

## INTRODUCTION

# The Big Picture

*As mediation has become commonplace, litigators think they know all about it. As a result, they have been trying to make the mediation process an adjunct of litigation without realizing that it is a different process. They fail to use mediation to its full potential and can instead impede settlement.*

—Louise LaMothe, mediator (2010, p.66)

*Representing Clients in Mediation* is designed for lawyers who need to help their clients mediate legal disputes that typically involve a claim for damages. This book probably differs in at least two ways from others you have seen on the subject.

First, this book offers multiple perspectives on all aspects of the mediation process. My research included almost 40 interviews with a variety of experienced mediation players—litigators in private practice, inside counsel, mediators, mediation program administrators, and law professors specializing in the field.<sup>1</sup> You will hear their voices throughout these pages, talking about what works and what doesn't. They are joined by the voices of dozens of other mediation players who have written or publicly spoken on the topic, whose advice is also incorporated here.

These multiple perspectives create a conversation that gives you the benefit of differing opinions on the best way to handle certain aspects of mediation advocacy. As with litigation, mediation is an art, not a science. The practitioners I've interviewed provide insight into how mediation of legal disputes may vary in a range of settings and contexts—for example, mediation of a securities claim under a contractual ADR

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1. In addition to elite, distinguished veterans, I also sought lawyers whose backgrounds reflect the workaday world of mediation practice “in the trenches.”

clause versus court-ordered mediation of a personal injury claim versus voluntary mediation of a complex, high-stakes business case.

Second, *Representing Clients in Mediation* provides step-by-step advice covering the entire mediation process in detail from beginning to end. Despite variations in how mediation of legal disputes is carried out in different jurisdictions, forums, and practice areas, there are wide areas of agreement among experienced mediation players—including those whose perspectives are reflected in these pages—as to how to get the best results. If you follow the 12 steps outlined here, you can feel confident that you have cost-effectively done all you can to ensure the best possible outcome for your client.

Another unusual and useful feature of this book is that, in addition to the main text, every chapter includes a variety of sidebars—stand-alone pieces that are often just a page or so in length. Many of these sidebars are excerpted from interviews, containing the words and viewpoint of a single mediation player. They range from instructive anecdotes to direct “me-to-you” advice on specific mediation topics.

For example, three sidebars are included in this introduction. In Sidebar I-1 (“Andrew Berry’s Rules for Success in Mediation”), a former law-firm chairman offers mediation advice at the culmination of his 40-year career. In Sidebar I-2 (“How to Doom a Mediation”), three mediators provide tongue-in-cheek guidance on how lawyers can most efficiently *poison* the mediation process. Just do the opposite and you’ll be fine! Sidebar I-3 (“What One Partner Tells Associates About Successful Mediation Advocacy”) distills what new lawyers at one firm are taught about mediation and negotiation.

As you will see, seven of the 12 steps described in this book must be taken before the mediation session begins. In that sense, the session itself is the tip of the iceberg. That does *not* mean you have to spend many hours preparing to mediate a nickel-and-dime dispute. The actual amount of time will be in reasonable proportion to the size and complexity of the case—but it is essential to touch all the bases along the way.

Here is a preview of the 12 steps, along with a sample of what you will find in the chapters that discuss them.

## **Step One: Check Out the Governing Rules and Plan Accordingly**

Although mediation is less standardized and more flexible than litigation, there are still rules—and the specifics can vary significantly. Step One includes four substeps, from locating the applicable rules to learning about the local realities of mediation practice in your forum. Along the way, you will find a discussion of court-ordered (“court-annexed”), contractual, and purely voluntary mediation in terms of key rules that may potentially apply (and what you should check for at the outset.)

Among this chapter’s seven sidebars: In Sidebar 1-4, mediators, counsel, and mediation program administrators discuss the problem of parties who participate in court-ordered mediation solely for the purpose of “punching their ticket.” In Sidebar 1-7, a prominent construction lawyer talks about mediation in complex cases where many parties are involved.

