The Art and Science of Mediation

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About the Presenter

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Robert Schwartz received his undergraduate degree, magna cum laude, in American Civilization, and law degree, as a Rapp Scholar, from the University of Illinois. For nearly thirty years, he has successfully litigated civil matters in Illinois and Federal courts and represented clients in alternative dispute resolution (ADR) forums.

Mr. Schwartz is a certified Chairperson of arbitration panels in the Circuit Court of Cook County, Illinois and FINRA and a Panel Mediator with the American Arbitration Association, where he completed Mediation Training. Mr. Schwartz has also handled appeals, including before the Illinois Supreme Court.

In 2000, Mr. Schwartz was an instructor of a law class at the University of Illinois Graduate School of Business and from 2004-200. He was President of the Chicago-Lincoln American Inns of Court, a chapter of a preeminent national litigation bar association. Mr. Schwartz is a principal of the downtown Chicago law firm of ROBINSON & SCHWARTZ, LLC and can be contacted at:

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Course Description

Course Presentation

The Course is intended to introduce the fundamental methodologies of Mediation. The intended audience would be primarily litigators interested in exploring the often overlooked and under-utilized process of mediation.

While there are many (mis)perceptions about mediation, such as that it is expensive and that a mediator should direct and lead parties to a settlement, the more proper fundamentals and better practices and ethics of mediation are largely unknown.

The title of the Course derives from the fact that while those (empirical, hence the name "science") fundamentals are sometimes misunderstood, there are indeed also many subjective (hence the name "Art") factors that are also essential to effective Mediation.

Course Material

This material is intended to be a guide in general and is not legal advice. If you have any specific question regarding the state of the law in any particular jurisdiction, we recommend that you seek legal guidance relating to your particular fact situation.

The course materials will provide the attendee with the knowledge and tools necessary to identify the current legal trends with respect to these issues. The course materials are designed to provide the attendee with current law, impending issues and future trends that can be applied in practical situations.

Course Learning Objectives and Outcomes

After this course, the participant will learn how to effectively present a case to a mediator; what role to play in preparation for and participation in mediation and how to be an effective mediator.

After this course, the Participant will develop an understanding about the methodologies and ethics of mediation.

The participant will also learn skills in preparing for and participating effectively in mediation.

Upon completion of the course, participants should be able to apply the course material; improve their ability to research, plan, synthesize a variety of sources from authentic materials, draw conclusions; and demonstrate an understanding of the theme and concepts of the course by applying them in their professional lives.

Timed Agenda:

Presenter Name: Robert Schwartz

CLE Course Title: The Art and Science of Mediation

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Course Material

I. Introduction to Mediation: What it is and what it isn't

A. Distinguish from Litigation and from Arbitration
B. Distinguish from Negotiation
C. Definition: A Collaborative Forum and Methodology to Resolve Disputes and Conflicts Effectively and Efficiently

1. Collaborative: parties work within a framework not defined as adversarial.
2. Forum: not courtroom; more informal; "safe space;" "shuttle diplomacy."
3. Methodology: structured so parties elect their own fate.
4. "Dispute" differentiated from "conflict:" generally, a "dispute" is the substantive matter within certain parameters to be resolved; "conflict" is emotional or other "psychic" barriers to resolution.
5. Effective because it achieves final and full resolution (as opposed to ongoing litigation/appeal). Even if resolution is not achieved, more insight is gained.
6. Much less costly financially and emotionally than ongoing litigation.

II. Why a "Science" and also an "Art"

While generally more informal, the methodology and process of mediation retains empirical and objective criteria- a "science." Specifically, the parties and the mediator/neutral must follow rules and processes including: confidentiality, ethics, and decorum. Inherent to those factors are sheer honesty by the parties and their counsel, utter impartiality by the mediator, and implicit trust by all that the process, if followed and maintained scrupulously, can achieve a mutually satisfactory resolution (although not necessarily a favorable result for any one party).

The "art," or less objective factor(s), result from the subjective and psychological exchanges and transparency typically not found in litigation, arbitration, and negotiation. Open, honest discourse, refraining from "posturing," and the inherent desire to achieve accord engenders resolution.

A. Why Participate in Mediation

- Possibility of overlap in positions and missing opportunity because of communication problems or process issues, such as fear of making an offer
- Wrong perception of the case
    - Overlooking an issue altogether
    - Emotional factors and the like coloring judgment
    - Attorneys overselling themselves to their clients—like real estate brokers
- Cannot get the same result by direct discussion
- Option to use the trial judge, but
    - Awkward
    - Limited time
    - Possible lack of skills

B. When to Mediate

- Need enough information to settle.
- Sooner is better to save costs
- Trade-off

C. What Happens at a Mediation

- Neutral. May be a
    - Retired judge
    - Lawyer
    - Trained non-lawyer
- Documents and information exchanged beforehand
- Start with a joint session
    - Ground Rules set forth by mediator
    - Opening statements (by party or counsel). Usually, brief. Sometimes crosstalk
- Individual caucuses after joint session
    - Discussion of facts.
    - Discussion of options—what might happen without settlement
    - Exchange of offers.

D. Ground Rules

- Usually a written contract. Payment usually in advance.
- Confidentiality
    - Offers and statements privileged against later disclosure
    - Can designate information not to be shared by mediator
    - Illinois statute

E. Why does this work

- Process issues
    - Now or never; definite end point
    - Parties become invested in process, like an auction
    - Lower reluctance to make an offer because it goes to the mediator
- Mediator's input
    - Perspective on process issues; like a coach
    - Evaluation
        - Sometimes
        - Depends on mediator
    - Encouragement
        - Reduction of animosity when parties are across the table from one another
        - Usually works, but not always
        - Principle of Rule 201(k)
        - Used with mediator's discretion

F. Ethical Rules Applicable to Mediation

1. Case Law

Rule 1.12(a) of the Illinois Rules of Professional Conduct ("IRPC") provides that "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent." In the juvenile neglect case of *In re W.R.*, 2012 IL App (3d) 110179, the respondent-father was represented by an attorney who had mediated another

family court case between the respondent-father and the respondent-mother three years prior. *In re W.R.*, 2012 IL App (3d) 110179, ¶¶ 1, 22. Upon discovering this information, the court granted the mother's motion for a new trial, finding that the representation constituted a *per se* conflict of interest under IRPC 1.12(a), meaning that the mother did not have to prove that she was prejudiced by the attorney's representation of the father. *In re W.R.*, 2012 IL App (3d) 110179, ¶ 28. The court recognized that while there is no bright-line rule regarding how much time must elapse to avoid a conflict of interest, any information the attorney would have learned in her role as a mediator three years prior would still potentially be relevant in the juvenile case in her effort to have custody awarded to the father. *In re W.R.*, 2012 IL App (3d) 110179, ¶ 22.

