Mediation Round Table:

Improving the Quality and Effectiveness of Mediation

Sun Tzu, the ancient Chinese military theorist, observed that "the true objective of war is peace."[1] If litigation can be likened to war, then mediation should be considered as the road to peace. Mediation has increasingly proven to be the preferred conflict-management system of choice to settle contentious matters peacefully in advance of trial. It is often successful when traditional negotiation efforts fail. Indeed, the fact that litigators are "settling cases for fair sums without spending exorbitant amounts of money" has been attributed by some commentators as one of the reasons for the drop in the number of trials of civil cases in both federal and state courts in recent years.[2]

Mediation offers a number of advantages: greater flexibility in the timing and procedural format; a less stressful atmosphere conducive to settlement; privacy and confidentiality; expedited information-sharing; greater client control of decision-making; creative settlement remedies; and the ability to recognize the overall interests of individual parties rather than relying solely upon static positions imposed by the legal system.

Statistics from the federal courts reveal that alternative dispute resolution (ADR) has proven to be quite effective as a settlement device. A study that included statistical years 1996-2000 reveals a total of 3,911 cases referred to ADR, with 2,862 of those settled through alternative dispute resolution systems.[3] A 1992 Civil Justice Survey of State Courts estimated that only 3% of 762,000 tort, contract, and real property cases were disposed of by jury or bench trials.[4]

Given that mediation is a technique for settlement that is here to stay, the focus of this article is to utilize lessons learned by highly experienced litigators to provide guidance to improve the quality of the mediation process. In doing so, we have sought to review the mediation process through the eyes of a defense attorney, a plaintiff's attorney and a full-time mediator. John R. Phillips has been managing partner and practice group head of Blackwell, Sanders, Pepper, Martin, a Midwest law firm with which he has practiced in the areas of alternative dispute resolution, labor and employment and health care since 1971. Patrick Nichols is a past president of KTLA, current ATLA governor for Kansas, and a NBTA-certified civil trial lawyer. Larry Rute has more than 25 years of active trial experience. He is a principle in Associates in Dispute Resolution, LLC, and an active member of the International Academy of Mediators.

Mediation From the Perspective of the Mediator

By Larry Rute

Selection of the Mediator

It has been my experience that the mediator rarely receives consistent or reliable feedback regarding the reason or reasons he or she has been selected. Routinely, contact with the mediator is initiated by one of the litigators. Counsel will provide information to the mediator regarding the type of case to be mediated and will generally inquire whether the mediator would be available during a specified time period. Later, after the parties and their counsel have agreed on the date of the mediation, additional information will be exchanged regarding location, the time the mediation will begin, and who is expected to be present.

Upon receipt of this information, my office will generally send out a letter confirming the date, time and location of the mediation. The letter will emphasize the need for counsel to have persons with settlement authority attend the mediation and include an Agreement to Mediate.

In the spring of 2002, the Kansas Bar Association's Alternative Dispute Resolution Section, in cooperation with the Center for Dispute Resolution (Chicago), surveyed 175 Kansas and Missouri employment attorneys regarding their use of mediation and arbitration in the federal system. Names of the attorneys were obtained from a database of attorneys who had participated in federal court alternative dispute resolution in the District of Kansas and the Western District of Missouri within the previous three years.

In one section of the survey, participants were asked to rank the importance of a number of factors in choosing a mediator. The top ten responses ranked in order of preference included:

1. the mediator's reputation;
2. ability of the mediator to maintain (i.e., not disclose) confidential information requested by one of the parties;
3. ability of the mediator to relate to and communicate with both parties in a constructive manner;
4. the mediator's neutrality;
5. the mediator's substantial mediation experience;
6. the mediator's control of the mediation process;
7. the willingness of the mediator to demonstrate flexibility throughout the mediation process;

8. the mediator's ability to process complex or technical factual issues to help the parties clarify issues;
9. the ability of the mediator to assess the value of the case; and,
10. the mediator's substantive expertise in the field of law related to the case (statutory rights, case law, regulations and/or duties at issue).[5]

[Note: Factors found least important in the survey were the mediator's age, gender and race.[6]]

It is my view that professionals who are highly in demand as mediators are generally well-trained in a wide variety of mediation techniques. Such individuals are known for their honesty and integrity; are knowledgeable about case law, strategy and procedure; and are capable of earning the trust of the parties and counsel through the application of sound leadership and problem-solving skills. A good mediator must also have the capacity to be a strong listener, to be empathetic, and to build rapport with the mediation participants. This is a tall order indeed.

Pre-Mediation Communication With the Mediator

It is my practice to individually contact the parties' counsel several days before the mediation for a pre-mediation telephone conference. I will generally request a general factual overview and seek information regarding the status of discovery and settlement discussions. I may seek assurances that there will be someone in attendance at the mediation with adequate settlement authority.

During the telephone conference, I find it very useful for counsel to provide a candid appraisal of the strengths and weaknesses of the case, unique legal theories, and the "theme" of the case. It is not uncommon for litigators to share, for example, that their client has an unrealistic expectation of case settlement value. I may later utilize this information to take a stronger evaluative stance during the private meetings. Generally, it is helpful for the mediator to know in advance whether counsel prefers that the mediator take a more evaluative role or stress a particular aspect of the case.

I welcome the opportunity during the pre-mediation conference for an exchange of views whether the mediation will begin with a joint meeting, opening statements or will immediately commence with separate private meetings. Other topics of discussion might include particular time constraints, the use of demonstrative evidence and/or client presentations during the joint session, and the mediator's preferred style in conducting the mediation.

An additional benefit of a pre-mediation conference between a litigator and the mediator is that it allows the mediator to consider the timing of the mediation itself. Whenever possible, cases should be mediated neither too early nor too late. If the mediator believes that each party has sufficient information to make an informed decision, mediation is appropriate. In the alternative, if sufficient information is not available, the mediator might wish to suggest a pre-mediation discovery plan.

For example, in a personal injury case, it may be necessary to depose a key expert witness or party prior to commencing the mediation. It is the mediator's responsibility to ensure that each party has enough information to adequately analyze the strengths and weaknesses of the case. By doing so, the mediator will establish rapport and trust and improve the climate for settlement.

The Value of Providing a Confidential Statement to the Mediator

Many mediators suggest that counsel prepare a confidential statement for the mediator's review in advance of the date of the mediation. Commonly, it is requested that counsel provide a summary of the facts surrounding the dispute, a legal analysis, an analysis of the strengths and weaknesses, and a summary of negotiations to date.

Perhaps the greatest value of the confidential statement is that it provides the litigator with an additional opportunity to review the facts of the case, independently analyze strengths and weaknesses, develop a settlement strategy, and, perhaps most importantly, develop a "theme" that reflects the litigator's view of the facts and the law.

The "theme" is the overall impression that the litigator wants the opposition or the trier of fact to accept. The "theme" helps organize the case presentation and may be very persuasive during the course of mediation. The clever advocate develops a theme for trial, so why not utilize the same technique for mediation?

I generally recommend that the statement be no more than two to five pages in length. Depositions, exhibits and motions should be summarized whenever possible. An exception regarding the length of the statement would be the need to provide more extensive background information in a highly complex multi-party or class action matter. In those rare cases when the mediator would benefit from reviewing a large volume of information, the best practice is to notify the mediator and discuss the format in which the information will be provided.

