



Advocate’s Mediation Checklist

Tips, Tricks, Traps, and Tools

By
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Mediation is an effective tool to be used by counsel at strategic times and for specific purposes. It is considered the most effective of all ADR options because of its flexibility and party control.

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A. “TO SETTLE OR NOT TO SETTLE. . . THAT IS THE QUESTION!”

1. The following list of factors often helps determine if settlement or litigation is appropriate:

		YES	NO
A.	Factors Favoring Settlement		
	(a) A business or personal relationship could continue or be resumed.		
	(b) It is desirable to better control the dispute process.		
	(c) The position of each side has merit, and a trial could result in either side prevailing.		
	(d) Further litigation preparation and the litigation would be too costly and protracted.		
	(e) A speedy resolution is important.		
	(f) The dispute raises highly technical or other complex factual or legal issues.		
	(g) A jury trial should be avoided because of the “sympathy” factor for one side.		
	(h) The law on the determinative legal issues is well settled.		
	(i) Client needs to avoid an adverse precedent.		
	(j) Publicity about the case or its outcome should be avoided.		
	(k) No further discovery is required – or limited expedited discovery will suffice – for each side to assess its strengths and weaknesses.		
	(l) The client wants to be meaningfully involved at every step.		
	(m) A candid presentation by each side of its best case will help promote a better understanding of the issues.		
	(n) A strong presentation will give one side or the other a more realistic attitude about the case.		
	(o) A neutral could help diffuse the emotion or hostility that may bar a settlement of the dispute.		



	(p) The neutral's evaluation could help break the stalemate.		
	(q) There is a potential for a runaway result.		
	(r) A creative or unique remedy is needed.		
	(s) Fear of attorney fees and costs awarded on de novo trial of mandatory arbitration award.		
B.	Factors Weighing Against Settlement		
	(a) The case can most probably be disposed of on a motion.		
	(b) At least one side requires a judicial decision for its precedential value.		
	(c) There is no bona fide dispute; the other side's case is without merit.		
	(d) The advantages of delay run heavily in favor of one side.		
	(e) There is nothing to lose.		
	(f) The other side has no motivation to settle.		
	(g) More time must elapse before each side's positions and the settlement possibilities can all be evaluated.		
	(h) One side is refusing to settle so as to send a message to others who are not parties to the case.		
	(i) There is a need for continuing court supervision of one of the parties.		

2. When to propose mediation? Some opportune points include:

- a. Pre-filing
- b. Just after filing
- c. Post key "depos"
- d. Upon completion of discovery
- e. Post-filing/Pre-argument of dispositive motions
- f. Just before trial/arbitration
- g. During trial/arbitration
- h. Post-trial/arbitration

3. Initial Letters NOT to Send:



June 5, 2010

Current Defendant
P.O. Box 666
Hades, OR 66666

RE: Demand Letter and Constitutional Claims Against You and Your Entire Illegitimate Family

Dear Satan's Spawn,

I represent the greatest human being in the universe in an action against you, Deadbeat Defendant, for *[insert every possible legal claim and every dastardly deed even remotely contemplated by the wackiest followers of Charles Manson.]* Because of your malicious and intentional actions, my perfect plaintiff has suffered catastrophic and permanent, economic and non-economic damages that will continue to grow through time immemorial, plus one day. If you do not pay *[insert sum 10 times what any jury made up of your creditors would give you]* within 10 hours of this letter, we will bring the wrath of your deity du jour down upon your pointed head in the form of a class action lawsuit with punitive damages and attorney fees that exceed the GNP of most European countries before the current financial crisis.

I suggest you retain the scumbag attorney of your choice, who undoubtedly will have graduated at the bottom of last year's mail order class, and have it grunt in my general direction.

We look forward to resolving this in a timely and collaborative fashion.

With Contrived Sincerity,
Zorro

June 6, 2010

So-Called Plaintiff's Attorney
P.O. Box 1
Heaven, OR 11111

RE: Response to Your Drivel – Protected by Every Privilege Imaginable

Dear Zorro, aka Howdy Doody,

Glad to hear you got out of prison. How goes the Bar investigation?

Please note that I do not represent anyone named, Deadbeat Defendant. If I do, s/he has never met so-called Perfect Plaintiff. If s/he has, the Statutes of Limitations and Ultimate Repose have run, and the Rule Against Perpetuities and the Rule in Shelly's Case have been violated. If they haven't, my client did nothing wrong. If s/he did, s/he is an incapacitated person. If s/he isn't, assuming without admitting and for settlement discussion purposes only, your client was not injured. If s/he was, any injuries are speculative. If they are not speculative, there is no permanency or their recovery is void as against public policy. If there is permanency or they are not void, the injuries were pre-existing. If they were not, s/he is brazen malingerer. If s/he isn't a brazen malinger, s/he failed to mitigate. Finally, and with complete reservation of everything I forgot, my client has nothing but the assets necessary to buy OJ's house, s/he left yesterday for Florida, and I have no way to contact him/her.

Please dismiss this case with prejudice and without fees, and issue a public apology within 10 seconds of this letter or I will bring the wrath of your deity du jour down upon your square head in the form of 1,000 motions that will include sanctions that exceed the prior value of all your "toxic assets," like your brain.

We look forward to resolving this in a timely and collaborative fashion.

