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Going for the Gold – Best Practices in Mediation

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Observations from the Trenches of Mediation

a/k/a Random Thoughts of One Mediator*

(*with apologies to fans of Letterman's Top 10)

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INTRO: There are different styles and preferences to just about everything related to the practice of law. Bulldog or statesman? Scorched earth or laser focused? Contest everything or pick and choose? Mediation is no different. Mediation “posturing” often depends on not just the case (facts, damages, injuries, parties), but also the opposing counsel, venue, judge, even the mediator itself. Even so, there are certain core concepts that are in play in each mediation. Having transitioned to a full-time mediation practice the past several years - and spending a lot of time “in the other room” - it is fascinating to see that some very basic things are often overlooked – by all sides. Some of the ramblings below are interrelated, but each merits consideration. Hopefully, this list will be useful as you approach mediation in your cases. If nothing else, it will surprise you that some of these seemingly routine thoughts are encountered so often that they made this list.

1. Preparation is king.

It seems silly to even say this. It's not silly. Lack of preparation is one of the top reasons that mediation sessions fail to meet expectations. Lack of preparation can take on many forms, but most often it involves two key issues – a lack of adequate information to form a realistic settlement position or a general lack of preparedness on the facts and issues involved. It is frustrating (to the parties and to the mediator) to have someone take the position that they “just don't know enough” about a particular fact, such as future treatment, or actual damage amounts, or a key witness's testimony, and expect a fruitful mediation discussion. Counsel and clients alike should seriously consider whether they truly know enough about a claim before proceeding with mediation.

Preparation that addresses not just the facts of the dispute but also the legal hurdles, the realistic damage model, the admissibility of key evidence, the court, the venue and the expected jury charge is critical to effective mediation. Certainly, not every detail has to be nailed down, and early mediations are often successful BEFORE expensive discovery is taken. But the better one is prepared, the less likely the risk that the mediation is unnecessarily derailed.

2. Educate.

Closely related to preparation is being educated and educating the right people. If you properly educate those who need to be informed on your case, you've likely prepared well. Focus on who needs to be educated – your clients, the mediator and the other side.

Concerning the client, nothing interrupts mediation focus faster than a client who says “why haven't I heard this before” when counsel argues or concedes something. The client, the person who decides how much authority to be prepared with at mediation, **MUST** know the critical factors to make an informed **pre-mediation** decision on the amount of authority it brings. Also, it is wise to not provide anchor points that have no reasonable expectation of being admissible at trial. I often hear both sides of a case argue for a range of outcomes that are based in some degree on arguments or evidence that has very little chance of ever being made known to the fact finder.

Mediators also need education. Remember – you and your clients have lived the file. Yes, it is one of many for both of you, but you have immersed yourself in the file for some time, concentrated on the minutiae, sorted through the evidence to separate the important from the irrelevant, and can recite most details at the drop of a hat. Your mediator has limited time to grasp anything beyond the most basic of information (and even that assumes the parties have provided **ANY** information at all). Educating the mediator does not mean dropping hundreds of pages of motions, pleadings and depositions at the last minute (or ever). The likelihood that all of that will be read and absorbed is **very** low. Educating the mediator on the key issues and providing some backup for a deeper dive (if there is time) is always preferable.

PRO TIP: Two effective ways to educate your mediator: First, no doubt, there is an evaluation between attorney and client to prepare for mediation authority. Discuss this among your team and send a sterilized version of that to the mediator. Remove the items that you don't want revealed - you don't need to divulge state secrets - but the discussion of the case and legal/factual issues is typically much better in this format than simply answering the few questions on the typical mediation position statements. Second, speak to the mediator beforehand. Reach out and share times to have a call or zoom meeting and start the conversation early, allowing the mediator to understand your position and hit the ground running during the session.

Last, but not least, your opponent. If there is a dispositive or earth-shattering fact or defense or theory that impacts the settlement value of a case, or if there are serious coverage issues, make sure the other side has some idea of that *before* mediation. Don't expect a mediator to convince the other side that the case carries a markedly different value or range of values based on facts or theories they are hearing about for the very first time, especially during the mediation session.