I always review the confidential statement in advance of the mediation session. I will use this opportunity to summarize the facts of the case, including key dates and witnesses. In addition, I will list weaknesses identified for each side of the claim. In some situations, I may independently research legal points that may be important to discuss during the mediation. If the information contained within the statement is particularly compelling, I will sometimes suggest to the drafter that confidential or strategic information be removed from the statement and that it be forwarded to opposing counsel for review in advance of the mediation session.

Preparation of the Client for Mediation

It is wise to remember that while successful litigation relies, in large part, on the skills and persuasiveness of the advocate, mediation is a "team sport." Because clients are physically present at the mediation and have a vital role as decision makers, a different dynamic is present than in a trial situation where strategic decision-making is left to the litigator.

The plaintiff's team generally consists of the plaintiff and the plaintiff's attorney. The defense team generally consists of the client, the claims representative, and the defense attorney. Each individual has a vital role to play, and it is incumbent upon the litigator to take a leadership role with

teammates to keep them informed of the decisions to be made and the range of settlement options.

Just as litigators commonly prepare clients for trial, it is equally important that the litigator meet with the client before mediation to consider overall strengths and weaknesses of the case and to develop a risk-benefit analysis to aid in the overall negotiation strategy. If the client is unfamiliar with mediation, it is the litigator's responsibility to provide as much information as possible regarding the mediation process and the role of the mediator. For example, in those mediations where a joint session is anticipated, the credibility of the individual parties comes into play. Will the client be requested to speak during the joint session? If so, what will be said, what will be the tone and what will be the overall theme of the opening statement?

As part of the pre-mediation preparation, the litigator may wish to provide the client with a copy of the confidential statement before submitting it to the mediator. The preparation meeting provides an opportunity to consider whether to bring key witnesses to the mediation or whether to have expert witnesses available by telephone. The utilization of demonstrative evidence, such as charts, audiotapes, videotapes or PowerPoint presentations, may be an effective means of focusing on the strengths of the case. Remember, however, that the value of the presentation utilizing demonstrative evidence is diminished if the presentation is too long in duration.

In multi-party or class action cases requiring a relatively lengthy presentation, it is wise to contact the mediator in advance to discuss the presentation and to gain the mediator's view as to whether any portion of the presentation is potentially counterproductive. The mediator can provide valuable insight, allowing the parties to make the best use of presentation materials.

The Strategy of the Joint Session

At some point during the pre-mediation discussions with counsel, or shortly before the mediation commences, I will make a decision whether or not to recommend a face-to-face joint session, opening statements or commencement of private meetings. This determination is based upon: (1) the nature of the accusations or the emotional content of the case; (2) overall familiarity of counsel with the central facts of the case; (3) the personalities of the parties and / or their counsel; (4) the type of case, e.g., contract, employment, environmental, personal injury, professional malpractice, etc.; and (5) the overall "feel of the room."

Opening statements by counsel during the joint session provides an important opportunity to present the theme of the case, as well as to comment on key factual and legal issues. This is particularly useful in cases where the mediation session is scheduled pre-litigation or prior to significant formal discovery. In addition, counsel should not discount the settlement potential of allowing the parties to attend and participate in the joint session. As John Phillips points out, client participation and the opportunity to be heard during the joint session may significantly improve client satisfaction in the overall settlement process.

Like a performer on stage, the experienced mediator seeks to determine the mood of the audience. Seasoned actors often comment that while the stage production follows a defined script, the tone or emotional content of the play will, in large part, depend upon feedback from the theater audience. Should the emotional climate established by the participants in the mediation cause me to conclude that opening statements or a face-to-face joint session would not be productive, I will suggest to the parties that the meeting take place in separate rooms. Currently, this is recommended in only a minority of mediations.

At the joint session, I often describe the process of mediation as a facilitated "business meeting" in which both sides are given the opportunity to present their side of the story to the mediator and to one another. I explain that one facet of my role as mediator is to give both sides a reality check by sharing information and asking questions. A calm, non-judgmental presentation of the facts provides a climate in which important information is exchanged and underlying interests are addressed.

I often stress that the mediation process is most successful when the parties engage in "principled negotiation." Principled negotiation occurs when the parties engage in a "fair and open discussion of the facts and applicable law."[7] I generally recommend to counsel that no mention of suggested settlement terms be made during the joint session.

I also review the Agreement to Mediate during the joint session with particular emphasis on the provisions concerning mediation confidentiality. I remind mediation participants that anything that is said during the mediation, whether in a joint session or a private session, cannot later be used as testimony in discovery or at trial. Further, I remind them that there is a heightened confidentiality during the private sessions; I will not disclose information provided to me in the private session if I am requested not to do so. I do, however, suggest to the parties that should I feel that confidential information gained during the private session would be useful later in closing the gap in settlement discussions, I might persuade them to allow me to disclose the information at some strategically determined time. In the final analysis, it is the parties who control whether I am allowed to disclose confidential information.

After describing the mediation process and answering any questions, I generally call upon plaintiff's counsel to make an opening statement. Experienced litigators will generally direct the majority of their comments to the decision-maker on the other side of the table rather than to the mediator. At the conclusion of the plaintiff's presentation, I sometimes ask general clarifying questions, unless I have previously been given permission by plaintiff's counsel to ask more detailed questions of his or her client. Generally, my questions to plaintiff, if any, will center on "softball" informational questions. This is done merely to see how the plaintiff responds to questioning in a group format.

There are occasions when plaintiff's counsel forfeits an important opportunity by not allowing the client to share his or her feelings about the dispute. The joint session can provide a needed "day in court" by giving the plaintiff an opportunity to tell his or her story. If the plaintiff is particularly articulate, defense counsel may glean important information for analysis. The danger, of course, is that the plaintiff may ventilate pent-up emotions which may cause

the opposing party to go on the defensive. This is a strategic decision that should be fully explored by counsel during the pre-mediation meetings with the client and the mediator.

Following the presentation by plaintiff's counsel, I call upon respondent's counsel to provide his or her opening statement. At the conclusion of the defense counsel's opening statement, I generally follow the same general, nonspecific question format as I did at the conclusion of the plaintiff's opening statement. Defense counsel may more effectively utilize the joint session to humanize the corporate defendant by having a representative "tell the company's side of the story."

In a recent medical malpractice matter, the defendant doctor apologized to the plaintiff and described the devastating impact the lawsuit had had upon his family and his career. By acknowledging the pain of the plaintiff, and humanizing his own plight, the doctor reduced the desire of the plaintiff to overinflate her initial demand. It has also been my experience that defense counsel sometimes miss the opportunity to directly explain to the plaintiff the sharp distinction between the "liability case" and the "damages case."

Conduct of the Private Meetings

I leave the decision as to which party I am going to meet with first in the private meetings until the conclusion of the joint session. If one side has demonstrated an emotional reaction to the opening statements, I will likely speak with that side first. The private meetings give me an opportunity to learn a great deal more about the facts and evidence of the case, interact with each side's witnesses, and begin the process of closing the gap between the parties' positions. The parties are encouraged to focus upon their interests, as well as their rights under the law, and look for business-driven solutions.

The federal courts in the District of Kansas and the Western District of Missouri commonly send matters to mediation after Rule 26(A) documents are exchanged. Often depositions, even of key witnesses, have not been taken. In this situation, I try during the first portion of the private-session meetings to gain as much relevant information as possible regarding the facts and evidence. This is because information gaps often present significant barriers to settlement. The private meeting also allows those present to have an opportunity to ventilate pent-up emotions. During these private sessions, the mediator may work hard to serve as a "reality check" while engaged in empathetic listening and the use of humor and storytelling to establish rapport and trust.

