PRACTICE POINTERS FOR THE LAWYER ADVISING CLIENTS IN MEDIATION – A MEDIATOR'S PERSPECTIVE

by Phil Cutler[1]

Just as mediation is an art, not a science, there is an art to advocacy in mediation. I have developed the following "pointers" during the course of over 30 years as a trial lawyer in complex commercial and business disputes, and 25-plus years serving as mediator in such cases. Although they reflect my personal experience as lawyer and mediator in commercial cases, the essential learning points cut across practice lines.

Develop a Settlement Strategy

While some commentators treat "the vanishing trial" as a new phenomenon, the reality is that for many years only a small percentage of filed cases have proceeded to trial. The remainder whither away – some with the help of a judge – or settle. As you develop your discovery and trial strategy, plan a ***settlement strategy*** which tracks with those strategies. Identify at the inception of a case the amount and sequence of discovery which you need in order to evaluate your client's legal case and analyze settlement options – from both your client's perspective and from the perspective of your opponent. Do not let cases drift to the point where they cannot be settled because of pending dispositive motions or because an excessive prior expenditure of fees and costs in litigation needs to be rationalized. At least internally, treat the "transaction costs" (your fees and costs) as if they were part of a potential settlement fund and husband those resources accordingly.

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Talk to your client frequently about the client's goals in the litigation. Get your client to distinguish between ***needs*** and ***wants*** – and try to identify the other party's needs (you undoubtedly know what the other side wants). Revisit that discussion as the case progresses. Remember that clients unsophisticated in litigation may not fully appreciate the emotional and financial drain of litigation, particularly the discovery process. Take a client's "damn the torpedoes, full speed ahead" demand with a grain of salt and remind the client – often – of the risks of continued litigation – including the demands litigation will place on the client.

Mediation is not a panacea. Nor should all cases settle. There are disputes of such dimension that trial is the only real way to resolve them. Wise counsel, however, will distinguish those rare cases and consider mediation or settlement in other cases.

Use Mediation at the Earliest Practicable Time

Consider using mediation as early as possible. It is the unusual case where counsel needs to conduct every last scrap of discovery in order to effectively mediate a case. While many lawyers, when asked when mediation should be undertaken, respond, "After the close of discovery," that is frequently ***not*** the best time to mediate. Counsel's responsibility is to resolve their clients' disputes ***effectively*** and ***efficiently***. Discovery is generally the most expensive phase of the litigation process. Develop a discovery plan that focuses first on what you and opposing counsel need to evaluate the case and set the stage for a successful mediation or other settlement dialogue. Only by encouraging clients to participate in an earlier, neutral evaluation of their cases will lawyers prevent the litigants from saying, after the conclusion of the case, "only the attorneys won."

Know Your Mediator

Mediation is an art, not a science, and all mediators are not cut from the same cloth. Know your mediator's personality; his or her familiarity with the litigation process in general and as applied to your case; his or her familiarity with the substantive legal issues presented by your case (if familiarity with such issues is important to you or your client); and, perhaps most importantly, how your mediator generally conducts a mediation. Business disputes frequently require a mediator savvy in the ways of the business world where the finer points of legal "positions" take a back seat to practicality.

Counsel should be aware of at least broad styles of mediator performance. While conventional wisdom frequently categorizes mediation styles as *evaluative* (sometimes referred to as "directive"), *facilitative*, or *transformative*[2] in reality there is a much broader spectrum of mediator performance and many mediators use a hybrid approach combining various styles.

Some mediators are activists and conduct mediations much like a judicial settlement conference. They will get involved in the details of the case; will tell the parties their assessment of settlement value; and will actively try to assist the parties in understanding their strengths and weaknesses, all with a view toward producing a settlement.

Other mediators are more passive and view their role as primarily a relayer of settlement offers. They do not view it as their duty, or even appropriate, to provide an assessment either of the merits of a case or disputed legal points.

Some mediators believe that the best way to produce a settlement is to fully understand and discuss the merits of a case, providing the litigants with their "day in court" or at least an opportunity to "vent." This recognizes that in order for the litigants to settle, they will have to be satisfied that their position has been fully understood, and otherwise to have "closure" on the personal issues which they brought to the dispute. This mediation style believes that monetary offers and ultimately settlement follow an understanding of the merits (or the parties' view of the merits).

