I. INTRODUCTION AND GENERAL PRINCIPLES

Lawyers are most effective in mediation when they focus, and have their clients focus, on the factors that distinguish mediation from litigation. Mediation is flexible, informal and non-confrontational, allowing active party participation and control over the outcome. Mediation emphasizes party interests and concerns rather than legal issues, looks to the future rather than the past and permits “creative” settlements addressing current needs. The lawyer’s role begins well...
before the first mediation session. She must ensure that her clients are familiar with and understand the mediation process. Then, she must work with the mediator and opposing counsel in structuring the process to fit the needs of their case. Effective advocates assist the mediator by setting a tone of collegiality and openness, by encouraging clients to participate actively and by exercising patience and attentiveness throughout the process.

I have also found that in mediating employment or employment discrimination disputes, recognition of three principles promotes resolution. First, because all employment and employment discrimination disputes are workplace disputes, they involve non-legal as well as legal issues. Lawyers need to address both in mediation, and resolving non-legal issues is critical to resolving the dispute.

Second, all disputes do not become ripe for mediation or settlement at the same time. Almost all employment and employment discrimination disputes are amenable to informal resolution, but lawyers need to recognize when their dispute is ready for mediation. Mediation can be particularly effective at or near the time a dispute arises. But there are various other times mediation is also appropriate and effective: when a formal complaint is contemplated but not yet filed; when a claim has been filed but no “pre-litigation” activity such as motion practice or discovery has taken place; after limited discovery; when suggested or directed by a magistrate or judge; or when settlement of another dispute so provides. The structure of the mediation must take this timing into account.

Third, demeanor and style is a key consideration. Assuming an adversarial posture and treating mediation as an extension of litigation is often not only ineffective but counter-productive.
By contrast, a lawyer who focuses on parties’ mutual interests and accommodation advantages his clients. Reasonableness is not weakness and it promotes a like response from other parties. Some of my most effective -- and shortest -- mediations occurred when the demeanor of both attorneys (and their clients) showed an appreciation for the other parties’ perspectives.

Examples primarily drawn from my own experience will help to demonstrate how in particular contexts lawyers have promoted -- or in other instances inhibited -- effectiveness at various stages of the mediation process.

II. SPENDING TIME IN STRUCTURING THE MEDIATION

I find it critical to establish confidence and trust in the mediator and the process as quickly as possible and to structure the mediation to the particular dispute after more generic issues have been addressed. Trust influences the extent and nature of mediator-attorney contact prior to the mediation session, which varies depending on whether the attorneys are familiar to me. But I always send a copy of my standard mediation agreement, which describes what I consider critical elements of the process. Review of the agreement by party counsel serves to focus attention on the issues that need to be addressed by all of us.

If both counsel have worked with me previously and are familiar with my style, one conference call on procedural issues may be the only pre-session contact necessary. If, however, an attorney has not worked with me, I frequently discuss process considerations with that attorney and familiarize her with my style. Informal one-party communications about the mediation process and
the mediator’s prior experience are appropriate as long as all counsel are aware of the contact and the nature of the discussion. What is important is that the attorneys and I address our respective expectations, and the expectations of the clients, prior to the mediation session, so we can establish what form the mediation might take to meet party goals.

For example, if no formal complaint has been filed, some fact-finding may be necessary to clarify the issues in disputes. In one case the parties agreed to have the mediator interview the complainant and four other individuals in a pre-mediation session. At other times the parties may engage in limited discovery, conducting one or two depositions prior to mediation. The mediator may have to meet separately with one or more of the parties before a joint session.

Experienced mediators also recognize that they may not be the best “fit” for all cases and all parties. Or their lack of available dates precludes mediating a certain dispute. Lawyers should not be hesitant to raise questions with prospective mediators about the mediator’s background, experience, approach and availability. Other issues left unresolved at the outset will likely surface during the mediation and pose obstacles to resolution and the structure, timing, location of and participants in the mediation process are subjects that should be fully explored prior to the first session. Time spent planning and structuring the mediation for a particular dispute is always well spent, and fosters the goal of a mutually acceptable resolution.

Participation Issues

Lawyers generally recognize that having the “right” people at the mediation table promotes resolution and enhances the efficiency of the process. In deciding who should be present, attorneys
should consider who will facilitate settlement and who is necessary for resolution. Generally the claimants or plaintiffs will be present with counsel. But other individuals may also be both helpful in establishing the comfort level of the claimant, for example, a spouse or friend of a female client charging sexual harassment. In a case involving the layoff of a male employee who asserts age discrimination, a spouse or other family member may need to participate to endorse or foster the claimant’s reaching a decision. On the other hand, certain personality conflicts or intra-family dynamics of individuals who expect to attend the mediation may inhibit resolution. Similarly, if one attorney intends to bring associates or others not directly involved in the process, all party counsel and their clients should be aware of this intention beforehand.

