Chapter Five
Preparing Your Case for Mediation

Topics in this chapter include:
1. Prepare a Mediation Representation Plan
2. Prepare a Representation Plan for a Cross-Cultural Mediation
3. Select the Mediator and Study the Mediation Rules
4. Prepare for Pre-Mediation Contacts with the Mediator
5. Resolve Who Should Attend the Mediation Sessions
6. Divide Responsibilities between Attorney and Client
7. Select Your Primary Audience in the Mediation
8. Research Legal Case—the Public BATNA
9. Prepare Presentation of Your Legal Case
10. Prepare Preliminarily the Opening Statements
11. Consider When to Caucus
12. Consider Need to Gather Information and File Motions
13. Consider Level of Confidentiality that You Need
14. Consider How to Abide by Conduct Rules
15. Consider What to Bring to the Mediation Session
16. Checklist for Preparing Case and Mediation Representation Plan

Success in mediation is inextricably dependent on devoting the time and effort necessary to prepare properly and thoroughly for the mediation session. This chapter canvasses what needs to be done. (And, much needs to be done which is why this chapter is the longest one in the book.) Before meeting with your client, you should develop a fullfledged representation plan, gather essential information, and prepare to discuss several vital matters with your client. The subjects of this chapter are intertwined with the subjects of the next chapter on preparing your client for the first mediation session.

The consequences of inadequate preparation are clear and inevitable: You will prolong the mediation and increase the risk of failure. At a minimum, you will compel the mediator to spend considerable time “educating” you and your client on how to participate productively. For instance, if your client arrives wedded to the extreme positions in his pleadings and is unrealistically optimistic about his success in court, the mediator will have much work to do. The mediator will spend time shifting the discussion from your client’s positions to his interests and helping your client more accurately assess the benefits and risks of going to court. If your client arrives without considering why the case has not yet settled, the mediator will spend time assisting your client in diagnosing the obstacles to settlement and ways to overcome them. This “education” may require multiple sessions. And the education may not fully succeed, resulting in the mediation failing to achieve its potential.

Formulate Mediation Representation Plan
1. Negotiation Approach: Creative Problem-Solving
2. Goals: Meet Parties’ Interests and Overcome Impediments
3. Strategy: Take Advantage of Mediator’s Presence
   (The Mediator’s Mix of Approaches, Specialized Techniques, and Process Control)
4. Where Implement: At Each Key Juncture in the Mediation Process
1. Prepare a Mediation Representation Plan

Your single most important representational task is to craft a reasoned, tailored plan. Your mediation representation plan will govern what you and your client will do throughout the mediation process. It addresses the type of mediator you will need and what information you should put in your briefing paper. It includes what you will want to accomplish in the pre-mediation conference, what you and your client will say in opening statements, and how you and your client will participate in joint sessions and caucuses.

Your representation plan should be developed with your client, as explained in the next chapter on preparing your client.

You should try to prepare the representation plan in writing although you may not always find it practical to do so, especially for modest cases. At a minimum, you should use the checklist at the end of this chapter as a handy guide to help you think through your plan for mediation representation. The checklist also can serve as the outline for a written plan and the relevant sections of the plan can serve as the outline for preparing any pre-mediation submissions and opening statements.

a. Overview of Plan

Your representation plan, based on the mediation representation formula, consists of your plan for negotiating, using the creative problemsolving approach, to meet the interests of your client and to overcome any impediments by taking advantage of the ways the mediator might contribute to resolving the dispute at key junctures in the mediation process.

b. Negotiation Approach: Creative Problem-Solving

Your representation plan is propelled by the way you and your client negotiate. Remember, mediation is simply a continuation of the negotiation process.

Under the Getting to Yes division of the world into adversarial (positional) and problem-solving (principled) approaches to negotiations, each approach will produce a different representation plan. The two basic approaches were amplified in detail in chapter 1. Each approach points to a different way for developing settlement proposals and reaching an agreement.

In the classically adversarial (positional) approach, you commence the opening offer strategy and negotiation dance by taking firm, extreme positions in the briefing paper and focusing your opening statements on justifying your positions as the just and correct result. You know full well that your initial positions are unrealistic, presented only as an opening gambit. In the briefing paper, opening statements, joint sessions, and caucuses, you “spin” the mediator, hide the bottom line, use threats and a few tricks, and relentlessly delay any major concessions or compromises until the rapidly approaching “at the end of the day” deadline.

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1 See Section 2 of the Introduction Chapter.
3 See Chapter 2, which examines in detail the differences between the adversarial and problem-solving approaches. <not sure where this goes, there was not a “3” reference in the text.>
In a variation of the classic adversarial approach, you view the mediation session as an opportunity to frighten the other party into settling. The mediation session is not seen as an opportunity for collaboration or even compromise. Instead of offering an olive branch, you offer a well-orchestrated adversarial presentation of the merits of the case and a dramatic preview of what will happen to the other party if he dares to show up in court. You focus your entire participation, starting with the briefing paper and opening statements, on trying to demonstrate that you will win in court and that this mediation offers a less costly and painful way out of this misery.

In stark contrast, this book presents the problem-solving prescription. You will recall the general definition of creative problem-solving in the introductory chapter. As a problem-solver that is creative, you do more than just try to settle the dispute. You creatively search for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than settling for win-lose outcomes, you search for solutions that can benefit both sides. To creatively problem-solve in mediation, you develop a collaborative relationship with the other side and the mediator, and participate throughout the mediation process in a way that is likely to result in solutions that are enduring as well as inventive. Solutions are likely to be enduring because both sides work together to fashion nuanced solutions that each side fully understands, can live with, and knows how to implement. Solutions are likely to be inventive because you advocate your client’s interests instead of legal positions; use suitable techniques for overcoming impediments; search expansively for multiple options; and evaluate and package options imaginatively to meet the various interests of all parties. And solutions are likely to be found because you advocated as a creative problem-solver.

The problem-solving approach can be translated into a mediation representation plan by first selecting a mediator who knows how to conduct a problem-solving process. Then, you use the pre-mediation conference and the briefing paper to introduce a discussion of both parties’ interests, prospects for creating more value (expanding the pie), and settlement ideas that are not limited to what a court might do. These topics are further expanded in opening statements and given primary attention in joint sessions. You come prepared to suggest fair standards or neutral procedures for resolving any distributive conflicts, including objective criteria for sharing any expanded value. Throughout the process, you work with the other side, trying to preserve a continuing relationship. Out of this interest-based discussion, you, your client, and the other side collaborate to develop creative and sensible settlement proposals and solutions.

c. Goal: Meet Parties’ Interests

You want to be sure that your representation plan specifically advances your client’s interests while responding to the other side’s interests. If your client wants to develop a creative, global resolution, for instance, you should advance this goal

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4 For a discussion of various competitive games, see Charles B. Craver, Effective Legal Negotiation and Settlement 181–224 (3d ed. 1997).
5 For example, a conflict that arises over the value of real property can be resolved by using objective criteria. The parties could jointly agree to hire two real estate appraisers to appraise the property and then agree to use an average of the two appraisals.
6 For a full discussion of role of interests and ways to identify them, see Chapter 1.3(a)(ii), “Critical Juncture (Box) -Identify Interests”; Chapter 3.2, “Client Interviewing Techniques”; and Chapter 3.3, “Disputes Suitable for Mediation.”
throughout the mediation process. You should select a mediator who is skilled in searching for inventive, broad solutions, begin inviting these types of solutions in your briefing paper, raise this interest in the pre-mediation conference, and follow through in opening statements, joint sessions, and caucuses. A detailed example of how to prepare a representation plan that advances interests is offered in subsection (i).

d. Goal: Overcome Impediments

Your representation plan should confront the reasons that the dispute is not settling. If there was no impediment, then presumably there would be no dispute. Under the Moore approach, you identify the cause, classify the impediment, and develop a suitable intervention plan that takes advantage of the presence of a mediator.

In legal disputes, you are likely to encounter three types of obstacles. You may be hampered by a relationship conflict in which the parties are unable to communicate effectively with each other. You may be impeded by a data conflict in which each side is wedded to clashing views of what might happen in court, the public BATNA. Or, you may be hindered by a structural conflict in which the interests of a client and his attorney conflict, known as the principal-agent problem.

Several examples of representation plans to overcome impediments are supplied in subsection (h).

e. Strategy: Take Advantage of Mediator’s Mix of Approaches

Your representation plan should take advantage of your mediator’s mix of approaches. You will recall that a mediator’s approaches are influenced by the mediator’s professional standards and vary within four subject areas: how he manages the process (facilitative, evaluative, or transformative); how he defines the problem (narrowly or broadly); how he involves clients (limited or actively); and how he uses caucuses (extensively, limited, or not at all). At this point in your mediation representation, presumably you have either picked a mediator who follows your preferred mix of problem-solving approaches or have researched the approaches of the assigned mediator.

This section will show generally how your mediator’s mix of approaches influences your representation plan. For an example of a comprehensive plan, see subsection (i).

i. Facilitative, Evaluative, or Transformative

Whether your neutral is predominately facilitative or predominately evaluative will impact on your representation plan. If your neutral will predominately facilitate settlements, you should feel confident engaging in a collaborative, problem-solving representation strategy. If your neutral will predominately evaluate, however, you may prefer a more conventional adversarial strategy that is more suited to securing a favorable assessment. If your neutral’s approach will be a mix of facilitation and evaluation, your representational strategy will likely become a fragile hybrid in which you will make

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7 The Moore method for diagnosing impediments was examined in detail in Chapter 3.2 on “Client Interviewing Techniques.” For additional intervention techniques, see Chapter 8, “Breaking Impasses with Alternatives to Mediation (ATM).”
8 See Chapter 4.2(b), “Mediator’s Approaches.”
9 Id.
compromises that risk diluting the full benefits of the mediation process. For example, you may be inclined to withhold information that could be useful in a facilitative mediation in order to increase the likelihood of the neutral rendering a favorable evaluation.

If the mediator in your case is trained in transformative mediation,\(^\text{10}\) you will need to adjust your representation plan to account for this different approach to mediation. Instead of promoting settlement for the parties, the transformative mediator will support the parties’ own opportunities for perspective-taking, deliberation, and decision-making regarding matters the parties themselves choose to explore. This may or may not include settlement. As a result, you and your client will have the flexibility and responsibility to shape a problem-solving process for yourselves. Although the mediator will not shape the process for you, the mediator will support opportunities for positive interactions between you and the other party in mediation. For example, instead of developing a representation plan that relies on the mediator to initiate impasse-breaking strategies, you and your client can introduce these strategies yourselves. The mediator will facilitate your communication with the other side in ways that help both sides more clearly understand the impasse and the initiatives you are taking to overcome it.

ii. Narrow or Broad View of Problem

Your representation plan will be effected by how narrowly or broadly your mediator approaches the problem in the dispute.\(^\text{11}\) If the mediator will focus on Level I litigation issues, you should come prepared to engage primarily in a realistic assessment of the legal issues and to creatively solve the presenting legal problem. If the mediator will consider a broader definition of the dispute, as is typically done in classic problem-solving mediations, you should be prepared to explore creative ways to satisfy Level II business interests and Level III personal, professional, and relational interests.

iii. Limited or Active Client Participation

Your mediator’s approach to client participation\(^\text{12}\) will impact on how you should represent your client. If your mediator invites wide client participation, you should prepare your client to talk about the dispute, to explain his interests, and to answer the type of questions that are likely to be posed by the mediator, the other attorney, and the other client. If your mediator plans to restrict your client’s participation, you still need to prepare your client for the level of participation that you anticipate. Regardless of your mediator’s preferences, you should consider how you want to involve your client. Usually, the more ways you engage your client in a problem-solving endeavor, the more likely your client will uncover creative solutions. Remember that your client brings to the sessions his intimate knowledge of the problem as well as an insider’s view of possible solutions that might work for him.

iv. Primarily, Selective, or No Caucuses

\(^{10}\) For definitions and sources, see Chapter 2.2, “Mediators and Their Approaches.”
\(^{11}\) See Chapter 4.2(b)(i), “Mediator’s Approaches.”
\(^{12}\) For a full discussion of role of clients in mediations, see Chapter 5.5(b) on “Should Clients be Present and Active?”; Chapter 5.6 on “Divide Responsibilities between You and Your Client”; and Chapter 5.10 on “Prepare Preliminarily the Opening Statements.”
Your representational plan will be influenced by your mediator’s approach to caucusing. If your mediator follows a no caucus approach, you and your client should develop a strategy appropriate for a process in which all communications will take place in the presence of the other side. There will be no opportunity to share information privately with the mediator. If your mediator follows a mostly caucus approach, you and your client should develop a strategy for a process that offers little opportunity to communicate directly with the other side and much opportunity to communicate through a neutral third party who can filter information, convey messages, and serve as a sounding board for proposals. If your mediator follows the preferred approach in this book, a selective caucus one, you and your client should develop a strategy for a process that will give you and your client ample opportunity to communicate directly with the other side as well as ample opportunity to caucus with the mediator to share sensitive information, test risky proposals, or guard against reactive devaluations.

f. Strategy: Take Advantage of Mediator’s Specialized Techniques and Process Control

You should figure out ways to take advantage of your mediator’s techniques and control over the mediation process. Mediator’s techniques cover the skills for which he received specialized training. They include techniques for improving communications, managing emotions, and assessing the court case. Process control entails the power of the mediator to use the stages of mediation as a tool to guide the parties toward resolution. Although the line between techniques and process control is not always sharp, the two facilities do offer different opportunities that you can plan to enlist.

Here are a few examples of how you might gain access to your mediator’s techniques and process control.

You may plan to overcome a relationship conflict by selecting a mediator who welcomes active client participation and knows how to use the early stages of mediation (opening statements and early joint sessions) for venting and mending relationships. Then, you can rely on the mediator’s techniques of reframing and active listening to improve communications.

If you are having difficulty getting your client’s non-legal issues on the table in the pre-mediation negotiations, you can try again in mediation by using the mediator’s control over the stage of formulating an agenda as an opportunity to be sure that your client’s issues are included.

You may plan to overcome a data conflict by asking the mediator to allocate time to evaluate the court option, a recognized stage in the mediation process, and then invite the mediator to use his skills to help both sides evaluate the court case.

