CHAIM STEINBERGER, P.C.
ATTORNEYS AT LAW
150 EAST 58TH STREET, SUITE 2701
NEW YORK, NEW YORK 10155
(212) 964-6100
FAX (212) 500-7559
www.theNewYorkDivorceLawyers.com
admin@tnydl.com

Mediation Toolbox

REPRESENTING CLIENTS AT MEDIATION

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I. **Introduction**

Representing clients in court obviously requires much knowledge and many skills. The lawyer or advocate must be learned and schooled, and must meticulously know all of the elements for the claim the client is asserting, predict the defenses that will be raised to counter the client's claims and the elements to it (*i.e.,* the controlling substantive law). The advocate must also know the procedural law, the rules of evidence, the burdens of proof, burdens of persuasion, local courthouse rules, the customs and practices of the local courthouse, the general courtroom decorum or "batting order" controlling presentation in courts, the rules of direct and cross-examination, and of the opening, and closing statements. The skilled advocate must also be able to spot issues within the sometimes bland facts recited by the client, the adversary, and potential witnesses, be able to draw distinctions between cases, and recognize and argue the implicit but unstated underlying premises of decisional law, premises that must have been necessarily decided for the court to have reached its announced conclusions.

In addition to all this "bookish" knowledge and scholarly skills, the skilled advocate must also have interpersonal intelligence or "people smarts" to successfully achieve the client's objectives. The advocate must keenly perceive the human condition and have an ability to predict how certain presentations will affect the fact-finder's emotional state. Because the emotional "justice" of the case can often be more determinative than the dry, black-letter law,[1] the skilled advocate must have deep knowledge of sociology, human psychology and behavior, and emotional intelligence.

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[1] Ralph Adam Fine, The How To Win Trial Manual, chapter 5, "Your Winning Theme" (revised 3rd ed., 2005).

The skilled trial lawyer must also be able to convey complicated concepts simply, be a skilled screen-writer to choreograph the trial to dramatic effect, be a skilled raconteur to entertain while educating and elucidating, and have the ability to interrupt (inserting themselves into discussions at the bench to ensure the client's claims get appropriate "air" time), and disagree, without seeming disagreeable.

To represent disputants at mediation–or to settle disputes through negotiation, for that matter–the advocate requires all of the above skills as well as several others (detailed below). While, in mediation, an advocate might rely on the skills of the mediator to effect a resolution, better practice is for the advocate to assist the mediator (or at least not to increase the hindrances) by utilizing best-negotiation practices, increasing the odds of obtaining a resolution favorable to the client.

Before turning to the advocate's role at the actual mediation session, preliminary matters are dealt with.

II. **Why Mediate?**

There are many good reasons why even an excellent litigator should recommend and participate in mediation for all cases, and very few reasons why she shouldn't. Mediation–with lawyers at the clients' sides[2]–is generally a more efficient dispute resolution mechanism than

[2] Mediation without lawyers at the parties' sides is extremely dangerous. A party may relinquish serious rights without knowing that they've done so. The mediator is then thrust into the position of either abandoning her neutral position and protecting the party–something that might cause the other party justifiably to terminate the mediation–or allow the party to agree to inadvisable terms. The rejoinder often made, that the parties will obtain review lawyers, does not resolve this issue. Because parties continue to build upon the work they've done in prior sessions, they cannot later undo a prior, critical, agreed-upon term without seeming to have been negotiating in bad faith all along. As a result, review lawyers have little ability to undo prior terms and serve, primarily, only to innoculate the agreement against later

litigation. It is often quicker and cheaper than full-blown litigation, and usually results in a resolution more quickly than trial does. Considering that more than 99% of all cases resolve before being decided by a judge or jury, it makes sense to give all parties their best chance at resolving their dispute before incurring significant trial expense. Mediation's most important advantages to the parties, though, is that it preserves the parties' agency and autonomy, does not further deteriorate their already damaged relationship, preserves (or even improves) their ability to work together in the future, while also often resulting in better results for both of the parties than they either could have achieved by even the best judicial decision. (More on "win-win" resolutions below.)

In addition to the better outcomes usually achieved by the parties, the process itself benefits them. In mediation, a party is able to look the other, across the table–directly in the eye–and explain just how deeply they've been wounded by the actions of the other.[3] Often cathartic, it allows the other party an opportunity to explain themselves, apologize, or make up for the hurt done. More powerful than even their best "day in court," this has the potential for restorative justice and often gives the parties different or deeper insight into their and the other's actions, making them both more malleable and susceptible to listen to reasonable proposals facilitating resolution.

In mediation the parties experience a new way of speaking to one another and hearing the claims of the other. They then get to, together, develop a resolution that works for the both of them. As a result, they do not foist their dispute onto a disinterested third party who must

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challenge.

[3] Obviously, Courts are generally not concerned about parties' feelings and would not tolerate such an emotionally-important, but legally irrelevant, discussion, and certainly would not brook the sensitivity and patience it warrants and requires.

decide what is fair. Rather the parties themselves retain ownership of their dispute, fashion a beneficial resolution, maintaining their autonomy and agency throughout, and retaining control of their future and destiny. And, because it is "their" resolution, they have "buy in" and retain ownership of it leading to better satisfaction, more compliance and less attempts to modify it later.

Parties who voluntarily reach an agreement generally comply more faithfully and happily with it then those who have even those same terms foisted upon them by a controlling power, like for example, a court order. Though both might be equally controlling legally, compliance with a voluntary agreement feels less compelled and restrictive and, therefore, people bristle less when complying with them. Agreements are challenged less frequently, and parties return less often to court to modify agreements. Parents generally feel and stay more involved in their children's lives leading to more stability and better outcomes for the parents and children. Thus, even if the same result can be reached by litigation, there is great value in achieving it by voluntary agreement.

Moreover, often better, unconventional resolutions are found when the parties put their heads together to find ways by which each can simultaneously achieve what is most important to them. When parties come to lawyers, they've typically arrived at what seems to them to be a zero-sum position. In order for one party to win the other most lose, and vice versa. Very often, however, their interests just *seem* to be diametrically opposed but in actuality are not.

This point is well-demonstrated by the paradigm story of the orange. Two people were once fighting over an orange.

"I want it!"

"No, I want it!"

"No, I want it!"

"No, I want it!" each, in turn, yelled.

Impatient, one of them finally pulled out a knife, sliced the orange in half, and walked away with half. Peeling the half-orange, the person disposed of the peel and ate the fruit.

The second person peeled the remaining half of the fruit. However, instead of eating the fruit, the person threw the fruit away and used the orange-peel to bake a cake.

If only either party had stopped fighting for even a moment and asked the other, "What do you want the orange for?" each of them could have had *the whole orange*. Where one needed the fruit and the other the peel, each could have had the whole orange without either of them giving up anything they valued. What appeared initially to be diametrically opposite, zero-sum positions and interests was in fact anything but, and the dispute could have in fact been reconciled into a result in which *each* achieved *everything* they wanted. (More on probing beneath the surface below.) One could have won without the other losing. They both could have won at the same time–the famed "win-win" resolution, where both sides win simultaneously.

This is very often the case in mediation. In our rapid-fire, impatient, society, smart people often "bottom line" their interests by summarizing their *interests* into *positions*, and then viewing their positions in absolute terms. "I want the orange," one correctly stated. That position was then echoed by the other. And so, they arrived at an impasse.

Had one said, "I am hungry and need to eat something," and the other replied, "I'm baking a cake and need the zest of the orange for my recipe," they might've realized the resolution that was possible. But people generally don't talk at this level of detail. Instead they summarize their interests into seemingly absolute positions and a non-threatening mediation session can help

them dig beneath the explicit positions to unearth the core interests they are trying to satisfy.

As another example, at a meeting a person once said, "I need to leave." As a result, the negotiation session would have had to end, to the chagrin of the other party. What the person really meant was, "I'm very hungry right now, and need to eat lunch." By unearthing the interest rather than the stated position, the parties were able to order-in lunch, and continue negotiating during and after lunch. Understanding the interests behind the stated positions is key to successful mediation.

Two other concepts are relevant.

Game theory teaches that in situations where adverse parties can trust each other, they can achieve a better result for the both of them than they could if they distrusted each other. Something akin to the lowest common denominator, when parties cannot trust one another they both lose because they can only agree to a resolution that cannot be unilaterally violated by the other. As a result, the distrust cost them both the better result they could have achieved. But when parties are able to work together, even if they have divergent interests, they can usually construct results in which they both come out ahead–a better result for both.

Second, the major idea behind improvisation ("improv") acting–where the performers come onto the stage without any idea of what they or the other actors will do next–is that the result of diverse people working jointly together will almost always be better than the best efforts of any one of the performers. As Charna Halpern[4] writes, the Sufi master-weavers incorporate the mistakes of their apprentices into the larger patterns of the rug, to make an even

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[4] Charna Halpern, Art by Committee: A Guide to Advanced Improvisation (2006). Ms. Halpern was the partner of Del Close, father of long-form improv at Second City in Chicago.

more beautiful pattern. Carried over to the mediation context, when the both parties put their heads together and fashion a result, it will likely be far better for both of them than any resolution either of them could think up by themselves.

One example of such a better result that is available only in a non-adversarial dispute resolution process is the ability to "expand the pie" before you split it. When the pie is expanded, even if each gets only half of the metaphorical pie, that half is greater than what the party would have received if they got 100% of the initial, smaller-sized pie.

Because the parties retain control of their dispute and its ultimate resolution, they can fashion even non-legal resolutions that satisfy their needs and even if the resolution doesn't fit neatly into a pre-formed legal paradigm. Often ultimate "win-win" resolutions are outside the realm of what a judge could order. Parties can, for example, agree that a certain past invoice will be waived but that the customer will purchase all necessary future widgets from the other at an agreed-upon price, ensuring the seller receives a profit that would make up for the waived invoice. A court could never issue a ruling compelling future purchases, even though this resolution allows the both of them to "save face."

A mediated agreement demonstrates to the litigants how their disputes can be resolved with dignity, integrity, justice and fairness and, hopefully, gives them a paradigm that they can use in the future whenever a dispute arises.

As a party-driven, tailored process, parties in mediation need not strictly follow traditional discovery rules and practices. They can fashion the discovery that's appropriate for their particular case and controversy, saving themselves the significant legal and transactional costs, and the disruption of, assembling, producing, and reviewing what might be only tangentially-relevant

documents.

With more tailored discovery and a more relaxed procedure, the mediation process tends to move more quickly than litigation. Its informality allows the litigants to sit down at the negotiating table sooner and resolve their disputes earlier, saving them time, costs, and angst. Mediation will typically not require the multiple court appearances or the need to await multiple judicial rulings in the matter.