Similarly, California case law holds that when an attorney learns of confidential information from a party while presiding over a settlement conference, and the attorney subsequently joins a law firm, the conflict of interest imputes to the rest of the law firm. Therefore, the law firm may not represent an opposing party in the same action, regardless of whether the firm establishes screening procedures to prevent the attorney-mediator from having any involvement in the case. *Castaneda v. Superior Court*, 237 Cal. App. 4th 1434, 1437-38 (2d Dist. 2015); *Cho v. Superior Court*, 39 Cal. App. 4th 113, 125 (2d Dist. 1995). The court in *Cho* explained:

> No amount of assurances or screening procedures, no "cone of silence," could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm—which is now pressing or defending the lawsuit against the litigant. No one could have confidence in the integrity of a legal process in which this is permitted to occur without the parties' consent.

Cho v. Superior Court, 39 Cal. App. 4th 113, 125 (2d Dist. 1995).

Under Texas law, it is improper for a mediator to act as an arbitrator in the same or a related dispute without the express consent of the parties, just as it is improper for a mediator to disclose any confidential information to another arbitrator to the parties' dispute. In fact, all communications made to a

mediator are confidential and not subject to disclosure, even to the appointing court. *In re Cartwright*, 104 S.W.3d 706, 713-14 (Tex. App.—Houston [1st Dist.] 2003). Therefore, the court in *In re Cartwright* found that the trial court abused its discretion in appointing a former judge, who acted as mediator in the parties' child custody and visitation dispute, as arbitrator in the parties' post-divorce property dispute, where the former judge, as mediator, was privy to confidential information that a party might not want to disclose to an arbitrator and the parties did not know at the time of mediation that the judge would arbitrate the property dispute or consent to the appointment of their former mediator as arbitrator. *In re Cartwright*, 104 S.W.3d 706, 713 (Tex. App.—Houston [1st Dist.] 2003).

2. Best Examples of Worst Behavior

In re Francis Joseph Coyle, Jr. – Illinois Attorney Registration & Disciplinary Commission – No. 2015PR00041

In 2011 and 2012, Respondent was associated with the law firm of Coyle, Stengel, Bailey and Robertson (the Stengel firm) in Rock Island, Illinois, which maintained a client trust account on which Respondent was a signatory. Respondent represented PVY Development, LLC and its manager, David Requet, as the seller of commercial property where the buyer, Bhupen Patel and his company, WAG Davenport, was required to make two $50,000 payments to PVY under a real estate contract. Patel did so by wire transfer into the Stengel firm's client trust account. Due to a dispute between the parties, however, the sale was never completed. From September 19, 2011, to October 17, 2012, Respondent (or someone at his discretion) drew nine checks from the Stengel firm's client trust account: five to Respondent himself totaling $32,000; three to PVY totaling $53,000; and one to Requet for $15,000. The aggregate amount of the nine checks totaled $100,000—the amount Respondent was supposed to be holding in escrow under the terms of the real estate contract.

Following an October 2014 mediation, where Respondent was present as a possible witness but at which PVY was represented by other counsel, PVY and Patel reached an agreement providing that Patel and WAG would receive $62,500 from the $100,000 in earnest money and PVY would receive the remaining $37,500. The agreement specified that Respondent, as holder in

escrow of the $100,000, to distribute the money to WAG within seven days of the execution of the agreement. The attorney who represented WAG and Patel testified at Respondent's hearing that Respondent did not notify anyone during mediation that the earnest money was no longer in the client trust account and further did not pay over any of the escrow funds within the seven-day period. The attorney reported Respondent to the ARDC in December 2014 when he learned that the escrow funds were not in the client trust account.

The Hearing Board recommended that Respondent be disbarred, noting that his misconduct, including failing to inform the mediator and attorneys involved in the mediation that the funds were no longer available for distribution, was serious and that the only mitigating factor was that Respondent had not been previously disciplined. The Board's recommendation was affirmed.

G. Illinois State Bar Association Professional Conduct Advisory Opinions

- Reporting lawyer misconduct while serving as an arbitrator or mediator: Opinion #: 11-01
    - When a lawyer-mediator learns that a lawyer representing a party in mediation has committed misconduct, the lawyer-mediator has an obligation to report it, even though the lawyer-mediator was not representing a client at the time he learned of the violation.
    - Lawyers, including lawyer-mediators, who know "that another lawyer has committed a violation of Rule 8.4 (b) or Rule 8.4 (c) shall inform the appropriate professional authority." Ill. RPC 8.3(a).
    - Confidentiality provisions in the Uniform Mediation Act and Not-For-Profit Mediation Center Act do not prevent lawyer-mediator from reporting misconduct.
- Mediator preparing post-mediation divorce documents for unrepresented spouse to file pro se: Opinion #: 04-03
    - Divorce lawyer acts as mediator in domestic relations matters
    - It is improper for a lawyer who mediated a divorce settlement to draft a proposed judgment of dissolution of marriage,