If you think the impediment is that the other side does not know how to problem-solve, you can enlist the mediator to help convert them.

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13 For a detailed discussion of caucusing options and how to benefit from the selective approach, see Chapter 5.11, “Consider When to Caucus.”
14 Reactive devaluation describes the tendency of a party to devalue any proposal presented by the other party.
15 See Chapter 2.4 on techniques of mediators.
16 See Chapter 2.3 on stages of mediation process.
17 See Chapter 1.6 on “Advancing Problem-Solving in Mediation,” and Chapter 2.4 on “Facilitating the Negotiation of a Problem-Solving Process” in mediations.
g. Implement: At Each Key Junction in Mediation Process

You should implement your plan consistently throughout the mediation process. Your plan should be tailored to take advantage of the opportunities presented at each of six critical junctures in the process. These junctures arise when you are:

1. selecting your mediator;
2. preparing your pre-mediation submissions (briefing paper);
3. participating in a pre-mediation conference;
4. presenting opening statements;
5. participating in joint sessions with the other side and the mediator;
6. participating in a private caucus with the mediator.

h. Examples—Representation Plans to Overcome Impediments

When developing a representation plan to overcome impediments, you and your client should search for ways to take advantage of your access to a mediator at each of the six key junctures. Each junction offers these generic opportunities:

1. Selecting the Mediator. At this early point in the mediation process, you can select a suitable mediator with the credibility and skills to deal with the specific obstacles to settlement.
2. Preparing the Briefing Paper. You can alert the mediator of possible reasons for the impasse, the reasons that brought you and your client to mediation.
3. Participating in a Pre-Mediation Conference. Under the guidance of the mediator, you can begin discussing possible obstacles with the other attorney.
4. Presenting Opening Statements. At the beginning of the first mediation session, your side’s view of the obstacles can be introduced in the opening statements of either you or your client.
5. Participating in Joint Sessions. Under the guidance of the mediator, you and your client can engage the other side in a full discussion of possible obstacles and ways to overcome them.
6. Meeting in a Caucus with the Mediator. In a private meeting, you and your client can engage in a frank discussion of the obstacles with the mediator without fear of inflaming the other party and escalating the conflict.

It is virtually impossible to catalogue in detail how you should handle each possible obstacle. Each situation presents its own nuances that any cataloguing would

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18 See Chapters 2.3(a), and 4.2.
19 See Chapters 2.3(b), and 5.4.
20 See Chapters 2.3(c), and 5.4.
21 See Chapters 2.3(d), 5.9, and 5.10.
22 See Chapters 2.3(d) and 5.11.
23 Id.
24 In an instructive, partial cataloguing, Galton selects particular settlement obstacles and then suggests possible “mediation advocacy decisions” for dealing with them. See Eric Galton, Representing Clients in Mediation 85–97 (1994).
In another cataloguing of strategies, Sternlight demonstrates how an attorney and client can divide up responsibilities in the mediation sessions by taking into account how the attorney or client can each contribute to overcoming the particular barrier to settlement. See Jean R. Sternlight, Lawyers’
miss and, as a result, would mislead. Instead, through the use of three examples, this subsection demonstrates the basic methodology. These problem-solving examples are simple and short, designed to reveal the skeleton of the methodology. With this methodology in mind, you should be able to flesh out the details in your actual cases.

**Impediment:** Relationship conflict. Your client is very upset with the other party.

1. **Selecting the Mediator.** You select a mediator who is comfortable with and skilled in dealing with emotionally charged cases in which parties cannot communicate with each other and need to discharge built-up anger. Not all mediators know how to manage cases with intense relationship conflicts.
2. **Briefing Paper.** You alert the mediator to any emotional obstacles to settling the case. You might even give your client a chance to begin venting constructively by asking him to draft a section that expresses his feelings about what happened in the dispute.
3. **Pre-Mediation Conference.** You verify with the mediator that your client will have an opportunity to present an opening statement and to talk directly with the other party in the session. You also confirm with the mediator that he is ready to cope with any emotional outbursts and relationship difficulties.
4. **Opening Statements.** When assisting your client in preparing his opening statement, you encourage him to express his feelings directly, without making personal attacks, to the other party.
5. **Joint Sessions.** You encourage your client to talk directly to the other party, under the guidance of the mediator who will help the parties hear each other and guard against the interaction escalating out of control. You also caution your client to not overreact to any personal attacks that might be made by the other side.
6. **Caucus.** You use the private meeting with the mediator as an opportunity for your client to further vent and to be heard by an empathetic neutral. Your client also can share any inflammatory views and explosive information in the absence of the other party so as to avoid further stressing their relationship.

**Impediment:** Data conflict. You have a substantially different view of the likely outcome of the legal case than the other attorney.

1. **Selecting the Mediator.** You select a mediator who knows how to facilitate a rigorous evaluation of the legal case. You may want one who has experience using a decision-tree methodology. You should avoid a mediator who gives his own evaluation.
2. **Briefing Paper.** You alert the mediator to the difficulties of settling the case because each side holds such different views of the likely judicial outcome. Then, you succinctly and briefly explain the strengths of your client’s case while acknowledging its weaknesses.

3. **Pre-Mediation Conference.** For the first time in the mediation process, you raise this obstacle to settlement with the other attorney in the presence of the mediator who can begin facilitating an evaluation of the court option.

4. **Opening Statements.** You present to the other side a cogent, reasoned, and realistic analysis of the case’s merits. If the other side is listening (not a foregone conclusion, by any means), then the other side may begin to understand your perspective. You also should listen attentively to the other side’s legal analysis in order to isolate the areas where you disagree.

5. **Joint sessions.** You engage in a specific, reasoned, and realistic discussion of the merits of the case with the other attorney, under the guidance of the mediator who might facilitate the discussion through the use of a decision-tree methodology. Both sides should try to understand the basis for their different assessments and to narrow their differences in an effort to gain a shared understanding of the merits of the legal case.

6. **Caucus.** You explore in greater detail any weaknesses of your court case for the benefit of your client to be sure that he has a realistic understanding of how attractive it is to return to court.

*Impediment:* Structural conflict. The other side cannot settle because of a conflict within its organization.

1. **Selecting the Mediator.** You select a mediator with experience dealing with institutional parties.

2. **Briefing Paper.** You alert the mediator to the possibility that the other side may be unable to settle due to a conflict between two departments within its organization. For example, in a trademark infringement lawsuit, the defendant may be unable to settle due to a conflict between the marketing and legal departments. The marketing department may prefer a vague settlement in order to maintain marketing flexibility. The legal department may prefer a specific settlement to guard against any more lawsuits claiming infringement.

3. **Pre-Mediation Conference.** You ask the other attorney whether his client representatives in the mediation session will adequately represent all the interests in the corporation. You indicate that you want to be sure that all organizational constituencies that must approve a settlement are adequately represented in the session.

4. **Opening Statements.** You or your client asks whether the client representative from the other side might be hampered in the mediation by conflicting interests within its organization. And, if this is a risk, you or your client asks what can be done to prevent it from derailing the mediation.

5. **Joint Sessions.** You and your client discuss directly with the other side whether it can ensure that any absent people will not veto the emerging agreement.

6. **Caucus.** You enlist the mediator to mediate any possible internal conflicts within the organization of the other party. It may be less disruptive to the mediation process for you to make this request in a private session in which the other side will not be put on the spot and then possibly react defensively.
i. Example—Comprehensive Representation Plan

Let me suggest one way to develop a representation plan in a gender discrimination case in which you represent the plaintiff-employee, Ms. Earnest. She claims that the defendant-employer, Cutting Edge Computers, failed to give her a higher pay increase because the company pays women less than men for comparable work and experience.

Ms. Earnest has been working for four years as a computer programmer for Cutting Edge Computers. She claims she has worked long hours, enthusiastically embraced all assignments, and met every deadline. Yet, for the fourth year in a row, she received a smaller pay increase than her three male co-workers in the same department. This year, she only received a 2 percent increase when each of her male co-workers received an 8 percent increase. She claims her co-workers received the higher pay increases because they are men. She said she overheard her supervisor comment that she prefers to give higher pay increases to married men who must support their families than married women who do not need the money. Her co-workers are married with large families while Ms. Earnest is married with no children.

Ms. Earnest has complained a number of times about this unequal treatment to her supervisor who has belittled her complaints, claiming her problems are in her head, not in the way she has been treated. After her fourth year review, she could no longer tolerate this unjust treatment. Even though she enjoys the work, Ms. Earnest submitted her resignation and retained you to sue for damages. In the lawsuit, you are asking for $50,000 to compensate her for lost salary increases and emotional pain and suffering. Cutting Edge’s attorney responded by denying any discrimination, claiming that Ms. Earnest is simply not as productive as her co-workers.

After interviewing Ms. Earnest, you learned that she wants to be fairly compensated for her hard work and feels her supervisor did not appreciate her valuable contributions. You also found out that even though your client is reluctant about returning to her old job, she has not said never. You have surmised that Cutting Edge Computers’ interests are to avoid bad publicity and to encourage productive employees. You have tentatively concluded that at least two obstacles are impeding a settlement—a relationship conflict between Ms. Earnest and her supervisor and a data conflict about the credentials of the other employees and the basis for pay increases over the last four years.

After doing your legal research, you identified what discovery you need before you can realistically assess the strength of Ms. Earnest’s public BATNA. Ms. Earnest also mentioned one private cost of turning to her public BATNA. She cannot afford to wait too long for a judicial resolution because she needs the money now for a down payment on a new home. Therefore, she would be willing to accept significantly less money than her likely outcome in court.

You might prepare the following representation plan, using the checklist at the end of this chapter, to advance your client’s interest and overcome impediments at each juncture. Note how the representation plan is driven by problem-solving moves that take advantage of the mediator’s approaches, techniques, and process control. The plan assumes that you have completed part 1 of the checklist, “Preparation Before Preparing Representation Plan.”
Mediation Representation Plan for Plaintiff, Ms. Earnest
Part 2
Analysis of the Dispute (not legal case)

1. Goal: Interests to Meet
   Ms. Earnest
   Fair Compensation
   Recognition for Her Work

Goal: Interests to Accommodate
   Cutting Edge Computers
   Avoid Bad Publicity
   Encourage Productive Employees

2. Goal: Impediments to Overcome
   Relationship Conflict
   Between Ms. Earnest and her Supervisor

   Data Conflicts
   Credentials of Other Employees
   Basis for Each Employee’s Pay Increases

3. Identify Mediator’s Possible Contributions to Resolving the Dispute
   Approaches to Dispute
   Facilitative
   Broad View of Problem
   Active Client Involvement
   Selective Use of Caucuses

   Useful Techniques
   Promoting Communications
   Managing Emotions
   Overcoming Impediments
   Inventing Options

   Control over Mediation Stages
   Venting Stage
   Agenda Formulation Stage
   Overcoming Impediments Stage
   Generating Options Stage

Part 3
The Representation Plan for Six Junctures
(1) Selecting your Mediator. You plan to select a mediator with a suitable mix of approaches for helping both sides meet their interests and overcome impediments.

For a problem-solving process, you want a mediator who will facilitate an interest-based, value-creating negotiation and view the problem broadly as one about employee relations instead of one about a narrow legal dispute. You think this mix of approaches will increase the likelihood of the parties discovering inventive solutions that address your client’s interests in fair compensation and recognition in a way that respects Cutting Edge Computer’s interest in designing a compensation scheme that motivates employees to be productive. You want a mediator who welcomes participation by clients because your client is an articulate person who can sympathetically tell her story. Your client also has expertise to contribute; she knows best what options are possible and best for her. You prefer a mediator that limits the use of caucuses because you think that the parties are more likely to overcome the relationship conflict in joint sessions where they would talk directly with each other.

You also want to be sure that the mediator has the skills to help the parties overcome the relationship conflict. Ms. Earnest obviously distrusts her supervisor, blames her for her small pay increases, and is quite angry and upset. You want a mediator who can productively handle such a highly emotional dispute.

(2) Briefing Paper. You plan to use the briefing paper to introduce a broad view of the problem as one about how Cutting Edge Computers treats and evaluates its employees. The discrimination claim is the legal basis for getting the company’s attention. You will focus on how Ms. Earnest was unfairly treated. Despite her loyalty and dedication, her work was never recognized and appreciated. You will suggest that the dispute over the pay increase is one manifestation of the broader problem of how Ms. Earnest has been treated in regard to a number of matters. As compared with the men in her department, she has been given less challenging assignments, less current software, and less opportunity to earn overtime. You plan to emphasize your client’s interests in receiving recognition and fair compensation for her valuable work despite the fact that she was not given an equal opportunity to demonstrate what she could contribute.

You will probably omit discussing whether she is interested in returning to work at Computer Edge Computers because she is unsure of what she wants to do for now.

You plan to flag for the mediator how his techniques and control of the process might be helpful to the parties. You will request that when he reaches the agenda formulation stage that he ensures that the agenda includes the issue whether the company appreciates Ms. Earnest’s contributions. You will invite the mediator to employ his training in helping disputants overcome impediments to help the parties get past a possible relationship conflict between your client and her supervisor and to resolve a data conflict over the pattern of pay increases over four years. You will ask the mediator to use his control of the process to be sure these two potential obstacles are dealt with before moving to the stage of fashioning solutions.

You also will present your client as someone open to creative solutions so that the mediator knows to create a process in which parties brainstorm and search for solutions outside of the legal box.

You want your client, Ms. Earnest, to help draft the section on what happened as a way to help her organize her thoughts, to engage her early in the process, and to begin
meeting her needs to vent about what happened. (Do not underestimate the value of engaging an angry client early and productively.)

(3) Pre-mediation Conference. You plan a number of ways to take advantage of this first opportunity to meet and discuss the case with the other attorney and the mediator.

You will verify with the mediator that he plans to use your preferred mix of approaches in the mediation session. You want to confirm that he will be facilitative, not evaluative, will approach the problem broadly, will actively involve your client (including welcoming her opening statement), and will conduct most of the mediation in joint sessions.