Other mediators are more interested in immediately proceeding to an exchange of monetary offers. These mediators tend to believe that a detailed discussion of the merits is somewhat immaterial to the ultimate result.

All of the above styles – and they are by no means an exhaustive list, as each style has nuances – have their pluses and minuses. Counsel needs to carefully

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[2] Mediations are also sometimes referred to, and mediator style characterized, as "rights-based" or as "interest-based". Disputes driven by legal principles perceived by the client or counsel as of paramount, or at least very significant, importance often can be successfully mediated only if the mediator is able to deal with these legal "rights" in a fashion acceptable to both sides. On the other hand, where, for example, a continuing business relationship or the achievement of a result which could not be obtained at trial is a key consideration in a party's thinking, legal principles ("rights") are of secondary importance and the parties' respective "interests" are of primary consideration. The effective mediator will tailor his or her approach to the needs of the case.

investigate prior performance and style of the mediator. The best trial attorneys are not always the best mediators. Although the best mediators adapt their approach to the needs of the case, mediators are human after all and a particular mediator may be extremely well-suited to handle one type of case (or parties with one set of characteristics), but be absolutely the wrong choice for another type of case or involving different party dynamics.

- ✔ Consult fellow trial lawyers and lawyers in your own firm for their recommendations.

- ✔ Consult other sources for mediator candidates.

- ✔ Most mediators have an "ADR Profile" which outlines their substantive law practice, mediation training and experience, and other information of interest to counsel in selecting a mediator. Ask for a copy.

- ✔ All institutional ADR provider organizations (such as the AAA, JAMS) have similar profiles available for their mediators. Ask for one.

- ✔ If your court system has a court-annexed ADR program, consult the director for available information about mediators on the court's roster.

- ✔ Most state bar associations, and some local bar associations, have a dispute resolution section. Consult the section leadership for available information about mediators practicing in your area.

The bottom line: if you don't know about your mediator, ask.

Finally, consider whether substantive law knowledge is an important consideration in selecting a mediator. If it is, be sure to vet mediator candidates with that skill-set in mind.

Mediation is Most Often not Free

Most mediators are good because they mediate often. While some mediations take only a few hours, most take a full day, plus several hours of

preparation time. Not many mediators can afford to spend the equivalent of a business month – or more – without compensation. Nor should they be expected to do so.

Some mediators, particularly those participating in court-annexed ADR programs, offer their services *pro bono*, either in whole or in part. Indeed, one can argue that the fact that the mediator is not getting paid gives him or her some "moral authority." Although nearly all mediators (regardless of the forum through which they are selected or serve) will serve without compensation in an appropriate case, the reality today is that parties are expected to compensate the mediator for the skills he or she brings to the dispute resolution table. Recognize this and prepare your client for it.

As clients are entitled to know the basis on which their lawyers are charging them, so too you and your client are entitled to know the basis on which the mediator is going to be compensated and how his or her fees are going to be shared. While mediators' charges vary, in most major metropolitan areas a typical day-long mediation can cost in the neighborhood of $3500 - $5000; in simple two-party disputes, each side winds up paying about half that, $1750 - $2500. Ask your mediator about his or her charges and the mediator's estimate of mediation costs for your case. Be sure you understand what percentage of the mediator's fees are going to be charged to you and your client.

Are mediation costs "worth it?" It's impossible to generalize. If the case settles – saving all parties the aggravation, uncertainty and cost of a trial – they most always are. The analysis is more difficult if the case doesn't settle, but even in those instances both clients and their lawyers generally learn more about their case (and their opponent's) than they knew before the mediation. Of course, if you don't think the cost of mediation is worth it you always have the option of negotiating a settlement directly with your opposite number.

Help Your Mediator Understand Your Client's Perspective on the Dispute

Your mediator can be most effective if he or she knows something about your client and his or her perspective on the dispute. What drove your client to sue (or to defend the case so vigorously)? What is motivating your client to continue the case? What your client ***wants*** from a resolution of the dispute is important, but what the mediator (and you!) really needs to know is what your client ***needs***. What facts or issues are motivating a settlement, or would motivate your client or

the other party to settle? Ordinarily, these considerations are set forth in a separate, confidential, "mediator's-eyes-only" memo; even if your mediator doesn't ask for such a memo, consider submitting one.