I often ask counsel to think about and solicit suggestions from their clients not only on whose participation on their “side” of the table would be helpful, or might pose an obstacle to resolution, but also similar suggestions about the other parties. By such initial inquiries we can often avoid surprises that might otherwise impede progress at the beginning of the first mediation session. Sometimes one lawyer believes another party’s representative may impede the process but is concerned that premature disclosure of this reservation may be harmful to her client. For example, one party may have a personal reason for not wanting a particular individual at the table -- perhaps based on animus or on prior affair. That issue might best be raised in a separate contact with the mediator. The mediator can then fashion a suggestion on participation for all parties that avoids disclosure.

Similarly, if someone potentially beneficial to the process is unavailable, we can work out a
procedure that allows that individual to participate, either by phone or video conference. In other cases I have worked with the attorneys to break the mediation into parts. In multi-party cases, first meeting separately with each party can make a joint session more productive. In other cases it may not be necessary to have certain individuals present at all times. For example, someone may have a significant contribution to make in structuring a financial part of the settlement but little to contribute at earlier stages of the mediation.

An example from a case in which a 27-year employee in a high managerial position was terminated illustrates the importance of pre-mediation discussions. In the initial conference call plaintiff’s counsel indicated that only his client would be present at the mediation. Outside counsel for the defendant company indicated that in addition to in-house counsel, the vice-president with operational authority over the department of the terminated manager was also going to be present. Neither attorney had given much thought to having anyone else there. During my questioning, however, it became clear that the plaintiff, terminated as part of a system-wide reorganization, had not found other employment and was taking an unusually active role in his legal case.

In a follow-up call with plaintiff’s counsel I learned that the plaintiff had to a certain extent become “obsessed” with his case. His spouse was very concerned about her husband’s mental health and was urging him to seek a speedy resolution. His attorney agreed with her position. We decided that his spouse’s presence was crucial to the plaintiff’s ability to agree to any settlement short of “full” vindication. On the other hand, it also became clear in these initial discussions that the management representative whom the defendant’s counsel planned to have participate was newly
hired and not the individual involved in the reorganization process or in any decision affecting the plaintiff. In a conference call with both parties we determined that a former vice-president, who was available and familiar with all of the circumstances giving rise to the layoff -- and who had had a good working relationship with the plaintiff -- would be a better choice of company representative. The case settled at the first mediation session.

This example also indicates some of the questions outside counsel representing the employer should ask. Will it be necessary or helpful to have in-house counsel present? How familiar are human resources personnel with the facts giving rise to the dispute as well as with the specific workplace environment and other workplace issues that might surface during the course of the mediation? Although in-house counsel may be critical in addressing corporate policy or settlement posture, an operational representative involved in the circumstances leading to the dispute is almost always productive. Individuals present at the time rather than those with only second-hand knowledge may be more effective in clarifying factual issues or misinterpretation of facts.

In one case involving a hostile environment claim, separate suits by five plaintiffs had been joined by the court prior to mediation. The company originally intended only to have counsel present at the mediation session because, he posited, the only issue in dispute was the monetary amount of any potential settlement. In the initial discussions with counsel, however, it became clear that even though the parties had been through some discovery, the plaintiffs themselves were not in agreement on certain of the relevant facts. Plaintiffs’ counsel then solicited suggestions from their clients on company representatives the clients thought would be helpful. Three supervisors were identified and
counsel for the company agreed to the participation of all three. By this decision alone the plaintiffs were persuaded that the company was demonstrating good faith. And the participation of the supervisors proved critical. Where counsel had been less than persuasive in presenting the company’s perspective, the supervisors were successful and the case settled.

By contrast, in another case a supervisor who was participating in a mediation session was deeply disliked by a claimant and his participation effectively blocked any movement towards resolution. Ultimately both counsel deemed the supervisor’s presence counterproductive and they agreed on a “replacement,” an individual who later facilitated settlement. The mediation, however, had to be delayed and unnecessary time spent in addressing that issue rather than the substantive matters in dispute. The parties could have been better served if this problem had been identified before the first mediation session.

In claims of sexual harassment, and particularly where there is a quid pro quo and not just a hostile environment claim, the absence of a particular individual may be beneficial and even crucial. In one case involving an assertion of physical assault, counsel for both parties agreed that the individually -- named defendant -- who would be participating in the mediation -- would not be present at the table when the plaintiff made her opening statement because of his potentially adverse effect on her emotional well-being. However, the parties also agreed to videotape her opening and that tape was made available to the named defendant.

Even where an agency handles case administration and scheduling, an early pre-session conference call with counsel and the mediator is almost always beneficial. In one instance that call
established that the claimant was not represented by counsel although the company intended to have its counsel present. In preliminary discussions it became clear to me that there were potentially serious legal issues involved and the claimant was not well versed in the law. Company counsel, recognizing the obstacle to settlement this presented, agreed to establishing a fee reimbursement schedule so that the claimant could obtain counsel. The mediation proceeded once the claimant retained counsel.