You especially want to pin down who will be the client representative for Cutting Edge Computers. You want to be sure that a person with sufficient and flexible settlement authority will be present. Before this conference, you will discuss with Ms. Earnest whether she wants her former supervisor present. You will inquire whether she needs a face-to-face exchange with her supervisor before she can move on. But, you realize that the supervisor’s presence could be too provocative, making this a difficult and risky judgment call.

You plan to inquire whether the other attorney and mediator are open to viewing the problem broader than a narrow discrimination dispute and whether the other side is receptive to searching for inventive solutions.

You want to emphasize the interests highlighted in your briefing paper as well as raise for preliminary discussion the two possible impediments. In view of the data conflict, you will outline the specific objective information that you want from the personnel files of each person who currently works in the department or did for the past five years. You want to know each person’s gender, age, academic credentials, record of prior employment, number of years working in the department, starting salary, annual pay increases, and annual evaluations.

By making this data request in the conference, you intend to involve the mediator in helping you secure this essential data before the first session, data that you need before you can intelligently evaluate the strength of your client’s public BATNA.

(4) Opening Statements. You plan to invite your client to present an opening statement and to discuss ways to divide what you and your client will say.

You plan to assist your client in preparing a productive opening statement suitable for a problem-solving process. She can tell her story of what happened and how she was treated. She should tell her story sincerely and judiciously so that her statement can be heard by the other side and contribute to airing differences and mending the relationship. She should avoid personally attacking her supervisor although she should share some of the specifics about what she thought happened and how she was treated. For example, she should mention that each time she asked her supervisor for her software to be updated to the same version as her co-workers, she was told it would happen soon but it never did, and, as a result, reduced her level of productivity.

She should indicate what she wants out of the mediation. She seems to want the company to properly recognize her hard work and to fairly compensate her for what she has contributed as a computer programmer.

In your opening statement, you plan to re-acquaint the other side with your views of the legal case and ask that a more in-depth discussion be deferred to later in the
You will avoid making the traditional partisan legal arguments because you are not looking for an evaluation from the mediator and do not want the legal arguments to trump all else in the mediation.

You will encourage your client to present her opening statement first.

(5) Joint Sessions. You plan to focus your representation on advancing your clients’ interests in recognition and fair compensation. You think any settlement, regardless of how elegant or creative it might be, must ultimately pass these two interest tests.

Acutely aware of the stages of mediation, you will support, if not encourage, the mediator to use his control of the mediation stages to be sure that all issues are put on the table during the agenda formulation stage and to be sure the impediments are dealt with before moving toward discussing solutions. You want to ensure that the parties have begun repairing their relationship and that the data you need has been provided and discussed before your client moves into the stage of developing options and fashioning solutions.

In regard to the data issue, you plan to discuss with the other side the information in the personnel files that you requested and were provided by the company. You want to use this data as a basis for discussing whether Ms. Earnest was fairly compensated.

You also will vigilantly guard against the mediator giving any evaluations without your prior approval.

You will encourage your client to participate actively in the joint discussions in which she first tells her story, asks and answers questions, and then contributes to the brainstorming, value creation, and the assessment of options. You plan to ask your client to think in advance about possible solutions that go beyond reinstatement and immediate payment of money to her.

(6) Caucus. You plan to do most of the work in joint sessions, limiting any caucuses to specific and narrow purposes.

You might want to request a caucus so that Ms. Earnest can advise the mediator that she is not ready to disclose to the other side whether she wants to return to Cutting Edge Computers—whether to her old position or a new one. She wants to see what happens in the joint sessions before deciding. You prefer sharing this information in caucus because the mediator, who has been trained to handle sensitive issues and confidential information, can provide a safe place for discussing why Ms. Earnest is undecided about returning.

You think Ms. Earnest may be concerned that it will be impossible to continue working under the same supervisor. The mediator might explore with Ms. Earnest whether it is possible to restore a working relationship with the supervisor or whether she would be open to moving to another department under a new supervisor. By sorting through these questions in caucus, you and Ms. Earnest can resolve whether she has an interest in returning to Cutting Edge Computers and how to present the outcome of this essential discussion in the joint session.

You also may want to use a caucus as a safe place for ensuring that Ms. Earnest understands any weaknesses in her legal case. You are concerned that such a discussion in the presence of the other side might embolden them. Your client, assuming she has not

25 See Section 9 on presenting the legal case and Subsection 10(b) on the tone and content of the opening statements.
been persuaded by your legal advice, may find your answers to the mediator’s probing questions more convincing.

2. Prepare a Representation Plan for a Cross-Cultural Mediation

You should consider how your representation plan can anticipate and guard against cross-cultural obstacles. Such obstacles can arise in disputes between parties from different countries or between parties from within the same country but who come from different regions, recently immigrated parties, or different religious, ethnic, or professional groups.

Cultural obstacles can be handled in the same way as you would deal with any impediment to settlement. Under the Moore approach, you would classify the impediment, and then develop a suitable intervention for overcoming it. Many cultural obstacles can be classified as interest conflicts that arise due to the parties’ different cultural upbringings, upbringings that can foster conflicting wants and approaches to the negotiation.

This section defines cultural behavior and offers one specific approach for tracking and bridging cultural gaps. How to incorporate this approach into a representation plan is illustrated at the end of this section.

a. What is Cultural Behavior?

Before developing a strategy for overcoming cultural differences, you should first consider what it means to say that behavior is derived from culture. Cultural differences can be obscure and, as a result, difficult to identify. Professor Geert Hofstede, a Dutch social psychologist and author of renowned studies on culture, offers this definition:

In social anthropology, ‘culture’ is a catchword for all those patterns of thinking, feeling, and acting…. Not only those activities supposed to refine the mind are included ..., but also the ordinary and menial things in life: greeting, eating, showing or not showing feelings, keeping a certain physical distance from others, making love, or maintaining body hygiene....

Culture... is always a collective phenomenon, because it is at least partly shared with people who live or lived within the same social environment, which is where it was learned. It is the collective programming of the mind which distinguishes the members of one group or category of people from another.

Culture is learned, not inherited. It derives from one’s social environment, not from one’s genes. Culture should be distinguished from human nature on one side, and from an individual’s personality on the other, although

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26 This section is based on my chapter: International Dispute Resolution: Cross-Cultural Dimensions and Structuring Appropriate Processes, in Rau et al., Processes of Dispute Resolution: The Role of Lawyers Ch. VI (3d ed. 2002). This material is used by permission of Foundation Press.
27 The Moore approach to classifying and overcoming impasses are explained in Chs. 3.2(b) and 5.1(d).
exactly where the borders lie between human nature and culture, and between culture and personality, is a matter of discussion among social scientists.

*Human nature* is what all human beings, from the Russian professor to the Australian aborigine, have in common: it represents the universal level in one’s mental software. It is inherited with one’s genes; within the computer analogy it is the ‘operating system’ which determines one’s physical and basic psychological functioning. The human ability to feel fear, anger, love, joy, sadness, the need to associate with others, to play and exercise oneself, the facility to observe the environment and to talk about it with other humans all belong to this level of mental programming. However, what one does with these feelings, how one expresses fear, joy, observations, and so on, is modified by culture….

The *personality* of an individual, on the other hand, is her/ his unique personal set of mental programs which (s)he does not share with any other human being. It is based upon traits which are partly inherited with the individual’s unique set of genes and partly learned. ‘Learned’ means: modified by the influence of collective programming (culture) *as well as* unique personal experiences.

b. How to Bridge Cultural Gaps?

This section suggests one approach to identifying cultural behavior and differences in negotiations and to bridging any resulting cultural gaps.

Consider this five-step approach. In the first three steps of preparing for a cross-cultural negotiation, you master a cultural conceptual framework, learn about your own cultural upbringing, and investigate the culture(s) of the other side. The next two steps guide you in the negotiation sessions. You view the negotiating behavior of others with an open mind and then develop an intervention strategy for navigating around any obstacles.

These five steps will be demonstrated through the use of a hypothetical. Consider how you, as a U.S. attorney, would react if you were told that the other party, an institutional client, will not be represented by someone with substantial settlement authority. Instead, the other party will be represented by a team of people who will make decisions by consensus. Furthermore, all the team members will not be present in the mediation session. Under these circumstances, you are likely to suspect that the other party is acting in bad faith. The other party appears to be replacing a client with real settlement authority with an unwieldy team of people. How might you proceed?

You might approach the negotiation as follows:

First, you should become familiar with a *conceptual framework* in which cultural behavior can be identified, understood, and examined. The framework can only be grasped when you comprehend the meaning of cultural behavior and how it is different from universal human behavior. Cultural studies have recast cultural behavior into
various discrete generic characteristics, including characteristics relevant to conflict resolution.\(^{29}\)

In one widely cited study, the author identified ten cultural characteristics that could affect negotiations, although he recognized that some of them also could be influenced by personality.\(^{30}\) Each of these cultural characteristics presents the potential for an interest conflict under the Moore classification system. As the following list suggests, due to cultural differences, one party may want something that conflicts with what the other party wants, or one party may approach the negotiation in a way that conflicts with the other party’s approach:

1. The negotiating goal of one party may be a contract while the other party’s goal may be a relationship.
2. The negotiating attitude of one party may be to look for win/win possibilities while the other party’s attitude may be to seek win/lose solutions.
3. One party may prefer a formal personal style of interaction while the other one may prefer an informal style.
4. One party may communicate directly while the other one may communicate indirectly.
5. One party may be highly sensitive to time (e.g. time is money) while the other one may not be (e.g. lax about punctuality).
6. One party may be from a culture that tends to be emotionally passive while the other one may be from a culture that tends to be emotionally passive.
7. One party may prefer a general agreement while the other one may want a specific one.
8. One party may approach building an agreement from bottom up while the other party may prefer building an agreement from top to bottom.
9. One party may be from a culture where the authority of a negotiating team resides in a leader while the other one may be from a culture where the negotiating team arrives at decisions by consensus.
10. One party may be a risk taker

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\(^{29}\) See, e.g., Geert Hofstede, Culture’s Consequences (Abridged, 1980, 1984); Geert Hofstede, Cultures and Organizations—Software of the Mind (1997); Dean Allen Foster, Bargaining Across Borders—How to Negotiate Business Successfully Anywhere in the World 264–272, 273–293 (1992, 1995)(shows how Hofstede’s work relates to international negotiations);


For articles on the relationship of culture to mediation, see Raymond Cohen, Cultural Aspects of International Mediation, in Resolving International Conflicts—The Theory and Practice of Mediation, Ch. 5, 107–128 (Jacob Bercovitch ed., 1996) (The author identifies three cross-cultural roles of mediators: the interpreter who bridges intercultural communication gap, a buffer who protects the face of adversaries, and the coordinator who synchronizes dissonant negotiating conventions.); Cynthia A. Savage, Culture and Mediation: A Red Herring, 5 Am. U.J.Gender & Law 269 (1996) (The author recommends that instead of approaching differences in terms of racial, ethnic, or other single identifying characteristic, negotiators should recognize differences in terms of various value orientations that also can account for individual differences and effects of multiple cultures.); Selma Myers & Barbara Finer, Mediation Across Cultures 23 (1994) (The author identified five cultural issues that most significantly affect the mediation process: language, assumptions, expectations that others will conform to us, biases against unfamiliar, and values in conflict.); and Paul B. Pederson & Fred E. Jandt, Culturally Contextual Models for Creative Conflict Management, and The Cultural Context of Mediation and Constructive Conflict Management, in Constructive Conflict Management—Asia-Pacific Cases 3–26, 249–275 (Fred E. Jandt & Paul B. Pederson eds., 1996)(This is an analysis of over 100 case studies of cultural components of mediations in various Asian cultures and substantive settings, including the testing of two models of constructive conflict resolution, one based on high or low context cultures and another based on separating culturally learned expectations of behavior from actual behavior.)

while the other party may be a risk avoider (differences that can be complementary as well as conflicting).

In the hypothetical, the ninth characteristic on decision-making is implicated: Does the other side’s settlement authority reside with a leader or with a team that makes decisions based on consensus? This question can be investigated for the purpose of assessing whether conflicting approaches to decision-making may present an impediment.

This generic characteristic, as with virtually all cultural characteristics, encompasses a continuum bound at each end with a value-based pole. At one extreme, societies can be found that are hierarchical in which decisions are made by leaders. At the other extreme, societies can be found that are collective in which decisions are made by consensus. The actual cultural practice, rarely one extreme or the other, usually leans heavily toward one of the extremities. As practiced in U.S. businesses, for example, decision-making is predominately hierarchical, placing the practice near the leader pole but not at the pole because input and collaboration also are valued.

Second, you should fill in this conceptual framework with a deep understanding of your own culture or cultures. You may not be cognizant of the degree to which your own behavior is universal or culturally bound. Yet, it is through this personal lens that you observe and assess the negotiating behavior of others. Your cultural lens can distort your view of others’ behavior. To reduce these cultural distortions, you should learn about your own cultural upbringing so that you can appreciate the extent to which your view of behavior may not necessarily reflect universally practiced behavior. In the hypothetical, you, as a U.S. attorney, should be aware that your view that organizations tend to be hierarchical in which decision-making is centralized in “leaders” is not universal organizational behavior.

Third, you can strengthen your conceptual framework with an understanding of the culture or cultures of the other negotiator(s). You can identify and research the culture(s) of your client, the other attorney, and the other party. Furthermore, you can learn as much as possible about the other negotiators as individuals, about their personalities and ways their negotiating behavior may vary from practices of their culture(s). In the hypothetical, your research might reveal that the other side is from a society in which organizations typically make decisions based on consensus, but the research may reveal little about their individual personalities.

These first three preparatory steps in which you identify potential impediments are relatively easy to complete because they entail collecting mostly accessible information on cultural characteristics and practices. The next two steps, however, are much more challenging because they require you to suspend instinctive judgments and develop intervention strategies during intense, dynamic, and fast moving negotiation sessions.

Fourth, you should suspend judging key negotiating behavior of the other attorney or party and instead view it with an open mind. This requires considerable discipline. It is too easy for an attorney who routinely judges negotiating behavior to prematurely judge

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it in a cross-cultural negotiation. In the hypothetical, you would withhold judging the other side’s decision-making process as evidence of good or bad faith. Instead you would recognize it as key negotiating behavior that could conflict with your preferred approach and produce an impediment.

