The Mediator's Check List of Key Issues

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Introduction

Preparing a Mediator's Check List ("MCL") of Key Legal and Factual Issues will assist the Mediator to focus on the issues she must master during the Mediation Process ("MP") to facilitate a voluntary settlement of the dispute.

Specifically, using the MCL with help the Mediator identify and gain a better understanding of the important issues to discuss during the pre-mediation conference. Also, by completing the MCL, the Mediator will be more confident in directing Counsel's attention to the important legal and factual issues they need to review with the Disputants. Lastly, the MCL emphases the importance of sharing accurate and non-privileged information with all participants in the MP. By encouraging (and in some instances directing) the Disputants to exchange accurate information, the Mediator sets the stage for a successful MP. The discussion which follows is a summary of rules governing the MP that may be useful in dispute resolution, litigated cases and court annexed mediations.

A. Mediation Defined

California defines mediation as "a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement." See, Code of Civil Procedure section 1775.1, Evidence Code section 1115 and *Saeta v. Superior Court* (2004) 117 Cal.App.4th 261, 269.

B. The Mediation Process

The Mediation Process involves many Mediator-directed and "individualized processes," including discussions regarding the payment of the mediation fee, convening issues, scheduling hearings, telephone conferences, agreement on procedures to be followed during the MP, briefing schedules, confidentiality parameters, oral participation of Disputants, opening statements of Counsel and/or Disputants, procedure on private caucuses with Disputants and Counsel, conditions applicable to the delivery of documents, delays to obtain additional evidence or materials, the advisability of a

Mediator's proposal, delays to obtain settlement authority from indemnitors, intra-mediation negotiations with insurers, strategic disclosure of information, preparation of partial agreements and final settlement documents covering the entire dispute.

C. Flexibility

The MP must be flexible enough to incorporate the specific needs of Counsel, the Disputants and the type of dispute the Mediator is hired to resolve.

D. Mediation Tools

The MP includes (in varying degrees depending on the mediation style or process agreed to by the Mediator, Counsel and Disputants), collaboration, cooperation, evaluation, facilitation, negotiation and persuasion. Special attention must be devoted to discussing with Counsel and Disputants on the appropriate use of confidential information disclosed to the Mediator. When and under what circumstances may this information be disclosed? At a critical juncture in the MP, should the Mediator make a Mediator's proposal to move beyond an impasse?

Make sure there is clear agreement among the parties and counsel on the terms and conditions governing the use of a Meditor's proposal and the use of any confidential information..

E. Mediation Style or Process

Professor Jay E. Grenig from Marquette University Law School in his book, "Alternative Dispute Resolution," defines three "styles" or "processes" used in the MP.

1. Section 2:17 Evaluative

Evaluative is a hybrid of mediation and early neutral evaluation. In evaluative mediation, the mediator decides what the case is worth and advises how it should be settled. The evaluative mediator assumes the parties want and need the mediator to provide direction as to how and why the case should settle a certain way or for a certain sum. Evaluative mediation can be effective in a case where the neutral mediator has tried many similar cases, has judicial experience or otherwise knows the case well. The Meditor's proposal is the monetary value she places on the case as the means of moving the negotiations beyond an impasse.

2. Section 2:18 Facilitative

The facilitative mediator works with the parties, downplaying his or her expertise. A facilitative mediator does not offer options, solutions or opinions about the outcome. A facilitative mediator may be energetic in urging the parties to revaluate their positions

and legal analysis, but a facilitative mediator would not give his or her own opinion on the merits of the claims or defenses, or the likely outcome of the case.

3. Section 2:19 Therapeutic and Transformative

In therapeutic mediation, mediation is a form of communication in which the parties are encouraged to engage in a full expression of their feelings and attitudes. Therapeutic mediators claim authority based on expertise in managing personal relationships and use mediation to help people reach mutual understanding through collective agreements. The therapeutic model emphasizes emotional concerns.

