SESSION OUTLINE
"TIPS FOR EFFECTIVE PRESENTATION OF YOUR CASE AT MEDIATION"

1. Introduction:
    a. This is an outline for an Interactive workshop, to share questions and solutions to questions.
    b. We present an extensive outline, but will only have time to hit the highlights in the time allotted.
    c. Use this outline as a checklist in practice.
    d. There will be an opportunity for Q. and A. at the end of out session.

2. Why you might want mediation, in the first place.
    a. Benefits
        i. Change a two-way fight to the death into a three-way search for a solution.
        ii. Reduces devotion of Time and Resources if a negotiated agreement is achieved.
        iii. Provides you with information.
        iv. Exploration of creative solutions
        v. Provides client and attorney with neutral sounding board for their own positions.
        vi. Provides opportunity to receive benefits of resolution at the earliest date (consider the time value of money).

vii. Exploration of creative solutions that a court may be powerless to grant.
viii. TIP: Parties can communicate directly with each other safely and freely. More importantly, you get a chance to speak directly to their decision makers, without your words being filtered by his attorney.
ix. Party principals can save face by an out of court settlement.
x. Confidentiality
    1. TIP: Applies to what is said or done. It does not apply to what is learned. For example; at a later discovery of the party, the attorney can have a better idea of what to ask and the party's likely responses. You cannot use his mediation statements to impeach
    2. You can be open with the mediator who will not reveal communications to him unless you authorize.
    3. Applicable to the proceedings possibly to the eventual agreement.
    4. The Uniform Mediation Act ("UMA"), drafted by the National Conference of Commissioners on Uniform State laws is an attempt to provide a "privilege that assures confidentiality in legal proceedings." It is being considered in New York, but has not been adopted.
    5. *Hauzinger v. Hauzinger*, 43 AD2d 1289 (4th Dep't), aff'd __ NY2d___ , 2008 NY Slip Op 05781, 2008 WL 2519811,holds UMA immunity is not applicable in New York, and refused to enforce the confidentiality agreement in the mediation of a matrimonial settlement, where the courts were asked to review the fairness. The mediator was required to testify.
    6. In court-directed mediation, confidentiality and immunity from testifying is in the rules.
    7. Confidentiality of parties v. confidentiality of the mediators.

b. Pitfalls
    i. Mediation requires devotion of Time and Resources.
    ii. Mediation is hard work, but for the mediators and the attorneys.
    iii. Provides adversary with information
        1. It sees the quality of your evidence.

2. It learns the character of your witnesses.

3. When, in the life of a dispute, can it benefit from mediation?
    a. Consider initiating the first proposal to mediate. Sophisticated counsels do not consider this to be a sign of weakness. It is a sign of confidence that you feel a neutral will help your adversary see the strength of your case and the weakness of its case.
    b. As neutrals, mediators can bring value even to those disputes that are not "ripe" for settlement. They can help the parties get the case ready for future settlement in the most efficient way, or even avoid the dispute coming to a head.
    c. For a dispute to be ripe for settlement the parties should have sufficient data to enable them to bargain intelligently and in good faith.
    d. Once parties have the requisite data, the sooner mediation can start the better, because –
        i. Costs rapidly accrue, which parties seek to add to the settlement goals.
        ii. Positions harden. Parties become entrenched.
        iii. Chances of a cooperative splitting of the pie diminish. The "pie" gets smaller with the expenditure of time and resources.

4. Selecting the mediator.
    a. TIP: Generalist vs. Specialist; the debate lingers on. Some of the areas where specialists can add value are-
        i. Complex commercial disputes
        ii. Technical
        iii. Construction cases, involving Towers of Insurance
        iv. Labor (see, limited opportunity to request specialist under A.D.R. Rules of the S.D.N.Y.)
        v. Matrimonial (See Rules of the Matrimonial Part)
        vi. Former judges; it depends, Professional judicial habits die hard.
    b. Private mediation agencies and practitioners.
        i. It is OK to use due diligence to select, (as in jury selection).
        ii. Request and carefully read the mediator's resume.
        iii. Request references if not otherwise recommended to you by prior user.
        iv. Consider background and experience

v. Discuss there mediation style as applied to your type of case.
vi. Name-brand mediators are booked long in advance, so plan ahead.
vii. TIP: Name-brand mediators can be expensive, but (sometimes) you get what you pay for
viii. If you are a member of an association, inquire as to the experience of the candidates with your fellow members.