3. Have the money talk early.

Be truthful and practical in the evaluation stage on what can/can't happen. Also, when discussing money don't forget the “cost” to move forward – fees, experts, expenses, delays, lost opportunities, bad PR, bad discovery. If there is insufficient authority to resolve a case (and by that, I mean the party with the money knows it's probably not enough), try to have others available for that late day phone call. If that is not possible, work hard to help your mediator end the day gracefully and leave the door open. In other words, don't burn bridges.

4. Opening sessions.

Other than the question of whether to hold a mediation live or by Zoom, I don't believe there is anything that has changed more over the past several years than the death of opening statements. Unofficially and unaudited – I suspect that opening statements occur less than 5% of the time. While some cases have obvious reasons (marriages/business partners “divorcing”, super-charged emotions, personal safety concerns, claimants who grieve the loss of a loved one and cannot fathom meeting others), the fact is that people rarely want to have an opening session regardless of the case. In over 33 years of trial practice, I can count on one hand the number of times I agreed to bypass the opening session. Many times, the focus was simply to humanize both my client and me. Sometimes the simple “I'm sorry that you are here for this reason, and we may not agree on what caused us to be here, but...” went a long way towards diffusing emotions. However, when it didn't, useful information was gained simply observing the response from the opposing parties. Ask these questions before waiving an opening:

- Do you want to lay eyes on who is there and how they appear during the discussions? Might it be a preview of how they'll be at trial?
- Can opposing counsel's “performance” during the session provide intel on how effective (or not) counsel can convey themes?

5. Don't hide your goals/needs for the session.

At some point, you should reveal whether you really desire to resolve the case. This does not necessarily mean to always reveal your ultimate numbers. If you strongly believe that the case can reasonably be viewed as a no-liability or summary judgment case, and the appetite for settlement is very low, make that known - the process may look very different. Also, if you find yourself in mediation and it is clear there is more work needed to be fruitful, admit that – don't string parties out. In other words, don't burn bridges. (Hey...that sounds familiar!)

6. Walk a mile in their shoes.

This is both a strategical point, and a financial one. We all know that mediations are not always successful. Even when cases resolve, it is frequently AFTER mediation and the result of continued efforts. As mentioned above, showing some empathy goes a long way towards diffusing emotions. Consider not only the amount of an offer itself, but the message behind it. Messaging should be based in reality. If you expect mediation to result from threats of summary judgments, directed verdicts, certainty in trial/appeal results, the process is often disappointing. When those factors are considered alongside financial realities, progress is possible.

The financial realities of a case **must** be considered. I call this the “reverse math issue.” I often challenge the parties to test their offers with reverse math – how much do you estimate the Plaintiff will see of that offer when considering liens, fees, expenses, etc.? There is a canyon-gap between achieving a good or very good settlement and unrealistic expectations. To repeat an earlier point, never forget to consider the cost and risk to choose to move past mediation in the hopes of achieving a more favorable payout later.

7. Use the rule of 100's.

An effective exercise in evaluating a case for settlement is to ask yourself how many times out of 100 will “X” fact be favorable, or will damages be in a certain range, or will a court rule in a certain

way on a key issue. I ask this question often, especially to expose overstated damage claims or defenses – a/k/a the “sexy” claim or defense that sounds great, but will rarely, if ever, be successful. This approach often pivots one from anchoring to a point that, if true, would greatly affect the settlement range, but is a low probability event. It is critical, however, to be realistic and not overly aggressive in this exercise. Parties and their lawyers are experts at creating an outcome that they can justify but that may not be based on reasonable predictions.

8. Bracketing.

Bracketing is an effective way to approach perceived insurmountable gaps or slow-moving negotiations. It is interesting how many participants profess that they hate brackets but then use them successfully. When approached properly, and at the right stage, brackets are excellent for delivering messages while retaining a safety net on “real” offers. Brackets rarely work well early in the process. However, when the amounts in the conversation are very high, brackets can be used for the entirety of the negotiation to make better progress. When brackets are used, they can help differentiate the five-figure from six-figure (or six from seven, etc.) very effectively. They can also be used to convey even broader messages, such as differentiating low, mid and high ranges in each money level – i.e., low, middle or high six or seven figures. Another benefit is the ability to escape the “death by a thousand cuts” approach to “negotiation” – where noting but tit-for-tat moves are sent. Also, when negotiating with an opponent known to rely on astronomically high demands, bracketing offers the message that you are prepared to negotiate in a reasonable range **IF** they will engage in a reasonable range.