Consider sitting down (or conferring by telephone) with your mediator before the mediation to share with him or her your and your client's perspective on the dispute and what is important (and not important) to your client – and, if you know, the other side.

If your client's trial or settlement position is unrealistic – you need the mediator to go through a reality-checking exercise with your client – get the client's permission to share your difference of opinion ***before*** telling the mediator. If you fail to do so, you may violate the Rules of Professional Conduct by disclosing a client confidence.

Have a Settlement Conference with Your Opponent Before Mediating

Before mediating, try and settle the case by direct negotiation with opposing counsel. First, lawyers have been settling cases without mediators for generations; you might surprise yourself! Second, experience has shown that unless parties have attempted to settle their dispute on their own, a significant amount of time is spent by the mediator at the mediation session defining the parties' settlement positions and otherwise setting forth a framework upon which a settlement can be based. This results in wasted time – and money.

Prepare Yourself Thoroughly for the Mediation

Prepare thoroughly for your mediation and take it very seriously. Given the fact that a large percentage of cases which are mediated will settle, mediation represents one of your best opportunities for resolving your client's dispute. No self-respecting business lawyer or business-person would go to a negotiating session without thoroughly preparing for it. Prepare yourself and your client the same way.

Almost all mediators require a memo from each side, summarizing the salient facts and addressing both liability and damages issues. You need to prepare an excellent and ***concise*** mediation memo. Attach pleadings and exhibits only if your mediator asks for them or if you feel that reading them prior to the mediation will help the mediator better understand the issues in your case. While your

mediation memo should be an advocacy piece, it ought to be more analytical than rhetorical. Be sure your client understands that, notwithstanding the rhetorical advocacy in your mediation memo, his or her position is not necessarily invulnerable, that the dynamics of trial – not to mention the unpredictability of judges and juries – may well impact ultimate success.

Many mediators like to see a confidential, "mediator's-eyes-only" submission from each side. Your confidential letter to the mediator needs to be candid and should identify all impediments to – and motivators for – settlement. Think creatively. Remember that the mediator is relying on you to assist him or her in developing and communicating a settlement offer that realistically meets the needs of all parties.

Share Your Basic Mediation Memo with the Opposing Party

It is the rare case where the prospects for settlement are advanced by the parties ***not*** sharing their basic mediation memos. Share your basic mediation memo with your opposition – and insist that they share theirs with you. If there are things – about the case, the parties – that you'd rather not tell the other party (or tell the other party that you know), consider putting them in your confidential "mediator's-eyes-only" memo. Remember, though, that unless the other party is aware of your "smoking gun" document, "killer witness" or right-on-point-new-case, your having them won't do much to motivate the other party to consider settling on your terms.

Select an Appropriate Client Representative

Where your client is a business entity, selection of the appropriate client representative is of vital importance. Obviously, your client representative needs to have authority to evaluate and develop settlement proposals and to enter into a settlement agreement. Ideally, your client representative should also be someone detached enough from the dispute to be able to objectively evaluate settlement options but high enough in the organizational structure to have an appreciation for how settlement issues might relate to other parts of the organization. Encourage opposing counsel to select a client representative with the same characteristics.

Know your opponent's client representative. Try to ensure that your and your opponent's client representatives are counterparts. Don't hesitate to suggest to opposing counsel (or to the mediator that he or she suggest to your opponent)

that a particular individual in your opponent's organization would be a desirable (or undesirable) counterpart.

Where your client is an individual, make sure that if the client needs a support group – or needs a trusted advisor, friend, or family member to "bless" a settlement – that those persons are either present in the mediation room or at least available by telephone.

Whoever is the client representative, that person must have true settlement authority. Because mediation is a dynamic process, where bottom lines may become fuzzy or irrelevant, the client representative must also have authority to modify pre-existing settlement authority.

It is essential that both client representatives must be available throughout the course of the mediation. If someone else needs to be consulted for additional settlement authority, be sure to have him or her available, at least by telephone. If a key person is in another city or time zone, and will be unavailable (or difficult to reach) after a specific time, let the mediator know as soon as possible. If your client is a governmental entity where any settlement must be approved by the entity's governing body, or corporation where a settlement must be approved by the company's board, let both your opponent and the mediator know before the mediation.

