REPRESENTING CLIENTS IN MEDIATION: A TWENTY-QUESTION PREPARATION GUIDE FOR LAWYERS

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A well-tried case stems from a well-prepared case. Likewise, a well-settled case stems from good settlement preparation. Good trial results and good settlement results don't just happen; both require diligent, thorough preparation. Yet, counsel often approach settlement casually and almost impetuously, while at the same time methodically and thoroughly preparing for trial. Preparation for trial will not adequately prepare counsel or the client for settlement. This article, which is based on the author's nearly twenty-five years of experience as a judicial mediator, identifies twenty issues an attorney representing a client in mediation should address in preparing for the settlement discussions. Appended to this article is a condensed list of these guidelines that attorneys can use in thoughtfully preparing themselves and their clients for mediation. Conscientious consideration of these issues by counsel on both sides of a dispute should significantly enhance their prospect of fruitful negotiations.

1. Problem Solver or Adversary?

Many lawyers are most comfortable with traditional persuasive negotiations in which they argue their client's case and tear down the other party's case in an effort to persuade the other lawyer. The experience they have accumulated in the traditional negotiation setting does not transfer directly to the ever-expanding mediation setting for settlement discussions. Mediation incorporates an advocacy role for lawyers, but not in the same adversarial vein as litigation or traditional negotiations. In mediation the goal is not to win the argument, but to search for a mutually satisfactory and beneficial solution that meets both parties' needs and interests. A number of commentators have termed the skill set needed by lawyers to effectively represent clients in mediation as "problem-solving advocacy."[1] The goal in

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1. *See* Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, *passim* (2005) (explaining the genesis of

problem-solving representation is different from "winning"[2] and may lead to more satisfaction for the client than a "win" at trial.[3] Problem solving requires a collaborative approach in which lawyers work "*with* their clients instead of *for* their clients."[4] Some lawyers naturally shift gears and become problem solvers in mediation, while others either do not recognize the need to shift their focus or have trouble letting go of the adversarial cloak. In this author's experience, lawyers who take a problem-solving approach to settlement and partner *with* their clients, rather than posturing *for* their clients, achieve more satisfactory results for the clients in mediation.[5] Recognizing the distinction between these two representation models and trying to adopt a problem-solving mindset is a first step for lawyers who wish to represent clients in a mediation setting.

2. Pre-Mediation Communications With Client

Good settlement preparation should begin with the initial client interview.[6] The client likely will bring to the meeting preconceived notions and opinions about the merits of the dispute, including the value of the claim. Also, the client will have impressions of the litigation system and of the

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Abrahamson's book, MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS (2004)); *see also* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, *passim* (1984) [hereinafter Menkel-Meadow, *Toward Another View*] (outlining a systematic approach to negotiating in a problem-solving framework); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, *passim* (2000) [hereinafter Menkel-Meadow, *Winning*] (offering that a problem-solving approach to negotiation requires expansive thinking, unlimited by traditional legal mindset).

2. Menkel-Meadow, *Winning*, *supra* note 1, at 906.

3. Client satisfaction with mediation rests in large part on a sense of "procedural justice or fairness," which stems from the clients' opportunity to participate in the process and be heard on their own terms, whether or not the case settles. Robert A. Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 20-21 (1996); *see also* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL 885, 886-98 (1998) (analyzing various factors contributing to party satisfaction with mediation); J. Brad Reich, *Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation*, 26 S. ILL. U. L.J. 183, 186-96 (2002) (contrasting lawyer and party preferences for type of mediation process and satisfaction with process).

4. Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1375 (1998).

5. In a study in which lawyers rated the effectiveness of the negotiating style used by other lawyers, researchers found that 75 percent of negotiators using a true problem-solving approach were rated as effective by their peers, but over 50 percent of adversarial negotiators were rated as ineffective. Of those adversarial negotiators who used unethical tactics, only 25 percent were rated as effective. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 196 (2002).

6. Menkel-Meadow, *Toward Another View*, *supra* note 1, at 801 (citing DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING (1977); THOMAS L. SCHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976)).

settlement process, gained from personal experience in prior litigation, from news reports of large verdicts, from "reality" TV, or from fictional representations.[7] The lawyer should inquire into the client's motivations for deciding to litigate, the client's impressions of the legal system, and the client's expectations. The way the lawyer handles his or her early meetings will affect the client's impressions and expectations, for better or worse, either by reinforcing pre-existing notions or creating new ones. In the same way that initial impressions of new people we meet tend to stay with us, a lawyer's early expressions about a case may strongly influence the client's future attitude. Unrealistic client expectations that go uncorrected in the initial meeting, or worse, are created through the lawyer's own representations, are difficult to reverse later in the process. The more the lawyer understands the client's motivations and expectations, the better opportunity the lawyer will have to overcome unreasonable client impressions.

Understandably, a lawyer, particularly one who is striving to build a practice and gain new clients, may hesitate to criticize a client's motivations or to diminish the client's expectations, for fear the client will see such negativity as a sign of disloyalty or weakness in the lawyer, rather than a sign of unreasonableness in the client's own views. This concern is legitimate, but it should not lead the lawyer to over-promise what the lawyer and the legal system can realistically produce for the client. Of course, the lawyer does not necessarily want to discourage a potentially good client so much that the client seeks legal representation elsewhere, but over-promising can also cause problems. Over-promises ultimately lead to a disappointed, disgruntled client who will blame the lawyer for unmet expectations, rather than to a client who understands and accepts reality. Acknowledging how the client might have reached such high expectations, yet gently and firmly refocusing the client to a more realistic plane, will ultimately serve both the client and lawyer better than allowing unreasonable expectations to persist. A client who refuses to acknowledge the potential existence of an alternative reality will likely be dissatisfied with the outcome of the litigation and may blame counsel for the perceived failure. Counsel should attempt to forestall this potential development early in the attorney-client relationship.

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7. This exposure causes the client "to conceptualize a case as a morality tale," a matter of good versus evil, with the lawyer "fighting" for the client's cause. Robert Rubinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 846, 866 (2004); *see also* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 320 (1999) (showing that the client vision of the lawyer's role as "gladiator" causes tension in lawyer settlement discussions).