The transformative approach to mediation rejects problem solving as a goal. Instead, it seeks party empowerment and recognition. Transformative mediation aims at changing the parties. Transformative mediators view disputes, not as problems, but as opportunities for moral growth and transformation.

F. How Does Mediation Differ from Adjudication of Disputes

Mediation differs from Arbitration and Litigation in many important ways. In Mediation the Disputants themselves impose the voluntary terms of settlement of their dispute, they control the MP, its timing and scope.

The Disputants involved in the MP can't be compelled to accept a settlement. They must voluntarily agree to accept a settlement.

The Disputants create their own time line for the mediation sessions, its location, and the mediator encourages them to remain non-adversarial during the MP.

Disputants have the option to terminate the MP and session at any time. It is very important for the Mediator to inform the Disputants and Counsel that no one can compel them to accept a settlement during the MP.

Some litigated cases arising out of the MP involve claims that the mediator coerced one of the parties to accept a settlement based on the misuse of confidential information. See *Travelers Cas. and Surety Co. v. Superior Court* (2005) 126 Cal.App.4th 1131, 1139.

G. Confidentiality

Confidentiality is a key advantage of Mediation. Arbitration in many instances, and litigation in all but very unique circumstances, is open to public scrutiny. The MP is and remains confidential. And, in all but a very few instances, Mediation and the settlements achieved therein are not subject to discovery or review by the courts.

The Mediation privilege bars the use of all documents, communications and actions taken in preparation for and during the Mediation even in cases where the client alleges

in a lawsuit filed against the lawyer for malpractice arising out of communications, out of the presence of the Mediation, between the lawyer and client that occurred during the mediation. Cassell v. Superior Court, 51 Cal. 4th 113(2011).

Additionally, a signed confidentiality agreement pursuant to a court ordered settlement conference conducted by a Mediator in a pending in Federal Court lawsuit will be enforced to bar evidence of what occurred during a Mediation in an effort to set aside a settlement reached during a Mediation. Facebook Inc. v. Pacific Northwest Software Inc.,604 F. 3d 1034, 1040-1042(9th Cir. 2011)..

Mediation produces a final and confidential settlement of the Dispute. Courts will continue to dismiss litigation challenging settlement arrived during mediation. See *Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc.* (2001) 26 Cal. 4th 1, 13 prohibiting reports from the Mediator other than a statement that the case has or has not been resolved.

The parties and the Mediator should sign the confidentiality agreement when the Mediation is scheduled and a deposit is made for the Mediation and certainly not latter than the first contact with the parties and counsel.

H. Third Party Adjudicators

In Litigation a judge or jury decides who wins the case and how much the winner recovers in damages or other relief. Appeals from judgments are common and may take several years to complete. The Litigation process takes place using legal rules leading to a decision - who wins and how much the winner recovers.

Arbitration, while less formal than litigation, still has legal, commercial or other formally adopted rules the parties agree to apply during the arbitration which leads to an award from an arbitrator or group of arbitrators.

In both Litigation and Arbitration, third party adjudicators - other than the Disputants involved - make the decision on who wins and losses. In Litigation, the intimate details of the dispute and Disputants' lives become a part of the public record. How would like your life history to become an open book that anyone can read?

Many people want to avoid Litigation and Arbitration because they do not want their disputes to be subject to public scrutiny. Arbitration may also result in public scrutiny of personal lives and business deals, when one of the Disputants opposes the award and moves to vacate it in the court.

All court proceedings are open to the public unless a court orders otherwise after a court hearing on the necessity and justification for confidentiality.

I. Case Law Analysis of Mediation and Adjudication

"Although mediation takes many forms and has been defined many ways, it is essentially a process where a neutral third party who has no authoritative decision-making power intervenes in a dispute to help the disputants voluntarily reach their own mutually acceptable agreement." *Saeta, supra,* at 269.