Client Representatives and Lead Counsel Must Attend in Person

Client representatives must attend the mediation in person. Just as important is the in-person attendance of the lead lawyer from each side – the lawyer who will actually try the case if it is not settled. Mediation is dynamic, not static. Information is communicated not only by words but by body language as well. Your client is most likely paying a significant amount of money for the mediator's services. Your client representative must actively participate in the mediation and deserves to hear first-hand the mediator's questions, comments and observations, and to see how the mediator communicates those matters. A telephone connection is a poor substitute for in-person attendance. By the same token, your client needs the advice and counsel of the lawyer who will try the case – and the mediator needs to be able to communicate, directly and in-person, with that lawyer.

Your mediator has most likely left his or her mediation day open-ended, to accommodate wherever mediation dynamics may lead. Do the same. If you, or

your client, simply must be on a 4pm flight home, let the mediator know before the mediation – or at least when the mediation begins. It is discourteous, and not in your client's best interest, to spring an imminent departure on the mediator at the last minute. Better yet, adjust your schedule – and insist that your client adjust his or her schedule – so that you are both able to devote whatever time is reasonably necessary to the mediation.

Prepare Your Client for the Mediation

Mediation often is a poker game. Despite decisions reached prior to the mediation regarding who on your side will be the principal spokesperson during settlement discussions, a good mediator will ask ***both*** counsel and his or her client direct and important questions in an effort to remove impediments to settlement. Assume that your client will be required (or will want) to talk during these private sessions with the mediator. Your client should be prepared to anticipate and correctly answer questions from the mediator concerning ranges of acceptable settlement results. You do not want to be negotiating with the mediator. Be ready. Your client should not hear things for the first time from the mediator.

Consequently, ***thoroughly*** prepare your client for the mediation. Share a draft of your mediation memos with your client; share the opposing side's mediation memo with your client as well. Explain your legal theories and damages rationale; explain your opponent's defenses. Share with your client your assessment of the other side's needs; get the client thinking about how both sides' needs can be met in a settlement. Be candid with the client about the risks of trying the case and the vulnerabilities of the client's position. Explain the mediation process and why you are engaged in it. Tell the client what you know about your mediator's "style" and how he or she is likely to conduct the mediation.

Your client should have a thorough and realistic expectation of the attorneys' fees and costs necessary to take the case through trial and of potential trial outcomes and the consequences which flow from these outcomes. Clients – particularly individuals – tend to think about litigation in simplistic terms. Remind the client (again) that there are "costs" of continued litigation far beyond the out-of-pocket expenses for depositions, experts and your fees: not only will your client have to "live" with you during the trial and the trial preparation period, your client will have to relive – again and again – the events surrounding the dispute. Moreover, unless you've concluded (and advised the client) that the case is a "slam-dunk winner" for your client, remind the client that a trial might not only

produce a less desirable result than hoped-for, your client might actually recover nothing (or be required to pay more money than the client has ever dreamed of). Where there is a fee-shifting statute or contract, make sure the client understands that the client might not only lose the case but be required to pay for the privilege, not once but twice – by paying not only your fees but also the attorney's fees of the opposing side. Also make sure the client understands that if there's a basis for an award of attorneys' fees and the client prevails at trial, trial judges (and arbitrators) don't automatically just award the "winner" all of the attorneys' fees incurred – the touchstone almost always is this: "What is a reasonable attorneys' fee, under the circumstances, to shift to the loser?"

To Begin with a Substantive Joint Session . . . or not?

Twenty or thirty years ago, before mediation became an accepted "event" in the life of a litigated dispute, mediations commonly began with a ***substantive*** joint session, where the lawyers (and sometimes their clients) spoke directly to the other party about the presenter's view of the case or dispute. Indeed, in many regions of the country almost all mediations still begin with a substantive joint session, even when the bulk of mediation time is spent in caucus with the mediator. While a substantive joint session is an unparalleled opportunity for lawyers and clients to speak directly to their opposite numbers, if done haphazardly and without thought it can set the stage for positional bargaining, which is usually not a productive beginning. Now, many mediators commonly convene a joint session, but limit it to discussing the mediation process in general and the ground rules for the upcoming mediation, moving then to separate caucus sessions. Regardless of mediation practice in your region, think carefully about whether a substantive joint session is likely to be productive. Discuss your views with the mediator before the mediation. Solicit the mediator's advice.