In addition to discussing reasonable expectations with the client at the first meeting, the lawyer should lay the groundwork for settlement by explaining the overwhelming likelihood of resolution of any case by settlement rather than trial.[8] The public hears more about trial results than settlements and generally is unaware that only one to two percent of civil cases are resolved by trial.[9] New clients may feel angry and be driven by their emotions. They often expect a trial to vindicate their position and satisfy their emotional needs and expectations. Again, a gentle but firm reality check is in order. Satisfactory trial results are often an illusion. Settlement may provide an earlier and even better result for the client. Mediation also offers an opportunity for the client to take a direct role in resolution of the dispute.

A primary feature of mediation as a dispute resolution process is active involvement by the client.[10] Mediators generally assume that since the parties and their lawyers have decided to engage in mediation as their chosen dispute resolution process, both the parties and the lawyers are prepared for the process. Unfortunately, this is not always the case. Mediators, myself included, commonly encounter lawyers who have not prepared themselves or their clients for the mediation process, and who may have failed to address the subject of settlement with the client at all. Repeatedly certain lawyers, but fortunately not all lawyers, bring their clients to a mediation conference without ever having discussed the mediation process, the client's expectations, interests or needs, the solution the client hopes to achieve, or a strategy for getting to that solution.

The lawyer may presume she will speak for the client and may have failed to advise the client that the mediator will likely expect to address the client directly. Every client has a story,[11] and a mediator usually will want to hear that story directly from the client. The client's own words will add texture to the legal dispute and permit the mediator to gain insight into possible solutions that will benefit the client. An unprepared client may feel exposed and vulnerable when questioned by the mediator and may

8. *See* Rubinson, *supra* note 7, at 866-73 (providing a "toolkit" for raising the issue of mediation with the client and promoting it as a dispute resolution alternative).

9. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 13 (2008) (showing that 257,507 civil cases were filed in federal district courts in 2007). Only 3,387 had full blown bench or jury trials, or 1.3 percent. *Id*. at 390. The rate rises to 2.0 percent if evidentiary hearings on motions, including preliminary injunctions, are counted as trials. *Id*.

10. Sternlight, *supra* note 7, at 333.

11. *See* Nolan-Haley, *supra* note 4, at 1375 ("Client storytelling is an integral part of the mediation process. It captures the human element which is so often missing when lawyers do most of the talking and translate client stories into legal contexts.")

distrust the mediator and the process as a result. A well-prepared client will understand the process and view the mediator's questions as a natural part of the process of building trust and developing creative solutions.

In certain situations the lawyer may explain the mediation process to the client but advise the client to remain silent and let the lawyer do the talking. If the mediator expects to hear from the client, the lawyer should be prepared to explain the decision to speak for the client and the reason for the decision. Usually, that decision is misplaced. If the lawyer wishes to speak for the client because the client is unreasonable, the mediator could assist the lawyer in conducting a reality check to test and hopefully overcome the client's unreasonableness. On the other hand, if the lawyer has advised the client to remain silent simply because the lawyer has not prepared the client, that decision will do a great disservice to the client and may leave the client feeling left out of the process even though he or she is physically present.

A lawyer may presume that the mediator's role in managing the process and guiding the parties' search for an acceptable solution absolves the lawyer from preparing himself or herself, or the client. The mediator will do the heavy lifting, and the lawyer and client will reap the benefit. This attitude likely stems not necessarily from laziness on the lawyer's part, but rather from fear that raising the topic of settlement with the client communicates weakness. The lawyer may feel safer in allowing the client to think that exploring settlement is the mediator's idea, especially if the mediator is a judge, and the lawyer and client are obliged to follow.

Mediation has little chance of bearing fruit without an investment by the mediator, the lawyer, and the client. The mediator controls the process and hopefully brings an ability to manage that process effectively. The client controls the outcome, and the lawyer must work with the client to reach a satisfactory outcome. The lawyers and parties bring to the process superior knowledge of the dispute and its potential solutions. They should use the mediator's process skills to aid them in overcoming obstacles and identifying potentially satisfactory solutions.[12]

At best, attorney-client failure to communicate about settlement in advance of mediation slows the process. The time allotted to the session by the mediator may prove insufficient if it must incorporate pre-negotiation discussion between attorney and client. Additionally, creative solutions do not simply "materialize"; they become apparent only after thoughtful consideration of the parties' needs and interests. The mediator can help the

12. *See* Abramson, *supra* note 1, at 121-33 (detailing ways to enlist the mediator's assistance, depending on the mediator's style and the nature of the impasse between the parties).

parties identify which solutions will work, but most often the clients provide the best and most creative ideas for solutions.[13] Advance discussion of the client's needs and interests, as well as potential solutions addressing those needs and interests, significantly improves the potential of a successful mediation conference. The cardinal rule, therefore, is that lawyers must speak with their clients extensively about all issues touching on settlement *before* attending mediation.

3. The Client's Emotional State

At the first meeting with the client and at each significant contact thereafter, counsel should take the client's pulse about settlement. The client may initially approach counsel with the expectation of a quick and easy settlement, and when this does not come to pass, the client's disappointment may manifest itself in a decision to "punish" the other party by going to trial. Conversely, the client may initially want public vindication through a trial, but may become worn down over the course of the litigation process and simply prefer to end the ordeal. The extremes of these client positions rarely result in outcomes satisfactory to the client, whether at trial or in settlement. Counsel may temper these extremes by monitoring the client's emotional state periodically and by reassuring the client that the course of the litigation and any settlement discussions are normal, with any delay being necessary to serve the client's best interests.

Some attorneys regularly check the client's emotional state and conduct reality checks on the client's expectations, both in outcome and time frame.[14] Other attorneys, unfortunately, focus only on the issues in the litigation and leave reality checking to the mediator or the fact finder. The latter attorneys' clients are often disappointed by the settlement and/or litigation process and ultimately harbor resentment toward their own attorneys.