marriage separation agreement and joint parenting agreement for unrepresented parties.
        - Constitutes representing two parties with adverse interests in violation of IRPC 1.7(a).
    - "Where a lawyer acts as a mediator in a dispute, the lawyer cannot represent any of the parties in the underlying dispute" without violating Illinois Rule of Professional Conduct 1.7 (a) if the lawyer seeks to represent both parties or (b) if the lawyer seeks to represent one party. ISBA Opinion No. 92-05.
- Mediation firm paying nonlawyers in exchange for case referrals: Opinion #: 01-05
    - Law firm employs attorneys who render both legal and mediation services. An accounting firm approached the law firm and offered to refer mediation clients to them in exchange for a 20% referral fee.
    - The law firm intended to establish a separate mediation firm where one or more lawyers from the law firm would be employed for the sole purpose of providing mediation services. Mediation services referred by the accounting firm would be handled through the mediation firm by these lawyers.
    - Relationship between the mediation firm and the accounting firm is improper:
        - Violates IRPC 5.4(a) which provides that a lawyer is not permitted to share legal fees with a nonlawyer, except under narrow circumstances
        - Violates IRPC 7.2(b) which provides that a lawyer may not give anything of value to a nonlawyer as a result of the person's recommendation of the lawyer's services, except for the reasonable cost of advertising as permitted under the Rules.
    - In re Discipio, 163 Ill. 2d 515 (1995)
        - Lawyer shared contingent fees with a disbarred lawyer for worker's compensation client referrals made by the nonlawyer
        - Court held that this arrangement violated the fee-sharing prohibitions of the then-applicable Code of

Professional Responsibility because the lawyer would split the resulting fee with the nonlawyer if the claim proved successful

III. The Process

A. Commencing Mediation

Mediation can be introduced at any time. Some situations, such as divorce/family law, labor agreements, and certain contracts, compel mediation. Almost invariably, such compelled mediations produce less satisfying results than when elected by parties ab initio. It is the voluntary nature of mediation that is one of its most compelling and appealing qualities. Psychologically, parties in a dispute, whether before or after filing a lawsuit, often feel a sense of loss of control that is subsumed within the dispute itself. Mediation, as an alternative dispute methodology, offers the parties a visceral and real opportunity to regain control and become an ultimate decider of their own fate, as opposed to relinquishing the outcome to an unknown and potentially hostile judge, jury, or arbitrator. Parties would be well advised to mediate as soon as possible.

B. Court-Mandated Mediation

Cook County, IL

- Mediation is required pursuant to Cook County Circuit Court Rule 13.4(e) for parents who are in conflict over allocation of parental responsibilities, relocation, and other non-child support issues related to their children.
- Parents will be referred to Family Mediation Services if they cannot agree to a mediator.
- Mediation for non-child related issues may be ordered by the Court, including but not limited to disputes over debts, assets, and money. If the parties cannot agree to the selection of a mediator for non-child

related issues, the Court will choose a mediator from the list of court-certified mediators.

New York County Supreme Court

Commercial Division Multi-Option ADR Program

- Selected cases referred to ADR after a preliminary conference or at any other time deemed appropriate by the Judge
- Parties are directed to select the ADR process of their choice (mediation, neutral evaluation, or arbitration). 95% of all cases referred to ADR proceed to mediation.

ADR in Family Courts

- Throughout the state's Unified Court System, Family Courts refer litigants to community dispute resolution centers (CDRCs) and other agencies to obtain the assistance of a mediator.
- Unified Court System funds CDRCs to mediate child custody, visitation or support matters in 49 of the state's 62 counties.

1. Objections to Mediation and Overcoming Them.

Mediation, even amongst lawyers, is rarely utilized nor well understood. Our society prizes success, and the drama and potential victory in a courtroom, mythologized in popular culture, fuels litigation. That which is misunderstood, such as mediation, is often shunned. Counsel would be well advised to explore mediation as a possible method to better meet the expectations and needs of their clients.

2. Expense.

An often-expressed objection that "mediation is expensive" can readily be overcome by comparison to the usually exorbitant cost of litigation or unknown and unresolved disputes, exposure, and liability.

The potential embarrassment of "unfamiliarity" with mediation can be overcome by the relative informality of the process, direction and discretion afforded by mediators, and widely available resources (hopefully including this one).

3. Discovery.

Some lawyers may object to mediation for the reason that they feel or fear that their ability to uncover a "smoking gun" or any significant fact is

thwarted. Conversely, there may be objection because an entrenched view that Discovery already obtained presents such a strong case that there is no incentive to mediate. If that was true, then the other side would likely concede; further, the candor and transparency that occurs during caucusing, infra, should quell these Discovery-related objections.

C. The Preparation Stage

Although informal, extensive preparation for mediation is critical, and it is suggested that the parties carefully include the following:

1. Define objectives and goals.

a) The more specific, tangible, and concrete, the better.
b) Most parties (and people in general) state that they want "to win," or gain money (or mitigate loss of money); keep in mind that such nebulous "goal" can actually create a roadblock—as adversaries can equally and forcefully assert the opposite.
c) Contemplate prospective resolution. Mediation, by nature, is prospective, and not retrospective like litigation or arbitration that focus on past facts to assess "fault," "liability," and "damages."

2. Prepare the case.

Although not adversarial, a party should have mastery over their own case in order to be prepared for objections, arguments—and where to concede. Understanding the strengths and weaknesses of your own case—and the maturity to be objective about them—is a linchpin to successful mediation. Accordingly, review all pertinent facts and law and consult with all relevant people involved on 'your side,' including: potential witnesses, insurance carrier if appropriate, "control group", and any ancillary or related parties that may be affected by an outcome to understand their perspective.

Too often, mediation is not anticipated by counsel with the same thrill as trial but, effective mediation requires diligent preparation. Plan to invest in mediation preparation at least as much effort as you would a TRO. For example, good trial lawyers develop a theory and a theme for their case long before trial. You should do the same for mediation. If "broken promises" would be an effective theme for trial of a contract case, it will also work well in mediation. Build your mediation case around the theme. You can "test drive" your theme at the mediation to see if it works. It is better to find out the frailties of your theme in a mediation than at trial.

- Look from the perspective of the other side—what will move the other side? What do they want? It's not always about result v. cost
- Do not set absolute parameters or final numbers; remain flexible.
- Written submission—a chance to directly pitch the other side.

A good briefing book persuades two audiences: the opponent and the mediator. A superficial brief or one which omits vital information will do little to advance your case. In almost all circumstances, the mediator and your opponent should be able to read a detailed and forceful presentation of your best case long before the mediation begins. Smoking guns or other strong evidence should almost always be disclosed. If you withhold vital evidence, you diminish significantly your chance for success. Also, you can confirm at the mediation if evidence is really a smoking gun or only shoots blanks. The mediator and your opponent need to know why your client should prevail. The advertising rule of thumb applies: "the more you tell, the better you sell."