In Arbitration and Litigation a judge, arbitrator or jury imposes their decision resulting in the entry of a judgment, verdict or award in favor of one Disputant. The adversary system is designed to identify one winner. In some high profile arbitrations, such as *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 835-836, the arbitration was very similar to a trial before a judge but the costs were significantly higher because the parties paid the Arbitrator's fees. Arbitration fees can amount to as much as $700/hour. In The Ovitz case, the court of appeal affirmed the trial court's order vacating the arbitration award. It observed: "The arbitration proceeding began on September 8, 2003. On 23 days through February 26, 2004, the Arbitrator took evidence and heard argument. Twenty-one witnesses testified in person, seventeen by declaration. The parties introduced several hundred exhibits. On February 26, 2004, following closing arguments, the Arbitrator orally ruled in favor of the APG parties on certain of their claims, and awarded them approximately $1.5 million in damages. He found against Schulman on all of her claims. On May 12, 2004, the Arbitrator ruled that the APG parties were entitled to $1,878,739.15 in attorney fees and costs. The Arbitrator directed the APG parties to draft a written award reflecting his findings."

J. MP Totality of Interactions

The Mediation Process includes the totality of interactions among the Disputants, Counsel, indemnitors, insurers, and the Mediator.

Mediation is a very inclusive process. It includes all forms of communication, oral and written, demonstrative, and the all important body language the parties' exhibit during the entire MP.

All Counsel and Disputants should observe and stay tuned to all forms of communication and other conduct each exhibit during the MP.

The Mediator must always take account of parties' and counsels' reaction to her actions that may be interpreted as favoring one Disputant over another. As an example of conduct to be avoided by the Mediator's is greater familiarity with a party's counsel or social activities. Avoid all appearances that the parties can interpret an favoring one side over the other. .

K. Intra-Mediation Side Bars

Mediation may include the intra-mediation side bars of negotiations that take place ancillary to the primary dispute before the Mediator. For example, in a labor termination case, how much will the insurance carrier pay to resolve the dispute? How much will the employer pay?

The Intra-mediation side bars may have to take place and issues of contribution resolved before, during or after the primary mediation session is underway.

It is important to document intra-mediation agreements reached with all funding sources, providing very specific terms of when and how much each party will pay to resolve the dispute.

L. Presence of Necessary Parties and Funding Sources

In court annexed mediation, the law requires that an insurer's representative attend the mediation session. It is advisable to have all funding sources participate in the mediation when their existence has been disclosed by the parties because they may directly or indirectly control the outcome of the mediation. See *Doe 1 v. Superior Court,* 132 Cal.App.4th 1160 (2005) and *Travelers Casualty and Surety Co., supra,* at 1146, discussing the role the insurance companies for the Roman Catholic Bishop of Los Angeles play in the settlement of sexual abuse claims and the fight over insurance policy exclusions. As reported in the Los Angeles Times on November 9, 2005, Craig de Racat a lawyer representing one insurance company said: "What we want to understand is the facts and the policies." Time staff writer Jean Guccione said:

> "Lawyers for the insurers said Mahoney had placed them in a Catch-22 situation where they either must pay to settle all the cases, without knowing whether they are valid, or refuse and be sued for failing to provide coverage."

Judge Fromholz, hearing the insurers' motions for release of evidence, said:

> "insurers have the option of meeting settlement demands and then suing later to recover any money paid out for damages not covered by the archdiocese's existing policies."

M. Appearance at the Mediation

In Court Annexed mediation, Disputants and their insurer's representative must attend the mediation. California Rules of Court Rule 1634, provides:

"The parties shall personally appear at the first mediation session, and at any subsequent session unless excused by the mediator. When the party is other than a natural person, it

shall appear by a representative with authority to resolve the dispute or, in the case of governmental entity that requires an agreement to be approved by an elected official or legislative body, by a representative with authority to recommend such agreement. Each party is entitled to have counsel present at all mediation sessions that concern it, and such counsel and an insurance representative of a covered party also shall be present or available at such sessions, unless excused by the mediator."