Where a union employee is represented by outside counsel, party counsel and the mediator should discuss the union’s role in the mediation, particularly if a settlement may potentially affect other employees. Similarly, if a claim involves more than one unit member, union involvement may be critical. In one case involving a claim of failure to accommodate a bargaining unit employee who was partially blind and confined to a wheel chair, I learned in the initial conference call with counsel that the union was predisposed not to participate in the mediation. Given the nature of the potential settlement possibilities as articulated by party counsel, and at their request, I contacted the union and was successful in obtaining union participation. It proved to be a critical factor in structuring the settlement.

In other circumstances involving disability discrimination claims, the presence of a personal physician or medical expert may facilitate resolution. For example, in one case involving a claimant with Parkinson’s disease, his physician was able to explain the claimant’s condition in detail and discuss directly with the claimant’s managers their concerns about the claimant’s ability to continue his work as a supervisor of phone operators. Certain preconceptions of the managers were dispelled
and an accommodation on the claimant’s work schedule resulted in a speedy resolution.

In another case involving the possible return to work of an accountant with AIDS, the parties’ attorneys agreed that I would select an expert in the field from a list supplied by a well-known advocacy organization to assist in the mediation. Party counsel and the expert met first with the mediator to define the parameters of the issues, which also provided the attorneys with a sense of how best to use the expert in the mediation session. This meeting also helped to prepare the expert and the mediator for the kinds of issues likely to be raised by the parties, and how the mediator and the expert should interact during the mediation session. Part of the settlement in that instance involved the company’s agreement to sponsor a work-site seminar on AIDS and the workplace.

Technical experts have also proved helpful in particular circumstances. In one case involving a financial institution’s “downsizing” of several positions as the result of the introduction of a new and sophisticated computer program, party counsel agreed to pay for the participation of a professor of computer science selected by the plaintiffs, who were suspect of the company’s technical consultant. Both experts participated in the mediation and their ability to converse on technical issues and give opinions to the parties helped to overcome the distrust generated in part by lack of understanding of certain technological issues.

Counsel should also alert the mediator where insurance carriers are involved and jointly determine the role of carriers at the table. In one instance, an insurance company’s attorney demanded that he be the only representative for the employer, and the client acquiesced. The insurance representative had not even contemplated any non-monetary aspects of resolution. I had a
series of conference calls with all counsel, eventually persuading the carrier’s counsel that it might be beneficial to have an operational representative present. The line manager’s presence proved critical in the mediation session.

**Location and Timing Issues**

Attorneys should also pay attention to location issues, at times critical to the efficiency of the mediation as well as to setting the appropriate tone. Generally speaking, a “neutral” location is preferable but may not be available. Where both cost and neutrality of the location are concerns, counsel may need to identify acceptable, alternative institutional settings such as churches or synagogues. Prior to the mediation counsel should also establish the number of individuals who will be participating, how many caucus rooms will be necessary, and any special requirements of participants, such as wheelchair access. Parties’ representatives and principals are often nervous and will likely be alone for extended periods of time while the mediator caucuses with the other party. Sufficient and comfortable space for caucusing by all parties helps to overcome discomfort and to facilitate a focus on substantive issues.

The lack of a neutral or accessible location can undermine a mediation. In one case a plaintiff’s counsel did not tell his client that the mediation would take place in the offices of outside counsel for the employer. When the plaintiff discovered that the offices belonged to the employer’s counsel, she became convinced that all the rooms were “bugged” and would not participate in any discussions. This led to a series of problems. Not only did the mediation have to be moved to a different site at a subsequent time but also the plaintiff’s stress level and the irritation level of the
other participants had increased. Personal issues of pique had to be resolved before the parties could focus effectively on the substantive issues in dispute. In another mediation a potential problem with the original location was avoided when counsel asked his side for any specific requirements of potential participants. The employer then informed him that one of the management participants was disabled and used a wheelchair. That individual would not have been able to get to the only available caucus rooms in the original site, so we changed the location of the mediation.

Even the time of day for the mediation should be considered by counsel and fully discussed with the mediator. Most mediations take place during the normal work day and possibly into the night. But that time framework may not always be appropriate. For example, in one case counsel and the mediator had agreed that claimant’s spouse should be present at the mediation session. She had a job during the day and for financial reasons could not leave the job. Therefore the parties agreed have the mediation in the evening. In a case involving a claim of *quid pro quo* and hostile environment sexual harassment against a public figure by another public figure in the entertainment industry, the parties agreed there would be less likelihood of potentially harmful press coverage if the mediation was held outside of normal working hours.

Mediations can be lengthy and counsel should tell mediation participants that it may be a long day, and that the mediator may spend hours with the other parties in caucus. Participants who are surprised by this aspect of the process can find it frustrating. Similarly, if a necessary party or attorney has any time constraints, whether child care, scheduled medical appointments or travel requirements, that issue should be raised with other counsel and the mediator at the earliest
opportunity. By addressing these issues before the initial mediation session, attorneys and other participants can avoid the frustration that frequently results where the rhythm of the mediation is disrupted by the unanticipated or premature departure of a party. In those cases the focus generally shifts from substantive issues to rebuilding trust in the commitment of the departing party to a resolution.