With Thinly Veiled Contempt,
Arc Angel



4. If you decide to initiate mediation discussions, how can you convince the other side? Here are several common objections to mediation and suggested responses:
- a. *We are not interested in compromising, and suggesting mediation is a sign of weakness.*
 - Parties frequently negotiate over settlement proposals. Mediation employs an expert on negotiation issues in much the same way as parties hire experts on the factual issues. Clients often want and need a “resolution,” not just a “settlement” where each side walks away equally unhappy!
 - Mediation is about developing viable options, not about giving something up.
 - Mediation is appropriate anytime you consider a negotiated agreement, and that is in every case because the ninety-plus percent of all cases settle.
 - b. *We have already tried to resolve this ourselves...Mediation would be a waste of time.*
 - A mediator can “reframe” interests, concerns, and positions. This frequently leads to shifts in negotiation strategy that can result in settlement *and* resolution.
 - Mediators are “agents of reality” and people often need an independent person to hear their side of the story. While mediation is not *therapy*, it can be *therapeutic*!
 - c. *What good is a non-binding process when we need a done deal?*
 - Negotiations are always non-binding until there is an agreement. The vast majority of mediations result in binding and enforceable agreements.
 - An agreement reached through mediation invariably produces greater satisfaction than an imposed decision, and compliance with voluntary agreements is higher.
 - d. *We think the other side is unreasonable and is on a “fishing expedition.”*
 - The conflict would already have been resolved if the other side was reasonable.
 - It is easy to maintain an unreasonable position in correspondence and pleadings. It is more difficult to sustain an unreasonable position during a face-to-face, detailed analysis of the case with a seasoned mediator.
 - You can leave if they are negotiating in bad faith. Because the process is voluntary, you do not have to produce anything at mediation even if the material is subsequently discoverable.
 - Mediators are sensitive to “fishing expeditions” and are skilled in facilitating appropriate information exchanges to “jump start” the negotiations.
 - e. *It is too early to mediate, we have not done enough discovery.*
 - You only need sufficient information to reasonably assess risk and analyze options. If mediation seems premature, you may raise this issue with the mediator who can often facilitate the exchange of documents before the mediation.
 - Mediation allows the parties to explore their underlying *needs*, work on settlement *options*, and not debate *positions*.
 - Part of the time and money saved on future transaction costs can go toward a practical, business fix and settlement.
 - f. *Why should we mediate when we can go to a hearing or trial?*
 - Unlike with a hearing or trial, you maintain *control* of the process and outcome.
 - Often the “winners” are not satisfied after a hearing.



- Even if your case does not settle, the issues will be streamlined for adjudication and you will better understand the entire case.
- g. *Mediation sounds good, but we are concerned about the cost.*
 - The cost of mediation is usually shared equally between the parties and often is the same as the cost of nominal research or a deposition.
 - Sometimes the other side will pay the full cost, especially if it settles at the mediation. Everything is negotiable!
- h. *We cannot afford to waste any time, let's just proceed to trial.*
 - The mediation can be scheduled very quickly and you will get to pick the mediator.
 - Mediation often takes a single day. How long will the preparation and trial take?
- i. *We have a secret that we are saving to surprise them with at "depos" or trial.*
 - The process is confidential so you can keep your "secret" – and they can keep theirs!
 - Often a judiciously timed disclosure of a "secret" is the impetus necessary for settlement with terms that may surprise you.
 - It is common for the other side to already know the "secret" anyway!
- j. *Mediation does not work in a zero sum game.*
 - Not true. If it was, why do so many "zero sum" cases settle before hearing?
 - Parties often find compelling reasons to settle that are not apparent before the mediation session – unstated interests govern most behavior in the "intersection of logic and emotion" where most parties find themselves during litigation.
 - Mediators have impasse-breaking techniques that cannot be done in one-on-one negotiations.
- k. *We have an airtight case – there is no way we will lose!*
 - Have you given your client a guarantee? Why does the other side disagree?
 - Often the "winner" does not feel victorious after the trial given the rigors of the adversarial process.
 - Mediation allows you to explore alternative settlements and still maintain control.
- l. *We need a sound public policy decision and the policy makers will not be at the table.*
 - A mediated agreement in a public policy matter is more likely to be approved if all the interested parties are at the mediation. Invite all of the stakeholders (e.g. developer, neighborhood group, staff, government attorney, etc.). The approving body will be happy if there is a consensus – no risky "political" decision to make!
 - A skilled mediator will help the parties explore the public policy considerations. A private agreement that does not protect the public's interest is unlikely to be approved, and this reality can be therapeutic for the parties at the table.

5. If you decide to mediate, you will need to agree on:

- a. Confidentiality issues
- b. Model of mediation ("evaluative," "facilitative," or "transformative")
See, "If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Parties Pick and



- What are the Mediators' Obligations?" 43 Idaho Law Review 643 (2007)
- c. Mediation time and location (neutral site?)
 - d. Mediator compensation: Who pays under what circumstances?
 - e. Pre-Session papers: confidential, full exchange, or partial exchange

B. SELECTING A MEDIATOR WITH "THE RIGHT STUFF!"

Mediators have been trained in different approaches and it is important to understand their approach. What kind of experience? What kind of training? To what school of mediation does the mediator ascribe? How will the mediation be conducted? How much use of joint sessions or private caucuses will there be? Will the mediator ever separate you from your client? Will the mediator assess the situation and express an opinion regarding a judicial outcome?