- Primacy persuades
- Opponent is target audience
- Tell it all, persuasively
- Confidential (FRE 408)

3. Pre-Mediation Submission.

Unless the parties disagree, mediators should receive, in advance of the mediation, a confidential submission from the parties, presenting the pleadings, Discovery, status of negotiations, and goal(s) of the party. The parties should refrain from posturing and advocating, but rather offer a candid assessment that enables the mediator an opportunity to frame the issues, challenges, and opportunities of the mediation session.

- Transpose tangible goals and accumulated understanding into specific proposals and clear priorities for the mediation process. Develop a flexible strategy that includes options and "fall back" positions. Expecting or accepting only "your own way" is a surefire strategy to lead to disappointment and failure.
- Consider and anticipate the position(s), reactions, and "counters" of the other side.

D. Initial Joint Session

1. At the beginning of a mediation, the mediator generally begins by meeting together with all parties in a joint session. This can be eliminated if the parties are too hostile or if the parties prefer and have already agreed to all ground rules, etc. Typically, the Mediator utilizes

the Initial Joint Session to: first affirm in writing confidentiality and inadmissibility: educate the parties about the mediation process; explain the procedures such as caucuses; establish behavioral guidelines; engender trust in the process, the mediator, and between the parties; build a positive atmosphere conducive to resolution; and significantly secure a commitment to good faith negotiations. It is absolutely critical that the parties put faith in the process, themselves, and the mediator in order for the process to work.

2. The mediator must establish his/her absolute neutrality and commitment to the process and not any loyalty to a party, result, or outcome (even settlement).

3. The mediator and parties must pledge to never disclose any of the substance of the mediation.

4. All conduct and substance of the mediation is absolutely inadmissible and confidential; again, a crucial aspect to engendering parties' trust in the process and security to be open and forthright.

5. Parties use this Initial Session to: make sure their positions and interests are understood by the other side; communicate their priorities; identify where compromise may be feasible; express their willingness to be flexible.

E. Opening Statements

Not mandatory. Some counsel may insist on presenting opening statements. Generally, mediators strongly urge litigants not to present an opening statement such as would be used in trial, but rather as an opportunity to introduce their client in realistic and sympathetic, if not "likeable" light, and express willingness to collaborate, honestly articulate their desired outcome, and concede where compromise might be made. Such an honest approach, rather than strict advocacy, actually encourages the other side to then "meet on the same terms," that is, similarly concede where appropriate. Psychologically, if an initial opening statement is collaborative in nature, then the respondent typically feels comfortable or even compelled to likewise offer a collaborative, rather than adversarial, tone and tenor, further setting the stage for the subsequent mediation proceeding.

An opening statement in a mediation should be similar to one at trial—fact based. It should have a theme which tells a story in a non-argumentative manner. The audience is unique, however. You are trying to persuade the opposing client and the mediator. Therefore, craft your opening to address that audience. Showcase the strength of your case but avoid aggressive assaults on

your opponent's credibility. Use the same demonstrative aids that you would show a jury or a judge. Enlargements of exhibits and summaries of crucial facts can be persuasive. If you have any relevant videotape or effective excerpts of testimony, use them.

Don't argue. Sell the positives of your case and point out the weakness of your opponent's but do it with civility. There is no reason to offend the very people you are trying to persuade. If you have results from a jury simulation, they can be very effective in persuasion of the opponent and the mediator. Also, their confidentiality and privilege can be protected by agreement in advance of the mediation. Your client paid a lot for that jury research, so get some additional benefit from it at the mediation.

Following the initial presentation, the mediator will usually permit questions. This is not the time for rabid cross-examination. This is a time to ask questions to clarify and explain. For example, instead of challenging with, "Isn't it a fact that ...", ask, "Our people are concerned that ...". A less threatening preface will gather the same, if not more, information.

- Use the theme
- Persuade with facts
- Don't polarize
- Use graphics

F. "Caucusing"

This part of the process is considered the "meat" of mediation and generally one of the most effective and beneficial aspects of the mediation process. A caucus is a private, confidential meeting held by the mediator with each party separately. (Rarely, mediations may be comprised of one continuous joint session, essentially an open, facilitated negotiation).

The benefit(s) of caucusing derive from the fact that the parties have previously been unable to reach accord via private negotiation. Typically, lawyers and their clients become entrenched in their respective positions, and despite interest in settlement, may find themselves talking "at" and "to" each other, rather than "with" each other. It is the third-party neutral mediator's job to bring true dialogue and discourse to already-eager parties.

First and foremost, a mediator must be neutral, dispassionate, and honest. Any display of bias or threat tends to discredit the mediator and the process.

The caucus offers each party a unique opportunity to present their views, opinions, goals, strengths, and weaknesses in a "safe space," where the mediator can help facilitate resolution by sympathetically distinguishing issues and questioning assumptions. For example, typically, one of the biggest hurdles

to settlement is often the lingering, pervasive, but largely unspoken hostility, animosity or other psychological hurdles that would otherwise seem inappropriate to bring to the forefront in arbitration or litigation. These points of "conflict" can be distinguished from the substance of the "dispute," and enlighten a party as to what might have been a non- objective hurdle to overcome. Parties must feel comfortable to bring these to caucus, and a mediator must diplomatically and respectfully address them.

Next, the caucus offers parties a confidential, safe forum to apprise the mediator of their true settlement situation, without posturing and without disclosing to the other side (unless expressly directed to the mediator to do so), thereby enabling the mediator unique information (and therefore power in the sense of ability to fully understand parties' positions) to help bring parties to compromise. While often done, the "better practice" is for mediators to refrain from coercing parties to alter their settlement position, but rather facilitate the parties to reach a compromise of their own accord. The mediator should likewise refrain from emotional reactivity to a position instead utilizing his or her unique position to foster parties to further: analyze, assess, and prioritize alternative solutions to a problem or position.