N. Completion Deadlines in Court Annexed Mediation

California Rules of Court Rule 1637(b) provides:

> "Mediation shall be completed within 60 days of a reference to a mediator, but that period may be extended by the court for up to 30 days on a showing of good cause..."

O. Rules Encouraging Mediation before Discovery

California Rules of Court recommend that mediation take place during the early stages of a litigated case and before the parties spend a lot of money on prosecuting and defending the lawsuit, discovery or extended legal proceedings.

California Rules of Court Rule 1637(b) provides:

> "The parties are urged to exercise restraint in discovery while a case is in mediation. In appropriate cases, a protective order under Code of Civil Procedure section 2017, subdivision (c), and related provisions, may be issued to accommodate that objective."

California Code of Civil Procedure section 1775(d) provides:

> "Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. Where appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action."

The Los Angeles County Superior Court Local Rule 7.12(k)(3) and (4) provide:

> "(3) In every case, counsel should consider and discuss with the client whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other form of alternative dispute resolution.

(4) Counsel is encouraged to discuss the various ADR processes with their clients and explain the confidentiality and non-binding nature of the selected process."

Statistics generated by administrators of Court Annexed mediation programs claim that 70 percent of cases referred to Mediators are settled during the mediation session or shortly thereafter.

P. Other Benefits of early Mediation-Reduction of Transaction Costs

Early mediation of the disputes will save the parties substantial "transaction costs." Transaction costs represent all expenses allocable to all participants in the litigated case that are not paid to counsel, the experts and as court costs.

Transaction costs include the value of time devoted by salaried personnel and others to assist the Disputants in supporting a claim or defense. For example, a company sued by an employee for wrongful termination will need the assistance of the HR Manager and other knowledgeable employees to supply information about the terminated employee, the review of records and to participate in mediation, discovery and trial if necessary.

The time devoted by these employees is computed by their hourly rate and multiplied by the number of hours devoted to the dispute. The employer bears this expense and pays the employee for these services. In business litigation, lawyers estimate that transaction costs may equal the amount of money paid to the lawyers prosecuting and defending the case.

Actual transaction costs are computed by taking an hourly rate and multiplying it by the number of hours devoted by persons recruited to support the claim or defense. Transaction costs do not include lost opportunity costs, time away from family, cancelled vacations or other activities not pursued because of the time demands of the dispute.

Additional transaction costs may be incurred when an employee must transfer some tasks to a temporary employee or the company has to pay overtime so work is completed in a timely manner.

When an employer indicates that "this is not costing me any money to defend the claim," or the plaintiff says "my lawyer is working on a contingency fee basis so I have nothing to lose," the Mediator may consider engaging Disputants and Counsel by asking questions regarding the items noted above. This will focus their attention on transaction costs. Liability for attorney fees and court costs should also be reviewed when clients have not considered that risk factor.

Q. Summary of Mediation's Advantages over Adversary Process

Mediation provides confidentiality, may preserve a relationship, reduces dispute resolution costs, and is final in all but a small percentage of cases. Moreover, unlike the adversary dispute resolution methods, Mediation permits the parties themselves to implement unique solutions to resolve a dispute that may include the exchange of value other than a money judgment.

1. Confidentiality: The Disputants' lives, transactions and mistakes are not spread upon a public court record;

2. Preservation of Relationships: The non-adversarial nature of the MP may preserve business, professional or personal relationships;

3. Finding Acceptable Solutions: Mediation permits the Disputants to focus on underlying interests, needs and goals that may not be addressed by a court judgment, jury verdict or the award of an arbitrator;

4. Costs: See comparative chart on typical litigation or arbitration and how early resort to the MP will reduce legal expenses; and,

5. Finality: A Mediation settlement is final when properly documented.

R. How to use the MCL?

Counsel, Disputants and the Mediator all need to have access to accurate information on key issues to assist the Disputants to reach a settlement.

The MCL is a guide to make sure all involved in the MP have identified and gathered the information that will be helpful to resolve the Dispute.

