

Mediation Advocacy: Preparing for Successful Mediations

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1. Introduction.

When I teach mediation for the Straus Institute at Pepperdine Law School, before I do anything else, I ask my students why they take this class. As you can imagine, the question is usually met with a stony silence. I explain that the most recent federal statistics show that around 97% of all cases filed in US federal courts never go to trial, and about 12% are withdrawn or dismissed upon a successful motion. Statistics for state courts are not much different from the federal data.

These statistics seem to indicate that some 85% of all litigated cases are disposed of by utilizing one of the processes my students are about to study. It is widely assumed that the majority of these cases is settled with the assistance of a process called mediation. Yet, few law schools include “alternative dispute resolution” as a *required* course in their curriculum.

Mediation is sometimes defined as “*facilitated negotiation*”. The role of the mediator is not to decide, but simply to help the parties come to a solution that they can both live with. This process usually starts off in a joint session in which the mediator gives an opening statement explaining the various aspects of the process to the participants, and how she plans to conduct the mediation, followed by opening statements by the attorneys on each side, sometimes accompanied by statements by their clients. The joint session is often (but not always) followed by separate sessions with each party and its attorney. These separate sessions are called *caucuses*.¹

In the ideal case, the settlement solution represents what people call a “win-win” outcome, but as you can imagine, those cases are rare. Most cases end in a compromise which, given the financial, time and emotional costs associated with preparing for and going to trial, both parties believe is a better outcome than running the risks inherent in the unpredictability of a trial.

A successful mediation depends as much on the party participants as it depends on the skills of the mediator. In the ideal world, each party comes to a mediation with

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¹ These days, the mediation may not open in joint session, especially when emotions run high. Instead, the mediator starts with meeting each party in caucus. In that case, the joint session may be reserved to a later time, for example, when the parties see there is hope for a successful conclusion of the mediation. Some mediators go so far as to never hold a joint session.

- (i) a willingness to make concessions,
- (ii) a willingness to stay with the process and see it through to its completion,
- (iii) a willingness to be open and honest at least with the mediator but also, ideally, with the other side, and, yes,
- (iv) not only with a *willingness* to be prepared, but in a state of *actually being* prepared.

It may sound obvious that litigators should prepare for a mediation, just like they prepare for trial. Nonetheless, many mediators, including myself, have found that a surprisingly high percentage of attorneys prepared insufficiently for the mediation, and sometimes, did not prepare at all. Unfortunately, an attorney in either of these categories risks that he not only wastes his own time, but also the time of everyone else.

Some litigators are even known to have brought the wrong file to the mediation, or to see the file for the first time *after* they have arrived at the mediator's office. Nor have they conferred with their client in advance of the mediation. Obviously, these attorneys do not have a clue as to what they would like to get out of the mediation.

But even before the *substantive* preparation of the case, there are *procedural* preparations that need to be looked after.

2. Preparing the “Procedural” Aspects of Mediation.

What I call the *procedural* preparations can be listed as follows:

- Determining when the dispute is “ripe” for mediation
- Selecting the “right” mediator for the type of dispute
- Scheduling the mediation
- Filling the empty chairs
- Scheduling a preparatory meeting with your client
- Scheduling a pre-mediation conference with the mediator

a. When is the dispute “ripe” for mediation?

Opinions differ as to when a dispute is ripe for mediation. Many attorneys believe that they act in the best interest of the client to not schedule a mediation until close to the trial date. At that time, both client and attorney are best informed about the case, discovery is completed, and the litigator has commenced preparation for trial so he has a good feel for the strengths and weaknesses of the case.

The problem with this approach is that by then a lot of time and money has been spent on interrogatories, depositions and document production, as well as both the factual and legal analysis of all aspects of the case. Apart from the money that might have been wasted, there is another, unintended consequence to this strategy: the longer the parties and their attorneys have lived with a dispute, the more “invested”, and therefore inflexible, they have become with respect to their respective positions about the case.