Fifth and finally, you may need a strategy to bridge a cultural gap. In view of your understanding of your own cultural upbringing (step 2) and the upbringing of the other side (step 3), you should be able to recognize a potential interest conflict that you need to overcome.

Interest conflicts can be overcome by negotiating or deferring to the other side’s practice. You could negotiate a solution through an interest-based approach, where the interests behind the practices are respected. You also might negotiate a compromise. As an alternative to negotiating over closure of the gap, you may defer to the other side’s practice, especially when the other practice is not a deal-breaker or does not implicate core personal values. For instance, you may defer to the other side’s formal practices of carefully using titles and avoiding personal questions about family. The gap, however, can be difficult to bridge when the conflicting practices reflect ingrained strategic practices, such as a conflict between problem-solving and haggling.

In the hypothetical, instead of viewing as bad faith the other side’s claim that they cannot agree to anything without a consensus among a large number of team members, you might focus on how to respect their need for consensus while still meeting your need for clients with substantial settlement authority. You could negotiate an arrangement in which the other side brings to the negotiation sessions all the people who must concur or at least ensures that the absent people are available by telephone. Then, in the sessions, the consensus approach could be respected by giving members of the negotiating team ample time to meet privately as the negotiation progresses.

c. Examples—Mediation Representation Plan to Bridge Cultural Gaps

Example 1: In a successful mediation, you, as a typical U.S. lawyer, might insist on a signed agreement that covers many details and contingencies. However, the other side, a Japanese party and lawyer, may resist elaborating such details, creating an obstacle to drafting the settlement agreement. You, as a culturally sensitive lawyer, might view this difference as one that could be due to conflicting cultural interests. In investigating the impasse, you might realize that your own preference for reducing everything to writing may be due to your own cultural upbringing (step 2). The drafting of comprehensive contracts is taught in U.S. law schools and reinforced in law practice. A Japanese lawyer may have been brought up differently (step 3). Instead of being concerned about the details of the written agreement, the Japanese lawyer may be concerned about the business relationship, leaving for the written agreement a general statement about the relationship.

When developing a strategy for overcoming this impasse in the mediation, you should avoid the instinctive reaction that the other side is trying to evade resolving key issues. Instead, you should view the other side’s behavior with an open mind (step 4).

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32 When researching the other person’s cultural upbringing, you should not assume that just because a person was brought up in a clearly identifiable culture, that person will act in accordance with its cultural norms. You should test possible assumptions under step 5 when trying to bridge any gaps.
From a Japanese cultural perspective, they may not be hesitating; they just may not be interested in the details of the written agreement.

This interest conflict might be investigated in a joint session by each party explaining why the party prefers or is disinclined to put details in writing. You might be able to overcome this obstacle by discussing and respecting the reasons for the different practices and then negotiating a compromise. The clients might seek to cultivate a relationship of trust and enter into a written settlement that covers key obligations but not every conceivable contingency (step 5).

Example 2: Your mediation representation plan would be shaped by your analysis of any potential cultural obstacles uncovered under steps 1–3 on bridging cultural gaps. For example, when preparing for the mediation, you may have learned that in addition to valuing personal relationships over contract details, the other side recognizes and respects hierarchy and rank, and communicates subtlety and indirectly instead of forthrightly and unambiguously.

Under step 5 on bridging cultural gaps (overcoming cultural impasses), this information would influence what you and your client do throughout the mediation process. First, you would want to select a mediator who is sensitive to and capable of mediating disputes between parties with different cultural upbringings. Assuming you decided to bridge any cultural gaps by respecting the differences, you and your client would behave in a culturally sensitive manner in each contact with the other side: when participating in the pre-mediation conference, when presenting opening statements, and when participating in joint sessions. For instance, you and your client would communicate graciously and not brutally bluntly, would be respectful of the ranks and formalities to which the other side is accustomed, and would support cultivating a genuine working relationship. You and your client would interpret the other side’s communications through their cultural lens of subtle and indirect methods of communicating. Instead of expecting the other side to flatly say “no” to a proposal, for example, you would look for other clues such as the way the other side delays giving an answer. In a caucus with the mediator, you may enlist his advice and assistance in presenting proposals to the other side in a way that is less likely to be misinterpreted due to their different cultural filter.

3. Select the Mediator and Study the Mediation Rules

If your case was referred by a judge into a court-annexed mediation program, you should examine the court’s procedure for selecting mediators. Procedures vary among programs. Under one approach, the administrator may give you access to a mediation roster and invite the two sides to select a mediator. Under another approach, the administrator may assign a mediator and permit you to investigate his credentials and veto the selection for cause such as an interest conflict or unsuitable qualifications. You may then be permitted to replace the mediator with one from the court’s roster or possibly a private one whom both sides can agree on. The previous chapter gave you guidance on investigating a mediator’s credentials and approaches to mediating.33

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33 See Chapter 4.2(a) and (b) on credentials and approaches of mediators.
If you and the other side had decided to use mediation on your own, you would have investigated the credentials of the mediator when you negotiated the mediation agreement and selected the mediator.

Under either selection scenario, you and the other attorney should contact the mediator about two matters. You should inquire whether to submit a pre-mediation submission as discussed in the next subsection and whether a pre-mediation conference will be held to discuss the matters enumerated in the subsection on pre-mediation conferences.

Finally, you should read any applicable state statutes and court rules, giving special attention to any confidentiality rules and rules that might authorize the mediator to report anything to the court.34

4. Prepare for Pre-Mediation Contacts with the Mediator

Prepare Pre-Mediation Submissions
and Prepare for Pre-Mediation Conference
You have two valuable opportunities to launch a productive problem-solving process even before you appear in the first mediation session. You should consider how to use the two pre-session junctures for submitting a briefing paper and participating in a pre-mediation conference for advancing your client’s interests and overcoming any impediments. These two pre-session junctures are surprisingly underutilized.

a. Prepare Briefing Paper (Pre-Mediation Submissions)
(See Sample Briefing Paper in Appendix D.)

The pre-mediation submissions, sometimes known as briefing papers, offer you your first opportunity to begin cultivating a working relationship with your mediator and educating him about your client’s interests and what impediments may be impeding the case’s resolution.

Before preparing a briefing paper, you should ask the mediator whether he wants one and, if so, what information to include, the maximum number of pages, and whether the briefing paper will be held in confidence or should be sent to the other attorney(s). Practices vary among mediators. Do not prepare any pre-mediation submissions before getting the answers. If you submit a briefing paper without inquiring what the mediator wants, you may end up wasting time preparing two briefing papers—the one you thought the mediator would want and the one the mediator does want.35

The type of information that the mediator requests reveals how the mediator plans to use the pre-mediation submissions. Purposes can vary among mediators. When the mediator asks you to summarize legal positions, factual issues, and demands, and requests that you submit copies of pleadings, the mediator probably wants to only become acquainted with the legal case and its status. When the mediator requests you to

34 See Section 13 on confidentiality.
35 I have had several cases in which an attorney sends a briefing paper before asking what it should contain. Then, after the attorney receives my letter requesting specific information, the attorney unenthusiastically prepares a second, more suitable briefing paper.
amplify the legal arguments and submit copies of legal briefs, the mediator may be preparing to evaluate the merits of the legal case. When the mediator inquires about your efforts to settle, why the matter has not settled, and what your client wants that might go beyond conventional judicial solutions, the mediator not only wants to broaden his understanding of the dispute but also may be trying to reorient both sides into a problem-solving mode.

If your mediator does not require a briefing paper, you should inquire whether you can submit one because of the opportunities it offers to launch the problem-solving process. If the mediator does not advise you what to include or does not restrict what you can include, you might consider covering the following information using the following format with the phrases in quotations serving as headings:

“Description of Dispute and Legal Case”
1. “Factual Summary,” including a chronology of events, statement of key factual issues in dispute, and your client’s view on each issue;
2. “Critical Legal Issues” in dispute, including your client’s view on each issue and key cites;
3. “Relief” sought, including a particularized itemization of all damages claimed;
4. “Motions” filed and their status;
5. “Discovery Status,” including what still needs to be done to be ready for trial;

“Settlement Analysis”
6. “Interests of Your Client” that you want met in mediation;
7. “Settlement Discussions” including any offers or counteroffers previously made;
8. “Why Not Settled” covers your views on the obstacles to settling this dispute and ways to overcome them;
9. “What Want Out of the Mediation” especially what you want the mediator to do and what inventive settlement concepts that you would like the other side to consider;

“Other Information”
10. “Who Will Attend” the mediation sessions and the title of any client representatives;
11. Attach critical documentary evidence.

In the briefing paper, you should present a balanced view of the facts and legal case, and attach essential documentary evidence. But, do not send every piece of discovery that has been collected in the case unless the mediator so requests. You should limit your attachments to critical evidence such as key contracts and revealing excerpts of depositions and documentary evidence, the sort of information that you will want to present in the mediation to give the other side an understanding of the strengths of your legal case. But, the briefing paper is not similar to a trial brief in which you would present a comprehensive partisan case. Such a strategy would be a waste of time and money because the mediator will not decide the case.

You should keep in mind that when you prepare your briefing paper, you also are preparing for the mediation session. Most of what you do will be recycled. Much of what you include in the briefing paper may be suitable for presenting in your opening
You should prepare the briefing paper with your client. By involving your client, you ensure that your client’s specific interests are reflected in the briefing paper, and you convey the message early to your client that he will perform an active, vital role in the mediation process.

b. Prepare for Pre-Mediation Conference

You should consider what you want to accomplish in a pre-mediation conference. You can use this juncture to advance the problem-solving process. The pre-mediation conference is usually held, if at all, shortly before the first mediation session in a telephone conference call with only the attorneys and mediator. You should consider requesting a conference if the mediator fails to do so.

At the conference, you should determine whether the mediator plans to use a mix of approaches that will foster a problem-solving process and whether the other side knows how to participate in such a process or needs to be educated by the mediator. You also should be sure that the parties or client representatives with sufficient knowledge and flexible settlement authority will be participating in the sessions. In addition, you can confirm the scheduling details. If held early enough, the conference can be used to clarify what the mediator wants included in any pre-session submissions and to resolve what information you need from the other side before the session.
For a fuller discussion of what to do in a pre-mediation conference, read chapter 7.1.

5. Resolve Who Should Attend the Mediation Sessions

You should not approach lightly the question who should attend the mediation session. The wrong people at the table can derail a mediation. Unfortunately, it is not always obvious who the right people are.

a. Should Attorneys Be Present?

Attorney practices vary depending on the subject area of the dispute.

Generally, in commercial mediations and mediations involving governmental parties, attorneys should and do participate with their in the mediation session. When weighing with your client whether you should participate, you and your client should consider such factors as the complexity of the case, the nature of the factual and legal issues, ability and bargaining power of your client, amount at stake, and attorney costs. In simple cases in which relatively little money is at stake, you and your client may be comfortable with your client appearing alone and limiting your involvement to preparing your client for the session and reviewing any mediated settlement before it is finalized and signed.
In matrimonial cases, clients are strongly encouraged to be represented by attorneys but attorneys usually do not participate in the session, especially if the session is limited to custody and visitation matters.  

In community disputes, in contrast, clients are rarely represented by attorneys because the disputes tend to be interpersonal with negligible legal issues. Many community dispute resolution programs even discourage participation by attorneys because of the fear that they will convert an informal, disputant-centered process focused on finding fair solutions into a formal, legalistic one focused on proving legal rights.

**Client Participation**
1. Clients should usually participate actively (subsection 5(b)).
2. The best client representative for an institutional client should be selected (subsection 5(c)).
3. A plan for splitting responsibilities between you and your client in the session should be formulated (subsection 6).

b. Should Clients Be Present and Active?  
Parties with firsthand knowledge of the dispute and broad flexible settlement authority should participate in any mediation session that claims to promote problem-solving. Parties should be both present as well as active contributors.

i. Changing the Traditional Arrangement  
There is a widely followed deal between attorneys and their clients. Clients unload their legal problems on their attorneys so that clients can return to do what they do best as businesspeople or whatever they do. Attorneys like this arrangement because then they can do what they do best—deal with legal problems. This division of responsibilities has become a comfortable and tidy arrangement. As a result, clients rarely become deeply involved in the primary forums of resolving disputes. Clients seldom show up in settlement conferences with judges. When they do show up in court, they are limited to serving as a witness or observer.

This long-standing arrangement is a fragile one. Even though clients prefer attorneys to take care of their legal problems, the legal problems still belong to the clients who must live with any negotiated solutions. Even though attorneys prefer to be left alone, attorneys cannot settle cases or make any other significant legal moves without securing approval from their clients. Each partner contributes something different and vital to the resolution of legal disputes: attorneys contribute as experts of the legal process, law, and ways to resolve legal problems; clients contribute as experts on the underlying substantive problem. In contrast with court and judicial settlement conferences, mediation takes full advantage of the different expert abilities of attorneys and their clients by inviting both to participate actively throughout the process.

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36 For a study of the benefits of attorneys participating in sessions, see Craig McEwen & Nancy Roger, *Bring the Lawyers into Divorce Mediation*, Disp. Resol. Mag. 8–10 (1994) (In a study of mandated mediation in contested divorce cases, the authors found that in Maine attorneys along with their clients participated actively in the sessions and that the attorneys contributed constructively.)

ii Benefits of Client Participation

Your client might benefit greatly from the initiatives of the mediator who progressively involves your client in the resolution of his dispute.

The mediator structures a process in which clients interact with each other so that they personally hear each other’s views and perspectives. Communication errors are reduced that might otherwise arise when communications travel through multiple people, for example, from your client to you, from you to the other attorney, from the other attorney to the other client. Among other initiatives, the mediator helps your client and the other party clarify each of their goals and interests, and exploits their expert understanding of the underlying problem. The mediator also can expose your client and the other party to a methodical discussion by you and the other attorney of the strengths and weaknesses of the legal case.