A couple of caveats from my experience – messaging and progress tend to get obscured with the use of too many brackets. I suggest an agreement to proceed with brackets only if all agree that any conversion from a bracket to a whole number will be a number within that party’s last bracket. This maintains progress towards resolution and prevents a party from exiting the bracket at numbers outside the bracket and closer to the last pre-bracket demand/offer. Also, beware the false security of believing that mid-points of the brackets are always the real numbers at issue. Increasingly often I find that to not be the case. For my own reference, I clarify with both sides what they are looking at in the brackets so that I am more accurate in interpreting the messaging.

9. The Mediated Settlement Agreement.

Do not underestimate the importance of the MSA. Often, parties are tired and ready to get out at the end of a session, so there is less care in reviewing the MSA than is warranted. Review it closely and make sure it is accurate and has the key points in it that you need. While the MSA contemplates a formal release to follow, there is great comfort in having a MSA that can be enforced if problems arise. It is important to divulge key/necessary terms or conditions early in the process so their inclusion in the MSA is not only accomplished but expected by all involved. This is more than just confidentiality or non-disparagement clauses, but also issues such as collateral documents (title, title policy, press releases, referrals/references, reviews), structured settlements (are they allowed? Co-brokered?), advertising the results, expected delays in payment, or approvals that may be needed (often the case when governmental units or other associations are involved). Arguing for terms such as these only after an agreement is made on the dollar amount frequently results in delayed closure, anger, frustrations and, occasionally, a derailed agreement.

10. Mediator's proposals.

Mediator's proposals are in the spotlight now more than ever. There is great debate in the mediation community over the effect of ABA Formal Opinion 518 ("ABA 518"), particularly with respect to mediator's proposals. See Exhibit A. Soon after the release of ABA 518, there was immediate disagreement within the ADR community about how it affected mediator's proposals, with some arguing that they were no longer allowed and others arguing it was a non-event. The crux of the argument that it curtailed mediator's proposals appears to be the belief that a proposal was the mediator's representation that it was "in the parties' best interests" to accept the proposal – advice that ABA 518 prohibits. While the voices behind this approach appear to have quieted to some extent, the mere fact that some accomplished and respected mediators interpreted ABA 518 in this way gave reason for pause and reflection. The more restrained reading of ABA 518 yielded these simple truths:

- lawyers for the parties are advocates, are to look out for their best interests of their clients, and are allowed to "puff", but not make material misrepresentations of fact;
- mediators are just that, mediators. They are not advocates, are not looking out for the best interests of the parties (as they do not represent either side) and are NOT allowed to puff or exaggerate.

In short, lawyers advocate, mediators mediate.

Different mediators have reacted differently to ABA 518 and the ensuing debate. Some insist that the parties at least indicate a willingness to accept the terms of the actual proposal before it is made. This approach seems unnecessary to many mediators, including me. If/when a mediator's proposal is called for, I have chosen a different approach to be clear with all involved what the proposal process involves. First, I will never issue a proposal unless there has been sufficient efforts to reach an agreement and those efforts have failed. Second, all parties must agree that they want a proposal from me. Assuming these have been met, there is a process:

- First, there is a discussion in the session itself where the concept of a proposal is discussed, including what it does/does not represent;
- Second, at the end of that discussion, a request to proceed with the proposal is made;
- Last, I send a public email to all counsel reiterating the points made in the discussion. The form of that email is included at the end of this paper.

A proposal will only be issued AFTER receiving email confirmation from all that they agree to the process. See Exhibit B. As explained in the disclosure and again in the proposal itself, the actual proposal is blind in that no one knows what the other side responds unless they have said "yes" to the proposal. If all agree to the terms of the proposal, there is a resolution. If any party rejects the proposal, the party accepting it knows the others did not agree, but those rejecting it have no idea with the other party said.

Mediator's proposals after healthy dialogue and extended negotiations are mostly successful. Even when not successful, there can be a strong message to the party that accepted it, knowing the other side did not. It is a strong intelligence on what a party will or won't do to resolve a matter.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 518

October 15, 2025

A Lawyer's Duties to Avoid Misleading Communications When Acting as a Third-Party Neutral Mediator

Rule 2.4 of the ABA Model Rules of Professional Conduct addresses a lawyer's duties when acting as a third-party neutral and defines third-party neutral as a lawyer who assists two or more persons – who are not clients of the lawyer – to reach a resolution of a dispute.