Moreover litigation, as an adversarial process based on who can *compel* a result upon the other (a "force-" or "power-based" process), further antagonizes the parties. At the end, no matter who wins and who loses, the parties will dislike and distrust each other more, and will have a harder time cooperating with one another in the future. They may never be able to do business with one another again. Their relationship may be destroyed beyond repair. In the family-law context this can be crucial, permanently damaging the parties' ability to make joint decisions for the benefit of their children. A dispute-resolution-mechanism that resolves the parties' dispute but does not further traumatize their relationship is, therefore, preferable to any one that will make it impossible for them to co-parent their children. Thus, particularly when the relationship between the parties is more important than the issue they are fighting about, parties should select a non-adversarial dispute resolution process. "Do you hate your [future-ex] more than you love your children?" is something divorcing parents should always consider.

Moreover, even if the case does not settle in mediation,[5] the litigator has received

[5] Some fair proportion of cases that don't actually settle at the mediation itself construct a process through which the case will be settled. Thus, if the parties cannot agree on a home appraiser, they might agree that each of them would select one appraiser and they would use the average of the two appraisals; or they might ask the two appraisers to agree on a third whose appraisal would bind them both; or they would put the house up on the market for the higher appraised amount and, if not sold, reduce the price every 60 days until it reached the lower appraised amount. While

valuable information in the least costly manner available, by using the mediation process. The litigator gets to audition the client's claims and hears how the other side will respond. The weaknesses of the client's own case is probed, and the other side's perceived strengths are revealed. In the face of competent lawyers (and perhaps some probing by the mediator) the hyperbolic rhetoric and exaggerated claims of either side usually falls away. The litigator gets to test-run her best arguments and sees whether it will hold up to scrutiny or whether there is a defense to it she hadn't thought of. She gets to hear and see how her own client and the other side's will present in court, providing a window for whether they will be effective on the witness stand or not. A mediation session is, therefore, the best, most educational discovery device and crucible to test and learn about one's own case and that of the other's. As a moot court exercise, it can't be beat!

Moreover, as every good litigator knows, parties' positions are not stagnant. Rather, they shift and shape with the sands of litigation, countering and adapting to the claims, replies and defenses of the other. As a Prussian General once noted, even the best laid battle plans never survive the first encounter with the enemy.[6] Too often, litigators are surprised by the claims or defenses raised by the other side, sometimes even for the first time at a mediation or negotiation session or, more fatally, at the trial itself.[7] Mediation sessions are, therefore, great devices for getting

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reaching an immediate settlement is the ultimate goal, agreeing to a defined process through which the dispute is resolved is a great second.

[6] Helmuth von Moltke the Elder, Chief of Staff of the Prussian army before World War I.

[7] It is for this reason that the author discourages lawyers from submitting pre-mediation statements. The lawyers spend significant time writing them, the mediator reviewing them, only to find out at the joint session that the battle lines have shifted and the real issues in contention are not those presented in any of the pre-mediation briefs. Moreover, not reading the parties' papers ahead of time means that the mediator enters the session without any preconceived ideas and is, therefore, more in the moment, with no agenda of her own, and genuinely curious and interested to hear with the parties and their lawyers will say. Without an agenda or preconceived notion of how the case "should" settle, the mediator is more able to maintain a clean slate and effectively establish rapport with each side.

to the essence of the parties' dispute, learning, and dealing with their ultimate claims and defenses.

Parties often won't naturally recognize the advantages of mediation. The only time a party involves a lawyer is after the party has determined that the *other*[8] is unreasonable and can't be negotiated with. If parties have been fighting for years and have spent more than token amounts on litigation, their initial impressions of the other have calcified. And, of course, these parties are correct, to a large degree. If they keep doing what they've been doing, they'll keep getting what they've been getting. Doing more of the same won't bring them any closer to a resolution. Though parties have typically convinced themselves that the other just cannot be negotiated with, the techniques below will likely change their dynamics thus changing behaviors and outcomes, allowing them to reach resolutions in even the most intractable of cases

Litigators, too, are often skeptical of mediation. "I can negotiate and settle cases myself," they say. "I do it all the time. So why do I need a mediator?" The dynamics of mediation, as detailed below, however, change the battle lines of the parties and their dispute, and more often than not brings them to settlement or to its verge. Moreover, as detailed below, there are functions that mediators can do that even the most skilled litigator can't do for himself.

Litigators sometimes mistakenly believe they should keep their best evidence in reserve, hidden in their breast pockets so that they can use it to create the famed "Perry Mason" moment at trial. They don't want to participate in mediation, they say, because they don't want to reveal the smoking gun that will destroy the other side's case. This reasoning is mistaken.

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[8] No party can consider himself unreasonable. The cognitive dissonance would be too great. And, so long as the party thought the other was reasonable as well, he would not need the services of a lawyer (or part with his hard-earned income to such an individual). After all, as two reasonable people, they'd surely work things out. Thus, the only time a client calls a lawyer is after he's concluded that his adversary is unreasonable and can't be negotiated with.

Because 99% of all cases resolve without going to the decision-maker for decision, Professor James McElhaney wrote in his famed litigation practice column, holding the best evidence in reserve means that the litigator will not get any benefit from his best evidence in 99% of his cases. And because each settlement offer is made or evaluated based on the *perceived* relative strengths of each party's respective legal positions, a party that doesn't know about the smoking gun will make lower settlement offers and reject the litigator's higher demands, oblivious to the existence of the litigator's best evidence. Keeping the best evidence in reserve will therefore either result in forcing the client to go to trial or settling the case on terms that don't benefit from the party's strongest evidence–both terrible results. Professor McElhaney, therefore, advocates that each party reveal its strongest evidence so that they can each consider and evaluate it, and reach a fair settlement based on the actual merits of their respective cases.

Mediation will also give the clients an excellent opportunity to observe the skills and quality of their lawyers. They and their lawyers will present their case, counter the adversary's, and demonstrate their legal prowess and negotiating skills. Cases will be resolved more quickly with less expense, the clients will be happier, and refer more business to the attorneys. That counts as a win-win result!

And, of course, because mediation is a voluntary process, if a party is ultimately dissatisfied with the results of the mediation they can walk away from it with no cost other than whatever time and fee was paid for the mediation itself. Mediation therefore represents almost all upside with little or no downside.

III. **The Role of the Mediator**

An intelligent advocate and negotiator may then wonder, "Why do I need a mediator? I can do it all myself!" There are, however, several functions that a mediator can accomplish that even the most-skilled advocate cannot do for himself.

Keeping temperatures cool: Especially in tense situations–like in important negotiations–people make inarticulate statements that others might take offense to. They might respond a bit more emotionally or harshly than the circumstances might warrant. Or they might express themselves hyperbolically in a way that prevents the other side from "hearing" their underlying message. Of course one party cannot dictate how the other speaks, and any effort to do so will likely cause the death spiral of the negotiation effort.

Thus, one of the important functions of the mediator is to keep the temperature in the mediation-room cool. Some mediators do not allow anyone to violate the sanctity of their mediation-chamber, insisting on a certain decorum and a neutral, non-judgmental rendition of facts. ("No, you can't say 'He stole from me. You can say he took money without asking me; he took money without my permission; he took money without paying it back.' But saying the judgmental he *stole*, shuts down communication and results in the parties talking *at* each other instead of them talking *to* one another.") This is essential to keep the atmosphere conducive to resolution, and even the most skilled advocate cannot accomplish this for herself.[9]

Reframing arguments and positions: Parties and advocates, with their eye on the ultimate result, may often not consider how to frame their issues so that they are best heard,

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[9] The Talmudic saying that "No prisoner can release himself from prison," is brought to mind. Babylonian Talmud, Brachot. Sometimes one needs someone else to do for him that which is impossible for one in his position to do for himself.

understood, considered, and perhaps even accepted by the other side. Too often, people say things that get rejected by others when, if only they had framed or characterized it differently, it might have been adopted by the other side.

Thus another important function of the mediator is to observe the underlying points made by the parties, but also considering *the manner* in which they are said. The mediator reflects back to the parties the points they've made so that: (a) the parties feel heard and understood; and (b) the mediator is sure she hasn't missed any part of the party's argument. While reflecting back, the mediator might also use the opportunity to reinterpret or re-frame a claim in a way that is easier for the other side to hear, consider, and agree to.

Reality-testing: Even smart people sometimes come up with arguments that feel clever and might look good on paper but aren't actually persuasive. They cannot trust their adversary's skepticism or criticism because, after all, if lawyers caved every time an adversary did not agree to their arguments, the lawyer would soon be out of business. And, like in Aesop's fable of the wind and the sun fighting to remove the traveler's cloak, the stronger an adversary argues, the more likely the lawyer thinks he must be right. Lawyers, therefore, need a disinterested, reliable truth-teller who can reveal to them the weaknesses of their arguments.

Brainstorming: The parties and their lawyers, deeply immersed as they are in the controversy, likely suffer, as all humans do, from tunnel vision, viewing the situation as they have always viewed it, and discounting ideas as impossible before they can even be articulated. Bringing a fresh, disinterested perspective into the room can jump-start the creative process for the parties and their lawyers, reexamining their assumptions, and envisioning solutions that seemed impossible just hours earlier.

Thus, even if both advocates are skilled mediators in their own right, it almost always makes sense to engage a neutral mediator into the discussion to increase the odds of achieving a resolution more quickly and without further traumatizing the parties' relationship.

IV. **Suitability for Mediation**

Of course a primary precept of attorney ethics is that clients always retain control of any settlement or resolution of their matters. Thus any party can decide that they have no stomach or wallet for further litigation or controversy, and can walk away from a fight at any time for any reason. Mediation, in which the parties usually face off across the table from one another, however, presents certain additional risks that are mitigated in the litigation context and must be carefully considered before mediation is embarked upon.

An abused or victimized party might feel sufficiently safe and comfortable in the austere, formal courtroom, surrounded by court officers, and where the advocate does the heavy lifting and the party merely sits idly by, making decisions and being called on only to testify. Even there, certain protection protocols may be instituted to ensure the victim's safety to and from the courtroom. In a lawyer's mediation room, without court officers and protections, however, the party might feel vulnerable. And, aside from feeling vulnerable, their safety might actually be at risk.

Moreover, in litigation, except for when the party takes the stand, the lawyer acts as the champion for the party. In mediation though, parties are generally called upon to speak more often, give account of the relevant events, and their feelings about proposals made–something that, in the presence of their victimizer, might be emotionally impossible for a victimized party and carries the potential to re-traumatize them.

A victimized party might not have sufficient strength and presence to contradict the victimizer in the mediation process. If the mediation is nevertheless allowed to continue, the resulting "agreement" might not reflect the true will of the victimized party. It might only be the result of unseen and unrecognized coercive control. Thus the idea of party autonomy and self-determination might be turned on its head, the guise of autonomy facilitating a coerced agreement and further victimization of the victim.