By hearing what is being said and participating in the discussions, clients can develop a better understanding of their dispute and, as a result, become acutely appreciative of the possibilities for trade-offs and deeply involved in shaping the settlement terms. By being heard and hearing others, clients can experience the psychological equivalent of a day in court, a form of “hearing” that may be just what they need before they can move forward to resolving their dispute.

c. Who Should Attend on Behalf of an Institutional Client?

i. Ideal Client Representative

You are likely to have trouble identifying the best institutional representative in a large organization because the ideal person might be buried in the bureaucracy and must be capable of doing so much. The person should possess broad settlement authority and a broad understanding of the institution’s interests. He should possess knowledge of the dispute but not such intimate involvement that he is unable to be objective. The person should project integrity and respectability and be level-headed and not too emotional. He should possess superior communication skills and come off as a good witness. And, this ideal person should be available to prepare for and participate in one or more days of mediation sessions. For you to find this person, you will need a sophisticated understanding of the internal bureaucratic organization and decision-making process of your corporate or government client.

ii. Key Credential—Settlement Authority

Your client representative must possess broad and flexible settlement authority. The person who partakes in the mediation experience should be the person who decides what settlement terms are acceptable. Otherwise, your client is unlikely to realize the full benefits of mediation. A client representative with inadequate authority will be relegated to the arduous task of summarizing and conveying to the person with settlement authority a full appreciation and nuanced understanding of how the settlement proposal incrementally came together. Hearing a summary of what happened cannot substitute

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38 In large corporations, the higher the representative is in the corporate ladder, the greater the settlement authority, with the board of directors possessing the broadest authority. For governmental parties, the same principle applies with the governor, president, or even a legislative body possessing the broadest settlement authority. The higher the person is in the hierarchy, the more difficult it usually is to convince the person to attend the mediation sessions.
fully for being there. It is too easy for the absent person to reject the proposed settlement and say try harder.

You should convey clearly to your institutional client the type of settlement authority the client representative should possess. In a case with multiple issues, different issues may call for different types of settlement authority. For example, a damage claim requires money authority while a claim for a trademark infringement calls for someone who can decide acceptable uses of the mark. It is not always clear at the outset what will be the likely settlement terms, making it perilous to determine in advance the necessary settlement authority.

You should carefully verify the settlement authority of your client representative. Unfortunately, your representative may not always candidly admit his limited authority. If your client’s lack of authority derails the mediation, your credibility could be impaired for the remainder of your representation in the dispute.

iii. Next Best Client Representative

Your ideal client representative may not be available. If the ideal representative exists, the person may have too many other responsibilities and commitments and be unwilling to spend time preparing for, traveling to, and participating in the mediation session. In corporations and government, the ideal person may be a group that may be too unwieldy or unwilling to participate in the session. In corporations, the person may consist of the board of directors or a committee within a department or across departments. In government, the person may consist of a legislative body, a committee within the client agency, an intra-agency committee, or two separate government agencies—the agency directly involved with the dispute and the agency responsible for overseeing all governmental expenditures such as the budgetary agency or the comptroller.

Under these circumstances, you need to find the next best client representative. Sometimes, that representative may be a team of two or three key representatives. The next best client representative must possess unquestionable credibility with the person or group who has the ultimate settlement authority. The next best representative should agree in advance that he will put his personal prestige and integrity behind his endorsement of a settlement agreement when he tries selling it to the person or group with ultimate settlement authority. The person or a delegated representative of the group with ultimate settlement authority should be available by telephone.

iv. Role of In-house Counsel

Your client representative should usually not be an attorney in your client’s in-house counsel office. An in-house counsel is likely to contribute more like an attorney than a client. Your client representative should be a person who can bring a client perspective and see the dispute, not as a legal problem, but as a business or policy problem. You may want to weigh making an exception for an in-house counsel who knows the business or government agency well and has considerable experience functioning more like a client than an attorney at the institution.

v. Convincing Client Representative to Participate
Your ideal or next best client representative may resist participating because the person is consumed by other pressing institutional matters. You should try to convince this reluctant representative of the enormous benefits of personally participating, using the points covered in the previous subsection, 5(b), on why clients should be present and active in the mediation session.

If you cannot get the commitment of even the next best client representative, you should consider whether or not the mediation may be worthwhile and discuss this with your institutional client.

d. Should Other People Be Present?

It may be essential that your client bring his “advisors” to the mediation session. These advisors can be one or more key people that your client relies on for input. These advisors might offer hard information (fact or expert witnesses), provide psychological and emotional support, or possess unofficial settlement authority. For instance, in a patent case, a party might be unable to assess the strength of an infringement claim without input from a technical advisor during the session. In a discrimination case, a party might be unable to settle without hearing the reactions and suggestions of his spouse and getting her approval. In a case in which a claim is covered by insurance, a party may be unable to agree on the amount of money to pay without approval of the person with the checkbook, a carrier representative. (Because of insurance carrier’s focus on money, the representative also may not be interested in the creative solutions that mediation tries to foster.) If one of these key “advisors” is left out of the session, the advisor may derail the settlement by giving advice or even vetoing a settlement based on considerations that are not informed by what happened in the session. Furthermore, the discussions in the session would not have been informed by valuable input from the advisor.

6. Divide Responsibilities Between You and Your Client

You and your client should resolve how to share responsibilities in the mediation session. Four basic arrangements are possible.

a. Options

In the first two options, your client performs the dominant role. This approach is more likely to be practiced in family or community disputes. In the first option, you, as the attorney, would be a “non-participant,” limiting your counseling and representation to before and after the session. In the second option, you would participate in the session as a “silent advisor,” known as the “potted plant,” intervening only when necessary to protect your client’s interests.

In the third and fourth options, you, as the attorney, perform an active role. In the third option, the one commonly practiced in business disputes and disputes with government parties, you serve as a “co-participant” with your client. You and your client divide up the responsibilities in the session. In the fourth option, you perform as the “primary or sole participant.”

b. Recommendations

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Especially in a problem-solving process, you and your client should consider an allocation arrangement in which your client participates actively. To engage your client early in the mediation session, you should consider inviting your client to share in presenting an opening statement. Then, you should look for other opportunities for your client to contribute throughout the session. You, as the attorney, have other responsibilities in the session: You prepare and protect your client, ensure that any legal matters are intelligently considered, assist your client in assessing settlement options, and help draft a legally sound and enforceable settlement agreement.

In some cases, you or your client may be reluctant about your client participating actively. Your client may not be a skilled speaker. Your client may not speak fluently the language used in the mediation. Your client may be too shy, upset, or angry. Your client may have been emotionally or physically harassed or abused by the other party. Or, your client may be less educated, feel less worldly, or have less bargaining power. Nevertheless, your client should still try to say something in a guarded effort to overcome some of these participation barriers. Your client will still be protected by you who will prepare him for the session and should be sitting next to him during the session.

Consider this advice for how to suitably share responsibilities between you and your client:

The extent to which mediation can prove useful in bridging economic, psychological, and strategic gaps between attorneys and their own clients is crucially dependent on the roles played by the attorney and client in the mediation. No single lawyer’s role is always best in mediation. Rather, the attorney’s appropriate role in mediation should vary depending on which barriers seem to be impeding the appropriate settlement of a particular dispute. That is, while the attorney should remain an advocate for his client at all times, he should adjust the manner in which he attempts to further his client’s interest depending upon which barriers are preventing the fair settlement of the dispute. For example, given many of the barriers, the attorney should frequently stop himself from dominating the mediation, instead allowing the client to play an active role in the process. In other situations, however, the attorney must be active and assertive to ensure that his client is not coerced by the opposing party or client. The attorney should not himself determine these relative roles, but rather should in most circumstances consult with the client regarding this issue.

7. Select Your Primary Audience in the Mediation

Who is Your Primary Audience?
1. Other Party
2. Other Side
3. Mediator

40 See Chapter 5.5(c) and 5.10(c) and (d) on who should attend the mediation sessions and the role of the client in presenting opening statement.
41 Precisely how responsibilities should be split can vary depending on the particular case. See, e.g., Sternlight, supra note 24, at 274, 345–48, 365–66 (suggests that the reasons for the impasse in the negotiations can guide how to split up responsibilities between attorney and client).
42 See id. at 274.
4. Mediator and Other Side
Recommendations: Your primary audience should be the other party.

Your primary target in a problem-solving process is clear: It is the other party.\(^{43}\) The other party has ultimate settlement responsibility, not the other attorney whose role is limited to counseling the other party or the mediator whose role is limited to facilitating the mediation process, not evaluating or deciding the case. The other party will ultimately decide whether to settle and on what specific terms.

You and your client should conscientiously and productively use this unique opportunity to speak personally with the other party. Through face-to-face interactions, you and your client can exchange information more reliably with the other side. You can circumvent the other attorney who may have over-sold the case to his client and would otherwise filter any communications. You can avoid the other attorney failing to accurately convey the nuances of what your client wants his client to hear and the nuances of what his client wants your client to hear.

But, this opportunity can be easily squandered if you do not consider how to communicate in a way that will be heard by a suspicious if not hostile other party. Conventional adversarial presentations and arguments are likely to be counterproductive for an audience that is not a neutral third party who is unaccustomed to hearing partisan presentations and who is not dedicated to listening with an open mind. You and your client must craft presentations for an audience who may not be in the mood for listening.

Some attorneys maintain that the primary audience should be the mediator. The mediator performs the primary role of structuring and facilitating the process. You want to get the mediator on your side and then enlist him to use his power over the process to prod the other side to move in a direction favorable to your client. Even though the mediator is a professional committed to neutrality, the mediator still can subtly steer the direction of the settlement discussions. For example, if your client seems reasonable while the other side appears stubborn and blinded to the weaknesses in their court case, you can try to nudge the mediator to engage in reality-testing strategies with the other side to be sure that the other side understands and factors in the weaknesses. While the mediator may have this power over the process, he still should be your secondary audience as compared with the other party who has the indisputable authority to accept or reject any emerging settlement agreement.

At least one commentator recommends that clients face the mediator when speaking in order to prevent the clients’ interactions escalating the conflict. If your client talks directly to the other party, your client’s comments might seem accusatory or demeaning which may arouse and inflame the other party.\(^{44}\) However, this very real risk can be guarded against by preparing your client to speak and not react and the mediator sensitively managing the exchange between parties.

In addition to the mediator, the other attorney can be an important secondary audience. The other attorney will be counseling the other party so you want to be sure that that advice is informed by your side’s presentations. In some cases, you may need to


\(^{44}\) See John W. Cooley, Mediation Advocacy 91–92 (1996).
influence the other attorney because he may be the obstacle to settlement. For example, he may prefer litigating the dispute even though his client prefers settling.

8. Research Legal Case—the Public BATNA

There is nothing unusual about how you research your legal case for mediation. This undertaking is a familiar one for attorneys. You should identify key legal issues and research relevant law. What you learn will obviously impact on what discovery you need to do for gaining a meaningful understanding of your client’s legal case.45

How you use your research in mediation can be less familiar. The distinctively different way becomes evident when you compare it with the way research is used in court and settlement conferences with judges. In court and settlement conferences, you use the research to “win” arguments. In court, you present your strongest, partisan arguments in an effort to convince the judge that your client is legally right and the other side is legally wrong. In settlement conferences, you may either make the same partisan arguments or temper them to maintain credibility in an effort to convince the settlement judge to signal his views of the case. You want the judge to either signal that your side has the stronger case or signal enough uncertainty to motivate both sides to compromise and settle.

In mediation, you use your research differently. Instead of using the research to justify your strongest partisan arguments to a neutral third party, you use the research as the basis for methodically discussing the public BATNA with the other side, the mediator, or both. You use the research to inform your discussion of the strengths and weaknesses of the case, the likely judicial outcome, the probability of it happening, and the legal costs of getting there. The mediator wants to ensure that both sides have a clear understanding of the merits and uncertainties of going to court so that each client can assess accurately when going to court may be less attractive than staying in the mediation.

9. Prepare the Presentation of Your Legal Case

How Present Legal Case

You should plan how to present your legal case to a hostile audience.

You should consider how and when to present your legal case, the public BATNA, in a process that is not an adversarial one.

a. How to Present It

When you present your legal case in a problem-solving process, you should adopt a different approach than what you customarily do in court or a settlement conference. You should modify the tone, language, content, and emphasis. You need a different approach because you are not trying to convince a neutral audience—a judge; you are trying to influence an averse audience—the other side. A conventional approach can derail the mediation. It might antagonize the other side who would then feel compelled to respond in kind, leading you into a contentious legal debate.

45 For a fuller discussion of discovery in mediations, see Section 12 of this chapter.
You should give great care to how you present your client’s legal case in order to take full advantage of this opportunity to talk directly with the other attorney and his client, under the guidance of a trained neutral. Your case should be presented in a way that it can be heard by a lawyer who thinks he knows more about the legal case than you do and a client who is probably distrustful and antagonistic. Your tone should be humble, sincere, and civil. Your language should be plain, devoid of legal jargon, and understandable to lay people. Your content should be succinct and substantive and should emphasize a realistic and thoughtful assessment of the legal case.

b. When to Present It

You will have an opportunity to present your legal case in four different settings during the mediation session.

1. You may set forth your legal case when presenting your opening statement. In the next section on opening statements, two approaches are considered—a limited summary or a fuller presentation.

2. You will have an opportunity to discuss the legal case when the mediator poses questions about its strengths and weaknesses. The mediator may explore the case in joint sessions or caucuses.

3. You are likely to feel compelled to present your legal case whenever the other attorney vigorously and pugnaciously argues his client’s legal case. You should resist copying the other attorney’s tactic. Instead of responding with an equally combative stance, you should respond calmly and confidently (if warranted) about your client’s case and ask the mediator whether this is the occasion for a full discussion of the legal case. The mediator will either defer the topic and shift the discussion to another subject or elect to structure an orderly analysis of the legal issues. Your tact should avoid a contentious legal debate while returning management of the process to the mediator.

4. You may want to re-visit the legal case whenever the other side appears too entrenched in their negotiation positions because they are overly confident in securing a judicial victory. You may even ask the mediator to assist everyone in engaging in an in-depth assessment of the legal case.