In many if not most cases, fairly early on both client and its attorneys have a pretty good idea of the facts of the case, at least enough to know where they would like to end up with this dispute. For a successful mediation, a “pretty good idea” (accompanied by solid preparation) is often enough.

Additionally, the earlier the case is resolved, the better the chance that the relationship between the parties can be restored. This is an important aspect of mediation when the parties have a contractual relationship that retains value to the clients if it can be maintained or restored.

On the other hand, I have mediated quite a few disputes that were not yet “ripe” for mediation, because *too little* information was known. One of the attorneys may realize (often too late) that he still needs an important piece of information in order to evaluate the case in an informed manner. Timely substantive preparation of the case for mediation should alert the attorney whether or not he is adequately informed about the case. In such event, he needs to re-schedule the mediation rather than allowing it to go forward and waste everybody’s time.

So what IS the right time to mediate? In general, as I implied just now, the right time to mediate is as soon as each party has *enough* information to adequately appreciate its risks and to fully evaluate the case.²

b. Selecting the “right” Mediator

Training and Experience. The first requirement is that the mediator has received formal training in dispute resolution. Currently, in California and many other states and countries, anyone can put up a shingle and proclaim that he or she is a mediator. It is important, therefore, that the parties investigate what formal training the mediator has received.

I recommend that the mediator has received at least a Certificate in Dispute Resolution, or its equivalent from a law school that has a reputable dispute resolution institute.³ This generally means that the mediator has received at least 14 law school units of instruction and practical training from such institute or center.

The second requirement is that the mediator has a fair amount of experience *as a mediator*. Certain mediation skills cannot be taught and really come only from doing it for a while.

²Accord, Joe Epstein, *Preparing For Effective Employment Mediation*, www.mediate.com/pfriendly.cfm?id=1093

³ The top three such institutes are the Straus Institute for Dispute Resolution at Pepperdine Law School in Malibu, CA, the Center for the Study of Dispute Resolution at the Missouri University Law School at Columbia, MO, and Harvard Law School’s Program On Negotiation (the Harvard Negotiation Project).

The third requirement is that the mediator has a reputation for being both skilled and effective as a mediator. There are mediators who have had all the training there is to get, have done a lot of mediations and still are not particularly strong mediators. There are certain inherent personality traits, including flexibility, creativity, patience, persistence, knowing how to set the climate of a mediation session and trusting one's gut as to how to guide the parties to a settlement. These are qualities you either have or you don't have. They are hard to define, and practically impossible to learn, but which may be vital when it comes to breaking an impasse and achieving a settlement.

Styles of mediating. Several years ago, Professor Len Riskin defined the various approaches used by mediators into a system he called a "grid" which went from being facilitative to evaluative and from being "narrow" to being "broad."⁴ A facilitative mediator would be someone who promotes the communication between the parties in order to help them find an acceptable resolution of their dispute. An evaluative mediator would be the person who will express an opinion about the various aspects of the case, - including a dollar amount that she believes to represent a fair settlement in a distributive, zero-sum negotiation.

In my view, the best mediator will in fact consider the "grid" to be a true continuum, in which she can freely use the facilitative and evaluative styles in the same mediation, applying these differing approaches to the various stages or aspects of the process as she sees fit.⁵ In either case, the mediator should attempt to refrain from advising a party what to do.

Substantive Legal Knowledge. If the mediator is unfamiliar with the area of law that the dispute revolves around, it is obvious that she will need more time to understand the issues that arise from that area of the law, and she may require a more detailed briefing. For example, if the dispute involves a copyright matter, it is highly recommended that the mediator knows something about copyright law. Similarly, if the dispute involves family law, it is highly recommended that the mediator is an experienced family lawyer. In many ways, the considerations are the same as when you would select an arbitrator.