## **Step Two: Agree on a Mediator (If You Have a Choice)**

Where you have the right to choose, selecting the right mediator for your case may be the single most important decision to increase the likelihood of a good outcome. An effective selection process involves substeps that culminate in execution of a mediation agreement and filing a notice (where applicable), all set forth in Step Two. The substeps include a discussion of deciding with opposing counsel on one of the six possible ways to arrive at a mutually acceptable candidate, followed by agreement and buy-in on the best person for the job. Of course, the chapter also deals with familiar distinctions between facilitative and evaluative mediator styles (as well as some other approaches), offering advice in deciding what approach along that spectrum might be most beneficial in your case.

Sidebars include Sidebar 2-2, in which experienced players discuss the pros and cons of selecting a former judge as your mediator. Sidebar 2-5 describes the potential benefits of a “judo maneuver”: deliberately opting for your opponent’s preferred choice for the mediator.

### **Step Three: Agree on Tailored Ground Rules (As Needed)**

The fact that most mediation systems have relatively few procedural rules makes them very flexible—but it also puts the burden on the participants to agree on more detailed and specific ground rules to suit their particular case. As an ABA task force has noted, “sophisticated repeat users [want] to have substantive input into the mediation process itself.” The chapter covering Step Three offers detailed advice on what specific aspects you may want to tailor with your opponent and the mediator, and why. It also discusses effective use of a pre-mediation conference or its equivalent.

A sampling of sidebars: In Sidebar 3-3, national mediator John Bickerman talks about under what circumstances planning to hold a joint opening session may not be a good idea. Sidebar 3-4 describes an alternative model for mediation where the parties spend the entire mediation session at the same table, with no private caucuses. Sidebar 3-7 addresses the topic of *ex parte* communications with the mediator.

### **Step Four: Exchange Information With Your Opponent, Including an Exchanged Memo for the Mediator (As Warranted)**

For best results in mediation, experienced players agree that besides obtaining key information about your opponent’s case, it is in your client’s best interest to ensure that your adversaries also have key information *they* will need in advance of a mediation session. In addition to activities such as direct exchange of documents, exchanged mediation memos—which are required in some forums—can be a means to exchange information as well as to bring the mediator up to speed. The chapter covering Step Four looks in detail at exchanged mediation memos, including their functions, ideal content, style, and timing.

Also, Sidebar 4-2 offers first-person advice on how an associate can best help a senior lawyer with the exchange of documents and memos. In Sidebar 4-3, a mediator tips you off on phrases to avoid in your mediation memo.

### **Step Five: Confidentially Brief the Mediator (As Allowed or Required)**

In addition to or instead of a memo exchanged between the parties, you may be required (or allowed) to submit a confidential memo for the mediator's eyes only. The chapter on Step Five includes a discussion of why it is important to help shape the mediator's view of your case as early as possible (even though she will not be acting as a judge) and how to make an "eyes-only" memo work best for you. You will also find advice on when it may be worth drafting both an exchanged memorandum and a confidential brief.

The chapter's eight sidebars include "A Clerk's-Eye View of Confidential Mediation Briefs" and a longtime mediator's explanation of the characteristics that prompt him to read the briefs of one particular lawyer before the rest.

### **Step Six: Prepare Yourself for the Mediation Session**

In preparing for an upcoming mediation session, there are some tasks that you will likely perform on your own, while others will be completed in the course of preparing your client. Step Six involves the first set of tasks. The chapter on this step describes seven substeps, from moving toward calculating a financial value for your case to preparing a skeleton settlement memorandum.

Among topics of the chapter's eight sidebars: using Litigation Risk Analysis as a mediation tool, preparing "zingers" for use in the mediation session, and determining how to proceed if your mediation team for a corporate client includes an executive who was the alleged wrongdoer in the case.

