Effective Advocacy in Mediation

A Planning Guide to Prepare for a Civil Trial Mediation

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I. Introduction - *Mediations should never be allowed to simply "happen"*.

It has long been true that more lawsuits are filed than tried. As the trial date approaches, the uncertainty promised by adjudication becomes a near term reality rather than a distant possibility. Final trial preparation, pre-trial conferences, jury selection and even opening statements generate a sharper focus on the dispute. In turn, a more comprehensive evaluation of the lawsuit occurs which leads to consideration of settlement options. Last minute negotiations to settle civil trials then take place in the midst of the opening phases of the lawsuit, often in courtroom hallways and from courthouse telephone booths. The primary settlement arena for the American civil trial system has long been "on the courthouse steps".

With the growth of alternative dispute resolution systems, however, we are seeing a far higher percentage of lawsuits settle much earlier in the trial process. As ADR procedures - primarily mediation - become an integral part of the civil litigation process[1], settlement negotiations are becoming institutionalized, and frantic last minute discussions on the courthouse steps

[1] Some states now have statutory "court ordered" or "court annexed" ADR processes in which the trial judge has the discretion to order the parties to mediate or participate in a non-binding arbitration exercise as a condition prerequisite to getting into the courtroom. (See, Fla. Stat. §43.00 et. seq.) Other states have similar pilot programs in effect or comparable legislation under study. Virtually every state in the U.S. has resources to service litigants who are willing to submit to voluntary participation in ADR programs.

are no longer the norm. Indeed, many cases today are filed with every expectation that the parties will face settlement decisions through mediation or some other court associated ADR procedure long before the courtroom comes into view. Prosecuting or defending a civil trial claim, therefore, now involves something more than simply getting ready for trial – we must also prepare for the certainty of institutionalized settlement programs early in the litigation process. The civil trial lawyer's role must now expand to include proficiency in representing their clients' interests in mediated settlement sessions. In simple terms, the growth of ADR is redefining the role of the American trial lawyer.

Although the process is still relatively new, experience has already taught us successful mediations are initiated at the right time with the right people who have the necessary information and disposition to settle the case. This preparation guide is intended to guide civil trial counsel in bringing those elements together and reaching a new level of proficiency in fulfilling this new role in the civil trial process.

This preparation guide covers activities preceding the mediation; planning initial case presentations to the mediator, the caucusing process, and closure. It does not deal with bargaining or negotiating strategies that may be deployed while actually working toward a settlement. Taking these preparatory steps, however, can often profoundly influence the effectiveness of the negotiations to reach reconciliation of the case.

The civil lawsuits to which *every* element of this mediation preparation guide applies would involve multi-party, multi-issue, complex, relatively high dollar claims and counterclaims. Individual components of the preparation guide, however, can also be useful any case that will face mediated settlement procedures at one time or another. The time and money spent to prepare for mediation, like the time and money spent to prepare for trial, will be governed by the amount in controversy, the parties' resources, and the nature of the case. Many of the steps called for by this guide, however, can serve to benefit both settlement and trial preparation. In preparing counsel for both mediation and trial, these suggested steps might thus provide a "win-win" benefit as the case is worked up for either eventuality.

The preparation guide also assumes some discovery or preliminary investigation has been completed, or data is otherwise available regarding

the basic facts underlying claims and responses. For the most part, the focus here is on what trial counsel can do with their clients, as opposed to things that can only be done with cooperation from the opposition.

II Step One: Preparing the Client for the Mediation Experience – *What is the mediation process all about?*

Most sophisticated legal clients today have some working knowledge of the mediation process. Risk managers, insurance adjusters, and claims specialists within client corporations have probably encountered one or more mediations by now. Many parties involved in a lawsuit for the first time, however, have obviously never gone through mediation. Their knowledge of the process will be anecdotal at best. More often than not, they will tend to confuse mediation with arbitration or some sort of administrative adjudication. These clients would benefit from an explanation of the process in advance. (In truth, many seasoned participants of mediation would also benefit from a review of the basics every now and then as well).

It is critically important to have the clients understand that almost any outcome of a mediation process contemplates a "win-win", not "win-lose" result. Mediation is a process that seeks to *reconcile* disputes. Mediation is not a process that seeks to *adjudicate* disputes. The outcome of reconciliation is an *agreement* with the other side. The outcome of adjudication is a *judgement* against the other side. There are big differences between securing a judgment and reaching an agreement. To fully benefit from the mediation experience, the client must understand those differences as soon as possible.

The client should understand the reconciliation of a dispute is reached by developing terms of agreement that *mutually* satisfy the interests of the parties as opposed to confirming concepts of right and wrong. Judgements, not agreements, define concepts of right or wrong in the eyes of a judge or jury. Agreements mutually satisfy interests and concerns. Reaching settlement agreements, therefore, is a *problem-solving* exercise dealing with the challenge of finding a mutually acceptable way to satisfy often-conflicting interests and concerns. Obtaining judgments, on the other hand, is a *faultfinding* exercise involving efforts to convince a third party on issues of right and wrong.

The mediation of a civil lawsuit involves realistically analyzing the full aspect of the adjudicatory option available to the parties resolve the dispute, then attempting to build a more mutually viable reconciliation alternative.

The client should be informed, therefore, that the first part of mediation, the opening presentations, seeks only to define and explore the complete aspect of the adjudicatory process – not to decide the case. At the end of the opening presentations, both parties should have a realistic and balanced concept of their adjudication option. The second phase of the mediation, then utilizes a private caucus process to face the problem-solving task of creating a reconciliation option that deals with both parties' interests in an acceptable manner. At that point, a choice is made.

Clients should understand in advance that the mediation process does not dwell on who may be proven right or wrong in court. The probability of various adjudication outcomes is a factor, but not a controlling factor, in considering settlement options. To be successful at mediation, the client must understand the focus must ultimately come to creating the best possible reconciliation option through an agreement that will mutually satisfy the interests of all parties to the dispute. Creating the best settlement option will involve compromise – giving as well as getting.