In one case, for example, an attorney for one party asked to speak to me in confidence before the initial joint session began, much to the surprise of her own client as well as of the other participants. She then told me she would have to leave within a few hours because she was having surgery the next day. The mediator took on the onus of “ending” the mediation session, much to the consternation of the plaintiffs. That case did not settle at that time although the relationship of the counsel was preserved. And the case settled after the defendant counsel had recuperated. In another instance as the parties were moving toward settlement, one attorney announced he had to leave to catch a plane and he had not previously stated his time constraints because he had been “certain” the mediation would not take “that long.” It took weeks to get the mediation back on track.

Pre-Hearing Submissions

I generally find some pre-session factual recitation -- whether previously submitted internal or administrative agency filings or a brief summary of events -- particularly useful. In complex cases where litigation has already commenced, I may ask the parties to provide me with the papers filed with the court to get “up to speed” on the dispute’s background and the outstanding issues. Submissions do not generally add substantially to the cost of the mediation, but they often move the
process forward at a swifter pace. I also generally request a two-or-three page, informal and usually confidential position statement from each attorney to avoid surprises about party expectations at the outset of the mediation. I ask all party counsel to indicate what they see as the obstacles impeding settlement from their client’s perspective, and also how they perceive the other parties would assess obstacles to resolution. This process focuses attention of the parties as well as the mediator on what needs to be addressed in the mediation.

I have rarely found lengthy presentations of legal arguments and theories by counsel particularly helpful at the beginning of a mediation. This type of presentation can cause the mediation to get bogged down in technical issues that may not need to be addressed in reaching settlement. Attorneys may be comfortable with a legal approach, but they need to remember that the mediator is not a fact-finder and mediation is not essentially a fact-finding process (although that may be a component). A review or exchange of case law and legal theories may be necessary at later stages of the mediation, when settlement options and the implications of not settling are under consideration, but generally an overview is sufficient at the beginning.

III. LETTING PARTIES AND THE MEDIATOR COMMUNICATE DIRECTLY

Attorneys are familiar with preparing their clients and witnesses for arbitration and litigation but that preparation tends to focus on “closed” responses to structured questions. Attorneys should encourage their clients to “open up” in mediation. Clients who have been well prepared for litigation need to be reoriented for mediation so they can be active participants at the earliest stages.

The value of direct client participation and contact at the beginning of the process cannot be
overemphasized. Even where parties are “familiar” with the respective positions of each, perhaps as a result of depositions or prior proceedings, those statements and positions were taken in the context of an adversarial setting. Opening statements by the parties themselves are by definition more neutral in tone and establish the parties’ involvement in and control over the process. For example, in a mediation involving a claim of sexual harassment by the secretary to the U.S. branch general manager of a foreign corporation, the claimant’s attorney made no opening statement. Rather, the claimant spoke for herself from notes she had written prior to the mediation. The complainant, who had resigned prior to filing her complaint, started out by saying how good the company had been to her over the years, and how distressed she was to have had to file a complaint, but that she had found she had been unable to stop the conduct about which she was complaining -- advances by the general manager -- and how intolerable the workplace had become for her. Her attorney elected to make no opening statement and there was no mention of the law.

At the end of the claimant’s statement, the employer’s representative, a high level officer of the parent company who had flown in specifically for the mediation, asked for a recess. Although somewhat unusual, we took a break at that point and after about 10 minutes the company’s counsel asked to speak with me and his client. Even though the company’s attorney had been prepared to make a fairly lengthy formal presentation, his client, in seeing the demeanor and listening to the complainant, found her to be so credible that the denial of overtures by the manager were viewed in a whole new light. In the caucus I learned that the company had reversed its previous “hard line” about settlement and was prepared to make a substantial offer to the claimant. In short order the
manager also reversed his prior position and admitted to at least certain of the allegations.

While the company representatives might have eventually been persuaded that the allegations were accurate without the claimant’s opening remarks, it was the face-to-face contact that resulted in the swift settlement. If the opening statements had been made only by the attorneys, and only focused on the law, it is unlikely that the credibility of the complainant would have been established in the same effective way. Although some attorneys are reluctant to have their clients speak in a joint session, having clients address each other directly serves important functions. Clients should be encouraged to do so, even if counsel also intends to make opening statements. By permitting clients to speak, attorneys may also learn something about their clients’ underlying concerns not previously raised by them. Attorneys may also gain insight into how a client responds in a stressful situation, particularly if depositions have not yet been taken. Mediation may be the first time that opposing counsel and their clients have heard party concerns stated directly or the first opportunity to assess other clients.

In another instance, disregarding a prior understanding of counsel and the mediator, one attorney made a lengthy opening statement on behalf of his client, who was suing for wrongful termination and age discrimination. Plaintiff’s counsel was somewhat belligerent in his demeanor, causing company representatives (who had been persuaded against their wishes to attend) to lose interest in a speedy resolution. They were offended at the tone and content of the presentation. Many hours then had to be spent in caucus to deal with the company representatives’ irritation before they were willing again to focus on resolving substantive matters.
Attorneys should also counsel their clients about the client’s demeanor during the mediation session. Clients need to know the importance of curbing personal reactions and responding dispassionately to statements with which they disagree. In one case a plaintiff grimaced, exclaimed and sighed throughout the opening statement of a company counsel. The company’s management representative became disinclined even to enter into realistic settlement discussions because of his personal ire. While some clients may be “beyond control,” it is important for them to understand the negative impact displays of annoyance have on the other parties.