### **Step Seven: Prepare With Your Client for the Mediation Session**

At least one experienced mediator lists inadequate advance client preparation as the number-one mistake that inexperienced lawyers make in mediation. Adding to the advice in Step Six, the chapter covering Step Seven describes seven substeps to help you avoid this mistake. One important substep is to agree

on a negotiating plan for the session. Coverage of this substep includes a discussion of negotiation theory—not just the now-familiar concept of interest-based negotiation, but a critique that this concept has limited practical application in mediating many legal disputes.

Along the way, you will find specific advice on how to arrive at a starting number for negotiations, as well as one mediator's model of how to plan in advance a series of offers to make in an upcoming mediation session that is not dependent on your opponent's responses. Sidebars in this chapter include an inside counsel's advice on preparing business executives, a mediator's views on worthwhile objectives besides settlement to discuss with clients before the session, and an example from a litigator of how good communication with her client made a difference while preparing for a mediation session.

### **Step Eight: Start the Mediation Session Strategically**

The initial joint part of a mediation session—where the parties typically convene together with the mediator and each side makes an opening statement—is an example of a topic where multiple perspectives make a big difference. Are opening statements really worth doing? In the chapter on Step Eight, seasoned mediation players make reasoned arguments on each side of that issue, while others describe why they believe the answer depends on certain variables. If you make an opening statement, what should you try to achieve, and how? Should your client participate? What about visual aids? These are just a few of the questions this chapter deals with in the course of describing seven substeps to make the most of the start of your mediation session.

On the topic of information or evidence that your opponent doesn't know about yet, Sidebar 8-5 deals with the question, "Should I hold something back for trial?" In Sidebar 8-6, a mediator recalls a plaintiff's video exhibit so effective that the other side was stunned. Sidebar 8-7 tells the story of "The Initial Joint Session That Swallowed a Mediation."

### **Step Nine: Position Your Negotiations at the Initial Private Caucuses**

In the series of private caucuses between each party and the mediator that typically follows the opening session, the first one or two are often qualitatively different from the rest. The chapter on Step Nine tells you what the mediator's goals and techniques are likely to be for her initial private caucuses with your side, and offers guidance—in eight substeps—on what *you* should be trying to achieve (and how).

The sidebars to this chapter include a dramatic example of the power of client venting, a mediator's explanation of what he hopes to get from a party during first caucus, and a discussion of the roles of outside lawyers in relation to inside counsel during the caucus stage of mediation.

### **Step Ten: Pursue Your Plan for Movement Through Caucus Rounds to Settlement or Impasse**

From the point that a party puts an offer on the table, the negotiating can potentially begin in earnest. You will find a range of guidance in the chapter covering Step Ten on how to move toward your goal proactively rather than reactively and ultimately bridge the inevitable gap to settlement. You will also find concrete advice on how to lower the danger of impasse, as well as perspectives on when the best course of action is to cease efforts to settle at the session and focus instead on ways to advance the ball afterward.

Among the many sidebars, you will find an illustration of how opposing parties sometimes miscommunicate through numbers; an example of how the “fatigue factor” can wreak havoc in a session; the story of a mediation where both parties unexpectedly came out ahead; and “What Maralee Eriksen Learned From Watching 40 Mediated Settlement Conferences.”

### **Step Eleven: Seal the Deal, Plan for Future Resolution, or Disengage at the Closing Joint Session**

Regardless of how the negotiating rounds of caucuses end, the closing joint session requires careful handling for best results. Step Eleven outlines helpful substeps to follow for each of three possible scenarios: (a) the parties have reached an agreement on all issues; (b) the parties have made progress, but there are still outstanding issues to be resolved; or (c) the parties have reached an insurmountable impasse, and any further mediation efforts at this stage look unproductive.

This chapter has three sidebars. Two discuss items you need to consider for inclusion in any settlement agreement. The third discusses a hybrid of mediation and arbitration that has sometimes been used to sidestep the parties' impasse.

### **Step Twelve: Follow Up as Needed in the Postsession Period**

Under scenarios (a) and (b) in Step Eleven, you very likely have more work after the mediation session ends. Step Twelve offers advice on how to proceed if you signed a term sheet (but not a full-fledged settlement agreement) at the closing joint session, or if you and the other side agreed on further steps to help reach a settlement down the line.

