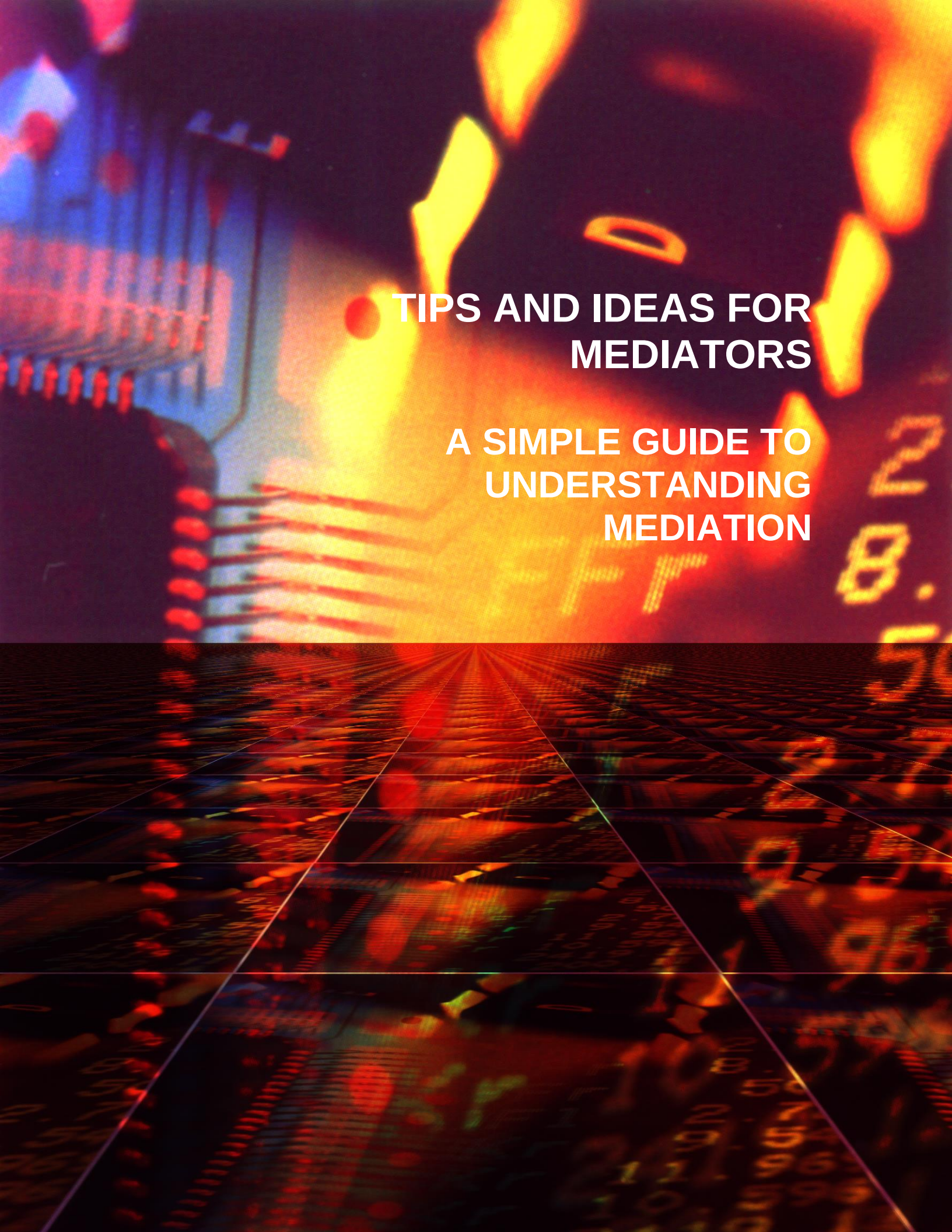

TIPS AND IDEAS FOR MEDIATORS

A SIMPLE GUIDE TO UNDERSTANDING MEDIATION

ZIP IT UP ALREADY!

Ever been tempted to yell that at counsel across the table during his interminable opening statement? Sometimes the irritation is warranted; other times maybe not.

How long should an opening statement be? Can it be too long? Too short? Yep and nope.

After all, attorneys are paid for how they write and how they speak, and, since mediation is primarily an oral session, speak they will. If too little is said, relevant factual details and effective arguments can fall short, allowing the other side to fill in the gaps. If opening statements are too long, eyelids begin to droop and attention lags.

The key is in the nature of the case, which states the obvious. A severe injury with multiple medical services and serious questions of liability will justify a thorough opening. And blowups of injuries and accident scenes can go a long way toward the participants' and the mediator's understanding of the dispute.

That said, attorneys adept at achieving the maximum effect in the mediation process are careful to leave some details for caucus and, perhaps, later disclosure. Timing in the sharing of information in a mediation can be as critical as that required of a tightrope walker.

The routine fender bender or minor slip and fall (if there are such things) usually can be truncated to suit the lack of complexity and to control the cost of mediation. Despite my urgings, I have seen

attorneys harangue over what eventually turns out to be a $2000 claim and run up a mediation cost way out of proportion to the stakes involved.

I've also had lawyers try to say nothing, other than, perhaps, "He [opposing counsel] knows what's involved. Let's get to the money." Uh, uh. The mediator expects the scene to be set by both sides. Otherwise, don't waste everyone's time with a pointless proceeding by declining to bring the mediator into the process.

I know I've said it so often before, but it bears repeating. There is no substitute for preparation.

Considering the opportunity offered for an early settlement of a dispute that might otherwise hurl the parties into an expensive, stressful, greatly delayed and uncertain trial process, mediation should never be taken lightly. If either side arrives at the proceeding unprepared or underprepared, both sides are penalized. And the mediator is frustrated in his or her efforts to help resolve the dispute.

The guideline for a trial attorney should be that which he follows in preparation for trial. In that way, the length of an opening statement will be just right and will effectively promote an early and reasonable settlement, thus avoiding an unnecessary trial.

So, say what you will and don't say what you won't, but, if you get too long winded, know when to zip it up.

AN UNTYPICAL MEDIATION

After well over three hundred mediations, it becomes difficult for me, as it is for other mediators, to recall with any detail a particular mediation.

Every mediator, however, immediately following the proceeding, reacts in some manner to the outcome, whether it ends in settlement or impasse, of every mediation over which he or she presides. Even those that settle do not always leave a good feeling in the mediator, since the mediator judges himself or herself according to self-imposed yardsticks that do not necessarily hang on the end result.

Recently, I had a mediation that left me with a uniquely pleasant reaction, and it was not merely because of my actions in helping the parties reach a settlement. Indeed, in this case, the parties ruled the roost.

One of the parties was a contractor, the other a subcontractor. The latter believed he was owed a large sum of money for a series of jobs, the former that he had greatly overpaid the latter in some of those jobs, resulting in a net amount owed him.

Neither party, as it turned out (facts not shared with each other), was properly licensed to do all the work he had done. This eventually had a bearing on the outcome of the case.

The process was fairly routine as to format. Opening statements by the mediator and each attorney, following which we met separately. Almost immediately, I noted the two men appeared cordial to each. Such behavior, while not unique, is uncommon in a litigated dispute where, especially close to trial, the parties have dug their emotional trenches in preparation for the blowout in court. I made a mental note of their apparent relationship.

When I met separately with each of them and his counsel, I broached the subject carefully, expecting them to reassure me that their enthusiasm to go forward was real and to urge me to press the other side with urgency. I first asked each about their past relationship, considering they had worked together contractually in more than eight or ten projects, and I explored the possibility of some social contact between them. There was little of such personal contact, but clearly the two had maintained a good working relationship, and hints of true cordiality were strong. Money may have been the most important issue, ultimately, but it was not the only one.

The value of the relationship had to be weighed against the fact that plaintiff was no longer doing contracted work, and defendant, his contracting company now defunct, was employed by a contractor. I had to be careful not to exaggerate the significance of their past association.

After a number of meetings with the parties, plaintiff's claim--primarily because he was very concerned, not only about penalties for working without a license, but also because of the possibility of non-recovery in a civil action by reason of a Florida Statute--was down to $6000, while defendant had come up to $2000.

With $4000 separating the parties, I began to concentrate on the cost of further action. They were on the trial schedule at that time, and it was likely they would go to trial the following week. Interestingly, each party, while admitting there was some interest in maintaining the relationship or at least remaining cordial, spoke repeatedly about "principle." This did not come from the attorneys, and I believed the parties believed what they were saying. In fact, both attorneys concurred that the cost of going forward, even absent an appeal, would cost each party about $2500.

Plaintiff's counsel finally stated that his last offer was $4000, and, if not acceptable, asked that the mediation be impassed. In addition, he suggested that defendant meet with plaintiff, alone, without the mediator or attorneys. Something obviously was going on that plaintiff did not wish the mediator, defendant's attorney, and perhaps even his own attorney to know.

When I went back to defendant, he was adamant about his $2000 offer. The attorneys and I waited in another room, while the parties talked in the meeting room. The attorneys were so pessimistic they discussed trial strategy, and there were facetious comments about "blood on the floor" where the parties were meeting. When fifteen minutes had passed, I had a good feeling that the contractors were reaching a resolution. Finally, after another twenty minutes, the parties came out and informed us that they had reached an agreement to settle for the amount of $2000. I never knew what went on in that room, and I wonder if their attorneys did.

This mediation was one of those rare occasions when I can say a satisfactory conclusion was reached largely by reason of the process. The parties had stalemated, they, not their attorneys,

appeared to be in control, and, had I not pressed them on the cost of trying the case and therefore the high cost of the "principles" they espoused, the case would not have concluded. While I had emphasized to them that a good settlement agreement usually left both sides a little unhappy, by reason of the various intangibles, both sides appeared very happy with the agreement and thanked me personally for my help.

Fate often plays a part in the outcome of a mediation. I should have had a good feeling, when I pulled into the parking space in front of the attorney's office and discovered a quarter lying at the base of the parking meter.

Be Prepared!

In the fields of observation chance
favors only the prepared mind.

Louis Pasteur 1822-1895
Inaugural lecture, University
Of Lille, December 7, 1854

After all these years following the codification of mediation ground rules, I continue to be amazed at the all too frequent lack of preparation by attorneys and adjusters coming into a mediation proceeding.

Come on, folks. If you were ever in the Boy Scouts or Girl Scouts, you know their motto is "Be Prepared!" And, as Mr. Pasteur so eloquently states, if your mind is not prepared, you don't have a snowball's chance in…well, that's what he would have said today.

Just as we occasionally replenish our spiritual needs by returning to the scriptures of our particular faith, so should attorneys replenish their mediation skills by reading, or rereading, Florida Statutes, Chapter 44; the Florida Rules of Civil Procedure, 1.700, et seq.; the Family Law Rules of Procedure, 12.740, et seq.; and, yes, the Florida Rules for Certified and Court-Appointed Mediators, 10.010, et seq. The latter will give you a good idea of the requirements and authority of and limitations on a mediator. And it doesn't hurt for us mediators to go back to those books from time to time. Changes

are taking place, and our memories are not always as swift as we might think they are.

I still get occasional requests to evaluate a claim, to offer a legal opinion, even to render a decision—all of which are prohibited by the rules. Mediators are facilitators, not judges or arbitrators. We are there to reach a common ground between the two (or more) sides, where a settlement can be reached for the benefit of all sides.

When we are all—mediators, adjusters, attorneys and clients properly prepared by counsel—familiar with the process, you will be surprised how smoothly the process flows. Be prepared to know what the mediator can and cannot do, what he or she should or should not do, what you, adjuster and attorney, can do to help the mediator and the other side reach your ultimate goal of a negotiated, reasonable resolution of the dispute that brings you to mediation.

The process works, and it works best when we come prepared to make it work.

CHECK THAT IMPULSE! BE A DISPASSIONATE MEDIATOR

Confession is good for the soul, they say, so here goes mine…

I recently conducted a mediation involving injuries to a teenager. The case settled, so my conscience should be clear. However, during the process I fell into the trap of letting impulse overrule reason. I never received a complaint, and both sides left the proceeding happy (or at least equally unhappy, as mediators are prone to predict) but my conscience told me afterward I had slipped, with the best of intentions, but slipped nonetheless.