It is therefore important for the advocate to be cognizant of these risks and dangers, alert to them, and actively protect the client against them. The advocate must assess the risk by not only speaking to the client, but by observing the client's affect, demeanor, and temperament. While what the client says is important, the client's behavior may be more so.[10] Together with the client, the advocate must decide whether mediation is appropriate for this client in this instance and what, if any, protective protocols must be made to ensure the client's safety.[11]

In the event mediation is appropriate, like when no DV is identified or the party and lawyer determine that it won't be an issue, the advocate must still remain sensitive to these issues

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[10] Clients occasionally present with no indication of any intimate partner violence ("IPV") but demonstrate certain behaviors or recount certain facts that clue the advocate in that the client might be the victim of domestic violence ("DV"). Lawyers must be ever vigilant for symptoms of IPV and DV and explore them when they rise or else administer appropriate screens to determine their existence. For more information and further resources *see*, *e.g.*, the ABA publication **Screening for Intimate Partner Violence in Mediation** (available for free download from https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2013/fall/screening-for-intimate-partner-violence-in-mediation/) and the resources listed therein, as well as the Michigan Supreme Court's **Domestic Violence Screening Training for Mediators** (available for free download at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/alternativedisputeresolution/mc282.pdf), and, particularly, the DV and Child Abuse/Neglect Screening for Domestic Relations Mediation (appearing at pages 14-49 thereof); as well as the **Domestic Violence Lethality Screen for First Responders** (available for free download from https://www.nccpsafety.org/assets/files/library/Domestic_Violence_Lethality_Screen.pdf).

[11] The protocols of many court-annexed mediation programs preclude any mediation if there are allegations of DV.

throughout the mediation to ensure that the client retains their agency and does not feel intimidated or compelled to enter into an inadvisable agreement.

V. **Preparing for the Mediation – Increasing the Odds of a Favorable Settlement**

The skilled advocate, to large extent, controls the outcome of the mediation by taking steps and using techniques that improve the odds for a favorable outcome. The most important of these are preparation:

Eschew the misconception that it's "only" mediation! It's a rookie's mistake to believe that because it's "*only*" mediation, the other side is going to give money away in order to settle the case. Typically each side believes as firmly in the justice of its case as the other. Nobody offers a concession unless they believe that they are getting something of equal or greater value in return. So a skilled advocate would not think any less seriously of mediation than trial. In fact, mediation may be the last, best opportunity to settle the dispute without incurring the expenses of trial. But the chances of settlement are minimized in direct proportion to the failure of the party to prepare the case.

Prepare, prepare, prepare. An advocate should prepare her case as if it were going to trial. The advocate should have at her fingertips the elements she would have to prove, how she is going to prove them (for those to which she has the burden of proof), and what standards of proof she will have to meet and how she will meet them. She must prepare the evidence which will rebut the other side's case. She must, at the mediation session, show the other side why they don't have a leg to stand on and, therefore, why they would want to settle with her now instead of spending more time, effort, angst, and money to go to trial–just to then lose there.

As someone once wrote, "Those cases that prepare for trial settle at mediation; those that prepare for mediation are forced to go to trial." The advocate's degree of preparation and readiness to deal with the adversary's claims and rebuttals will determine the outcome of the mediation.

Give the client the "gift" of safety. Because fear inhibits creativity and reasoning[12] the best thing a lawyer can do for a client embroiled in litigation is to make the client feel safe. Unfortunately, telling the client to feel safe will not accomplish this. Instead, the lawyer must demonstrate her commitment to the client and the client's cause by being attentive, caring, empathetic, and knowledgeable, and demonstrating the lengths the lawyer will go to for the client's cause.[13] By feeling safe, the client can then take that deep cleansing, relaxing, breath, expand their mental and emotional view, and assist in exploring additional settlement options.

[Pre-]Determine proper settlement limits: Unfortunately, mediation, as a voluntary process, tends to "take" from the reasonable and "give" to the intransigent. (This is yet another reason why parties need experienced counsel at their sides at the mediation, to protect them against such an occurrence.) To ensure that mediation does not become a vehicle of oppression, parties must clear-handedly determine their settlement limits well before entering the stress of the

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[12] Fear trigger the amygdala which hijacks the body's typical reasoning-systems and focuses *all* of the body's energies on the perceived threat. While this insured the survival of our species for millennia, it also inhibits the prefrontal cortex's ability to think more broadly. The greater the perceived danger, the more adrenaline is secreted, and the more inhibited the person's reasoning abilities become. The person then responds more by instinct than reasoning.. (That is why people are told to bring along a friend with a pen and paper, when getting an upsetting diagnosis from a doctor. The patient typically remembers but a fraction of the doctor's instructions.) Thus, a person might not recognize opportunities that lie before them while in the throws of fear.

[13] For more on how to demonstrate commitment to clients, see J. Harris Morgan & Jay G. Foonberg, How to Draft Bills Client Rush to Pay, chapter 1 (ABA LPM section), or the author's own article, Chaim Steinberger, *Make More Money by Being More Ethical*, 33 Family Advocate 2 at 12 (Fall 2010).

negotiation chamber. They should determine the point at which the deal is no longer worthwhile, and when they would be better served by "walking away" from further negotiation, rather than accepting a sub-par settlement proposal. Then, unless new information is brought to light at the mediation session–new facts or arguments that haven't been considered before–the party knows when the mediation has deteriorated beyond being helpful. Despite the emotional difficulty, the party should then "stick to their guns" and hold fast to the pre-determined limit (assuming, of course, that the limit was realistically and wisely set), if the party does not want to regret an inadvisable decision later.

Setting such a *trip wire* protects a party from giving away too much in the heat of the moment. However, designating the trip-wire requires the party to consider what alternatives it has to a negotiated agreement–known in mediators' parlance as the parties' "BATNA," the best alternative to a negotiated agreement. To determine that, a party should–well before the actual mediation session–determine what options or courses of action are available to it, and what their costs and benefits will be. If there's anything the party can do to improve its BATNA they should do it, gaining leverage and improving the parties' bargaining position in the negotiations. Aside from these "tangible" benefits, having a backup plan will also give the party added confidence which, itself, can change the course of the negotiations.[14] At the negotiation, a party should be able to compare each proposal against the parties' best BATNA.

A clever negotiator will also attempt to deduce or determine the adversary's BATNA. Knowing what the adversary's alternatives are, positions a party to make wise offers and

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[14] William Ury, The Power of a Positive No: Save the Deal, Save the Relationship–And Still Say No, chapter 2, "Empower Your No" (Bantam, 2007).

know when to hold out for better ones.

If, during the negotiations, non-traditional solutions are proposed, they will likely not fall neatly within the BATNA analysis. The party will then have to consider whether the proposal made is ultimately more beneficial than rejecting the offer and perhaps being forced to live its BATNA.

Developing a BATNA also tends to inhibit imagination, so parties would be well-served by trying to keep the traditional analysis out of their heads when exploring and brainstorming resolution ideas.

Prepare the Client to Know What to Expect: Any time a client is surprised, it means that the lawyer did not competently do his job.[15] Clients should always know in advance all the different things that might happen and what is likely to happen. The lawyer should have explained all the different ways any proceeding might progress. The client should, of course, know the claims and elements of their own case (and be ready to hit the ball out of the park if ever they get a softball question), the likely defenses of the other side, and the rebuttals to the other's defenses. Skilled advocates also explain the different permutations of what might occur, and the most likely of them. That way clients are prepared for the best, the worst, and the most likely. At mediations, clients should be prepared to speak, if called upon to do so in the mediation (the advocate might want to inquire of the mediator about the mediator's practice), and be prepared to listen quietly if not, communicating later in private with the lawyer. Clients would be well served to bring along a pen and paper so that they can take notes and write down the questions they'd like to later ask their

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[15] *Make More Money*, *supra*, at 13 ("Anytime a client is surprised, it means that the lawyer has dropped the ball").

lawyers.

Ahead of any court appearance, negotiation, or mediation session, skilled advocates also explain to their clients that they intentionally do not respond to *every* provocation of the other side. That is, the skilled advocate always acts *only* to further the client's interest. If the client or even the lawyer is personally provoked, the lawyer's job is *not* to respond *unless responding would advance the client's interests*. Sometimes clients see that their attorneys are not responding or not sticking up for, and protecting, them, and they become disillusioned with their lawyer. Clients should, therefore, be told *ahead of time* that the lawyer will only respond when it makes strategic sense to do so, and won't respond when it will not; not because the lawyer shies away from a fight, but because the lawyer has the client's best interests at heart and will only fight when it makes tactical and strategic sense to do so. This must be said before the occasion arises or it will not be believed by the client.[16]

VI. **Choosing the Right Mediator** -

Depending on the context, the parties might have some [limited] say in the selection of their mediator. Obviously, if the dispute involves knowledge specific to a certain field, selecting a mediator that has the knowledge and experience in that field has the advantage that the mediator comes pre-schooled and need not be educated on the controlling law or industry practice.

The mediator's temperament, demeanor and mediation skills, however, are more critical. To establish credibility, the mediator must be reliable, trustworthy and honest. To establish rapport with the parties and to successfully settle the matter, the mediator must be empathetic,

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[16] Fine, *supra* n. 1, chap. 15 at 153 (detailing how certain responses to claims must be "foreshadowed" before the claim is made or they will not be accepted as true by the fact finder).

caring, kind, committed, determined and passionate, willing to work hard, and courageous enough to make proposals even if they are likely to be rejected. To be respected by the lawyers, the mediator must be learned in the law and skilled in trial practice. To help the parties develop settlement ideas the mediator should be creative, but also balanced, not proposing wacky ideas, and have the interpersonal intelligence ("people skills") to be able to read the people around the mediation table, respond to their emotional states, draw them in, calm them down when necessary, and push back when appropriate, know when to push a party on a proposal and when to give a party room. The mediator therefore has to have a high emotional intelligence quotient ("EQ"),[17] and be a skilled advocate, able to "make the case" for a particular proposal when a party does not themselves see the advantages of that proposal. Of course a mediator's strategic and tactical reasoning would also help parties better see what the future holds for them under the scenarios being considered. This, obviously, is in addition to the basic skills every negotiator must have: patience, being present in the moment, open-mindedness, curious, willing to listen, willing to consider proposals, and the skills to delve beneath stated positions, and engage in principled negotiations (detailed below). Fortunately, although this shopping list is extensive, there are many skilled mediators who excel at their task.