Now that you have seen the big picture, you are ready to start reading Step One—or simply dive into whatever part of the book seems likely to help you the most at this moment.

## SIDEBAR I-1

**Andrew T. Berry's Rules for Success in Mediation**

*In more than 40 years of law practice, the late Andrew Berry's experience as an advocate in mediation ranged from the ordinary to mass-tort insurance coverage behemoths involving 50 or so different entities. In an interview years ago, I asked him: "If you were asked to give a speech on the 10 secrets to successful mediation, what would be secret number one?" He jokingly replied, "Get a piece of paper with numbers 1 to 10 so you [can] keep track." Berry then proceeded to surprise himself (and me) by actually coming up with seven "rules" off the top of his head. Here they are, along with some of his explanations.*

**Rule #1: Understand that nobody, including the mediator, is going to be completely candid.**

This rule has nothing to do with ethics; it arises from the simple fact that negotiations in mediation are what Berry called a sub-optimal candor environment. "The parties trust the mediator as a general proposition, but understand that the mediator may take minor liberties with the truth. So you won't—and the other side won't—be completely candid with the mediator until you really get down to short strokes."

An example of the mediator's minor liberties: "A good mediator will not give you his candid opinion of how good your case is. A good mediator will tell you your case is worse than you think it is—and probably worse than *he* thinks it is. He will do the same thing to the other side."

Similarly, "when the mediator says, 'I think I can get the other side to X [dollars],' it may mean that the other side is already at X, or that the other side has said there's no way on earth they're ever going to get to X. But if the mediator is candid in revealing either one of those positions, it will make it harder to settle the case."

Meanwhile, you may take minor liberties when talking to the mediator. (This does *not* include playing fast and loose with the facts of the case; see Rule #3.) For example, if there are four items up for negotiation, you might "spend a lot of time

explaining why piece number four is critically important” to you, so that “when it comes time to trading and you trade piece four, you increase the chances you’ll get something for it. You’ll either get credit for it that’s usable in ‘buying up’ *their* pieces, or they will think that they have won something and psychologically be more agreeable.”

And of course, you know that the other side will be doing the same thing with *you*.

**Rule #2: While you want to negotiate to “yes,” it’s okay to say no.**

This rule is based on the premise that “sometimes even the best mediator can’t get the other party to a place which roughly approximates the litigation risk alternative dispute resolution analysis.” There is a danger that you (and your client) may nevertheless become so caught up in the process that you give away too much in order to get a resolution.

To be able to know when to say “no,” it is essential to do a good litigation risk analysis before walking into the mediation session. If you do, and you and your client have communicated well with each other in advance, “you know what your stopping point is.”

Of course, sometimes facts can emerge during the mediation that may raise a defendant’s estimation of the settlement value. And for either party, other considerations may justify a higher settlement than the strict value of the case. For instance, your client may be willing to pay somewhat more (or accept less) just to be done with it or to save the time of company executives. But this should be the result of a calculated decision—not getting swept away in the moment.

However, that doesn’t change the basic rule: “It’s okay to say no, even if you disappoint the [mediator], and even if it makes the other side crazy.”

**Rule #3: Appear to be entirely candid—and actually be quite candid.**

Although this rule may seem to contradict Rule #1, Berry called it a corollary, because he was talking about a different kind of

candor. It is one thing to obscure your views and intentions in the negotiation process; it is quite another to misrepresent facts or break promises.

“In mediation, getting caught up in a small exaggeration is an almost trivial event. Getting caught in a big, fat lie is bad for your client in that mediation, bad for you in that mediation, and bad for you in other mediations—at least if any of these mediators talks to another.”

An example of breaking Rule #3 during a private caucus with the mediator would be to somewhat misstate the content of certain e-mails in order to exaggerate how much they help your position in a contract dispute. A competent mediator will then bring up those e-mails in his caucus with the other side—and your credibility takes a nosedive. “Believability is very important in mediation, as in life.”