1. To begin, obtain possible candidates from:
 - a. Other lawyers
 - b. Court list of mediators
 - c. Provider organizations

2. Interview potential mediators:
 - a. Obtain their resume and references (both attorneys from last 3 mediations).
 - b. Will the other side and your client find them credible when it is time for "reality therapy?"
 - c. What is their subject matter (needed for an "evaluative mediator")?
 - d. When considering retired judges, determine if their style is adjudicatory such that the mediation would proceed more like a settlement conference. Is this what you want?
 - e. Review their Standard Rules of Mediation/Agreement to Mediate.
 - f. Note the mediation structure preferred by the mediator (e.g., length of session, caucus, joint session, opening statements by attorneys and/or parties, etc. Ask them to define a "successful" mediation. Do they direct their comments primarily to the attorney or party? When do they declare an "impasse" and how do they handle it?).
 - g. Ask about "confidentiality" and exceptions. Insist upon a signed Agreement to Mediate.
 - h. What is their approach ("evaluative," "facilitative," or "transformative.")?
See, "If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Parties Pick and What are the Mediators' Obligations?" 43 Idaho Law Review 643 (2007)



Stereotypical Mediator Practice Approaches

Approach	“Transformative”	“Facilitative”	“Evaluative”
Negotiation Theory	Interest-Based Relational	Interest-Based Preference	Rights-Based Distributive
Mediator’s Value	Process	Process	Results
Central Actor	Party	Party	Attorney-Focused
Reference Points	Relationship	Relationship Preference	Legal Rights & Responsibilities
Communication Style	Listen	Explore	Argue
Goal	Fairness and “Resolution”	Prefer “Resolution”	Power and “Settlement”
Decision-Making Reference Points	Perceptions & Subjective Standards	Combination	Evidence & Objective Standards
Length of Sessions	Longer	In-between	Shorter
Underlying Values	Self-Determination	Both	Protection of Rights
Disclosure Expectations	Full Disclosure	Full Disclosure Preference	“Secret” Information OK
Number of Sessions Assumption	One or More Sessions	One or More Sessions	One Session
Mediator’s Skills	Process Expertise	Process Expertise and Subject Matter Familiarity	Process Familiarity and Subject Matter Expertise
Party’s Interests	Non-Economic	Economic and Non-Economic	Primarily Economic
Negotiation Style	Collaborative	Combination	Aggressive

i. Ask which of the following tools they utilize:

TOOL
Explain Approaches
Focus on Interests
Focus on Rights
Focus on Relationship



Joint Session
Caucus
Joint Session And Caucus
Pre-Mediation Submissions
Full Party Disclosure
Process Expertise
Relationship Expertise
Subject-Matter Expertise
Mediator Options
Mediator Opinions
Mediator Raises Matters Not Discussed by Parties
Legal Information
Mediator Declares an Impasse
Mediators Raise Interests of Those Not at the Table
Advise Parties on When to Make a Proposal
Advise Parties on What to Propose
Advise Parties on What Arguments to Make
Advise Parties on When to Make the Arguments
Advise Parties on What Information to Give Other Side
Advise Parties on When to Provide Information to Other Side
Willingness to Make Conditional Offers
Willingness to Hear the “Bottom Line” and Still Negotiate with Different Numbers
Prefers to Discuss Money First



Prefers to Discuss Non-economic Terms First
Urge Or Require Pre-Mediation Submissions
Evaluate Credibility
Discuss Jury Appeal
Discuss Only Strengths
Discuss Only Weaknesses
Discuss Both Strengths and Weaknesses
Refer Parties to Outside Information
Research Law Independently
Research Facts Independently
Prepare Unbinding Memorandums of Understanding
Prepare Binding Memorandums of Understanding
Prepare Formal Settlement Documents
File Formal Settlement Documents
Willing to Manage Profanity/Anger
Discuss Firmness of Offers from Other Side
Rectify Procedural Power Imbalances
Rectify Substantive Power Imbalances
Willing to Use “Mediator’s Solution” Technique
Willing to Talk to Parties Without Their Attorneys
Willing to Talk to Attorneys Without Their Parties
Follows Up After Formal Session
Willing to Convert From Mediator to Arbitrator on Any Issue



Willing to Convert to Arbitrator for Settlement Language Disputes

Willing to Convert to Arbitrator on Fees Disputes

- j. Training: how much/what type?
- k. What mediator ethical codes do they adhere to?
- l. Neutral location and amenities (e.g., computer, phones, fax, espresso!).
- m. Length of typical session: allow for an entire day (9:00 a.m.-9:00 p.m.).

C. PRE-MEDIATION PREPARATION

Plan a negotiating strategy with your client. While you should come with an open mind because new perspectives and information are often revealed during the mediation, you should still think about a strategy. Remember, if you are using a neutral, s/he is condensing weeks or months of negotiation into a single day (mediation is sometimes called “Turbo-Charged Negotiation”). Do not, in any event, be constrained by your negotiating plan. Remain flexible with the process, but never let the mediator control your side of the negotiation. You and your client are in charge.