c. Court-annexed mediation
    i. Most have undergone extensive training and experience, some more than others. The biographies of the panel members are posted on the Web site for Supreme Court, NY and some others.
    ii. Fees, after 4 hours of pro bono time, are permitted and generally limited to $300/hour.
    iii. Some courts offer a choice to select from.
    iv. Check the Rule of the particular jurisdiction, as these programs are still experimental and evolving.

d. TIP: Mediators selected by your adversary should not necessarily be rejected or avoided.
    i. The mediator makes no decisions. You always retain the right to reject their recommendations.
    ii. If your adversary chooses the mediator, it may mean that it is because it feels that the mediator has the ability to settle the case on mutually agreeable terms and it has faith in his judgment.
    iii. If in doubt, tell the prospective mediator about your concerns. Since the other side trusts the mediator, he may be more effective and persuasive than a mediator with whom it is unfamiliar.
    iv. Feel free to ask for references from the attorneys or parties in other cases that he mediated in which your adversary was a party.
    v. Ask his feeling about the particular concerns you have regarding the subject matter of the action or the attributes of your client.

e. TIP: Because the mediator has no power to decide a dispute, *ex parte* communications with mediators, either prior to joint sessions, in caucuses and otherwise, are the rule, rather than the exception. You can talk about the case, your particular problems that may impact on the negotiation, and what you think about your

adversary. As mediators do not function as judges or arbitrators, so that there is no prohibition. But do not expect any compromise to the mediator's neutrality.

5. Mediation Service Agreements deal with the following:
    a. Fee Structure and responsibility for payment
    b. Confidentiality and being barred from testifying, to be signed by all individuals and parties present at mediation sessions.
    c. Discuss and decide preference for mediation style, such as Facilitative vs. Evaluative.
        i. Facilitative: Mediator encourages self-determination and discloses no judgment or opinion.
        ii. Evaluative: Mediator's evaluation and judgment is desired.
        iii. May start as Facilitative and evolve into Evaluative
        iv. Med-Arb. If mediation fails, the neutral makes a binding decision. Confidential communications during the process may influence the award. Raises issues of privilege and confidentiality
        v. Arb-Med. The neutral acts as an arbitrator, hears the case and renders a sealed award. The neutral then attempts to facilitate a settlement. If unsuccessful, the award is issued.
    d. In court-annexed mediation , terms and conditions terms are fixed by court rules, so that no formal agreement is required. To avoid surprises, when fees apply and what they would be should be discussed at the start.

6. Pre-Mediation procedures
    a. Initial conference agenda:
        i. Arranging for disclosure needed to negotiate in good faith
        ii. TIP: Who shall attend mediation sessions? You are entitled to know that it will be someone with authority to hear the facts and theories from an adverse party and bind the adversary to a settlement. It will be a waste of your time if adversary is not bringing the right people to the table. "That's all the authority I have" is unacceptable. The best practice is that the representatives should include one authorized to agree to the amount demanded, if that amount can be justified in good faith.
        iii. Commitment to a full day, if necessary. An additional reserve date may be indicated if the case is complex. "I have

to make a 3:30 train" is unacceptable when others have committed themselves.

iv. Location for the mediation that preserves the feeling of neutrality.

v. Interim relief, e.g., preserving the status quo, hiring of neutral consultant.

b. TIP: Convening stage mediation (Pre-mediation caucuses}. This consists of ex parte caucuses prior to joint sessions, and may be days in advance or immediately prior to the joint session.

i. Not a universal practice. A fair number of mediators are not familiar with it, or do not believe it is helpful.

ii. May be requested by the mediator or by the parties.

iii. Participation may boost your client's comfort level with mediator; rapport and credibility.

iv. Discuss special problems that may arise in mediation, e.g., and intimidating relationship.

v. Helps parties set reasonable approaches and goals for the mediation.

vi. Ex-parte convening sessions are OK, since the mediator is not a decision maker, but the fact of the meeting itself should be disclosed to the adversary.

vii. Review of prior negotiations, so as not to move backwards.

viii. Educates and prepares mediator to overcoming factors that may prevent resolution.

ix. Makes sure that all the right people will be physically present. Telephonic presence is a poor second choice.

c. Ì TIP: Use the convening session to determine if there are any issues that can be agreed upon in advance?

d. Discuss the Mediation Brief, as preferred by the Mediator

i. TIP: Ask the mediator what he would like included, and follow mediator's direction. Usually, it will include the following:

1. Description of the Parties and the history of their relationship.
2. The material facts and exhibits, e.g. contracts, photos, expert reports.
3. Controlling principals of law, and if determinative, the controlling case and statutes.