**Rule #4: Keep careful track of the “bid” and “ask”—and the reasons asserted.**

As figures start to be exchanged back and forth during the mediation session, don't just rely on your memory. You will want a complete record of how the offers and counteroffers evolve. This will help you develop a clear picture of “what's negotiating to the middle, how you signal what the middle is,” and “what's a false middle.” It will also enable you to say things to the mediator like, “You know, that's a movement of less than two percent. If that's what they really mean, we're not going anywhere.”

By “the reasons asserted,” Berry meant the rationale that an opponent (or you) may give for putting a certain number on the table. At a minimum, this will help you stay clear. In an ideal case, you might even be able to put your hands on facts or legal precedent that undermines your opponent's rationale—and thus weakens his number.

**Rule #5: Come in with a really good, readable mediation statement.**

This rule refers to the memoranda or letters that parties often provide to the mediator in advance of a session. “Any time you tell your story in a lucid and persuasive way, you're advantaged.

I mean at the margin, mediators are human! They prefer to be dealing with people who are relatively candid and relatively intelligent and relatively open about their needs and their willingness to make compromise.”

Even though the mediator has no power to force settlement decisions, his assessment of the strength of your case may help shape his idea of where the negotiated numbers should end up. Beyond this, “virtually all mediations at some point turn into evaluative mediations” to some degree, “even if they weren’t set up as such.”

**Rule #6: Either have good stamina or refuse to work late at night.**

“It’s amazing how many deals you get done when people are exhausted,” Berry said. “Sometimes that’s right and sometimes it’s not right.”

From Berry’s perspective, it’s right to the extent that fatigue helps foster a momentum in favor of getting the case settled and done. At the same time, “fatigue does affect one’s judgment.” If your opponent’s judgment is affected (to your advantage), then great—but if fatigue causes you or your client to lose sight of your proper stopping point (see Rule #2), it’s bad.<sup>2</sup>

One of Berry’s favorite classic movies was *The Hustler*, starring Jackie Gleason as a legendary pool player and Paul Newman the young rival who ultimately wears him down. You want to be Fast Eddie—not Minnesota Fats.

**Rule #7: Start out by being more respectful to the [mediator] than he [or] she might expect.**

If you don’t know the mediator personally, you don’t know how much deference he wants to receive. For example, does the mediator who is a retired judge (which is common) prefer to be called Judge Jones or Charlie?

Better to start with Judge Jones. If the former judge then says, “Please, call me Charlie,” you can become less formal and

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2. For an anecdote illustrating this, see Sidebar 10-5: “The Fatigue Factor.”

everything will continue to go smoothly. But if you call him Charlie and he corrects you—“That’s ‘Judge Jones’”—you’ve started on the wrong foot.

“You can always get more casual and friendly as the mediation proceeds. It’s very hard to go in the opposite direction.”

Even if the mediator is someone you know well—perhaps someone you’ve mediated previous cases with—you should still start with an air of formality. This is especially true where your opponents do not have the same previous background with the mediator.

“If you go in and say, ‘Hi, Charlie,’ in the presence of the other side, that could be read as suggesting a level of familiarity with the mediator—and either an accurate or a false suggestion that your friendship with the mediator will be to your advantage and to their disadvantage. And because the mediator understands that it could be read that way, the mediator will be angry at you.”

## SIDEBAR I-2

### How to Doom a Mediation

*By John J. Upchurch, Kimberly Sands, and Michael S. Orfinger*

*A panel of mediators from across the United States compiled a boldface list of mistakes that often cause failure. Mediators John Upchurch, Kimberly Sands, and Michael Orfinger (whose firm has offices in Florida and Alabama) added commentary to write an article (2011), from which this sidebar is adapted. It is worth noting that at least four of the featured paths to doom involve inadequate preparation for the mediation session.*

#### **1. Fail to prepare the client and/or decision maker for mediation.**

Participants should be prepared for the process itself; i.e., be fully briefed as to the dynamics of the mediation process, the

nature and extent of mediation confidentiality and privilege and the underlying policy rationale for its existence, and an idea of the basic procedural aspects of the mediation experience. Evaluations and strategies should be sufficiently flexible to be responsive to opportunities and new information learned during the mediation. This capability is predicated on a thorough discussion and analysis of the parties' strengths and weaknesses leading into the mediation. There is no effective alternative to a meeting in advance of the mediation session itself.