10. Prepare Preliminarily the Opening Statements
(See Sample Opening Statements in Appendix E.)

Opening Statements

1. You should carefully determine the tone and content of the opening statements.

2. You should figure out how much of an opening statement can be productively presented by your client.

a. The Challenge

The opening statements of attorneys and clients set the tone for the mediation. Excellent statements can propel the settlement process forward by establishing a positive, problem-solving environment for settlement negotiations. Poor opening statements can
set back the settlement process by creating a hostile and distrustful environment. Opening statements must be crafted for an audience that is likely to be not only antagonistic but also personally knowledgeable and protective of its view of the facts and law. If you have little mediation experience, you should aim for the modest goal of doing no harm! As you gain more experience, you should be able to do some good.

Consider the following warnings and advice:

Permit me to be blunt. With your opening statement, you can do tremendous good for your client, or you can do so much damage that you destroy any chance for a favorable resolution. I have observed exceptional opening statements that have created unbelievable results for the clients. And I have heard opening statements that were so inappropriate and unfortunate that chances for resolution were obliterated with the uttering of those words. In those cases, I have had to spend countless hours in private caucus helping parties get beyond their rage at the words said by opposing counsel. Sometimes, and sadly, it is an impossible task.

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Preliminarily, you must analyze how your opening statement at mediation is different from your opening at trial and understand what your goals in a mediation opening statement happen to be.

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What do people who neither like nor trust you do when you speak to them? The answer is simple—they do not listen. And you need the other party to listen. More than with a jury who will forgive you (because it is not their dispute), the other party will seize on any word or phrase you say to confirm their preexisting distrust and dislike for you. And if your words evoke such feelings, you will not persuade them or even get them to listen.

As a litigator, you do everything possible to get neutral people to like you, listen to you, and be persuaded by you. Isn’t it the ultimate challenge, as the mediation advocate, to get the other party at least to listen if not be persuaded?

You should keep in mind that opening statements provide you your first opportunity to set the tone for the mediation session as well as your only opportunity to present a comprehensive, coherent, and compelling summary of what is important. There is no opportunity to give closing statements because as the mediation progresses, the focus moves forward toward clarifying issues and interests, narrowing areas of dispute, and developing possible solutions. The mediation ends, not with closing statements, but with an impasse or a resolution.

b. Tone

You should give considerable attention to creating the right tone in the opening statements. You want to establish a rapport with the other party, attorney, and mediator,

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46 Eric Galton, Representing Clients in Mediation 75–76 (1994).
and cultivate a problem-solving atmosphere for resolving the dispute. The statements should be presented in a way that they can be heard by the other party who is likely to be sensitive, suspicious, and even hostile. The tone should be different than what you are accustomed to conveying in an opening statement presented in court or arbitration.

The opening statements should convey the commitment of you and your client to be reasonable, to listen, and to keep an open mind in search of a solution that meets the interests of everyone. And, that the two of you are prepared for the mediation and acting in good faith.

You and your client should sincerely thank the other attorney and client for participating in the mediation sessions. The opening statements should be presented with respect and compassion and acknowledge the other party’s perspectives. The statements should not sound righteous or vindictive and avoid exaggeration, threats, and personal attacks (especially attacks to the integrity of the other party or attorney). The wording should be in plain language with minimal use of legal jargon.

You should find ways to specifically invite the other side to collaborate in devising sensible and inventive solutions. Any highly delicate issues should either be deferred or presented in carefully crafted, non-provocative language.

The opening statements can be made more captivating by presenting key documentary evidence and creatively using audio or visual aids.48

c. Content—the Story, BATNA, and What Want49

Based on your representation plan that is designed to advance parties’ interests and to overcome impediments, you should begin outlining the opening statements. The content and emphasis in mediations are somewhat different than opening statements in arbitration or court. The content can cover four subjects: the story, the legal case and any other BATNAs, what your client wants out of the mediation, and what you would like the mediator to do.

i. The Story

The opening statements should cover the story, that is what led up to the dispute. The statements should approach the story broadly, although sometimes a narrow version might be warranted if you prefer to approach the problem narrowly. The statements should present a sympathetic story (the “facts”) and if relevant, acknowledge any mistakes and even offer an apology. Although the details need not be constrained by rules of evidence, the credibility of the story will be affected by what can be proven in court.

ii. The Public and Personal BATNAs

The opening statements should cover the legal case. They also might cover some of your client’s personal benefits and costs of litigating and any other attractive personal alternatives to settlement that you want to educate the other side about.

Public BATNA. You may want to say something about the legal case in the opening statement. You may need to recognize this alternative to settlement, the one that provides the context for the mediation. If you skip the legal case all together, the other

48 See Section 15 on what to bring to the mediation session.
49 See id.
side might think that your client lacks faith in his court option and as a result has no other viable options but to capitulate to an unfavorable settlement.

Presenting the legal case is by far the most treacherous part of the opening statements. If you make a conventional, trial-oriented opening statement in which legal positions, supporting evidence, and precedent are ardently advocated, you are likely to antagonize the other participants, escalate the dispute, and derail any problem-solving efforts. Therefore, you need to tailor a different, more suitable approach to covering the legal case. Here are two possible options:

In one approach, you treat the legal case as a small part of your opening statement. You summarize briefly your legal positions. In order to avoid the impression that you lack faith in your case, you might explain that “Because we are committed to working together to try to creatively settle this case, we are deferring our detailed discussion of the legal case. Of course, we are ready for that discussion whenever you want to have it.” By adopting this approach, the legal arguments are less likely to preempt the discussion of other more productive subjects.

In another approach, you give your legal case greater prominence because you think it has a convincingly high probability of success and therefore should substantially influence the settlement terms. Your client also may need to hear his personal outrage expressed in your vigorous presentation of the legal positions. Even you may need to present the legal case because you have become so vested in your legal work. Only after experiencing this “psychological hearing” can your client (and sometimes even you) move on.

But, this approach poses the risk that the legal arguments will initially dominate the mediation session, preempting discussion of other ways to resolve the dispute. You should work hard to temper your legal presentation. You might even begin it with a warning that “what my client and I have to say may be provocative to you but it is important for us to air the legal issues that we believe are germane to this case. But, we do not want our discussion of the legal case to prevent us from exploring other creative ways for resolving this dispute.”

As part of the legal presentation, you may want to request from the other attorney any additional information that you may need to assess the legal case. For example, you could ask what key cases or what specific language in a statute that the other attorney is relying on.

You also should say something that demonstrates that you are prepared to listen to the other attorney’s legal points or that you heard and understood the other attorney’s legal position, even though you may not agree with everything said.

*Personal BATNA.* You or your client might note some of the personal benefits or even costs of litigating that are individual to your client. For example, if your client finds going to court attractive because it may create a precedent that will discourage other plaintiffs from suing, you may want to mention this personal benefit. If you think that the other side also would like to preserve a continuing relationship, you might mention that going to court poses the drawback (personal costs) of possibly destroying the relationship between the parties who seem interested in working together in the future. But, it may be premature or counterproductive to discuss all your client’s personal benefits and costs of

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50 Obviously, if participants are engaging in positional negotiations, they will use the opening statement to present forcefully their legal case and legal positions.
litigation. You probably do not want to include in the opening statements, for instance, that your client has little tolerance for the personal cost of suffering through the litigation process and risk getting nothing.

Occasionally, your client may have a viable BATNA other than going to court. If so, you should figure out a gentle and tactful way to educate the other side about this other option. You or your client should not be too forceful so that the explanation is not construed as a threat that may drive the other side away. If, for example, the defendant is in dire financial condition, the defendant’s alternative to settlement might be filing for bankruptcy. The defendant might raise this alternative to settlement along with some credible supporting evidence. But, if presented so bluntly that it comes across as a threat, the other side may walk out.

iii. What Your Client Wants Out of the Mediation

The opening statements should express generally what your client wants out of the mediation. This is the moment to set forth your client’s interests that might go beyond dealing with the legal issues that your client would like met as well as the moment to sincerely recognize that the other party has legitimate interests that need to be met. Your client also might suggest possible impediments that your client hopes will be overcome in the mediation. But, you and your client should usually avoid presenting any detailed settlement proposals.

You may find it surprising that you should avoid presenting specific proposals, an approach to opening statements that can be frustrating to the other side. The other side may be anxiously waiting for a serious proposal and may be deeply disappointed when none is forthcoming. At this stage, however, references to proposals, especially monetary ones, can be inherently provocative and may trump everything else that is being said and derail efforts to stimulate out-of-the-legal-box thinking in the mediation. Nevertheless, you and your client should come prepared to discuss during the session the damages claimed and how they were computed.

You and your client also might start priming the pump for value-creating ideas, although you should guard against prematurely going into detail. In an employment discrimination case, you might indicate that your employee-client is open to options unavailable in court by suggesting a few possibilities such as promotions and good references, and emphasize that these specific examples should not be viewed as positions or proposals. Then, you might invite a fuller discussion of these and other options in the mediation.

iv. What You Would Like the Mediator to Do

In your opening statement, you might want to suggest which approaches and techniques of the mediator could be helpful and how he could use his control of the mediation stages to advance the settlement efforts. The mediator might welcome your analysis of how he could be helpful and welcome your flagging these opportunities early in the session. When making these suggestions, you do not want to appear to be telling the mediator how to do his job. For example, if you think that a data conflict is impeding the settlement, you might invite the mediator to help the participants gather the information that they need. If you think the parties are stuck and obstinate, you might inquire whether the mediator could design a process for creative brainstorming. If you
think the other side has not fully analyzed the legal case, you might ask the mediator to spend time in the session facilitating a discussion of the legal case. Of course, these suggestions could be deferred until a later opportune moment in the session when the need for these actions arises.

d. Should Your Client Present an Opening Statement?

When you and your client plan to both participate in the session, you need to resolve whether your client will present an opening statement. In a problem-solving process, your client should usually present an opening statement for the same reasons that your client should appear in the mediation sessions. Presenting an opening statement is the first step to engaging the person with ultimate settlement authority, your client, in the mediation session. When preparing an opening statement, your client begins shifting his role early in the mediation process from a passive one that is customarily encountered in other settlement processes and litigation to a much more participatory one. An opening statement by your client can aid in giving your client the experience of a psychological day in court. This early client involvement should help him become comfortable with the process quicker and therefore ready to resolve the dispute quicker.

An opening statement by your client also can be effective in moving others. Your client is in the best position to talk authoritatively, sincerely, and therefore persuasively about his circumstances. Your client may be able to empathetically connect with the other party due to their shared experience with the dispute.

You or your client may be reluctant about your client presenting an opening statement for the same reasons you may be reluctant about your client participating actively throughout the sessions. Nevertheless, your client should still say something even if it is as little as simply introducing himself and briefly indicating his interest in resolving the dispute. Your client’s opening statement provides a way to engage your client early in the process. Your client will still be protected by you who will help him prepare his statement and will be sitting next to him in the session.

e. How Should You Divide Opening Statements Between You and Your Client?

Generally, you should encourage your client to cover as much as he is comfortable doing. He can usually tell his story—what happened and how it impacted on him, as well as explain what he wants out of the mediation. As already indicated, your client is in the best position to talk about his own circumstances and needs, and to empathetically recognize the other party’s needs. He can even suggest what some of the impediments might be; he could be in a credible position to indicate potential sources of the conflict (e.g., data or relationship conflict). He can say things to prime the pump for creating value and generating new settlement ideas. He may be capable of talking about personal alternatives to a negotiated settlement. However, your client should not cover subjects which he is ill-equipped to discuss such as the law, strength of the legal case, and

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51 See Chapter 5(b) on “Should be Client Be Present and Active?”
52 As indicated in Chapter 5.6, you may be reluctant about your client participating for a number of reasons: “Your client may not be a skilled speaker. Your client may not speak fluently the language spoken in the mediation. Your client may be too shy, upset, or angry. Your client may have been emotionally or physically abused or harassed. Or, your client may be intimidated by the other party because your client is less educated, feels less worldly, or has less bargaining power.”
what is happening in the legal process. You may need to adjust this split based on how secure your client is about speaking and his facility in explaining things.

f. Should You or Your Client Speak First?

*Opening Statements*

*Who Speaks First?*

1. Attorney
2. Client

Recommendations: *The client should usually speak first.*

You need to resolve whether you or your client will speak first when you and your client will be presenting opening statements.

Your client should speak first for the same reasons that your client should present an opening statement. This arrangement clearly and further engages your client early in a process that cannot result in settlement without his approval. If your client speaks first, you also are less likely to inadvertently preempt your client’s prepared statement, leaving little for your client to say of substance. However, this arrangement increases the risks of your client setting the wrong tone and saying the wrong things at the beginning of the first session. You can reduce these risks by properly preparing your client and guiding him during the opening statements.

Some attorneys still firmly believe that you should speak first and do most of the speaking because your client hired you to speak on his behalf. You are the expert orator who is comfortable with the forum and knows how to sympathetically and skillfully present a case. This circumscribed role for your client increases your control over the tone and content of what is said in the session. But, it runs the risk of chilling your client’s early involvement in the session because he may see you as the primary participant instead of a partner in the session.

As a compromise that still keeps your client deeply involved, you might start with a brief statement in which you introduce your client, indicate that your client is participating in good faith, and provide some procedural background that puts your client’s presentation in context. Your client then gives his story and describes what he wants out of the mediation. You finish the opening statements by presenting the legal case, suggesting how the mediator can be helpful, and adding any concluding comments.

11. Consider When to Caucus

In preparing for the mediation sessions, you should consider when it will be advantageous to move from a joint session to a caucus and what you want to accomplish in the caucus.54

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53 In a case that I mediated a few years ago, the attorney preferred to speak first because his client was not very confident speaking in English. As a compromise, I encouraged the attorney to help his client prepare a brief written opening statement. The attorney thought it was an idea worth trying. At the mediation, his client read a very brief statement and then his attorney took over. However, after the opening statements, the client got deeply involved in the discussions and the case resolved after a short but critical private meeting between the clients. Whether the case would have resolved without the client speaking, we will never know. But, it clearly did not hurt and probably did help.

54 Joint sessions are when the mediator meets with all the parties and attorneys. Caucuses are when the mediator meets privately with one side.
When to Caucus
Options:
1. Not At All
2. Most of the Time
3. Selectively
Recommendations: In a problem-solving process, you should limit the use of caucuses to serve specific, limited purposes.

a. Options for Caucusing

Caucusing is a controversial subject that is hotly debated in the field of mediation. Different mediators and advocates are guided in the use of caucusing by different philosophies on how to manage information, maintain neutrality, and move disputing parties.