While the primary obligation to establish a neutral and positive tone is the mediator’s, lawyers play a critical role. At times it can be difficult for lawyers to give up control in mediation, but if they do the mediator can take the heat for what otherwise might be perceived as the lawyer’s oversight or weakness. In joint sessions attorneys who demonstrate a sensitivity to and appreciation of the views of the clients and who focus on the other parties, rather than on her opposing counsel or the mediator, help set a tone of mutuality and promote party participation. Lawyers who assume a neutral posture are also more likely to be heard by opposing parties than if their positions are presented in an adversarial manner.

IV. MAINTAINING FLEXIBILITY AND A FOCUS ON ACCOMMODATION THROUGHOUT THE PROCESS

Attorneys must also keep in mind mediation’s flexibility. In contrast to litigation’s focus on rigid procedures and control, mediation is oriented toward openness and adaptability. In consultation with the mediator, counsel can fashion ways of proceeding when a party or other “necessary”
individual is unavailable to participate directly; mechanisms to deal with parties whose presence impedes the mediation; ways of using the mediator as a lightning rod or confidante; and ways of incorporating other forms of dispute resolution into the process. Some examples from actual cases help to illustrate the adaptability of the mediation process.

Unavailability of a Party

Sometimes a necessary party simply cannot attend the mediation, but this need not prevent the mediation from going forward. In a case involving a plaintiff alleging sex and ethnic origin discrimination, the mediation was set for the eve of trial, approximately three years after the plaintiff had taken a position in another city. The plaintiff had also recently given birth and her attendance at the mediation had to be weighed against the additional cost as well as health considerations. With the cooperation of the two party attorneys, and mindful of a significant time difference, the mediation was scheduled at a time when the plaintiff could be available on a speaker phone. She was able to make an opening statement and participate substantially in caucus settlement discussions. Similarly, where a high-level executive with additional decision making authority is not available to participate directly in a mediation because of other commitments, counsel can frequently agree to have the decision maker available by phone, either to consult or caucus with her counsel and other party representatives, or with opposing counsel and the mediator if necessary. Or, as I have done in the past, the mediator may recommend a break in the process to accommodate a participant’s scheduling conflicts without putting the onus for the break on that individual.

In a multi-plaintiff age discrimination case, one plaintiff died after the initiation of the case
but prior to mediation. While counsel for the plaintiffs did not originally intend to have anyone “stand in” for the deceased plaintiff, it became clear in the mediator’s pre-mediation phone conference with party counsel that allocation of any settlement funds would be a central issue. We agreed that having someone representing the deceased party at the mediation would be beneficial. When counsel for the plaintiffs went back and spoke with his clients he learned they all had great regard for the surviving spouse of the fifth plaintiff, and also that the surviving spouse was experiencing financial problems. The spouse attended the mediation session. Her direct presentation to company managers, explaining her circumstances, helped break the impasse. Once the company put money on the table, counsel and the mediator structured a separate “mini” mediation among the plaintiffs. Their joint decision to allocate a more significant portion to the surviving spouse prompted the company to place more money on the table and settle the case.

**Parties Who Impede the Mediation**

Sometimes the presence of certain individuals at the mediation session can impede progress. For example, a complainant may be unwilling to confront an alleged harasser. Or individuals who perceive they will be of assistance to a party may in fact interfere with the process. In one instance a female employee, who had recently spent time in a mental institution, alleged sexual harassment on the part of a former supervisor. Her attorney and her personal physician felt a face-to-face confrontation with that individual would be detrimental to the claimant. The parties agreed that she would make a statement to company representatives and the company’s counsel and that the alleged harasser would participate by phone. Her personal statement and the sincerity she evinced was
impressive to company management and was a significant factor in moving to resolution. In another case involving a single plaintiff but three institutional defendants with insurance from three separate carriers, the plaintiff’s concern about a perceived “power” imbalance was addressed through a pre-mediation agreement, in which counsel agreed that a co-mediator, who was a prominent member of the plaintiff bar, would participate. Counsel should also make certain that co-mediators have worked together previously or that they spend time together prior to the mediation session to establish a consistent and coordinated approach.

In one mediation involving a claim of sex discrimination and wrongful termination by a female executive terminated under an employment contract, the claimant was interested in returning to employment. During the early stages of the mediation it became clear that the claimant’s spouse -- who had recently retired and was present at the table -- was quite thrilled that his wife was no longer working and would now be available to spend time with him. The spouse was promoting a monetary settlement only. In that circumstance with the agreement of counsel for both sides, the mediator in effect “ruled” that “outsiders” -- including the attorneys -- would not attend certain mediation sessions until the parties had agreed to general settlement terms. By having the mediator take on the onus of this decision, neither counsel nor the principals were viewed by the spouse as undermining his interests. The spouse did participate after the terms of the mediation were essentially crafted, but then the mediator was able to work with him and the claimant directly and help to persuade him of the viability of the settlement, which included some consulting work by the claimant.