### **2. Fail to prepare your *adversary* for mediation.**

It is important to precondition your adversary as much as possible in order to set the stage for a successful outcome. This requires timely, effective communications in advance of the mediation date. Often, despite the requirement that representatives with "full authority" attend, in actuality the representatives in attendance must "call the home office" to get additional authority to settle. The safest strategy is to assume that you must educate some distant authority figure in advance. Hence, a judgment should be made as to what critical evidence will be shared in advance, most often in the form of the mediation summary. Timing is critical. Assume it will take several days, at a minimum, for the "claims committee" to meet, compare notes, and set an appropriate reserve on the file.

### **3. Fail to involve the mediator in pre-mediation preparation.**

Many mediators will, as a matter of course, interview all counsel in advance. However, if this doesn't appear to be your mediator's practice, engage the mediator to meet in advance, whether in person or by telephone. This affords counsel an advance opportunity to prepare the mediator for the peculiar dynamics at play in a given case that are likely to affect the outcome. Also, this is an opportunity for counsel and the mediator to identify and be well prepared for special complexities such as coverage disputes, estimates, or expert reports.

### **4. Fail to consider your audience.**

It is critical that the advocate determine in advance who will attend on behalf of his or her adversary. The identity and back-

ground of the decision maker is particularly important, and worth some independent inquiry if there is information available from colleagues, or even a Google search. This applies both to counsel as well as the client representatives. Your research into the character and background of your audience will influence your approach in the opening, with the goal of securing maximum persuasive impact.

**5. Make ineffective use of posturing.**

Mediation is the business of managing ambiguity, vague signals, and even shifting goals on the part of the participants. Frequently a party will become frustrated with the process, or become anxious to wind things up, and declare in absolute terms something like, “This is my bottom line—and if you don’t agree to pay it, this mediation is over.” Should you be the advocate who resorts to this tactic, you will almost certainly experience (a) a failed mediation plus (b) an untenable position from which to restart negotiations later should your client’s interests so dictate. A more enlightened strategy is to advise the mediator that you have reached the end of the line for this session—and ask for an adjournment. Let emotions cool.

**6. Allow absence of the decision maker.**

We are all aware of the practice of insurance carriers to send representatives who do not have the independent discretion to increase their authority absent “phoning home.” But lack-of-authority problems are not limited to insurance companies. Encourage the personal attendance of as highly ranked a representative as possible. At a minimum, it is important to have the ultimate authority figure available by telephone to consult during the mediation. Encourage that person to let the mediator participate in the discussion, even with the understanding that he or she will be excused at some point for private consultations.

**7. Resort to offensive or unethical practices.**

Perhaps it is asking a lot to require counsel for the litigants, engaged in the “war” of litigation, to suddenly become friendly delegates to a peace conference. Yet for mediation to work, this transformation is a necessity. Mediation is often an appropriate forum for a party to vent and “blow off steam”; this process

often provides the cathartic effect the client needs to reach a settlement. Sometimes, however, mediation becomes a forum for the *attorneys* to vent—casting the opposing counsel or client in a negative light and generally sabotaging any realistic chances of settlement. No legitimate interest of the client is served by blowing up a mediation by engaging in overtly offensive or unethical behavior. Counsel should also bear in mind that unethical conduct or conduct falling below the standard of care may not necessarily enjoy the blanket of confidentiality and privilege generally afforded to mediation communications.

#### **8. Negotiate reactively.**

Merely reacting to the tactics of your adversary, as opposed to taking concrete steps in light of your own strategy, is unlikely to lead to a successful outcome. Ask the mediator to present settlement options as his or her idea if you are concerned about “reactive devaluation” or a reduction in authority because of perceived weakness in your bargaining position.