If counsel detects strong emotions or unrealistic expectations in the client, counsel's best course is to address them early and often. A client's resistance to settlement should be dissected: Does the resistance stem from a firm, well-founded conviction in the strength of the client's legal position, or a need for adjudication to inform the client's future policy? On the other hand, is the client's resistance a product of something the client read about

13. Sternlight, *supra* note 7, at 344.

14. *See* Joan L. O'Sullivan et al., *Ethical Decsionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109, 133 (1996) (stating that understanding the client's perspective, which encompasses emotional state, has been suggested as "an ethically required practice skill" in the context of litigation). Understanding the client's perspective is also "an ethically required practice skill" in mediation. Nolan-Haley, *supra* note 4, at 1383.

another case or the opinion of a misguided family member or friend with no stake in the litigation? Even worse, does the client's opposition to settlement stem from counsel's own puffing about the case or desire to try the case for selfish reasons? Counsel's open-eyed exploration of client-driven barriers to negotiation will assist counsel in managing any unreasonable resistance or expectations by the client.[15]

4. Case Information vs. Settlement Information

Before undertaking discovery and engaging the other party in settlement discussions, counsel should assess the known information about the case, the information that counsel knows is still unknown to the other party, and the possibility of unanticipated information—the information that counsel doesn't know is unknown to the other party. Counsel can then engage in a cost-benefit analysis of what information should be gathered before opening settlement discussions. This assessment should include an appraisal of opposing counsel: Will opposing counsel engage in a cooperative, informal exchange of information, or is formal discovery, though slower and more costly, necessary for gathering sufficient, reliable information?

Counsel should differentiate case information that critically affects settlement value from information needed for trial. The two spheres of information will likely overlap significantly, but the congruence is far from perfect. Certain information may be necessary for presentation at trial, but it may not be critical for settlement purposes. Conversely, a number of the issues listed in this article may affect settlement but not trial. Counsel should then embark on a dual track to develop the information needed for settlement as well as for trial, with a suggested emphasis on developing settlement information first. Once counsel has gathered settlement information and key trial information, the case may settle without need for full trial discovery. In fact, many lawsuits settle without any formal discovery at all.

5. Evaluating Strengths and Weaknesses

Mediators, both judicial and private, often ask counsel, either in advance or during the course of a mediation session, to assess the strengths and weaknesses of the facts and the legal issues. In response, counsel will frequently reel off a list of strengths of his or her client's case, while giving only token attention to weaknesses. Conversely, when asked to perform an

15. *See* Sternlight, *supra* note 7, at 297-313 (identifying various economic and psychological barriers to negotiation).

assessment of the opposing party's case, counsel will recount numerous weaknesses and give little or no credence to the other party's strengths. This egocentric approach ultimately undermines the settlement process and interferes with the parties' ability to achieve resolution. Hearing these lop-sided evaluations encourages the clients to remain invested in unbalanced and unrealistic positions.

Counsel should not only engage in a two-sided assessment of strengths and weaknesses, but also share that assessment with the client before they form the settlement strategy and position they will bring to the settlement negotiations. The assessment should address the merits of the case, as well as non-merits factors that may affect case value, such as the fact finder's likely impression of the respective parties or key witnesses, hometown advantage or disadvantage, and complexity of the evidence. A fully versed client is more likely to approach negotiations with a realistic frame of mind than is a client impaired by blind spots.

6. Parties' Needs and Interests

A facilitative mediation process will focus as much on the interests and needs of the parties as it does on the merits of the case. Lawyers often hyper-focus on the factual and legal issues, to the exclusion of their clients' needs and interests. Focusing on the issues in the lawsuit also limits the field of remedies the lawyer considers, usually to money damages.[16] A well-prepared lawyer will recognize both the interests the client hopes to serve through litigation and the interests served through settlement. The litigation interests and settlement interests may not coincide; in fact, they may be quite different. The client may not have even considered, much less prioritized, these interests.

Client interests or needs that fall outside the scope of the litigation issues may include financial pressure, the emotional toll of the ongoing dispute, embarrassment or business loss if certain evidence is revealed publicly, or guilt over contributory fault, among many other possible considerations. Counsel and client should engage in a pre-mediation discussion of the client's interests and an analysis of how those interests may affect the

16. *See* Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of Plaintiff's Litigation Aims*, 68 U. PITT. L. REV. 701, *passim* (2007) (presenting the results of an empirical study about plaintiff motivations). One finding in Relis's study was that every medical malpractice plaintiff in the study reported receiving either no explanation or an unsatisfactory explanation for the bad outcome. *Id.* at 725. This squares with this author's own experience. A number of medical malpractice plaintiffs have expressed during mediation conferences that their physicians stopped talking to them as soon as things went wrong, and the plaintiffs were left feeling abandoned and disrespected. They all said they would not have sued if the physician had just expressed regret and explained what happened.

settlement negotiations. Finally, the pre-mediation discussion should include an assessment of the effect of disclosing those interests or needs to the other party: Is disclosure more likely to aid the settlement process or harm the client? Only after both lawyer and client recognize the client's needs and interests, and factor those interests into their settlement strategy, can they achieve a resolution that serves those needs and interests.

In addition to considering his or her own client's interests, counsel should prepare himself or herself and the client to take into account the interests and needs of the other party as they frame their settlement strategy. Obviously, the parties will agree to settlement terms only if both sides find the terms more beneficial than continued litigation. A lawyer can enhance his or her client's prospects of settlement by considering what terms may be attractive to the other party and why. Certain interests of the two parties may be contradictory, but others may be compatible or at least neutral. Counsel should consider the extent to which his or her client can meet the other party's needs and interests without unduly conflicting with his or her own client's interests. For instance, in an employment discrimination case, the employer can provide a letter of reference, remove an arguably unfair personnel evaluation from the employee's file, or at least soften the language, with little or no pain to the employer, yet provide substantial value to the employee.

7. Litigation Remedies vs. Settlement Remedies

Mediation provides an opportunity for the parties to craft their own remedies. The law provides only a limited range of remedies, but mediation allows them to creatively shape their resolution to best meet their needs.[17] Counsel often miss this opportunity by failing to explore prior to mediation what remedies may best serve the client's interests, and whether those remedies are available only through settlement. All too often, counsel's focus is limited to a monetary award, when a more expansive approach to settlement remedies could bring more satisfaction to the client than a good litigation result. Examples of creative settlement remedies in cases that this author has mediated, in addition to the personnel matter

17. Carrie Menkel-Meadow refers to the limited range of remedies available by law as judges having "limited remedial imaginations." Menkel-Meadow, *Winning*, *supra* note 1, at 908. This observation arises from another of her articles, Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 7 (1996). Menkel-Meadow also observes that mediation "can craft future relationships and does not have to find facts, assign fault and blame, or issue judgments or awards about the past." Carrie J. Menkel-Meadow, *Remembrance of Things Past? The Relationship of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97, 101 (2004).

mentioned above, include charitable contributions made by the defendant in the plaintiff's name, rewriting a policy the plaintiff finds offensive, redirecting payment to a third party, sale of equipment in lieu of cash payment, statements of apology or regret,[18] and a joint press release, to name only a few.