4. The history of prior settlement discussions.
5. Whether there any issues that we can agree upon in advance.
6. Describe what have been the past obstacles to settlement. Why did the prior attempts to negotiate a settlement fail?
7. What you think the other side views as a fair settlement?
8. Any other information that you want the mediator to know to better understand the matter from your client's perspective.
9. Suggestions for an agenda and what the negotiated settlement should look like in order to meet your client's needs. This will save time.
10. The overall tone of the submission should not be incendiary, but conciliatory and indicative that you understand the positions of each party. That builds trust.

ii. Confidentiality of submissions:

1. Submissions to the mediator can be all confidential, all shared, or a mixture. For example, items 1 – 5 can be shared and 6 -10 can be confidential.
2. Sharing more, rather than less, improves the chances of success in mediation. If the information contained in items 1-5 is not shared with the adversary, or is disclosed to the adversary for the first time at the mediation session, it may not be possible for the adversary and its executives to fully evaluate it and be able to respond during the mediation session. It could result in impasse, or at least the need to reconvene for a subsequent session.
3. Indicate on the face sheet the submission that you wish to keep confidential.

7. Preparation for Mediation
    a. TIP: Preparation for mediation is as important as preparing for trial, since your case will more that likely be settled and disposed of before trial.
    b. The attorney must prepare (1) himself, (2) the client, and (3) the mediator.

c. Define issues and interests. What does each party need to achieve, both psychologically and economically?
    i. Yours, and
    ii. Theirs
d. Identify the critical facts and decide how to illustrate and show them with maximum impact. Professionally made exhibits, as used in court, are helpful, and hopefully get the adversary to focus more on your points, and less on its points.
e. Prepare client to listen closely and be open to learn and process new information and ideas presented by the mediator and the adversary during mediation.
f. TIP: Help your client to be realistic. [Most attorney-client disputes arise because the client feels it was encouraged by the attorney into maintaining inflated impressions about the strength and value of its case rather than the vulnerabilities**. Why did I spend more on the litigation than I could have settled for?]** Emphasize that it is usually unlikely that one can guaranty the outcome of litigation. Litigation involves risk. The client should not hear about the weaknesses in its case for the first time from the mediator or adversary. To manage this inherent risk the lawyer must guide the client in attempting a settlement through negotiation or mediation. In either case, the attorney assists the client developing a "Settlement Range."
    i. One of the most successful ways that a Settlement Range is computed is by assessing your client's BATNA (Best Alternative to a Negotiated Agreement) and its WATNA (Worse Alternative to a Negotiated Agreement). See, Roger Fisher and William Ury, *Getting to Yes* (New York: Penquin Books, 1983).
    ii. This seemingly simple assessment is really quite complex. Also known as "Decision Analysis." It works when the participants are trying to divide a "fixed pie," and both parties want to claim as much of the pie as possible. It involves creating a factor for the various risks along the path of a litigation, such as the outcome of a motion for summary judgment and loss at a trial, and multiplying that factor by the high range and the low range of the verdict sustainable.
    iii. An alternative concept is known as "Integrative Negotiations." This involves creating value or "Enlarging the pie." It occurs when the parties have a shared interest in

the subject matter of the dispute, such as when dealing with intellectual property or natural resources. They combine their interests to create joint value.

iv. Be brutally frank with Client on this assessment. If you are not, and the eventual outcome is unexpected, the client will feel mislead.

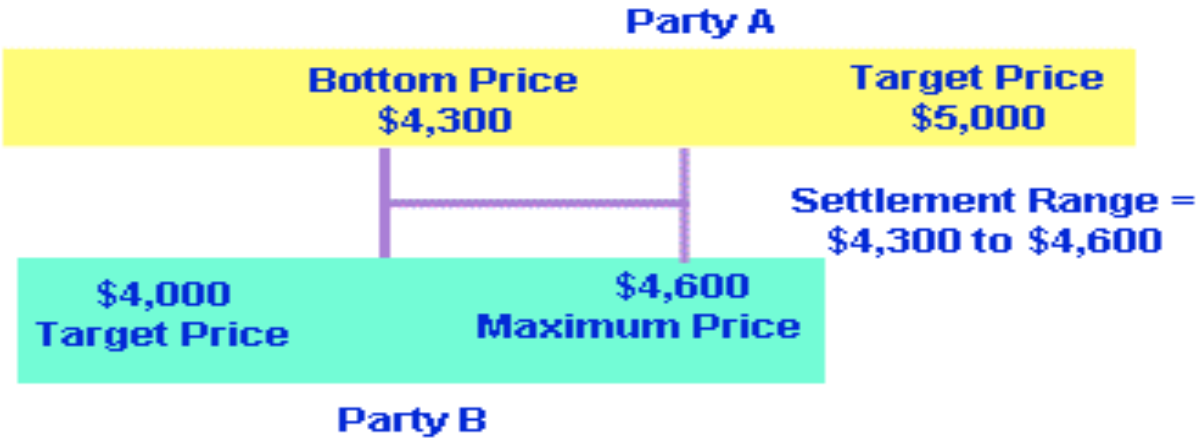
v. Putting these assessments together, calculate your Settlement Range, which is somewhere within the scale of values between the BATNA and WATNA.