In that vein, the client should be given a realistic definition of exactly what it means to be "successful" in mediation – what it means to prevail in the mediation process. To many participants, a successful mediation would be one that gets them settlement terms that they perceive would approximate a favorable court judgment. This concept needs immediate and forceful readjustment. "Winning" in the mediation process does not mean successfully convincing the other side to buy into a settlement agreement that would mirror a victory in court conceived without their input. "Winning" in mediation is not defined as, "making the other side lose". The ultimate objective of a civil trial mediation is to put the client in a position to make a meaningful choice between continuing litigation and accepting the best settlement option available. The goal of mediation is to develop and present the best settlement option available and thus create the opportunity to accept (or reject) a viable option to the lawsuit. The "winner" in mediation, therefore, is the party who conducts themselves in such a manner that the other side is persuaded to offer up their very last and best option to

litigation before any decision to accept or reject is made. The "loser" in mediation is the party who causes the termination of the process without getting the best alternative available from the other side extended.

Success in mediation isn't getting everything you think you want or deserve. Success in mediation is getting the parties into a position of being able to make an intelligent choice between the best options available.

It is critical that trial counsel thus steers a mediation bound client away from "bottom line" dollar amount thinking. Avoid articulating pre-conceived "absolutes" of what must be taken or what will never be paid to settle the case. Becoming entrenched with positional anchors on settlement terms destroys flexibility and creativity that is critical to any successful negotiator.

The client often needs to be reminded there are things other than money that can settle lawsuits. One salient difference between resolving disputes through adjudication and resolving disputes through reconciliation is the range of settlement mechanisms available to the parties in if the chose to reconcile. The judicial resolution of a dispute is generally restricted to money judgements reached through legal damage formulas that focus on remedying past offenses. Often the damages available have no bearing on meeting the parties' real needs in the resolution of the matter. Reconciliation offers far more choices to craft a customized settlement of the conflict that can look forward to the future relationship as well as dealing with past offenses. Thinking through and developing contingent plans to utilize these options in advance, doing feasibility research on settlement alternatives before the mediation starts, can dramatically increase the potential for a successful outcome. Structured annuities, future work, letters of apology, product discount programs, bartered services, use of equipment, joint undertakings to raise settlement dollars, introductions and bid invitations – the realm of possible settlement tools is limited only by as the creativity of the mediator, the parties and counsel. That creativity should never be chained with fixed dollar concepts.

A good method for getting clients off "bottom line" thinking is to explore what constructive steps must be taken to resolve the damage done. Rather than focus a pre-mediation client on dollar amounts, focus instead on how the dollars would be used to remedy the damage done. Define the

interests that have been directly impacted by the dispute and look at the widest range of possibilities for accommodating those interests.

Clearly, the structure, overall objectives, and various settlement scenarios available through reconciliation, should be discussed with the client in advance of a mediation session. Perhaps the best advance preparation for the client however, is to get the client directly involved in actually preparing for the mediation itself. In truth, the negotiation forum presented through mediation belongs to the client. In the final analysis, the client must make the ultimate decision to accept or reject the settlement option reached. Give the client the opportunity to take an active role in the process.[2]

III. Step Two: Defining the Overall Goals of Mediation – *What are we trying to achieve through this mediation?*

The first step of any journey is to decide where you want to go. In mediations, the destination of choice is obviously a full settlement of the case. As noted, preparation for that step is initially taken by simply sitting down with the client and mutually agreeing, in concept, on a range of acceptable outcomes to the mediation process without fixating on, "bottom line" dollar amount absolutes. There are also, however, other equally important objectives that can be obtained through mediations that do not include a full settlement of the dispute. Such objectives may include:

A. A Partial Settlement of Peripheral Issues.

One reality of litigation is that all claims and all defenses arising out of the same facts and circumstances must be asserted in the same lawsuit. The judicial goal here – to avoid multiplicity of suits – is important to the judicial system and must be met. An unfortunate consequence of the rule, however, is that many lawsuits end up filled with peripheral arguments that really aren't determinative of the central issues between the parties. This tends to expand, rather than narrow, the focus of the trial and drives up the time and cost of an adjudicated resolution. Mediation can serve to eliminate those peripheral disputes by final or interim partial settlement agreements, stipulations to abate certain portions of the trial, or agreements to informally set certain issues aside pending the resolution of the main claims.

[2] For a more comprehensive discussion of preparing the client for mediation, please see, Vol. II, Alternative Dispute Resolution In Florida, Section 2.6, pp. 2-6, The Florida Bar (1995)

B. A Process to Move Toward Final Settlement.

Many times, despite the best efforts to prepare for every contingency in advance, mediations become stalemated because of insufficient information or lack of agreement on what the facilitated negotiations reveal to be core or pivotal issues of fact or law. Rather than calling impasse and returning to the litigation path, the mediation process can be used to facilitate an agreed "downstream" program defining and scheduling further steps aimed at breaking those logjams and continuing steps toward reconciliation. The variety of downstream programs available is discussed in detail below.

C. A Better Understanding of the Opposition's Case.

Plan to listen to everything said during a mediation. Despite the considerable discovery skills developed by practitioners within the trial bar, it is seldom that the opposition's full story - complete with intended themes, nuances and emphasis is flushed out during discovery. More often than not, discovery will only reluctantly yield what we ask – not what we need to know. More importantly, mediation can provide the critical opportunity to see both sides of the story contrasted against each other. A unique opportunity to hear both sides of the issues presented in their best light side by side which is never available through traditional discovery tools. Finally, with the consent of the party and with the right mediator, a neutral third party's reaction to the issues is also available through mediation.

Obviously, any preparation for mediation should be undertaken with a full understanding of the complete of goals that are available through the dispute resolution process.

IV. Step Three: Deciding When, Where, Who and How The Case Will Be Mediated - *What are the "Shape of the Table" issues involved with this mediation?*

A. Initiating the Mediation Process - Getting past the "First To Blink" Syndrome

Although dated, an attitude still exists among many trial lawyers (and risk management professionals) that being the first one to suggest settlement - by mediation or any other resolution process - is a sign of weakness to be avoided. The perception is that one must not "blink first" because it suggests a lack strength or confidence in the merits of the argument, and involves an immediate loss of face. There are a number of ways to bypass this problem and get a meaningful settlement program rolling.

In jurisdictions where mediation is mandatory, the "first to blink" problem is avoided by simply noting to the other side that participating in a mediation session is an inevitable event that must occur before trial. Accordingly, both sides would be better off taking the initiative to control the process themselves in a program of their choosing. The argument can be made that both sides are better served by deciding on a mutually agreeable mediator, picking a mutually convenient time and location, and defining an acceptable format for the process rather than allowing the judge or a court administrator to do it for them.