Experienced mediators are trained in the use of different techniques, such as "collaborative," "evaluative," "facilitative," "transformative," "therapeutic," "distributive," or "zero-sum" mediation and negotiation techniques to achieve settlement. It is my experience that during the private sessions, the mediator may utilize one or all of these techniques based upon the emotional energy and participation of the parties. A mediator who focuses merely on monetary settlement to the exclusion of addressing and understanding the underlying issues and interests of the parties will experience great difficulty in finding a common ground upon which the ultimate settlement decision may be based.

The impact of an acknowledgement or apology on the ultimate outcome is often overlooked. When the respondent accepts some responsibility for harm, but nonetheless contests liability, an acknowledgement of the physical or emotional pain may be both helpful and appropriate. An apology, far from being an expression of guilt, is a recognition of injury and an acknowledgement of "we are sorry this happened to you—we will work with you to help ensure something like this does not happen again." Expressions like this provided during the opening statement or carried by the mediator during the private sessions are particularly useful when a party concedes liability but disputes the level or extent of damages.

At a certain point during the process, discussions will begin to focus on monetary and non-monetary issues of importance to the parties. When we reach this stage of the negotiations, I encourage the parties to share information with me regarding the strengths and weaknesses of their case and the potential risks, expenses, and delays inherent in litigation. I encourage discussion of the merits of particular offers and counteroffers. Occasionally, I will suggest that a party anchor the offer or counteroffer in a reasonable negotiation zone by making the "first credible offer."

I may ask to speak with counsel for plaintiff or defendant privately to determine whether I should take a particular approach during the negotiation or whether there is information they would prefer to share outside the presence of the client(s). Other techniques may include a decision-tree analysis of the probability of prevailing, a discount-model analysis, or the mediator's independent evaluation of the case.

Approaches to Settlement or Closure

On or about the midpoint of the negotiations, I will often begin to discuss particular clauses that ultimately may be placed in the final settlement agreement. This is a step that may not occur in market-variety personal injury cases, but may be a vitally important step in other types of civil mediations. For example, in employment cases, we will often begin to discuss final settlement language relating to confidentiality, method of payment, timing of payment, release, tax treatment, mutual release of claims, non-disparagement, and so on. This discussion also provides an opportunity to incorporate issues that have been identified as important underlying interests within the settlement agreement.

In the employment context, provisions might include reassignment of the complainant, sanctioning of the wrongdoer, human diversity or multi-cultural awareness training, personnel manual modifications, notices, no-reapplication clauses, letters of reference and out-placement services, to name but a few. I may recommend that counsel for plaintiff or defendant begin preparing the outline of the interim agreement that will be utilized and refined as final settlement discussions come into play. Monetary settlements have been known to break down due to the failure of the mediator to be cognizant of the details inherent in what are often complex settlement agreements and dismissal orders.

It is important that key settlement provisions be agreed upon by the parties at the earliest possible stage. This is particularly true in matters involving multi-party, class action and complex constitutional law / public policy cases. Indeed,

in such situations, discussions regarding the framework of the final settlement agreement may have occurred well in advance of the mediation session itself. It is common for the mediator, in more complex cases, to choreograph what I sometimes refer to as the "e-mail minuet," whereby counsel and the mediator collaborate in developing language that will assist in the ultimate resolution of the matter.

Post-Mediation Communication With the Mediator

At the conclusion of a successful mediation, I always leave the door open for counsel to contact me should there be a dispute regarding details of the settlement agreement. Normally, this can be resolved very quickly by a conference call between the parties' counsel and the mediator.

On those occasions when the mediation has come to an impasse, it is my policy to periodically calendar a telephone follow-up call or letter to counsel to see if there is anything I can do to help bring the matter to resolution. This often results in a series of telephone calls by which settlement offers and counteroffers are negotiated over a period of hours or days, or a new mediation is scheduled. In addition, it is not uncommon for me to receive a telephone call on a confidential basis from one side or the other requesting that I attempt to "kick start" settlement negotiations. In such a case, I will telephone or write the other side without disclosing the previous communication and recommend additional negotiations.

Finally, from time to time, I am requested by counsel to write a letter to his or her insurance representative, general counsel or client setting out my evaluation of the case on a confidential basis. I am always happy to do this, as such a technique often generates a useful and productive response from that party.

Conclusion

Mediations have an extraordinarily high resolution rate because of the power of the process, wherein key participants are focused entirely on settlement over a relatively concentrated time period. The strength of the process is enhanced by virtue of the fact that the decision-makers are present and are personally engaged in the process with the assistance of a mediator specifically trained in collaborative negotiation techniques. This is a powerful combination.

Nonetheless, careful case selection and preparation are the keys to success. Even the strongest mediator cannot "balance the table" if the advocate has failed to prepare adequately. "Successful mediations are achieved only with preparation and skillful negotiation. The mediator must be the creative facilitator; the advocate must be the skillful and flexible negotiator." [8] As Sun Tzu has pointed out, "[o]ne who fully prepared, awaits the unprepared will be victorious."[9] ❖

Endnotes

[1] *Sun Tzu The Art of War* (James Cavell ed., 1983); *See* Ralph D. Sawyer, *Sun Tzu: The Art of War* (1994); Joe Epstein & Eileen Siskel, *Sun Tzu's Tips on Effective Mediation,* presentation to Nov. Annual Conference of the International Academy of Mediators, Naples, FL (Nov. 7-9, 2002).

[2] Hope Viner Sanborn, *The Vanishing Trial*, 88 A.B.A. J. 24 (2002).

[3] www.txnd.uscourts.gov/statistics/ADR.htm (last visited Jan. 19, 2003); *See also* Thomas C. Waechter and Isadore E. Newman, *Mediation From the Litigant's Perspective*, presented to Nov. Annual Conference of the International Academy of Mediators, Naples, FL (Nov. 7-9, 2002).

[4] U.S. Department of Justice, Bureau of Justice Statistics *available at*, www.ojp.usdoj.gov/bjs/civil.htm; *See also* Thomas C. Waechter and Isadore E. Newman, *Mediation From the Litigant's Perspective*, presented to Nov. Annual Conference of the International Academy of Mediators, Naples, FL (Nov. 7-9, 2002).

[5] Kansas Bar Association, Kansas Missouri EEO/Employment Discrimination Mediation and Arbitration Survey Results, p. 3 (June 2002).

[6] *Id.* at 4.

[7] Joe Epstein & Eileen Siskel, *Sun Tzu's Tips on Effective Mediation*, presentation to the Annual Conference of the International Academy of Mediators, Naples, Florida (Nov. 7-9, 2002).

[8] *Id.* at 5.

[9] Ralph D. Sawyer, *Sun Tzu: The Art of War* 179 (1994).

Mediation From the Perspective of Plaintiff's Counsel

By Patrick Nichols

"To win one hundred victories in one hundred battles is not the highest skill. To subdue the enemy without fighting is the highest skill."

—Sun Tzu

The art of mediation has become a fundamental part of civil litigation. Like the art of negotiation, it has more and more become an alternative to the trial process. The vast majority of cases will settle without trial. Therefore, developing an array of skills, procedures and practices in mediation is no less important, and perhaps ultimately much more important, than maintaining basic trial skills and presentation abilities. Lawyers are communicators. Learning to communicate with the client, with opposing counsel, and with the mediator forms the bedrock of all of these procedures, negotiation, mediation, and litigation.

Mediation early in litigation is not new. The Sumarians, in the legal code which was the predecessor of the Code of Hamurabi, required efforts at mediation before suit was filed. The failure of this idea to survive in subsequent millennia may highlight the difficulty with mediation early in the case.