vi. It is within the Settlement Range that you and your client can fix the following values:

    1. Target Point (Desired Settlement Point): The preferred price, aspiration, or the point at which the party would like to conclude negotiation, the optimal point.
    2. Resistance Point (Walkaway Point or Bottom Price): The reservation price, beyond which your party will not go. If you do not establish this value there is a possibility your client can walk away with a bad deal, suffer buyer's remorse (and blame you). This value remains secret, and might not even be revealed to the mediator, except perhaps when on the verge of impasse. Your objective is to reach an agreement as close as possible to your adversary's Resistance Point. When the claimant's resistance point is lower the respondent's, then a deal is possible. If claimant's resistance point is higher that the claimant's, then no deal is possible.
    3. The Initial Offer (Opening Position): This is the artful balance between being optimistic and realistic. This will be a number in excess of your target price, but not far in excess as to discourage the adversary from believing that negotiations can proceed in good faith. The number should be at or between your BATNA and well above your Target Price. It must be presented with a reasoned explanation showing that it was not pulled out of thin air. For example, it should be supported by a written computation that might include your BATNA, or by jury verdict reports, with a modest discount for the (a) the savings

for present value, (b) unrecoverable costs of further litigation, and (c) a modest factor for the chance of an adverse judgment.

4. Here is an illustration of how negotiation values may work. When your bottom price is less than your adversary's resistance price, a settlement is possible, as you are both within the Settlement Range. It will be referred to below as the Zone of Possible Agreement ("ZOPA"). See, Spangler, *Zone of Possible Agreement (ZOPA)*, June 2003, http://www.beyondintractability.org.
5. ZOPA exists if there is a potential agreement that would benefit both sides.



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vii. CAUTION: At this point in the process, your client has not yet had the opportunity to fully assess the strength of your adversary's presentation. You must caution your client to listen attentively and be open to revision of the foregoing values. If your adversary has a more colorable case than first thought, your client's assessment should be modified.

g. Preparation for an Opening Statement.
   i. To be presented by party or its representative, or by Attorney
      1. By party or party representative, if -
         a. Party is articulate and not feeling threatened or uncomfortable.

b. Party would be an impressive, or at least a convincing witness at trial
c. Party has personal knowledge and command of the issues. Always try to have your client speak to the technical aspects of the case, especially if he is at least as knowledgeable as the adversary in the relevant facts.
d. Some mediators will strongly urge that it be the party, but the final choice belongs to the party. They will say –"Let's hear from the parties." However, the choice is not the mediator's.
e. TIP: If it is not to be the party, this should be discussed with the mediator ex parte, to avoid unnecessary contention at the joint session.

2. By attorney if the foregoing factors are lacking.
   a. Tip: This is not to be the same as an opening statement at a trial. The attorney may start by pointing out that if the matter goes to trial, both sides will pull all stops to competently present the most overwhelming to insure they will win and the other side will lose. If you were not convinced of that, you would not have commenced (or opposed) this lawsuit. You then allow that this is not the objective in the mediation.
   b. The intent and purpose is not to inflame and harden the positions of the adversaries.
   c. The objective is educating your adversary that all participants share interdependence in the success of the mediation. Mediation is a joint venture.
3. TIP: You need to show that you are fair in understanding the position of the adversary. You do this by accurately and fairly reframing their position so that your adversary knows that you understand, even if y9u do not agree. If you follow their opening, thank them for it and restate their points to show that you were listening and understand them. Remember,

"understanding" your adversary's position is not the same as "agreeing" with that position.

i. You need to appear as trustworthy and impartial as possible in discussing the strength and weaknesses of both sides.
ii. You need to appear as someone your adversary can talk to, to whom it can appeal to with reason.
iii. You want to be as courteous and civil as possible, thanking them for being there.
iv. After showing that you understand the emotional components of the adversary's position, attempt to persuade the adversary to focus on the facts, rather than the emotions, as if they were a neutral judge or jury. Your goals include informing the adversary of your client's issues and interests.