The young lady had a not very visible scar on her upper lip, purportedly caused by an auto accident, liability for which was attributed to the insured defendant. Fairly routine case, as auto accident cases go.

During opening statements, plaintiff's counsel presented a persuasive and well reasoned argument in his client's behalf, emphasizing in particular the serious and permanent nature of the scar on her upper lip. He described the scar as "ugly." When he did, I instinctively looked at her. Mary [not her real name] was a very attractive young lady, 16-years old, and I wondered what her silent reaction was to his reference to this lifetime defect to her beauty.

It was during the first caucus with plaintiff and her counsel that I expressed the inappropriate comment, stemming from a purely emotional response to the attorney's characterization of her injury:

"Mary, I have to tell you you are pretty enough not to have to worry about your social life with that scar. I can barely notice it."

Oops!

Now, Mary's counsel may well have prepared her, for purposes of her claim, for some hyperbole in his description of the scar, but I did not think about that at the moment. In the eyes of her attorney, and possibly to her mother who was present, it probably seemed this mediator had diminished, at least in his own mind, the value of Mary's claim, and, perhaps, was not as impartial as he had assured everyone at the outset he would be.

In fact, I was and remained impartial during the duration of the proceeding—the other side certainly never enjoyed the benefit of my comment—but perception, as we well know, can sometimes override reality.

A lesson learned. Mediators can and should empathize, but they must

remain dispassionate and check the emotional, albeit natural, impulse.

Civility is Still in Style

"The greater man the greater courtesy." --Alfred, Lord Tennyson

What do students learn in law school that causes some of them to practice law as if they were in a bloody, take-no-prisoners war?

The vast majority of attorneys that come before me in mediation are civil and courteous, to me and to those on the other side of the dispute. Unfortunately, on occasion, I run into one that seems to believe the other side is the enemy to be demoralized and destroyed at any cost. They forget they will meet these folks again, perhaps even on the same side. But memories can be long, and hard, and, at the risk of repeating an old cliché, what comes around often goes around.

I had occasion recently to conduct a mediation at the office of plaintiff's attorney. I assumed this was at his request and an accommodation to him and his client. The mediation impassed, but the impressions made on me and the defendant's representative and counsel were more noteworthy.

I arrived early and was escorted to a meeting room. Normally, "guests" are offered coffee or water. Neither was set up in the room, nor did the receptionist offer them. Not a big deal, but a bad start in creating a relaxed, congenial atmosphere. Worse was to come.

Impasse essentially was reached when in caucus with plaintiff and his counsel. (Coffee, etc., was never served or offered to defendant

or her counsel.) Plaintiff would not move from his initial figure, and the parties were miles apart. Counsel for plaintiff insisted I call an impasse. I conveyed this information to defendant, and she agreed we were at impasse. Returning to plaintiff's office, I suggested we conclude the mediation in joint session at which time I could give both sides copies of my report to the court and, of course, my billing statements. He refused and stated he was too busy. To neither mediator nor defendant or her counsel was there a "thank you," "pleased to have worked with you," "maybe we'll settle the next one," or even a "goodbye." We were left to find our way out, unescorted.

Like most mediators, I have a thick skin, and I understand attorneys can get wrapped up in their cases and become imbued with gladiatorial spirit. Never, however, is there an excuse for being uncivil to others in a mediation, or in any other proceeding or gathering.

Ralph Waldo Emerson said, "Life is not so short but that there is always time enough for courtesy." On the other hand, life and our careers are much too short to have to suffer the long-range stress caused by incivility. We should enjoy what we do, enjoy the opportunity to meet, converse, and engage in spirited debate with others, enjoy the many challenges presented us in this the world's best legal system—and remember that tomorrow is indeed another day.

(In this case, plaintiff's refusal to negotiate was based on the belief he had a sure winner, that there was no incentive to compromise, certainly an attorney's prerogative. Jury trials can be unpredictable.

I found out later this jury rendered a "0" verdict for plaintiff. It happens, folks…)

Best wishes for a happy holiday season.

Do you think that Civility is still in style and is necessary for the mediation process? Please let us know your opinion below:

- All parties should be civil and courteous to each other during negotiations.
- The other side is the enemy and should be demoralized and destroyed at any cost.
- The behavior of either party should not affect the negotiations.

Vote!

CIVILITY IS STILL IN STYLE—PART II

Rarely do I find the need to do a follow-up to an Ed'sitorial. As with most rules, however, there are exceptions.

Judging from the favorable responses we received, my piece, "Civility Is Still in Style," obviously struck a nerve. Good. It can only mean that others agree with my sentiments and have observed similar instances of incivility. Also, the genie now is out of the bottle, and perhaps more attention will be given to the need for civility and, if one cares to split definitional hairs, sociability.

The irony of uncivil behavior is that it is a loser. At the least, it is nonproductive, at worst counterproductive. In other words, it just doesn't achieve the desired results. The only achievement is one of ego enhancement, or at least the perception of it by the ego's owner. Nothing pleases a mediator more than a proceeding where attorneys remain cordial, win or lose. How often I have had the pleasure of hearing in caucus a comment, to the effect: "I know Jim is reasonable and fair, and we will be the same." The reference can be to either an attorney or an adjuster. Both are experienced, repeat participants in the mediation process.

Lobbyists are seen by the public, thanks largely to the media, in a negative light. I did some in my previous life, and I can tell you that a lobbyist who steps over the line and is caught lying to a legislator or even another lobbyist can find his feet buried in deep defecation. In some cases, his credibility is destroyed. Also, lobbyists are skilled in the art of social intercourse. After all, they seek to gain favorable legislative treatment in behalf of their principal, and they

know they must work with those legislators and other lobbyists in the future. More importantly, the ones I knew enjoyed their work and their association with other lobbyists, regardless of persuasion.

Why should it be different for attorneys and adjusters (perhaps, in some instances, even mediators)? Some attorneys display multiple personalities: one in the presence of his or her client; another in the presence of only opposing counsel; still another when alone with the mediator. For the mediator, it is sometimes difficult to keep track of the roles being played out in these dramatic performances. Whatever happened to being true to one's self and to others, in a word, being natural?

In one instance, the attorney stated in joint session, in a pleasant and conciliatory manner, that he knew his client "could win or lose in trial." In caucus, he loudly bragged he would "destroy" opposing counsel and refused to come off his initial demand. Having been present on both occasions, I can only imagine what his client must have thought about attorneys in general and his in particular.

I have said it before but it is worth repeating, we have but one, short life on earth, and it seems a shame not to enjoy it, at work and at play. In the legal profession, as much or more than any other, we see each other repeatedly. Angering, insulting or exasperating others reflects poorly on the profession and creates "monsters" that can only haunt us in the future.

The end game in negotiating the settlement of a claim should not be simply to "win." The object is to represent your client in a professional manner and, together with opposing counsel, achieve a resolution that is a "win/win" for both sides. It sounds corny, I know, and you have heard the phrase before. But think about the

last time you concluded a case and word got back to you that the other attorney bragged about "whipping your a…" (Maybe you said it about someone else?) If you are human, your emotional pendulum swung from anger to self-doubt, and you may have looked forward to a measure of revenge in the next case. All the wrong behavior and reactions. And, if you prevail in that unpredictable arena of legal gladiators, do not gloat. You may lose the next one.

Now, go forth, be professional, love thy neighbor, enjoy what you do, and always take the high road in what, with all its faults, is still the greatest legal system in the world. Do it without hurting your opponent and without compromising your integrity or credibility. And, by the way, mediators are here to help you, so don't offend them too much. We have thick skins, but don't push it!

CONFIDENTIALITY

In a recent mediation, involving multiple defendants and a roomful of attorneys, adjusters and parties, I had returned from my caucus with plaintiff and had explained his position and demands. Lead counsel for the defense then laid out their position, defenses and reasons why the demand was unreasonable. At that point, I reminded defense counsel, as I had plaintiff's counsel, that communications in caucus were confidential, and, glancing at my notes, asked lead counsel what, in the information he had given me, he and the others wished for me to keep confidential.

His reply? "Everything."

Rule 10.080 of the Standards of Professional Conduct for mediators does indeed provides that "a mediator shall keep confidential from the other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure."

Pretty clear, huh? I think so, and, in general, confidentiality is the engine that makes mediation run. But if confidentiality is the engine, then information is the transmission, and the discreet sharing of information puts the mediation vehicle into high gear.

So, let's talk about the mediator's situation when he or she, in caucus, is not allowed to disclose any information given him. Yes, offers and demands in dollars alone can be relayed back and forth, in which case we have, for all intents and purposes, a settlement negotiation with the mediator serving as a mere money messenger-

-rarely workable and not a healthy environment for a meaningful, supervised settlement negotiation.

Mediation is, after all, consensual. The Court may order parties to mediation; it does not order them to settle. The right to trial is preserved, and, if one or both of the parties wish to terminate mediation, even before it begins, it is their right to do so, no questions asked.

If, however, the parties have an honest desire to take advantage of the one opportunity they have to amicably resolve their dispute and to avoid the expense, delay, stress and uncertainty of a trial, judgment and discretion should be used by counsel in instructing the mediator on what information may be shared with the other side.

No one is more aware than the mediator that the mediation process involves strategy, and the mediator expects counsel to frame and time the sharing of information in a manner best calculated to achieve a beneficial result for his client. Information is power; in mediation that power can move the settlement process toward a productive end. A successful mediation involves carefully planned, step-by-step negotiation, utilizing the professional skills of the attorneys and the mediator.

Mediators are accustomed to the occasional posturing, even show-boating, of some lawyers. No problem. If it impresses the other side and does the job, go for it. Are you there only to meet and appraise the opposing side? Okay. To engage solely in a little informal discovery? Okay, too--I guess.

However, if there is, from the beginning, no real intention to share any information with the other side, just know that it puts the mediator in handcuffs and suggests that there is no intention to settle under any circumstances. In such case, the party and counsel should inform the mediator immediately, before everyone's valuable time is lost and the cost of mediation run up.

Incidentally, the well-attended mediation when I was "handcuffed"? It impassed, after a few pointless back-and-forths.

CREATIVITY VS. DEFENSIVENESS

It is the function of creative men to perceive the relations between thoughts, or things, or forms of expression that may seem utterly different, and to be able to combine them into some new forms - the power to connect the seemingly unconnected.

-- William Plomer

"She sure is creative."

"He sure is defensive."

Which would you prefer to be the subject of?

All of us pride ourselves in being creative, whether artistically or professionally. To be defensive, on the other hand, implies weakness or, if you will, a lack of aggressiveness.

As practicing attorneys, we prosecute or defend claims, and, in that limited context, to be defensive may carry a very different connotation. However, in the context of a settlement negotiation, or in a mediation, defensiveness suggests an arbitrary or obstinate frame of mind, an attitude connoting a lack of cooperation and an unwillingness to negotiate with an open mind - a sure-fire road to failure.

Mediators are trained to spot areas for creativity, while remaining neutral and unbiased. Legal advocates often have trouble with this concept, because they believe their objective is to win at any cost.

In truth, creativity is a talent available to all legal practitioners and should be utilized a lot more than it ordinarily is.

I have honestly been stuck at times to devise a means of breaking a logjam in a mediated negotiation, when, suddenly, the attorney on one side or the other sugctional device available to the mediator as well as both sides of a legal dispute, and it should not be ignored.

Just as an artist creates an original painting or sculpture that communicates a unique message to its viewers, attorneys by their very professional training have the talent to be creative, especially in the course of a settlement negotiation. Use that creativity. Use it to the advantage of your client. Use it to avoid the costly, time-consuming, stressful and uncertain outcome of a trial. "Exercise the power to connect the seemingly unconnected."

DON'T BLOW YOUR TOP!

I know, I know. There are moments when, if I weren't so damned neutral, I'd blow my top, too. Negotiations, in or outside of mediation, can be frustrating and full of tension. As an attorney, claimant or adjuster, you ask: Am I demanding enough or too much? Am I offering too little, too much? What is enough? What is too little? And why are they being such horses' axxxs?!