Parties want, and frankly deserve, to be "heard" by the mediator, who should effectively but respectfully question, challenge, and analyze assumptions, which might be entrenched. Rather than a "day in court," parties should feel they are getting something of equal or greater value from the process. That is not to say that a mediator is a "hand holder," but rather a listener, analyzer, questioner, and determined searcher for truth and alternative ways of viewing potential outcomes to help the parties reach such, by their own volition.

The mediation is typically comprised of caucuses or "shuttle diplomacy" whereby the mediator engages the respective parties and then propounds offers, demands, proposals and counter proposals between the parties. It is critical to remove distortions in communication and eliminate hostility and pretension.

The mediator should be a facilitator, managing the parties' expectations by helping them frame issues, expand resources, and generate and test creative options.

Caucusing provides a unique opportunity for an advocate to candidly express views about how the law and facts procured in formal and informal discovery strengthen or weaken their position. The "better practice" for a mediator is not to dispute such, but rather engage and question, leading to an enlarged and enhanced viewpoint of potential for resolution. Mediators cannot disclose to the other side confidential information given during a caucus without express direction and authority to do so. Similarly, mediators cannot reveal

confidential settlement authority unless directed to do so. The “shuttle diplomacy” and “recency effect” of caucusing, however, very well lends itself to prompting the parties to mutually, if slowly, reveal more facts to each other—and the import they place on certain facts, mutually informing all parties of salient factors that could help lead to resolution. Nuanced details not otherwise disclosed in formal Discovery can be uncovered and understood, again apprising the parties of salient factors.

The mediator is also an analyst and consultant, leading parties back to their underlying interests, rather than their positions, to discern which are the most critical to a final resolution of the problem.

A mediator is also an agent of reality, objectively framing and expanding the perceptions of each party to the other party’s needs and also to framing the context within which the parties can assess the costs and benefits of resolving the dispute.

The real work of mediation begins during the caucusing. Here, the advocate becomes the counselor. A good mediator will make the client the principal actor in caucuses. In most cases, don't resist. You have prepared your client for this role, so for you, win the best supporting award.

- Prepare client for center stage
- Prepare for waiting
- Fewer representatives / Less time
- Share confidences
- Be candid/ Demand candor

G. Concluding and Formalizing the Settlement, if any.

The parties need to feel that their financial and emotional investment in mediation (and indeed it is an investment) is worthwhile. Rare is the mediation that concludes within one hour, unless with good reason. In addition to being “heard” and having “their day and their say,” parties need and deserve to feel that the Dispute (and the Conflict) has been thoroughly, logically, and honestly parsed and resolved. Again, rare is the mediation where one or all parties feel happy or that they procured a great result; that is not the goal. One significant goal of the process is to terminate the Dispute, and if possible, and sometimes more importantly, the Conflict(s). That can be achieved through resolution—sometimes called settlement. Not every situation can—or should be settled, however. The disclosure of certain facts or conduct of parties may, in fact, warrant not settling. Settlement, in and of itself, is not the sole benchmark of a successful mediation, just as a seemingly favorable verdict may not necessarily be the only harbinger of a “successful” trial for the reasons, among others, that

it might be appealed, it might not have awarded all relief sought, and it might have caused psychic damage.

As the process wends through the day (and sometimes night), the mediator and parties should be mindful of: the progress being made; the communication opened (that may have been impossible previously); and "otherness," that is, that the other party is reaching a goal that may also enable oneself to procure a result, and that "other" factors outweigh continued disputation (such as cost and distraction of ongoing litigation).

Invariably, the parties and mediator reach "critical mass," that is, realization of whether the mediation will achieve resolution. This can be prompted very naturally by an organic negotiation process, but more likely by facilitated re-assessment of one's own position(s). At some point, the parties and mediator reach either an impasse or realization that resolution can be achieved. Because (depending on jurisdiction and nature of case) the vast majority of lawsuits end in settlement, there is very little reason why mediation should not result in settlement—and achieved on mutually agreeable terms.

If it appears that settlement is inevitable, then the terms should be strictly and expressly articulated. A somewhat obvious technique is to repeat and re-frame the terms to ensure that all parties fully and comprehensively understand and agree. Then, and only then, can terms be memorialized and reduced to writing.

Somewhat counterintuitively, it is not the mediator who drafts a settlement agreement, but rather one party's representative/counsel who is designated, by agreement, to act as "scrivener" to prepare the written settlement agreement. The mediator might continue to facilitate the process, and repeat, confirm, and verify terms, but the "better practice" is that mediators do not draft the document, in order to avoid any possible doubt that the settlement agreement was procured by the mediator and reflects the mediator's intent or coercion rather than a memorialization of the parties' understanding and agreement.

Unfortunately, after a typically long and challenging day (or more) of mediation, attention may be diminished to the details and nuances of a settlement agreement. Accordingly, "better practice" commands that the parties draft "boilerplate" and even a full settlement agreement in advance of the mediation session. If it becomes impossible to finalize full agreement on all terms, for various reasons, then the parties should finalize as much as possible and agree to a format and method for finalizing the remainder. Contingencies, conditions, and enforcement should be addressed.

If an agreement is struck, you have two goals. First, make sure the deal is memorialized in writing, even if not in final form. Often resolutions are reached late in the day just before the last plane is leaving town. Nevertheless,

write down the key points of the agreement; scribble them in longhand, if necessary and have all sides sign it. This simple memorandum is your client's best protection from the next day's inevitable buyer's remorse. Second, you must help your client sell the settlement at the home office. Properly framing the settlement is an important job of persuasion. Trial lawyers are well equipped for this task. For example, assume you represent a company which settled a case as a plaintiff facing a large counterclaim. You must remind your client's bosses that the settlement is not just the compromise dollars the defendant paid but includes the added value of the dismissed counterclaims.

Get any deal in writing before leaving the mediation. If no deal emerges, you must help your client appreciate that they still garnered value from the mediation. At a minimum, your client obtained:

- Some free discovery
- The opportunity to resolve all or part of the case
- A test-run of your theories
- Insight into your opponent's best case
- A preview of the presentation of the key facts
- A screen test of some witnesses, and
- Audition of the competing lawyers.
- There is a great value, even in an unsuccessful mediation.