Under Rule 2.4(b), a lawyer acting as a third-party neutral must inform unrepresented parties that the lawyer-mediator does not represent them. Paragraph (b) also requires the lawyer-mediator to explain the difference between the lawyer-mediator's role as a third-party neutral and the role of a lawyer representing a client in a mediation when the lawyer knows or reasonably should know that the parties do not understand the mediation process. Therefore, in most instances, unless the parties are sophisticated consumers of mediation services, the lawyer-mediator should ensure that all persons involved in the mediation understand the role of the lawyer-mediator.

Although a lawyer is not subject to many of the Model Rules when acting as a third-party neutral mediator, a lawyer-mediator is subject to Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. A lawyer-mediator may not give credence to statements the lawyer-mediator knows to be false or personally make statements that the mediator knows to be false.

I. The Lawyer-Mediator's Duties under Model Rule 2.4 When Serving as Third-Party Neutral

The Preamble to the ABA Model Rules of Professional Conduct explains that lawyers play various roles in the legal system. Their usual role is to represent clients, but one alternative is to “serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter.”¹ Rule 2.4, titled “Lawyer Serving as Third-Party Neutral,” defines a third-party neutral as a lawyer who assists two or more persons “who are not clients of the lawyer” to reach a resolution of a dispute. This differs from the lawyer's role in circumstances in which the lawyer represents one or more clients.

Most provisions of the Model Rules address a lawyer's role in representing one or more clients. Some of these govern the client-lawyer relationship. *See, e.g.*, Rules 1.1 through 1.10, 1.13, 1.14, 1.16, 2.1, and 2.3. Other Model Rules address lawyers' interactions with the tribunal, other counsel, or third parties, but all in the context of representing a client. *See, e.g.*, Rules 3.1-3.9, 4.1-4.3. None of these Model Rules applies to a lawyer-mediator. Instead, Rules 1.12 and 2.4 specifically address lawyers serving as third-party neutrals. In addition, other Model Rules apply to lawyer-mediators

¹ ABA MODEL RULES OF PROF'L CONDUCT, Preamble [3].

simply because those Model Rules govern lawyers' conduct regardless of whether the lawyer is serving in a representational role. *See, e.g.*, Model Rules 8.1-8.4.

Paragraph (b) of Rule 2.4 imposes two duties on the lawyer-mediator: to "inform unrepresented parties that the lawyer is not representing them," and "[w]hen the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Particularly when a party to a mediation is unrepresented, fulfilling these duties ensures that each party to the mediation understands that the lawyer-mediator is not representing the party, is not seeking to protect the party's best interests, as would a lawyer in a legal representation, and is not assuming the duties that a lawyer would ordinarily have to a client under the Model Rules.²

Comment [3] to Rule 2.4 explains that lawyers serving as neutrals "may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative." It notes that "[f]or some parties, particularly parties who frequently use dispute-resolution processes, this information [that the lawyer does not represent anyone in the matter] will be sufficient. For others, particularly those who are using the process for the first time, more information will be required." The Comment further advises:

Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.³

Unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means.

² Mediation, like all alternative dispute resolution processes, is generally conducted subject to other rules and policies that may include state statutes, court rules, or procedures promulgated by the organization conducting the mediation. These other mediation rules will also inform the lawyer-mediator's obligations. *See, e.g.*, AMERICAN ARBITRATION ASSOCIATION, AMERICAN BAR ASSOCIATION & ASSOCIATION FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (Sept. 2005), https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf. For example, Standard III provides: "A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."

³ The requirement that a lawyer inform persons who are not clients about the lawyer's role in a matter is not unique to Rule 2.4(b). In other contexts, lawyers have similar obligations to avoid confusion about their role. For example, Rules 4.3, 5.7(a)(2), and 1.13(f) also address a lawyer's obligation to disclose to some persons with whom the lawyer is dealing that the lawyer will not owe that person the duties imposed by the Model Rules applicable to a lawyer who is representing a client.