In jurisdictions where mediation is optional, the court can be subtly prodded to make the initial suggestion that the parties mediate. Counsel can call a case management conference to plan the litigation schedule and simply incorporate the concept of a settlement effort in the agenda, or otherwise encourage the judge to suggest the idea. More often than not, the court will automatically raise the issue at some point - especially if it is revealed that the trial will involve a substantial allotment of time on his or her docket. There will be no need for either side to raise the prospect of settlement discussions.

Another approach is to attribute the idea to the economics. Once a litigation plan is in place or even roughly sketched, it is natural for both sides to take note of the projected costs involved in continuing the lawsuit. A suggestion that mediation be explored can be attributed to simple economic good sense. An ideal time to raise the prospect of saving trying to save everyone litigation expenses is immediately before a major discovery event like a prolonged series of depositions, or hiring experts. Rather than an admission of weakness, raising the prospect of mediated settlement discussions can be seen as simple good business.

B. Selection of the Mediator.

Selection of the case mediator should be initiated as quickly as possible - and well before a final date, time, location or format for the mediation is set. The availability and location of the mediator as well as the practice style they prefer to utilize will play a role in how final preparations for the mediation should be undertaken. More importantly, by agreeing on a mediator early in the process, he or she becomes an available resource for dealing with any disagreements that might arise with respect to how and when the mediation will take place. If "shape of the table" disagreements thus develop, the mediator selected can play a role in getting them resolved.

Mediators and mediation styles vary considerably. Whether the best mediator for a given case should be "evaluative" or "facilitative", whether the mediator's experience in the particular subject of the lawsuit is important or not, and the mediator's prior experiences with the parties or counsel are important considerations in making a final selection. With popular mediators who are heavily scheduled, simple availability may be a critical factor.

Perhaps the most important consideration in selecting the right mediator, however, is the simple question, *"Who will the other side listen to?"* Many experienced trial lawyers will conscientiously defer to the other side's choice of mediators based on that fundamental concern. A more conservative approach, however, might be to have one side proffer a list of three to five acceptable mediators giving the other side the final choice from that list.

In preparing the initial list, or in making the final selection from the list, it is wise to take the time to complete some level of research on each mediator under consideration. Ask the mediators under consideration to submit resumes and, more importantly, the names of other counsel with whom they have worked in the past. Contact those lawyers and ask about the proposed mediator's style, energy, creativity and success rate. Network with other lawyers in your own firm or in the field to see if they have had any experience with the proposed mediator. Prepare a short report on each candidate and include the client in the final selection process. In particularly significant cases where the proposed mediators are unknown, arrange for a short interview session to meet with the proposed mediators in advance. Including the client in those sessions will not only go a long way to help determine the best person for the job, but get the client to buy into the process as well.

The overall goal in selecting the mediator should be to find an individual who can truly serve as a neutral, who demonstrates a capacity to work hard, and who will command the respect of both sides. Of these three, the general consensus among experienced trial lawyers seem to be the capacity to work hard - a willingness to become familiar with the details of the case, to create and explore every settlement option possible, and to persistently pursue the reconciliation option with the parties. In complex, multi-party cases, something more than a mere "messenger" is required.

C. Location, Duration and Timing of The Mediation

1. Where Should We Mediate?

Ideally, the choice of location for a mediation session should be driven solely by the physical requirements necessary to stage the event. Appropriate considerations would thus include reasonable travel accessibility, ample room for attendees in joint and caucus sessions, adequate secured storage space for files and materials, overnight lodging opportunities and some separation from other distractions. Choice of location should never be allowed to become a positional issue involving a “home court” advantage of one party or another.

2. How Long Should The Mediation Session Take?

The planned duration for a mediation is more important than the location. Sufficient time should be made available to allow for adequate opening presentations, meaningful caucus work, and an opportunity to reach a suitable closure.

Obviously, the number of parties, the complexity of issues, the dollar amounts involved, and people who must provide input to the opening presentations will play into defining an appropriate time to reserve for the opening presentations. The decision-making temperament of the parties, their distance from an agreement when the mediation commences, and the time needed to think through the issues and make a decision are important factors in scheduling time for the caucus work. Closure requirements will vary from case to case, but adequate time must be reserved to properly confirm and memorialize a settlement agreement as well.

Creating situations in which the parties are rushed to judgement, or forced to endure exhausting marathon sessions into the late hours of the night can compromise the validity of the agreement reached. Scheduling or conducting a mediation in a manner that adversely affects the parties' self-determination is tantamount to abusing the process. Anything that stands a chance of producing, "mediation remorse" should be carefully avoided.

While there is no general rule, and mediations tend to take the time they are given, in a "typical" complex case, two or three days is a safe period to allow for ample presentation of both sides and a fair time to negotiate a resolution. If there is any doubt as to the time needed to appropriately complete a given mediation, seeking input from the mediator will prove instructive.

3. When Is the Best Time to Mediate?

Experience has taught us there is a time to mediate, and there is a time to settle, and the two don't have to be the same. The best time to mediate will vary from case to case. The best time to settle is the point in time when one knows enough about the dispute to intelligently agree to resolve it.

The knowledge necessary to settle intelligently includes adequate information on the merits of the case as well an informed appreciation of the full extent of the political, financial, or other peripheral issues involved in continuing the lawsuit. Depending on the circumstances, civil trial cases can thus be settled before suit, immediately after suit is filed, at the conclusion of discovery, or shortly before trial. All things being equal, the point in time when the parties usually develop a valid understanding of both the merits of their arguments and the full aspect resolving the problem through litigation, occurs after discovery or shortly before trial. A properly timed mediation session, however, can serve to accelerate and simplify the process of getting the parties to the point when they can settle intelligently.

As a general rule, early is better than late in timing a mediation session. While lack of information and the higher energy level of the parties early in a dispute can impede early settlements, pre-suit or pre-discovery mediations can also be used to determine the exact data that needs to be further developed before a case can be settled. In this instance, mediations might be planned in a two-stage process. An initial session to isolate the core

issues of the case, work through the factual and legal basis for each parties' contentions with respect to those issues, and mutually agree on what needs to be done to provide the additional data necessary to reach settlement. This process would produce an interim mediation agreement developed at the first session calling for an adjournment, cost effective, cooperative and focused information gathering of the relevant data, and a return to later mediation sessions to reach closure.

Late mediations conducted after the close of discovery or shortly before trial will enjoy the benefit of better informed negotiations. By that time, however, the full process costs of litigation will have been incurred, and emotional entrenchment is likely to be present. The combination of these investments in the dispute may become insurmountable factors in defining viable settlement options.