If a substantive joint session is held, keep the end-game – a settlement – in mind and focus less on communicating how wronged your client feels and your client's intent to secure its legal rights and more on the client's sincere interest in resolving the case. Bombast and stirring rhetoric may be appropriate for your closing argument; resist the temptation to do a dry run in your substantive joint session.

Be Prepared to Invest Time in Mediation

It is the unusual business case that proceeds in mediation to a rapid exchange of settlement offers or settles in a matter of a few hours. Recognize (and brief your client) that mediation is a complex dynamic ordinarily requiring a substantial commitment of time. You've enlisted the aid of a mediator to facilitate negotiations; no mediator can do so without an understanding not only of the legal and factual issues but of the dynamics driving the dispute. No matter how skilled your mediator, he or she is unlikely to wake up with that "understanding" on the day of the mediation.

The mediator's initial private caucuses with you and the other party play an important role: the mediator is not only expanding his or her knowledge about the case and the factors that each side deems important, but is also building a level of trust with both counsel and their clients. Your client is counting on the mediator to accurately (and energetically) communicate your side's view of the case and settlement position to the opposing side. While you may know the mediator well, your client probably does not. Your client needs to feel confident that the mediator is not only informed, but also empathetic to the client's position.

Remember, too, that the mediator is the best judge of when – if ever – impasse is reached. While mediation is a party-driven, consensual process, abruptly terminating your client's participation in a mediation, or allowing your client to do so, is most often ill-advised – and almost always results in a step backward. In caucus mediations, only the mediator has heard the other side's expressions of settlement possibilities and has evaluated the body language that accompanies those expressions. Let your mediator decide when further mediation efforts would likely be unproductive.

The mediator will be spending substantial time with both you and your opponent. Use the time the mediator is spending with your opponent wisely – talk with your client about what you just learned from the mediator about your opponent's settlement views; consider whether anything you've learned alters, or should alter, your view of the case or settlement parameters; if the mediator gives you "homework," do it. Be prepared for the mediator's next visit to your side.

Understand the Human Dimension; Listen Actively

As the mediation proceeds, remember your audience: Your goal is not to convince a decision-maker of the correctness of your client's cause. Rather, it is to convince your client's opponent of your client's interest in negotiating a settlement that results in a *mutually* beneficial resolution of the dispute at hand.

Understand the human dimension of your case. Don't demonize your opponent or opposing counsel. Remember that in almost every case there are (at least) two sides to the story; while you may have legal or factual arguments to counter those of your opponent, the only way to be sure who's right is to go to trial – and even then, the judge or jury may not give as much shrift to one side's evidence as they should. Mediation isn't about "winning" or "losing" – it's about evaluating risk and making a mutually acceptable level of compromise. While you may disagree with the efficacy of your opponent's legal arguments, or the spin the other party puts on the facts, your opponent almost always has legal arguments – and a story to tell – that are as objectively valid as yours.

Listen actively during the mediation – and advise your client representative to do the same. Achieving success in mediation depends heavily on being a good listener. Understand the signals – from your client, from the mediator, from your opponent – which often are implied but not explicit. If the parties are from different cultures (business or otherwise), consider the impact these cultural differences may have on settlement dynamics and the flow of the mediation – and prepare for them.

Be prepared to acknowledge legitimate points made by the opposing party – and to modify your original assessment of the case or its settlement value. Sticking blindly by a position in the face of new information is a sure recipe for impasse.

Think Several Steps Ahead

Think several steps ahead: identify your opponent's likely responses to your settlement initiatives and, with the assistance of your client, develop appropriate responses. Use the mediator as a sounding board.

Put yourself in the opposing party's shoes. How would you and your client react if the opposing party made you the settlement offer you just asked the mediator to convey? What message are you trying to send? What message will

the opposing side get? Does your settlement offer give you the necessary flexibility to continue to negotiate? Are the parties' settlement offers moving at the right speed? Is it time for a dramatic "move?" What signal would a dramatic move send? Is it time to revisit your client's stated bottom line?

Give Careful Thought to Your Opening Offer

Lawyers tend to forget, or discount, the importance of the opening offer in mediation. Be mindful of the history of your settlement discussions with opposing counsel. Even if you haven't formally communicated an offer, if you've mentioned in passing that a settlement in a particular range or at a particular number might be possible, opposing counsel is going to remember that discussion. If your opening offer is outside those parameters, your mediation day is going to be either quite long or very short. If you do choose to make an opening offer significantly more advantageous to your client than what your prior discussions with opposing counsel fairly indicated, consider what impact doing so will have on mediation dynamics. At the very least, consider articulating an understandable rationale for your departing from what your opponent would reasonably expect.