⁴ Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994). Since then, Professor Riskin has vastly expanded the possible grids of mediation styles, as described in his recent article, Leonard L. Riskin, *Decision Making in Mediation: The New Old Grid and The New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003) ("In 1994 and 1996, I published articles that set forth a system for describing mediators' approaches to mediation; the system employed a "grid" consisting of two intersecting continuums. One continuum represented the mediator's notion of the mediator's role; the concepts of "facilitative" and "evaluative" provided its anchors. The other dealt with the mediator's customary approach to problem-definition, and it ran from "narrow" to "broad." When these continuums intersected, as shown in Figure 1, they produced quadrants, which I said represented mediators' "orientations" toward mediation.")

⁵ In my experience, purely evaluative mediators tend to settle cases only if the parties weren't really looking for a mediation but rather for a "neutral evaluation" of the dispute. In such a case, a retired judge might well fit the bill, while typically the retired judge is less able to adopt a more flexible, facilitative approach as that runs counter to what he was used to doing as a judge. But even the staunchest evaluative mediator should refrain from predicting the outcome of the case should it go to trial, unless both parties ask him for his evaluation.

On the other hand, it should be remembered that the most important skill-set of the mediator is his or her training and experience in the mediation process. If you *had* to choose between a mediator with lots of experience in copyright law but without adequate training in mediation and a mediator with no experience in copyright law but with extensive training and experience in mediation, choose the well-trained mediator.

c. Scheduling the mediation

As soon as the parties have agreed on a mediator, one or both parties need to contact her office in order to reserve a mutually convenient day (or days) for the mediation to take place. It is not uncommon for this date to be several weeks away, sometimes even several months.

It is important to schedule the mediation as soon as possible, but not, for example, prior to a deposition that one of the parties feels he needs to take beforehand. You would be surprised to know that this seemingly self-evident fact is often overlooked – perhaps because assistants schedule the mediation, but do not know the entire calendar of the case.

Be sure to allow sufficient time for the mediation itself. Occasionally, attorneys will come to the mediation with a willingness to observe the process for a couple of hours and the intention of leaving if no progress has been made in that time span. Even in relatively simple cases this is unrealistic and probably the result of a cynical view towards mediation or prior bad experiences with mediations in the past.

The truth is that you cannot rush the process. Even the simplest zero-sum bargaining needs its time to “do the dance” in order to find the right number. In other words, once the parties have given their opening numbers, you cannot just split the difference, no matter how reasonable that number seems to be. The party proposing to “split the difference and be done with it” risks that the other side interprets that number as the new offer from which he can move toward the middle between that amount and his own most recent number.

It is generally recommended to commence the mediation in the morning (as early as is practicable), and to reserve at least one day. Sometimes more than one session is needed to work through the issues and interests that have been identified during the first mediation session. Sometimes this means that several sessions are required that are spread out over several weeks, in complex cases sometimes over several months.

If when scheduling the mediation session it turns out that the mediator is unavailable within a reasonable period of time, I recommend you get another mediator who is available within that time period. In other words, do not lose the best time to mediate because of scheduling problems caused by the mediator.

d. Filling the “empty chairs”; Board Approval

It is evident that not only the attorneys, but also representatives of the respective clients need to attend the mediation. And these representatives must be authorized to settle the dispute.

This “authorization” means that the representative has the authority to settle on *any* set of terms and conditions that may arise during the mediation and that such representative considers to be in his organization’s interest. That means: for any amount of money, as well as for any non-monetary solution, such as entering into a license agreement or modifying an existing agreement. If an insurance company is involved, the same degree of authority needs to apply to the adjuster.

Even if all those requirements are met as much as possible, the mediation may not result in a binding settlement. There are practical considerations that you cannot get around. For example, your opponent may have to seek “Board approval”.

In such event, you open yourself up to a second round of negotiations and the ensuing risk of being forced into making additional concessions. In an attempt to avoid this dilemma, it may be helpful to agree to the settlement on the condition that the other party’s Board considers it on a “take it or leave it” basis.