D. Ground Rules for The Mediation

In states that have mediation statutes or procedural rules in place, the legal ground rules for the process are established. A stipulation to mediate with a reference to those standards may be all that is necessary to set the legal framework. In areas where there are no pre-established procedural rules, a simple agreement to mediate will be necessary.

The agreement to mediate need not be elaborate, and should not become the subject of extended negotiation and debate. There is often a natural tendency for the parties and counsel to transfer their disagreements and contentiousness on the central issues of the dispute to the simple agreement to mediate the dispute. Care should be taken to avoid prolix, overly detailed agreements that will serve as focal points for still more arguments. Keep the agreement to mediate simple; cover only the essential points.

Obviously, provisions should be made to cover the confidentiality of the process. While some states impose a legal privilege on the process[3] – excepting only any signed settlement agreement that may evolve – all that is really needed is an acknowledgment that any concessions, admissions or communications exchanged during the mediation process are inadmissible in any subsequent evidentiary proceedings. Most states already have

[3] See, for example, Fla. Stat. 44.102(3)

appropriate evidential rules precluding the admission of settlement discussions that can be referenced.

A mutual assurance that both parties shall appear with all necessary authority to reach an agreement should also be included in a stipulation or agreement to mediate. In the case of public bodies requiring compliance with "government in the sunshine" laws, an acknowledgement of the required approval process may be noted to avoid later surprises. In those cases a commitment to include officials who are in a position to make a meaningful recommendation to the public entity should suffice to provide each side with the assurances they need for having the right people at the table. If there are doubts as to who should attend, simply providing that each party will satisfy the mediator as to the authority of the designated representatives may suffice to resolve the problem.

If the mediator chosen has preferences with respect to the format, timing, content and character of pre-mediation statements, those standards might be referenced or incorporated as well, along with provisions dealing with sharing of mediation fees and any facility costs to be incurred.

Finally, it may be advisable to set forth the time, location and duration of the process in the agreement to mediate.

E. Pre-Mediation Organizational Meetings.

In larger cases with multiple parties or complex issues, a pre-mediation organizational meeting of the mediator, counsel, and, if necessary, key client representatives may be appropriate agree on a time and place, develop an agenda, and establish a schedule for the mediation session. At the same time a wide range of other, mechanical and logistical issues can be resolved to make the mediation session go more smoothly – room assignments, cost sharing, joint use of audio visual equipment, and the order of presentations, to name a few.

In multi-party cases, it may also be helpful to consider staging separate pre-mediation organizational meetings between the mediator and all sides to the dispute in order to allow the mediator to get a broad overview of the case and the controlling issues from everyone's perspective. With this insight, the mediator should then be able to advise each side of the more important topics to cover in their presentations when the joint session

convenes. While engaged in defining logistical issues the parties and the mediator can often get a head start on addressing substantive issues as well.

If the subject isn't otherwise covered in the mediator's engagement letter, the stipulation of the parties, or controlling procedural rules, some time might be spent in planning the format a scheduled mediation will follow.

The typical mediation is divided into three segments – opening presentations, caucus meetings, and closure. As will be noted below, each phase is critically important, and fully warrant advance preparation and thought by counsel. For purposes of this section, however, it is sufficient to note that part of the work in pre-mediation organizational meetings should include making sure all three phases are considered in terms of time and adequate participation by the parties.

Ample time and the appropriate audience should be provided for every party who wants an opening presentation made on their behalf. A brief response period should be included in the schedule to allow for development and identification of key issues. Sufficient time and facilities to conduct private caucus meetings should be put in place, and some advance thought should be made concerning what requirements will need to be met to reach and confirm closure of the dispute.

F. What Authority Should Be Present?

Having the right players at the table is critical to the success of any mediation. As the benefits of early mediation become more and more apparent, sophisticated defendants recognize the value in the process and make sure the right players attend mediation sessions. While more and more cases are thus mediated without encountering significant authority issues, when questions of adequate authority do arise, the answers often raise troublesome issues.

The most frequent problems that occur with having appropriate authority present at mediations are found in those cases involving parties that customarily make the sort of decisions necessary to settle a major lawsuit a "group effort". When the parties to a lawsuit utilize decision-making mechanisms such as claims committees, boards, commissions, panels and the like, authority problems appear. It is a physical and logistical

impossibility to convene a mediation session with an entire City Commission, School Board, corporate Board of Directors, or group of company Division Heads in attendance. In cases involving insurance companies, claims adjusters governed by supervisors or claims committees will often appear at mediations with limited dollar authority - authority that turns out to be unrealistic even in the eyes of the attending adjuster. If coverage issues are involved, coverage counsel and an entirely different set of insurance company decision-makers may be necessary to complete a settlement agreement.

As with most other "shape of the table" issues, enlisting the aid of the mediator in resolving these issues early in the process can be helpful. Rather than have one party directly confront the other with authority questions, the mediator can be made aware of the perceived problems and asked to address authority concerns in private pre-mediation planning sessions. If both sides agree to satisfy the mediator that special steps have been taken to make sure the right players come to the table, biased judgements on the issue can be avoided. Through the offices of the mediator, agreements to generate board resolutions delegating authority, written credentials, or simple confirming assurances can thus be negotiated before the mediation begins.

In the case of large corporations, for example, a representative from the general counsel's office may suffice as a mediation representative of the company if the mediator is reasonably convinced that the legal department of the company has, as a matter of corporate policy, full authority to settle the case. If the corporate policy in such matters would require settlement proceeds to be taken from the operating funds of the division or department involved, however, it may be advisable for the mediator to suggest an appropriate representative of that department attend as well. To remove the problems created by overly aggressive settlement demands, counsel for the claimant may wish to consider a private, confidential session with the mediator to discuss the differences between probable trial verdict ranges and more realistic settlement ranges. The mediator, in follow up private sessions with the opposing party, can then make a more informed judgement as to whether or not the representatives suggested will be the right player for the settlement negotiations.

As previously noted, in the case of governmental entities controlled by public bodies, government in the sunshine laws preclude having the appropriate decision making group attend a confidential mediation session.

In those cases, assurances should be generated confirming that individuals who have the position and rank to make an influential recommendation to the governing body will represent the public entity.