Some mediators and advocates prefer a no caucus approach because they believe the mediator should work with the parties in joint sessions in which the parties share information directly with each other.\(^55\) They mistrust caucuses because of how private meetings with the mediator can taint the neutrality of the mediator. Caucusing also can undermine the opportunity for parties to work together to resolve their own problems because caucusing cuts off vital direct communications and creates undue reliance on the mediator, who is the only person with a full view, for transmitting reactions and information between sides and for fashioning a solution.

At the other extreme, some mediators as well as advocates prefer a mostly caucus approach in which the sides meet jointly only at the beginning of the mediation and then again at the end when signing the settlement agreement. You and your client have little opportunity to interact directly with the other side. By primarily using caucuses, the mediator insulates hostile parties from each other and as a result limits the opportunity for the dispute to escalate. The mediator carefully screens and tightly manages the flow of information and the way proposals are framed and presented.

Other mediators and advocates prefer a selective caucus approach in which most meetings are held in joint sessions in order to promote communications between the parties and preserve the mediator’s neutrality. These mediators and advocates limit caucusing to narrow and laser-sharp purposes that they believe can be accomplished only in private meetings. Under this approach, you and your client are able to communicate directly with the other side as well as to meet in caucus with the mediator to share sensitive information, test risky proposals, or guard against reactive devaluation,\(^56\) among other purposes.

b. Recommendations

In a problem-solving process that is designed to promote collaboration, out-of-the-box legal thinking, and creative solutions, you should avoid using the caucus as a

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Two of the leading proponents and practitioners of the no-caucus approach are Jack Himmelstein and Gary Friedman at the Center for Mediation in Law at www.mediationinlaw.org.

\(^56\) Reactive devaluation describes the tendency of parties to devalue any proposal presented by the other party.
crutch. When unsure what to do next, you should not react reflexively with a request to caucus with the mediator. Instead, you should either avoid caucusing or limit caucusing to selective, narrow purposes. Even if you are requested by the mediator to go into a caucus, you should consider whether the mediator is using the caucus as a crutch. If you doubt the value of caucusing at that moment, you should raise this question for discussion with the mediator.

You should limit the use of caucuses to serving specific purposes that cannot be accomplished in a joint session. Here are some purposes that might be best accomplished in a caucus:

1. You or your client may need to vent privately or share confidential, inflammatory, or damaging information.

   Extreme venting that might escalate tensions in joint sessions can usually be safely expressed in a caucus. You or your client may need to discharge much built-up anger. Only after experiencing the release from the extreme venting, you or your client may be capable of moving forward in the joint session. Confidential, inflammatory, or damaging information may need to be disclosed to the mediator if you want to ensure that he has the information necessary for helping the parties resolve the dispute. If you have a document damaging to your client, for example, you may avoid the risk of the other side exploiting this information by disclosing it only in a caucus. By doing this, the mediator will be able to facilitate your assessing whether and when to disclose the information and how to factor it into the negotiations. If you have evidence damaging to the other side, you may want to disclose the evidence to the mediator so the mediator has a full picture of the case. But, you may want to delay disclosing the information to the other side until it is likely to be heard and productively used such as when the parties are exploring their BATNAs in joint sessions.

2. You may want the mediator to help clarify your client’s interests.

   As the mediation advances and new information and perspectives spew to the surface, your client may become overwhelmed and less sure of what he wants to accomplish in the mediation. You and your client may need to re-visit and clarify the interests that your client wants met in the mediation. You may be more comfortable first clarifying your client’s interests in a private meeting with the mediator before sharing a more nuanced understanding of your client’s interests with the other side.

3. You may need a safe place to give a candid assessment of the legal case.

   In a caucus, you may be more willing to openly explore the strengths and weaknesses of the legal case, the public BATNA, with the mediator and respond more frankly to the mediator’s reality-testing questions or questions about quantifying the inputs for a decision-tree analysis. With the absence of the other side, you will be under less pressure to posture as an advocate. Hearing a candid discussion of the legal case can help your client understand more fully whether or not the court option is more attractive than any emerging settlement proposals. Furthermore, by demonstrating a realistic assessment of the case, including its weaknesses, you protect your client from the mediator.

57 See Appendix A on Decision-Tree Plus Analysis.
suggesting that the in-caucus assessment should be a basis for adjusting any sensible offers already made by your client.

4. You may welcome advice from the mediator on how to package or react to a proposal. The mediator can counsel you and your client about proposals because the mediator brings to the session his experience as a dispute resolution expert and can acquire during the session an objective feel for what is possible to do in the mediation based on what he learns in joint sessions and caucuses about each side’s attitudes, interests, priorities, and bottom line. Therefore, instead of risking derailing the mediation in a joint session, you might first test a daring proposal with the mediator. The mediator may offer his reactions and give advice on how to shape and present the proposal so that it is likely to be heard and even accepted by the other side. You also may want to solicit the mediator’s private advice on how to constructively react to a proposal presented by the other side.

5. You may want to present a serious proposal for the mediator to present hypothetically to the other party (“What if” proposals—“What would you do if the other side proposed X?”).

You may prefer transmitting proposals through the mediator for two reasons. First, you may want to protect your client from being trapped into bargaining against himself. Your client may be ready to present a bottom line proposal that includes his final concessions so long as it will result in an agreement. By the mediator presenting your client’s proposal hypothetically to the other side, the mediator can guard against the other side simultaneously rejecting it and then insisting that your client up the ante with another significant concession. Second, you and your client may want to guard against wasting the final concession by the other party’s reactive devaluation of it. Reactive devaluation describes the tendency of a party to devalue any proposal presented by the other side. If they are willing to present it, then there must be something wrong with it.”

6. You may want to convey private suggestions to the mediator when formulating a mediator’s proposal.

If the parties request the mediator to present a final settlement proposal, you should try to provide some personal input before the mediator fully formulates and proffers the proposal to each side. A mediator’s proposal works briefly as follows: If both sides confidentially accept the proposal, then the proposal is adopted.

If one or both sides reject the proposal, then the decisions are not revealed so that if one side did accept the terms, the other side would not know it.

12. Consider Need to Gather Information and File Motions

58 See Golaan, supra note 37, at Ch.7.2.2; Robert H. Mnookin, Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict, 8 Ohio St. J. on Disp. Resol. 235, 246–47 (1993).

59 See Chapters 2.4 and 7.2(d) where the mediator’s proposal is described in detail including the process, opportunities, and risks.

60 See, e.g., Edward F. Sherman, The Impact of Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process, 15 Rev. Litig. 503 (1996)(considers how discovery and motion practice are impacted by the use of ADR processes, including mediation).
You need to assess how much of the case should be cleaned up and illuminated before your client can participate meaningfully in the mediation. Your client may not be ready until you clarified or narrowed the dispute by assembling essential information or by asking a judge to decide a focused motion.

a. Information Gathering

i. Assembling Essential Information

You should consider whether any information needs to be collected either informally or through discovery before you and your client are ready to engage in productive negotiations. In mediations, as in any negotiations, you must confront the prospect of settling a case without full information. This prospect runs counter to your U.S. legal training and practice of exhaustive discovery. You need to make an informed but inherently uncertain judgment call: What critical information must you know before you can help your client settle? You need sufficient information to elucidate dispositive facts and to adequately but not necessarily thoroughly evaluate the merits of the legal case. You may be able to gain this information informally from public sources such as the internet or from the other side. Otherwise, you may have to secure this information through formal discovery.

ii. Reducing Discovery Costs

Your client may ask you how to reduce the discovery costs and the time it takes because he wants to minimize his dispute resolution costs and extricate himself quickly from the conflict. First, you should be sure that your client understands the benefits and risks of settling before completing discovery. Then, you should consider ways to reduce discovery costs by taking advantage of the opportunities in the mediation process for inexpensively and informally gaining information. As the session progresses, you can ask questions, request data, and gain an in-depth view of the case. When the credibility of the parties weighs heavily in the court outcome, you and the other attorney can observe each other’s client in the session instead of testing them in costly depositions. Attorneys with mediation experience commonly declare that they can “learn more in one day of mediation than in six to twelve months of expensive, formal discovery.”

You also should consider ways to cost-effectively use formal discovery. You can reduce the costs by agreeing with the other side what documents to exchange, the form and number of discovery devices, deadlines for completing discovery, and the number of specific issues or witnesses that will be subject to discovery. If you and the other attorney are unable to negotiate a truncated and efficient discovery schedule or resolve any disputes over compelling discovery, you can avoid contested motions or ad hoc conferences with the judge by folding these issues into the mediation process. Then, the mediator can help you resolve the issues in a pre-mediation conference or the session.

iii. Avoiding Discovery Abuses

Some attorneys react to this less costly access to information with alarm, contending that attorneys abuse the mediation process by using it in bad faith as a cheap,

62 For a discussion of the costs and benefits, see Chapter 6.4, “Review Needs for Discovery and Risks of Incomplete Discovery,”
easy, and one-sided way to gain discovery for trial instead of using mediation to try settling the dispute. When you consider that it is usually only a matter of time and more expense before the other side gains the discovery, you should be willing to take a chance in the mediation under the guidance of a third-party expert in settling cases, an expert who can foster a reciprocal and fair exchange of information. By providing the discovery in the mediation, you also are likely to increase the chances of settling the case. If it works, your client will be happy or at least relieved. If it does not, then some of the discovery would have been accomplished at less cost to your client.

b. Motions

Sometimes, you may consider filing a motion or welcome the other side doing so in order to clean up the case for the mediation. A motion to dismiss or a summary judgment motion can eliminate extraneous aspects of the case such as causes of action that you consider frivolous. Motions also can solidify strong claims that you do not want to compromise or that you want to use as leverage when negotiating in the mediation. Any resulting judicial decisions may guide both sides in assessing the strengths and weaknesses of the most contentious legal issues.

13. Consider Level of Confidentiality that You Need

Before the first session, you should review the sources of confidentiality that cover the mediation process. You, your client, and the other side may each need assurances that what is said in the mediation will be held in confidence as a condition for participating openly in the mediation session. You want to be sure that these sources will sufficiently protect your client from being haunted outside the mediation by what happens in the mediation.

You ought to give attention to the level of confidentiality because a party may challenge it after the mediation. This might happen if the mediation fails to settle all the issues or a party wants to dispute the mediated settlement agreement or the interpretation of a key provision. The contesting party is usually motivated by the prospect of using advantageous information disclosed in the mediation in the litigation over any unsettled issues or the enforcement of the mediated agreement.

a. Sources

The typical sources of confidentiality include rules of evidence that protect settlement discussions, statutory or common law mediation privileges, court rules, private mediation rules, and confidentiality agreements. The law on protecting confidentiality in mediations has been developing intermittently and erratically and can vary among the states and even among the federal courts. Therefore, all these confidentiality sources

63 See e.g., AAA and CPR Mediation Procedures in Appendices H and I.
64 See Golaan, supra note 37, at Ch.13.14; Nancy Rogers & Craig A. McEwen, Mediation—Law, Policy, Practice, Ch. 9 (2d ed. 1994).
65 See Weston, Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation, 8 Harv. Nat. L.Rev. 29 (2003)(explores the inherent judicial power to monitor, regulate, and sanction participants in court-connected mediation even where participants are protected by a broad statutory privilege); Deason, Predictable Mediation Confidentiality in the U.S. Federal System, 17 Ohio St. J. on Disp. Resol. 239 (2002)(concludes that no counsel can predict with confidence the level of confidentiality in mediation that will be upheld by the courts); and Litt, Note: No
should be researched to determine the level of protection that you can expect in the jurisdiction of the mediation session as well as the jurisdictions of the likely place of trial and enforcement.

Confidentiality law may gain new vigor and vision from the recent approval of the Uniform Mediation Act (UMA) by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The publication of the UMA is expected to spur many states into action and shape the content of a new generation of state mediation privilege laws.\textsuperscript{66}

Until the law on protecting confidentiality is more fully developed and stable, you will want to sign a private confidentiality agreement. The proposed agreement may incorporate a confidentiality rule found in the private mediation rules of a dispute resolution organization.\textsuperscript{67} Remember that the confidentiality agreement is simply a private contract, subject to the traditional legal requirements and defenses as to formation and enforceability of any contract. Typically, the proposed confidentiality agreement is offered by the administering organization, court sponsor, or mediator. The proposed agreement should be studied to be sure it gives your client sufficient protection.

A thorough confidentiality agreement\textsuperscript{68} would apply to all discussions done under the auspices of the mediation, all documents produced in the mediation process that are not otherwise independently discoverable, and all observations and notes of the mediator and other participants. The agreement would prohibit using this information as evidence or for impeachment in pending or future proceedings including judicial, arbitration, and administrative agency proceedings. The agreement might even include provisions to aid enforcement. For instance, the agreement might obligate each signatory to notify other signatories of any effort by a third party to secure the confidential information. It also might provide for liquidated damages to be paid by the breaching party to cover any harm caused to the other party.

b. No Airtight Protections

A confidentiality agreement does not provide airtight protections. As in any contract, it is only binding on signatories, not other third parties that may try to obtain and use the information. You can reduce this third-person risk by securing the signatures of known, key nonparties—although it can be difficult to convince people who are not participating in the mediation to sign on. Furthermore, courts may not enforce a confidentiality agreement when the need for confidentiality clashes with the need for public disclosure such as the need to report activities that may harm third persons. When a party is a governmental entity, information exchanged may be subject to disclosure under a state or federal freedom of information law. Even if your client has a clear legal protection, enforcement can be problematic. By the time the breach is discovered, it may be too late for an injunction to be helpful and proving damages can be difficult and not

\textsuperscript{66} See Uniform Mediation Act in Appendix O. For a copy of the Uniform Mediation Act that includes an extensive Prefatory Note and detailed Reporter’s Notes and to learn whether your state is considering or has adopted the UMA, see www.nccusl.org.

\textsuperscript{67} See Appendices F, H, and I for cites to and examples of private mediation rules.