If the other party nonetheless seeks to extract additional concessions in order to obtain Board approval, I recommend you continue to involve the mediator and resist the temptation to conduct direct negotiations.

e. Scheduling a pre-mediation meeting with your client

Once the mediation date has been set, the attorney needs to double-check that a representative of his client (with the required settlement authority) is available to attend on that day (or on those days). The next thing for the attorney to do is to arrange a face-to-face meeting with that representative. This meeting is in part to take care of certain procedural matters, but also constitutes the second part of the substantive preparation of the case, that we will discuss a little later.

The procedural part of the pre-mediation meeting between attorney and client includes the following:

- Explain the mediation process to the client.
- Emphasize the need for flexibility and willingness to compromise.
- Encourage client’s active participation in the mediation process (and if desirable, rehearse the client as you would prep a witness for a deposition or for trial).
- Emphasize that the client, and not the attorney, is the decision maker in the process.

I will discuss the substantive portion of this meeting in Part 3 below.

e. Scheduling a pre-mediation conference with the mediator

The mediator, unlike the arbitrator, is free to meet separately with each party, and/or with each attorney, whether in person or by telephone, and whether before, during or even after the actual mediation session if the parties failed to achieve settlement. This conference is commonly referred to as a pre-mediation conference. Sometimes it is called a case development conference.

Pre-mediation conferences are (or should be) protected by the applicable provisions of state law that deal with the confidentiality of mediation, since the confidentiality provisions apply from the date the mediation commences, which generally is held to be the date of first contact between one of the parties and the mediator, until the mediation ends -- a date that varies depending on which law applies. Generally, a mediation ends when the parties have entered into a settlement agreement, or when one of the parties, or the mediator declares the mediation ended.

Under most legal systems, the mediator is bound not to reveal confidences acquired from one party during this period, to the other side. In addition, the mediator usually cannot be compelled, to testify about what occurred in the mediation process.

As not all mediators have the habit to conduct pre-mediation conferences, I recommend that you ask the mediator to hold such a conference with both attorneys. They can be in person or by telephone (but usually by telephone), and should not last more than thirty minutes to one hour.

Pre-mediation conferences allow the mediator to go over the various procedural aspects of the mediation: giving advice as to how to prepare the attorney's client; making sure that the representatives have full settlement authority; setting a date for the exchange of mediation briefs; making sure that the mediator and the parties have reserved an adequate amount of time; discussing the process of the mediation session and how the mediator intends to conduct it; and advising the attorneys about their opening presentation in joint session.

In addition, the mediator may hold pre-mediation conferences with each side separately. These allow the respective attorneys to discuss in advance of the mediation confidential matters pertaining to their clients, their positions and their interests. For example, the attorney may want to discuss that the representative of his client is the CEO, and that he has a high personal stake in the outcome of the dispute. That he is short-tempered and very emotional about this dispute. Or that the client has very unrealistic expectations about the chance of success of the litigation. In all these instances, the attorney may want to ask the mediator for her assistance during the initial stages of the mediation process, in the form of empathetic reactions in caucus, or a discussion in caucus focused on lowering the client's expectations.

It is possible that the pre-mediation meeting with the client occurs *after* the pre-mediation telephone conference with the mediator. This need not be a problem, and can even be an advantage because it allows the attorney to explain in more detail to the client the procedural issues he covered with the mediator.

3. Preparing the “Substantive” Aspects of Mediation.

The substantive preparation for a successful mediation includes work that the attorney needs to do before meeting with the client, work he does with the client during the pre-mediation meeting, and work he needs to do afterward that meeting and before the mediation takes place.

a. Analysis of the case

The first stage of the substantive preparation is an analysis of the facts, the legal issues and assembling the key documents that you believe will help support the client’s case. This work also allows the attorney to see what information is missing and to determine how to obtain it. It is helpful to have this work summarized in bullet points in advance of the pre-mediation meeting with the client.

b. Substantive preparation with the client

The second stage of the substantive preparation is the pre-mediation meeting between attorney and client, or, more specifically, the second part of that meeting (See Item 2(d) above). The purpose of this part of the meeting is to make a systematic and strategic analysis of the negotiation to be conducted at the mediation.

Before we get into the details of the substantive preparation, it is important to acknowledge that all of us have biases in favor of our own position with respect to a dispute.

