties interpret or frame discussion or analysis of the issue or interpretation of events. The initial proposal can tend to become a focal point of subsequent discussions.

Understanding that anchoring has a power, might lead negotiators rather to wish to make the first proposal so that they are able to create a focal point more favorable to their interests. The

[9] Social psychologists Amos Tversky and Daniel Kahneman were at the forefront of developing theories on how people use heuristic devicess or interpretive shortcuts, like anchoring or focus illusion, to draw judgments and make decisions. See,e.g.,Tversky, A.; Kahneman, D. (1974). "*Judgment under Uncertainty: Heuristics and Biases*" (PDF). Science. 185 (4157): 1124–1131. doi:10.1126/ science.185.4157.1124. PMID 17835457.

[10] Lewicki, Roy J.; Barry, Bruce; Saunders, David M. (2015) [1985]. "*Zone of potential agreement*". Negotiation (7th ed.). New York; Spangler, Brad (June 2003). "*Zone of possible agreement (ZOPA)*". beyondintractability.org. Conflict Information Consortium, University of Colorado, Boulder. Retrieved 3 December 2016.

combination of these factors often leads plaintiffs' counsel who tend to be expected to make the first demand, to make extremely high demands. This way, they anchor high and likely avoid unduly slicing the ZOPA.

A challenge with high opening demands is that it sends a message of irrationality to the defense that can feed into a circle the wagons attitude that plaintiff is overreaching and unrealistic. The saw about hanging the meat low enough for the dogs to jump at it[11] has been used as an antidote to this phenomenon.

Principled Negotiation

One approach that is helpful in developing bargaining proposals is to couple the proposal with a rationale. In business negotiations, bargaining parties often have a richer array of potential party interests to address, in addition to case cost and risk analyses, and are able to craft complex and sophisticated options for resolution. Personal injury negotiations generally tend to follow a more straight line of monetary exchanges, with occasional variations on the manner in which payments might be made.

While it is possible simply to exchange dollar proposals, moving from high demand against low offer gradually towards a number somewhere in the middle, principled bargaining involves associating reasons with one's moves. The large demand can be accompanied by an optimistic assessment of the plaintiff's chances for winning at trial, supported by a list of chief facts and reasons for victory. It might also be accompanied by recognition of the costs likely to be incurred by the defense – although this is often met with less than enthusiasm. It can also be supported by an assessment of damages tied into the medicals, a calculation of economic losses, and a hefty dose of pain and suffering. It can help the mediator to provide on point jury verdict reporters from the county where the action is venued that support the damages calculation.

In preparing for the mediation, one is likely to have developed an aspirational, realistic, and walkaway (BATNA) set of proposals. One can prepare for the economic dance of mediation by already having rationales and backup to accompany each of these three proposals, as well as intermediate ranges of proposals, as well. Information can be doled out in this sense to accompany the various proposals. Of course, one should maintain an open mind not only to adjustments from discussions with the mediator and from what one learns from the other parties, but also from one's own team's refinements of thinking and case assessment. It is not atypical for the plaintiff him or herself to come up with additional information, on treatment, pain and suffering, economic impact or even liability related recollections as people focus more on the details of the matter. These, too, can be helpful tidbits to associate with offers, or to use privately, as appropriate, to reassess one's goals and game plan.

Bracketing & an Eye Toward the Middle

It is fairly typical of insurers and other recidivist negotiators to assess each new move in the offer and concession pattern with an eye toward the midpoint created by the new proposal. Thus,

[11] See FN 7, supra.

e.g., a demand of $2,000,000 and offer of $100,000 creates a facial ZOPA[12] of $1.9 million, with a midpoint of $1,050,000. As the next move is made, e.g., a new plaintiff demand of $1.8 million, the range shrinks by $200,000 and the midpoint for the moment can be recognized to be $950,000. It is helpful for the plaintiff's counsel to understand that dollar moves can be seen as signaling a possible willingness to resolve the matter at the indicated midpoint. Of course, this is a moving and somewhat shifting target, but it can be used to help parties move progressively to a deal.