The initial question is whether to mediate. For decades, competent lawyers negotiated settlements without the aid of a third party. Recently, the use of mediation has become almost universal for litigated cases. Mediation thus becomes to some extent a self-fulfilling prophecy, used in part because it exists. Cases which 10 years ago would have been settled by counsel now settle at mediation. As a result, negotiations between counsel have become less likely to resolve

the claim; fewer fair offers are exchanged since they would compromise the parties' subsequent positions at mediation.

Timing is important. Cases are resolved by settlement, negotiation or mediation when the issues in dispute are minimized. The greater the number or scope of the areas of disagreement, the less likely the parties are to view the case in a similar way and thus place a similar valuation upon it. Pending motions for summary judgment, disputed issues of liability or fact, or pending discovery all tend to argue against successful mediations for the plaintiff. Recent efforts by the federal court for early mediation suffer in efficacy because neither side can realistically assess the strengths and weaknesses of the case at such an early stage.

If the case is sufficiently advanced, I insist on an exchange of offers (prior to mediation). Mandatory early mediation is an exception. In personal injury cases, it is not very useful. Intelligent counsel with properly advised clients can formulate opinions of case value. By a pre-mediation exchange of offers, each party has the opportunity to determine whether the other is evaluating the case in good faith. Lengthy but unproductive negotiations costs the plaintiff's counsel time (for which he is not compensated), increases the stress on the client, and compromises positions in later negotiations. Since I wait to mediate after discovery, I insist on an offer from defendants from which I can interpret a good-faith willingness to resolve the claim. Granted we may be far apart, but an unreasonable offer from either side is a harbinger of failure of the process. Whenever a realistic opening offer has not been present, the mediation has not been successful. The attendant frustration and discontent on the part of the client and her counsel dictate an initial assessment of willingness to bargain in good faith.

As mediation must not occur too early, so should it not occur too late. I generally notify defense counsel that we will not negotiate within 30 days of trial. This is the time to finalize the arduous task of preparation. Negotiations undercut the necessary psychological focus and waste time at a critical juncture. These distractions benefit the defendant, and thus I refuse.

Selection of the Mediator

Mediator "styles" include evaluative, facilitative, and transformative. The latter two tend to view mediation success in terms of the process; the former in terms of settled cases. There may be mediations outside the litigation process, where "ownership of the process" is more important to the satisfaction of the parties. My goal in mediation is settlement. As such, I rarely seek a mediator whose skill is in the facilitation of communication. Good lawyers can do this themselves.

Parties are unable to come together on a settlement primarily because they value the case differently. I prefer evaluative mediators because they focus on the issues and case value. Typically, this style also includes a significant ability to facilitate communication. Through the use of an evaluative mediator, one or sometimes both parties have an opportunity to receive new information which may cause them to alter their own evaluation of the case. Moreover, the evaluative mediator tends to be less "touchy-feely." Courtrooms are rather bruising environments. It helps the plaintiff to be bluntly confronted about the weaknesses in her claims in somewhat the way she will be confronted in court. This "reality checking" function of mediation often helps remove unreasonable expectations.

My preference for evaluative mediators dictates a priority in selection for skills in case assessment, substantive expertise in the area of the litigation, and an ability to process complex factual or legal issues. From this author's perspective, the KBA survey noted earlier *(see p. 1-2)* lists the most important criteria last. Although reputation and neutrality are important, this individual would not be an effective evaluative mediator without such abilities. Expertise in the subject, case assessment, and legal knowledge are the paramount tools which motivate the defendant to change their assessment and which give the plaintiff confidence that the mediator's opinion is worthy of belief and reliance.

Pre-Mediation Communication

I communicate primarily by submitting extensive written materials. It serves no positive purpose to attempt to sway or influence the mediator; rather, I have on several occasions felt the mediator resented such transparent efforts to create bias by my opponent. If the client is properly prepared, the mediator properly selected, and the material timely submitted, the way is prepared for success. Efforts to persuade *ex parte* make one appear weak.

One crucial step does occur here, namely establishment of the proper parties at mediation. The mediator should insist on the presence of a representative of the defendant with full authority to pay the plaintiff's last demand. If necessary, this can be compelled by court order. There is no sense in negotiating a settlement if the person who must approve the agreement is not present or available.

There are a variety of "procedural" matters that can be taken up in such a conference. Mr. Phillips provides an excellent list of the types of information which can be so gained.

The Value of Providing a Confidential Statement to the Mediator

A mediator must receive sufficient materials to understand the case and its value, both for the plaintiff and the defense. Since mediation is no substitute for trial preparation, and since I believe that mediation is most effective after discovery and pre-trial, the plaintiff is in an ideal position to use the event for the secondary benefit of simplifying, summarizing, and visualizing her case at trial. I submit a readable, manageable set of materials to tell the story, document the claim, and persuade the mediator as I will the jury at trial. I submit extensive attachments, exhibits, etc., with the hopes that the mediator, like the juror, will be able to understand the case simply by reading the attachments and looking at the pictures.

I include a summary letter that sets forth the parties' evidence, claims, and contentions. It identifies the defense's and my rebuttal arguments. I summarize liability and the evidence in support along with documentation concerning causation, if appropriate, and the most important element, damages. If legal issues are undecided, they are addressed. Further research may be enclosed to show the strength of my position. A candid assessment of case value is also in-

cluded. It is critical to include a discussion and an assessment of any obvious weaknesses. Failure to do so will damage your credibility with the mediator as it would at trial. However, one must reveal weaknesses with discretion. If your opponent has not seen it, keep it to yourself.

Case attachments include a variety of materials to focus and educate the mediator. A Pre-trial Order or any other documents clarifying the evidence give the mediator a sense of the issues and evidence. Liability exhibits often include the accident report, photographs of the scene, the injury of the client, vehicular damage, other evidence or liability issues, the witness statements or deposition excerpts, Interrogatory or document production excerpts, and, if prepared at this point, copies of demonstrative exhibits to be used at trial. Exhibits should focus on damages, including photographs of scars; photo positives of X-rays; demonstrative exhibits such as diagrams, medical charts, etc.; specific exhibits demonstrating MRI's, CT findings or, in document cases, highlighting key information.

The submission will include a summary of offers made by each side, our relatively candid case assessment, and information on any known, unusual obstacles to the process. Counsel must also present an analysis and rebuttal of the defenses. This demonstrates awareness of case weaknesses. It arms the mediator with the necessary material to show the defendant that these issues will not prevail or have limited merit.

Preparation of the Client for Mediation

Client preparation is as important as materials preparation. The client should review the submission materials. In fact, they should have input, where possible, into their contents. Counsel should discuss certain basic rules concerning risk aversion, negotiation, and case valuation as soon as sufficient information is available. By providing the client a realistic assessment of the case, settlement rules and principles, case value, and the strengths and weaknesses of the case, she becomes prepared to make the ultimate determination regarding settlement or trial. This information must be provided to the client well in advance of the mediation. If this is not done early, there is insufficient time for the client to internalize and understand these complicated and unfamiliar principles. This results in a much higher dissatisfaction rate because the client does not feel they made the decision but rather that it was made for them.

Lawsuits are foreign environments for individual litigants. The client needs to understand the important and often highly unfamiliar principles regarding litigation and settlement. Make certain that the client understands the benefits of settlement, i.e. a guaranteed payment with the benefit of individual control over the outcome, the absence of additional costs, and an immediate resolution of a major life stressor. Moreover, clients must confront their own personal philosophy of risk aversion or acceptance. Are they natural gamblers? Do they like risk and are they comfortable with the possibility of loss? Can they afford to accept a poor settlement or refuse a good one for the uncertain outcome of a trial?