Okay, calm down. Believe it or not, there is life after negotiation. Once concluded, you can return to your office and open another file. And, Mr. or Ms. Claimant, you will never know for sure whether that figure you accepted was the correct one. You can be sure, however, that whatever it was was better than the alternative.

Emotions can run high during a mediation, and a little (the operative word) emotion can be a good thing, so long as it is calculated to achieve a result and subject to self control. When uncontrolled emotions clash with uncontrolled emotions, trouble's afoot and impasse looms large.

I have seen temper tantrums even in a caucus. That's when I quickly convert the caucus room to a day care center and communicate with the parties involved according to their age levels. Believe me, the mediator is not impressed or influenced by such outbursts. He or she may even be suspicious as to whether the display is simply for the mediator's benefit, whatever that may be perceived to be. Forget it. It rarely accomplishes anything, and may indicate either or both a lack of confidence in one's case or an imagined substitute for substantive evidence.

So, stay cool, and, as the famous sign above the long gone Mayflower Restaurant downtown once urged: "As you ramble on through life, brother, whatever be your goal, keep your eye upon the doughnut and not upon the hole."

And, speaking of holes, when you are standing in one, for heaven's sake stop digging — and, ahem, don't blow your top.

DON'T MEDIATE!

Whoa! A mediator telling me not to mediate? Is the apocalypse near? Have the planets realigned?

One out of three is not bad. The answer to the first question is Yes. But, to be fair, you have to do something in the place of mediation.

Mediators' goal, their professional purpose in life, is to help litigants resolve their differences and avoid the perilous path of a trial, where stress, cost and unpredictability abound.

As with all mediators, I have had mediations scheduled, then cancelled, sometimes on very short notice. The reason for many, if not most, of these cancellations is that the case was settled. And therein lies the theme of this Editorial.

I'm not a hypocrite. I enjoy, like any other professional, the income flow resulting from the satisfying work I do. But I enjoy even more hearing that parties have gotten together, negotiated their differences and concluded their litigation in an amicable manner. That's our business, folks, to see you kiss and make up, with or without our assistance.

So, if the cost and inconvenience of mediation prompts you to settle your claim or the claim against you, good! Of course, I expect the courtesy of at least a twenty-four hour notice of cancellation, but, if the latter occurs because of a settlement, I applaud both sides.

There will be numerous cases where a neutral facilitator will be essential to reach a settlement, or at least to lay the groundwork for

one, where the controlled environment of the mediation process will carry the day—and we mediators are here to help you in such cases.

GET TO THE BOTTOM LINE!

"Man does not live by words alone,
despite the fact that sometimes he has to eat them."

—Adlai Stevenson

In the course of a negotiation, when one side or the other says to the mediator, usually with a calculated measure of scorn: "Tell him to get to the bottom line!" it is not necessarily time for the mediator or the other party to rejoice.

What the speaker really says is: "Tell him to get to MY bottom line." If plaintiff, don't confuse that with a ship's keel. If defendant, don't misread it as the peak of the main topgallant mast.

Now, in fairness, the comment often is borne of frustration, and the speaker then commences to move in a substantial way to encourage a response in kind from the other side. That's good, and it warms the cockles of the mediator's heart.

On the other hand, if it is meant merely to rush the process and the other side is neither willing nor prepared to do so, it can only cause aggravation and exacerbate the frustration.

As every good negotiator knows from experience, negotiation involves both art and craft. It is a process, often a painfully slow one, that, when pursued with patience and temperance, does, somehow, in most cases, achieve resolution, a settlement, which, while not necessarily prompting a bacchanalia by either side, offers indisputable advantage to both. They call it a Win/Win.

A mediator can be caught between the proverbial rock and a hard place. If he or she accedes to the "rush" command, an impasse can result. If the mediator appeals for patience and urges the parties to let the process work, he or she may be accused of seeking personal gain from the additional time involved.

I think I can speak for most mediators in saying that nothing gives us greater pleasure than helping disputants settle their differences. If that takes twenty minutes, more power to them and to the process. Nothing, absolutely nothing, disillusions a mediator more than a six, eight or ten hour mediation that ends in impasse.

In mediation, the best of all worlds involves a combination of many things: attorney, adjuster and mediator skills, mutual respect, an honest, patient, straightforward effort on the part of each participant, and a willingness to let a proven process work its magic, whether in five minutes or five hours.

Remember, if you don’t resolve that dispute, a costly, protracted, stressful and uncertain future lies ahead.

GOD IS MY COPILOT!

Remember that old WWII cinematic appeal to patriotism? Made a lot of us—at least those of us old enough to have been around—run out and buy a War Bond. I never expected the theme to reappear in the context of mediation—but, then, lots of things happen at mediations we don't expect.

As mediations go, this one was fairly routine except in this case we had the emotional overlay of an alleged false arrest. Even accepting plaintiff's version of the events and the validity of her claim, how much value do you place on embarrassment, however severe it may be? Obviously depends on the particular circumstances, as well as the personalities of the parties. Negotiations went nowhere. Plaintiff had a monetary figure coming into mediation and departed with the same figure, the mediation at an impasse. In private session, her attorney appealed to her to negotiate reasonably, to drop her inflexible demand, at least enough to allow defendant to respond. No dice. And then she issued the quintessential rationale for her position: "God is with me, and God will be with me at trial." I had heard similar statements in the past, intended always to impress the mediator with the "righteousness" of a party's cause, but this lady convinced me she was sincere, albeit terribly misguided, in her convictions.

I wondered later if, maybe, we should lead off these proceedings with a soulful prayer, perhaps holding hands, entreating the Almighty for guidance and reasonableness. Wouldn't work. Each side would pray, respectively, for its top and bottom line. As a

result, when it was all over, both would lose their faith in the Supreme Being, not to mention the mediation process.

Believing God is with you at mediation or trial creates a dilemma. Where was He/She at the time of the accident, at the time the injury, emotional or physical, was incurred? And, further, if God is in such control, maybe we have the wrong guy as a defendant. Why isn't it God?

Okay, I'll admit it was a slow month. But, folks, if you do not remember anything else, remember, God helps those who help themselves. And He/She is on both sides.

Happy Holidays! And forget that letter to Santa Claus. It won't work either.

HE WANTS WHAT?!

"He wants a hundred thousand dollars for a whiplash injury?"

"She wants to pay only five hundred dollars for all my client's pain and suffering?"

Yep, same case, same parties. And haven't we, as attorneys and mediators, heard it all before? As mediators, this often is where we say, "Okay, now that I know both sides' positions are outrageous, let's move along."

Most attorneys understand the negotiating Ouija board and move patiently forward into the back and forth tussle necessary to achieve a settlement, normally one in which the claimant will receive a bit less and the defendant will pay a bit more than either expected.

Some attorneys, however, will shut down the process upon hearing the initial demand or offer. Not a very wise move, since in almost all cases, when a figure is perceived to be outside a reasonable range, it is being tossed out merely for the visceral reaction it gets. And that reaction can set the tone for the remainder of the negotiation, which almost invariably moves into reasonable, if not necessarily settleable, parameters.

Other attorneys and adjusters rant and rave, usually in caucus, at what they consider to be an unreasonable amount of money offered or demanded, in the misguided belief the mediator will be impressed, rather than see it for the posturing that it is.

Down deep, all of us want to receive something for nothing or to pay nothing for something, and we carry that dream into our personal and business dealings. After the car salesman tells us that the price of the vehicle (plus a "popularity surcharge") is on the window sticker, we laugh. He then asks, "What do you think you should pay for this fine automobile?" Whereupon we gently slip tongue into cheek and respond, "Fifty bucks!" Everyone laughs, and only then do both sides proceed to negotiate in a reasonable way.

If only an injury claim had a dealer cost basis from which to begin negotiations. Economic damages are the closest thing we have to dealer invoice, but, unfortunately, even they are often a subject of great dispute. In addition, questions of liability frequently cloud damage assessments. And carefully selected war stories of huge verdict recoveries or defense verdicts do not help much.

The psychology of offers and demands, including the manner in which they are submitted, is a fascinating one. The claimant must start high and the respondent low. (How high is high? How low is low? Same as the length of a string, i.e., twice the distance from the middle to either end!) If they don't, signals will be confusing, since each expects the other to do so. Only occasionally will the attorneys know each other well enough to avoid extreme starting positions.

A mantra that amuses mediators is the one that goes something like this: "Well, you just tell her that we came down from one million to $750,000, so she should come up the same amount!" If this logic were true, the claimant need only start at two or three million, in order to oblige the respondent to "match his move." The only way

the logic could operate fairly is if the respondent were able to start with a minus figure, also of her own choosing. A respondent occasionally uses the ploy, but the "zero up" negotiating yardstick makes such reverse use rare.

Ultimately, a claim is worth whatever it settles for - or a jury, judge or arbitrator deems it to be worth - nothing more nor less. And, of course, either attorney has the right to storm off for having paid too much or received too little. That is the game, the game of negotiation, and, when it ends in a settlement, it sure as hell beats the alternatives.

So, stay cool during that opening round of the negotiating playoff and remain confident that, as Yogi Berra said, "The game ain't over till it's over."

HELP! MY MEDIATOR'S ON AN EGO TRIP!

The law requires a mediator to make an opening statement, to explain the purpose and methodology of mediation. He or she must make it clear that the mediator will not, indeed is not allowed to make decisions in respect to the dispute, must explain that, although the parties may be ordered to mediation, mediation is a consensual process, and, whether by statute or agreement, communications during the proceeding are confidential. In addition, it is customary for the mediator to assure the parties that he or she is impartial, a neutral, and has no bias in favor of one side or the other.

In addition, at the outset and prior to discussing the above items, the mediator will talk about himself or herself.

I can't speak for other mediators, but I can tell you that this is not one of my happy moments in a mediation proceeding. It is not that I don't take pride in what I do and believe I am fully qualified to perform the services I render. After all, aren't we all, down deep, on ego trips? We just don't like to shout our virtues from the rooftops. At the least, it's gauche. I simply do not like to toot my own horn as if I were some snake oil salesman!

So why do mediators do it? If we're certified, you already know we are attorneys or, in the case of family mediation, hold a qualified professional position. You also probably are aware we have conducted numerous mediations, and, if we are lucky enough to be on a web site, you know more about us than you ever wanted to know.

However, just as lawyers are eager to gain the respect of their clients, so, too, mediators are eager to assure that the attorneys, adjusters and clients coming before them have confidence in their dispute resolution capabilities and in them personally. Without commanding that confidence and respect, a mediator's role as a settlement facilitator can be dicey.

Granted, confidence can be gained by the way in which the mediator addresses the participants, the tone of his or her voice, the ability to relate an appropriate piece of humor, even the manner of dress.

But the clincher, especially for the client who has never met nor knows little about the mediator and in many cases is intimidated by the unfamiliar environment, is in what the mediator says about himself or herself, however immodest it may make the mediator appear. It is often a brief recap of the mediator's background and experience that determines the level of cooperation offered by the client and the extent of that person's faith in the process.

So, you denizens of the ADR process, be patient as the mediator, however uncomfortably, expounds on his or her virtues. The payoff to the mediation process can be worthwhile.

IN SUMMARY

I had a mediation the other day that raised some troublesome questions about how familiar attorneys are with the U. S. District Court-Southern District rules for mediation.

One side of this mediation delivered its ten-page summary of the case on the morning of and prior to the mediation. It was labeled "Confidential." The other side, at the commencement of the proceeding, handed the mediator and opposing counsel copies of three documents totaling forty-eight pages.

Okay, you ask, what's wrong, Mr. Mediator? You received your summaries. What's the beef?

Here is the beef.

Most attorneys understand that the Florida rules do not mandate the submitting of summaries prior to a mediation. It is not a bad idea, of course, to do so in all mediated matters, especially where the mediator might benefit from an overview of a case involving complex issues of liability and damages.