There are times when, after several moves in the offer/ concession pattern, the parties grow stuck. Each might think, or profess, that the other has made inadequate concessions and that the gap between the parties is too great. When this occurs, mediators or parties at times propose using conditional offers, sometimes referred to as "brackets" to re-energize the negotiations. If, e.g., the parties were stuck at an offer of $300,000 against a demand of $1.2 million, counsel for one of the parties, let's say the plaintiff, might suggest a willingness to move below the magic seven figure mark to $900,000 on the condition defendants move to $600,000. That would narrow the facial ZOPA to $300,000 with a midpoint of $750,000. While there is no promise that any party will settle at the midpoint, it at least significantly narrows the bargaining range to a workable zone.

Defendants might respond to a proposed bracket by agreeing, at which point the move shifts back to plaintiff. If, however, defendant is not wild about the proposed bracket, defendant is free to make a counterproposal of a different bracket, e.g., an offer of $500,000 if plaintiff were to move to $800,000. While the proposed bargaining range is still $300,000, the midpoint is $650,000, rather than $750,000.

From this point, whether or not the parties agree on a particular bargaining range, they have learned some encouraging news. The projected midpoints are only $100,000 apart. The parties are within striking distance. At this juncture, the mediator might begin exploring end game scenarios in "meta-talk" with parties in caucus. Alternatively, the mediator might opt to pull counsel out of their respective caucus rooms for a quick huddle to see if a breakthrough is possible. Any number of approaches can be productive.

Judicious Use of Leverage

Leverage is a form of bargaining strength afforded by having something the other party needs, or having the ability to without something of value. A nearby owner of a horse could have profited mightily when Richard III, seeking to escape the battlefield, desperately exclaimed "my kingdom for a horse." The needed object might have far lower value to the current owner, or far lower market value, than it does to the person who has serious need of it for another purpose.

While more frequently spotted in business settings, even the personal injury matter has elements of leverage. In cases with multiple defendants with complex facts and extensive anticipated discovery, expert costs and trial, the collective cost of defense might well exceed the value of the plaintiff's claims. That is a form of leverage justifying elimination of cost with a decent settlement.

[12] The ZOPA can be assessed on a number of levels. One can consider it from the standpoint of case value based on the range of likely recovery at trial. One can also consider the ZOPA simply as what remains after the last bid and ask. Most typically, however, the ZOPA truly consists of the range created by each party's final walkaway authority – that is, the greatest value defendant would be willing to pay and the least value the plaintiff would be willing to accept in order to settle the matter. This is informed by case risk and cost assessments, as well as by party needs and interests.

Venuing the matter in the Bronx or Kings county might generate leverage for the plaintiff, where venue in certain upstate counties might create leverage for the defense. Time itself can be a lever for the defense where the plaintiff is old or financially strapped, or even where plaintiff's counsel contemplates the benefit of immediate cash in hand against projected costs, expenses, delays and uncertainties.

It is helpful to understand the various levers in the mediation of each matter. One should bear in mind, however, that no one likes to be manipulated to subjected to a power play. Here, wise counsel, can use the mediator to deliver observations about leverage in a manner that does not feel like a threat or hostile act.

Bypassing Impasse; Mix & Match

There are instances where progress might seem impossible. Do not give up. Mediators have a bag of tricks to help parties overcome what might appear to be impasse. Patience and reassurance of the client is key at these times. Counsel are encouraged to be creative, be friends of the deal.

Sometimes it might help to reconvene a joint session and seek breakthroughs. If the relationship is civil, it might help to speak with counsel for the defense.

Approach the "Mediator's Proposal" with due Trepidation

Some mediators, when matters seem gummed up, might suggest use off the "mediator's proposal." This mechanism involves the mediator's suggesting a settlement package to each party. The parties are given time to consider it, and then to respond privately and confidentially to the mediator. If each party accepts the proposal, there is a deal. If one party accepts by the other party rejects the mediator's proposal, the party who has rejected the proposal will not know that the other party had accepted.