\textsuperscript{68} See Appendix C—Sample Confidentiality Agreement.
always cost-justified. Finally, because confidentiality agreements have been rarely tested in court, judicial attitudes toward enforcing them have not been fully formed.

Even though confidentiality cannot be guaranteed, a confidentiality agreement in mediation will usually be broader than the confidentiality protections secured in alternative settlement forums such as conventional negotiations between attorneys. In conventional negotiations, you can normally only count on the usual rules of evidence that bar admitting information from settlement discussions in any pending court case, and these protective rules contain their own exceptions and minefields.\(^{69}\)

Ultimately, you must assess whether the relatively small risk of disclosure to third parties or the likely harm due to disclosure is outweighed by the distinctive opportunities for settlement in mediation.

c. Withholding Information Despite Confidentiality

Regardless of confidentiality protections, you ought to consider whether your client should withhold disclosing any specific information from joint sessions or caucuses. Any information that you hide from the mediation process should be scrupulously selected and narrowly confined because withholding information can diminish the potential benefits of mediation. Nevertheless, you may want your client to withhold some types of information. For instance, you may want to instruct your client not to disclose particular trade secrets, financial projections, propriety business data, damaging evidence, or private conversations between you and your client about the negotiation strategy. You should state clearly to your client what specific information to withhold from the mediation process.

You might consider whether any of this withheld information could be disclosed to the mediator in a caucus. Disclosure would enable the mediator to discuss with you and your client whether the information may be of some help in settling the case and how to use the information while preserving any necessary confidentiality. For instance, you may want to disclose to the mediator evidence damaging to your client’s case that is unknown to the other side when your client is resisting a settlement proposal that you think fairly reflects his vulnerability in court. You may want to caucus with the mediator and your client so that the mediator and you can help your client craft a settlement proposal that factors in the litigation risk.

14. Consider How to Abide by Conduct Rules

You should check the local rules in your own jurisdiction to learn the specific professional conduct rules that govern your behavior as a lawyer that would apply to your behavior in mediation. The American Bar Association’s latest thinking on how to approach a range of representation issues can be found in the ABA Model Rules of Professional Conduct.\(^{70}\) The rules prescribe your duty to prepare, to be diligent, and to consult with your client about the means for accomplishing objectives. The rules obligate

\(^{69}\) For example, Federal Rule of Evidence 408 bars introducing evidence from settlement discussions unless, among other exceptions, the evidence will be used to impeach a witness or might be otherwise discoverable. See Appendix O—Federal Rule of Evidence 408. For a discussion of the risks posed by Rule 408 and how to negotiate around them, see Michaels, Rule 408: A Litigation Mine Field, 19 Litig. 34 (Fall 1992).

\(^{70}\) Selected ABA rules relevant to mediation representation can be located in Appendix N.
you to maintain client’s confidences, to not make false statements of material fact or law, to further meritorious, not frivolous claims and contentions, and to avoid means designed to embarrass, delay, or burden a third person. The rules also regulate how to communicate with represented clients, ways to deal with conflicts of interest, and when you can appear in mediations in another jurisdiction. There is no separate professional code for attorney-advocates in mediation although a lively discussion of those obligations, including suggestions for tailor-made ones, is unfolding and someday may produce model conduct rules for mediation advocates.71

One separate legal obligation that impacts directly on the way you and your client conduct yourselves has begun to take hold, an obligation that participants participate in “good faith” throughout the mediation process. Good-faith participation is required by a substantial number of state statutes as well as the rules of a number of state courts and federal district courts although most of these mandates fail to define good faith.72 You should determine whether a good-faith requirement applies in your jurisdiction and how the requirement has been interpreted. The good-faith obligation has triggered a handful of reported cases73 in which parties alleged bad faith when the other party failed to attend the session, bring a representative with sufficient settlement authority, submit a pre-mediation memorandum, bring experts, participate substantively, provide requested documents, and sign a mediated agreement.

There is much debate about what good-faith behavior is and whether a good-faith standard is efficacious or could be made efficacious.74 At least one critical observer recommends relegating the good-faith standard to a last resort option and instead trying a system designs approach for inducing good-faith participation.75 As more litigated cases surface, this ongoing debate is likely to produce specific rules or incentives to guide you and your client’s participation in the mediation.

15. Consider What to Bring to the Mediation Sessions

You should bring to the mediations sessions the case file including pleadings, depositions, critical documentary evidence, and any court orders or decisions in the case. You also should bring your legal research including copies of key statutes and court cases. This information may be essential if you expect to evaluate the merits of the legal case. Some of this information may be used as part of your opening statements; other information may become relevant as the mediation progresses.

71 See e.g., Symposium, Focus on Ethics in Representation in Mediation, 4 Disp. Res. Mag. (Winter 1997).
72 See Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69, 78–81(2002)(reported on requirements in twenty-two states, territory of Guam, twenty-one federal district courts, and seventeen state courts.)
73 Id. at 82–83 (analyzed twenty-seven reported cases).
75 See Lande, Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs, 50 UCLA L. Rev. 69, (2002)(sharply criticizes the effectiveness of a good-faith participation standard and recommends, as an alternative, the use of dispute system design principles and system design policies.).
You also should think creatively about how to present visually important information in a way that effectively engages the other side. The information could be presented on pasteboards, large newsprint pads, overheads, or computer-generated PowerPoint presentations. For instance, key documents might be enlarged; chronologies might be presented on pasteboards; or key depositions, schematics, and contracts might be shown in a PowerPoint presentation. But, do not get too creative. You want to guard against your visual aids being more engaging than the substantive points that you want to communicate. PowerPoint presentations, for instance, can be so dazzling that the other side can become more absorbed by your technological prowess than your substantive presentation.

16. Checklist: Preparing Case and Mediation Representation Plan

This checklist consists of three parts: Parts 1 and 2 cover the homework you should do before you prepare your representation plan. Part 3 covers what to include in your representation plan when implementing it at six junctures in the mediation process.

Part 1
Preparation Before Preparing Representation Plan

☐ 1. Analyze dispute (not legal case). (See part 2.)  
☐ 2. Research legal case (public BATNA).  
☐ 3. Develop with your client your client’s personal alternatives to settlement (personal BATNA.)

4. Consider whether you need to gather any information or file any motions before the session.
   ☐ a. What information do you need?  
   ☐ b. How can you keep the costs of collecting information down?  
   ☐ c. Should you file any motions?

5. Decide who should attend the mediation session.
   ☐ a. Should you attend?  
   ☐ b. Should your client attend?  
   ☐ c. How do you involve an institutional client?
       ☐ Who should participate on behalf of an institutional client?  
       ☐ Does the person have sufficient and flexible settlement authority?  
       ☐ How can you convince the client representative to participate?  
       ☐ What should be the role of an in-house counsel?

   ☐ d. Should any other people participate (advisors)?  
       ☐ Expert Witnesses?  
       ☐ Fact Witnesses?  
       ☐ Personal Advisors or Supporters (family member or friend)?  
       ☐ Other?
6. Resolve who your audience is in the session.

7. Prepare presentation of the legal case.
   a. How can you productively present the legal case?
   b. When do you want to present it—in opening statements or later?

8. Consider level of confidentiality that you need.
   a. What are the sources? Look at mediation contract, any binding private mediation rules, and local laws.
   b. Are they adequate?
   c. Do you want to withhold any information despite confidentiality?

9. Consider how to abide by conduct rules.
   a. Check local professional conduct rules relevant to mediation representation.
   b. Check whether a local obligation to participate in good faith applies and how it is interpreted.

10. Contact mediator.
    a. Inquire whether the mediator plans to hold a premediation conference.
    b. If not planning one, request one if you determine that it would be useful.
    c. Inquire whether the mediator wants a pre-mediation submission. If yes,
       □ Determine what the mediator wants included.
       □ Determine whether the mediator will share any information in the submission with the other side.
       □ Determine that if the mediator plans to share any information, whether the mediator wants you to send the entire submission or a portion to the other side.
    d. If mediator does not want one, request one if you determine that it would be useful.

11. Consider what to bring to the mediation session.
    a. What will you bring to the session?
    b. How will you visually present key information?

Part 2
Analysis of the Dispute
(not legal case)

Identify three components of the mediation representation formula: interests, impediments, and ways the mediator might contribute to resolving the dispute.

1. Goal: Identify Interests to Meet
   □ Your Client’s

Goal: Identify Interests to Accommodate
2. Goal: Identify Impediments to Overcome
   □ Relationship
   □ Data
   □ Value
   □ Interests
   □ Structural

3. Identify Mediator’s Possible Contributions to Resolving the Dispute
   Approaches to Dispute. You want the mediator to use the following mediator’s approaches:
   □ a. Manage the process by primarily facilitating, primarily evaluating, or following a transformative approach.
   □ b. View the problem broadly or narrowly.
   □ c. Involve clients actively or restrictively.
   □ d. Use caucuses extensively, selectively, or not at all.

Useful Techniques. You want the mediator to use his or her techniques to:
   □ a. Facilitate the negotiation of a problem-solving process.
   □ b. Promote communications through questioning and listening techniques.
   □ c. Deal with the emotional dimensions of the dispute.
   □ d. Clarify statements and issues through framing and reframing.
   □ e. Generate options for settlement (e.g. brainstorming).
   □ f. Separate process of inventing settlement options from selecting them.
   □ g. Deal with power inequalities.
   □ h. Overcome the impediments to settlement.
   □ i. Overcome the chronic impediment of clashing views of the court outcome (public BATNA).
   □ j. Close any final gaps (consider your preferred methods for closing gaps).
   □ k. Deal with ________________________________

Control over Mediation Stages. You want the mediator to use his or her control over the mediation process to:
   □ a. Use the mediator’s opening statement to set up a problem-solving process.
   □ b. Use the information gathering stage for venting and securing information for the specific purposes of understanding issues, interests, and impediments. (Opening Statements of Participants, First Joint Session, and First Caucus)
   □ c. Use the stage of identifying issues, interests, and impediments to ensure that key information is clearly identified.
   □ d. Use the agenda formulation stage to ensure key issues and impediments will be addressed.
   □ e. Use the overcoming impediments stage to overcome known impediments.
   □ f. Use the generating options stage to ensure creative ideas are developed. (Inventing stage)
g. Use the assessing and selecting options stage to ensure that your client’s interests are met. (Deciding stage)
h. Use the concluding stage to ensure that any written settlement meets your client’s interests or if no settlement, a suitable exit plan is formulated.

Part 3
Mediation Representation Plan for Six Junctures

Develop a representation plan based on the mediation representation formula:
Plan to negotiate using a creative problem-solving approach to meet interests and overcome impediments in a way that takes advantage of how the mediator can contribute to resolving the dispute at six key junctures in the mediation process.

Plan for Each Key Juncture (Use the information you collected and the choices you made when doing your homework in Parts 1 and 2.)

1. Select Mediator
   a. Select person who is facilitative, evaluative, or transformative.
   b. Select person who views problem broadly or narrowly.
   c. Select person who involves clients actively or restrictively.
   d. Select person who uses caucuses extensively, selectively, or not at all.

2. Pre-Mediation Submission (Assuming you plan to submit one.)
Consider whether you want to cover the following points in the submission:

“Description of Dispute and Legal Case”
   a. “Factual Summary,” including a chronology of events, statement of key factual issues in dispute, and your client’s view on each issue;
   b. “Critical Legal Issues” in dispute, including your client’s view on each issue and key cites;
   c. “Relief” sought including a particularized itemization of all damages claimed;
   d. “Motions” filed and their status;
   e. “Discovery Status,” including what still needs to be done to be ready for trial;

“Settlement Analysis”
   f. “Interests of Your Client” that you want met in mediation;
   g. “Settlement Discussions” including any offers or counteroffers previously made;
   h. “Why Not Settled” covers your views on the obstacles to settling this dispute and ways to overcome them;
   i. “What Want Out of the Mediation” especially what you might want the mediator to do and any inventive settlement concepts that might not be available in court;
“Other Information”
  □ j. “Who Will Attend” the mediation session and the title of any client representatives;
  □ k. Attach critical documentary evidence.

3. Pre-Mediation Conference—Agenda
  □ a. Verify mediator’s mix of approaches to the mediation.
  □ b. Verify other side’s approaches to the mediation.
  □ c. Verify attendance by the other side’s best client representatives with sufficient and flexible settlement authority.
  □ d. Verify date, time, place, and length of session.
  □ e. Resolve what information you need from the other side before or by the session.
  □ f. Resolve whether the mediator plans to have any ex parte conversations with each side before the session.
  □ g. Consider signalling the likely interests of your client.
  □ h. Consider broaching a discussion of possible impediments.
  □ i. Ask about the pre-mediation submission, if questions still unresolved.
    □ Determine whether the mediator wants you to submit any pre-mediation materials.
    □ Determine what the mediator wants included in the pre-mediation submission.
    □ Determine whether the mediator will share any information in the submission with the other side.
  □ Determine that if the mediator plans to share any information, whether the mediator wants you to send the entire submission or a portion to the other side.
  □ j. Identify any other issues that need to be resolved in the pre-mediation conference.

4. Opening Statements
  □ a. Tone.
  □ b. Content.
    □ Tell story.
    □ Cover BATNAs—public and personal.
    □ Suggest what your client wants out of the mediation (no specific proposals yet).
    □ Suggest how the mediator might help the parties resolve the dispute.
  □ c. Should your client present an opening statement?
  □ d. How should you divide the opening statements between you and your client?
    □ Story.
    □ Legal Case—public BATNA.
    □ Other BATNAs—personal and other.
    □ What want out of the mediation.
    □ How want the mediator to contribute to resolving the dispute.
  □ e. Should you or your client speak first?
5. Joint Sessions
☐ Determine how to advance interests and overcome impediments at each mediation stage:
  ☐ a. When venting and gathering information.
  ☐ b. When identifying issues, interests, and impediments.
  ☐ c. When formulating agenda.
  ☐ d. When overcoming impediments.
  ☐ e. When generating options.
  ☐ f. When assessing and selecting options for settlement.
☐ Determine ways to enlist assistance of the mediator.
☐ Resolve how to split responsibilities between you and your client.

6. Caucus
☐ Select purposes that you want to accomplish in any caucuses.