The rule in the U. S. Federal District Court-Southern District is quite different. Rule 16.2 includes the form of Order of Referral to Mediation issued by the Court. Paragraph 6 states:

> **At least ten days prior to the mediation date, all parties shall present to the mediator a brief summary of the case**

identifying issues to be resolved. Copies of these summaries shall be served on all other parties.

Now you see the beef? In my case, for example:

1. Both sides violated the ten days requirement. The consequence was that no one, including this mediator, had an opportunity to adequately study the summaries;
2. Almost fifty pages is not brief. I'll concede that most of these pages consisted of supporting documents, however, they still had to be reviewed, which takes us back to (1); and
3. The confidential summary to only the mediator violated the requirement to send a copy to opposing counsel.

Before someone accuses me of being a stickler for a rule that is so often breached, understand that, if the mediator either does not receive a summary or receives it late, the time wasted by the mediator to fully grasp the nature of a complex case or to study a summary is time charged to the parties. Worse, the effective participation by the parties and mediator in the mediation, even the ultimate outcome, can be affected. (The mediation in question ended in an impasse.)

Mediators pride themselves in conducting efficient mediations at a reasonable cost to the parties. Hard to do that when participants are handicapped by insufficient or untimely information.

Also, attorneys who ignore these instructions by the federal courts expose themselves to complaints by opposing counsel who may not be above exploiting a procedural violation to their advantage.

So, in summary, summarize. Listen to the judge and, when in federal court, familiarize yourself with and follow the rules. Not a bad idea to do so in state courts as well.

IT'S NOT FUNNY, MCGEE!

Okay, we mediators are not comedians, and we don't claim to be. But a joke is a joke, folks, and, if it gets a laugh, funny things can happen on the way to the forum.

We know there is concern for the clock and its impact on the cost of a mediation proceeding. Mediators are sensitive to that. We gain nothing in the long run by extending a proceeding longer than necessary. Honestly, we do try to be as efficient as we can be. We realize time is money for attorneys and adjusters.

That said, however, the mediator's goal is to help parties settle their differences, and they have certain techniques they use when negotiations seem to be breaking down. One technique is levity. When tension builds to a point where the mediator fears that emotions start to rule the proceeding, it is time to bring the participants back to reality, reality being simply that we should not take ourselves too seriously during this all-too-brief earthly existence.

I do not mean to belittle the significance of a legal dispute. There can be a lot at stake for both sides, and the object is to resolve that dispute in an amicable and mutually satisfactory manner. That objective should never be forgotten.

There are times, however, when lips are squeezed tight, eyes are glaring, words are harsh, and the mediator realizes that the whole proceeding is about to implode.

Now, I have had occasion when my joke or lighthearted story fell on deaf ears, but it doesn't happen often. Indeed, it is not unusual at times for parties to look for someone to melt the icy mindsets.

I have started mediations with a tasteful joke, and, while the reactions may occasionally border on the polite, the mood is almost always improved, especially if the story is relevant to the dispute or to mediation.

We are speaking, of course, of the mediator's role in relieving tension and keeping folks on the negotiating track, and we do the best we can. Frankly, I wish there were more participation by the attorneys and adjusters in contributing some humor to the process. It can perform wonders at times.

Settlement negotiations are all about communication, and, like ships passing in the night, those communications do not always achieve the desired connection. I have often (hopefully, not to the same audience) told the story of the husband (wife, if the majority present are of the female persuasion) who called home and said: "Honey, I just won the 10 million lottery. Pack your bags." To which the happy wife (or husband) replies: "Oh, sweetheart, that's wonderful…but, should I pack for warm weather or cold?" To which the husband (or wife) responds: "Doesn't matter. Just be gone by the time I get home." Corny, perhaps, but somehow it hits home with those involved in a negotiation where minds are otherwise loath to meet.

Our dilemma, of course, is keeping track of when and with whom we share our limited repertoire of jokes. I think I have about used up the one above, but I always look for others.

Laugh and the world laughs with you. Cry and you cry alone—and without a settlement. And, despite Molly's admonition, Fibber was funny—at least for those of us old enough to remember.

KEEP THOSE FEET OUT OF THE CONCRETE!

The greatest assassin of life is haste, the desire
to reach things before the right time.

Juan Ramon Jiménez,

Selected Writings, 1957

People in a hurry cannot think, cannot grow.
They are preserved in a state of perpetual puerility.

Eric Hoffer,

The Passionate State of Mind, 1954

Were he living, Al Capone could tell you a thing or two about putting your feet in concrete. In mediation, better you should emulate Fred Astair and keep those hoofs dancing.

Premature commitment to a demand or a denial, I should not have to tell you, is anathema to constructive settlement negotiations, in or out of mediation. Yes, yes, I understand that at some point in a negotiation "a line in the sand must be drawn." (Lord, save me from that cliché!) Too often, however, that line is drawn too quickly, too early, lacks tactical consideration, and invariably inspires a matching response from the other side. Result? Impasse - and all the litigious consequences that follow.

The rhetoric employed by attorneys is legion and, given the nature of their roles as advocates, perfectly understandable. The level of discourse is nowhere more prominent than in mediation, where, also, too often, an increased volume level is believed to complement the powers of persuasion.

Precipitate positioning and bombastic rhetoric seem to go hand in hand in many cases, combining to implant the speaker's feet in the aforementioned concrete. Fortunately, Capone's follow-through does not occur. Unfortunately, in a mediation proceeding, loss of the spirit of negotiation does.

My advice? Relax, counselor. Go with the flow. Let the process work. Give the mediator a chance to do his or her thing. If you are attending solely by reason of the judge's mandate and have already exhausted - truly exhausted - settlement opportunities, an appeal to the court to waive court-ordered mediation (good luck!) may be appropriate and fairer to both sides. Otherwise, allow the "magic" of mediation to play out. No, the mediator is not a magician. The magicians are all those in attendance, each wielding a wizard's wand ready to cast its spell of reason and compromise on the symposium.

Won't bid against yourself? Won't take "$1 under" or pay "$1 over" a certain amount? Think your case is a slam dunk? Get real. Learn to paint outside the lines. Keep your feet out of the concrete. And resist the "desire to reach things before the right time."

The payoff for reasonable patience in reaching a settlement can be invaluable, as you explain to your client how he, she or it has averted the cost, delay, stress and uncertainty of a trial.

MEDIATION: A REWARDING EXPERIENCE IN ITSELF

"Hey, Ed, great mediation! You've earned a bonus. And, if you have four more settlements, you receive a plaque!"

Nice, huh?

It doesn't happen, folks, no matter what you have heard. And it should not. Win or lose, the mediator and the parties' counsel are paid for the services rendered. After all, who should receive credit for a successful mediation, or blame for an unsuccessful one? Let's use an analogy father's will relate to: You have just taken the training wheels off your child's bicycle, given the bike a gentle push, and watched with pride as he or she wobbles and pedals into a new stage in life. Whose accomplishment is it? Clearly, it is chiefly your child's, not yours. You did play a crucial part, however. You arranged the circumstances in which the youngster could achieve that dramatic moment. If the bike topples and the child falls, it simply means he or she was not ready for the venture. Just so, the mediator arranges and facilitates the conditions in which the parties and their counsel can constructively move toward resolution, the achievement of which, ultimately, is up to the parties.

If you think about it, an extra financial or tangible reward to a mediator for a successful mediation would only serve to infect the mediator's objectivity and perhaps neutrality. The function of a mediator is to orchestrate the process that leads to settlement. It is not his job to tell the participants what to do but rather to remind them of the advantages of constructive negotiation and final

settlement. Remember, mediation is consensual, a fact the mediator should convey to the parties at the outset of the proceeding.

(An attorney friend once told me he only wants a mediator that "pushes the parties aggressively to settlement." Reasonably, encouragingly, even urgingly--but never aggressively or forcefully. Unreasonable pressure is dangerously close, if not tantamount to making a decision for the parties or forcing a settlement, both violations of mediators' Standards of Professional Conduct, Rules 10.020 and 10.050.)

So, how is the mediator rewarded for the task performed? Forgive the play on the cliché, but a mediated resolution is its own reward. The mediator truly enjoys the satisfaction of having helped disputants settle their differences and save the cost and avoid the stress, delay and uncertainty of a trial. By the same token, when an impasse is reached, a mediator invariably searches his or her soul, to assure everything was done in the process that could have been done--a sometimes unreachable goal--to help the parties settle.

MEDIATOR ON A TREADMILL

Frequently, I have found myself in the later stage of a protracted mediation proceeding saying: "Well, I just won't get on the treadmill this evening!" This usually follows the 15th or 16th inter-caucus trip, with no end in sight.

Is this bad? Of course not. Just the venting of an occasionally tired mediator. In fact, whether a settlement takes five trips or (God forbid!) fifty-five trips, if agreement is reached, how can it be other than good. And the result likely is one that could not have been reached in a one-on-one negotiation between counsel, because at some stage one or the other would surrender to pique and frustration and close down discussions, thus driving the parties to trial.

Can this sometimes comical routine be avoided? Probably, but it depends largely on the mutual respect between or among counsel for the parties and the realistic attitudes of all involved. Respect often relies on a prior working relationship between counsel, so, if they do not know each other prior to the proceeding, the difficulty can be pronounced.

At times, leverage and raw, financial power is at work, where one party intentionally drags out a mediation with small, incremental moves in order to impose an intimidatingly growing mediation expense on the other. But what else is new. Isn't this what often happens in litigation, where one side has legal resources way in excess of the other and uses that ammunition to try to overwhelm the opponent. It is an unfortunate but very real aspect of our

otherwise excellent legal system. And, in the context of mediation, the relative additional cost is not that significant.

The push and pull of negotiation psychology, if not simply the forces of human nature, makes elongated negotiations, in or out of mediation, a reality that parties and counsel must face.

Mediators, too, have a responsibility for taking certain measures that can shorten the process. Care has to be taken, however, lest one or the other side be offended by what may be perceived as "pressure tactics," a method to be avoided by mediators.

So, all you attorneys and mediators, don't be discouraged by the sun going down during the course of your mediation. It happens, and, if it ends successfully (ready for a tired cliché?), all's well that ends well. And the mediator gets a physical workout that he or she probably needs anyway.

And, always remember, that an alternative filled with stress, delay, expense and uncertainty lies happily awaits every failed negotiation.

MEDIATOR TYPES

- CASPER MILQUETOAST:

  Shy, wallflower type. Sits back, says little, let's the parties run the show. Believes mediator's presence is sufficient by itself and shines forth—in a bright circle above the head.
- **PSYCHIATRIST:**
  A telepathist. Has a high school major in psychology. Reads minds and believes knows what the parties are going to do before they do it. What's fun is when they don't!
- **BULLDOZER:**
  Aggressive type. Pushes parties to settle—whether they want to or not! Settle or not, they may leave a little unhappy, but figures what else is new?
- **SHERMAN TANK:**
  The Bulldozer plus Weapons. Blasts away to get parties to settle. Takes no prisoners. They settle—or else!
- **PREVARICATOR:**
  Creative. A great story teller to his children—and to mediating parties. In caucus, weaves positions out of whole cloth to get parties to settle. Everyone's happy—until parties' counsel compare notes the day after.
- **POLITICIAN:**
  Nobody is left unhappy. Settling parties leave the proceeding bewildered and talking to themselves: "What happened? What did I do? Why did I do it?"
- **CHAMELEON:**
  "What do you want me to be?" Changes with the mood of the environment. Unpredictable. Reacts and adapts to the unique personalities of the parties. Has no identifiable style—or personality.
- **GROUCH:**
  Nothing seems to make this mediator happy. Miserable if you impasse. If you settle, you're not sure you did right—but you enjoy seeing the glimmer of a smile, however short-lived, on the mediator's face!
- **FRANKENSTEIN'S MONSTER:**
  Rants and raves. Parties settle out of sheer terror, uncertain of the measure of this demon's wrath.
- **I-DOTTER/T-CROSSER:**
  Exacting to a fault. Step one inch over mediation's statutory or

regulatory line, and you will hear chapter and verse from this mediator's bible. Foreheads bounce off the table during his interminable opening statements.