H. Mediation: With Apology

1. The Unique Role of Apology in Mediation

Textbooks define mediation as assisted negotiation, but, unlike trial or arbitration, its paramount selling proposition is the opportunity to apologize in private without later regret. Federal Rule of Evidence 408 and its state equivalents provide mediation an umbrella of confidentiality which creates a valuable and often underutilized tool. A sincere, timely apology can be worth millions of dollars in settlement. The earlier an apology is given the better. Some very effective mediation opening statements begin with a sincere apology. An apology from the lawyer is not usually as effective as one from the client. An apology empowers your opponent to accept it, and so it can create valuable leverage for you in mediation. In the context of an apology offered in front of a mediator, your opponent is inclined to accept it. An agreement on that issue can help stimulate further agreements which lead to settlement.

Some suggest that apologies are rarely helpful in commercial disputes. I disagree. Most commercial disputes arise in the context of a failed relationship (employee, long-time vendor, distributor, fiduciary, etc.) where the fight is over money and something as important—breach of trust. An apology can help to stanch the parties' bleeding over broken promises by a former ally. The apology may not repair the commercial relationship, but it may help settle the dispute.

Like all tools, an apology can be destructively misused. A perfunctory or manipulative apology can polarize and may abruptly terminate a mediation. George Burns once said, "The essence of acting is sincerity, and once you can fake that you've got it made." Use apologies, but only if you or your client can be sincere. In almost all cases, the parties can sincerely admit that they are sorry about some aspect of the dispute. But apologies can go much farther. A genuine regret that mistakes were made, proof of contrition, and a commitment to reform can bridge gaps that dollars never could.

2. A Bad Apology Is Worse Than No Apology.

1. Blame Shifter – "I'm sorry you feel that way."
2. Alcohol – "I was drunk."
3. Genes – "It's just the way I am."
4. Forced Forgiveness – "You must forgive me."
5. But... – "I'm sorry, but..."
6. Sympathy – "I had a tragic childhood."
7. E-pology – no email, no candy gram or a teddy bear
8. Generic – "I'm sorry I hurt your feelings for forgetting an anniversary."

I. Mediation in Federal Court

1. Federal Practice Manual for Legal Aid Attorneys—Section 6.4: Mediation

- Federal agencies may use either voluntary or mandatory, nonbinding ADR procedures before an action is filed in court.

    - Federal courts are mandated to provide nonbinding ADR procedures, but they do have discretion to determine which cases are appropriate for ADR referral.
    - Mediation is the most common form of ADR used in the federal court system
- Alternative Dispute Resolution Act of 1998
    - "[e]ach United States district court shall authorize, by local rule …, the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy …" 28 U.S.C. § 651(b).
    - The ADR process "includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration …" 28 U.S.C. § 651(a).
- Benefits of early use of mediation:
    - Better understanding of factual and legal basis for claim may result in mediator perceiving party to be in stronger litigation position and thus putting pressure on other party to settle
    - Helpful to legal services programs with limited resources to pay for discovery expenses
    - Opportunity to discuss with mediator costs potentially involved in litigation
- Settlement conference
    - Counsel and parties expected to appear (in person or by phone) and orally summarize litigation positions
    - Mediator may meet separately with counsel and parties to discuss case and facilitate reaching full or partial settlement

J. Bench Trials Following Settlement Conferences

Rule 16 of the Federal Rules of Civil Procedure expressly provide for a judge to preside over settlement conferences. Many find this practice improper, because a settlement judge involved in settlement negotiations who also serves as the presiding judge may lose appearance of impartiality. Campbell Killefer, Wrestling with the Judge Who Wants You to Settle, ABA Litigation News (2017).

- Reasons for favoring presiding judge's involvement in mediation
    - Personal knowledge of case
    - Best position to evaluate merits of complex cases with several legal issues
    - May be able to offset "distribution inequalities" that may result in unequal bargaining power
- Cautions
    - Judge is aware of all statements made during settlement negotiations, which are generally inadmissible in a jury trial
        - May stifle open negotiation/unduly influence party's decision to settle or engage in settlement discussions
        - May prejudice a judge
    - Judge may become tainted and fail to ignore information discussed in settlement conference

K. Holistic Approach to Mediation

1. Introduction: Problems are inherent in human nature.

We each have our own ideas and thoughts on a subject and there are times when the person (company) we are dealing with is not on the same wavelength. Courts were set up to help people settle their disputes without resorting to violence. Somewhere along the way people forgot how to settle their disputes without going to court. Thus, the Court System became an entanglement to which only those privileged few (lawyers) knew how to weave through the process. Thus, the average citizen became lost in this forest of bureaucracy - unable to understand the process which has culminated in an overall distrust of the legal system.

Mediation provides a new avenue of dispute resolution a process whereby individuals can empower themselves to create their own destiny.

As an attorney you are in an exciting position to facilitate the mediation process and create not only an environment where a solution to an initial problem is remedied but as a result you have fostered a dichotomy that can restore both parties to a healthier happier state of being.

2. Conflict can be turned into positive energy when it is directed properly.

There is an old saying that you are only given what you can handle and what does not kill you makes you stronger. That is true with conflict. The person that can handle the situation in a mature fashion has a better chance of rising above the dispute and gaining something positive from the experience.

Thus, Mediation gives both parties an outlet to design an outcome that will benefit all concerned. It will be a solution that will not be imposed by a third party that really has no interest in the dispute like a judge or jury.

All clients tell you they want to "win" and they want to see so-and-so "get what they deserve". This statement is not as simplistic as it appears. There is a deluge of emotion that goes along with that simple sentence. There is an underlying current of animosity, hatred, betrayal and other self-defeating emotions – These emotions play a crucial role in any conflict – it is not just about the win. Of course, there will be the occasional sociopath that will comprise about 2% of your clients (I hope your sociopath figure is low) that no amount of reason will ever budge their destructive thought patterns.

For those of us that went into the practice of law to help people, mediation can provide the basic starting point for a holistic approach to law. If on the other hand you are one of those lawyers that went into the practice of law to get rich, have power and not get attached to the personal trauma of your clients and are only forced into mediation due to a court order for your client, mediation can help you further your business goals when you understand the process.

Whether you call yourself altruistic or a power-monger attorney, mediation can work, and you and your clients are the benefactors.