1. Be able and willing to try your case if the matter does not settle!
2. Confer with your client on:
 - a. Advocate’s role during the discussions – prepare them for the fact that you will not be stylistically aggressive
 - b. Client’s role during the discussions
 - c. Role of the mediator
 - d. Typical mediation process
3. Determine who needs to be there:
 - a. Attorney, CPA
 - b. Party with full settlement authority
 - c. Consider experts and consultants
4. Learn as much as possible about your client’s and the opponent’s:
 - a. Stated facts (depositions not necessarily required but informal discovery exchange is helpful)
 - b. Understanding of the law
 - c. Negotiating style
 - d. Issues
 - e. Perceived business & personal needs
 - f. Expectations
 - g. Perceptions and decision-making style
 - h. Outside influences on the negotiation
 - i. Openness to creativity
 - j. Value of ongoing relationship, if any



5. Do some “reality testing” with your client.
6. Do unresolved legal matters impact your willingness to settle?
7. What is the relationship between the advocates?
8. Summarize the history of settlement negotiations. What obstacles to settlement have you observed? Are there other factors affecting the negotiations, such as a spouse or supervisor “leaning” on the party, precedential value of the case, public visibility, etc.? How can these factors be overcome? *(The skilled negotiator made twice as many comments regarding long-term considerations of issues, with the average negotiator focusing on the short-term.)*
9. What are some creative, non-economic options for settlement? *(The skilled negotiator considered twice as many outcomes and options per issue as the average negotiator.)*
10. What external objective standards of legitimacy could be applied to the settlement options to frame them as reasonable?
11. What proposals for settlement do you think your client would be willing to make? What proposals do you think the other side would be willing to make? *(The skilled negotiator made three times as many comments to their clients about areas of anticipated common ground.)*
12. Does your client representative have FULL authority to settle the case (not just a “bottom line”)? Does the opposing party representative have similar authority?
13. Ensure that your party or party representative will be present for the entire session. Reserve the full day if you are mediating. Be sure others who may have bearing on the decision are available, even if only by cell telephone, on the day of the negotiations.
14. Establish your client’s goal: “Settlement” or “Resolution”

Ask Their Objective: “Resolution” or Settlement”

“Build a Relationship and Fix the Problem”
or “Build a Case and Fix Blame”



	“Resolution”	“Settlement”
Definition	Durable, Satisfying Closure	Walk Away Unhappy
Getting the Deal	Slower	Faster
Ultimate Acceptance	Sooner	Later
Result	Success	Compliance
Maintenance Costs	Low	High



D. PREPARING THE CONFIDENTIAL MEDIATION PAPER

Prepare a confidential mediation booklet. (5-10 pages). Make copies for yourself, your client, and the mediator if you are using one. Send it to the mediator to review at least ten (10) days before the session. Seasoned mediators will begin the process even before the parties arrive at the scheduled mediation session.

1. This summary analysis should cover the following:
 - a. a brief review of the procedural status of the case;
 - b. a brief factual overview;
 - c. identification of the key factual and legal issues including a detailed “damages” analysis;
 - d. a bullet-style list of your factual/legal strengths;
 - e. a candid, bullet-style list of the other party's factual/legal strengths, along with your response;
 - f. the underlying business or personal needs of *both* parties from a non-monetary perspective;
 - g. history of settlement discussions including the last proposals and “whose court you think the ball is in;”
 - h. your view as to the past and current barriers to settlement including your thoughts as to the other side’s realistic view of the case;
 - i. highlighted copies of the key documents; and
 - j. a summary of any other information that will assist me in working with you.
2. Provide or have available this additional information:
 - a. Highlighted copies of the key documents and a summary of any other information that will assist the neutral in working with the parties
 - b. Copies of the current pleadings
 - c. Copies of relevant appellate decisions (highlighted)
 - d. Summary of documentary evidence
 - e. Summary of damages claim with backup documentation
 - f. Accounting of fees and costs to date
3. Consider sending a separate mediation brochure (without confidential information) to the other party in advance of the session with a copy to the mediator.
4. Stop negotiating if you are going to mediate... Save your moves for the session to create momentum toward resolution.

E. AT THE MEDIATION

1. In the initial joint session, the mediator usually makes an opening statement. This is designed to set a specific tone and is likely to include the following:
 - a. Introductions by the persons present
 - b. Summary of the mediator’s background and experience
 - c. Discussion of the mediator’s role as distinguished from judge, arbitrator, or fact-finder
 - d. Discussion about impartiality and disclosures surrounding it
 - e. Presentation on the voluntary and confidential nature of the process



- f. Outline of day and a summary of the ground rules
- g. Confidentiality
- h. Solicitation of the participant's commitment to negotiate in good faith and the signing of the Mediation Agreement
- i. Opportunity for opening statements by attorneys and/or parties – not Jury Closing Arguments

F. MEDIATION JOINT SESSION

Effective representation in mediation involves a unique advocacy style. Please consider the following:

1. "Good Stuff:"
 - a. Thorough preparation
 - b. Visual aides are helpful and show you are willing to try your case
 - c. Introduce yourself and your clients to everyone and identify their roles.
 - d. Prepare a ten-minute summary of your case for your opening remarks. It should include:
 - (1) Facts -- undisputed and disputed
 - (2) Key issues (*The skilled negotiator only used an issue sequencing process half as often as the average negotiator, to control the order that items were discussed.*)
 - (3) Law -- undisputed and disputed
 - (4) Key witnesses and other proof
 - (5) Damages analysis with back-up documentation
 - e. Use a communication style that conveys:
 - (1) A willingness to "explore" the problem instead of "debating" the issues
 - (2) Empathy, if sincere
 - (3) Confidence that settlement will be reached
 - f. You can get further with nice words and a gun than you can with just a gun!
 - g. Direct your remarks to the other party, if present. The target of persuasion is not the neutral. The one who must find your arguments convincing is the party who must compromise their claim or defense. This is not the place for grandstanding. It is an opportunity for direct and concise communication. (*The skilled negotiator tended to give an advance indication of the class of behavior they were about to use six times more often than the average negotiator. For example, instead of merely asking a question, the skilled negotiator prefaced with, "Can I ask you a question," to label their behavior and prepare the other party. This was true for all behaviors except disagreeing, in which the skilled negotiator was only half as likely to label in advance of disagreeing compared to the average one. The skilled negotiator is more likely to begin with the reasons and lead up to the disagreement.*)
 - h. Be attentive and actively listen to the neutral and the other side. When the opposing party or counsel has completed their presentation, ask non-argumentative questions to clarify any matters. (*The skilled negotiator asked more than twice as many questions during negotiation as compared to the average negotiator.*) Communicate to the other side that you understand their position. There is a difference between understanding and agreeing. If you can articulate their perspective, you are closer to a meaningful settlement. (*Skilled negotiators tested the other party's understanding of a previous statement more than twice as often as the average negotiator, and summarized the previous points of the discussion almost twice as often.*)