8A. Authority to Settle: Business Entities

Productive settlement discussions require the right participants. Counsel who represents a corporation, other business entity, or insured party should explore with the client or its insurer early in the life of the case, and well before settlement discussions begin, the client's decision-making hierarchy for settlement of such a dispute. Frequently, more than one person is involved in evaluating the case and deciding on the party's settlement position. To provide effective advice on settlement evaluation, and to understand the client's views on settlement, counsel should confer directly with all critical decision makers. Ideally, counsel will also secure the attendance of all the decision makers at the mediation conference. More often the client, after making a settlement evaluation, will delegate a particular level of settlement authority to one employee, who will attend the mediation on the client's behalf with directions to negotiate within that authority limit. The representative's lack of discretion to exceed the authority limit becomes an issue when the parties reach impasse in their negotiations, and the representative must contact a superior, who is hopefully available by telephone, to inquire about further authority. The superior, not having participated in the give and take of the negotiations, feels no investment in the process and frequently finds it easy to attribute the impasse to unreasonableness by the other party and refuses to enhance the offer. This refusal often results not only in failure to reach settlement, but also to resentment by the other parties of an unengaged, distant person making the decision to stop the negotiations. This perceived lack of respect complicates the negotiations going forward and makes it difficult for counsel to re-engage the other party in settlement discussions.

The authority quandary has led most judicial mediators to impose a requirement that representatives attending a mediation conference hold sufficient authority.[19] The language used for this requirement varies from

18. *See* Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, *passim* (1997) (assessing the power of apology in transforming relationships, but recognizing that crafting apologies in litigation is a delicate process).

19. *See* FED. R. CIV. P. 16(c) (authorizing the court to require the attendance of a party's representative at a pretrial conference, including one for the purpose of discussing settlement).

one judge to another. For instance, some judges require a corporate party or insurer to send a representative holding authority equal to the plaintiff's last settlement demand.[20] Other judges, myself included, believe language this strong permits an unreasonable plaintiff to manipulate the process by forcing the defendant to bring a higher level representative than necessary. Thus, this author's order and those of similar-minded judges require a representative with "full" or "final" settlement authority.[21] Yet other judges use arguably more lax language, for instance, requiring "a representative authorized to discuss and make recommendations relating to settlement."[22] Despite the efforts of settlement judges to forestall the authority issue, issues involving inadequate authority nevertheless surface with some regularity at mediation conferences.

Counsel should familiarize himself or herself with the judicial or private mediator's expectations concerning authority and then take steps to ensure the client's settlement representative possesses the required level of authority. If counsel encounters difficulty in securing the attendance of properly authorized representatives, counsel should promptly inform the mediator of the situation and seek further direction or request a waiver of the authority requirement if circumstances warrant this step. In appropriate circumstances, the mediator may approve a less stringent arrangement, such as availability of the fully authorized representative by telephone, particularly if the other party does not object. Remaining silent and hoping that the mediator and the other party will not notice the authority deficiency, or that they will overlook it, is a strategy designed only to invite impasse in the negotiations and, in a judicial mediation setting, a potential award of sanctions against the client, the attorney, or both.[23]

A representative with final authority, even authority equal to the plaintiff's last demand, is never required to actually offer the full extent of that authority. Mediators' requirements for authority are intended only to avoid authority gaps that would bring an end to the negotiations before the parties have reached true impasse. The authority requirements are not

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20. Form Order used by U.S. Magistrate Judge David Piester, District of Nebraska (on file with author).

21. The order used by this author requires "a representative in person with full and complete authority." (On file with author).

22. Form Order used by U.S. Magistrate Judge Celeste Bremer, Southern District of Iowa (on file with author).

23. *See* FED. R. CIV. P. 16(f) (authorizing imposition of fees and costs "[i]n lieu of or in addition to any other sanction" against the attorney, the client, or both); *see also* Universal Co-ops., Inc. v. Tribal Co-op. Mktg. Dev. Fed'n of India, Ltd., 45 F.3d 1194, 1195-97 (8th Cir. 1995) (affirming sanctions against a party for failing to send a representative with "full settlement discretion," but reversing the award of sanctions against that party's attorney, because the attorney had "used his best efforts to secure the compliance of his client").

intended to force a party to offer more than that party is willing to pay in settlement.

8B. Authority to Settle: Governmental Parties

Attorneys representing governmental entities also face logistical challenges in securing the attendance of appropriate representatives. To comply with open meeting laws,[24] a governmental entity must approve a proposed settlement in a properly noticed, public meeting.[25] Thus, the governmental party cannot make a final settlement decision at the mediation session, even if the entire governing board attends. This limitation does not excuse counsel or the governmental party from taking preparatory steps to minimize the effect of the lack of final decision-making authority during the mediation conference.

Generally, the board, or certain of its members, should meet with counsel in an executive session prior to the mediation conference to discuss settlement evaluation and negotiation strategy.[26] One or more members of the board should then attend the mediation conference and negotiate based on the agreed parameters. If the case does not settle within the agreed parameters, the representatives in attendance may need to exercise discretion to propose a settlement beyond those parameters. When the representatives do reach a conditional settlement with the other party beyond the agreed parameters, counsel and the attending representatives should be prepared to assure the mediator and the other party that the representatives carry sufficient credibility with the entire board that their recommendation for acceptance of settlement terms is likely to garner full board approval at a subsequent open meeting.

9. Insurance Coverage

Counsel for both parties should determine in advance of mediation the existence of any applicable insurance coverage. In federal court, a defendant must reveal such coverage before discovery commences.[27] Before

24. *See, e.g.*, N.D. CONST. Art. XI § 5 (providing that all meetings of public or governmental entitites, or publicly funded organizations, must be open to the public); N.D. CENT. CODE §§ 44-04-19 to -21.3 (2007) (establishing the requirement for public access to meetings, exceptions to the open meeting requirement, notice requirements, administrative review procedures, and remedies).

25. N.D. CENT. CODE § 44-04-20 (notice required); § 44-04-21 (open voting required).

26. *Id.* § 44-04-19.1 (creating an exemption from open meetings law for attorney consultation and negotiation preparation).