In instances where the claimant is a minor or a ward of the court, everyone should be made aware that court approval will be necessary to confirm any settlement reached. In those cases, it may be advisable to have the legal representative who will be petitioning for court approval on hand or available at the mediation session. If the claimant comes with other parties with an interest in the settlement proceeds – holders of subrogated claims for reimbursement of worker's compensation or medical benefits

V Participants – Assembling the Mediation Team

The people selected to serve as party representatives in a mediation proceeding are obviously a critical component of a successful outcome to the process. An effective mediation team consists of carefully selected and prepared individuals who understand both the overall process and their specific roles. Rather than choosing a mediation team based on titles, seniority, or simple relationships to the parties, mediation team members should be selected on the basis of their ability to make a meaningful contribution in one or more specific phases of the process.

There are three basic functions mediation team members can provide to the process – participating in the opening presentations, providing services as an information source, and participating in the final decision-making

A. The Opening Presentation Players

The opening presentations in a mediation are designed to both present the best case for each party's day in court, and to give each party some opportunity to "vent" stored-up emotional feelings about the dispute that would otherwise serve to block fair consideration of settlement options. The people selected to make the opening presentations should be capable of meeting each goal.

Clearly, lead trial counsel (along with any special counsel to be utilized) is primarily responsible for making the opening presentations in a mediation session. Depending on the nature of the case, however, key expert

witnesses can be effective in giving short samples of their proposed trial testimony as well as taking the parties through some of the more complex aspects of liability or damage positions. Another potentially effective participant might be a key lay witness who would be willing to either directly participate to offer a preview of their trial testimony, or indirectly appear through affidavits, letters, or a video taped appearance.

The opening presentations in mediations are basically condensed versions of the complete trial position each party will present should the dispute be adjudicated. Within the overall duration of an average mediation session, however, there is a relatively limited amount of time available to present a fair representation of what would be a lengthy, complex trial. Quite apart from the time available, the audience in a mediation has limits on what it can or will effectively absorb. To maximize use of the time available for these abbreviated presentations, more and more trial lawyers are turning to specially created graphics to quickly and effectively illustrate their points. Computerized power point illustrations, videotape segments, overhead view graphics, slides, and simple feather board charts have all become integral tools for effective opening presentations in mediation sessions. Accordingly, technical support personnel are becoming regular players on many mediation teams as an integral part of the presentation group.

B. The Information Sources

One principal factor that leads parties in a mediation to a settlement agreement is the discovery of new or different information during the mediation process. Whether the “new” information consists of a previously unknown fact, or simply another slant to a previously known fact, the data learned serves to give the parties a "safe" reason to change their minds without loss of face. New data prompting a reason to change that doesn’t require an admission of fault, direct recognition of wrongdoing, or acknowledging an error in judgment.

The stage is set for new questions concerning the facts underlying a dispute to emerge during mediation in a variety of ways. In many cases, a post presentation dialogue will inevitably raise issues concerning one or more of the specific matters in controversy. In the midst of settlement options being discussed in caucus, it is quite common for new questions to be raised concerning critical elements of one or more of the sub-issues in the case. Answering these questions promptly and forcefully can be critical to

the outcome of the mediation. Verifying asserted contract balances, change orders, the content of meeting minutes, confirming test reports, notices, and existing testimony are but a few of the endless stream of underlying challenges that can emerge in this respect. A well-prepared mediation team will be ready to respond to those instances with prompt access to the documents, testimony, or other information relevant to the issues raised.

One member of the mediation team should thus be delegated with the responsibility for organizing a retrieval system to access required additional information. The capacity to immediately retrieve and convincingly present the one fact that may change someone's mind is a critical part of a well-prepared mediation team.

Portable computers can obviously simplify this task. Deposition records can be indexed, key documents can be scanned, and both can be electronically stored for prompt and accurate retrieval during the mediation session. Alternatively, documentation control personnel can be charged to stand by remote file storage centers with cellular telephones and telefax machines in hand to promptly respond to requests for key documents required.

In some cases, key employees with direct knowledge of the underlying facts can serve as extremely helpful information sources during a mediation session. Their simple presence at the mediation can serve to quash temptations to wander to far afield from the facts during the case analysis phase. Assuming their memories are sound, and their deliveries convincing, they might even be given a speaking part in the joint-session presentations. Whether "information source" representatives should stay with the process and take an ongoing role in decision-making, however, bears careful thought. Often individuals directly involved in the underlying dispute carry an agenda that makes an objective evaluation of the issues problematical. At the very least, however, they too should be armed with cellular telephones and available for instant contact and reference to provide whatever information emerges as necessary to resolve issues under discussion.

Other information sources that might be kept available on or off-site include home office staff, employees, or administrators who might help deal with settlement scenarios – sales, marketing, service, or administrative personnel for example.

Finally, the information source component of the mediation team should also consider arranging for access to key non-party witnesses. Many times, it will become helpful for parties to a mediation to place a joint telephone conference call to a critical non-party witness to clarify or resolve an issue under consideration.

C. The Decision-Makers

The people who will ultimately decide upon settlement terms are obviously critical components of any mediation team. In addition to someone with complete and full authority to both define and bind a party to an agreement, the decision-making components of a team may also include the financial, administrative or executive advisors appropriate to reach an agreement. While care should be taken to insure that the decision-maker's support group doesn't ultimately take over the decision making process, the people who are to decide should be given ample resources to enable them decide intelligently.

Some care should be taken in advance of a mediation to make sure everyone participating in the process has a clear understanding of who will be making the ultimate decision. Mediation is a relatively unstructured process. Absent clear instructions, strong personalities found in experts, relatively low level employees, and even trial counsel can rise and dominate the group in the decision making process. Decide who is to decide, then let them decide.

VI. Preparation for Mediation

A. Preparation for Opening Presentations

The presentation of the client's case in the opening phase of a mediation is a task that must meet two often-conflicting needs.

First, the client must feel his or her story has been told. Any anger, frustration, and discontent stemming from the events leading to the dispute must be relieved before focused attention can be given to reconciliation considerations. To one extent or another, therefore, the client must be given the chance to vent - either through counsel or directly. In all occasions, the

client must feel that the merits of his or her position in the debate has been fairly presented and understood.

Secondly (and often in contradiction of satisfying the client's "venting" needs) there is a need for the opening presentations to clearly and objectively communicate the "other side of the story" to the opposition. Many clients to a dispute might be quite pleased with a lawyer that relieves built up feelings and relates their position in ominous, scolding, or even threatening terms. An overly aggressive tone or demeanor to an opening presentation in a mediation, however, can serve to turn off the opposition and the critical task of expanding their understanding of the dispute is not achieved. The better rule is to avoid hyperbole - don't give the other side any more adrenaline than they already have.