- **STYLIST:**
  A frustrated actor. Believes the mediator must have a unique style and tries to dazzle you with the uniqueness. Has forgotten different strokes for different folks. Sometimes works, if the right combination of personalities are present.
- **AGNOSTIC:**
  "Why am I here, and what am I doing?" Milquetoast's first cousin. True believer in letting the parties reach their own decision—dubious about the whole process, still trying to figure out what to do and why.
- **PREACHER:**
  "We are here for a reason, and we are doing God's will." Has no doubt about the virtues of The Process. When all else fails and negotiations are going south, resorts to silent prayer—but only if group won't join.
- **LEGAL EAGLE:**
  The lawyer-mediator. Knows he shouldn't render a legal opinion but can't help it, bursts with enthusiasm to do so. Walks a thin line, sometime gets the job done, but won't see the loser of the legal argument again.
- **SLEEPWALKER:**
  Hello! We're here. Are you? Never seems to connect with the group. Ambulates wearily through the process. Probably had a tough night before. Always there on pay day, however.
- **COMEDIAN:**
  Doesn't know much about the process but tells damned good stories. Amidst the humor, parties settle, if only to maintain the levity of the moment. What's fun is when they don't laugh!
- **GREENHORN:**
  Watch this mediator's eyes as they bounce repeatedly off the checklist clipped to the corner of the mediation file. Stressed but thorough. Gets the job done—among yawns around the table. Eventually learns to relax—or becomes I-DOTTER/T-CROSSER's prime student.
- **CLICHÉ MONGER:**
  Doesn't have an original thought, just worn clichés, which are driven into parties' heads like nails into a new roof. The approach often works—probably because parties and counsel compete with mediator for the same worn clichés.

MEDIATORS' SKILLS

Let each man pass his days in that
wherein his skill is greatest.

Sextus Propertius
c.54 B.C. – A.D. 2

How happy is he born and taught,
That serveth not another's will;
Whose armor is his honest thought,
And simple truth his utmost skill!

Sir Henry Wotton
1568-1539

The question I pose is a simple one: Does a mediator, in order to be effective, require legal skill in the area of law involved in a mediated dispute?

I doubt there are many mediators who are skilled in all areas of the law. Each of us has one or more fortes, usually borne of our career experiences. Few of us are competent in all areas as legal practitioners—and therein lies the quandary.

Lawyer mediators are legal practitioners by professional status only. Their skills as mediators are unique to the mediation process. They include special rules of conduct, statutory and judicial mediation procedures, people skills, the power of persuasion, and an impartial approach far removed from the world of a litigating advocate.

Is a legal skill in the area involved in a dispute beneficial to the process? I would be hard pressed to say it is not. But the selection of a mediator should not stop there. I suspect-without necessarily putting myself in this category-there are mediators whose mediating skills are so well honed that a complete lack of experience in the legal area involved would not make a difference in his or her ability to conduct an effective mediation.

On the other hand, there are those mediators who are highly skilled in the area of law involved but woefully unqualified as mediators. Where does that leave them? Remember, a mediator is not allowed to render legal opinions and must rely on the legal knowledge of counsel present at the proceeding. And decisions, by law, must be left to the parties, not to the mediator.

Moreover, falling to the temptation to become involved in the legal issues may well cause the mediator to step outside the bounds of impartiality. How does one express a legal opinion of any nature without betraying a bias? Of course, it is not unheard of for counsel to prefer a mediator with a bent for judicial decree, but this does not exempt the mediator from the stringent rules set forth by the Florida Statutes and the Florida Supreme Court.

Perhaps it is all a matter of degree. A mediator highly skilled as a practitioner may be able to mask a lack of mediating skills. A superb mediator may be able cover up his lack of legal skills. Fortunately, many mediators are able to balance the two.

Should the mediator "pass his days in that wherein his skill is greatest"? Or will "honest thought and simple truth" suffice?

MILES APART-BUT HEART NO FONDER

Absence makes hearts grow fonder, so they say. An apt aphorism for lovers-not necessarily for parties to a mediation.

When adversaries in litigation or pre litigation are miles apart or "absent" from one another in their respective evaluations, insurmountable problems sometimes arise. Such cases are especially frustrating for mediators, as they rack their brains trying to figure out what they are doing wrong.

Assuming, for purposes of my thesis, there are no disagreements about the facts of an accident or other circumstances of a dispute or about the applicable legal aspects, it is to the credit or discredit of the human mind that opinions on damages still can differ drastically and irresolvably. Truth is, there are times when one or both sides in a legal dispute have such disparate opinions of the value of a claim that the gap cannot be closed. Is this the mediator's quintessential copout? Perhaps. I hope not. In many instances it may have more to do with 1) an attorney's exaggerated opinion of his or her professional worth; 2) an attorney's desire to perpetuate (or restore) his/her track record in court; or 3) a party's exaggerated or unrealistic opinion of the claim's worth, often, on the plaintiff's side, stimulated by friends, relatives and/or news media and, on the defendant's side, depressed by associates, supervisors not present at mediation, and/or news media.

A mediator's reality checks only go so far, and the mediator must stop short of pointing a finger at the "damned fool who has lost touch with reality." After all, about the time he or she did so, a jury

will bring in one of those unexpected zero or blockbuster verdicts, thus shattering the mediator's credibility in the eyes of counsel and client. In addition to which it is not the mediator's job to set a value on a claim.

In Alice In Wonderland a character says, to the effect, "A word means what I say it means, nothing more nor less." Just so, a claim is worth what either side says it's worth, nothing more nor less. Even if one or the other turns out to be dead wrong.

Fortunately, we do not see many of these cases where the mediator, trying to restore humor to the proceeding, is forced to say: "Now that I know both sides' positions are outrageous, let's move on." Even then, more often than not, they do move on, and, more often than not, to a settlement. This is in the nature of clear, knowledgeable heads and of reasonable attitudes toward the mystery and unpredictability of jury trials.

OPENING STATEMENTS

Each one readily believes what he fears or what he desires.
Jean de La Fontaine (1621-1695)

Mediators often hear an attorney say, "I'm not going to waste time on an opening statement." Then, turning to opposing counsel, "You know what it's all about anyway."

Oh? He does? The client does? Opposing counsel knows what he or she believes "it's all about." It is doubtful he or she - certainly not the client - knows what their opponent considers it to be all about. And therein rests the ongoing debate over the value of opening statements by counsel.

From the clients' viewpoints, the mediator's opening comments are calculated to clarify what the process is all about, why the parties are there, and what they should be trying to accomplish.

Similarly, an attorney's opening soliloquy conveys an important message. Not only does it enlighten the mediator on the nature of the dispute (we rarely receive a written summary) but it also attempts, or should attempt to elicit a response, however silent and undisclosed, from opposing counsel and, perhaps more importantly, from the latter's client

Opening statements in mediation are rarely as detailed or impassioned as their counterparts in trial. That said, however, their goals are much the same. In addition to influencing the other attorney, either with substantive arguments or persuasive rhetoric,

it behooves counsel to remember that clients are not stupid. They, too, listen carefully, either on their own volition in their own best interests, or because of the mediator's earlier urging to be attentive to what's being said. Indeed, it is not unusual for a client to question his or her own counsel during a breakout session as to the "truth" of what the other attorney has said. What is happening at that moment is a further step in the search for the truth, albeit in the form of a diminution of the client's resolve.

Do not underestimate the value of opening comments. It is tempting to regard them with the proverbial "grain of salt," given their advocative source. But their later impression, however paraphrased, on a juror is something you will never know for certain. Any attorney with more than one trial under his or her belt knows how effective a lie can be in the course of trial testimony. Different and otherwise honest slants on or versions of facts can be even more effective.

Use the mediation process for what it is worth. Prepare almost as you would for a trial. The neutral mediator may perform a valuable service, but it is the attorney who ultimately carries the day, and that is as it should be.

OPENING STATEMENTS

…and at about this time attorneys' and adjusters' heads begin to bobble, eyelids drift downward, and an occasional forehead bounces off the table. Yep, the mediator's opening statement can be boring as hell, especially for those who have heard it a hundred times. But one person in the group has not, and he or she is meeting the mediator for the first time, knows nothing more about the mediator other than what the attorney has described, and very likely is looking for assurance that his or her side of the case will be viewed without prejudice or bias.

I have had attorneys gabbing among themselves during my opening remarks. Doesn't bother me personally, despite the obvious rudeness demonstrated. What does disturb me, however, is that the client who has not been involved in a mediation before is at best being distracted, at worst receiving the message that the mediator's role and therefore the mediation process itself is of little importance. Bad message for those interested in utilizing the process to its fullest potential for the purpose of settling their differences and avoiding the expense, trauma and delay of protracted litigation and a trial. Also, for the benefit of you attorneys and adjusters who have never mediated with a particular mediator, it is your opportunity to evaluate the mediator's personality, background and experience. Going into a mediation, this can be pretty powerful information. Even if you know the mediator, you may be able to discern if he or she is having a good day or bad, if a brawl with the spouse or kids started the day.

Although mediators try to spice up their comments to grasp and hold everyone's attention, there are only so many ways to share

with the participants the many unique aspects of mediation, some of which (e.g., confidentiality, the consensual nature of mediation, etc.) are legally required to be conveyed.

So, my message to you old legal and insurance war horses: Be patient, my friends. Remember, the mediator is required to do his or her “thing,” and the primary reason is to assure that the uninformed in the group knows what we’re all about—and what we’re all about is the business of amicably settling contentious and costly disputes, a worthy goal.

LORD, SAVE ME FROM THAT BORING OPENING STATEMENT!

"I've explained it all to my client. We can dispense with your opening statement and get down to business."

Every mediator on occasion has heard this first-shot-out-of-the-cannon remark. The speaker, an attorney, has been through so many of these proceedings that he or she has become jaded to the process. Sometimes, the attorney believes the opening comments by the mediator are calculated merely to "run up the tab."

Too often forgotten are the clients, who in most cases have no idea what is about to happen. Adjusters frequently have been exposed to the process, but just as frequently they have not.

The opening statement accomplishes many things:

1. It establishes the purpose of the gathering—why everyone is there;
2. It sets forth the procedures and ground rules;
3. It explains the role of the mediator (too often misunderstood by lay people, and occasionally attorneys, to be that of a judge or arbitrator); and
4. It carries out the mediator's legal obligation to inform the parties and their counsel that the mediator is neutral, impartial, not the decision- maker, and that the process is, even when court ordered, always consensual.

The opening statement also allows the mediator to say something about himself or herself, in order to gain the acceptance, confidence and respect of the parties and their counsel. (Much the same, by the way, can be said of the attorneys' opening statements, in which they offer their respective interpretations of the facts and the law involved.)

While the attorneys normally are aware of the confidentiality of a court ordered proceeding or of one enjoying the cloak of a confidentiality agreement, the parties usually do not understand the consequences, and they are the only ones having first hand knowledge of the facts.

Depending on the circumstances or whether the parties already were involved in close, amicable negotiations prior to the mediation, I have truncated the opening statement. That is a matter of judgment, only for the mediator. It is essential, however, to relate, at least briefly, those items required by the Rules.

So, counselor, do not be impatient with the process. Human nature being what it is, a well laid foundation often will best support the construction of a final settlement

PERFORMANCE ACCEPTANCE

The performance assessments we get back after the conclusion of a mediation are helpful to the mediator, make no mistake about that. Whether the comments are favorable or unfavorable, no responsible mediator ignores them. We may disagree at times, but we know "the customer is always right." Even if the customer is wrong, not often the case I'm afraid, it is little consolation if he or she does not call on us for service in the future.

But let's put some things in perspective. As a whole and as a rule, the parties know best-usually better than the mediator-whether a mediator has done a good job or not, irrespective of the proceeding's outcome, whether in settlement or impasse. Attorneys and adjusters, on the other hand, know or should know mediators cannot perform magic. They cannot pull a rabbit out of a hat.