Each party and attorney needs to analyze as much as they can what their own “perceptual filters” are, allowing them to develop a more objective analysis of the respective elements of the dispute. This is true to a certain degree for the attorney, but even more so for the client, who is naturally more emotionally involved with the dispute. The client’s CEO, project manager, or other relevant employee may have a need to be right, may feel guilty, or responsible for what happened. It may not be necessary (or desirable) to challenge this head on -- after all, an attorney is not a psychiatrist.⁶ But an awareness of these perceptual filters is important in the attorney’s approach to the meeting with the client in which he searches for what the client’s real needs are.

(i) IDENTIFY THE PARTIES: Sometimes it is obvious who the parties are, but often it is not. The question to ask yourself is *who will be affected by the outcome* of this dispute and *who has the power to determine or influence the outcome* of

⁶ And neither is the mediator (at least in most cases).

the dispute or the execution or implementation of the negotiated settlement, both on your own side and on the other side.

(ii) IDENTIFY THE ISSUES AND POSITIONS: What are we talking about when we talk about the issues? Issues are the *concrete, definable items that determine the agenda of the mediation*. They are the subjects that *need to be resolved* before there can be a settlement. They are the matters that are "*on the table*" about which there may be disagreement. Sometimes there is but a single issue, but more often than not there are many issues in a particular dispute. With respect to each issue, each party will have taken a *position*, i.e. a proposal for a resolution of that issue that is favorable to that party.

Analyze in your preparation what the *issues* and *positions* with respect thereto are *for each of the parties (including the other side)*.

(iii) IDENTIFY THE ALTERNATIVES TO A SETTLEMENT: What other avenues are available to you, in the event the mediation does not lead to a settlement? What other avenues are available to the other side if the mediation does not lead to a settlement?

I cannot overstate the importance of the analysis of alternatives. Sometimes, alternatives may include such "outside the box" possibilities as getting publicity for your case and thus getting public opinion to support your cause.

Obviously, if there are very attractive alternatives available to you outside of the mediation, you will be less inclined to make large concessions within the range of the bargaining that will take place. By the same token, if the other side has attractive alternatives available to it, the other side will be less inclined to make concessions.

In other words, this analysis gives you an idea how badly you (or the other side) will need to settle the case *because it gives both parties something to compare the other side's final offer with*. If the final offer is less attractive than the alternative you have identified, you know you will want to go with the alternative, or increase your demand. Conversely, if the final offer is more attractive than the alternative, you may want to take the offer (if you are convinced the offer is really final).

Conversely, having identified as best you can what the alternatives are *for the other side*, you will know what you *need* to offer so as to be more attractive than the other side's alternative.

(iv) AS A "SUBPART" TO ALTERNATIVES: IDENTIFY EACH PARTY'S BATNA, WATNA AND EATNA: As part of this exercise, you need to identify several specific alternatives:

First, determine each party's BATNA,⁷ or "Best Alternative To a Negotiated Agreement". This will tell you what your *best* chances are if you don't settle. It will also tell you what the other side's best chances are if you don't settle.

BATNAs are not always readily apparent. In their famous book, *Getting to Yes*, Fisher and Ury outline three action steps for determining your BATNA:

1. develop a list of actions you might conceivably take if no agreement is reached;
2. improve some of the more promising ideas and convert them into practical options; and
3. select, tentatively, the one option that seems best.

The opposite of BATNA is each party's "WATNA", or "Worst Alternative To a Negotiated Agreement". What are your worst alternatives if you don't settle? What are the opponent's worst alternatives if they don't settle? The other side's BATNA may be your WATNA, and the other way around. Or it may not be, especially if the cost of conducting a long litigation is substantially higher for one side than the other.

The third, and maybe the most important exercise in this Subpart is to identify each party's *Estimated*, or "Most Likely Alternative To a Negotiated Agreement" (MLATNA). In the mediation of a litigated case, this analysis requires that attorney and client try to make an objective evaluation of the chances of winning and how high an amount is likely to be awarded. Again, it is useful to do this exercise for both sides.