All things considered, it is probably better to shape the opening presentations in a mediation to meet the demands of the second task rather than the first. Calming the client down or providing a process to vent subliminal frustrations can be handled in other ways. There is only one opportunity, however, to be in a position to bring the opposition to understand and fully appreciate all dimensions of the dispute. In instances where there are insurance representatives, claims adjusters, or other conflict management personnel involved in the decision-making for the other side, an angry or emotive presentation is a waste of time.

One acceptable method of satisfying both needs is to simply allow the client an opportunity to participate in the opening presentations to satisfy whatever venting needs exist. In that event, Counsel would prepare and execute an opening presentation geared toward communicating the reality of the dispute to the opposition in a tone and manner best suited to complete that task. The client could then add the emotive element to the presentation while satisfying his or her need to vent.

Accordingly, the best overall theme and tone of opening presentation in mediation would probably be a matter of fact description of the case to be presented at trial – firmly and unequivocally stated. It should clearly set forth the principal contentions underlying the position asserted, and the facts, principal documents, and expert opinions that support those contentions. There should be minimal argument – let the facts do the arguing.

As a general rule, presentation notes should stay in outline form – avoid reading a scripted narrative. This should be a generalized, "Executive Summary" presentation that goes to specific instances only to demonstrate a point. At the same time, however, be prepared to go to the specifics whenever challenged or questioned.

While interactive exchanges during the opening presentations can be helpful, they should be carefully monitored and controlled. Be prepared for and encourage clarifying questions by the Mediator or the opposition, but avoid debate. With some clients (as well as overly assertive experts, advisors, and other support personnel) there will be a compulsion to "play lawyer" during interactive sessions. These efforts are usually manifested by clumsy attempts at imitating cross-examination techniques with a series of prefatory questions aimed at striking a final smashing blow with the witness hopelessly trapped into agreement. Everyone, especially clients and non-lawyer participants, should be discouraged from turning a mediated interactive exchange of information necessary to clarify the elements of a dispute into a process aimed at winning the dispute. The objective for the opening presentation is met when the issue is delineated, not when it is decided.

As claimant, avoid making an overly defensive presentation that dwells on anticipated defenses expected to be raised by the opposition. Save key defensive arguments for rebuttal (if the case warrants, be sure to plan for rebuttal time with Mediator in the pre-mediation organizational discussions). Focus instead on the affirmative elements of the case in chief. If and when the anticipated defenses are raised during the opposition's presentation, deal with them in a systematic, "bullet point" manner in a short rebuttal.

As previously suggested, make good use of graphics. Power point presentations, overhead view graphics, feather boards and models can serve as persuasive components to an opening presentation. Care should be taken, however, not to overkill with graphics. Under all circumstances, avoid simply reading a script displayed in an overhead or on a board. A good use of graphics summarizes key points rather than advances the entire argument. A very effective graphic in mediation, for example, would have a principal contention briefly stated at the top, with the list of the facts, documents, testimony etc. that will be used to prove that contention spelled out below it.

Finally, it should also be remembered that an opening presentation in mediation need not be confined to a preview of the lawsuit or limited to a discussion of admissible evidence. The time allotted for these presentations can also be used to effectively communicate economic, social, or even political reasons supporting settlement.

B. Overall Preparation for Caucus Discussions – "White Papers", "Zingers" and Settlement Options.

Interestingly, participation in caucus discussions is rarely the subject of extensive planning or predetermined strategies by mediation parties or their counsel. More ground, however, is lost or gained during the ebb and flow of the negotiations that occur in caucuses than at any other phase of a mediation session.

The initial caucuses convened usually involve a continuation of the positional debate presentations. Despite the most careful preparations, what needs to be said by everyone who needs to speak doesn't always occur during the main presentations. It is quite common, therefore, for the mediator initiating an early caucus to be greeted with still more positional debate.

When that dust settles, however, the real mission of the caucus sessions can commence. The confidential, closed-door nature of the caucus provides a forum with the mediator to accomplish two basic tasks.

One purpose of the caucus meetings in mediations is to give the Mediator a chance to privately "probe vulnerabilities" in each party's position. To directly, indirectly, bluntly or subtly instigate "reality checks", and focus the parties on the true strengths and weaknesses of the underlying case. (Emphasis, of course, is placed on developing each party's recognition of the stronger points on the other side of the case). Caucuses are also used to develop and explore possible settlement scenarios – to brainstorm and run through the variety of settlement options that arise during the process. The caucus sessions thus become critical components of mediations.

Clearly, recognizing and accepting legitimate vulnerabilities in each party's positional debate is an integral part of the mediation process. Indeed, experience has taught us we often learn more in mediation about the merits of a case than through formal discovery. Aggressive advocacy from counsel

should not interfere with this important step on the road to settlement. Clients (and lawyers) should be given the room and opportunity to fairly adjust the evaluation of their claims against the opposition. At the same time, however, surviving the "reality check" phase of the caucus sessions in a balanced and equally represented manner can be substantially enhanced with appropriate preparation and forethought. To fully benefit from this aspect of the caucus process any available data that will fairly and rationally balance points raised by the opposition should be gathered, organized, and made available for caucus sessions. At the same time, additional data might be gathered, synopsized, and made ready for delivery to the mediator to raise as new vulnerabilities in opposition's case.

1. "White Papers" – Preparing for Positional Vulnerabilities

Prior to mediation, an effort should be made to objectively research the pleadings, correspondence, discovery documents, notes of oral arguments, and any "table talk" comments recorded to prepare a detailed list of the opposition's principal contentions and defenses regarding the case. Locate and record what the opposition has actually been saying, don't be led astray by what you believe the arguments against your case should be. Focus then on the opposition's most frequently raised arguments, noting the statistical frequency in which specific arguments are raised. Prioritize a list of their arguments by the frequency of their appearance. These same arguments will become a central part of the mediation discussions. Odds are, the opposition will be raising the same themes in mediation that they have been raising during the life of the litigation process.

After listing each contention raised against your case – in order of the frequency in which those contentions are raised – research the law and facts which balance or rebut each of those points you can expect the opposition to assert at mediation. Think through and succinctly record your response along with the sources for your response.

On a single sheet of paper, then combine each contention you can expect the opposition to raise, followed by your response. Using an abbreviated "bullet" format set forth in simple language and plain terms both their contention and your points rebutting that contention. The final product should be a tool that can be given to the mediator as a guide in quickly and succinctly responding to the opposition arguments as they are raised during

mediation caucuses. Attempt to limit each to one or two pages with footnoted references to supporting documents, testimony, etc. that can be retrieved if necessary.