The MCL is useful in court annexed mediation programs and private mediations as well. When possible, this information should be gathered before the first mediation session. To encourage Disputants and Counsel to make this information available to the Mediator, the Mediator may want to discuss the list with Counsel and even outline the information she needs in her mediation engagement letter.

In small case mediation and less complex disputes, the MCL should be streamlined to cover only the critical information needed to resolve the Dispute.

Also, the Mediator should ask for any other information that Counsel or the Disputants think is important to understand to assist in resolving their dispute. The Mediator, Counsel and the Disputants should agree in writing how to treat the information made available to the Mediator. Will it be confidential? Will it be shared? The Mediator

should discuss confidentiality and document the agreement reached with Counsel before the information is exchanged.

S. Pre-Mediation Discussions with Counsel

Many Mediators have pre-mediation conferences with counsel. Such conferences are very helpful in gaining information that will not be put in legal briefs or requires explanations not suitable for a written presentation. But make sure a confidentiality agreement is in place before having such conferences with Counsel or a Disputant.

During these discussions with Counsel or the Disputants, the Mediator will want to confirm that the information they provide will not be used to the detriment of any Disputant.

In addition to maintaining confidentiality, the Mediator must make sure the information obtained in these conferences will not affect her duty to remain impartial during the MP.

Counsel in many instances may express a reluctance to take the time to compile the information identified in the MCL. The Mediator must persuade Counsel and the Disputants to supply the information as preparation is the key to a successful mediation.

The Mediator must stress the importance of having accurate information on the key issues to assist the Disputants to arrive at a settlement.

T. Delays Caused by Information Imbalance

Many mediations are delayed because accurate information on important issues has not been reviewed, exchanged or verified by the decision makers. It is very common for expert reports, lost wages, and documents establishing the key elements of claims or defense or witness statements to be at issue during the course of the MP. If this information is disclosed for the first time in the Mediation session, decisions makers will want time to analyze and verify the accuracy of the information. Accurate information is the foundation for a successful mediation.

Accurate information creates a climate of cooperation, places in context the parties' offers, demands and counter offers that will be exchanged during the MP. The importance of accurate information that is made available in a simple and understandable format, and that is capable of objective verification, is a critical component of a successful Mediation. Knowledge is power. And, accurate information is the source of the Mediator's power to bring about a successful resolution of the Dispute.

U. Privileged Information

At times the Mediator may find Counsel and the Disputants will not deliver information to her because the information is protected by the attorney-client, attorney-work product

and trade secretes privileges. The Mediator must make arrangements to protect these privileges and advise the parties that such privileges remain as a matter of law under the all inclusive Mediation Privilege. Cassell v. Superior Court, 51 Cal. 4th 113(2011). What occurs in mediation remains confidential unless there is a documented wavier by the parties. .

V. Preparation of Pro Bono and Small Cases

At times the Mediator will find when talking to the Disputants and Counsel that they have not prepared for the Mediation and failed to gather the information she thinks is needed to start the MP.

Lack of preparation is a very significant problem with Pro-bono mediations and small case mediations. In small case mediations, failure to prepare is sometimes caused by a client's limited budget and a desire to save money until it is clear the case will not settle. The Mediator must be persuasive in getting the information she needs to assist the parties to resolve these cases as well.

W. Information and Estimates

When the Mediator finds that the parties have not prepared for the Mediation she should give guidance on the importance of providing reliable estimates for each category of information she needs during the MP. Also, it may be necessary to devote time during the mediation to sort out accounting, billing and contract issues.

A review of reported arbitration and jury awards, settlements and mediations published by the Los Angeles Daily Journal or other sources of case resolutions may be a useful source of information to show the parties how similar cases have been resolved. At a minimum, the Disputants should provide the Mediator with legible copies of key documents to be used during the MP. When the Mediator discusses the need for accurate information, she should stress the fact that accurate information supplied to the Mediator, and exchanged among the decision makers, is what good faith demands of the participants in the MP.