ii. How much to reveal?
    1. Elements of the cause of action
    2. Schedule with itemization of claims. Get the focus of the discussions to be the items of claim.

h. Persons you will want to attend. (On these issues, the mediator is your best ally, as he too does not want to waste his time if there is no likelihood of settlement.)
    i. Individuals that have personal knowledge of the facts
    ii. Experts, such as engineer, architect, economists or accountant.
    iii. The decision-maker on any settlement, who you want to hear and determine your client's presentation and the opposition.
    iv. TIP: Significant others who have to live with your client's settlement, e.g. spouses, partners.
    v. TIP: Refuse to attend mediation unless assured that the person with full authority is to attend. If it is court-annexed mediation, the court will generally back you up on this.
    vi. Where insurance companies are involved, in some cases in "tower" arrangements, where different companies are involved at different dollar levels, you must gain a n understanding of the structure and insure that the

companies responsible for the likely amount of the settlement are represented.

vii. Special problems arise when dealing with a government agency as an adversary. In such cases, settlements are generally subject to approval of a controller or other official. Some research is necessary to understand the particularities of the party in such cases.

i. In your briefcase:
    i. Punch list of items to be covered by party spokesman
    ii. Controlling exhibits, such as documents and photos, with copies for all.
    iii. Statements of claim or Pleadings, if litigation has commenced, and any controlling decisions rendered by court.
    iv. Itemized statement of claim, with copies for all.
    v. TIP: Trial Graphs and visual aids.

8. Conduct of Mediation.
    a. Arrive early to spend a little quality time with the Mediator. It is an ideal time to review issues and suggestions as to the agenda for the session.
    b. The Mediator will usually make an opening statement, establishing the ground rules and how he hopes the mediation will go, explaining the process (for the benefit of the non-attorneys present).
    c. Which party makes an opening statement first?
        i. Usually, the party with the burden of proof should open first, but this is subject to agreement. For example, if the other party has a serious affirmative defense that might bar recovery, it might logically wish to go first.
        ii. Throughout joint sessions, remarks and eye contact should be directed to the other party, whom you are trying to convince, not the mediator.
        iii. Respect and courtesy encourages agreement; no interruption, but listening party can take notes so as not to forget important points or questions.
        iv. This is an opportunity to ask questions to clarify issues.
    d. "Getting past yesterday;" try to focus on going forward and not dwell on the past. However, often when emotions are high, there is a need to vent. But that should not dominate the time after the opening remarks.

e. "Mediation Tone" should govern the style and demeanor of the lawyers throughout the mediation. One can be powerful, convincing and persuasive while avoiding the rancor that can disrupt or discourage the mediator and adversary from hoping for a reasoned settlement.
f. TIP: Remember; to succeed, this is the time to focus on creative problem solving and settlement. On this day you are from the State Department, not the Defense Department. Shock and Awe is appropriate only when diplomacy fails.
g. TIP: Try to have your adversary join you in focusing on what must be done to move forward. Sometimes a private caucus with your adversary will help. In front of his client he may need to grand-stand, but one on one may help set a constructive mood.
h. Emphasize that success in mediation is a shared responsibility.

9. TIP: The first offer: The opening statement is not the time to make any offer. That should happen after both sides have listened to the other's opening statements.
    a. It is often a good idea to caucus with the mediator before making an offer. He has a neutral take on whether the adversary is ready to negotiate.
    b. The first offer will not be accepted. It should be viewed as a starting point for negotiations. Your adversary will expect that there will be significant modification. You need to anticipate that there will be a need for built-in margin.
    c. The exception is a practice has became known as "Boulwarism," named for Lemuel Boulwar, the vice-president of General Electric in charge of labor negotiations. GE had the bargaining power and the will to make one "take it or leave it" offer which the company considered to be fair and reasonable, and it was well=know that it will never budge from it. (It was a tactic that the NLRB ruled to be an unfair refusal to bargain, and illegal.) You can use this tactic if you represent GE. If not, it is up to you to make your client flexible.
    d. When ready to make an offer, it is really a suggestion of what you propose the settlement should be (your Initial Offer). Be sure to justify it. It should not be a round number or other relief that no reasonable court would award. Try to make it appear to be a thoughtful number, based upon a shared calculation, not a round number pulled out of the hat.