If either party or their attorney has made up their mind not to settle, or does not have a high regard for the mediation process, or is simply using the mediation proceeding as a stepping stone to a courthouse steps settlement, then nothing the mediator does or does not do is going to make a difference. Indeed, if settlement does take place outside the mediation proceeding, we are happy.

This is not to say that unsuccessful mediations are never the fault of the mediator. There are good mediators (I hope I am one) and poor mediators (I hope I am not). Mediators have up days and down days (Is confession good for the soul?), because, believe it or not, mediators are human. Little comfort to the parties involved

when the human element fails, but an inevitable feature of human behavior.

All these factors-and probably others-have a bearing on the outcome of a mediation. We-mediators, attorneys, adjusters, parties-collectively do the best we can with what we have. And what we have are the abilities to adequately prepare for mediation, to know the rules and prerequisites of the process, to recognize and assess the many nuances of effective communication in an adversary system, and, yes, to understand that social intercourse, a vital part of the process, includes an acceptance of the fact that none of us, in the final analysis, expect to get out of all this alive and therefore should enjoy what we do, enjoy the opportunity to meet new people and new challenges and deal with them as if there will indeed be a tomorrow.

PREMEDIATION CONFERENCES

No, it is not a breach of ethics, by mediator, counselor or adjuster, to discuss an upcoming mediation, even in the absence of the other party.

Mediators should not be confused with judges and arbitrators whose task is to ultimately render a decision. The danger of undue influence on decision makers is obvious, and exparty contacts with either therefore can constitute serious ethical violations.

Mediators cannot and are not permitted by the rules to make decisions, nor can they offer legal advice. So, the advantage gained by engaging in a pre-mediation conference is limited to a sharing of factual information and conveying legal conclusions that most often, the mediator knows, will be refuted by the other side.

A brief discussion, before mediation, of the facts of a case can be helpful to a better understanding by the mediator of the nature of the dispute. This may serve to shorten the "educational" process normally required to bring the mediator up to speed.

The same thing can be accomplished, of course, by submitting a written summary, confidential if desired, for review prior to the mediation. Such summaries can be a Godsend for the mediator in complex disputes. Attorneys work cases for years, then expect the mediator to comprehend what's involved in the space of a five or ten minute opening statement. We're not stupid (most of the time, anyway), but I am often bewildered by an attorney's inability to

understand the mediator's inability to instantly grasp what is going on in a complex case.

On rare occasions, an attorney will contact me to inform me of a behavioral problem or troublesome personal history of his own client, thus preparing me in advance for possible trouble at mediation. And, yes, in the opinion of most experts, the statutory confidentiality in court ordered mediations covers such discussions. (There is an open question in the case of voluntary mediations, since the parties have not yet had the opportunity to sign a confidentiality agreement, and retroactive application of such an agreement probably would be debated.)

All this said, it is important to remember that pre-mediation discussions do not take the place of opening statements by counsel at the commencement of the mediation proceeding. The attorney may have to repeat much of what he or she previously has shared with the mediator. A major feature of mediation is that it offers an opportunity for each participant to gauge the demeanor of other participants. Opening statements are as much for the benefit of the opposing side(s) as for the mediator.

You thought that last mediation stretched out longer than it should have? When the clock slipped past the one and one half hour minimum, you began to suspect the mediator was padding the old pocket book? Well, maybe she was, but I don't think so.

The mediators I know do not keep their eyes on the clock, except to see how quickly they can help resolve a dispute and make their clients happy. I get nervous, for example, when the time is running

and little progress is being made. It's true. We have as much concern for billed time as do the attorneys who bill their hours to clients. Reputations of both are not made on the amount of money earned but rather on the amount saved--and, of course, the end results.

Ironically, sometimes the mediator's dilemma is trying to decide whether to declare a mediation at impasse rather than waste more costly time, possibly at the expense of an unseen but imminent resolution lurking just around the corner.

What is the solution? Preparation, pure and simple. Yes, it takes billable time--or under a contingency arrangement, non-billable time, but still time--to prepare, but consider the valuable time to be saved. A well prepared, properly organized approach to a mediation proceeding by both sides saves the time of the mediator, the attorneys' time, and the time of the clients--yes, their time has value, too.

It is helpful, in that preparation, to furnish the mediator a summary of the dispute. He or she will read this (on their own time, by the way) and have at least a sense of what is involved, thus being able to digest rapidly what they are told in the brief, opening statements.

In my own experience as a mediator, I receive summaries in no more than 5% of the cases over which I preside. Worse than that, I have had occasions where an attorney is not even sure he or she has the correct file. And, still worse, an attorney has shown up without having looked at the correct file, either because he or she hasn't found the time to do so, or because the attorney is pinch-hitting for one who has worked the file from its inception.

This can happen when emergencies arise, but I fear, occasionally, there may exist an undercurrent of disregard for the mediation process itself. A terrible waste of clients' money.

Mediation is intended to, and in most cases does avoid the cost, delay, uncertainty and stress of a trial. Yet, while an attorney would not dare be unprepared for trial, some will treat the opportunity of a mediated settlement lightly. Go figure.

Get with the program, folks. The brass ring of a win-win settlement is there for the grabbing. Make the best of the opportunity. Happy mediating...

PREPARE THE WAY

Behold, I will send my messenger,
and he shall prepare the way before me.
Malachi, 3:1

I was especially struck by the above quote, because it seemed to apply to what I have seen in too many mediation proceedings. And, no, I certainly am not elevating the status of attorneys to the "messenger" referred to in the good Book. The promise and command, however, are appropriate.

Yes, I have preached this sermon before, but I do not mind taking the pulpit again, if only to drive the message home.

It is not simply the attorney's professional pride at stake when he or she comes to mediation unprepared. There is another participant whose presence is not exactly incidental to the process. Remember the client? The client is the one for whom the attorney prepares the way.

What runs through the client's mind, when his, her or its attorney stumbles and stutters through a mediation proceeding? Or apologizes for bringing the wrong file? (Oh, yes, it happens.) Or explains that "another attorney normally handles this file and is more familiar with it"?

Such attorney or the firm has many files and may enjoy the luxury of being able to waste or at least be cavalier about one. The client

has only one file, and nothing is more important to the client at that moment in life.

So, counselor, beware. Take your client's case lightly at your peril, and the perilous consequences can be many.

Mediation offers a golden opportunity to demonstrate your legal—and personal—skills to your client, as well as to others present at the proceeding. Settle or not, that is a matter between you and your client. But do not waste the best opportunity you will have, either to settle or to lay the groundwork to do so after mediation and before trial.

In a settlement, the expense, delay, stress and uncertainty of a trial are avoided. If those aspects of litigation are properly explained to your client, you will have a happy client, one impressed with your professional skills and one likely to see you again in the future or to send his friends and relatives to you.

Messenger, prepare the way!

--and, by the way, have the happiest of Holidays!

PRISONER FOR A DAY!

I confess. I was in prison last week. My crime? Being a mediator at the wrong time and in the wrong place.

Well, not really. In fact, it was a successful mediation day, albeit an unusual one. After over 600 mediations under my belt, the experience was a new one for me. The female claimant was an inmate incarcerated, for second degree murder, for the past twelve years with another five to go. Surprisingly, she was pleasant, polite and articulate, and she made no unreasonable settlement demands.

When we—the attorneys, Florida Department of Corrections risk manager, and I—arrived at the main building of the women's prison compound, we were told we could not bring in any bills in denominations of five or greater. (They didn't say what we could have done with one hundred ones.) "So, what do we do with them?" we asked. I nervously counted $85 in larger denominations in my wallet.

"Well, you might put it in your car," she suggested politely. She did not offer to hold the funds herself and receipt us for them.

Returning from our respective cars—I stuck the wad in the corner of the trunk compartment that, upon reflection, I'm sure would be the first place a thief would look—we then were told to leave our driver's licenses—and our car keys! Now wait just a goldarn minute, I thought. "They" know our stash is in the car, and now they insist on access to it? Hm. Oh well, there were enough witnesses to this

curious transaction, we felt confident we would not be returning home or to the office flat broke. As it turned out, we had nothing to worry about. Our cars, after all, were on the other side of the barbed wire fence. The question, of course, was whether the bad guys (or gals) were all on the other side.

The reasons for surrendering these belongings were pretty obvious. With money and car keys, an inmate could bribe her way out and take off.

After we passed through the electronic security check—they also took my cell phone for safekeeping, depriving me of any means of a rescue call—we were escorted through one door after another, a total of five as I recall, until we found ourselves somewhere in the bowels of the prison yard. Our escorts were trusted inmates, who I must admit could not have been more polite and respectful.

As we were led down one long hallway, I noted an attractive but disgruntled looking young woman, in her early twenties at most, sitting on a small metal stool, her legs and wrists shackled. I assumed she was awaiting further disposition and was not too happy about it.

We finally reached our destination, a bare, empty office that forced the six of us, including the claimant/inmate, to sit so closely our knees almost touched. We were informed that a second room for caucusing was not available, and we anticipated a series of hallway conferences. As it turned out, we invaded and took possession of the employees' coffee room and hoped nobody would evict us.

During the course of the joint and caucus meetings, I found it at least a bit unnerving that inmates, trustees I guessed (and hoped),

frequently passed us in the hallway. It occurred to me at the moment that, if we were abandoned by our "escorts," I for one would have no way of remembering how to maneuver my way back out of that compound and would be passing out this missive via some secret courier.

The mediated dispute was resolved in settlement, but not without a surprise ending. It appears the FDOC has a right to impose a lien on the assets of an inmate for "room and board," etc., at the rate of—hold onto your hat—$50 per day. Now, you don't have to be a master mathematician to figure out what that means for someone already imprisoned for twelve years with five to go. When you put that up against the $100,000 sovereign immunity waiver, you have to wonder whether the plaintiff/defendant roles are ripe for reversal. In any case, it chilled plaintiff's enthusiasm for a major settlement amount. Obviously, it is true that crime does not pay, even after imprisonment.

During the close of proceedings, as the parties and their counsel were signing the settlement agreement and I was finishing up my paper work, I asked the FDOC risk manager for his telephone number. I was puzzled by his stammering and stuttering in giving me the series of numbers. Later, he privately told me that the last thing he wanted was for the inmate claimant to have his number and pass it around to every complaining inmate!

The whole affair was an experience that, in retrospect, I do not regret. The operative word here is retrospect…

SO, WHAT HAPPENED!?

Fortunately, impasses in mediation do not occur often. But they do occur, and the mediator is always left wondering how the case finally resolved. Did the defendant get a verdict? Was the verdict more or less than the last offer? Did the plaintiff receive a verdict? Did the jury bring back more or less than the last demand? Was the No Fault Threshold met? How much, if any, comparative negligence was found?

I realize attorneys are busy, as busy as us mediators, and they may have little interest in taking the time to let us know how it all came out. But think about this—

While all attorneys, whether advocates or mediators, recognize the unpredictability of jury trials, we are aware that between the high and low extremes is a range that all of us think about during mediation. While supreme optimism sometimes reigns, on one side or the other, often frustrating the likelihood of a settlement agreement, most of us have at least a general idea of what might happen when the case goes to the fact finder.

"Reality check" is a term often used by mediators. The ultimate reality check, however, is rendered by the jury (or judge in a bench trial), and, when it comes in, attorneys on both sides experience an enlightened awareness. The same reality emerges from a voluntary settlement. In either instance, the knowledge gained influences, at least to some degree, the attorneys' evaluations of future cases.

So, why not share that negative or positive enlightenment with the mediator? He or she also gains some insight into the evaluation process, and it can help us better assist the parties in future mediations.

My suggestion to counsel: Upon the resolution of a case, whether by trial or voluntary settlement, ask your secretary to make a quick call to the mediator and give him or her the final figure. While the “losing” attorney, in a given case, may be reluctant to convey such information, the “winning” attorney should be more than happy to do so.

THE CASE OF THE TRANSIENT BIAS

No, this is not a mystery thriller. My observations spring from the common but erroneous perception that a good mediator has no biases.

Any mediator who says he or she has no biases or partialities is a misguided zombie. In fact, such a mediator does not exist. The distinction may be semantic, but the biases or prejudices that the courts, attorneys and parties are or should be concerned with are defined in Rule 10.070:

Impartiality means freedom from favoritism or bias in word, action, and appearance.