Organize the total number of white papers in a simple, easily retrievable manner – perhaps an indexed notebook or file folder. Be ready to get to the points analyzed quickly and efficiently in the heat of battle. Have back up data accessible, but don't make it part of the main package. The benefit of the white paper work is in its simplicity and brevity.

When your vulnerabilities are then probed during the caucus sessions, you will be ready to meet the Mediator's inquiries with a comment like, "Good point – and we are glad you asked that question. Here is a brief analysis of that issue which presents both sides, or better balances the problem we have". The Mediator will then have a single sheet of paper to refer to in the event the point arises again, or when he returns to caucus further with the opposition.

No case is perfect. It is inevitable that there will be anticipated or unanticipated contentions raised by the opposition that simply have no pat answer or convincing rebuttal. Part of the mediation caucusing process is to flush out these issues and provide a confidential, "safe" environment to give them fair consideration with a neutral. In analyzing the, "trial or settlement" decisions that must be made in the course of a mediation, it is critical that both good and bad points of the trial option are fully presented. That analysis cannot be intelligently made without all points of view getting the full and fair credit they deserve. Once again, clouding that fair consideration with overly enthusiastic advocacy is a misuse of the mediation process.

2. "Zingers" – Creating Positional Vulnerabilities

During the caucus sessions, it is helpful to provide the Mediator with what you consider strong or compelling points supporting your contentions in the case; "zingers" that the Mediator can raise in fulfilling his or her reality check function with the opposition.

Prior to the mediation session, prepare a list of the ten most compelling points you feel the opposition should fairly consider in making its own "trial or settlement" analysis. The list may include not only perceived weaknesses in the opposition's case at trial, but political,

economic, or pragmatic reasons to settle as well. Prepare a short briefing statement to support each – again, on a single sheet of paper.

The "Zinger" list may and should include points favoring your side of the positional debate to be resolved at trial. Include on the list major credibility issues, positional inconsistencies, procedural obstacles, prior jury verdict ranges, and any other aspects of litigation that the opposition will have to meet and overcome to achieve a successful outcome at trial.

The list might also contain a series of practical reasons not to try the case no matter who wins or loses. Examples might include, an analysis of the cost of litigation (in time and money), the market impact and benefit to competition of the debate going public, disruption of business activities, corruption of future business relationships, and potential adverse precedents created.

In short, the "zingers" list should include any considerations that speak for a settlement over litigation. The zinger list should serve to provide the mediator compelling points to raise with the opposition that will favor settlement.

3. Settlement Options - Something Other than Money.

One of the most important functions of a mediation caucus session is to brainstorm and develop settlement options. While a robust exploration of the full range of potential aspects of litigation is always important, that dialogue ultimately serves as a backdrop to consideration of options to settle the case.

In commercial cases, a systematic search for settlement options other than money should be conducted before the mediation commences. Consideration should be given to possible future business arrangements, i.e., an edge on the bid for the next project, special supply or delivery agreements, an exchange of products or services, joint undertakings or other "earn out" arrangements. Often simple things like business references, introductions, or joint public statements can serve as compelling elements of a settlement agreement in commercial disputes. If there is any way to convert a business dispute to a business opportunity, careful consideration should be given to that option in advance. In considering "other than money" settlement options careful thought should be given as to whether they are

potentially doable – whether there are legal, contractual, political or physical barriers to including such terms in final settlement. The ultimate decision to actually include these terms in an agreement can be made later. In the advance panning stage, focus is on nothing more than feasibility. The settlement negotiations themselves should be entered with an, “anything is possible” frame of mind.

In personal injury or intangible damage cases where the payment of money is the principal settlement consideration, there is still room for advance planning for caucus negotiations. In those cases, for example, defining realistic goals for the *use* of any settlement funds generated can focus the parties on aspects of settlement more solid than a simple dollar amounts. What bills need to be paid? What are the exact amounts necessary to eliminate liens or third party claims on the settlement proceeds? After the bills are paid, what needs to be done with settlement money to address valid interests and concerns? What are the immediate and future family needs? Will immediate case be needed to address those needs, or will long-term annuities work as well or better? College education, retirement security, even future family living support can often be met with structured settlements – either taken as part of the settlement (which, in some cases, can also generate income tax advantages), or purchased independently with settlement proceeds.

Even in the intangible damage cases, settlements are not always about money. Letters of apology, public announcements of exoneration, reinstatement, amending or destroying adverse personnel records, job references or opportunities, all can play a major role in making a final settlement more satisfying to the parties.

C. Preparing for Closure - The Settlement Agreement

All the preparation for the mediated negotiations will be for naught if the end result of those negotiations – the settlement agreement – is not properly documented at the conclusion of the mediation session. Virtually every jurisdiction with statutory mediation programs cloaks the process with strict confidentiality provisions. In other jurisdictions, concessions, admissions and even agreements reached during a mediation would normally be considered "settlement discussions" and thus generally held inadmissible in any subsequent evidentiary proceeding. The only exception to these confidentiality and evidential restraints is a signed settlement agreement. It

is essential, therefore, that any ground gained in resolving a conflict in mediation be confirmed in writing immediately.

Tying down detailed, final settlement terms at the end of a mediaton session, however, is not always possible. Available time, secretarial services, facilities and the temperament of the parties after a long, grueling negotiation session will often preclude closing a mediation session with a detailed and lengthy agreement. Confirming closure at the conclusion of the mediation therefore might best be accomplished in two steps. Begin with a short, handwritten "bullet point" agreement signed by the parties and counsel to seal the deal at the end of the session. That document can then be followed by more detailed agreement (with all required attachments) prepared by counsel at later date to finalize the agreement.

1. Sealing the Deal - Plan to Keep it Short and Simple

As a general rule, it is by far the better practice to capture the essential terms of a mediated settlement agreement in a short "bullet point" written instrument signed by parties and counsel and exchanged at the conclusion of the mediation session. Many states with established mediation statutes and standards of performance for mediators flatly require the parties to sign off on the essential terms of the agreement before adjourning.[4] The agreements drawn at the conclusion of the mediation session need not be final in form. Mediated settlement agreements can be, and often are, prepared as handwritten instruments with the idea that "final" documents making up the more detailed terms of the settlement, i.e., release forms, stipulations of dismissal etc., will be prepared by counsel in due course.