II. The Lawyer-Mediator's Duty to Avoid Statements that Imply that the Lawyer-Mediator is not Neutral but is Seeking to Achieve a Party's Best Interest

Under the Model Rules, a lawyer must act in the client's interest. Various provisions of the Model Rules give expression to that responsibility, however, that is not the role of a lawyer-mediator. The lawyer-mediator's role is to assist the parties in resolving their dispute, regardless of where the interest of a party may lie.

Once a lawyer-mediator explains the role of a neutral, as distinct from the role of a lawyer for one or more clients, the lawyer-mediator must not depart from that role. Specifically, the lawyer-mediator should be vigilant in conducting the mediation to avoid creating the impression that the lawyer-mediator will be providing the protections of the client-lawyer relationship. For example, if the lawyer-mediator explains that a mediator's confidentiality obligation under the applicable mediation rules,⁴ the lawyer-mediator should ensure that the parties understand that the source of the obligation is not a client-lawyer relationship, and that the attorney-client privilege does not apply.

The obligation to avoid misleading the parties about the lawyer-mediator's role also means that, in conducting the mediation, the lawyer should not state that the lawyer-mediator is acting to achieve a party's best interest or that a proposed settlement is in a party's best interest. Otherwise, the party may rely on the lawyer-mediator's assurance, mistakenly believing that the lawyer-mediator is acting in the party's best interest as the party's lawyer.⁵ The lawyer-mediator may, of course, provide truthful information that helps the parties to conclude for themselves, or even makes it obvious to them, whether a proposed resolution is in their best interest, given their objectives.

Likewise, if the give-and-take in a mediation includes a discussion of how the law applies to the parties' dispute, the lawyer-mediator should avoid communicating in a manner that might be taken as rendering legal advice, or otherwise suggesting to a mediation party that the lawyer-mediator's role is to protect or advance a party's legal interests or to help the party to attain a particular desired result. It is not misleading, however, to provide legal information or to discuss the parties' respective views of how a tribunal would resolve a legal or factual question.⁶ A mediator may offer an opinion as to how a tribunal is likely to rule on an issue, but the lawyer-

⁴ See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 2. For a helpful discussion of the interaction of the Model Rules with other rules applicable to mediation (which other rules are beyond the scope of this opinion), see John M. Barkett, *Ethics in ADR – A Sampling of Issues*, 9 AM. J. MEDIATION 9 (2016).

⁵ Similarly, the Committee recently discussed the responsibility of an organization's lawyer, when interacting with the organization's individual constituents, to avoid misunderstandings about the lawyer's role. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 514 (2025).

⁶ For a discussion of the distinction between legal information and legal advice (and the advisability of accompanying legal information with a statement that the legal information is general in nature and not intended as a substitute for personal legal advice), see ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 10-457 (2010).

mediator should not state or imply that a settlement is in the party's best interest *because* a tribunal is likely to decide adversely to the party.⁷

If a party, particularly an unrepresented party, requests that the mediator provide legal advice, the mediator should again explain the mediator's role and advise the party to seek legal advice from counsel of their choice.

III. The Lawyer-Mediator's Duty to Avoid Dishonesty, Fraud, Deceit, and Misrepresentation When Communicating with the Parties

The role of the mediator, like any third-party neutral, turns on being credibly neutral. To resolve disputes, the lawyer-mediator will be conveying information to the parties. The lawyer-mediator will often provide mediation-appropriate insights when conveying this information to help the parties evaluate whether to settle and, if so, on what terms.

At the same time, there are limits on what a lawyer-mediator may say to the parties to assist them in making this determination. Rule 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. This Model Rule applies not only when a lawyer represents a client but also to the lawyer's personal and professional conduct outside of the practice of law. Thus, notwithstanding the fact that they are not representing clients in the mediation, lawyer-mediators have an ethical duty under Rule 8.4(c) to avoid engaging in conduct that is dishonest, fraudulent, deceptive, or misleading.

This raises the question of whether a lawyer-mediator may engage in exaggeration or concealment of various kinds in an effort at persuasion. For lawyers representing parties in negotiations, untrue statements are not entirely forbidden. Rule 4.1 forbids a lawyer "[i]n the course of representing a client" from "making a false statement of material fact or law to a third person." However, Comment [2] to this rule recognizes that "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact." Among the examples are statements regarding "a party's intentions as to an acceptable settlement of a claim." ABA Formal Ethics Opinion 06-439,⁸ which addresses a lawyer's obligation when representing a client in a mediation (but explicitly does not address the ethical duties of a lawyer-mediator, who does not represent any party), provides further examples as follows:

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the

⁷ If a mediator were to provide legal advice to a party in the mediation, the mediator would risk forming a client-lawyer relationship with that party (*see, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 (2001)). Doing so is incompatible with the mediator's role as a neutral.