Counsel must discuss the issue of client flexibility. Unlike defendants, the plaintiff has ultimate flexibility. He or she can simply "walk away" from the case. Thus she is far more susceptible to pressure to resolve the claim due to this ability and other related stressors. Defendants typically function within a greater context of authority, structure, and control. The defendant's representative in most cases does not have individual responsibility for the outcome. As a result, the plaintiff must be willing to look honestly and candidly at her case and to establish some financial parameters prior to mediation. These include a "bottom line" below which she will settle only upon genuine and effective persuasion from a trusted, evaluated mediator. It should also include a threshold which the defendant must meet before negotiations will go forward. In this way the plaintiff prepares herself for the stress of the event by having previously established her own boundaries in the same way that corporate defendants have boundaries established for them. This prevents victimization by aggressive adversaries.

Finally, the client must consider the issue of outcome and recovery. She must understand how a settlement is disbursed, including attorney fees, case expenses, and tax consequences in employment or non-personal injury cases. An awareness of the likelihood of success and jury verdict research or other case valuation materials is important. Most important, however, is counsel's opinion, honestly given, about the strengths, weaknesses, verdict range, likelihood of success and, ultimately, whether counsel believes this case should be tried before a jury.

Once the client has not merely heard these ideas but come to understand them and utilized her own personal values to apply them to her position and goals, she will be able to make well-grounded decisions and be most likely to be satisfied with the outcome.

The Strategy of the Joint Sessions

I do not find joint sessions particularly helpful except as a comfort/trust-building exercise. They seem to make little difference to the outcome. If I have not successfully communicated the essence of my case to the mediator and the defendant prior to the mediation, it is highly unlikely I will succeed in doing so at such a meeting. If a joint session is to be held, plaintiff's counsel must be prepared to make, in effect, a combined opening statement and summation. This requires extensive preparation to be done correctly. If poorly done, it influences the defendant's case valuation in a negative way. Well done, however, it seldom brings about a positive change since it only reinforces information previously conveyed.

A joint session does have some benefit. First, it allows the mediator to hear the case presented in a straightforward, summarized way providing an overview of the issues and a contrast between the points of view of the parties. In addition, the client gets a sample of the atmosphere of a courtroom with adverse counsel presenting the competing theory of reality that represents the defendant's case. No matter how often her own counsel may have explained the theories of defense or the personality of the adversary, this real life experience gives her information she needs to understand part of what is to come. Finally, and perhaps of greatest importance, the session allows the mediator to establish her credibility, fairness, and credentials. A review of the pro-

cess, signing the agreement, reminding the parties of confidentiality, all promote confidence in the process and person of the mediator. Evaluative mediators can summarize their experience and credentials so that both parties understand the value of their opinions.

Conduct of Private Meetings

Here the real work of mediation occurs. Counsel should allow the well-prepared plaintiff to handle as much of the communication as possible. This impresses the mediator with the client's presence, personality, and overall grasp of the strengths and weaknesses of her case. This will be conveyed to the defendant, probably quite specifically. Further, it prepares the client for the difficult communication challenges which lie ahead. Finally, by allowing the client and mediator to establish rapport, the mediator's valuation of the plaintiff can be intelligently formed and the client becomes more willing to accept negative information or opinions.

When mediating after discovery has narrowed the issues, if each party has exchanged an offer within some plausible range of reasonableness, I feel comfortable making the next proposal. My client and I will generally agree on this number before we attend the mediation. If no offer was made by the defendant, we have agreed on a threshold which they must meet to continue. I do not hesitate to declare the meeting at an end if we do not have a proper response. After this, however, offers and other responses must be arrived at on a more impromptu basis. So many factors influence the subsequent course of negotiation that it would be impossible to outline comprehensive strategies. The time spent preparing the plaintiff for mediation bears fruit here. Already possessed of a clear understanding of the strengths and weaknesses of her position as well as the risks and vagaries of litigation, she is less susceptible to the pressure to simply relent in order to resolve the case. She can participate in the evaluation of the defendant's stated rationale for their position and judge her response based on all factors, including her risk-taking preferences.

One frustrating situation involves the competitive negotiator. These individuals see mediation as a continuation of litigation rather than an opportunity to resolve the case. Plaintiff's counsel does not attend mediations for this purpose. The great danger is that the plaintiff, in an effort to be cooperative and reasonable, will make substantial concessions in her position without a similar effort on the part of the defendant, resulting in unfair settlements with unhappy clients or in the breakdown of mediation. When this strategy is in play, the mediation is in jeopardy; as a result, counsel must be attentive to this possibility and respond appropriately.

Where cooperative counsel is confronted by this type of aggressive gamesmanship, studies indicate that the best strategy is the simple process referred to as "tit for tat."[1] In negotiations, each party watches the opponent's move and must choose whether to do so competitively or cooperatively. Where the opponent acts aggressively or combatively, the response must be an equivalent one, i.e. tit for tat. On the other hand, if there is an effort to move forward, this must be met in kind. Failure to follow this model creates an imbalance in power against the advocate who continues to seek cooperation and can result in a devastating outcome.

Five basic rules have been presented for achieving cooperative solutions against competitive/combative mediators: (1) begin cooperatively; (2) retaliate if the other side is competitive (when struck, strike back); (3) forgive if and when the other side becomes cooperative; (4) be clear and consistent in your approach and make sure the defendants know the consequences of their actions; and (5) be flexible.

The greatest challenge, and one least likely to be met, is to change the strategy of the adverse party. This requires confidence in the mediator and reliance on his skill in communicating effectively to change the defendant's position. First, the defendant, not the attorney, must be brought to commit to the *possibility* that their exposure is greater than they believe it could be. Next, additional information can be given to them either from the plaintiff or for the evaluative mediator himself. Finally, an opportunity to "save face" with a significant change of position is offered.

Approaches to Settlement or Closure

This author's experience is primarily in the personal injury field. As such there are very limited issues addressed when cases are settled. Confidentiality may be sought but, in the author's opinion, should be refused, especially if raised after lengthy negotiations. A return of sensitive documents may be required. Generally, handshaking all around along with congratulations on a day well spent are in order.

In situations where a non-cooperative party causes the breakdown of the mediation, either through hard ball tactics or inadequate offers, the author feels no obligation to end on a "warm and fuzzy" note. I consider that to be a day wasted both for myself and my client. Moreover, I consider it to be an insult to the process, since no party should come into mediation unless they are there to resolve the claim. I am not referring to mediations which fail to settle cases, but rather those situations where the paucity of the offers made is such that it is apparent that no real effort has been made to evaluate the case or secure the authority necessary to settle the claim. In such a situation, I leave it completely to my client as to whether we should have any contact with the defendants prior to our departure and feel perfectly comfortable leaving without such contact where circumstances warrant.

Post-Mediation Communication With the Mediator

Occasionally it occurs that the case is not resolved but significant prospects remain for that resolution in the future. In such a circumstance, the mediator should remain "in the loop" regarding ongoing negotiations so that if further assistance is beneficial, it can be sought. Otherwise, I see little need for such communication except to provide feedback. However, it is important to pay promptly for the mediator's services regardless of the outcome. They have earned their compensation and, like all others we work with, deserve the respect of a prompt payment. ❖

Endnote

[1] This information comes from testing on a game theory known as the "Prisoner's Dilemma."