Clearly, there is something to be said for going immediately to the word processor and, while everyone is still assembled and the mediator on hand to resolve any disagreements along the way, prepare complete and final settlement documents at the end of the mediation session. If the circumstances of the case at hand will allow it, by all means, get it done then and there. Insisting that the parties and counsel go into a prolonged session reading and reviewing complicated fine print in a settlement document, however, can be counterproductive after a long hard negotiating session to reach the essence of a settlement.

[4] See, Fla., Stat. §44.102(3); Fla. R.C.P. 1.730(b)

People are usually physically tired and emotionally drained after prolonged or difficult settlement negotiations. Tempers are likely to be short. On many occasions, travel arrangements are imminent causing hurried thinking and reactions. After prolonged mediation sessions, there is a very good chance the parties simply aren't in the best frame of mind to make even minor decisions over detailed terminology and phrasing in a boilerplate settlement agreement. The entire settlement can be lost over a disproportional disagreement concerning relatively minor terms that is driven more by fatigue and anxiety than logic. The better course may be to simply capture the essence of the deal in a manner to create an enforceable agreement, and leave the peripheral details for a following session with counsel.

In a simple two party, one claim case between "ABC" and "XYZ", therefore, a bare-boned simple handwritten instrument capturing the following essential terms might be adequate:

a) The case style and number
b) The date
c) An introductory agreement and consideration clause, such as,

"In consideration for the mutual covenants net forth below, the parties agree as follows . . ."

d) Who will pay how much to who, and when and how it will be paid, such as,

"XYZ shall pay ABC the total sum of XXX dollars in full settlement of all claims asserted by ABC in these proceedings. Such sum shall be paid in ____ days by check payable to Trust Account of _____ Esq. to be held in escrow pending preparation, execution and delivery of all documents necessary to carry out the terms of this Agreement."

e) Who will release who, and how the case is to be disposed of, such as,

"In exchange for the funds described in paragraph ___ above, ABC shall deliver to XYZ a General Release inuring to the benefit of XYZ (and it's liability insurance carriers) and ABC and XYZ shall file in these proceedings a Joint Stipulation of Dismissal With Prejudice.

f) A joint commitment to complete the settlement process by parties and counsel, such as;

"The parties hereto and counsel further agree to cooperate fully in the preparation, delivery and execution of all documents necessary to carry out the terms of this Agreement."

All this, of course, is followed by signature lines for all parties having a role in the settlement.

2. Plan to Deal with Special Documents and Provisions

It is, of course, impossible to predict exactly where settlement discussions will end. Preparing a detailed settlement agreement in advance of the mediation session - even one that leaves blanks to fill in settlement amounts and basic terms - may not be entirely practical. There are, however, a number of supporting documents or special clauses unique to a given case that can be collected or prepared in advance and either signed or approved as to form by both parties at the conclusion of the mediation. In addition, certain collateral matters that must accompany a settlement agreement in certain cases should be considered in advance of the mediation session.

Thus, some thought should be given to the advance preparation of special settlement documents that may be necessary in a given case, such as;

a) Limited releases, mutual releases, or indemnification agreements.
b) Lien waivers, mortgage satisfactions, security instrument releases.
c) Referral letters, employment confirmation statements.
d) Structured settlement annuity contracts or performance charts.
e) Close out warranties (construction cases), ongoing product warranties.
f) Dispositive pleadings, stipulations of dismissal, stipulated final judgements, etc.

In addition, preliminary thought might be given to advance preparation of any special provisions that might be appropriate to a settlement agreement in a particular case such as;

a) Confidentiality clauses
b) Mutual non-disparagement clauses
c) Settlement fund escrow clauses
d) Settlement agreement dispute resolution clauses
e) Covenants not to compete
f) Stipulated injunctive clauses
g) Settlement agreement enforcement clauses
h) Ongoing business relationship arrangements

Again, while a certain amount of preparation for closing a mediated settlement arrangement is in order, care should be taken to recognize the physical and mental limits of what the parties can accomplish at the time. All that is required is a simple, enforceable confirmation of the agreement. Discretion should be exercised in pushing the parties to far with a detailed, lengthy final settlement agreement at the conclusion of the mediation session.

D. Avoiding Impasse - Plan for the Contingency of Downstream Mediation Activities

Mediation sessions that don’t end with an overall settlement don't need to be totally unproductive. Impasse is not the only option to reaching a final agreement at the conclusion of the mediation process. With some creativity, and a bit of advance contingency planning, mediation sessions that do not immediately settle a case can be used to plan subsequent facilitated measures between the parties that, in turn, might result in settlement. These subsequent measures or, "downstream mediation programs", tailored to specifically deal with issues that are blocking settlement, can turn what appears to be an unsuccessful mediation effort into a success.

In the event negotiations to reach a final settlement stall, some effort should be put into attempting to determine why. What underlying issues in the dispute are blocking settlement? What are the fundamental disagreements between the parties preventing reconciliation? With help from a good mediator, it is not difficult to identify specific factual or legal

disputes that have the parties locked from further movement toward an agreement. Perhaps there is a significant difference in how the parties have valued a personal injury case, how they have logically arrived at commercial damages claimed, or perhaps there is disagreement on whether an asserted legal defense will dispose of all or part of the claim. In many instances, some of these issues can be anticipated in advance of the mediation, in more instances, the fact of these differences in opinion come to light during the mediation.

Once the blocking issues are defined, thought might be given to using the mediator to facilitate a downstream program aimed at shedding more light on those issues and giving the parties an opportunity to reconsider their settlement positions. Programs, for example, might be agreed upon to;

a) conduct joint testing or investigation procedures to confirm or deny defects,
b) initiate focused discovery activities to establish disputed facts,
c) conduct focus group or non-binding adjudicatory hearings to get additional evaluative input, or
d) hold special facilitated workshop meetings with experts to reach consensus on repair methodology or damage calculations.

Most of the time, potential stumbling blocks to settlement can be anticipated in advance. If they arise during mediation, having an outline of a plan for furthering the settlement program can keep settlement hopes alive.

VII. Conclusion

As a structured settlement negotiation process, civil trial mediations are quickly becoming the predominant dispute resolution mechanism in this country. In the future, mediation of civil trial actions will probably become the process disposing of the vast majority of civil trials that are filed. To remain a central figure in this part of dispute resolution, trial lawyers must be able to perform effectively in the mediation process. Like anything else, this will require careful preparation and planning. Mediations cannot be allowed to simply happen.