⁸ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Lawyers representing negotiating parties have the same leeway to make immaterial false statements under Rule 8.4(c) as they have under Rule 4.1. (This is not to suggest that this Committee encourages doing so, but simply that the Model Rules do not forbid it.)

A lawyer-mediator does not have the same leeway as a lawyer negotiating for a client, however, because a lawyer-mediator does not represent a client in the mediation but serves as a third-party neutral under Rule 2.4. Therefore, neither Rule 4.1 nor the above-noted Comment to this rule applies to the lawyer-mediator.⁹

A mediator's statement may violate Rule 8.4(c) even if a similar statement by a lawyer representing a party in a negotiation or mediation would not, because the lawyer-mediator's statement may be taken as true and influence a party's decision. Rule 8.4(c) applies differently to lawyer-neutrals than to lawyer-advocates because their different roles create different expectations. False statements that would not be regarded as statements of "material fact" under Rule 4.1, or violate Rule 8.4(c), coming from a party's lawyer are likely to be taken at face value coming from a lawyer-mediator precisely because of the lawyer-mediator's role as a neutral.

Given the lawyer-mediator's neutrality, parties are likely to trust the lawyer-mediator to play it straight, and to not exaggerate or make false statements designed to lead the parties to an agreement. Framed differently, parties dealing with the opposing party or the opposing party's lawyer are expected to know that negotiating parties engage in "puffery" or exaggeration about certain matters, and to discount their assertions about such matters. But parties to a mediation, having been advised about the lawyer-mediator's neutral role, would have no similar reason to be on their guard when receiving communications from that individual.

Therefore, it follows that a lawyer-mediator must be both thoughtful and cautious in communicating information from one party to the other and in answering questions that may be asked about the information communicated or about the lawyer-mediator's views of the information. For example, a lawyer-mediator may not make a statement that the lawyer-mediator knows to be false that "this is the best offer the opposing party will make." The lawyer-mediator must be careful not to make misleading statements about the strength or weakness of a party's case. While a mediator may accurately convey statements from one party to another that may

⁹ ABA Formal Ethics Opinion 06-439 opined that lawyers who represent clients in a negotiation or caucused mediation may make "statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation 'puffing'" without violating Model Rule 8.4's proscription on making false or misleading statements. Formal Opinion 06-439 at footnote 19 states, "This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c)." The footnote goes on to state "in our view, Rule 8.4(c) should not impose a more demanding standard of truthfulness for a lawyer when acting as a mediator than when representing a client." The lawyer-mediator may communicate statements made by the parties or their counsel as long as the lawyer-mediator makes clear the origin of such statements and that the statements do not represent an opinion of the lawyer-mediator.

include falsehoods that are not regarded as false statements of “material fact” under Rule 4.1, the lawyer-mediator may not give credence to those statements if the mediator knows them to be false by suggesting that the lawyer-mediator credits them or by implying that the opposing party should do so. Similarly, the lawyer-mediator must be precise and avoid any inappropriate gloss in describing to one party the position that the other party is taking. For example, as noted, it is improper, if untrue, to state that “this is the best offer the opposing party will make.”

IV. Conclusion

A lawyer-mediator does not represent any party to a mediation. Under Rule 2.4, lawyer-mediators must explain their role to mediation parties who are not represented or who do not appear to understand the mediator’s function and, where necessary, inform all parties of the difference between the role of a mediator and that of a lawyer representing a party. Based on the guidance in Comment [3], unless the parties are sophisticated consumers of mediation services, it is prudent for the lawyer-mediator not only to inform all parties that the lawyer-mediator does not represent them but also to afford them an opportunity to discuss what this means. In addition to other rules governing the duties of a mediator, the Model Rules require the lawyer-mediator to avoid communications that are dishonest, fraudulent, deceitful, or misrepresentative in violation of Rule 8.4(c).