27. *See* FED. R. CIV. P. 26(a)(1)(A)(iv) (requiring initial disclosure of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment").

mediation, counsel for each party should explore the nature and extent of that coverage, and whether there is any dispute over coverage. If the insurer is defending the insured under a reservation of rights to deny coverage, counsel should discuss with one another whether that dispute must be resolved prior to addressing settlement of the underlying claim. Conversely, counsel should address whether the underlying claim can be settled subject to later resolution of the coverage issue. Whether separate coverage litigation is pending, counsel should also consider whether the coverage dispute and the underlying claim may be resolved at the same time in a global settlement. This approach will require attendance at mediation and participation by the insurer's settlement representative and its coverage counsel. If the named defendant has secured separate counsel for the coverage dispute and a possible bad faith claim, that attorney should also attend the mediation conference. In exploring these complexities, counsel should keep the mediator and their clients informed. The mediator can assist counsel with planning the sequence and scope of the negotiations. For instance, the negotiations may proceed in stages rather than with all issues at the same time. An informed mediator can better prepare to manage the negotiations, and the parties will approach the negotiations with a clearer understanding of the nature and pace of the process.

10. Subrogation Interests

Personal injury plaintiffs frequently have received workers compensation payments or health insurance benefits due to their injuries, and the payor may hold a subrogated interest in any settlement or judgment. The plaintiff's attorney should verify the existence and amount of any such interests and share that information with counsel for the other party and the mediator. Informed participants are better prepared to meet the added complexity presented by multiple interests. Further, counsel should determine whether the interest can be compromised, and if so, whether the subrogee is willing to reach an agreement in advance of mediation to accept a certain dollar amount or a set percentage of any settlement, or alternatively, whether the subrogee wishes to participate in the mediation conference in person or by telephone. If the attorneys fail to address such interests in their mediation preparation, the subrogation interest may become an obstacle to the parties' effort to reach a settlement.[28] The mediator should

28. In the author's experience, such obstacles can arise in at least two ways. If a defendant is unaware until late in the negotiations that the plaintiff expects the defendant to pay any subrogation interest in addition to the amount offered in settlement, the defendant will view that development as a sudden increase in the plaintiff's demand, which is likely to end the discussions. Conversely, in one case, the defendant assumed the plaintiff would receive ongoing workers

be kept informed of the status of any subrogation interest, a subrogee's anticipated participation in the mediation conference, and any arrangement to settle the subrogation interest. Again, the mediator can assist counsel in organizing the session to wrap the resolution of the subrogation interest into the negotiations.

11. Shadow Parties

Generally a mediator will direct only that the named parties and any applicable insurers attend the mediation conference, but additional persons may be critical to reaching a settlement agreement. A spouse, significant other, parent, child, other relative, or close friend of a party may exert strong influence on the party's expectations and settlement position. The party may hesitate or even refuse to agree to settlement terms before consulting with that person. This situation usually presents itself with individual parties, but a business entity may want to consult with a banker or accountant before agreeing to any settlement. If such a person, often called a "shadow party," is influencing the party, or the party relies heavily on the other person for advice, counsel is well served to explore with the client whether it would help or hurt settlement prospects to bring the person to the mediation conference. Although the shadow party may have strong views about the case and its settlement value, that person may not be living with the emotional or financial burdens of the litigation and may stake out a rigid and unreasonable stance on settlement. Direct participation in the negotiations may soften or at least better inform that person's views. Counsel and the mediator will have an opportunity to observe the dynamics of the relationship between the client and the influential person, to attempt to correct erroneous impressions about the facts, the law, or the litigation process, and to perform a reality check on both the client and the shadow party. Counsel should, of course, inform the mediator in advance of the client's reliance on the other person and of counsel's strategy for dealing with that dynamic.

12. Financial Limitations on Settlement

A defendant facing a strong prospect of an adverse litigation outcome may nevertheless make seemingly inadequate settlement offers. Such offers may be a product of the defendant's financial inability to pay a judgment in the likely range of outcome. Unless the defendant informs the

compensation payments, but the plaintiff had already settled all workers compensation claims without telling the defendant. When the defendant learned of this development accidentally, the resulting mistrust of the plaintiff brought the negotiations to an end.

plaintiff of this situation, the plaintiff will likely read the defendant's offer as unreasonableness and call off the negotiations. The parties will then proceed with litigation, pouring more money into a needless exercise with an ever-shrinking recovery potential. Counsel for the plaintiff may not have access to information about the defendant's financial condition through discovery, but if the defendant's attorney advises plaintiff's counsel of the financial concern early in the litigation, counsel for both parties can redirect their efforts into determining what kind of settlement terms the defendant can afford, rather than wasting time and money on litigation preparation and evaluation of the merits.

A defendant pleading financial distress should be prepared to share with the plaintiff verification of its financial condition. The plaintiff's attorney cannot provide informed settlement advice to his client without such documentation. Counsel for both parties should discuss what information the plaintiff will need to satisfy regarding the defendant's financial condition. The parties may enter into a confidentiality agreement limiting the use of the information or even the persons who may review it, since the information may have no other purpose in the case. The defendant's independent accountant or in-house financial officer may need to meet with counsel or even participate in the mediation conference in person or by telephone. Counsel for the defendant should, of course, inform the mediator prior to the mediation conference of the financial issue and be fully prepared not only to make settlement proposals based on the defendant's ability to pay, but also to provide substantiation of that position.

13. Client Control

Counsel should candidly assess whether she has a client control problem before entering into mediation. If so, counsel should consider how to overcome the client's unreasonableness and refusal to listen to counsel's advice. Perhaps the client has a family member or trusted friend who could help the client redirect his perspective. The attorney may practice with a more experienced lawyer or lawyer with a different personality who can help with this challenge. In addition, counsel should consider disclosing the concern to the mediator and enlisting the mediator's aid in meeting the problem.[29] An ethical mediator will not usurp the attorney's role and advise

29. *See* Sternlight, *supra* note 7, at 340-41 (stating that the mediator may relieve the attorney from serving as a bearer of bad news to the client).

the client on settlement,[30] but the mediator can support counsel's advice by performing a reality check with the client.