e. Your offer need not be blind to extra-legal arguments, if such is the decision of your client, for example:
    i. The adversary has an immediate need for relief.
    ii. The adversary lacks the resources to support litigation.
    iii. Adversary needs to get matter off its financial statement.
f. TIP: Who makes the first offer?
    i. There is no rule, but as a general proposition, where your client has not made the last offer, there is no prejudice in making a first offer.
    ii. If you client has made a reasoned last offer in prior negotiations, that offer should be reiterated and supported by argument, and not changed until there is a good faith counter-proposal.
    iii. Never bid against yourself, at auctions or at negotiations. If your adversary does not respond positively to your last good faith offer, there is no negotiation. In general, it is for the mediator to go to work on your adversary at that point.

g. Heuristic Biases (See, *Negotiation and Mediation*, Peter J. Carnevale and Dean G. Pruit*t, Annu. Rev. Psychol.* 1992, 43:531-82). These are also referred to as "cognitive biases," of mental shortcuts engaged in a statistically significant number of negotiators. Some negotiators are assumed to have a limited attention and capacity to store and retrieve information from memory. They use heuristics – shortcuts and other simplifying strategies – to help manage information. They include the following:
    i. ANCHORING: Most people subconsciously adjust their expectations based upon the first numbers they hear. That is why a first offer and a first demand should show thoughtfulness and a willingness to negotiate a settlement. An arbitrarily chosen reference point has an inordinate negative influence on judgments. It was observed that prior information on pricing has an unusual impact in negotiations. The initial offer, within the realm of credibility, thus had a beneficial effect on negotiation.
    ii. BIAS DUE TO FRAMING OF OUTCOMES: With a positive frame, negotiators viewed prospective outcomes as gains and saw the negotiation as an effort to maximize net profits. Ex.: Show a concern for the other party's outcomes. Ex: If we can achieve a settlement today you will be able to save

your client tens of thousands of dollars, all flowing to, and representing a gain to, the bottom line, while still not overcompensating the claimant.

iii. THE FIXED-PIE PERCEPTION: Do not assume that "your win is my loss;" or zero-sum. This happens when negotiators believe that the other negotiators' interests are directly opposed to theirs. Some negotiations provide an opportunity for joint gain. When we buy a carrot cake, my wife only likes the frosting, and I only like the cake part. Therefore, we each get the whole cake. We have a win-win outcome.

iv. ILLUSORY CONFLICT: Try to point out the common interests of the parties, such as marketing a product and gaining royalty income. The licensor had no interest in distributing the product, which the distributor had no interest in manufacturing it. They had compatible interests.

v. REACTIVE DEVALUAITON: Don't devalue a proposal even before your adversary proposed it. Sometimes, with a little tinkering, your adversary's proposal can also benefit your client. Avoid the reaction, and persuade your adversary to avoid the reaction that whatever is good for one party is bad for the other.

h. The caucus.

i. Tip: Do not try to "play" the mediator. It will waste time. Also, he has heard that one before.

ii. TIP: Prepare your client to experience the reality check in caucus. Don't let you client walk into a caucus unprepared.

1. It is good for you and your client to hear.
2. It does not mean that he is not neutral; your adversary is going to get the same treatment.
3. Be prepared to counter the mediator's reality check, giving the mediator the ammunition to challenge your adversary's arguments in their caucus.
4. Try to get the mediator to verbalize your point, to make certain he understands and in comfortable in expressing it in their adversary's caucus. Make him your spokesman.

iii. TIP: Always ask the mediator for his advice prior to proposing a settlement offer. Ask the mediator what he thinks would be the reaction to that offer. Often the

intention of the offer is not to settle on it, but to act as a catalyst for a counter-offer. Then, consider that advice. However, your client must have the last word on making the offer.

iv. Propose options that might be beyond the power of the court to direct, or encourage the mediator to do so, and authorize the mediator to float these options to the adversary.

i. Consider a Neutral Expert. In complex and technical cases, where the parties seem far apart on the facts and their implications, it may be useful to suggest that they agree to bring in a neutral expert in whom they both trust.
    i. They must agree on the selection of the expert, fee sharing and that neither will use the expert or his report in the trial of the action if there is not settlement.
    ii. The mediator must still maintain his role in facilitation of the process.

j. Your objective (with the help of the Mediator) is to convince your adversary that your client's BATNA and WATNA are realistic, so that his settlement range makes sense.
    i. Once you and your adversary have a Settlement Range that overlap, you have achieved a ZOPA (Zone of Probable Agreement).
    ii. Within this zone, an agreement is possible. Outside of this zone no amount of negotiation will yield an agreement. It is at some point in the ZOPA that your client should be prepared to settle.
    iii. If the ZOPA for each party is irreconcilable, then you need to enlarge the pie to create a "win-win" solution. Think creatively. There may be alternatives not contemplated in the zone that might bridge the gap, such as -

        1. Future services or agreements.
        2. Payment terms or guaranties.
        3. Buy-outs.
        4. Division of the pie giving each party the part that fits there needs.