- i. *Attack the problem, not the person! (Average negotiators used heated, emotional, or value-loaded behaviors to either attack the other party or defend their position more than three times as much as skilled negotiators, leading to “attack/justify/blame.”) Tie any settlement proposal to an external objective standard. (In counting the number of times a negotiator made statements about what was going on inside his or her mind [e.g., feelings of fairness and motives for proposals], research showed the skilled negotiator offered feelings-related commentary almost twice as often.)*
2. “Bad Stuff:”
 - a. *Adversarial banter (Average negotiators used phrases that are not very persuasive, but cause irritation by implication, five times more often than skilled negotiators. For example, they used “generous offer” instead of “reasonable offer.”)*
 - b. See Letters NOT to send, above!
 - b. “Jury” pitches
 - c. “Bottom-lining” from the start of the process
 - d. “Retreating” from your last settlement position
3. Should you allow your client to speak?
 - a. Safe (confidential, subject to exceptions)
 - b. “Yes” when:
 - (1) Client will be an attractive, compelling, or sympathetic witness, or
 - (2) To defuse hostilities, or
 - (3) To give the client their desired “day in court.”
 - c. “No” when:
 - (1) Client talks and talks and talks..., or
 - (2) Client cannot control emotions and is looking for revenge, or
 - (3) Client makes a poor impression.

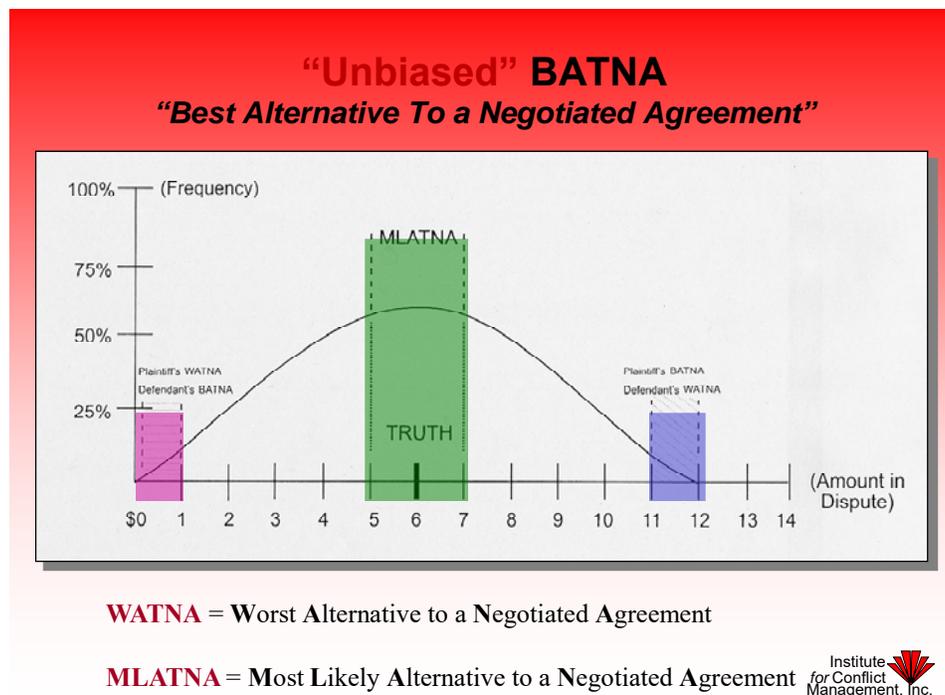
G. THE FIRST MEDIATION CAUCUS (“I’VE GOT A SECRET!”)

This is primarily an “information-gathering” session by the mediator. At the beginning, confirm that the mediator will maintain confidences.

1. Set a reasonable tone:
 - a. Objective
 - b. Candid
 - c. Fair
 - c. Open minded
2. Let your client talk with the mediator, particularly about the client’s view of the case. Let the mediator help your client navigate the intersection of logic and emotion.
3. Let your client “vent” in the safety of the caucus. The parties have both facts and feelings that impact their decision-making process. Allow time for emotion. Good mediators encourage it.



4. Be prepared to respond to the mediator about **SWAP LION**:
 - a. **Strengths**: Where are you strong and where is the other side weak?
 - b. **Weaknesses**: Where is the other side strong and where are you weak?
 - c. **Alternatives**: If the conflict is not resolved, what will happen?
 - (1) What is the likely outcome? (e.g., “If you try this case 100 times, what percentage of the time are you going to win? When you do prevail, what is the likely range of the award?”)
BATNA – “Best Alternative to a Negotiated Agreement”
WATNA – “Worst Alternative to a Negotiated Agreement”
MLATNA – “Most Likely Alternative to a Negotiated Agreement”
 - (2) What are the expected fees and costs (and the value of lost opportunity time)?
 - (3) How long until the trial or arbitration?
 - (4) Predict the length of the proceeding
 - (5) What is the probability of appeal, cost of appeal, and likely outcome on appeal?