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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CENTER FOR PROFESSIONAL RESPONSIBILITY

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EXHIBIT B

Mediator's Proposal e-mail

Re: Cause No. XXXX; John Doe v. Jane Smith - Mediator's Proposal Disclosure

Counsel:

NOTE ON THE MEDIATOR'S ROLE AND PROFESSIONAL STANDARDS. Some commentators have suggested that ABA Formal Opinion 518 (October 2025) prohibits attorney-mediators from making mediator's proposals. In my view (and that of MANY others), that is a misinterpretation of the Opinion. ABA Formal Opinion 518 does not bar mediator's proposals; rather, it emphasizes that mediators must not provide legal advice, mislead parties, or suggest what is in a party's "best interest." A properly framed mediator's proposal — offered as a neutral, confidential mechanism to test whether a mutually acceptable resolution exists, without recommendation or coercion — remains fully consistent with those principles.

Here is my process:

1. Everyone will get the mediator's proposal with terms and conditions;
2. I am not telling any party what to do or advocating for a result. Oftentimes, however, I have discussed the issues substantively with each party and offer opinions as to how they MAY play out in court as an exercise in risk management. Some may argue that this may violate the spirit of ABA Formal Opinion 518, but in my experience it is the heart of mediation.

My process offers a structured, blind process that allows each party to make its own independent decision in confidence. Even so, because of ABA Formal Opinion 518, I will not send out a Mediator's Proposal until each party consents by reply e-mail to me doing so WITH THE UNDERSTANDING that the private discussions may have contained evaluative statements to consider.

Please "Reply to All" with your consent or lack of consent to me making a Mediator's Proposal. Any proposal actually issued will be "blind" - no other party will see your response to the proposal itself. If you wish to speak to me privately, please call or text me. Thank you.

Observations from the Trenches of Mediation

Random Thoughts of One Defense Lawyer*

(*with apologies to fans of Letterman's Top 10)

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INTRO: I recently asked Google, “What percentage of civil cases go to trial?” The results set included an article titled “Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?” Statistics from various sources indicate that approximately 95% of civil cases settle or resolve before trial. This trend is not surprising, given high litigation costs and the rise of nuclear verdicts, especially in product liability matters. By contrast, the use of mediation as a tool for dispute resolution continues to grow. Consider your own practice and the number of mediations v. trials you have had in 2026. I have mediated approximately 5 matters, as compared to starting only one trial. In that spirit, I offer my Top Ten list of “Random Thoughts of One Defense Lawyer” regarding mediation. The defense lawyer in me is constrained to add that these are my views, not necessarily those of my Firm or clients.

1. Is it ever too early to mediate?

It's never too early in my view, provided that claimant's counsel will provide the background information needed to conduct an early case assessment. In a product liability/personal injury matter, we typically request medical records, product related information and a product inspection. We also evaluate the potential legal claims and defenses, and conduct jury verdict/settlement research. For repeat claims involving the same product, we use the same mediator whenever possible. It's not a full proof process – some cases cannot be resolved early, especially where multiple defendants are involved. But when early resolution works, it saves the client time and money.

2. Selection of mediator

Selection of the mediator can make or break the success of the mediation. It is also a highly individual decision. Some clients/counsel swear by retired judges; others prefer practitioners. In some matters, a non-lawyer with the relevant subject matter expertise may be the right fit. Mediator A may be a good fit for matter A, but not for matter B. Whatever your preference, be sure to vet the proposed mediator with your colleagues and client. An important consideration is whether the plaintiff's counsel respects the mediator.

3. Pre-mediation case evaluation

A thorough case evaluation is critical to developing a consensus with the client about case value, settlement range, and strategy. It should include an evaluation of the venue, plaintiff's counsel,

assigned judge, jury pool, strengths/weaknesses of fact and expert witnesses, “hot documents”, likelihood of success on dispositive motions, likely jury verdict and settlement range to name a few. In cases involving multiple defendants, also consider potential allocation of fault, and implications of joint and several liability. Too often, the mediation statement takes the place of a case evaluation, and the lawyer and client do not talk through the potential downsides or gaps in the case defense. Remember that the mediation statement is an advocacy piece, not a case evaluation.