Obviously, if you are the plaintiff, your opening offer needs to be high enough to give you and your client some flexibility to move lower. If your client is the defendant, of course, your opening offer needs to be low enough to allow you some flexibility in going higher. Whoever you represent, the opening offer must telegraph to the opposing party that you and your client are sincerely interested in settling the case. Think about how you and your client would react if you were on the other side and heard the mediator communicate your offer. Remind your client of these facts, and emphasize that mediation is nothing more than a structured negotiation – movement up or down is a requirement.

Finally, if there are"other" issues that, from your client's perspective, must be addressed in a settlement – such as a confidentiality agreement or non-disparagement clause – those matters should be raised sooner rather than later so as not to derail the settlement at the last minute. By the same token if your client's willingness to settle is going to be affected by the tax treatment of the settlement payment, talk to your tax-partner or your client's CPA before the mediation and get your settlement parameters, or the factors affecting them, clearly in mind. Similarly, if any settlement that is negotiated at the mediation must be approved by your client's governing body, be sure your opponent (and the mediator) knows this before the mediation; you and your client representative cannot guarantee approval

but can assure the other party and the mediator that you will negotiate in good faith and will recommend the governing body's approval of any negotiated settlement.

Evaluate Settlement Offers Realistically

Evaluate (and encourage your client to evaluate) settlement offers based on what's good for your client, not on whether the settlement is painful enough for the opposing party. This isn't to say that you should accept what you and your client regard as an inadequate settlement proposal; but you and your client shouldn't reject an offer merely because, on some subjective basis, the other party isn't paying enough or is asking for too much.

Settlement is all about compromise. Cases settle because clients, with the advice and counsel of their lawyers, conclude that a settlement on the terms identified is, on the whole, a better alternative to trial. Always keep possible trial outcomes in mind, and remind your client during the mediation of the range of those outcomes. Remember, too, if you are counsel for the plaintiff, that a court judgment is merely a piece of paper: it does not guarantee payment. When the solvency of the defendant or the defendant's ability to pay is in question, immediate payment of a somewhat smaller settlement may be more attractive to your client than assuming the risk of collecting a larger amount.

Bear in mind (and remind your client) that the difference between a particular settlement offer and what the client "wants" is really an insurance premium – insurance against having to pay more or recovering less after a trial. The "premium" needs to be evaluated against realistic trial outcomes and, from the plaintiff's perspective, prospects for collection: remember that a victory at trial is hollow if the defendant is judgment-proof, has limited assets, or can vitiate your judgment by declaring bankruptcy. The defendant's ability to pay is something you need to factor into your evaluation; conversely, the defendant claiming poverty needs to understand that his plea will fall on deaf ears without some evidence to support it. Finally, remember that an appeal is always a possibility and will, regardless of success, substantially delay final resolution of the dispute and increase costs.

Be Creative

Be creative; think "outside the box." Keep your client's – and the opposing party's – ***needs*** in mind. While it's a mathematical certainty that the shortest

distance between two points is a straight line, settlement dynamics sometimes require a different approach. Remember that through mediation a settlement can be fashioned to provide a kind and type of relief which your client may never be able to achieve at a trial. Principally, trial results in a monetary judgment. On the other hand, settlements can be structured to take into account mutually advantageous future business relationships, tax advantages, and a variety of other factors. Try and know what each party, including your opponent, really needs to obtain in settlement. Use that knowledge in developing settlement proposals. Consider incorporating non-economic factors in your offer, making a money offer that can result in a real advantage to a plaintiff but at less out-of-pocket cost to the defendant than a straight cash payment, or otherwise satisfying a "need" of a party in a fashion that also meets the other party's needs.

For instance:

- In an intellectual property dispute, consider offering a long-term, royalty-free license (with appropriate safeguards) in lieu of a transfer of the intellectual property.

- In an employment case, would a change in termination status (from "fired" to "resigned") help get the dispute settled? If the employer has multiple offices – and the employee plaintiff willing to relocate at least his or her workplace – would an offer of employment in another office, far from the offending supervisor, do the trick?