IV. What Mediation is Not

A. A Path to the Poorhouse for Attorneys

It can have the opposite effect. If you can resolve disputes in four hours rather than two years of litigation that has been dragged out, you are free to help more people. Think of the time and cost savings to your practice:

- No Interrogatories
- No Depositions
- No Court Reporter to record and translate deposition
- No Travel to Court and wasted gas (several times over the course of two years)
- No Time in Court to keep extending litigation, a motion here, a motion there --- 1 1/2 hours of court time, each time you enter the courthouse
- No calls from the client 3 times a week looking for an update

B. The Easy Way Out

Some lay persons think that mediation is a cop out for lawyers that do not want to practice their fancy footwork or magic as you will. The chess game will not be played and thus the lawyer is not doing their job. Again, the opposite is the effect. Whether you are the mediator or the attorney recommending mediation, encouraging opposing parties to settle their disputes together in a non-confrontational manner is no easy task. Once achieved it is an important step in acquiring the trust of your client that you have their best interests at stake. Furthermore, you can point out that their best interest:

- Is to not have a disinterested 3rd party make decisions for them This issue will be resolved sooner than later
- Resolution will cost less from their pocketbook in reduced lawyer fees and potential court costs

C. Practiced by “Wimpy” Attorneys or “Passive” Non-Attorneys

Many attorneys refer to themselves as aggressive advocates for their clients and many lay persons believe that this notion is the only adjective to

describe a good lawyer. Looking at the words aggressive, assertive and passive, Webster defines aggressive as wanting to dominate by attacking, domineering (involving attack) enterprising and forceful. Assertive on the other hand is described as domineering - positive, allowing no denial or opposition.

> ***The difference being the word "attack" What kind of lawyer 'attacks' another? Isn't a forcible attack on another called assault? What kind of la wyer wants to be known for assaulting an opponent's client?***

The word passive conjures up many peace rally type images, according to Webster, passive is not reacting to an external influence, inert, offering no resistance, (of a person) lacking initiative or drive. Lawyers involved in mediation are far from passive or lacking initiative or drive. The act of setting up mediation, whether the attorney is the mediator or counsel to a litigant is an assertive step with the best interests of the client upheld. As we delve further into this study you will see that the preparation involved by the attorney and client are what make or break effective mediation.

D. The Coach Approach to Mediation

Before we get into the process steps, I would like to share a few excerpts from a Coach Approach to Law taken from Philip J. Daunt's website, www.coachapproachlawyers.com.

Particularly useful to the mediation process are the following three distinctions that when addressed can assist the client in moving forward in their life and expedite negotiations:

1. Distinguish "Blame" from "Responsibility"

"Blame" stresses censure or punishment for a lapse or misdeed for which one is held accountable and involves anger and resentment.

"Responsibility" involves personal accountability without anger or resentment, censure or punishment.

The client's choice between blame and responsibility affects the client's ability to move forward toward a workable solution to the legal problem

2. Distinguish "Epinephrine" from "Endorphins"

"Epinephrine" is a hormone secreted by the adrenal medulla that is released into the bloodstream in response to physical or mental stress as from fear or injury. It initiates many bodily responses, including the stimulation of heart action and an increase in blood pressure, metabolic rate, and blood glucose concentration.

An "Endorphin" is a neurochemical occurring naturally in the brain and having analgesic properties.

The thoughts we choose to dwell on can generate either one substance in the body or the other. Which one serves the client more?

3. Distinguish what "Cannot" be changed from what "Can" be changed

The client can only change the client's own thoughts and actions, not the thoughts and actions of others

The disempowering consequences of focusing on what the client cannot change

My favorites are 2 and 3 above. What better reason to quickly end a conflict than to regain your health to become the vibrant person that you once were prior to this conflict. All court related matters are stressful. Whether a client will admit that there are changes to his/her health is a choice. The client is not the only person affected by the stress of litigation; it spills over to family and work. Not only are these other individuals affected by the clients' attitude but in turn their own attitudes are affected as they interrelate with the client.

No one will ever argue with you that the past can be changed. Thus, if the past cannot be changed then there is no sense dwelling on it. The question to ask your client is how can I help you move past this experience? What do you want/need to end this situation and get on with your future life?

The above snippets from the Coach Approach to Law are a great starting point for you as an attorney to help your client move forward. You are giving them the mindset that they need for successful negotiation.

Additionally, consider these possibilities:

- The client is always free to choose between alternatives The client is constantly choosing, but mostly subconsciously
- Conscious choice allows the client to create and move toward clear goals
- If the client doesn't choose, someone else will choose for the client

By giving up the need to dominate the other party, attorneys and their clients can focus on solutions that work for the client moving forward into the future, (instead of dwelling on the past).

These solutions can either include collaboration with the other party or not; it's the client's choice.

For those of you that operate on a higher plane you may want to pass this statement on to your clients:

- When You Block or Deny an Emotion:

> ***Let's imagine ...***
>
> ***That when you block or deny an emotion,***
>
> ***You've crystallized the energy and now you need to***
>
> ***Symbolically pick up a rock and put it in your emotional bag.***
>
> ***When you block, store, deny, Or stay stuck in an emotion, Imagine carrying rocks ... Visualize this as a literal rock***

In your emotional bag, A heavy rock that you carry all the time.

E. Applying the Coach Approach to Law

When a lawyer applies a coach approach to the practice of law, the lawyer works collaboratively with the lawyer's clients to assist them in transforming their legal problems into opportunities for positive change and spiritual growth. The coach-approach lawyer achieves these goals by engaging the client in profound conversations about choice and the freedom to choose the client's own interpretations of events and the significance to the client of those events and by inviting the lawyer's clients to place their legal problems into the context of their lives and of their goals, aspirations and dreams.