10. Avoiding Impasse: While some of the ways that avoiding an impasse are outlined below, the advocate must never fear the possibility that a particular case cannot be settled in mediation. In such a case, leave the

mediation after thanking the mediator and the adversary for their efforts and leave with a tone of good will. Many times a mediation that ends with an impasse will still have accomplished laying groundwork for future negotiation. Also, better mediators will try to stay in contact with the parties and encourage a change of thinking as time passes. Suggestions for breaking an impasse follow:

a. Exchange Value in the negotiation:
    i. Listen carefully and ask questions to identify interests and needs.
    ii. Ferret out the party's UNARTICULATED NEEDS, by asking searching and open-ended questions.
    iii. Bring options to the table. There is no harm in experimenting and floating creative ideas.
    iv. TIP: If your idea does not work, ask your adversary if it has any ideas to put on the table.
    v. Exchange low-cost for high-value items. These can include apologies, letters of recommendation, confidentiality, and payment terms in exchange for concessions of value to your client.
    vi. Cooperate with adversary to fulfill its needs.
b. Conduct to avoid:
    i. Offers or demands that cannot be justified, so as so appear to be in bad faith.
    ii. Agreeing to "Splitting the Difference" before you are within the ZOPA.
    iii. Personal attacks
    iv. Factual misrepresentations and fraud.
    v. Concerns about maintaining good relations with the mediator, the adversary or its attorney.
    vi. Threats, but you can certainly alert your adversary that it is walking a thin line, legally or ethically.
    vii. Preventing face-saving concessions
    viii. Changing your position without corresponding change in position from your adversary.
    ix. Unwillingness to stand pat, or walk away
    x. Impatience; you do not score advantages by being the first to pack up bags and leave.
c. Tools of persuasion
    i. Show how your concessions equate with theirs and are fair.

ii. Identify possible precedents from the past or between your adversary and other parties.
iii. The concessions are justifiable both in the instant dispute and as precedent for future transactions between the parties or with third-parties.

d. Mutuality of Vulnerability
   i. Each party representative tells what might happen if the dispute went to court, both in the strength of your case and the risks.
   ii. Then, assume that you went to court and disaster struck. How would you explain that to your client? How could this have happened? (It will happen to at least one of the parties.)

e. Divide and Settle:
   i. In dealing with a dispute involving multiple parties, it is very often beneficial to settle out the more cut-and-dry cases, reduce the number of parties at the table, and them clear the air to focus on the main issues. This is common in construction disputes, where amongst the multiple parties, the case can be settled against one or more.
   ii. In dealing with multiple claims against a single party, a claim can be settled, contingent on global settlement ultimately being reached.

f. Adjourn to another day:
   i. Sometime, the parties have accomplished all that they can for the day.
   ii. It is OK to summarize where the parties are and adjourn to another day, giving all a chance to regroup and consider where they are and how they can move forward.

11. Impasse – An impasse (unlike diamonds) are not forever; even after appeal, mediation can succeed.
    a. The Three P's.
    b. Impasses are made to be broken.
    c. The threat of an impasse can sometimes be an effective tactic to achieve a settlement. It is really a dare. Since your adversary (as well as you) has made an investment in the mediation process, he does not want to have to explain to his client that it was a wasted investment.
    d. Encourage follow-ups by mediator.

e. Conditional offers: If I can get my client to point "X" can you get adversary to
    i. accept that offer, or
    ii. improve his demand to "Y"?
f. Mediator's Proposal – A mediator can suggest a settlement and privately ask each party whether it will accept it.
    i. If both agree, the matter is settled.
    ii. If one party does not agree, the identity of the party that agreed is kept confidential, so that the other party does not know that about it, and the settlement fails.
    iii. If the mediator's proposal is not accepted, that usually ends the mediation, as the mediator has stated his evaluation. For that reason, the mediator will seldom make the proposal unless, having spoken to both parties, he believes that it is within the ZOLA and will be accepted.
g. Med. - Arb. In the event of an impasse, the parties agree that the mediator will make a final and binding decision.
h. Baseball arbitration: Each party makes a confidential proposal for settlement. The mediator becomes an arbitrator and must select the one that seems right to him. He can only chose one or the other. There is an inherent incentive for each party to submit a fair proposal.