- Are there changes in policy – that the defendant was planning to implement anyway – satisfy, at least in part, the plaintiff's desire for effecting "change" and having made a difference?

- Could all or part of the settlement amount be financed through an annuity or some other tax-advantaged financial product? If tax regulations permit it, can the payment to the plaintiff be accomplished by means of a payment made under a form 1099, rather than having taxes automatically withheld?

Be Open to Different Approaches

While some mediations do not begin with a substantive joint session, good mediators are attentive to the fact that mediation dynamics may indicate that such a

session would be useful after some groundwork has been laid in caucus sessions. If your mediator suggests a joint session – even to brainstorm possible solutions – consider it. Also, your mediator may suggest that you accompany him or her to explain to the other party the nuances or finer points of a settlement proposal. Be prepared to do so.

Occasionally, the mediator may suggest (or the other side may request) a party-to-party meeting – without lawyers. Particularly with business disputes involving sophisticated clients or disputes between parties for whom an ongoing (or future) business relationship is important, such a meeting – perhaps even a discussion between principals over lunch – is often of immense help in clarifying "needs." Don't dismiss such a suggestion or request out of hand. Consider how such a meeting could facilitate a resolution of your case.

Understand how to Break Through Impasse

Sometimes, despite the parties' and the mediator's efforts, impasse is reached. The impasse may be as deep as a chasm; it may just be a sizeable bump in an otherwise smooth road. Trust your mediator to evaluate the seriousness of the impasse and to suggest ways it might be broken. While your creative "outside-the-box-thinking" may resolve, or go a long way to dissipating, impasse issues, you should also understand the array of available ADR methods in breaking through impasse.

In the appropriate case, consider asking the mediator for a "mediator's proposal." A mediator's proposal can take many forms – from a settlement "range" the mediator thinks is appropriate to "a number" to a draft of a detailed settlement agreement comprehensively addressing the issues in dispute. Every mediator has his or her own mediator's proposal procedure, but most often the process is "double-blind" – the party rejecting a mediator's proposal is never aware whether the opposing party accepted or rejected it, thus preserving all parties' bargaining position in the event a settlement does not result.

Similarly, be prepared, if appropriate, to suggest that certain issues be submitted to binding arbitration (or that the trial, when it comes, be limited to those issues), or to suggest that the mediator resolve the dispute by "baseball arbitration" – where each side submits a "last best offer" to the mediator, who picks one or the other. Particularly where one party has a less-than-realistic view of its case or the case's settlement value, such a procedure often has the salutary effect of

encouraging that party to present a more realistic "last best offer" than the offers presented in mediation, so as to avoid the mediator's selection of the opponent's offer.

Alternatively, consider asking the mediator to reduce his or her recommendations on settlement to writing. This is especially useful in a mediation which does not result immediately in a settlement – even one where a seemingly unresolvable impasse has been reached – and in cases where the client is not being realistic.

In an appropriate case ask that the mediator recommend to the trial court that a settlement judge be appointed. Occasionally, a party needs to hear an assessment of the case from a "real judge."

If lack of information is the stumbling block, consider asking the mediator to help the parties identify the information needed and develop a protocol to get the information and evaluate it.

Finally, even if the mediator doesn't volunteer, consider asking the mediator to follow up with renewed mediation efforts after all parties have had some time to think about the mediation and to re-evaluate their settlement positions.

Close the Mediation with a Written Settlement Agreement

Always reduce your settlement agreement to writing; never break from the mediation without a signed written document reflecting the terms of settlement. A handwritten agreement summarizing the key "business points" of the settlement will often do just fine. If you believe that more formal settlement documents are necessary, in order to ensure that the agreement made at the mediation is not later deemed an "agreement to agree" the agreement should provide that the signed settlement agreement memorializes the business points of the settlement and is a binding agreement even though "the parties contemplate the preparation of more formal documentation to more fully implement this agreement." Consider agreeing with your opponent that disputes over the "more formal documentation" – or at least the boilerplate terms of that documentation – will be submitted to the mediator for binding resolution. If such an agreement is made, it needs to be included in the business points of the settlement agreement.

If signing a "pretty," comprehensive, type-written agreement at the mediation is important to you or to your client, draft your proposed boilerplate before the mediation and come with your lap top, disks, and printer connections. Work on it while the mediator is busy with the other party. Be prepared to negotiate the boilerplate.