4. Ex parte submissions

Over the years, I advocated for ex parte submissions to mediators and resisted exchanging my mediation statement with an adversary. Why should I share my written work product with my opponent? Recently, I have noticed that many of the mediators with whom I have worked prefer that the parties exchange initial mediation statements, and I am becoming a convert to this approach. Aren't there advantages to my adversary reviewing my written analysis of the weaknesses of his/her case? Having the opportunity to review my adversary's mediation statement in advance of mediation gives me information about what he/she believes are his/her client's strongest arguments/documents and ample time to address them. Clients benefit from reviewing the adversary's statement as well. Mediators often request/allow the submission of an ex parte statement simultaneously with the initial mediation statement or as a reply. So, if there is information you really want to provide in writing ex parte to the mediator, there are options to accomplish that.

5. Pre-mediation discussions

Take advantage of any and all opportunities to speak to the mediator in advance of the mediation session. As defense lawyers, we have lived with the case for years, and know the facts/legal arguments inside and out. By contrast, the mediator has spent a couple of hours reading your submission and likely has questions, especially in science heavy/technical cases. Give the mediator a chance to ask those questions and to respond to any preconceptions about the strengths/weaknesses of your client's position.

6. Opening session/opening statements

Opening sessions are important and can be helpful; opening statements much less so. Opening sessions provide a forum for the parties to meet and greet the mediator and each other. Mediation may be the first and only time the clients are in the same room (or Zoom square) with each other. The client may want to see/speak to the plaintiff to assess his/her injuries, credibility, likeability, etc. There is an intangible benefit to shaking the plaintiff's and stating something along the lines of “I am sorry this happened to you” or “I am sorry to be meeting you under these circumstances.” This simple interaction can go a long way towards humanizing a corporate defendant and laying the groundwork for productive settlement discussion.

Opening statements, on the other hand, can be provocative, and needlessly raise the temperature in the room. Oftentimes, lawyers feel they need to perform for their clients, and this leads to inflammatory statements that undermine the mediation before it has a chance to get off the ground. Skip the opening statement.

7. Attendance at mediation

In person or by zoom? Must the clients attend? Reasonable minds can differ, of course, but for high value cases, my preference is for in person mediation 10 times out of 10 times. Call me a dinosaur, but I like to meet the plaintiff in person. You can learn a lot about a person's alleged injuries by

attending a mediation with them. That's not say that zoom mediations cannot work – they can be effective, are often the default these days and are incredibly convenient. Whether in person or by zoom, be sure to confirm that the plaintiff will be present. The last mediation I attended for wrongful death case, the plaintiff's parents were available by phone, but not present. Defense counsel reasonably expected and understood that the parents would be present.

I want the plaintiff to hear the risks associated with his/her case directly from the mediator, not filtered through counsel.

8. Negotiations/bracketing/mediator's proposals

Ask the plaintiff for a demand in advance of the mediation and come to the mediation prepared to make an offer, however small it might be. Deciding on the opening offer is an art not a science. There is a balance between starting with a modest number versus a number so low that it is insulting. When there are good reasons to convey the offer before the mediation, do not hesitate to do so. My only exception to that general rule to make an offer during mediation is in a multi-defendant case, where it is important for strategic reasons that all defendants contribute to a resolution of the case. Let the negotiations play out before considering brackets or a mediator's proposal. Both techniques can be helpful in the right situation, but I find that parties fall back on them too early and too often.

9. Confidentiality

Confidentiality is a critical requirement/condition for most defendants. Raise it early and often with the mediator and make sure everyone has the same understanding of what it means. When I was a baby lawyer, I mediated a case to conclusion and raised the issue of confidentiality after the parties agreed to the settlement amount. Shame on me...confidentiality cost me an additional \$10,000. I now raise confidentiality in the opening session with the mediator. Plaintiff's counsel typically readily agree to confidentiality conceptually, but when it comes time to prepare the release, they often take the position that confidentiality does not preclude them from listing the settlement on their Firm websites or in other advertising material. Recently, one plaintiffs' lawyer tried to include language in the settlement documents that allowed him to use the fact pattern of the case in a law school class he was teaching. Not exactly my idea of confidentiality.

10. When has the mediation failed??

Just because the mediation session ends without a resolution doesn't mean that the mediation has failed. A good mediator will end a mediation session when the parties have reached an impasse, but will follow up with each of them following the mediation, to continue the discussion. At times, a pause in the mediation can give the parties an opportunity to follow up a particular fact or claim, consult with a fact or expert witness or even to retain a consulting expert to conduct a further evaluation. It's not over until it's over.