Mediation From the Perspective of Defense Counsel

By John R. Phillips

Setting the Table for a Successful Mediation

As a rule, successful mediations don't just happen – they require careful forethought and attention to detail by the parties as well as the mediator in advance of the mediation. Setting the table by preparing and causing the parties to prepare for the mediation is an important prelude, sometimes even a prerequisite, to bringing the parties a satisfactory resolution to a claim or litigation matter. If the parties are ill-prepared, do not understand or feel comfortable with the process, or feel that the process is unfair or that the neutral biased, the mediation itself has little chance of success. The number of preparatory steps can increase the likelihood of successful mediation and make the initial joint mediation session more meaningful. The first step is to decide *when* to mediate.

When to Mediate

When to mediate is often, but not always, a decision of the parties. Sometimes mediation occurs prior to litigation, such as through a voluntary agreement of parties when a claim exists or through administrative processes such as the EEOC Early Mediation Program. Most federal court jurisdictions now have some form of ADR program, the vast majority of which result in mediation as the alternative of choice. Some, such as the Early Assessment Program in the Western District of Missouri, which was initiated in 1992, require an assessment or mediation within a short time after the complaint and responsive pleading are on file. In the District of Kansas, most federal judges require mediation at some point in the litigation prior to trial, but the practices of the various judges varies widely as to *when* it is required. Other jurisdictions vary widely with respect to when mediation is required, but there are a few impediments to the parties reaching agreement in an early mediation if sufficient facts are known.

Whether early mediation succeeds often is dependent on the attitude of the parties, whether partial discovery is necessary, whether the parties are willing to reveal strategies prior to the close of discovery and, in some instances, whether legal issues need to be decided, such as through dispositive motion practice. Certainly, mediating prematurely under inappropriate circumstances substantially reduces the chance of early resolution, but often early mediation can be surprisingly successful. Further, mediation can be recessed and reconvened at a later time if it is determined that a witness needs to be deposed or documents produced before one side can properly evaluate a case. Mediating early is often in the best interest of all parties due to the cost savings that can be afforded from early resolution and prior to incurring the substantial costs of discovery. That is one of the clear advantages of having mediation as an early step in the litigation process.

Selecting a Mediator

Factors to consider in selecting a mediator might include:

- Mediation skills (as opposed to adjudicative skills)
- Substantive knowledge of the law
- Style (eg. facilitative vs. directive vs. transformative)

Although it often is easy to determine the experience and substantive knowledge of the law of the mediator, it is much more difficult to learn the mediation skills and style of mediation that mediator practices. Unlike arbitrators in certain industries such as securities, construction and labor, there is little published data or Internet information to draw on with insightful information on the subjective considerations involved in selecting a mediator. Nor is there a consensus even as to the language or descriptors used to distinguish various mediation styles. One source of information is to check private databases. Firms or organizations in a locality that make frequent use of mediators are increasingly keeping track of such subjective assessments on intranet databases. Another source of information is to contact litigators or mediation advocates in a particular locale for "word of mouth" references. Finally, and perhaps most revealingly, is to contact the mediator and ask probative questions. *Ex parte* contact with the mediator in advance of selection generally is not considered to be inappropriate or unethical in most jurisdictions and can be quite revealing.

Choosing a facilitative as opposed to an evaluative mediator may depend on the case. If counsel is confident that both he/she *and client* have a reasonably accurate assessment of the strengths and weaknesses of the case *and* that plaintiff's counsel *and client* also are able to reasonably assess their case, a facilitative mediator may be preferred. However, there are times when the lawyer has unrealistic expectations or, more often, his/her own client has unrealistic expectations (or similar lack of realism from the adverse party) when an evaluative mediator makes sense. Unlike Pat Nichols' preference for evaluative mediators, my experience has been that style of mediating should depend on the fact-specific circumstances of the case, not a predisposition to one or the other.

The April 2002 Kansas Bar Association Dispute Resolution Section/Center for Employment Dispute Resolution questionnaire referred to in Larry Rute's article accurately identifies a number of factors identified by practicing attorneys in Kansas and Missouri when choosing a mediator (p.1). It is interesting to note that reputation ranks first, neutrality fourth and ability to "assess the value of the case" (i.e. evaluative) ranks tenth on the list. My experience has been that mediation skills and style, though more difficult to ascertain, are more important predictors of success in mediation than substantive knowledge of the mediator.

Pre-Mediation Telephone Conference with Counsel

Generally, a pre-mediation telephone conference with counsel weeks or at least several days in advance of the me-

diation is very worthwhile to sort through any issues prior to mediation itself and to generally set out expectations of the mediator and counsel. Often a mediator sets up such a telephone conference as a matter of practice. However, if it is not a mediator's practice, there is nothing prohibiting counsel for any of the parties to suggest such a telephone conference to the mediator and perhaps even suggest an agenda. Although it need not be immediately upon selection of the mediator, it is preferable that it occur at least several days in advance of the mediation to allow for submissions that may be agreed upon, arrange for necessary parties to be present, and perhaps even allow for a scheduling or rearranging of travel for out-of-town parties whose presence had not been anticipated until the telephone conference. Topics for discussion in such a pre-mediation conference might include:

- Mediation agreement – including confidentiality and handling of fees
- Time constraints – not just the start time but how much time has been set aside and whether flight schedules of out-of-town parties place time constraints on the mediation
- Style of mediation – facilitative, evaluative, elicitive, directive, distributive, collaborative, transformative, mindfulness, etc.
- Meeting format – begin with joint or separate caucuses
- Specific identity position and authority of participants
- Spouse?
- Insurance? (Query whether mediator should raise)
- Fact witnesses? (Query inclusion in joint caucus)
- Telephone conferencing of additional participants?
- Prehearing submission
- Length and content
- Confidential or exchanged
- Timing if exchanged
- Discussion of expectations of mediator preparation time
- Mediator practices and expectations
- Opening statement
- Use of exhibits, demonstrative evidence and/or PowerPoint
- Involvement of the parties by mediator questions

Generally, it is preferable that contact between counsel and the mediator take place jointly at first, particularly if counsel for one of the parties is not already acquainted with the mediator. However, once the joint pre-mediation telephone conference has occurred, it is permissible for counsel to have *ex parte* contact with the mediator to share thoughts or concerns they may have that are better said privately, even in the absence of their clients. Follow-up *ex parte* calls may be especially useful in revealing concerns about one's own *client's negotiating position, not just about arguments regarding the merits of their case.*

Pre-Mediation Submission

Some mediators require extensive confidential submissions and briefing, including a "candid" assessment of the risks and dollar value of the case, including dollar amounts of settlement range, expectations or authority. Query whether such assessments are truly candid and whether it prematurely causes the parties to focus on dollar values of settlements without considering more creative solutions. Other mediators rely on submission of existing pleadings or documents requiring no effort or preparation on the part of counsel. Often pleadings, summary judgment briefings and statement of positions can be informative to the mediator. However, a submission of such file documents does not cause counsel or their clients to focus on the litigation for purposes of mediation.

Therefore, it is suggested that the preferable practice is to submit at least some form of summary prepared specifically for the mediation and, hopefully, exchanged at least a few days prior to the mediation. Remember, the ultimate objective is to persuade the other party, not the mediator. If not exchanged, it can be wasteful because it requires the mediator to spend the precious time of all parties shuffling back and forth to convey basic information on the merits that needs to be absorbed by the other parties if there is to be a settlement. The summary should include status of the litigation or claim, the history of negotiations, if any, and some discussion of the claim and issues to be presented. It is also helpful if counsel attach key documents, at least to the mediator's copy, to which they may be making reference in the mediation, especially in federal court litigation since these are usually exchanged under Rule 26.