The Mediator should encourage the parties to exchange information that must be disclosed in discovery. It is imperative that the Disputants and Counsel agree with the Mediator's observation that the exchange of accurate information is the foundation they need to build on to arrive at an efficient resolution of the dispute.

X. Why the need for a MCL?

The information listed in the MCL helps all understand the Disputants' needs, goals, demands, offers, settlement negotiations, underlying interests and some of the unique issues that may need to be resolved during the MP.

Y. Preparation

The Mediator must devote the necessary time to prepare for the mediation.

A recent court decision suggests that the Mediator should explain the risks and costs involved in not resolving the dispute.

In *Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1516, the court observed that:

> "A mediator's explanation of the process and estimate of likely expenses, which would have taken place before or shortly after the litigation began, could have permitted the parties, in their own self-interest, to reach a compromise agreement."

The *Frei* case consumed over $500,000 in legal fees and costs during the course of litigating a real estate dispute. "Yet the Daveys admitted they originally proposed to settle the dispute by completing the sale of the property and having Coldwell Banker credit its commission of approximately $18,500 to the Daveys."

Z. Education

The Mediator must educate the Disputants and Counsel on issues they may have overlooked in private sessions to obtain the necessary movement toward settlement. See "What Do Carriers Look For In A Mediator", at Tab H. Q: Is it appropriate for a mediator to point out that a party may have overlooked or perhaps incorrectly analyzed an issue?

A: Yes; however, this should be done subtly and in such a way so as not to embarrass any of the parties.

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THE MEDIATOR'S CHECK LIST

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ALL INFORMATION WILL BE MAINTAINED IN THE STRICTEST CONFIDENCE.

A CONFIDENTIALITY AGREEMENT HAS BEEN SIGNED BY ALL PARTICIPANTS IN THE MEDIATION BEFORE THE EXCHANGE OF ANY INFORMATION.

PARTIES

1. Identify each party and title of all participants involved in the dispute.

2. Identify each Disputant required to be present during the mediation process.

3. Identify each decision maker who will not be present during the entire mediation process.

4. Describe any special needs, demands, interests and goals of each Disputant and Counsel.

DISPUTE

1. Describe each claim, dispute and defense.

2. Describe each Disputant's demands —the best case outcome-to be achieved in the Mediation.

3. Identify and quote the key statutes governing the claims and defenses.

4. Identify and quote the key cases governing the outcome of the liability issues. For example: *Stout* v. *Turney* (1978) 22 Cal.3d 718: "Of the two measures the 'out-of-pocket' rule has been termed more consistent with the logic and purpose of the tort form of action (i.e., compensation for loss sustained rather than satisfaction of contractual expectations) while the 'benefit-of-the-bargain' rule has been observed to be a more effective deterrent (in that it contemplates an award even when the property received has a value equal to what was given for it.)"

5. Identify the legal support for each demand for special, general and punitive damages.

6. Identify all defenses to the claims for special, general damages and carefully review the law that requires clear and convincing evidence of malice, oppression and fraud to support punitive damages.

7. Identify key disputed facts discussed in the legal briefs.

8. Identify any key facts and legal issues overlooked by Counsel and the Disputants and strategically and in private caucuses review them with counsel out of the presence of the parties.

9. Identify other issues that may have an effect on the dispute, including change in case and statue law, change in management, change in key decision maker, vacations, trial dates, motions for summary judgment, divorce, employment termination, surgery, promotion, restructure of company, bankruptcy, sale of business, cancellation of insurance coverage, and the need for closure.

10. Should the mediation be conducted in segments? For example, if the claimant is rehired in wrongful terminations claim will the damage claim be resolved? If the

franchisor reinstates a franchise will the damage claim be resolved? If the insurance company renews the insurance policy will the claim for bad faith claim be dismissed?

11. Identify possible resolutions of dispute by restoring, creating or enhancing a commercial relationship that the defendant may be able to provide as an alternative to payment of money damages. For example, a HR Director may be able to re-hire an employee without consulting with a higher authority, whereas the payment of a damage claim may have to go through several levels of review and approval and consultations with the company's risk manger for reporting to an insurance carrier or audit committee.