One mediation was successful after an institutional party voluntarily withdrew from the
process based on its attorney’s recommendation. That employer also committed to the assumption of a significant share of the cost of settlement as well as a commitment to effectuate certain of the terms of any settlement agreement. In that instance the board of a national not-for-profit organization sought neutral intervention where the director of programs, a long-term employee who was an attorney and was well liked and respected by the organization’s constituencies, had been terminated by the recently-appointed executive director, who previously had served as the organization’s outside counsel and was brought in to “clean up” certain perceived financial irregularities. The board valued both individuals and agreed to mediation. During the initial session it became clear that the presence of board representatives at the table inhibited frank discussion of the issues between the two executives. Upon agreement of all counsel, no further discussions between the executives and the mediator were to be shared with the board without their mutual consent.

By focusing on organizational needs and what each should do to promote shared organizational goals, the parties were able to move from seemingly irreconcilable positions to settlement. Each party developed an individual program for organizational change. When the program of each was shared by the mediator with the other, both recognized the commonality of their interests and the other’s willingness to resolve some of the personal as well as institutional issues underlying the friction in their relationship. As part of the settlement agreement, the two set a schedule of mandatory monthly meetings. The mediator was asked by the parties to participate in these monthly meetings for a six-month period, but no additional neutral intervention proved
necessary. The executive director also agreed to address her lack of managerial skills and training and to hire a consultant to establish new accounting and operational procedures. The program director agreed to take computer training in order to be able to communicate more easily from remote locations. Each principal assumed responsibility for personal legal expenses, and the settlement did not include any monetary or other financial exchange.

In a case involving a claim of hostile environment sexual harassment by a female carpenter against a construction company, the female plaintiff was represented by the union’s outside counsel. The claimant arrived at the mediation -- without notice to her counsel or the other counsel -- with four of her brothers as well as her father, all in the construction business. In that circumstance the plaintiff’s counsel did not feel comfortable telling all of these “supporters” not to attend. Having so many “assistants,” all of whom were vocal, in effect stifled the process and the plaintiff’s ability to articulate her position.

Counsel for the company then suggested a solution to deal with this dynamic. One of the company’s inside counsel was female. Additionally, a female construction manager had worked with the plaintiff and the plaintiff considered them to have a good relationship. Outside counsel agreed under these circumstances that the mediator would suggest that only females would attend the mediation session. Additionally, counsel and the mediator fashioned a procedure for official progress reports by the mediator to the family members and to company representatives. Once the plaintiff could turn her attention to her claim rather than coping with her family, a resolution was achieved with relative ease.
In another case a plaintiff used the mediator effectively by having her suggest during the course of mediation that the plaintiff’s parents not attend certain mediation sessions and by proposing times when these family members would have difficulty attending. The claimant herself told me that she did not believe she could be fully honest in their presence because they were not aware of, and would not believe, that she had participated in a love affair with her former supervisor. Her legal claim was that the supervisor improperly denied her a promotion based on a poor performance evaluation he gave her after she refused his subsequent advances.

**Using the Mediator As A Lightning Rod or Confidante**

Often counsel know what needs to be done to help their side move towards settlement, but they cannot do it themselves. A mediator can take the blame for necessary but uncomfortable procedural decisions. In addition, a mediator can act as a confidante when a client does not want to reveal certain facts to the other parties and, in extremely limited circumstances, to her lawyer.

For example, a direct attack on any individual’s credibility by an attorney is generally counter-productive. By contrast, having the mediator present a perspective from the outside and describe why one position might appear more reasonable without expressly attacking credibility can be effective in gaining that individual’s acquiescence in a settlement position. In one case an individual who held a position of prominence in his field had, despite the efforts of his attorneys, no concept that the conduct in which he had engaged -- demonstrating certain medical procedures on himself in front of female technicians, residents, students and interns although he had never done so with males in comparable positions -- was inappropriate and could potentially be viewed as legally
impermissible. Against the advice of his attorneys to settle, the named defendant continued to hold to his position that he needed vindication in court. Rather than attempting to change that individual’s mind, the mediator and counsel turned the focus of discussions to the kinds of facts that would likely come out in a public forum and how they could be viewed, irrespective of whether the defendant had any intent to be abusive or to act in a sexual manner. By focusing on his concern for his family in this context, the defendant was persuaded to settle.

In another case, a client asked her attorney if I could speak with her directly, not in her attorney’s presence. In that instance the attorney had been counseling a client not to settle at an amount offered although the client appeared to be predisposed to accept the settlement offer. Because trust had been established, the claimant’s counsel was prepared to permit this conversation out of his presence on the basis of an understanding among the mediator, the attorney and the client that only that one matter would be discussed. In that case the claimant disclosed to me a sensitive personal issue that likely would have come out if the matter proceeded to litigation. I believed she had a good faith basis for non-disclosure, even to her own attorney because of other personal relationships. I then brought the client’s attorney back into the discussion. By posing questions to the attorney of a general nature about the kinds of information that could likely come out in litigation, the two were able to agree on an appropriate settlement range because the attorney understood the nature of his client’s concern without having to be told the specific facts.