Further, submission of a pre-mediation statement requires some forethought on the part of counsel, thereby causing at least some minimum preparation for the mediation. Furthermore, it increases the likelihood of meaningful contact between counsel and client in preparation for the mediation. Finally, it allows the mediator to determine in advance of the initial joint caucus whether the issues have been "joined" and whether there has been any misunderstanding with respect to any negotiations that may have occurred prior to the mediation. A confidential addendum or attachment can always be added to address any issues counsel feel uncomfortable sharing with the other parties in advance.

On the other hand, sometimes counsel feel that once they have submitted their evidence and arguments to the mediator on paper, they are "wasting time " to go over it in detail in the initial joint session, thereby defeating the potential beneficial effect of having opening statements in joint session. Thus, parties should be forewarned that even if a substantial exchange of information or briefing takes place prior to the mediation, counsel should nevertheless be prepared to make a thoughtful and thorough opening statement or presentation in the presence of all participants in initial joint session.

In preparing the pre-mediation submission, counsel has an opportunity to visit with the client and prepare the client for mediation. Certainly, the client should review any submission in advance and understand reasons for taking certain positions with the mediator. But moreover, such a conference affords the opportunity to acclimate the client to what will transpire at the mediation, put the client at ease and make preparations for any participation on the part of the client that is anticipated either in joint session or private caucus. Most importantly, a realistic assessment of the case should be shared with the client so that the client is aware

that initial positions taken are "negotiating positions," not one's true or final evaluation of the case.

Contrary to Pat Nichols' experience, my view is that an exchange of offers should not necessarily be required pre-mediation. On the other hand, informing the mediator in advance of the general "range" can be helpful to the mediator in determining how to structure the mediation. There are occasions where a mediator may call for an exchange of offer and response, but more often than not, such statements prior to a sharing of information are wildly speculative, fail to set any realistic parameters, and may lock parties into unrealistic positions. When counseling clients in preparation for a mediation, I often ask them not to fix an absolute dollar amount, but instead be flexible and listen to what is presented both on the merits and, more importantly, in terms of a range of remedies that may change the dollar amount. An alternative to consider is to exchange offers only after the joint session and an opportunity to meet with the mediator privately.

Preparing the Client for Mediation

Some lawyers do not take preparation for a mediation very seriously, and a few have even been known to forego meeting to prepare their clients prior to a mediation. The first step is to ask yourself how you would analyze the merits of the case if you were counsel for the other party. Think carefully about what the other side's underlying needs might be. Look at the underlying interests, not just the position of the other side. Give some thought to what information or documents opposing counsel will reasonably need to evaluate the case and what you are prepared to make available at or before the mediation. Prepare your client to adjust their risk analysis and settlement calculations based on new information or insights that you and/or your client may gain in the course of mediation.

Most importantly, take the time to prepare your client for mediation. We often forget that many clients are inexperienced with mediation and do not know what to expect. With inexperienced clients, you might consider showing them a training video of mediation re-enactment (available from AAA or any other number of service providers). Explain what to expect at the mediation and the various stages of mediation.

Prepare the client for the possibility that the mediator may directly ask questions of the client or try to engage them in a dialogue about the case. Learn in advance whether the mediator has a tendency to do that in joint session or not and prepare your client accordingly. Coach your client to be patient and not to be in a rush to get to the bottom line. Explain that there may be long stretches of down time between private caucuses.

Give some thought and discussion with your client to the emotional/psychological dynamics of the dispute. Experience shows that every mediation will have a distinctive emotional dynamic or fulcrum when the process shifts and the parties move toward agreement. Make sure that you and your client are on the same page when that happens. Explain the concept of "principled negotiations" to your client so that they will understand the difference between that and positional bargaining.

Initial Joint Session

Although a few mediators prefer separate caucuses, most mediations start in joint session or utilize a joint session early in the process. Unlike Pat Nichols, I almost always have a joint session early in the process, but take steps to assure fairness and neutrality. Even seemingly minor nuances in the joint session may have dramatic impact on the satisfaction level of the parties. Standard Law School Professor Deborah Hensler, in her article *Suppose It's Not True: Challenging Mediation Ideology* in Journal of Dispute Resolution 1 (2002), relying heavily on previous Rand studies, pointed out that a number of factors bear on client satisfaction with mediation. The appearance of neutrality and fairness and the opportunity to be "heard" in a formal setting appear to heavily influence satisfaction levels of parties to litigation.

Thus, it is important that neutrality of the mediator be maintained. Not being overly familiar with counsel for one side or the other is a factor sometimes forgotten. It is recommended that the mediator initially remain out of the room when only one party is present. Having the second party walk in while the mediator has been chatting sociably with the first party to arrive can create distrust or even alarm on the part of the later-arriving party. If the mediation is conducted with informality, the informality should be with all. Establishing rapport and commonality can be conducive to establishing trust and empathy but only if done equally and without the appearance of favoritism.

When opening the mediation, all parties and their positions or their representational capacities should be identified. Even passing around the mediation agreement or a sheet of paper with names and positions and distributing copies to all present can put everyone at ease with respect to who is participating and in what capacity. If the mediator fails to do this, nothing prevents counsel from requesting a sign-in sheet with capacity or position identified.

It is recommended that the mediator review the process by which the mediation occurred, i.e., review with the parties whether the mediation is being conducted as a result of a dispute resolution agreement of the parties, agreement through counsel, court-annexed ADR procedures, a court order, etc. Next, the mediation agreement which has previously been sent to counsel should be reviewed in detail with all parties present, including reference to attorneys' fees. One consideration is whether to make as a part of mediation agreement that attorneys' fees will be borne equally by the parties unless some agreement has been reached in advance by the mediation. The confidentiality provision of the mediation agreement should be explained in detail to all parties. Further, the parties as well as counsel should be asked to sign in order to stress the importance of confidentiality. Again, if this is not standard practice of the mediator, it may be appropriate for counsel to affirmatively request that the mediator explain to all present and require all to sign.

A distinction should be made between the confidentiality of the mediator not being subject to being subpoenaed to testify about statements made in the mediation as distinguished from confidentiality as that term is used, as the mediator may engage in a shuttle diplomacy, going back and forth between the parties in private caucus.

Next, the mediator might review his own credentials as a neutral, his experience in practice and some discussion of his substantive knowledge of the area of law. These are all factors which, according to survey, have considerable bearing on the confidence of parties in the mediator in the process. The mediator then can proceed to discuss the reasons or advantages of using mediation over litigation, although care should be taken to avoid litigation-bashing or suggesting that the court system is "broken." Bludgeoning parties into settlement through mediation in order to avoid what some mediators describe as the "draconian" alternative litigation is destructive to the court system and often counterproductive in dealing with parties who respect and may ultimately be required to use the judicial system.

It sometimes helps for the mediator to define what might be considered a successful outcome of the mediation. Certainly, settlement and resolution is usually considered by the parties to be a successful outcome – hopefully in a win-win context. However, sometimes settlement comes about with all the parties feeling as if they gave up more than they had expected to and, consequently, they are left feeling somewhat unrequited. The parties should not necessarily expect to feel that they "won" when they leave, although sometimes that does occur. Further, mediations sometimes can be "successful" without reaching settlement if the parties narrow the issues or identify information or discovery needed that might subsequently result in resolution. Sometimes parties leave a mediation feeling that it was successful, even though no settlement occurred.