VII. **At the Mediation – Increasing the Odds of Reaching a Good Deal**

A mind-set conducive to negotiation: An advocate who is in the appropriate frame of mind sets the conditions to be more conducive to generating favorable resolutions. Of course

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[17] Daniel Goleman, Emotional Intelligence, Why It Can Matter More Than IQ (Bantam, 1995)

these traits are just as advantageous for anyone negotiating:

Patient: Nothing inhibits the establishment and development of trust between the parties than impatience. The impatient lawyer or litigant cuts off other people as they're speaking, tries to jump to the bottom line instead of slowly developing underlying facts and implicit interests, or considering the constituent, embedded-parts of a proposal, and, already knowing what other person will say, cannot be present in the moment or empathize with the other person's legitimately held grievances.

The patient advocate, in contrast, even when disagreeing with the other, listens attentively, with understanding and empathy, and commiserates with the trials and tribulations of the other even as they disagree with the other's ultimate positions. "Wow, that must've been difficult," the attentive negotiator might say. Or, "Oh, that must've hurt." Understanding and empathizing with the other side is the single most important thing a party can do to get the other side to be willing to compromise on their positions and consider that party's.

Patience is also important because "time" is one of the levers of negotiation. Thus, an impatient negotiator will be compelled to give up more leverage than a patient one in order to achieve a quick resolution. The patient negotiator, in contrast, uses time to best advantage, moving forward in a steady, methodical pace, without being rushed to make concessions in order to meet an arbitrary, self-set, deadline. Moreover, an offer made too quickly, can signal desperation to the other side who will then be ready to exploit it.

Present in the moment – listening attentively with complete, rapt attention. Though it's hard to do for lawyers who are well-prepared and know all the arguments on each side of the issues, it is well worth the effort. A know-it-all attitude will not bring the parties closer to resolution.

Demonstrating respect and attention when the other is speaking will.

Open-minded – the ability to hear and see the dispute from the other side's vantage point even while disagreeing with the result they desire. Important to this is the ability to recognize the legitimate claims of the other side and concede that which must legitimately be conceded. This demonstrates the person's good faith and willingness to recognize even the equities that don't work in her favor, making it conducive for the other side to reciprocate and do the same.[18]

There is, for example, no statement more powerful to a father than hearing the mother's lawyer say that the mother "respects, acknowledges, and honors the father's role in the children's lives; she knows and acknowledges that the children will be better off if the father has an ongoing, meaningful, steady and reliable presence in the children's lives; she will do nothing to interfere with that relationship; and she will actively work to nurture it." Having set the stage, mother's lawyer can then ask father's counsel whether father concedes that "Mother has the right to not live in fear that the children will not be well-cared for when with father [assuming that there's a legitimate cause for that concern]; and that she shouldn't have to worry about the consistent arrival of the money needed to properly support the children." Framed this way, parties often agree to the principles, and then work cooperatively to work out the details and fine points.

Curious – the ability to demonstrate a genuine interest in the other person's view of the case, the factors that motivate them, and why they believe their position is justified and correct. It is the ability to ask a question, not to trick or "catch" the other, but in order to hear the answer and

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[18] Robert B. Cialdini, Influence, The Psychology of Persuasion (Collins, rev. ed., 1984), chap. 2 "Reciprocation: The Old Give and Take . . . and Take"; Leslie K. John, How to Negotiate With a Liar, Harvard Business Review July-Aug. 2016, https://hbr.org/2016/07/how-to-negotiate-with-a-liar, "1. Encourage Reciprocity" ("randomly paired participants who worked their way through a series of questions designed to elicit mutual self-disclosure were more likely to become friends").

understand the other.

Willingness to listen rather than talk – Most people really don't listen to others and, instead, listen just enough to know when they can jump back in and resume speaking. A true willingness to listen requires the putting aside of one's own agenda and listening patiently, not to interrupt or even jump in with a response immediately upon the other's taking a breath, but instead to just hear what the other feels is important for the listener to hear and know. It might require the taking of a deep breath and the summoning of reserves of patience. When the speaker has finished speaking, sitting quietly and reflecting a moment or two on what has been said before responding.

An old salesman's adage says, "God created man with two ears and one mouth so that he should listen at least twice as much as he talks." Part of the reason for this is that when people are talking they are generally not learning anything new[19] but, instead, sharing what they already know with others. It is only when people listen quietly and patiently with open minds, that they can learn things they did not know before.

Probe beneath the stated positions to determine the party's real interest. As stated above, people often "bottom-line" the things they want, leaving others to believe that it is that bottom line that they actually desire. Often, however, the constituent parts of that bottom line is what is really important to the party. But because they are embedded within the bottom line, they usually remain unspoken and unrecognized, are hard to identify and accommodate unless a negotiator is skilled enough to probe beneath a party's stated position in a non-confrontational way. Often, while a

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[19] The exception to this is when someone is teaching something. By teaching others, the teacher must analyze and break apart the subject matter into its component parts. This causes a deeper focus, crystallization, and understanding, resulting in a better understanding by the teacher. The teacher, therefore, knows it better after explaining it to others than she did before. This paradox is the only exception to the rule that people don't learn anything new when they speak.

party cannot agree to the other's bottom-line request, they might be amenable to acceding to the interests embedded within their bottom-line.

Often parties don't have the self-awareness to be able to articulate their embedded interests. Gentle inquiry, curiosity, and a genuine desire to understand, is what makes the probing possible without offending the other. Indeed, a genuine interest and desire to understand will likely make the other feel better, more valued, and respected. Gently asking the "why" questions rather than the "what" questions, helps the negotiator understand why the other is asking for the things they're asking for.

Sometimes people are not actually fighting about what they say they are fighting about. Instead they have different interests that they can't, or don't want to, admit to, and their stated position is their way of couching their desires. Sometimes this occurs inadvertently because a party lacks the self-awareness or the ability to articulate their desires. Other times it's due to an inability to admit weakness.[20] Moreover, different people, and particularly men and women, communicate differently. So it might be a mistake for someone to assume that they know what a person is saying "merely" because they listened carefully to what the person *actually said*. And because about 93% of communication is nonverbal, *how* a person says something might be more revealing than *what* they actually say. A skilled negotiator, therefore, gently and curiously probes beneath stated positions to understand its constituent parts, allowing for the exploration of win-win resolutions.

Active (or Reflective) listening techniques – This is single-handedly the *most powerful*

[20] It might be hard for a man to admit that he feels weak and threatened or that he's scared that he might lose his relationship with his children.

technique any negotiator can use. It is foundational to the teachings of Dale Carnegie[21] and is used extensively in clinical psychology and sales as the primary method of establishing rapport with patients and prospects. It is also a technique that allows a person to instantly eliminate or reduce by half, the hurt and anger of another person. It works almost like magic!

Though the technique is simple, there are potential pitfalls which, if not protected against, can make the technique backfire. More on this below.

"Active" or "reflective" listening–also known as "mirroring"–as its several names imply, is accomplished by simply repeating back to the speaker what the speaker has said. Though it sounds simple enough, most people feel uncomfortable doing so. It is *not* pantomiming or mimicking the speaker; rather it is patiently repeating back to the speaker what the listener understood the speaker to say. Often speakers' subconscious choice of words reveal their inner emotional state and their underlying beliefs. It is important that the listener incorporate those emotional states or beliefs when reflecting back. This could be done by repeating the speaker's emotional or primary words, or by *explicitly* stating the *implicit* assumptions buried within the speaker's statement. The goal is for the original *speaker* to recognize–emotionally more than logically–that the listener has fully and comprehensively understood the message the speaker was trying to deliver.

Repeating the speaker's message does *not* mean the listener is agreeing with that message. It is only demonstrating that the speaker was heard and understood. It is a sign of respect, caring, and empathy and makes the speaker feel understood and valued. It frames the listener as

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[21] Dale Carnegie, How to Win Friends and Influence People (Pocket Books, 1936).

being reasonable and understanding, someone with whom reasonable settlements can be reached.

It is often the case that even a careful listener absorbs only 70% or 80% of the speaker's message but not the entire message. This could be because the speaker was unclear, because of the speaker's less than precise choice of words, or because the speaker themselves haven't identified clearly what was really bothering them and is crystalizing their thoughts only as they "talk it through." It is therefore important, after the listener reflected back what they heard, to "check in" once again with the speaker by asking whether they got it all or had they missed any part of the message. (Obviously, like with all of the techniques, this must be done with a patient, curious and generous tone or else it will be met with a frustrating, "Oh, never mind!" and the speaker will shut down. The speaker must intuitively sense that the listener is genuinely interested in receiving the speaker's entire message.) If the speaker feels that the entire message was not fully received (whether the belief is justified or not), the listener should invite the speaker to take another opportunity to clarify or elaborate on their original message. The listener should then reflect back the message they received and check in again. "Wash-rinse-and repeat," the listener should continue reiterating this cycle until the *speaker* is satisfied that entire message has been received.

An unobtrusive, natural-sounding way of accomplishing reflective-listening is to, after a speaker has said something, take a momentary pause (this slows the conversation down, and prevents the speaker from feeling pounced upon, and implies that the listener has given some serious thought to what the speaker has said), and then saying, "Let me see if I understand you. If I understood you properly, you're saying that . . . . Did I get that right? Did I miss any part of it?" After saying that, the listener should completely stop speaking and allow the speaker to digest, think about, and respond in due time. [Too often, people rush to fill dead air. That, however, is a

negotiation killer, resulting in people that don't have time to consider and think about the ideas being discussed. The better technique is to slow things down so that people can consider their responses and articulate them without pressure.]

The pitfall to be wary of, is that too often sarcasm or facetiousness creep into the listener's voice when they repeat back the message. If that happens, a nuclear explosion is likely and, instead of dissipating anger, it is further inflamed by an order of magnitude. The difference in likely responses to someone saying in a flat, monotone, non-judgmental voice:

> "Let me see if I understand you correctly. I understood you to say that by my not-showing up on time to dinner you felt disrespected and that I was not committed to our relationship and that I must feel that you are not important to me. Did I understand you correctly? Did I leave anything out?"

and the likely response to a sarcastic or facetious, higher-pitched, statement that begins with,

> "So you really think that . . . ."

would likely be monumental. The first healing, the second destructive! Thus, *the most important part of this technique is to eliminate all inflection or judgment from the voice when repeating back the reason why the original speaker is upset.* Because all people, consciously or subconsciously, read the people they interact with, the original speaker will instantly intuit whether the listener is genuine or judgmental in the rendition of what they are upset about.[22]

Why this works? This technique is so powerful because the most basic need of all human beings is to be deeply understood and accepted for who we are. Someone who feels understood is okay with not being agreed with. Not being understood, however, if very frustrating and leaves the person frustrated, anxious, and irritated. A person who feels understood feels calm

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[22] "Like water [reflecting] a man's face to itself, so too the heart of man to the other." Proverbs 27:19.

and validated, even when disagreed with.