Other than the cases just cited, I have rarely been involved in a mediation where, by the end of the process, information initially deemed to be confidential was not at some point “shared” with
the other party. Withholding information rarely is of value and attorneys whose approach is to withhold information to gain some perceived advantage generally are missing out on the value of mediation. Available information, when shared appropriately, often serves to clear up misunderstandings that may have contributed to a party’s position going into the mediation, or to bolster a party’s position. I have found that asking attorneys and parties what more information they can give me to help persuade the other party to move from an articulated position helps the first party to focus on the value of disclosure of previously withheld information. Counsel can also help to clarify or address the concerns underlying non-disclosure. But of course there are exceptions to every rule.

Although I generally prefer to speak with clients and their attorneys together, speaking only with counsel is at times helpful to the process. For example, in certain instances where I have a concern that information I am authorized to disclose may be hurtful to a party who may be hearing it for the first time, I like to seek guidance on how best to convey that information to the client. I also ask attorneys to interrupt me in caucus with another party if a caucus has extended far beyond expectations. I may have lost track of time and while the rhythm of the one caucus may be disrupted, generally a brief word with the clients who are getting antsy is sufficient to allay their concerns. I also ask attorneys to follow my cue if in caucus I suggest moving on to other issues, but at the same time I want them to ensure that I fully understand the interest under discussion.

Incorporating Other Processes

Unlike litigation, mediation allows the parties to tailor the process to incorporate other forms
of dispute resolution in order to achieve a resolution. In one case the attorneys were willing to
experiment by combining fact-finding and mediation. Counsel for the employer and the individual
respondent (who would likely be subject to termination were the claims substantiated) and counsel
for an individual claimant asserting sexual harassment entered into a written “fair resolution”
procedure. The agreed-upon process called for the claimant and the individual respondent -- not the
employer -- to select a joint mediation/fact-finding team from lists provided by the American
Arbitration Association. The mediator/fact-finding team was to interview the claimant and the
respondent, either jointly or separately at their discretion, and to interview any other of the
employer’s personnel deemed relevant by the team. Either one or both of the mediation team could
participate in any interviews. Following interviews, the procedure called for mediation. Only if
mediation efforts were not successful would the fact-finding component kick in. The mediators were
then to draft a report, with findings of fact on several specific charges. The draft report was first to
be shared with the individual parties, then there was to be a further attempt at mediation. Only after
a second attempt at mediation proved unsuccessful did the procedure call for the submission of a
report to the employer.

In this case the first mediation did not result in a settlement because the parties did not enter
into realistic negotiations. Only after the draft fact-finding report was shared did each party
apparently understand, or accept, the potential financial and legal consequences of its position.
During the second round of mediation the parties entered into a settlement agreement, obviating any
need to issue a fact-finders’ report.
In another case counsel agreed to a combination of facilitation, informal fact-finding and “traditional” mediation that resulted in resolution. Outside counsel to the New York office of a foreign corporation received a customer report of widespread dissatisfaction, among the American staff, over race relations in the office. Once the facilitation began, it became clear that the underlying staff issue was the termination of an Afro-American manager, who was consulting with an attorney about suing for wrongful termination and discrimination based on race. The facts surrounding the manager’s termination were unclear and different staff members had drawn widely varying inferences from assumed facts.

What started out as an office-wide facilitation evolved into a mediation. By agreement of counsel for the company and counsel for the terminated employee, that employee was brought into the process, and the mediator first engaged in an informal fact-finding. The fact-finding results, shared verbally with all participants, indicated that cultural and management-style differences were a significant factor in the manager’s termination. Once certain of these differences were recognized and aired, corporate executives and the former manager continued in a mediation, which resulted in rehiring the manager with back pay and an agreement on new operating and reporting procedures. It was the willingness of the parties’ counsel to keep the process flexible and to adapt to evolving circumstances that permitted the neutral to address the parties’ underlying interests and avoid what could have been a loss of staff morale and productivity, as well as potentially messy litigation.

V. CREATIVE SETTLEMENT STRUCTURING

Attorneys should keep in mind how flexible settlement structuring can be in mediation.
Positive references and apologies have proved to be important, non-financial components of settlements. For a group of claimants between the ages of 20 and 22, the purchase of annuities for each bridged a financial gap. Consulting agreements and payouts over time can be helpful in certain contexts. In one case season tickets to games of the claimant’s favorite basketball team clinched a settlement. What is important is for attorneys to keep an open mind.