An important aspect of each BATNA/WATNA/MLATNA analysis is the determination what each action will cost. Often, in a litigated case, the alternative to settlement is going to trial. What is the best estimate of the attorneys' fees and costs (including travel, witnesses, experts) involved in getting through a trial? If the parties agreed to arbitrate following the mediation, what is the estimated cost of the panel of arbitrators and the administering institution (e.g. the American Arbitration Association)? What is the risk of losing at trial? If we win, what is the chance of an appeal by the other side? If we lose, what is the risk of having to pay all or a portion of the other side's attorneys' fees and expenses? If we lose, do we want to appeal and what is that going to cost? What are the company's expenses both in lost management time (attending depositions, travel, attending the trial, conferences with the attorneys) and the out-of-pocket costs associated with these activities? What is the emotional toll this process will take on the employees most directly involved in the conflict?

This analysis raises two sub-questions: what can you do to *improve your BATNA*, and what can you do to *worsen the other side's BATNA*?

Try to be as *objective* as possible about the other side's case in determining what *he sees* as his estimated (or most likely) alternative.

⁷ The acronym was first introduced by Fisher & Ury, *Getting to Yes: Negotiating Without Giving In* p. 103 (New York: Penguin Books, 1981).

(v) IDENTIFY EACH PARTY'S INTERESTS: Wait a minute, didn't we do that one already? No. We identified the possible issues and positions in the dispute, not each of the party's interests.

Interests are the underlying needs of each party. They may be *abstract and hard to define*, but they are very real to the party whose interests we are talking about. The underlying interests may never be discussed, but for a mediation to end in a successful settlement, they must have been satisfied to a significant degree. This means that the attorney needs to sit down with his client and try to *figure out what motives, concerns, needs and goals the client has down deep* that prompted the parties to have a dispute. In the proper circumstances, the attorney may ask the client what his *real needs* are that need to be satisfied for the dispute to settle. It may not always be easy to explore the needs. They may concern things the client is not consciously aware of.

Perhaps even harder, the attorney and the client need to do the same thing for the other side. Now they really have to *put themselves in the shoes of their opponent* and try to figure out what motivates it in this dispute.

We call this exercise *going "below the line"*. The discovery of the client's own interests as well as those of the opponent will enable you to come up with more creative and satisfying solutions to the dispute.

This may be an ongoing process that requires several meetings and telephone calls. It will most certainly continue in the mediation, as more is revealed as the mediation process unfolds. The mediator may play an important role in helping each party develop a better realization of its needs, goals and values.

(vi) IDENTIFY CREATIVE OPTIONS: This leads us to the next point: now that attorney and client have identified each party's underlying interests (needs, goals and values) as best they can, the client may want to organize a *brainstorming session* with a small group of creative people. Ideally, this is an "anything goes", "there are no wrong answers", "free flow of ideas" kind of meeting where people make suggestions for partial or whole solutions. Often, it is better for the attorney *not* to be present at this session because his presence may deter some of the participants to engage spontaneously in this free flow of ideas.

Brainstorming will give the client the best chance to come up with creative solutions that may satisfy the needs of both parties. (You may know the example of the mother who has two daughters and one orange.⁸) These solutions will typically be

⁸ A mother has two daughters. One afternoon, they are assembled in the kitchen, and each daughter indicates that she wants the one orange the mother has left. Without further investigation of each daughter's needs, the mother will simply cut the orange in half, and give a half to each of the daughters. Had she asked what they need it for, the result would have been very different and satisfying to both daughters: one needed the orange peel for the recipe she was preparing, the other wanted to eat the flesh. With the knowledge of the underlying interest of each daughter, the mother could have peeled the orange,

outside the normal parameters of distributive or zero-sum bargaining (i.e. positional bargaining that just distributes the value defined by the opening positions of each side): Instead of looking how to divide the pie, you look for ways to make the pie bigger.