This technique of establishing rapport works even with terrorists[23] and kidnappers.

A recent news story reported how a kidnaped woman, mother of a newborn 14-week-old-son, whose kidnapper had already tried to kill her at least once before and had fractured her lower arm and skull, managed to save her life by establishing rapport with her brutal kidnapper. This came to her when she first noticed his orchids in the secluded house she was being held in. She realized that she would never again see her son unless she got the kidnaper to release her. She began by establishing rapport with him, commenting that his "orchids were so beautiful" and the care and devotion her own orchids required. This instantly transformed the kidnapper into a "completely different person," and started him talking, first about his orchids, and later about his grandparents, drunk mother and betraying girlfriends. The woman shared with him how her own baby needed his mother and asked him how it would have been for him to grow up without a mother. Moved, the kidnapper ultimately drove her home.[24]

Thus, in any situation the most powerful thing a negotiator can do is to establish rapport with the other side and leave them feeling heard and understood. That, single handedly, ameliorates much of the harshness, intransigence, and inflexibility of parties' positions.

From there, modeling and demonstrating reasonableness and a desire to be fair,

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[23] *See, e.g.,* Don Rabon, Interviewing and Interrogation (Carolina Academic Press, 1992) (the author, a former Israeli *Shin Beth* intelligence officer, describing how connecting with a terrorist and understanding their motivations results in obtaining more reliable intelligence more quickly than torture ever could).

[24] Melissa Eddy, Austrian Woman Softens Her Kidnapper With Kindness (N.Y. Times, July 31, 2019, at A6, available at https://www.nytimes.com/2019/07/30/world/europe/austria-cyclist-abducted.html).

usually results in the other side responding in kind.[25] Thus a negotiator should concede any fair points made by the other side, strive to find legitimacy in the other side's legitimate claims, and concede to facts and positions that can't fairly be disputed.

Ask genuine questions (and listen carefully to the answers) – Together with the attributes listed above (being open minded, present and attentive in the moment, and establishing rapport and reflecting back) the negotiator can be genuinely curious about the other side and its positions, trying to understand why they feel they are justified. When done in this manner, the questioner is perceived as attentive and curious and not sly and accusatory. It encourages the other side to be honest and reflective about what is really going on for them. A question in the "Help me understand this one thing"-vein, and not a transparent attempt for a "gotcha" moment, won't cause people to become defensive and uncooperative.

It is also a good idea to confirm the important underlying facts. Too often parties fight about outcomes without realizing that their positions are based on different versions of the underlying facts. If a common factual basis can be established and agreed upon, the parties' positions would be closer to one another's or might even be alike. It is, therefore, a good idea, though it might feel superfluous, to summarize the important facts and first determine whether they are disputed, and then explore how any factual dispute can be resolved before trying to reconcile the parties' positions.

Another important reason to ask detailed questions is that by carefully listening and evaluating their answers, the party is able to evaluate the other side's honesty and truthfulness. By

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[25] Cialdini, *supra* n. 18; Proverbs, *supra*, n. 22.

some accounts, the typical person tells three lies in every ten-minute conversation.[26] Negotiators must, therefore, be alert to not only lies of commission but more particularly lies of omission which are psychologically easier to tell.[27] Moreover, people inadvertently give off "tells" of dishonesty that negotiators should be alert and sensitive to.[28] When they see any such "indicators of deception," they should follow up with more probing questions to ascertain the truth. Better than a direct question that the other is prepared to lie to, however, is a glancing or presumptive question that assumes specific information, increasing the mental-load and requiring the person to think about their answer and, perhaps, reveal the truth they hadn't intended to reveal.[29] Done in a non-confrontational manner, this is an effective method to get other parties off their declared positions.

Ask, don't tell – People don't generally do what they're told to, and are generally not convinced by being told what to think or how to feel. In fact they resist it. Instead the better practice is to ask such questions of the person that causes them to think through their situation, allowing them to discover for themselves the mistakes or misconceptions that they held or, perhaps, how the position they've adopted will ultimately hurt instead of help them. Akin to asking the puppy what it would do once it catches the bus, a negotiator might ask, "So if you refuse to pay this invoice and the XYZ Company refuses to sell you any more widgets, how will that affect your

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[26] "UMass researcher finds most people lie in everyday conversation," June 10, 2002, Public Release, U. Mass. at Amherst (available at https://www.eurekalert.org/pub_releases/2002-06/uoma-urf061002.php), *citing* study by Robert S. Feldman, Ph.D., published in the Journal of Basic and Applied Psychology.

[27] Philip Houston, Michael Floyd & Susan Carnicero, SPY the LIE 52 (St. Martin's Griffin, 2012) (hereinafter "SPY"); John, *supra*, n. 18, How to Negotiate With a Liar, Harvard Business Review July-Aug. 2016, https://hbr.org/2016/07/how-to-negotiate-with-a-liar, "2. Ask the Right Questions."

[28] SPY, *supra*, chapter 5, What Deception Sounds Like.

[29] SPY, *supra*, chapter 12, You don't ask, You don't get; John, *supra*, ("use . . . indirect tactics to glean information").

production line and your ability to obtain widgets in time?" Presented in a non-confrontational and genuinely curious manner, it is more conducive to achieving the desired self-reflection than an accusation that might only cause the other side to dig in and more adamantly assume the postured position just to save face.

Principled (rather than transactional) negotiation: In their seminal work "Getting to Yes," Professors Fisher, Ury and Patton of the Harvard Negotiation Project developed an entirely new way of negotiating and resolving disputes.[30]

Dispute were traditionally settled by raw power. By demonstrating actual or perceived power, the more-powerful party compelled compliance by the weaker. Litigation is just such a method, where the party legally more powerful can compel a result upon the legally-weaker party. The problem with using any such brute-force dispute-resolution mechanism is that it leaves both parties more estranged from the other. No matter who wins and who loses, both parties are more upset and distrusting of the other. Their ability to work together, do business together or, in the family-law context, raise children together is further damaged and minimized.

In Getting to Yes, the professors suggested that disputants use "principled" negotiation rather than positional bargaining. Instead of each side declaring what their position and desired outcome is, they suggested that parties frame their positions in terms of principles. The parties might agree to resolve their dispute so that there is a "fair outcome." They might agree that they want to do what is "best for the children." They might develop another principle that is important for them both. They would then argue their positions in relation to this agreed-upon

[30] Roger Fisher, William Ury, and Bruce Patton, Getting to Yes, Negotiating Agreement Without Giving In (Penguin Books, 2011).

principle.

This method has a great advantage over brute-force negotiation. In any brute-force technique, each party feels put upon. Each feels attacked. Each feels victimized, perhaps even brutalized. As the process continues, the harm to each of them increases and escalates. The longer the parties negotiate, the more their relationship is harmed.

In contrast, when using principled negotiation, the parties are not harmed by the ongoing negotiation. In fact, the negotiation can have the opposite effect, bringing them closer together and giving them new appreciation for each other. Because they are discussing and arguing what is "fair" or what is in the children's "best interests," the reasons given are not personal attacks on the other. It is more of an intellectual debate than a personal beat-down. And discussing what is fair or what is best for the children can remind the parties what they both have in common and how the other is also behaving in an honorable, dignified manner. Instead of hating the opposing party, a party may grow to appreciate the other even more. The argument not only doesn't harm the parties' relationship, but it can also begin to heal it. It also gives the parties a new way of dealing with one another to mutual benefit.

Moreover, because the parties will be dealing with principles rather than positions, probing beneath their respective stated positions to get to each's core interests, and understanding how those core interests can be satisfied, the parties will be well-positioned to find the win-win resolution.

Whenever the relationship is as important, or more important, than the issue being fought over, these techniques should be used to prevent traumatizing the relationship even further.

Explore win-win options: With open-ended, inquiring questions that probe

beneath the surface of the parties' stated positions, by understanding the parties' underlying interests, parties can explore what options exist that allow them both to achieve their most important interests. Creative, non-traditional brainstorming, even if the exact idea won't work, might lead someone around the table to think of an idea that would work. The parties and counsel are limited only by their creativity and the boundaries of the parties' needs and interests.[31]

Reject ideas in a positive (not negative) manner: Professor Ury wrote a great companion book to Getting to Yes titled The Power of a Positive No: Save the Deal, Save the Relationship–And Still Say No.[32] In it he describes how a "no" that comes from a place of dignity, respect and caring, for oneself, one's own needs and desires as well as the other's, preserves and improves the relationship even when the other's requests are not being agreed to. By framing rejections in this positive manner, the relationship and ability to reach agreement on issues is still preserved and maintained.

Consider the negotiators' respective negotiation styles: People behave and negotiate differently based on their personalities: how agenda-driven they are and how much they care about the relationships involved.[33] Those who are agenda-focused and have little regard for

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[31] When controlled by the parties' needs and interests, unconventional solutions might be appropriate for them. Like that one couple who decided to sell the marital home and buy two smaller ones close to one another so that, after divorce, the children could travel between the parents. Another couple, realizing that the mother needed the particular school district and not the home itself, agreed to sell the home and buy a less-expensive one within the district. The parties creativity and ability to think in unconventional ways, serves as an advantage to come up with the right solutions for them. And, of course, the kindergarten-cupcake rule is always fair: one cuts and the other chooses.

[32] William Ury, The Power of a Positive No: Save the Deal, Save the Relationship–And Still Say No (Bantam, 2007)

[33] *See, e.g.,* the Thomas-Kilmann scale, available at: https://workshopbank.com/wp-content/uploads/2012/11/ThomasKillmanConflictResolutionStyles.png and described at https://www.researchgate.net/profile/Ioana_Darjan/publication/273133939/figure/fig1/AS:294719583211523@1447

relationships are generally "competitive" in their style. Those who care about the relationship but not about the agenda are "accommodaters." Those who do not care about either are "avoiders;" those who care a somewhat about them both are "compromisers;" and those who care strongly about both are "collaborators."

Each personality type will, obviously, negotiate differently and respond to different triggers. Rushing an avoider will not be helpful, and the avoider will likely relish any delay by the other. Threats might backfire and raise the ire of a competitor. Thus, it's best to ask and listen, establish rapport, and deal with the other's negotiating style to best advantage.

Do not react to provocations of the other side: The skilled negotiator recognizes that others might try to push buttons, and reacts only when strategically wise to do so. Pride and ego must be left outside the negotiating chamber, playing no role in the negotiations. Instead, the wise negotiator feigns anger only when strategically advantageous and without allowing actual anger to affect her decision-making. One technique used by negotiators when they sense they are flooded with emotion is to metaphorically go up "to the balcony" where they can take in the bird's eye view of the dispute and view the long-term issues of greater importance and commonality between the disputing parties.[34]

Do not adopt indefensible positions: So much of the atmosphere and therefore progress in the negotiation depends on the good will of the negotiator and his image of being honest, fair, and reasonable. Any bad-faith bluff, bluster, bravado, hyperbole, or exaggeration will

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278032846/Modes-of-conflict-management-Thomas-Kilmann-1976.png.