14. Knowing the Mediator

There are as many variations on the mediation process as there are mediators. Counsel should attempt to learn as much as possible about the mediator's procedure, expectations, style, and personality. This information will help in shaping the party's negotiation strategy. It is helpful to know whether the mediator uses mostly joint sessions with all the parties together or prefers separate caucus meetings with each party. Counsel should determine whether the mediator primarily addresses the attorneys or expects active participation by the clients. Evaluative mediators who focus principally on litigation issues will likely communicate mostly with counsel. At the other end of the spectrum, facilitative mediators with a broad focus will want to hear directly from the clients.[31]

Counsel should explain the anticipated process to the client and prepare the client to participate to the extent the mediator will expect. If the client is expected to speak openly and actively, counsel should reassure the client that counsel will be there to advocate where appropriate, protect the client's interests, and advise the client as needed. An attorney with little or no experience with client-centered negotiation should invite the client to express in advance of mediation the client's views about the litigation, the emotional and financial burdens it has caused, the client's interests and settlement expectations, and the pressures on the client to settle or not settle. This pre-mediation session may relieve counsel's qualms about the

30. *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS § II(B) (2005) (adopted by the American Arbitration Association, the American Bar Association and the Association for Conflict Resolution) ("A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality."); *see also* Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, *passim* (1997) (citing *Ethical Codes Caution Mediators—and Other Neutrals—Against Assuming Other Roles* as one of the "Top Ten Reasons" mediators should avoid being evaluative).

31. There is an extensive body of literature on mediator style, and the evaluative-facilitative distinction in particular. *See* Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, *passim* (1996) (defining the evaluative-facilitative mediator style). This distinction, first articulated by Leonard Riskin, usually indicates whether a mediator will offer an evaluation of the issues, opinion of case value, or a mediator number as a suggested resolution. *Id.* Riskin also identified a second dimension of mediator style, that of broad or narrow. *Id.* A narrow mediator will focus on the legal and factual issues presented by the claim, while a broad mediator will look beyond the legal dispute to the parties' extra-legal interests. *Id.* Riskin has since refined his model. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, *passim* (2003).

client speaking directly to the mediator and may lessen counsel's tendency to interrupt during the mediation conference to speak "for" the client.

15. Time Commitment

The mediator may not indicate his or her expectations for the length of the mediation conference, or he or she may have no idea how long it will take. Counsel should always inquire in this situation as to the mediator's expectation. When this communication does not take place, counsel or the client representative may make travel arrangements based on their personal schedules or their assumptions arising from experience with another mediator. Then, in the midst of a mediation conference, if the attorney or client announces he or she must leave soon to catch an airline flight, the mediator and other party become frustrated. Instead of using the remaining time to achieve settlement, the parties often devote the time to complaining about or defending the travel schedule. In a different scenario, counsel could expect an all-day session, and when the mediator announces that the session will end soon, the parties may not have progressed as far as counsel had expected.

Attorneys can avoid these situations by communicating with the mediator in advance about the mediator's expectation for the length of the session. Not only should an attorney conform his or her own travel plans to the mediator's expectation, but he or she should also make sure the client's travel schedule complies as well. If counsel does not believe he or she, or the client can meet the mediator's expectations for commitment of time, counsel should inform the mediator as well as counsel for the other party, so they can discuss whether the limited time is sufficient or whether the mediation session should be rescheduled.

16. Attorney's Fees

If attorney's fees are an element of the plaintiff's potential recovery, counsel for the plaintiff should anticipate that a discussion of the amount of fees will arise during the negotiations. Counsel should bring to the mediation documentation of the fees and costs and be prepared to support any amount sought in settlement for those items. The defendant, who is already paying his or her own attorney, invariably will resist paying any significant amount toward settlement of fees and costs. A plaintiff's attorney may respond by suggesting that the parties submit the attorney's fee issue to the court for decision after settling the plaintiff's claim. The defendant will generally refuse, preferring to resolve the entire matter at once, which places pressure on the plaintiff's attorney to decide whether to forego

settlement or to resolve the case satisfactorily for the client, but perhaps unsatisfactorily for the attorney.

The natural resistance of the defendant to pay significant attorney's fees creates a significant source of conflict between the plaintiff's attorney and his or her client, particularly in cases where the plaintiff's damages are relatively low but the fees have become significant. The fees often become "the tail that wags the dog." Defendants in such cases may try to make a split offer, offering the plaintiff a relatively generous sum and offering only a small sum, or nothing, for attorney's fees. The plaintiff's attorney then feels pressure from the client to reduce or waive fees in order to secure the offer for the client's damages. Or, the client may refuse a generous offer, saying, "I need to take care of my lawyer." This situation may be complicated further when the plaintiff's lawyer and client have a contingent fee agreement. Lawyers in attorney-fee award cases should thoroughly review with their clients in advance of the mediation the issue of attorney's fees and the potential for conflict.[32] Better preparation will generally yield better understanding and less conflict during the mediation.

17. Rationale for Settlement Proposal

A party may offer a proposal at mediation that seems to make little sense to the other party, yet the offering party will offer no rationale to support that proposal. Counsel will expect the mediator to communicate the offer, but the mediator is hampered by lack of information about the basis of the proposal. Sometimes a party simply will have no rationale for its offer; the offer is just a trial balloon the party may float to see how the other party reacts. In other situations, the proposal may be based on calculation of certain items the offering part is willing to consider in settlement, while rejecting others, such as allowing for back pay but rejecting front pay. The offer may also be based on the anticipated effect of certain evidence.

Many lawsuits have "skeletons," or information that one party uncovers about the other without the other's knowledge. The more dramatic the skeleton, the more likely it will affect the discovering party's settlement evaluation and the more likely the discovering party will not have revealed

32. This potential for conflict of interest is not limited just to fee-award cases, although it may be more pronounced in those cases. Commentators have posited that every fee arrangement entails some potential for conflict between lawyer and client, since "the lawyer's financial self-interest will be exactly congruent with his or her client's goals in the representation. Only the lawyer's sense of professional obligation—his or her 'purity of heart'—can assure that it is the client's goals that are being advanced." Robert P. Burns, *Some Ethical Issues Surrounding Mediation*, 70 FORDHAM L. REV. 691, 700-01 (2001); *see also* Sternlight, *supra* note 7, at 313-31 (identifying a number of economically and psychologically divergent interests of attorney and client).

its knowledge to the other party. Yet, in settlement discussions, the party with the "juicy" information will often resist disclosing its knowledge to the other party, choosing instead to keep the knowledge secret until its surprise revelation at trial. This author has heard counsel say on a number of occasions, "We don't want you to tell them we know this but . . . ." Counsel then divulges information regarding the video showing the personal injury plaintiff playing basketball, of the sordid workplace affair in which the other party engaged, or the like.