(vii) IDENTIFY YOUR AND THEIR OPENING POSITIONS, FALLBACK POSITIONS AND BOTTOM LINE POSITION: Having completed all the above steps, the attorney and his client are now able to determine with some semblance of probability, what their opening position, bottom line and in-between moves or fallback positions ought to be: They are based on their assessment of each of the preceding points.

Ideally, the plaintiff's opening move needs to be as high as it can reasonably justify on the basis of the issues and interests identified and on the basis of their best estimate of *their* BATNA, WATNA and MLATNA. In a distributive bargaining process each party makes an opening move from which a "dance" begins. This dance often takes place when the mediator shuttles back and forth between the parties who are each in separate rooms and "caucus" there with the mediator.

The "dance" is a necessary part of distributive bargaining, but also in a more sophisticated setting where there is a mix of distributive bargaining and a search for creative options. After all, even the larger pie needs to be divided. For the dance to be effective and actually take place, each of the parties must have made an opening move that is more or less within what is called the "zone" of agreement.

The parties know already what their bottom line is, because it is determined by their analysis of their and the other side's BATNA, WATNA and MLATNA.

The in-between moves are determined as "fall-back" positions between each party's opening move and their bottom line.

(viii) REMAIN FLEXIBLE: Now that the attorney and his client have developed a good set of parameters for the mediation, it is important to realize that they need to retain a *high degree of flexibility* in the mediation itself. There may be developments that occur *during the mediation process* that they did not or could not foresee, which may affect or even change their analysis of the case, and may change their BATNA, WATNA and MLATNA. In other words, their conclusions with respect to each of the foregoing elements may change during the process, and they may have to take time during the mediation, with or without the mediator, to review the issues, underlying interests, options and alternatives to a negotiated agreement. For now, it is sufficient to inform the client of this aspect.

give the peel to one daughter and have the other daughter eat the peeled orange! See Fisher & Ury, Getting to Yes, *supra* note 7, at 56-57.

c. Preparing a Mediation Brief

The final item of substantive preparation is drafting a mediation brief. The purpose of the mediation brief is, of course, to educate the mediator about the nature of the case, to demonstrate the strong factual and legal points of the case and to prepare the road for a successful mediation. After reciting the facts, summarize the procedural history of the case. Then proceed to a discussion of the legal issues and any non-legal issues that are relevant to the mediation. Finally, indicate what if any previous settlement negotiations have taken place.

Although certain elements are the same, it should be remembered that the goal of a mediation brief is not the same as that of a brief in support of a motion or a trial. The goal of mediation is to arrive at settlement. Thus, it may be helpful to point out the *common ground* that you perceive to exist between the parties.

I generally recommend that the mediation brief *not* be confidential. Giving a confidential brief to the mediator may send the wrong message to the opposing side, because it indicates a desire to withhold information from your opponent. It may also give the impression that you are hiding certain weaknesses in your case, an impression you will want to avoid.

If you have to inform the mediator about certain elements of the case that need to be kept from the other side, it is preferable to *disclose those in caucus* rather than in the mediation brief. If the mediator needs to know these elements in advance, you can disclose them to the mediator during the case development meeting or by separate written communication.

Attach key pleadings, as well as relevant documents and other evidence to support your case, but try to keep the number of exhibits to a minimum. Again, the purpose of the attachments is to educate the mediator, not to overwhelm her with cumulative evidence.

4. Conclusion

When you add it all up, this may seem like a lot of work. But the goal is to create for your client the best chance for the best possible settlement. You can achieve this by following the steps I have outlined in this paper. The effort is worth it, even if the case does not settle. You and your client will have a better insight into the case and will have a better grip on the decision how to proceed in the absence of settlement. Even if the case did not settle at mediation, it will likely have paved the road for a settlement at a later time.

In the event that the matter does settle, you will have obtained considerable savings for your client, both in terms of dollars, but also in terms of the emotional cost and waste of management time that a prolonged, unresolved dispute would have caused it. Your client will be so satisfied with your services that he will want to retain you again when another legal problem arises.