[34] *See, e.g.,* the TED talk by William Ury, The Walk From "No" to "Yes," http://www.ted.com/talks/william_ury.html.

destroy the negotiator's credibility, reduce the other side's trust, and cause them to be distrustful and uncooperative. They should, therefore, be avoided.

Effective Representation at the Mediation:

While procedurally and substantively different, it is helpful to think of mediations as expedited, short-form trials. Because all negotiations happen "in the shadow of the law"[35] the skilled advocate, in addition to having an "incandescent conviction" of the righteousness of the client's cause[36] will also be fully versed in the legal elements and proofs and be able to demonstrate at the mediation how she will do so.

Clients should be ready to tell their stories and explain why their cause is righteous, how they were wronged, and why justice requires that they prevail. While clients likely won't be able to present this as clearly and smoothly as a lawyer might, the client's rendition of events will likely have a powerful impact not only on the mediator but on the other party as well. In one mediation a party looked across the table and said to the other, "How could you do this to me? I attended your daughter's wedding. You attended my daughter's wedding. How could you do this to me." Unable to face the accuser, the party turned his chair to the wall, sitting shamefaced for the remainder of the session.

When considering how these stories should be presented to maximum effect an old

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[35] Robert H. Mnookin and Lewis Kornhauser. Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale Law Journal No. 5 (1979).

[36] Fine, *supra*, n. 1 chapter 4 (citing Winston Churchill that the essence of persuasion was the speaker's belief in what he or she was saying; that belief like laughter is infectious; an author who characterized a lawyer as "the best" "[N]ot because he was smarter or better prepared of even luckier . . . but because in the bedrock of his soul [he] believed his cause was just and the *incandescence of that conviction* made twelve men and women believe it as well" (emphasis added); and that the effectiveness of a pain-relieving placebo administered by dentists depended on whether the dentist administering it believed that it would work).

salesman's expression is instructive: "Show, don't tell." Rather than characterize the other side's behavior, it is more effective to recite the cold facts and allow the listeners around the table to draw the obvious conclusion. Rather than brand an opponent as a thief, it is more powerful to describe that time that the collection plate was passed around, the person furtively glanced around and thought no one was looking, then reached into the plate, grabbed a handful of bills, and stuffed them into his pocket. "Showing" the story that demonstrates the point is many times more powerful and credible than asserting a subjective judgment. And the party making the claim faces less risk of being thought of as histrionic or over-reactive.

With the facts fully brought out and the controlling law explained, the advocate should be ready to demonstrate how the facts compel the desired result. Moreover, as stated above, rather than relying on the letter of the law, the skilled advocate uses the reasoning and intent that motivated the law to demonstrate why justice requires the desired result.[37] This is yet another form of the aforementioned "principled negotiation" theory, asking only for what is fair.

Of course the skilled negotiator should be ready to concede whatever points the adversary is clearly right about. Doing otherwise, destroys the negotiator's aura of being reasonable

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[37] An analogy to this is Judge Fine's admonition that advocates use the reasoning behind the rules of evidence to *undercut* objectionable evidence instead of objecting outright to the evidence's admission. Fine, *supra*, n. 1 chap. 17 at 169. Objecting to the admission of evidence, Judge Fine asserts, leaves the fact finder (whether judge or jury) wondering what the lawyer is trying to hide and, therefore, with the impression, that this lawyer is on the wrong side of the case and therefore trying to hide "the truth." People on the side of truth, of course, have nothing to hide. That the lawyer is trying to withhold certain evidence must mean that this lawyer is *not* the truth-teller and the other lawyer is.

Better then, Judge Fine argues, to always maintain the aura of being the "truth teller" in the courtroom. Instead of objecting to the evidence's admission, Judge Fine proposes, the skilled advocate requests a *voir dire* of the proffered evidence. She then demonstrates its unreliability and openly declares to the Court, "Considering that [the reason for the exclusionary rule] I don't see how this [letter/note/hearsay] can be of any use to the Court or jury but, if your Honor would like to admit it, I have no objection." The advocate has eliminated the value of the evidence without destroying his own aura of being the truth-teller. Fine, *supra*, n. 1 chap. 17 at 169 (Jurors believe that the lawyers know the truth, and that at least one lawyer is lying to them or keeping parts of the truth out. An "Honest Abe" would, therefore, never object in front of a jury).

and fair and undercuts the mediator's credibility and the mediation itself.

Support [/nudge?] the mediator: It is, of course, the mediator's job to guide the discussion and explore win-win settlement options. The skilled advocate can observe the mediator and even assist, by making suggestions and recommendations. The skill of the advocate becomes even more critical where the mediator is not successfully guiding the discussion, keeping the temperatures cool, or brainstorming settlement options. The advocate can then assist by modeling good behavior in response to bad (by, for example, lowering her voice the louder opposing counsel becomes), intentionally refusing to rise to intentional provocations, recognizing the validity of the other side's valid positions, exploring win-win options, and using principled negotiation techniques rather than positional bargaining ones. The advocate can assist by delving in, and making explicit, all the implicit assumptions that the client's and adversary's positions are based on,[38] so that the assumptions can be examined, rebutted, or corrected as appropriate.

VIII. **Conclusion**

Mediation offers the advocate a chance to shine, demonstrate her ability and professionalism, and obtain a better result for the client than can be obtained through litigation. It is quicker and cheaper than litigation, won't further traumatize the parties' relationship or their ability to work together in the future, allows them to better co-parent their children in the family-law

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[38] A seemingly-true statement that is based on mistaken assumptions are particularly frustrating to deal with. The statement cannot be dismissed because it seems to be true. Thus, the unspoken, underlying assumptions must first be identified and corrected before the statement itself can be branded as incorrect. Doing so takes effort and patience–tough commodities to come by when people are dealing with the relentless pressures of day-to-day life or while negotiating an important matter. Seeding assertions with such mistaken assumptions might be a form of passive-aggressive behavior intended to frustrate the other while trying to appear innocuous. Despite the challenge, the skilled negotiator slows down, re-centers, and draws on inner reserves of patience to deal with the challenge.

context, and learn new ways of dealing, and working out problems and disputes, with one another. Even if no resolution is reached, it will likely bring the parties' positions closer to one another making it easier to settle in the future, gives them new ways of viewing their dispute and their respective positions, and offers the parties and their lawyers the best pre-trial discovery at a fraction of the cost of any other process. Any advocate who cares for the client would at least try it.

SPEAKER BIOGRAPHY

Chaim Steinberger is principal of CHAIM STEINBERGER, P.C., a matrimonial and mediation practice in New York City. He chairs the Custody Committee of the ABA Family Law Section and, until recently, was a member of the Section's Council. He formerly chaired the Section's ADR Committee co-chaired the Collaborative Law Committee of the NYSBA Dispute Resolution Section. He is a member of the Executive Committee of the New York State Bar Association Family Law Section and chairs its Website and Community Forum Committee. Chaim trained as a mediator in 1993 and has been mediating ever since. He currently serves on panels including those for the Federal District Court in the Southern District of New York, the New York State Supreme Court Commercial Division, the Attorney-Client Fee Dispute Panel, the New York City Civil Court, Small Claims Division, the Matrimonial Mediation Project in Queens and Westchester Counties, and the Early Neutral Evaluation Panel in New York County. He is the author of "Divorce Without Destruction," "Make More Money by Being More Ethical," and "Father? What Father? Parental Alienation and its Effects on Children." He can be reached through his website www.theNewYorkDivorceLawyers.com.

NOTE: *This monograph is intended as an educational guide and not as legal advice. Legal advice should only be obtained from a qualified lawyer who is familiar with all of the facts and circumstances of your matter.*

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Divorce **Without** Destruction

By **Chaim Steinberger**

BY CHAIM STEINBERGER

Die-hard litigators who have only one tool in their toolbox often believe that the way to achieve the best results for their clients is to be as aggressive and confrontational as possible. Clients buy into this narrative because by the time they involve lawyers they have already concluded that the other party is unreasonable. Clients mistakenly believe that in order to win the other party must lose. Moreover, the fear, anger and pain of the dispute restrict parties' creativity and result in psychological tunnel vision, leaving them unable to visualize or create other acceptable options. As a result, too many pursue (intentionally or inadvertently) a scorched-earth strategy that destroys what might be their most precious things–their children, businesses and family relations.

Game Theory

Aside from the benefits of avoiding permanent injury to children, using game theory and advanced negotiation techniques can often achieve better financial and emotional results for the clients. Lawyers can be part of the healing rather than the destroying, doing well as they do good.

Game theory teaches that adversaries achieve better results by developing trust and working collaboratively, than they ever could by remaining distrustful, oppositional adversaries. As adversaries each party must protect themselves against the possible double-cross by the other. As a result, the parties can only agree to what is a "pareto optimal" solution—a solution in which any unilateral deviation by a party will hurt the deviating party more than it advantages them. These solutions are akin to the "lowest common denominator," often not the very best solution for either of the parties but only the best solution that leaves them both protected. If the parties can, however, create some measure of trust and collaboration they can often find solutions that leave them *both* better off. The techniques outlined below foster just such results.

"Win-Win" Techniques

In their seminal book *Getting to Yes: Negotiating Agreement Without Giving In*, Professors Roger Fisher, William Ury and Bruce Patton of the Harvard Negotiation Project develop techniques for achieving the seemingly impossible "win-win" resolutions in which both competing sides win at the same time. They recommend that negotiators be "hard on the problem, but soft on the people." That is, negotiators should thoroughly and critically analyze the positions of both of the parties, but do so without personally attacking either of them which could destroy any hope of a future working relationship between them.

Instead of using "positional bargaining" where each side conclusively states their demands, the professors recommend "principled" negotiation in which the parties negotiate around core values. So for example, parties may agree that they both want to be fair. They may agree that they both want to do right. They will likely both agree that they want to protect their children. Just expressing such common core values reminds the parties of the interests that unite them.