The mediator's proposal is usually not introduced as the mediator's view of case value; nor is it the mediator's view of fairness, ultimate case outcome or of who is right or wrong. Rather, it is based on the mediator's sense of the "doabilty" of the deal. The fundamental question is whether this will get the deal done.

Many in the mediation field would urge that the mediator's proposal is best avoided and used only as a last resort. It risks making the mediator too much of a central party, rather than a facilitator of the parties' own efforts at understanding and deal making. Moreover, where parties begin sharing confidential information with the mediator, even though this mechanism is offered only if the parties agree, nevertheless someone might feel used and abused by this result of the earlier confidences. Moreover, if the proposal is not aligned with one's own views, it might take on undue weight when expressed by the mediator, making it harder to resolve the matter if the proposal is not accepted. If one happens to like the proposal but the other parties do not, the mediator might lose vital credibility, trust and rapport with the other party. We have seen how critical it is for the mediator to retain the parties' confidence in order to be effective.

Nevertheless, at times, the mediator's proposal, or some other sort of feedback, can give cover to the defense counsel or claims person who might turn to the home office for further economic authority.

Odds are, in the vast majority of mediations, resort to the "mediator's proposal" should be entirely unnecessary. Creative and skilled mediators have a host of techniques and approaches that obviate its use.

***Carpe Diem*; Closing the Deal**

When the time comes that the parties have arrived at a deal in principle be sure to nail it down on the spot with a signed settlement agreement or memorandum of understanding. The mediator will often have a form memorandum of understanding at the ready. It is also good practice for counsel to arrive at the mediation with a form settlement agreement on one's computer. Indeed, where possible, while the client is available, there is no harm in arriving at the mediation with a General Release ready to be signed and notarized. The availability of key settlement documents can overcome protests of other parties or counsel that we can deal with it manana.

Mediation Redux; Never Give Up

In the unlikely event that the matter does not get resolved during the first mediation session, do not give up. Good mediators will follow up with counsel to see if the offer/ concession gap can be closed. This can be done by phone calls, or with a second mediation session. Even if, months later, the matter is heading towards trial think of checking in with the mediator to see if it might make sense to try reaching out to the other parties and assessing whether a deal might now be possible.

Mediation is a wonderfully rich and flexible process. It empowers parties, builds understanding, and offers swift resolutions that accommodate the interests of all. Be sure in every case to have this peacemaking arrow at the front of your quiver.

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[1]Simeon H. Baum, former litigator, and President of Resolve Mediation Services, Inc. (www.mediators.com), has successfully mediated nearly 2,000 disputes, including the highly publicized mediation of the Studio Daniel Libeskind-Silverstein Properties dispute over architectural fees relating to the redevelopment of the World Trade Center site, Trump's $ 1 billion suit over the West Side Hudson River development, and Archie Comics' shareholder/CEO dispute. For over two decades he has played a leadership role in the Bar relating to ADR, including service as founding Chair of the Dispute Resolution Section of the New York State Bar Association, and chairing the ADR Section of the Federal Bar Association and ADR Committee of the New York County Lawyers Association. He has served on ADR Advisory Groups to the New York Court system, including Chief Judge DiFiore's current ADR Task Force. Since 2005 he has consistently been selected for "Best Lawyers" and "New York Super Lawyers" listings for ADR, and was the Best Lawyers' "Lawyer of the Year" for ADR in New York for 2011, 2014, 2018 and 2020. He teaches on the ADR faculty at Benjamin N. Cardozo School of Law For over 20 years, he has trained mediators for the NY State Court's Commercial Division; and frequently speaks and writes on ADR. He has been adjusting to our new COVID-19 condition by conducting mediations via Zoom, and has delivered a number of webinars on that topic including one conducted via the miracle of Zoom at the University of Florence.