#### **9. Impose unilateral conditions on mediation.**

It is difficult to lure an adversary to the mediation bargaining table while seeking to impose seemingly inflexible conditions. One example is insisting on a particular mediator. This raises a suspicion of “inside baseball” and should be avoided. Another example: attempting to require an opening offer above a certain level, or a demand below some arbitrary figure. This never works. It is a naked attempt to seize control of the negotiations, and ordinarily sinks the mediation initiative before it gets off the ground.

#### **10. Fail to plan and prepare adequately for the mediation process.**

Mediation should involve the same level of planning and preparation that goes into any other method of dispute resolution, including trial. Mediation preparation is particularly important because mediation is the only method of dispute resolution in which the parties can control the outcome, rather than simply being bound by it. A negotiating plan is critical to a successful mediation. Fine-tuning as the session progresses is normal, and

is often a consequence of new information received during the process. Don't overlook the importance of taking into account the observations and suggestions of the mediator, who provides the benefit of his or her exposure to many similar cases, as well as appropriate observations and disclosures from your adversary.

### SIDEBAR I-3

#### **What One Partner Tells Associates About Successful Mediation Advocacy**

***Christopher R. Carroll (interview)***

*Christopher Carroll is a founding member of a law firm with offices in New York and New Jersey, with a practice focusing on resolution of insurance coverage issues. Here he describes three key points he likes to make when teaching associates about negotiation and mediation:*

I give a negotiation seminar to the newer lawyers when they come in to start work at our firm. When I talk about what I would like from my associates, I try to impart a few key points.

Point #1 is, “*Be prepared.*” You can't wing it. Going into a mediation session, there is no substitute for knowing as much as you can and showing your adversary you are ready, and that, if there is going to be a mediated resolution, it is going to be on the merits—there will be no corners cut. There is a huge value in demonstrating that you are prepared to address things on any level, on any issue—properly and well versed. In the end, you can negotiate, and there are games that can be played, and there are personality issues. But there is really no substitute for knowing your stuff.

Point #2 is, “*Bring creativity.*” In my experience, among mediators, clients, and advocates, all too often there's a relatively rote approach to how you proceed in a mediation. You know—numbers back and forth. The good mediators and good advocates

are those who recognize when the routine is just not going to work, for whatever reason. Rather than continue down that road—knowing full well that you are going to get to a dead end at some point, and probably create more damage than good in that process—they have the ability to jettison the process that was adopted and implement a new one. Go a different route. Try to come up with something different, something more creative as a resolution plan.

A different route could be something as simple as identifying the issues that actually separate you—forget numbers and try to drill down on an issue-by-issue basis. Maybe, in the end, you are going to narrow the case and come up with some highs and lows depending on different outcomes on different issues, you get to a resolution point, just not a straight number. Creativity and flexibility—being able to bend and weave based upon what you are seeing and hearing and the roadblocks in front of you—that’s probably the most critical part of good advocacy in mediation.

Point #3 is, “*Take care in listening*”—listening to and kind of reading the other side. Hear what they are saying, hear *how* they are saying it, and respond accordingly. Too often, people send the wrong signals, or don’t read the right signals, or aren’t reading the signals at all, or are just not listening. It might not be an overt signal—it could just be something that is somewhat subtle. If you are focused in on the persons you are talking to—their personalities, their messages—and if you deliver your own messages properly, you can get further along than otherwise in a mediation process.

See what the important points are from the perspective of your adversary. One of those points might not be something that you believe is really outcome determinative, but it is important to them. Perhaps you can deliver some peace on issues that may not be of import to you. If it has value to your adversary, for whatever reason, be prepared to address and recognize that.

Not every mediation is successful. Certainly, not every mediation I am part of is successful. But I am not going to leave a mediation unless I’ve overturned every stone—unless I’ve kind of gone down every avenue that I think needs to be explored.