In determining how much explanation and experience to relate in this introductory part of the session to set the parties at ease, the mediator might inquire as to whether the parties have had experience mediating before and, if so, whether it ultimately was successful or helpful in resolving the controversy. Finally, before starting the mediation, the mediator should explain the procedure that he will use, including some explanation of his style of mediation, how separate caucus rooms may be used, any time limits that may come to bear, breaks, caucuses, lunches and other aspects of a mediation that may seem routine to experienced litigators and mediators but may be new and unexpected to the uninitiated. The time and depth of such explanation and comfort-conditioning depends on the experiences of the party, not the professionals in attendance. Once again, if the mediator does not provide explanation as a matter of standard practice, counsel can always ask for an explanation to avoid surprises.

Effective Opening Statements in Initial Joint Session

Traditional litigators are often more accustomed to an adversarial presentation, which does not always lend itself to the best mediation opening statement. Remember, this is not a jury trial. It is not even a matter of "convincing" the mediator. Rather, effective advocacy in mediation means using the mediator to facilitate an exchange of information with the party or parties sitting across the table. Thus, moving from an adversarial style to a problem-solving negotiation should usually shape the opening statement.

The opening statement may include a summary of the issues, evidence, any legal questions and an evaluation of the case. In some instances highly charged with emotion, a conciliatory tone might be appropriate. On the other hand, counsel sometimes need to show the other side they are prepared to litigate or, on occasion, counsel may need to satisfy their own clients with an aggressive opening statement, so balancing is often necessary. Addressing the question of remedies, including alternative remedies, is not necessary in the opening statement.

One question to consider is the extent to which counsel will allow parties to participate in the initial presentations and opening. Again, litigators historically are adversarial and protective of their clients. Yet, a recent trend in mediation is to have more client involvement, either initially or at some point during the mediation. Surveys show that client involvement usually increases their own satisfaction. It gives them a sense that they are in control, that someone "neutral" who is "fair and impartial" has listened to their story, and it often produces a cathartic effect that they have been "heard." If client involvement in the opening session is discussed in a pre-mediation conference and if the parties anticipate in advance that this will be part of the mediation, it can be done without exposing a client to hostile questions or cross-examination. The mediator should remain in control of the mediation to avoid client involvement becoming contentious or turning into a mini-trial.

Sometimes, a presentation by a plaintiff in an employment case in joint session may fulfill the need for defense counsel to take a mini-deposition before seriously discussing settlement. Further, in some circumstances, the sincerity/credibility of the plaintiff can impress the defendant representative and produce results that might not otherwise have been attainable if only counsel is heard. On the other hand, occasionally interaction between the parties in joint session can be counterproductive, and even destructive, to the process. Depend on the mediator to keep control of the situation. If the decision has been that parties will not actively participate in joint session, they should nevertheless be prepared to participate in private caucus, since most mediators should and do interact freely with the parties in private caucus.

Although a minority of mediators tend to go straight to separate caucus or to separate as soon as possible, recent trends appear to be more toward keeping the parties in joint session as long as possible unless hostility arises. Going back and forth with all parties present, eliciting information from the parties with their counsels' acquiescence, and narrowing the issues while in joint session not only expedites the mediation but causes the parties to feel more in control and therefore more satisfied. The issues can be discussed back and forth until they are narrowed as much as possible. Further, if the mediator has gained the trust and confidence of the parties, alternative solutions and brainstorming can occur in joint session as well. Essentially, preferred practice is to make as much use of joint session as possible before going into private caucus.

If the mediator has a broad awareness of all of the participants' interests and is sensitive to the psychological as well as other underlying needs of the parties, the chances of the initial joint session being productive and of the overall mediation being successful are greatly increased. Professor Len

Riskin at the University of Missouri-Columbia Dispute Resolution Center in his article applying "mindfulness mediation," underscores the need to be aware of all aspects of the situation and mindful of the myriad of influences on parties. His article, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Mediation to Law Students, Lawyers and Their Clients*, published in the Harvard Negotiation Review (spring 2002), explains this innovative application of mindfulness in mediation.

Once trust and confidence have been established, the mediator can move on to looking for creative solutions through brainstorming, which can sometimes begin as early as the initial joint session. The continuum of basic functions the mediator can perform to bring about the collaborative and sometimes transformative mediation include:

- Causing participants to agree to talk
- Helping participants understand the mediation process
- Providing a suitable environment for negotiation
- Carrying messages between participants
- Helping participants agree upon an agenda
- Maintaining order
- Clarifying misunderstandings
- Identifying issues
- Helping participants understand the problem(s)
- Defusing unrealistic expectations
- Rephrasing perceptions into more acceptable language
- Helping participants develop their own proposals
- Expanding resources
- Proposing solutions

Using Separate Caucuses Early Within Mediation Process

Many litigators new to the mediation process fail to use separate caucuses effectively because they never stop being an advocate for their client. If the mediator determines that hostility exists which cannot be dealt with early in the joint session, it may be appropriate to do an initial separation of the participants into separate, private caucuses. Sometimes separating the parties briefly but early can allow the mediator to establish trust with the parties. Early separation may also allow venting to occur without the situation deteriorating to the point that reconvening in joint session would otherwise be counterproductive.

If the mediator gains the trust of counsel and the parties, more candor is possible in caucuses, whether joint or separate. Counsel generally should be able to trust the mediator. The mediator usually does not request or want to know the full authority, although, on occasion, it can be appropriate to give the mediator the full extent of one's authority. It is important not to misrepresent one's authority to the mediator. Rather, be careful to state clearly when a negotiating position is being taken as opposed to when one has reached the final limits of authority.

Counsel in separate caucus need to give the downside, i.e. the weaknesses of one's case, in a candid manner, as well as the strong points in order for the mediator to do his or her work. This is particularly true if one is engaged in facilitative as opposed to evaluative mediation. It is important for counsel to know in separate caucus that the mediator can sometimes say things to your client that you as their attorney may have difficulty saying. Clients often want a pit bull as an attorney, not a weak advocate, but are likely to accept from an experienced, neutral mediator evaluations of credibility as well as comments regarding strengths and weaknesses of the case, knowledge of the judge, and other factors bearing on evaluation of the case that counsel may have difficulty saying or that a client may not be receptive to hearing from their own counsel.

In conducting separate caucuses, the mediator must show the ability to maintain confidences as he/she shuttles between caucuses. This increases trust and credibility. Active listening is an important part of setting the stage for a successful mediator. Now the stage has been set for a successful mediation. Creative solutions, brainstorming, collaborative and, perhaps, even transformative mediation may now be possible, using joint session to the extent it continues to be productive and using separate caucuses as necessary to elicit information that might not be appropriate in joint session or to use mediation techniques to cause the parties to change positions.

Although impasse-breaking techniques, bringing about consummation of the final agreement and recording it in writing are beyond the purview of this paper, if advocates in mediation follow the above steps in setting the table for a successful mediation, the mediator, like the sage in Lao Tzu's *Tao Te Chin,* is well-positioned to cause people to "drop their ideas and agendas, and guide them like beloved children."

> The sage has no set mind.
> She adopts the concerns of others as her own.
> She is good to the good.
> She is also good to the bad.
> This is real goodness.
> She trusts the trustworthy.
> She also trusts the untrustworthy.
> This is real trust.
> The sage takes the minds of the worldly
> and spins them around.
> People drop their ideas and agendas,
> and she guides them like beloved children.
>
> —*The Tao Te Ching*, Lao Tzu

Reprinted from the Kansas Trial Lawyers Association Journal, Vol. 26, No. 4, March 2003..