In other words, what's in your head is your personal business, whether you are a judge, mediator, attorney, or anyone else. As a mediator (or judge), however, you do not let everything that's in your head manifest themselves in a mediation proceeding.

Wait a minute, Ahrens, you say, "I want someone who has absolutely no partiality toward…toward…hmm…the other side, of course…hey, weren't we in the same class at UM?"

You and I know that we all have our emotions, feelings and sympathies, and that those predilections all fall somewhere along the conscious, unconscious and subconscious spectrum.

The transient bias is that bias perceived to have evolved out of the mediator's pre-mediation legal experience. Few attorneys have spent their careers walking on a fence. Most of us were primarily

defense lawyers, plaintiff lawyers, or corporate lawyers. Each of us spent years bombarded by the propaganda prominent in the environment in which we worked.

But something happened to all of us on the way to the forum of mediation. Not only does the intense training program elbow the attorney toward the middle of the road, but, in the course of our mediations, we quickly discover that there are all types of personalities in the ranks of attorneys and adjusters and parties, on both sides. Some are wise, some unwise. Some are skilled, others just learning the ropes. Some have highly focused biases of their own and do not mind trumpeting them, while others take the high road and recognize that we are all there simply to do a job in the best and most responsible manner we can.

In any case, I have found that mediators, regardless of their professional background, not only take pride in their functional impartiality to the parties in a dispute, but actually do develop a deep seated, even handed attitude toward all the participants in a proceeding.

None of this, of course, excuses the mediator from failure to disclose potential conflicts of interest and relationships, as are envisioned by the Rules. Conflicts also may be only perceived, but perception in their case can quickly become reality in the minds of the attorneys, adjusters or parties affected. So it’s important to get them out in the open.

I guess my point is that a history of honesty and integrity—and experience—carry far more importance in the selection of a mediator. To date, I am blessed by having met none at Florida

Mediation Group that fails to meet these standards. I'm sure it is true of most mediators.

THE CREDIBILITY GAME

"What do you think he wants," she asks me.

"I don't know—at least not yet," I reply. "You'll have to read the 'tea leaves.' More often," I explain, "it is not the amount of money he demands but, rather, the way he demands it, the words he asks me to accompany the demand."

"Well, I know him," she says, "and I think he's way out of the ballpark."

"Perhaps, but he says the same about your offer. It's called 'negotiating.'"

Not an untypical exchange in caucus between mediator and attorney for either side. I call it the "credibility game." Neither side wishes to tip their hand on the settlement amount they seek. Indeed, they may not know. They know what figure they would like, but they realize that is not the way the game is played.

I often express regret that there is not a schedule of benefits for tort claims, as in workers' compensation. But, then, such a schedule likely would be criticized by either side or both sides as being arbitrary and unfair.

Negotiation, fortunately or unfortunately, almost always involves a battle of wits. The attorney asks himself or herself: Should I lose my temper? Should I kill him with kindness? Should I criticize his unprofessional behavior? Should I compliment his negotiating skills? The answers to these questions are yes—and no—and

sometimes. So much depends on the personalities of the attorneys and adjusters, occasionally even the clients who have been known to ignore their attorneys and grab the podium.

From a mediator's viewpoint, whatever works (within the bounds of common courtesy and ethical behavior) is fine. It is very satisfying to me when I discover the attorneys know and respect each other. They already have a good idea what to expect, leading to either a quick settlement or a quick impasse-with no hard feelings and the understanding that they will continue negotiating.

The tough case arises when the attorneys do not respect each other and one or the other perceives (or, for whatever the motive, accuses) his or her opponent to be unethical or unprofessional, or at a minimum unreasonable. Whether or not opposing counsel is does not matter. It is the perception that prevails. And the mediator must somehow overcome the roadblocks created by those perceptions and/or such rhetoric.

Yes, negotiations are steeped in clichés, but so what? Even clichés carry messages, and it is the message that often carries the day. Small, incremental moves coupled with words like "There isn't much more" or "We're close to where we want to be" or "We're close to our bottom line" have to be weighed carefully by the listener.

Similarly, large monetary moves along with remarks like "We're making a substantial move and expect the same in response" also hint at a top or bottom line. In either case, however, it cannot be assumed that what is said is what is thought. Listen carefully also to what the mediator says. His or her purpose is to convey the essence of a message that, on the one hand, avoids the strident

rhetoric with which it may have been imparted, while, on the other, offers a clue as to where the other side is going.

I wish I could reveal some deep, dark secrets to the negotiating process. There are none. It is a game and one that participants must play. Unless, of course, you choose not to play, always your right. You may decide to leave the matter in the hands of a third party, in which case both sides forego all control over their clients' fates and commit themselves to letting the devil take the hindmost.

What do you think? What do you expect from opposing counsel? How do you respond to "fire and brimstone" rhetoric? Do you engage in it yourself? Is it worthwhile to be completely straightforward and candid in your advocacy? Give us your opinion. We seek enlightenment.

THE EYES HAVE IT!

Unless you've been a hermit in a cave, out of touch with society all your life, you know that communication consists of more than speech and writing. When communicating parties are present at the same sitting, communication can include a tilt of the head, a furrowed brow, a squint of the eye, the curve of a mouth.

Body language interpretations are legion. Watch the arms crossed over the chest in a mediation and you probably are watching an impasse in the making. Other unconscious movements include:

- **Hand-wringing:** Thinking over an idea
- **Rubbing the nose:** Rejection, disagreement
- **Patting the hair:** Approval
- **Steepling of fingers:** Feeling of superiority
- **Rubbing the eyes:** An inner desire not to see something that might change one's mind
- **Fingers interlocked, elbows on table:** Inward struggle to keep silent
- **Tugging at shirt or blouse cuff:** Self-satisfaction
- **Legs crossed, one foot swinging:** Desire to walk away

And, yes,

- **Arms crossed over chest:** Reluctance to change one's mind

Okay, Ahrens, you might say, we've heard all that before. What's the point? And how does it relate to mediation?

Just this and in just this way: All mediators have had occasions where one or more of the parties are not present, and the others agree to proceed without that participant, or perhaps have them join by telephone conference. The mediator does the best he or she can to help the parties reach a settlement. Too often, however, an

impasse is the result, and there are reasons. A significant feature of mediation is the opportunity afforded the parties and their counsel to meet and get to know each other. Occasionally, they see each other for the first time.

How will the plaintiff appear as a witness? (The behavior of your own client in a “confrontational” setting can help you assess your chances in court. Some attorneys take the second chair in order to watch their clients’ reactions to what the mediator and the other side is saying.) What are the professional and oratorical skills of counsel? What are the emotional or stress levels displayed by parties or their counsel?

I recently impassed a mediation in which the insurance adjuster was available only by telephone. She was obstreperous in the joint session and unnecessarily aggressive in caucus. Even given an obviously troublesome personality trait, it was, I believed, easy for her to behave this way, because she was sheltered from the visible reactions of and respectful accountability to those present.

I cannot believe she would have behaved the way she did, had she been forced to look into the eyes of opposing counsel, his client and the mediator—perhaps even of her own attorney. Some folks simply act differently when on the telephone, not unlike their behavior behind the wheel of their SUV.

Watch the eyes, my friends, and the body language. They may tell you as much about the folks on the other side of the table as what they’re saying. Have you ever watched Marcel Marceau, the famous mime? He could communicate very well without ever saying a word.

Lawyers, of course, would choke on the silence, but I hope my point is made. At times, an absence cannot be avoided, and rescheduling can be difficult. Whenever possible, however, do yourself and your client a favor. Have them at the mediation proceeding. It can be a valuable learning experience for everyone involved, including your client, and can go a long way toward assuring a settlement and avoiding an impasse.

THE HIDDEN AGENDA

Those of you on the wrong side of sixty, like myself, will remember being glued to the old Philco each week hearing those ominous, deep-throated words calculated to draw us closer to the radio:

"Who knows what lurks in the minds of men? The Shadow knows!"

As memory serves me, and that is open to increasing debate, even the Shadow, while invisible and standing nearby, knew only what he heard others say. I do not recall his being able to read minds. But let's not get too technical. The message was clear. Only the Shadow could know what someone was thinking, what lurked deep in their psyche. We ordinary mortals did not have a clue.

And this is what my message is about. In the course of litigation and mediation, an attorney, mediator, adjuster or litigant cannot know what is truly on the mind of a participant in the process. We can guess, and occasionally we'll be right. More often, we'll miss the mark, then be surprised by the outcome.

When I was still in corporate practice at a major utility, we tried two cases that demonstrated how a hidden agenda can influence the outcome.

In one, the plaintiff claimed to have suffered an injury from electric shock while using the telephone. Although an electric line did come down in a windstorm striking a phone cable, there was much testimony over whether current could or could not have reached the earpiece. The plaintiff and her counsel were Black, a consideration

that was of no concern to the defense but had a definite bearing on the outcome.

During deliberations, a Black juror, remaining silent during an hour's debate over the operation of breakers, relays and other technical devices, finally had to be asked to express his opinion. He pulled his chair toward the table and said: "I don't know anything about all this technical stuff, but I know these people, and she's not hurt." End of deliberations, verdict for the defense.

In the second case, the utility was convinced it "had it in the bag," principally because there was an electrical engineer on the jury, an unusual development—in retrospect, plaintiff's counsel probably knew something we did not—and it was believed he clearly would support the defendant's arguments. Surprise. Verdict for the plaintiff.

The engineer was elected foreman—had we known that, we'd have been even more confident—and came up to us after the trial. He explained, almost apologetically, that, while he certainly was familiar with the workings of an electric system, he "could not let the plaintiff leave without some money." A mediator, of course, will make every effort to uncover hidden agendas from the participants in a mediation, since he or she knows well that lurking motives can have a bearing on whether a dispute is resolved or not, or in what manner. The mediator also knows that, even with the best of efforts, they will never all be uncovered.

To be clear, I am not talking about evidentiary matters that have been, can be or will be uncovered in the normal course of legal or voluntary disclosure. Sometimes, the most troublesome "evidence"

consists of personal biases, psychological bents, ulterior motives, or pressures from family and friends, to mention just a few.

It is essential that attorneys and adjusters appreciate the importance of hidden agendas. They can play a major role in negotiations, but, more often than not, decisions nonetheless will have to be made without knowing what they are. Cordial conversations, courteous inquiries, and patience can go a long way toward knowing more about your adversary and what makes him, her or it tick.

TO SUE OR NOT TO SUE: THAT IS THE QUESTION: WHETHER 'TIS NOBLER…TO MEDIATE FIRST

With apologies to Willie Shakespeare, what I'm onto here are pre-suit mediations. We'll call them, for short, "presuits." Why do so many litigants await the commencement of litigation and a court order before they go to mediation?

Perhaps, attorneys believe their clients do not have the benefit of the confidentiality assured by Florida Statutes in court ordered mediations, thus inhibiting a mutually collaborative and successful negotiation. Perhaps, they believe they cannot have sufficient information to resolve adequately their disputes without the benefit of extensive discovery. Perhaps, they believe they will reveal weakness in agreeing—heaven forbid, requesting!—early, voluntary mediation. Perhaps, they believe the cost of early, voluntary mediation is wasted, because it cannot be successful for all the above reasons.

Perhaps, just perhaps, they are wrong on all counts.

Confidentiality in voluntary mediations—before or after commencement of suit—can be readily assured with the use of form Confidentiality Agreement that merely has the parties agreeing to adopt the statutory provisions that would otherwise apply to a court ordered mediation. There is no need for attorneys to spend the time negotiating and drafting such an agreement. The form has never been challenged.