Any party who wishes to achieve settlement of his or her case must be willing to reveal to the other party the rationale for its settlement evaluation. Without the revelation, the settlement evaluation and offers of the party holding the information may confound the other party and will not cause the other party to rethink its own evaluation. Settlement negotiations may falter as a result. The best practice is for the party to reveal the evidence or calculation in an effort to improve the prospect of settlement. The party holding the secret evidence may have overrated the dramatic effect of the evidence at trial, and its effect on settlement may be no less dramatic than at trial. A party who has based its settlement proposal on a calculation should be prepared to share that calculation to provide some context for its offer. Counsel should prepare to share this information with the mediator and ultimately with the other party.

18. Written Mediation Statement

Many mediators, both judicial and in the private sector, require that counsel submit a written statement several days prior to the mediation.[33] The mediator may ask the attorneys to send a copy to other counsel, or he or she may request confidential statements that are provided only to the mediator.

Non-confidential statements should be written for consumption by counsel for the other party, as well as the mediator. A non-confidential statement will invariably have a persuasive tone, since counsel will want to impress the other party with a strong position.

A confidential statement should be a different animal altogether. Confidential statements should be written with the mediator in mind, since the mediator is the only intended audience.[34] The intended purpose of a confidential statement is at least twofold: (1) it should educate the mediator

33. This author issues a standard order setting out requirements for a written mediation statement. *See* discussion *supra* note 21 (establishing requirements for party representative settlement authority).

34. Counsel is, of course, permitted to share the statement with his or her own client.

about the issues in the dispute, both legal and extra-legal, the parties' settlement positions to date, and the potential for settlement; and (2) the exercise of preparing the statement should cause counsel to review the litigation risks, taking into account the relative strengths and weaknesses of each party's case, plus the transactional costs of continued litigation. In writing the statement, the attorney should have considered the interests and needs of each party and have analyzed potential settlement solutions. Counsel also should address strategies to achieve the potential solutions.

More often than not, in this author's experience, attorneys' confidential mediation statements fall short in several respects. First, the confidential mediation statements are frequently indistinguishable from a summary judgment brief, complete with case citations. They are one-sided arguments intended to persuade the mediator, not inform the mediator of the issues that will likely affect settlement, both legal and extra-legal, or assist the mediator in planning how to manage the process to guide the parties toward settlement. There is absolutely nothing confidential in them. Counsel may have just as well served these statements on the other party's attorney. Further, many of the statements are devoid of any indication of what the client is willing to do to resolve the case or what counsel believes the other party may be willing to do. Instead, if the statement contains any such information at all, it is limited to a proposal the client has already offered or will offer at the outset of the mediation process. Rarely does counsel include an assessment of where the negotiations may lead.

Whether the mediation statements are confidential or not, attorneys frequently miss the submission deadline. When late, an attorney will usually dash off a short letter the afternoon before the conference in a half-hearted effort to meet the letter of the mediator's requirement. The spirit is nowhere in sight. While such an abbreviated statement will limit the mediator's ability to prepare for the mediation session, a more important consequence is that it demonstrates that counsel has not devoted sufficient attention to settlement evaluation and strategy and likely has not conferred with the client to prepare themselves for the negotiations. This ultimately short changes the client, not the mediator.

These deficiencies, both in the content of the statement and the timing of its submission, are likely the result of counsel focusing primarily on litigating, not on settling. The mediator's requirement for a written statement is not a make-work rule imposed just to waste lawyers' time. A good mediation statement shows the lawyer has thought about the barriers to settlement and the possible resolution, has prepared the client, and is approaching the process in good faith with a serious intention to negotiate the case to settlement.

19. Negotiation History

Counsel should consider how prior settlement demands or offers might affect the mediation. The defendant may have responded to a very unreasonable demand by the plaintiff with an extremely low offer, or a refusal to offer anything at all. The plaintiff in turn may have viewed an unreasonably low, or "nuisance," offer by the defendant as an insult, also deserving no response. If mediation takes place against this backdrop, the parties will first want to process their negative feelings about the prior negotiations before they move forward in a positive vein. The lawyers should include in their written mediation statements a full report of the prior negotiations. A revisionist history will not suffice—a previous, unreasonable position by that party will not go away. The other party will not have forgotten and is likely to inform the mediator about it, complete with superlative adjectives. An informed mediator will anticipate the parties' tendency to dwell on past communications and plan the process to guide the parties toward a forward-looking view. Candor is the best policy, if the attorneys want the mediator to help the parties move past their prior negotiation missteps.

Surprisingly often, the attorneys will have differing recollections of the negotiation history and may need to spend some time at the mediation session sorting out what has already happened. The mediator will try to move them past their prior baggage and encourage them to make a fresh start, but a sense of the negotiation history will help the mediator minimize the "he said-she said" battle over prior proposals.

In some instances, attorneys will talk "off the record" with one another prior to mediation, with one of them sending signals about what amount "might" settle the case. In most instances these "non-offer" signals are sent without the client's authorization, and unless they are immediately greeted with acceptance by the other party, they will come back at mediation to haunt the attorney who sent them. Invariably, the attorney for the other party will insist on viewing such a signal as an actual offer, to which his or her client is prepared to respond with a counter-proposal at mediation. The counter-party will expect the signaling party to move beyond the signaled level. This creates not only a dispute about what was actually said or intended in the conversation between the attorneys, but also a potential source of conflict between the signaling attorney and his or her client. The client may view the attorney's comments as worse than unauthorized, perhaps even a betrayal of the client's trust. This may affect the client's willingness to participate in mediation candidly. Counsel should reveal to the mediator in advance any "non-offer" signals he or she may have sent, so

that the mediator may assist the parties in moving past the communications, rather than negotiating about where their negotiations are.

20. Special Settlement Terms

Rarely do lawyers' mediation statements mention such issues as the client's insistence on confidentiality of settlement terms, the need for the defendant to delay payment or pay any settlement amount in installments, the plaintiff's demand for confession of judgment to secure payment, or the request for unusual release provisions. In fact, these issues often do not surface until the parties are about to reach agreement on the "core" settlement terms. Nothing will dampen a settlement's potential faster than demanding substantial liquidated damages for breach of the confidentiality provision of a settlement agreement, belatedly asking for a long delay for payment or an installment plan, announcing that confession of a large judgment is necessary to secure payment of the settlement amount, or insisting on a non-party's signature on settlement documents that forego his or her potential claims.