The parties can then discuss aspects of fairness, of what is right, or of how to protect the children. Because the discussion is centered around fairness rather than demands, neither party feels attacked or becomes defensive. Parties can now hear and acknowledge the validity of the points made by the other, without feeling vulnerable or giving up their own deeply-held positions. This allows each party to feel heard and validated, a major step in fostering the trust that is necessary for a collaborative result. Unlike in the typical brute-force negotiations–negotiations in which the parties negotiate based on who has the better legal argument, the more aggressive or intransigent lawyer, or who is willing to spend more on legal fees–from which the parties walk away feeling worse about one another, these techniques create trust and understanding between the parties, making them more willing to work collaboratively in the future and perhaps even giving them the tools with which to resolve their own future disputes. Often a magical moment occurs in which what was a "me-against-you" problem becomes a "we have a problem; how can we find a solution that works for the both of us." Using creativity and empathy the lawyers and parties can then put their heads together to find win-win resolutions that would be impossible when the parties distrust one another.

Another powerful technique is to focus on the parties' interests instead of their positions. Instead of accepting the parties' posi-

tions as absolutes, the negotiator delves into the reasons why each position is important to the party. Though asking basic questions when the answer seems obvious might make one feel a bit daft, it is surprising how often the seemingly obvious motivation is not the party's actual motivation. The other difficulty of this technique is that after asking for the reasons behind the party's position, the person asking must be quiet, not talk, and actually listen to the answer–a skill difficult for many, lawyers included.

The classic example of this principle involves two people fighting over an orange. Unable to agree and having grown impatient, one pulls out a knife, slices the orange in half and walks off with half. Having walked away, the party peels the half-orange and throws away the peel to eat the fruit. The second peels the remaining half, throws away the fruit and uses the peel to bake a cake. How frustrating for those with a bird's eye view to know that each could have had the whole orange–one the whole fruit and the other the whole peel. Because it hadn't occurred to either of them to ask why the other wanted the orange, their "positions" were diametrically opposed, though their "interests" in actuality were not. Because of the way the dispute was positioned, it seemed that one could "win" only if the other "lost." At the least, each had to "settle" for one-half of what they wanted in order to reach the only "fair" result they imagined. In actuality, however, neither had to give up anything; they each could have received 100 percent of what they wanted and they both could have "won" without ever making the other one "lose."

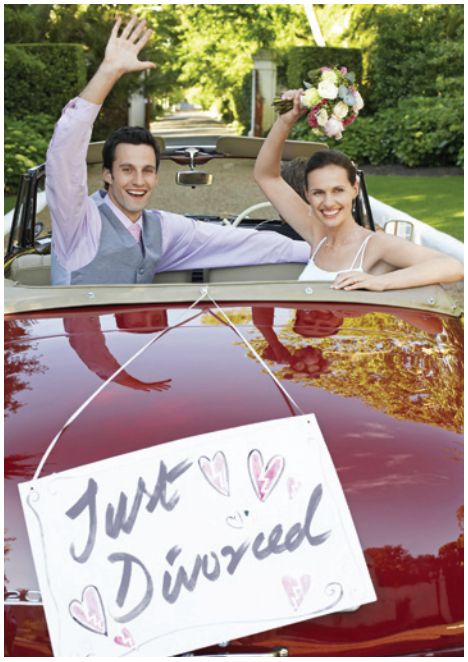
Like with the orange, so often uncovering the reasons behind parties' stated positions allows creative, empathetic lawyers to find win-win resolutions in which both sides win. A parent might demand the family home but really only want to remain in the school district with the special-needs program for the parties' child. Or it may not be the specific home a parent wants but only proximity to certain special friends or family members. Each of these motivations opens myriad choices that can fulfill the party's interest, one of which might satisfy the other party's interest as well and making a win-win resolution possible. A father's stated position may arise from his fear that his relationship with the children will be impaired. Acknowledging his legitimate concerns and providing assurances and guarantees may go a long way in reestablishing the shattered trust between them, which might then make it possible for the parties to craft an out-of-the-box resolution that is right for them and that can benefit them and their families for years to come.

Be Calm, Cool and Collected

Like litigation itself, these techniques require solid, thorough preparation, lots of patience and a cool and collected demeanor. The lawyer must know the client's case and all of its relevant, even picayune but emotionally persuasive, details. The litigator's theory of the case demonstrating why justice demands a ruling in the client's favor, is used here to demonstrate the fairness of a particular position. The facts, the law (and the fairness it represents), the closing argument and the advocacy are all put in play, but in a safe, respectful collegial environment, one that makes the parties feel heard and understood so that they can be amenable to fashioning a resolution that works best for themselves and their family. As Sun-tzu advocates, a true pacifist must be the most accomplished warrior.

> Game theory teaches that **adversaries achieve better results by developing trust** and working collaboratively, than they ever could by remaining distrustful, **oppositional adversaries**.

By listening carefully and respectfully, being genuine and forthright, agreeing with valid concerns and accommodating them when they can reasonably and fairly be accommodated, a good negotiator can avoid further traumatizing the parties' relationship and obtain better results for the client. By creating an atmosphere of rapport and even trust, the parties can discover or create resolutions that benefit both of them in ways that no adversarial win could. Achieving such a better resolution allows the parties to heal and move on, without the emotional negativity, recriminations and ill will that often linger long after the final appeal is decided and the adversarial battle is supposed to be over. Moreover, in addition to the better settlement terms, the parties will be better positioned to work together in good faith on joint issues like those involving their children. They will give their children the greatest gift divorcing parents can give children–permission to love the other parent and a willingness to work together to raise their children in a loving, cooperative manner.



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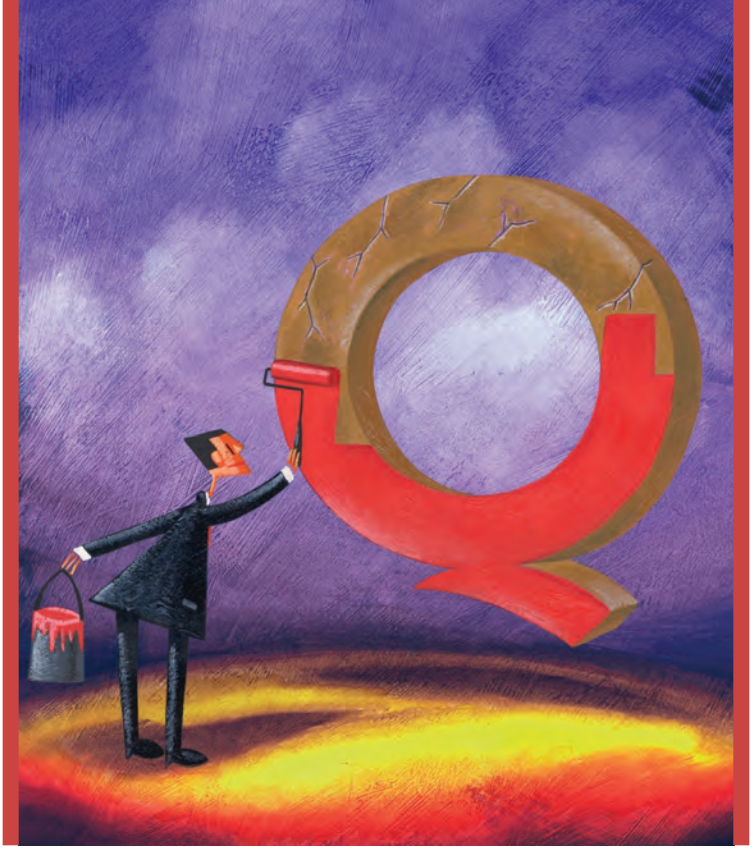
CHAIM STEINBERGER *is a mediator, arbitrator and litigator in New York City practicing "Divorce Without Destruction." He protects, defends and empowers people who have family problems with heart, tenacity and skill. He can be reached through his website, www.theNewYorkDivorceLawyers.com, or by telephone at (212) 964-6100.*

www.theNewYorkDivorceLawyers.com
Telephone (212) 964-6100



Make More Money by Being More Ethical

BY **CHAIM STEINBERGER**

Many believe that professional rules of ethics encumber us, make us less efficient, and prevent us from making more money. Actually, quite the opposite is true. 'Turns out that "good ethics," in addition to keeping us out of trouble, is also "good business."

BY FOLLOWING ETHICS BEST PRACTICES, you will operate your business in a manner most likely to provide more repeat business, generate more referrals, and ensure that a greater percentage of your invoices are paid. Follow these philosophical and technical rules and you likely will have more work, more clients, and more money in your pocket.

1. Be client-centric. Like successful dieting, it's not just one single thing that has to be done, but rather a way of life, an attitude, a frame of mind. Consider how everything you do will look and feel to the client. Being client-centric should affect every aspect of your practice. Here are some of the ways it can help you make more money.

• **Demonstrate care and concern for clients** over and over again. Studies show that, surprisingly, many attorneys do not know what is most important to their clients. Though many attorneys believe that clients are most worried about (1) costs, and (2) results, clients report that their attorney's *concern* for them is the *single most important factor* in determining whether they will rehire the lawyer. (J. Harris Morgan & Jay G. Foonberg, *How to Draft Bills Clients Rush to Pay* 77–78 (2d ed. 2003), citing the Missouri Bar Prentice-Hall Survey: A Motivational Study of Public Attitudes and Law Office Management 67 (The Missouri Bar 1963) (the "Missouri Study").

The wise lawyer, therefore, will demonstrate genuine

care and concern for clients at every opportunity. This includes simple courtesies like not permitting clients to wait when arriving at your office, personally escorting them into and out of your office, and not allowing yourself to be interrupted or distracted by phone calls, e-mails, or other office pressures while with the client. Giving a client your complete, undivided attention demonstrates powerfully how important the client is to you.

Analogously, it is widely reported that doctors with a good bedside manner are less likely to be sued for malpractice than those with a poor bedside manner. Likewise, patients are more understanding and forgiving of a "caring" doctor's mistakes. The same is true of legal clients. Clients are more likely to pay for legal services and less likely to file a grievance or malpractice action if they feel the lawyer is dedicated to them. Indeed, grievance committees have confirmed that the single most important thing an attorney can do to reduce complaints is to return telephone calls promptly. Obviously, this is a good business practice, too.

2. Draft time entries and invoices that convey your effort and dedication to clients. Instead of limp, lifeless, passive time entries, use powerful, active present-tense verbs that give life and vibrancy to the many hours you devote to the client's matter. For example an entry like "Review every reported decision involving a parent whose income exceeds the CSSA cap to determine client's maximum child support exposure" is likely to be more meaningful to the client than the vague "legal research–15 hours" type of entry most of us are accustomed to seeing. Your efforts are more likely to be appreciated and paid for, too.

Avoid time entries that would cause a reasonable person to raise an eyebrow. For example, never include two separate but identical entries. Distinguish them so that it is obvious that you are not asking the client to pay twice for the same work. For example, when charging for a phone call, specify what was accomplished, or attempted, during the phone call. Show the value the client is receiving for the money.