EVIDENCE:

12. Identify and highlight key provisions of the key documents each party relies on to support a claim or defense.

13. Identify key witnesses necessary to support each Disputant's claim or defense, and ask if it is documented and admissible at trial.

14. Identify key authenticated documents that have been exchanged to support or refute the damage claims.

15. Identify all out of pocket expenses (loss of earnings, medical bills , repairs) and if documents verifying their validity have been exchanged to support or refute the claim.

16. Identify a key decision maker who has surfaced during the mediation and get their contact information..

17. Have arrangements been made to assure that the identified decision makers will be present during the mediation and do the parties need to made arrangement for a video conference.?

18. Which newly identified decision makers will not be able to participate in the mediation process? Should the mediation be rescheduled?

19. Identify all people who have had input on the value of claim and get their contact information. Sometimes it is necessary during the MP to deal with sources of misinformation upon which a Disputant is relying in making a settlement demand that Counsel has not been able to identify.

20. Will an expert (and describe the area of expertise) be helpful in resolving the Dispute. In major cases it is beneficial to have the expert reports and the experts

available for consultation. In construction disputes and malpractice actions it is useful to have the experts on had to answer questions that arise during the MP.

21. Will it be necessary to postpone the mediation pending a verification of an appraisal, an expert opinion or other information that needs to be made available to key decision makers.

SETTLEMENT

22. Identify all contacts information for all sources of insurance or other funds that will be available to pay a settlement.

23. Carefully review and document prior offers, counter offers and settlement discussions? Note it is not unusual for Counsel and the Disputants to state that those damage claims are off the table because time has expired and more costs have been incurred.

24. Describe what each Disputant demands as the minimum acceptable settlement to avoid a trial or other action that may occur to affect the parties' decision making during the mediation. For example, will a new case limit the amount of Brandt fees that can be collected from the Insurer in a bad faith action?

25. Identify other cases or settlements with similar facts and bring them to the attention of Counsel to show outcomes that are different than the Disputants' expectations. While each case is unique, experienced litigants such as corporations and insurance companies, have access to data based on a large volume of case resolutions upon which they rely in making settlement offers.

26. Is there a settlement in kind or a source of creating settlement value other than the payment of money that may result in resolution of the dispute? For example, in a dispute over the under-sized beams for a construction project, will the under-sized beams create value for another use on an another construction project? In looking for value or settlements in kind, the Disputants should be encouraged to look for all potential sources of value and cash equivalents.

RESOLUTION

27. Is a partial resolution possible?

28. Have the parties documented the settlement and final resolution in an enforceable format in compliance with the law?

29. Is the settlement confidential? If so, under what conditions may it be disclosed?

30. Has the mediator completed her case file, closure documents and procedures for any future references to the mediation. In court-annexed mediations the Mediator

must file a form stating the matter resulted in partial agreement, total agreement or non-agreement.

31. If you have made a mediator's proposal, retain a copy for your files and note if it was accepted or why it was rejected. Learn from you mistakes by noting if the impasse could have been resolved by other suggestions. Ask the parties if they want to keep lines of communication with the Mediator open if a settlement is not concluded.

FEES

32. Is there a dispute between the parties and their lawyers about the amount that is owed to the lawyers? Be careful in getting involved in a fees dispute because it is a no win situation for the Mediator.

33. Is there a dispute between a party and her insurance company over coverage, funding the settlement and legal fees and costs? Do not let the funding sources leave the mediation without a written agreement on funding the settlement.

34. Identify the legal basis for the claim of recovery of reasonable attorney fees and costs. Leave the recovery of legal fees for review after the damage claim has been valued so the amount of legal fees and costs can be evaluated in light of the value created for the Disputant.

35. Has the Mediator made arrangement for final payment of her fees, received evaluation forms of her performance and obtained permission to use favorable evaluations by Counsel and Disputants as references for marketing purposes?