12. Preparation for memorandum of understanding
    a. TIP: Arrive at the session with check – list, if not a draft, of the agreement you would be prepared to sign, including all terms, with numbers blank. The excitement or the lateness of the hour may otherwise cause you to overlook something.
    b. If there are any sticking points besides the agreed negotiated settlement, do not spring them up at the last minute. Mention them as a part of any offer on the table, such as
        i. Confidentiality
        ii. Installment payment terms, with or without guaranties and penalties for default
        iii. Apologies
        iv. Non-disparagement clauses
    c. At this stage it is bad faith to add additional substantive terms.
        i. This is no time for a party to say "I almost forgot" or "I can't pay until the next fiscal year, " or "I also need a release of company Y."

d. If you settled, do not leave without a signed memo of understanding (MOU). A handshake is not enough.
e. Leaving a MOU to another day invites buyer's remorse.
f. Can be quick and dirty term sheet, or a carefully drafted agreement.
g. If a term sheet is signed, provide that if a more formal agreement is not executed in 30 days, have a fail-safe provision, e.g.:
    i. the term sheet shall be deemed final and binding, or
    ii. the mediator shall arbitrate the differences and his decision will be final and binding.

13. Settlement Counsel: This is a relatively recent area of specialty in the legal profession.

14. Ethical Issues
    a. Failing to advise a client of the availability of mediation.
        i. In certain jurisdictions the Code of Professional responsibility requires an attorney to advise his client of the appropriateness and availability of mediation.
            1. Va. Canon 6 (Competence)
            2. Va. Rule 1.2 of the Rules of Professional Conduct
        ii. New York Rules of Professional Responsibility, 22 NY Rules of Court, Part 1200 (April 1, 2009, has not explicitly gone that far, but there is pressure from various bars to do so. Until it does, it may be argued that it is the best practice to do so, and to even include it in the lawyer's letter of engagement.
        iii. There is no apparent down-side to advising the client of the alternate dispute resolution alternative to litigation.
    b. Rule 1.1: **Competence** (a) A lawyer should provide competent representation to a client. Competent representation required that legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. This includes representation at a mediation. (NOTE: the provision for "zealous" advocacy has been removed from the Rules.)
    c. Rule 1.12: **Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or other Third-Party Neutrals**
    (b) Except as stated in paragraph (e), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer

shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.

(c) A lawyer shall not negotiate for [his own] employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

d. Rule 2.4: **Lawyer Serving as Third-Party Neutral**
e. Rule 3.3**: Conduct Before a Tribunal**
f. Rule 3.4 **Fairness to Opposing Party and Counsel**
    i. Legal obligation to produce "smoking gun."
g. Rule 3.4(e) A. "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."
    i. What about threats of ethical misconduct, where there is an obligation placed upon lawyers to report such conduct?
    ii. Does the rule of confidentiality bar the lawyer from reporting misconduct?
h. Rule 4.1: **Truthfulness in Statements to Others**

In the course of representing a client, a lawyer shall not knowingly make a false statement of fact to a third person.

COMMENT 1: A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

COMMENT 2: Whether a particular statement would be regarded as on of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud.

This certainly applies to representing a client in mediation. Examples may include the following:

i. My best and final offer (at this time, or, until I hear a reason to change my offer).
ii. I am going to file in bankruptcy.
iii. The truth (yes), but the whole truth (?) A lawyer has no duty to inform an adversary of relevant facts (but may not provide statements which he knows to be false).

i. Rule 4.2:**Communication With Person Represented By Counsel**

(a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

a. "Reply All," when receiving an email from adversary who CC'd his client? What about a BCC?
b. Outside of Joint Session.
c. TIP: However, in a joint session the lawyer has a perfectly ethical and important opportunity to communicate directly with his represented adversary.)
j. Avoidance of fraud, impropriety and dishonesty.
    i. All participants in mediation are bound by this rule.
    ii. You cannot ask the mediator to transmit information that violates this rule. A mediator will not do this.
    iii. You cannot offer the mediator or opposing counsel the prospect of future employment in the course of mediation.
k. Special issues when the adversary is *pro se.*
    i. When it lacks knowledge that it has a good legal defense, e.g. statute of frauds, statute of limitations, lack evidence required to prove the elements of a *prima facie* case.
    ii. Mediator, feeling the responsibity for the integrity of the mediation processes, will urge, or at least offer the opportunity to the *pro se* party to obtain legal advice. At what point does the mediator overstep his neutrality?

15. Q. & A.