3. Always treat the client as you wish to be treated. That's the Golden Rule. Even better is the "Platinum" Rule: Treat each client in the way that client wishes to be treated. Here's how:

- **Never surprise a client.** We all hate surprises, unless they're the good kind. Lawyers' bills rarely are. We don't ever want to be surprised when we pick up our cars from the mechanic. Our clients shouldn't be surprised when they get our bills either. Anytime a client is surprised, it means that the lawyer has dropped the ball.

  Avoid surprising the client by calling ahead of time. Yes, I know it's uncomfortable. No one ever wants to be the bearer of bad news. It's still better to call clients ahead of time to personally explain why a bill is higher than expected. Even better, call the client before you do the extra work to explain what happened and why you need to do additional work and what it will likely cost. The client will feel more in control, and the work you do will more likely be appreciated and paid for. As one of our colleagues recently posted on the Family Law Section's listserve, "As between doing the work and not getting paid and not doing the work and not getting paid, I'd prefer the latter." A bill, or for that matter anything else in the lawsuit, should never surprise the client.
- **Keep clients informed.** Another way to avoid client surprises is to establish a mechanism within your office to ensure that clients are always kept informed of each development in their cases. By forwarding to them copies of each letter, e-mail, and motions, they see the work as you are doing it. They can, therefore, better appreciate the time you are devoting to their matters. At the end of the month when they receive your bill, the entries remind them of all the work you've done, and they'll appreciate it more and pay for it more easily. Of course, this also cuts down on clients complaining that they don't know what's going on in their cases.

  Avoiding client surprises also requires you to spell out early and clearly what the client must pay for, approximately how much it will cost, and when and how to pay. Do all of this in your initial retainer agreement. Every potential client is concerned about costs and likely feels uncomfortable raising the issue. By raising the issue early, you demonstrate your integrity, alleviate your client's anxiety, and build trust and respect. In addition, doing so avoids misunderstandings and reduces challenges to your bills or grievance complaints against you.

4. Bill "early and often." Clients are more apt to pay bills immediately before or immediately after the work is done. The more time that passes after the work's completion, the less likely the client is to recognize its value or pay for it. Like the old saw warns, "The value of a service decreases dramatically after it's been rendered."

An added benefit to frequent billing is that the client stays informed about the status of the case and the cost of your services. The more work you do for your client, therefore, the more often you should bill. This will help your cash flow and keep your clients happier. As studies show, yet another benefit of frequent billing is more referrals from existing clients. So by billing more frequently you'll have more clients, happier current clients, better cash flow, greater realization on your billings, and fewer complaints.

- **Track time religiously.** In order to bill early and often, you must track your time religiously and contemporaneously as you do your work. Your time records will be more reliable, will generate fewer challenges to your bills, and your records will better protect you in the event of any dispute. More frequent billings also will help you

make more money. Lawyers who have a system in place for recording and billing their time earn 40 percent more money than lawyers who do not. Morgan & Foonberg, *supra*, at 67.

- **Invoices must look and be reasonable under the circumstances and be accurate.** Do not issue an invoice that you would be unhappy or offended to receive.

5. Maintain and project ethics and integrity in everything you do. According to the Missouri Bar study, the second most important thing clients value is the attorney's integrity. Morgan and Foonberg, supra, at 2. If you show that you treat opposing counsel, the courts, or others deceitfully, your clients won't trust you either. By maintaining and demonstrating the highest ethical standards, you will earn and keep your clients' trust, confidence, and respect. This will lead to more business and more referrals. Ensure that all of your bills and time entries are correct and appear, both objectively and subjectively, reasonable. If they do not, then provide greater detail on bills to show why the time devoted was necessary.

6. Run your business competently like the business that it is. That means:

- **Do not let any client get (too far) behind in payments,** because the value of a service diminishes rapidly. Every day that passes after the work is done dramatically decreases the likelihood that your client will pay—no matter how genuinely or earnestly the client promises payment.

  You expose yourself to additional risks, moreover, when you allow a client to owe you a lot of money. The easiest way for a client to avoid paying your bill is to claim that you did something wrong. Thus, the more delinquent the bill, the greater the incentive for the client to file a grievance or malpractice action against you. The "nicer" you are to clients and the longer you "carry" them, the more incentive they have to betray you. At some point, the temptation may become too great for mere mortals to resist.

- **Get out of a bad situation sooner, rather than later.** About the only thing worse than a client stiffing you for your fee, is a client stiffing you for twice that amount and filing a grievance against you to boot. Although it's hard to walk away from work, particularly in troubled times, if a client is having trouble paying, consider withdrawing from the case (with leave of court, where leave is required, of course). Cut your losses and devote your time to productive matters.

  Remaining in a case in which a client is not paying you is problematic for another reason, too. When a client owes you a significant amount of money, your ability to collect will likely hinge on your success in the action. You have now, therefore, been converted from a dispassionate advocate on behalf of another, to an unnamed *de facto* silent party in the suit. You may feel pressured now that your own interests are at stake in the litigation and it may affect your judgment, impinge your objectivity and detachment, and increase the likelihood that you will commit a sanctionable error. Don't let yourself get caught between a rock and this hard place.

7. Use client challenges as marketing opportunities rather than attacks against you. Whenever a client questions or challenges your bill, try not to become defensive. Instead, use this as an opportunity to forge an even stronger relationship with the client. Treat each complaint as if it were an honest, good faith request for additional information. View it as an opportunity to explain your billing practices, the quality of the work you do, and your dedication to clients.

Begin by trying to find some common-ground principles regarding payment to which you both can agree. This might be something like, "I don't want any money from you that I am not legitimately entitled to, and I assume that you want to pay me the money you agree I am legitimately entitled to. Is that right?" Articulating such principles converts the negotiations from "positional bargaining," to what Fisher, Ury, and Patton, in *Getting to Yes, Negotiating Agreement Without Giving In*, call "principled negotiations." You can then discuss whether you are "legitimately entitled" to the money you seek without getting angry, threatening, or demeaning one another. This allows you to argue your claims without harming your underlying relationship.

Next, ask the client open-ended, probing questions that elicit how and why the client is unhappy and feels the charges are not legitimate. Even if you already know why or believe you do, giving the client an opportunity to explain it directly to you will help the client feel better and dissipate his dissatisfaction. Of course, try not to take any attacks personally, and respond in a measured fashion, not aggressively or defensively. Find out why the client feels the money you're asking for is not fair and what, in the client's view, would be fair under the circumstances and why.

Listen "actively" or "reflectively" to the client by repeating in your own words what you hear the client saying. This will demonstrate that you "get" it. Then ask if you have understood the client correctly or if you're missing any part of it. Allow the client to speak again. Then restate what the client has just told you. Wash, rinse, and repeat, over and over again, until the client feels completely heard and understood. Use this active or reflective listening technique any time you want to establish a powerful, deep connection with another human being.

When reflecting the client's position and then stating

your own, use clear, but nonjudgmental, nonaccusatory language. For example, you might fairly recharacterize a client's statement: "You stole our money from the escrow account," to "If I understand you correctly, what you're saying is that you think we were not entitled to the money we withdrew from your escrow account. Is that correct? Did I understand you correctly?" Using nonjudgmental language will help reduce passion and tensions, and allow each of you to hear the other without erecting mental barriers that make further conversation pointless.

Empathize freely and easily with the client's emotions, even if you disagree with the substance of the claims. It will make the client feel heard and understood, without your conceding your own position. "I understand that this lawsuit cost you a lot more than you intended to spend," can go a long way in making a client feel understood and allowing negative feelings to dissipate.

> Whenever a client questions or challenges your bill, use this as an opportunity to forge an even stronger relationship. Treat each complaint as if it were an honest, good faith request for additional information.

Recognize that there's a difference between responsibility and blame. Try to accept responsibility freely and easily for your role in the matter, without feeling blamed or defensive about it. This will allow you to apologize for the way your client felt, with everyone recognizing that such an apology (such as, "I'm sorry you felt neglected") is not an admission of guilt, fault, or failure and goes a long way toward dissipating hard feelings.

Next, review the issue from your own point of view. Again, use only nonjudgmental, nonaccusatory language. In addition to the facts that dispel the client's claim, review the value the client received from your work. Be sure to address the client's feelings as well as the logic of her arguments.

As the authors recommend in *Getting to Yes*, "be hard on the problem, but soft on the people." See, hear, and feel what the client is complaining about and try to assuage the client's hurt feelings. Be empathetic and understanding. Oftentimes, that will get you more money than fighting will give you.

In one fee dispute in which I served as a mediator, the client, a doctor, was outraged that his lawyers kept him waiting for more than an hour when he came for a scheduled meeting. He passionately explained how he would *never* permit his own patients to wait that long and, as another professional, he knew and respected the value of time. He also complained that the lawyers did not keep him apprised of what they were doing and did not return his phone calls. He also received some information that cast doubt on all of the "law" the lawyers had told him throughout the case and said he didn't trust anything they said or did anymore.

Although he had already paid 90 percent of the lawyers' bill, he was disputing the last ten percent. I was convinced that the doctor would pay the entire fee if the lawyer only apologized. I asked the lawyer if, before addressing the substance of the claims, he had anything to say about how the doctor felt. The lawyer, unfortunately, felt threatened or attacked and needed to deny the doctor's claims and justify his own actions. He could not "hear" what the doctor was saying and, because he was too intent on denying the "waiting incident," despite my prodding, could not bring himself to concede that it might have happened. He could not empathize with his client's hurt feelings. The result was that the parties became entrenched. Although the amount in dispute was reduced to a negligible sum, as "a matter of principle" neither party accepted the other's terms. As negotiations broke down, the client promised to sue, not only to avoid paying the final 10 percent, but also for return of a substantial portion of monies already paid.

Had the lawyer acknowledged that the doctor had once been kept waiting and apologized for it, had he empathized with his client, and, perhaps, offered to implement procedures that would ensure that clients would never again have to wait, he likely would have been paid his entire fee and ended up with a happy client and more money in his pocket. Instead, he now has a fee battle with a disgruntled client.

Good ethics and good business practice are not at odds. Both help lawyers work smarter, rather than harder, keep more money and clients, have fewer worries, spend less time chasing bad money and defending grievances, and leave law practices healthier. More importantly, they leave the lawyer with a healthier and happier lifestyle. **FA**

Chaim Steinberger is the principal of Chaim Steinberger, P.C., in New York, NY, where he represents clients in simple and complex family law matters from trial through appeal. In addition to being a litigator, he is also a mediator, negotiator, arbitrator, and collaborative law practitioner. He serves as a mediator and arbitrator on the Attorney-Client Fee Dispute Resolution Panel in Kings County. He is a member of the ABA Section of Family Law and chairs its Alternative Dispute Resolution Committee. He can be reached at csteinberger@mindspring.com.