- d. **Perspectives**:
 - (1) **Theirs**: What is driving the controversy? What do they need to agree on resolution? Why? What new information can you present to the other side that will change their perspective?
 - (2) **Yours**: What is driving the controversy? What do you need to agree on resolution? Why? What new information do you want from the other side to change your perspective?
- e. **List Underlying Business and Personal Needs and Interests**:
 - (1) Yours
 - (2) Theirs
 - (3) Common
- f. **Options**: Brainstorm multiple options for resolution. Separate the process of inventing from the process of deciding. (*Average negotiators made twice as many counter-*



proposals during negotiations. Counter-proposals immediately introduce an additional option before addressing the one on the table, and decrease the other party's receptiveness.)

- g. **Negotiation:** Consider that offers might be tied to legitimate objective standards, and let the mediator discuss the standard or formula with the other side. Throwing a number against the wall to “see if it sticks” is rarely effective.

5. Trust your mediator.
6. Instruct the mediator as to what information is/is not confidential.
7. This First Caucus process will then be repeated with the other party or parties.

H. THE SECOND & LATER MEDIATION CAUCUSES

The mediator will use this session to create momentum toward settlement by refocusing the parties on: previous areas of agreement, their underlying interests, the underlying interests of the other party, option generating, risk analysis, and transmittal of settlement proposals.

In additional caucuses, parties should:

1. Be willing to listen to different points of view.
2. Consider the information transmitted from the other side and transmit new information to them. “Documents are worth a thousand words!”
3. If appropriate, allow new information to impact your risk analysis/settlement parameters.
4. Use the mediator as a sounding board for “reality testing” and to “float” settlement proposals.
5. Be willing to explore creative solutions to the problem. The mediator is likely to give assignments for you to work on while the caucus with the other party takes place. Most likely you will be asked to explore the risk analysis in further detail and generate at least three options for settlement that have not yet been proposed to the other side.
6. As the subsequent caucus sessions continue, the mediator will build the momentum and assist in clarifying the common ground. Often, the mediator will recommend a joint session to hammer out details if the parties are close to a settlement.

I. THE ACTUAL “GIVE AND TAKE”

1. Seek competitive results in a cooperative manner!
2. It does matter who makes the first offer that puts the dispute on the “playing field.” If you need a settlement and they will not open, then put the best principled proposal you can on the table that will keep them negotiating. Present it with your logic and rationale in a confident but not arrogant manner. Do not make a concession until they step onto the “playing field.”



3. Develop a rational basis for each item presented in your opening position. This allows the other party to understand the rational reasons behind your demands, and helps explain your entitlement to ultimate goals.
4. Never lead with your “bottom line.” You might as well say, “See you in court!” Fully understand your bottom line prior to negotiating, and try to uncover theirs. Recognize there is a point below which the negotiations will not go.
5. Start bargaining with less important topics, in order to develop a cooperative mood and make progress. This will pay off later when more significant and contentious subjects are discussed.
6. Ask the other side about each element of its position. What exactly do they hope to obtain and what is the rational basis? What are the hidden motivational factors influencing their articulated demands? Go behind stated positions to unveil the underlying needs creating their positions.
7. Through patient probing, learn as much as you can about the other side’s range of choices, preferences, strengths, and weaknesses, without overstating or underestimating your own.
8. Ask questions to elicit information from the other side in a non-threatening way. Build relationships whenever possible.
9. Allow them to ask questions of you, but respond as briefly as possible without playing “hide the ball.” They are more likely to believe your answer than your unsolicited statement.
10. If they come up with an initial proposal “from the parking lot,” very calmly ask them a series of questions that elicit the external, objective standards that support (or likely do not support) their position. Build from the bottom up by dividing their proposal into its component parts and asking for the supporting data for each number.
11. Once they are on the “playing field,” your next proposal should be no closer to your goal than their position is from your goal.
12. Any subsequent movement on your part must have an objective rationale or be in response to their objective rationale. Do not move for the sake of movement . . . it is a sign of weakness.
13. Take advantage of the power of factual and legal arguments, appropriate and persuasive emotional appeals, as well as public policy.
14. Offer a rationale. Explain to the other party why they cannot get what they asked for. They will feel satisfied even though they did not get it because they heard reasons for your decision.
15. Rather than making negative threats, use affirmative promises to induce a reciprocal change in positions.
16. Your opponent is more likely to move:
 - a. Based upon an agreement (e.g., “If you’ll do X, I’ll do Y”),
 - b. Rather than in response to a caution (e.g., “If that happens, then X is likely to do Y”),