Sufficient information? Did you know settlements in presuits are reached almost as frequently as those in mediation after suit is filed? The proof of the pudding, etc. One major insurance carrier recently informed me its presuit mediation settlement percentage in one of its service areas is close to 90%, as compared to less than 60% for their mediations after swords are drawn. My personal experience in helping to reach settlements in presuits is about 70%, only slightly more in court ordered mediations. The fact is in most cases both sides already know just about everything that is important to know about the case. If both sides are doing their jobs, they have at least secured enough statements and other data to let them know what they are facing, good and bad. They just have not found a way to, in their minds, safely and effectively communicate the information. The mediation process, with the mediator in the caucusing stage carefully conveying information from one side to the other and respecting confidentialities requested in caucus, offers those means of communication. And I hardly need mention the cost saving. Clearly, settlement before suit is filed avoids the significant outlays in cost, time and stress. The cost of mediation is minimal by comparison.

Mediating early does not indicate weakness. Presuits are becoming increasingly popular with insurers. They, too, see the savings in resolving disputes before launching into expensive litigation—in many cases involving a costly retention of outside counsel. Some of the savings often go into the claimant's pocket.

Presuits are a win-win for all participants. Insurers clear up their backlog of files, attorneys recover fees in a greater number of cases within a shorter time span, and claimants are reimbursed

earlier (often with the benefit of a lower contingency fee) and avoid the stress, delay and uncertainty of litigation.

As the commercial once said: “If’n you ain’t tried it, don’t knock it!” Indeed, I believe you’ll be pleased with the outcome in most instances. Even where a settlement does not occur, the groundwork for one is established.

UNWELCOME ADVICE

Advice is seldom welcome; and those who
want it the most always like it the least.

Philip Dormer Stanhope,
Earl of Chesterfield
1694-1773

Maybe the good Earl was thinking of mediators and the rock-and-the-hard-place situations in which they too often find themselves.

A lawyer is a lawyer all of his or her life, and it's damned hard not to be one while serving as a mediator. The attorney/mediator faces a dilemma in many mediations. On the one hand, he/she has a general knowledge of the law and often recognizes when one side or the other misrepresents a legal principle; on the other hand, the mediator is loathe or unable to offer legal advice to correct the misrepresentation.

Rule 10.090 PROFESSIONAL ADVICE, provides that "[w]hile a mediator may point out possible outcomes of the case, under no circumstances may a mediator offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute." This Rule would appear to leave considerable room for advice that does not necessarily direct itself to the outcome of the case.

A Committee Note to Rule 10.060 SELF-DETERMINATION merely confuses the issue in stating "[w]hile a mediator has no duty to specifically advise a party as to the legal ramifications or

consequences of a proposed agreement, there is a duty…to advise the parties of the importance of understanding such matters…" (Emphasis added) The Note intimates that the mediator can ethically offer legal advice. I submit, however, that the comment may have been made in the context of a mediation in which neither of the parties are represented by counsel, such as in family mediations. Even in those circumstances, the line between mediator and arbitrator becomes fuzzy.

Mediator Qualifications Advisory Panel has consistently advised against mediators giving legal advice. In its January 7, 1997, the Panel states: "Implicit is that a mediator shall not provide the advice him or herself. One of the reasons a mediator may not provide advice is that advice inevitably will favor one party over another and thus, by its very nature, advice cannot be provided while maintaining impartiality."

As a practical matter, a mediator treads on very thin ice if he or she undercuts the authority if not the professional integrity of a party's attorney by offering unsolicited legal advice. Even when asked by counsel for such advice, the mediator is placed in a troublesome position, since he or she cannot know whether counsel is really only seeking concurrence of counsel's opinion or, at the least, seeks advice helpful to the client.

The better and safer practice is to decline offering legal advice—a function, after all, of the clients' attorneys, not the mediator—and, if it appears that significantly bad advice from counsel is floating in the air, to ask counsel questions that will serve to elicit clarification of his or her legal opinion—and, occasionally, a change of heart. This also might involve caucusing with counsel for both sides, apart from their clients, reminding them that legal issues cannot be resolved in mediation, and urging them to reconcile their opposing

legal opinions at least for the duration of the mediation in order to move the process along, hopefully toward a settlement. Under any circumstances and with the best of motives, the proffering of legal advice by the mediator can set the mediator on a course of partiality. Motions to dismiss, summary judgment and directed verdict are the places to resolve legal issues. The mediation proceeding is best suited to resolving factual differences and to addressing the practical considerations of protracted litigation and trials.

UPSTAIRS/DOWNSTAIRS

At the commencement of a mediation, the first thing a mediator sees, even before introductions, is the appearance of each of the participants—attorneys, adjuster, parties. Some of the sights are pleasing, others can be distressing. Attorneys sometimes are prepared "upstairs" but not "downstairs," that is, their cases are entirely in their heads and they bring no documents or records to the proceeding. The mediator's mind begins to spin with ugly possibilities: opposing counsel will request to see a document and it will be sitting back in the other attorney's office; opposing counsel is gearing up to respond in kind, i.e. furnish nothing, even though he or she has a full file at the table; or counsel is there only because the court ordered them there, and they have no intention of negotiating a settlement.

In contrast, when counsel has requested a VCR, has brought large blowups and other demonstrative displays they intend to use in court, and is pulling into the room an airline luggage cart bearing his complete file—the mediator can be pretty sure that attorney means business, is there to negotiate a settlement, and is prepared to demonstrate through documentary and other evidence the validity of their claim or defense.

In most cases, the appearance or non appearance of these accouterments fall somewhere between the two extremes, and, of course, they will vary with the nature of the case, the evidentiary magnitude of which is generally known by attorneys on both sides.

As important as the mediator's impression, positive or negative, is that of opposing counsel or the adjuster or even the parties. If they are turned off by what they see, or do not see, the proceeding may be over before it starts. On the other hand, it is no mystery why, when one attorney shows up with thick files and other evidentiary battle gear, the other side (perhaps not as prepared) is at a psychological disadvantage. Even if counsel pretends not to be impressed, the client can become very nervous.

So, what are we saying? I guess it's simply that being prepared for mediation involves both the appearance and reality of preparation. It is all well and good to have such a fantastic memory that one need not bring anything but his or her monstrous brain (normally contained in an enlarged head), but be fair to the process and to the other side. At least appear to be prepared, both to present your case in the best interest of your client and to respond to factual inquiries by the other side.

Yes, the court makes you be there, but, since you are there, why not make the most of it. In the absence of a final dismissal or summary judgment, no reasonable, experienced attorney would pretend to have a lock on the outcome of a trial. Different damage evaluations, perhaps, but these more often than not can be resolved at mediation. This after all is the function of mediation. Now go forth, be a good scout, and Always Be Prepared.

WATCH THE BOD!

No, guys and gals, there is nothing lascivious about my advice. After all, I expect all the participants at my mediations to be fully dressed and paying attention to the business at hand.

About three years ago, in a piece entitled "The Eyes Have It!", I offered some comments about body language and the importance to mediators, attorneys and adjusters of being aware of it. Since then, I have had the pleasure of reading The Mediator's Handbook, authored by John W. Cooley and published this past year by The Institute for Trial Advocacy. Mr. Cooley came up with a number of other observations on the subject. I think they're worth sharing.

In Section 2.3 of The Mediator's Handbook, "Effective Processing of Sensed Body Language," Cooley states that "your effectiveness as a mediator will, in part, depend on your ability to accurately sense and interpret the body language of parties and their counsel." Good advice, although I'm not sure why he limits his advice to mediators, since attorneys and others present should benefit by being similarly observant — and, also, by being conscious of betraying their own inner motivations.

Verbal communications, Cooley explains, conveys factual information, while nonverbal conveys emotional information or feelings, the latter normally, but not exclusively, in the form of body language. Interestingly, he refers to "paralanguage" as a form of communication conveyed by vocal aspects. Examples are:

- Monotone voice (boredom)
- Slow speed or low pitch (depression)

- High voice or emphatic pitch (enthusiasm)
- Abrupt speech (defensiveness)
- Terse speed, loud tone (anger)
- High pitch, drawn-out speech (disbelief)
- Ascending tone (astonishment)

Cooley and I have a few differences of opinion as to body language, so you'll have to be the judge. When in doubt and where different, consider both as possibilities:

Looking at you sideways or not at all	Suspicious
Chewing on pen or biting fingernails	Nonreassuring
Doodling, drumming fingers	Bored
Rubbing Palms	Expectant
Finger touching nose; hand over mouth *EPA: Rejection, disagreement*	Doubtful
Rubbing/touching nose after speaking	Dishonesty
Clearing throat; wringing hands; tugging ear *EPA: Thinking over an idea*	Nervous
Clenched hands; rubbing neck	Frustrated
Interlaced fingers *EPA: Inward struggle to keep silent*	Self-controlled
Steepling of hands or fingers *EPA: Feeling of superiority*	Confident
Leaning forward	Interested
Open arms and hands	Open, acceptant
Index finger to cheek; removing/cleaning glasses	Evaluating
Sitting on edge of chair	Ready
Crossing arms on chest EPA: Reluctance to change one's mind	Defensive

I would add to these the following:

Patting the hair	Approval
Rubbing the eyes	Desire not to see something that might change one's mind
Tugging at shirt or blouse cuff	Self-satisfaction
Legs crossed, one foot swinging	Desire to walk away

Now, a word of caution. To the extent these "languages" are instinctive and not self-controlled, they will mean something to you and may even tip you off regarding the other party's intentions or strategy.

On the other hand, beware the thespian who uses these motions to mislead you. Body language must be assessed in the context of the entire person and the total setting. As Cooley says, "you must carefully read these physical motions in the context of their facial expressions and vocal clues and your perception of the motivation and goals of the parties to decipher the true meaning of their message."

I'll bank on the probability that most people are neither aware nor conscious of such physical movements and will betray themselves without realizing they are doing so. That said, it still pays to be a good scout and always be prepared!

So, watch the bod, but keep your mind on your business!

WHAT DOES A MEDIATOR DO??

Okay, we know you can't make decisions. We know you can't issue orders. ('I'm not a judge or an arbitrator, blah, blah, blah.') We know you can't take sides, must always remain neutral. And we know you can't give us legal advice. And then you tell us mediation is a consensual process. Bummer. Now the other side can walk at will!

"So, what in the heck DO you do?"

Oh, you've never said this in so many words, but we've read your minds and understand your frustration. In many cases, you'd like the mediator to play judge and settle the matter once and for all, right?

The problem is the law and regulations covering the conduct of mediators and the process of mediation do not allow us to do these things, and it's well they do not.

Mediation is your process, not the mediator's. Decisions are yours and your client's to make, and mediation is the only forum in which you have complete control over decision making by or in behalf of your client. And, as much as you'd like the mediator to side with you, you don't really want this to happen, 'cause in a given case how would you know which side he or she actually is on, hmm?

And, finally, the rendering of legal advice is the job of the attorney representing the client. Ask for our opinion and we'll give it to you the best we can. But don't expect unsolicited advice. In the first place, you might resent it, professional pride being what it is, and,

secondly, how would opposing counsel feel about our giving you favorable advice or reminding you of some legal principle you may have overlooked? He'll think, hmm, smells of bias.

So, what DO we do?

Well, first and foremost, we give you a hard time - or try to. We ask you questions you probably don't want us to ask or have forgotten to ask yourself or your client, or have forgotten the answers to. We call them "reality checks."

We'll ask you and your client what it is you're really looking for in a settlement. We do this as much for your benefit, to be sure you are clear about your expectations, as for ours in helping you reach that goal.

We'll bore you with clichés that, while you've heard them ad nauseam, are probably quite original to your clients and frequently do serve to refine the objectives in steering parties toward a resolution.

We remind you to look at the big picture and not focus on inconsequential legal or factual issues. They merely distract you from the key issues and your settlement goal.

We tell you and your client (just in case it hasn't been discussed in recent weeks or months) trials are expensive, stressful, take time and that their outcomes are terribly uncertain.

While subtle and often not appreciated, by separating the parties in breakout or caucus sessions, we are able to control heated emotions that can frustrate a settlement and to keep folks focused on their interests rather than their positions.

And, finally, we try to make the point that an amicable settlement, while not always satisfactory to either side, is the best of all worlds and a win-win for both sides.

Oh, also, occasionally, we'll share the latest good joke with you even if it's not always worth the cost of admission.