As part of the settlement in a case involving a sexual harassment claim, a manager agreed to resign from his position and return to the country of his origin. The claimant was rehired and opted to take some management training courses in lieu of part of her financial settlement. That case also pointed out the value of having a management/business representative present in addition to counsel. Prior to the mediation, the company’s position had been premised on a belief that the manager, a relative of one of the parent corporation’s chief officers, was truthful in his denial of the allegations and the claimant was “gold bricking.” It originally had no intention of making other than a nuisance value settlement until the interactions during the mediation.

Attorneys should also consider how monetary settlements might be allocated other than directly to a claimant. In one case the settlement figure agreed to by the parties reflected the willingness of the plaintiff to direct almost the entire settlement amount to the creation of an academic chair at the plaintiff’s alma mater. Allocating a certain portion of settlement funds to charity, or to teaching, or training of others at times makes payment more palatable to employers and at the same time provides claimants with a sense of personal satisfaction that can impact on their willingness to settle at a given amount.
VI. BRINGING THE PARTIES TO CLOSURE

What is important in the final stages of mediation is that everyone is on the same page. The specific elements of the settlement -- or at least the concepts or general principles -- must be reduced to writing with as much specificity as possible before the mediation session has ended. At that point attorneys must also be prepared to take the time necessary to present and clarify with their clients the consequences of the agreed upon terms.

As the parties move closer to settlement, evaluation of legal positions and alternatives by the mediator can be helpful. But here, too, party counsel can be most effective by presenting their respective positions in a non-adversarial manner. In one case an attorney had participated throughout the process in a non-confrontational posture until the parties failed to overcome a gap in the settlement amount. Then, in another joint session about certain legal issues, that attorney’s tone and demeanor changed dramatically. He became aggressive and dismissive of the other party’s position and his style so obscured the substance of his remarks that other parties took offense and a great deal more time was spent in caucuses to address these feelings before the substantive issues could be resolved.

It is also important for attorneys to be prepared to discuss with their clients the tax consequences of specific monetary settlement amounts and how legal fees are to be paid. In one mediation involving a partnership that had gone bad, the plaintiff’s health deteriorated after the claim was filed. During the initial session it became clear that underlying affection between the two individuals remained. The defendant, however, had developed a great dislike for the plaintiff’s
attorney during the course of depositions. He was ultimately only willing to entertain what both lawyers had considered a reasonable settlement when he was persuaded that the plaintiff’s ill health could be exacerbated by continuing the litigation. Even then the specific settlement became possible only after plaintiff’s attorney agreed to be paid over time rather than “up front” when monies were paid to the client. A means for guaranteeing payment to the attorney was worked out as part of the settlement.

Where one or both parties have an interest in maintaining confidentiality regarding the mediation or the settlement terms, express provisions for protecting confidences must be specifically incorporated in the settlement agreement. Attorneys should also consider where limited disclosure -- for example to immediate family members of accountants -- may be necessary and include these exclusions in the settlement agreement. I also have found it important to make certain the parties agree on what is to be said about the mediation or the settlement itself and to make those statements part of the settlement agreement. Attorneys should identify potential problems they or their clients might have with settlement terms early in the mediation.

In one instance involving a public employer, any settlement had to be approved legislatively and that fact only became clear at the close of the mediation. Cooperating counsel, however, were able to agree on an alternative procedure in the event legislative approval was withheld. In a few exceptional cases where requested and agreed to by all counsel, I have issued a written Mediator’s Proposed Settlement, to assist the parties in overcoming a small monetary gap or where internal political or personal concerns are persuasive of the value of such a document.

Although at times attorneys look to the mediator for standard settlement agreement terms, counsel must be mindful that the mediator is not there to provide legal assistance in the settlement or
any other part of the process. While the mediator may appropriately suggest some language, the parties themselves should do the final drafting of the settlement agreement. Attorneys should also make clear to their clients that there may be waiting periods or other legal requirements before the agreement is fully binding, for example, a statutorily-based time period. Even after the parties have entered into a memorandum of understanding, the mediator can at times be of assistance in resolving issues that arise during the drafting of the final settlement agreement, either to facilitate communication between the attorneys if unforeseen matters of implementation arise or if clarification of discussions during the course of the mediation becomes necessary.

VII CONCLUSION

Legislative, judicial and enforcement agency initiatives as well as private and public sector employer ADR programs are promoting the use of mediation to resolve employment disputes as litigation and arbitration processes are increasingly perceived as cumbersome, time consuming and expensive alternatives. Attorneys experienced in mediation find that timely and satisfactory resolution of disputes is enhanced by recognizing the flexibility of the mediation process and adapting the process to fit the particular case. By working with the mediator before the formal session, attorneys can fashion a mediation that addresses party and attorney expectations and that meets the needs of those particular disputants. Attorneys who adopt a non-confrontational approach and encourage active involvement of all participants frequently find their own positions are more readily understood and the parties move more quickly to settlement. Attorneys are also likely to find that acknowledgment of parties’ underlying interests rather than a focus on technical or legal arguments results in an outcome more satisfactory to the clients.

By maintaining flexibility in approach, promoting client participation and demonstrating
patience and attentiveness to all participant positions throughout the process, attorneys contribute greatly to an effective mediation.