- c. Rather than in reaction to intimidation (e.g. “I’ll clean your clock in the courtroom”).
17. To get past “No!” and beyond impasse:
 - a. Avoid emotional reactions and escalation. Refocus on your fundamental interests. Try to separate the “person” from the “problem.”
 - b. Don’t argue. Diffuse their negative emotions, including fear and hostility. Listen to their points and acknowledge their feelings without agreeing. Try to re-frame their position in order to problem-solve.
 - c. Bridge the gap between their interests and your own. Show how it is in their interests to agree to a mutually beneficial solution.
 - d. Educate them to the consequences of their approach, including potential gains and losses for both sides. Focus on process and objective criteria. Brainstorm options, prioritize needs, gather and share data.
 18. When you enter the “resolution zone,” go slowly. 75% of the work happens in the last 25% of the allocated time. Patience is a virtue!
 19. Develop the power to walk away. Do not pass the point where you are no longer willing to walk away, based on your emotional investment and the time and effort spent negotiating, rather than on your best interests.
 20. Your final proposal must entice your opponent to say “yes” from the perspective of their most likely alternative, moderated by their risk-aversion, assuming they have realistically evaluated the matter.
 21. Do you want to be right or successful? Sometimes you have to choose. As a result, you may need to create a dynamic where you have to say “yes” to their proposal so they feel they won!
 22. Beware of “Oh, by the way!” Get all terms on the table and negotiate the package. Nothing is final until both sides have agreed to all the deal points.

J. IMPASSE BUSTING

Trust your mediator, who is likely to use one or more of these impasse-busting techniques:

1. Non-monetary items – An apology, a reference letter, etc. Try to find something of high value to one party with minor cost to the other.
2. Legitimate outside standards – Tie proposals to them. Focus parties on selecting a formula.
3. Bifurcation – Consider bifurcating the dispute and submitting the disputed portion to arbitration (e.g., settle the main claims and arbitrate the fee portion).
4. MEDALOA: “Mediation and Last Offer Arbitration” – Parties make one last attempt, and if unsuccessful, process converted into binding arbitration. Arbitrator must select either the last offer or last demand. Prepare a release approving the ex-parte contact.



5. Secret Poll – Use with multiple parties and a strong-willed individual is taking over. Conduct secret poll so everyone can express views.
6. Med-Arb or Arb-Med – The parties agree if a settlement is not reached, the mediator becomes arbitrator and issues a binding award. Concern is that the parties will be less candid with the mediator if that person may wind up arbitrating. In Arb-Med, the neutral conducts an arbitration and issues a sealed award. The parties then mediate and the envelope is destroyed if it settles. Otherwise, the envelope is opened.
7. Silence – Can motivate a party.
8. Set a Deadline – “90/10” or Extend Time – Recess
9. Record Agreements
10. Technical/Legal Sidebar
11. Ask for Help
12. Avoid Obstacle by Not Addressing It
13. Look for a WOWD Factor – A “Way Out with Dignity”
14. Charity
15. Uncle Sam Helps Break Impasse

Use “Uncle Sam’s” Bailout: Bridging the Gap with Tax Plays

- Wages
- Pain and Suffering (P & S):
 - Caused by Physical Injury
 - No Physical Injury
- Punitive Damages
- Interest
- Attorney Fees
 - Contingent Fee
 - Statutory Fees
 - Fees on Physical Injury
 - Fees on Combo Physical and P & S
 - Deductibility: Itemized Deduction ?
- Involve their CPA or Tax Attorney





16. The Conditional Offer

Conditional Offer

Defined:	An offer/proposal that may be disclosed only if a certain condition is met.
Use:	Get them on “Playing Field” or into “Resolution Zone”
Conditions may be:	
“Movement”	“If they move off last number in response to my offer (\$10,000), you may put the conditional offer on the table (\$20,000).”
“To finite number”	“If in response to my offer (\$10,000), they come down to (\$70,000), then you may offer (\$20,000).”
“To specific range”	“If in response to my offer (\$10,000), they come below (\$70,000), you may offer (\$20,000).”
Response:	May get a conditional response to a conditional offer.



17. Confidential Settlement Proposal

Confidential Settlement Proposal

Defined: Mediator obtains what is “pretty damn close” to their bottom line – not their actual bottom line! The structure allows for private testing of an offer (only the mediator will know.)

Use: In “Resolution Zone.” Second to last mediator move

Three Possibilities:

- 1) Numbers are the same and the case settles
- 2) Numbers “overlap” – never seen it happen!
- 3) The “gap” is:
 - A) Not bridgeable: mediation is over
 - B) Might be bridgeable: ask for new confidential numbers
 - C) Bridgeable: ask if they want you to:
 - i) Disclose gap in general terms
 - ii) Disclose actual number(s)
 - iii) Mediator’s Proposal (Frequently Selected)





18. Mediator's Solution

Mediator's Proposal

Defined: A solution proposed by the mediator to each side in caucus. It is not the mediator's opinion of case's FMV. It is the mediator's best judgment of where the case might settle based upon all of the dynamics.

Use: The Last "Trick" or "Tool." Usually for economics, but can be used for other terms.

Technique: Mediator explains the procedure and asks for permission to offer a confidential mediator's proposal. Not FMV; rather a solution that the mediator believes both sides are likely to accept. If one party says YES and the other NO, the party who said NO will not be told that the other was willing to accept the solution.

Number: Based on their BATNA analysis, risk tolerance, saved transaction costs, and mediator gut.



K. WHAT, NO SETTLEMENT?

1. What is the obstacle and how can it be overcome?
 - a. Can you obtain factual/legal stipulations or procedural agreements on additional discovery or time lines?
 - b. Are court rulings on motions necessary?
 - c. Is more time needed ("I will settle no case before its time!")?
 - d. Consider hybrid processes: Med-ALOA (Mediation and Last-Offer Arbitration), Neutral Evaluation, and Arbitration.
 - e. Discuss bifurcation (settle some issues... try others).
 - f. Be open to the mediator's suggestions concerning impasse-busting techniques (e.g., Conditional Offer, Confidential Settlement Number, Mediator's Solution, One-Text Procedure, etc.)
 - g. Discuss how to process the dispute in a fair, timely, and cost-effective manner.