A lawyer who has not prepared fully or thoughtfully may not think of these issues until the parties are concluding their negotiations, or he or she may think that waiting until the end of the negotiations will force the other party to agree to the additional terms to ensure a settlement that seems well within reach. A well-prepared lawyer, on the other hand, understands that raising these issues at the last moment may just as easily unravel the progress the parties have already made in mediation. Counsel should mention the need for these terms in the written mediation statement. The mediator can assist the party in deciding when and how to raise the client's need for these terms in a manner that does not frustrate or anger the other party. If a settlement term is important enough to insist upon, it is important enough to mention in the mediation statement.

CONCLUSION

A lawyer who thoughtfully and diligently follows these twenty guidelines will be ready to anticipate most of the issues that may arise during mediation. In addition, the lawyer's client should feel comfortable with the mediation process, be ready and willing to participate, and derive satisfaction in the process, whether or not settlement is achieved. Last but not least, the lawyer's and client's preparation will better prepare the mediator to assist the parties in developing appropriate solutions to the dispute. A question-format summary version of the guidelines is appended to this article for lawyers to use as they prepare for mediation.

APPENDIX

REPRESENTING CLIENTS IN MEDIATION: A LAWYER'S PREPARATION GUIDE

1. Are you ready and willing to serve as a problem solver and not as an adversary when you advocate for your client during mediation?
2. What discussions have you had with your client about settlement? Have you asked about your client's motivations for litigating, your client's impressions of the legal system, and your client's expectations? Have you explained the mediation process to your client?
3. What is your client's emotional state? Have you regularly monitored your client's emotions over time? Have you tried to promote a healthy client attitude toward settlement?
4. What facts or legal issues will most affect settlement value? Have you developed these facts and researched these issues? What information may be important to settlement but not relevant to the legal dispute? How will you gather this information?
5. Have you evaluated the strengths of your client's case? Have you realistically assessed the weaknesses? What are the strengths and weaknesses of the other party's case? Have you adequately considered the strengths and weaknesses in your settlement evaluation? Does this assessment include litigation cost as well as risk of outcome?
6. Have you discussed with your client his/her needs and interests which might affect the client's desire for settlement or for trial? Have you anticipated the other party's needs and interests? To what extent are your client's needs and interests and those of the other party compatible, or at least not incompatible?
7. What remedies are available through litigation? What remedies would address the needs and interests of the parties, but are not available through litigation?
8. A. If your client is a business entity or has insurance coverage, who makes the final settlement decisions for your client? Have you talked to that person about settlement? Who will attend the mediation on behalf of the client? Does that person have sufficient authority to make the final decision at mediation? If not, have you informed the mediator? B. If your client is a governmental entity, has the entire board met with you in an executive session to discuss settlement evaluation and negotiation strategy? Will the representative(s) who attend the mediation have reasonable authority parameters? If the case can be settled only

beyond those parameters, will the attending representative(s) have sufficient credibility with the other board members to make a strong recommendation for settlement? Do you know when the full board can meet to approve any settlement?

9. Is there insurance coverage in this case? What are the limits? Is there a dispute over coverage? If so, should the coverage dispute be negotiated before, during, or after negotiation of the underlying dispute? If global negotiations are best, will coverage counsel attend the mediation? Have you informed the mediator of the coverage dispute and the identity of coverage counsel?
10. Are there subrogation interests or outstanding liens? Have you verified the amounts? Have you informed counsel for the other party of these liens and the amounts? Are the liens negotiable? If so, can you resolve them in advance of mediation, contingent upon settlement of the case? If not, will/should a representative of the lien holder attend the mediation in person or by telephone? Have you informed the mediator of these interests and names of lien holder representatives?
11. Is there a person who may have a strong influence on your client's settlement decision? Will that person help or hinder settlement of the case? Should that person attend mediation with your client? Have you informed the mediator of this person's influence?
12. Does the defendant have the financial ability to pay a judgment or settlement in the likely range? If not, what financial information will substantiate the defendant's claim of inability to pay? Can you bring that information to mediation? Will you need to bring an accountant or other financial person to explain it? What payment terms might the defendant need? Have you mentioned the financial concerns to the other attorney(s) and the mediator?
13. Do you have concerns about your client's unreasonable expectations and your ability to manage them? Have you contributed to the client's frame of mind? Have you tried to conduct a reality check on the client? Have you or will you request the mediator's assistance in persuading your client to become more reasonable?
14. How well do you know your mediator? Does the mediator use mostly joint sessions or private caucus meetings? Is the mediator's style facilitative or evaluative, or does it change depending on the circumstances? Which mediation style would work better in this case? Will the mediator primarily address counsel or the clients? Are you and your client ready for this?
15. How much time has the mediator set aside for the session? How can you best use the time? If you or your client's travel arrangements may conflict

with the schedule, have you informed the mediator and the other attorney(s)?

16. Is an award of attorney's fees an issue in the case? If so, have you and your client discussed the potential for a conflict of interest between you? Do you know the current amount of the fees and costs? Are you prepared to show verification of the amount without infringing on work product or privilege?
17. Is there a rationale for the settlement proposal you will make at mediation? Are you prepared to share that rationale with the mediator and the other party? Are there calculations or documents you can bring to show the rationale? Do you have evidence adverse to and unknown by the other party that significantly affects settlement value in your client's favor? Have you weighed the risks and benefits of revealing the evidence to the other party? Have you disclosed the evidence to the mediator?
18. Are you expected to prepare a written mediation statement? When is it due? Does your statement address all of the mediator's requirements? Is it balanced and candid, or is it argumentative? Will the statement assist the mediator in guiding the parties toward a settlement?
19. Have there been prior negotiations in the case? What was the last settlement proposal of each party? Have you sent any "non-offer" signals to the other party's lawyer? Have you revealed the full negotiation history to the mediator, including any "non-offer" signals made to the other party's lawyer?
20. Are there special terms your client will want in the final settlement documents? Is confidentiality of settlement terms an issue? Are payment terms an issue? Will you insist upon certain language in the release(s)? What other special issues does your client have? Have you revealed these special issues to the mediator?