V. Moving Forward

A. Ten Key Distinctions

As part of the process of providing the client with legal services, the coach-approach lawyer coaches the client to choose among ten key distinctions that will assist the client in moving forward. The coach-approach lawyer invites the client to distinguish:

- Between perception and reality, story and fact and the consequences of confusing the one for the other
- Between emotions and feelings and the consequences of confusing the one for the other
- Between the "truth" and "beliefs" and the difference between disempowering beliefs and empowering beliefs and the consequences that arise from choosing one over the other
- Between affixing blame and accepting responsibility for a legal problem and the impact that choosing one response over the other has on a client's ability to move forward toward a workable solution to the client's legal problem

- Between sin and mistake, (generating either guilt or reasoned regret), and the consequences of believing that a past act was one or the other
- Between thoughts that generate adrenalin/cortisol and those that generate endorphins and the impact on the client's health of the presence of one or the other substance in the client's body
- Between motivation and inspiration and the pressure or the vacuum that results from choosing one over the other
- Between illusionary force and true power of unattached intention and the consequences of choosing thoughts and actions that create one or the other
- Between acting from a domination paradigm and a partnership paradigm and the consequences of operating from one or the other
- Between what cannot be changed and what can be changed and the implications of focusing on one or the other

B. Eight Possibilities

The coach-approach lawyer invites the client to consider the possibility that:

- The client is always free to choose between alternatives and, in fact, chooses constantly, though mostly subconsciously
- The life the client lives is largely the result of the choices that the client makes
- There are advantages to be derived from making conscious choices, rather than subconscious ones
- Choosing one thought over another can give rise to emotions and feelings that can physically change the composition of the client's body, for better or for worse
- The client can derive advantages from choosing to abandon thoughts of anger, blame, resentment, sin, guilt and fear and to replace them with blameless acceptance of responsibility for the legal challenges the client faces
- The client can derive advantages from letting go of the need to affix blame for legal challenges, whether to others or to the client, him/herself

- Forgiveness may not be enough; curiosity and gratitude just might take you farther
- Learning to distinguish blame from responsibility, then to embrace responsibility may enable the client to explore creative solutions to legal problems, focusing the client's energy on what can be changed, not on what is beyond the client's control, allowing the client to shift the client's life to new levels of productivity and fulfillment.

C. The Follow-Up

Not all mediators follow-up. I like to call each party to ensure that the final draft was correct as discussed and signed.

1. Resuming Mediation

If no agreement was entered into, the floor is left open to resume discussions at a later date or to move the issue to a court calendar.

2. Confidential Document Handling

After an agreement is reached and signed all paperwork by the mediator is shredded.

D. Rules for Mediation

- Come Prepared – think of what you want to get out of this session – what will bring peace to your mind/heart/soul.
- Casual Dress – This is not a Court of Law – suits are discouraged. Wear what makes you feel comfortable.
- Attendees – Only the parties involved are invited to this session and their attorney (if they have one). Friends/children/moral support companions are only admitted when the other side agrees.
- Open Mind – Bring an "open mind", unrealistic expectations should be left outside. Nothing can be accomplished in mediation if one is incapable of listening to possible alternative solutions. Remember, there are always two sides to every conflict.

- Attitude – Anyone gets an “attitude”; swearing, disrespectful to the moderator or other parties – the session will be immediately terminated with no refund.
- Confidential – Everything discussed in the session is confidential. Exception: we will report child abuse. All documentation/notes are shredded after a written agreement is submitted and signed by both parties. The written/signed agreement then becomes binding and is enforceable in a court of law. The mediator cannot testify in court as to what was discussed during the mediation session.

Coming prepared cannot be stressed enough.

Do not waste the mediator’s time, opposing counsel’s time or your client’s time. Consider mediation like a trial without the rules, you would not walk into a trial without a game plan, without actual costs incurred or costs for remedial measures such as schooling or fixing a broken fence. Don’t come to mediation without the same preparedness. Mediation is not a trial run for a bench or jury trial.

I like to emphasize casual dress. I do this for the most obvious reason – to keep everyone on a level playing field. If I could throw hospital gowns on everyone I would. (Try it sometime and let me know your results.) This goes back to your 101-psychology class in college – some people are intimidated by suits. When people are intimidated, they do not generally speak their mind, keep things hidden and thus hinder the agreement process. You are in mediation to get people talking not to intimidate the players. If you are coming from court, I would recommend at least taking off your suit jacket.

Only the parties involved should be present with their attorneys. The less people in the room the better. You do not need the distractions of children or significant others unless they are directly related to what is being negotiated.

1. Bring an Open Mind

This speaks for itself. If you are an attorney bringing a client to mediation, it is wise to mention that their picket fence is not worth

$50,000,000.00 just because it has been in the family for 100 years (unless it was made of gold or silver) does not make it an antique. Unrealistic expectations need to be nipped in the bud prior to mediation.

2. Attitude

Very Important! Disrespect to anyone by anyone, attorney or client can end the session immediately. No one puts up with abuse in my mediation session. I find that using the words "no refund" is sufficient to keep sharp tongues in place

3. Confidentiality

The mediator cannot discuss the mediation with anyone. All notes are shredded after the agreement is signed. Some mediators shred right after the session, I prefer to wait until I know the final agreement was signed in case the parties have to come back. I and many other mediators make an exception to confidentiality in the event that child abuse has been brought up. The mediator cannot testify in court as to what was said in mediation. The written/signed agreement is enforceable in a court of law.

VI. Conclusion

Mediation is an effective, efficient method to resolve disputes and conflicts, when approached in an objective but also innovative manner. The basic and fundamental groundwork for the process provides a unique opportunity for otherwise discordant parties to reach accord of their own empowered choice. "Science and art."

Resources

Resources Specific to this Course

American Bar Association & American Arbitration Association & Association for Conflict Resolution. (2005). *The Model Standards of Conduct for Mediators*. https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf

The Model Standards of Conduct for Mediators was prepared in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the Model Standards in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

Resources for the Legal Professional

ABA Center for Professional Responsibility - www.abanet.org/cpr

Chicago Bar Association - www.chicagobar.org

Commission on Professionalism - www.2civility.org

Judicial Inquiry Board - http://www.illinois.gov/jib

Illinois Board of Admissions to the Bar - www.ilbaradmissions.org

Illinois Department of Financial and Professional Regulation - www.idfpr.com/default.asp

Illinois Lawyers' Assistance Program, Inc - www.illinoislap.org

Illinois State Bar Association - www.isba.org

Illinois Supreme Court - www.state.il.us/court

Lawyers Trust Fund of Illinois - www.ltf.org

MCLE Program - www.mcleboard.org