L. YES, WE HAVE A SETTLEMENT!

The mediator will return the parties to the joint session format if they have been in caucus to summarize essential terms of the agreement. The participants will be asked if the mediator's summary was accurate and whether they agree the matter is settled. In order to avoid unanticipated problems occasionally created by "settlement remorse," and the "Oh, by the way" phenomenon, it is good mediation practice to have the attorneys and the parties sign a memorandum of essential terms if more detailed memorialization must be deferred because of the constraints of time or technology. In a



perfect, although not always practical world, the final settlement documents are executed at the conclusion of the mediation.

At the final joint mediation session:

1. Ask yourself: Have all bases been covered – are there any loose ends? Do we have a binding and enforceable settlement? Remember: “It’s not over until it’s over.” See, *Kaiser v. Doe*, 136 Or. App. 566, 903 P.2d 375 (1995) (settlement agreement valid), *modified on other grounds*, 138 Or. App. 428, 908 P.2d 2850 (1996).
2. Memorandum of Understanding on Essential Terms and Conditions will be prepared. Bring your boilerplate settlement agreement, edited to include language unique to this case, to the mediation session. Bring it on your laptop or thumb drive (saved as WordPerfect and Word). All parties and counsel should sign it before anyone leaves.

SAMPLE

Memorandum of Agreement of Essential Terms and Conditions



1. The mediation being concluded,
 - this is a final, binding and enforceable agreement resolving all issues raised or raisable between the parties, **OR**
 - this is not a final, binding and enforceable agreement. Signed final documents effecting the following essential terms and conditions are required before all issues raised or raisable between the parties will be resolved.
2. Full mutual releases.
3. Terms confidential except when exercising enforcement remedies. May also be disclosed to: clergy, spouses, therapists, accountants, lawyers, shareholders, directors and officers, as required by law.
4. Total amount paid by _____ to _____ : \$ _____



- 5. Allocation and payment terms:
- 6. Tax treatment: hold harmless and defend.
- 7. Promissory notes: Contain cross default and cross acceleration provisions.
- 8. Cure language in the event of a default (e.g., notice and opportunity to fix).
- 9. No prepayment penalty but prepayments are applied to end of note term and all subsequent payments must be made on time and pursuant to applicable ___-year amortization schedule.
- 10. Additional terms: _____



- 11. Confession of Judgment on promissory notes to be signed by _____ and held by _____’s attorney and not filed or executed upon unless a default occurs.
- 12. Parties agree to complete and sign final documents by _____. Inability to reach agreement on the final documents will not invalidate the settlement reached on _____. If they can’t agree on language, disputes over the final documents will be resolved by:
 - final, binding and non-appealable arbitration by _____ who can provide any additional language and terms to effectuate this settlement. (The parties: acknowledge that the Mediator has received confidential information during the mediation process, agree that s/he can use this information in deliberations to arrive at a final decision and waive any and all claims against her/him.), **OR**
 - other process (please specify):





13. Standard boilerplate: _____ law; number, gender, caption; prior agreement/integration; enforcement/survivability; non-waiver; binding effect; notice provision for non-promissory note notices; legal representation; representations re: full authority to bind.
14. Mediator will authenticate this document and the signatures, but will not otherwise testify or be compelled to produce, testify or give any other evidence. Mediator will hold this original agreement with copies to each party. Mediator can destroy all information in his/her possession, including this agreement once final documents signed.
15. It is so understood and agreed: *(signed and dated by each party)*
16. Approved as to form: *(signed and dated by each attorney)*



3. Mediator can act as a scrivener at the mediation session and/or act as mediator/arbitrator for language disputes in final documents.
4. Mediator testifies only as to the authenticity of “Memorandum of Understanding of Essential Terms and Conditions,” and nothing more, absent agreement of all parties and the mediator.
5. In lieu of written agreement, consider putting the settlement on the court record or tape record it with formal documents to follow.

M. DEBRIEF

After the case is finalized, call your mediator to do a bilateral debrief/post-mortem of the process.

N. SOURCES

Beginning in 1968, Neil Rackham of Huthwaite Research Group collected and quantified data through direct observation of negotiations to show how the skilled negotiator behaves. *The italicized texts in parentheses are findings from that survey.* “Negotiation Techniques,” by Charles B. Craver, in *Negotiation* (3rd Ed.) (1999). “Secrets of Power Negotiating,” by Roger Dawson. “Step into My Parlor: A Survey of Strategies and Techniques for Effective Negotiation,” by Terry Anderson. “Winning at the Sport of Negotiation” by Kathy Aaronson. *Interactive Negotiations: Prepare It. Do It. Analyze it*, by Latz Negotiation Institute (2000). “Achieving Integrative Agreements,” by Dean G. Pruitt, in *Negotiating in Organization*. “Characteristics of Effective Negotiators” from “The Negotiation of Settlements: A Team Sport,” by James G. Zack, Jr. *Negotiation* (3rd Ed.), Roy J. Lewicki, et al. (1999). “Understanding Competing Theories of Negotiation,” by John S. Murray, from *Negotiation Journal*, April 1986. “Consider Both Relationships and Substance When Negotiating Strategically,” by Grant T. Savage, John D. Blair, and Ritch L. Sorenson from *Negotiation* (3rd Ed.) (1999).