Thinking Strategically: Planning to Mediate
A Step-by-Step Approach

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STAGE ONE: DEVELOP A PLAN

A. The Big Picture at the Mediation Table

Strategic planning begins with the big picture. To appreciate the big picture requires stepping back from techniques and procedures, methods and tools to ask what goals and objectives drive mediators. While no two cases are exactly alike, the mediator's role typically includes: 1) overseeing the exchange of information, 2) identifying areas of common ground, 3) improving relationships, 4) clarifying areas of risk and 5) sowing doubt about outcomes should mediation fail. To achieve these goals and facilitate settlement, mediators need a plan. Where to start? What to cover? When to cover it? What are the risks? How to sow doubt? What underlying interests are in play? Developing an effective approach to bring the parties together requires careful thinking and advance planning tailored to each specific dispute. A strategic mediation plan is the end result of thought and painstaking preparation. A strong strategic plan – and a flexible mediator who can depart from the plan when appropriate – are crucial to successful mediating.

This paper provides a step-by-step road map to the development of a strategic plan, following the BADGER model taught in basic training.

B. Elements of preparation

1. Building a Time Line

a. A simple, neutral time line capturing the sequence of important events is an essential tool for almost any mediation.

b. The sequence and timing of events is often crucial to a final determination of the outcome, as for example, in a case of whistle blowing or retaliation, medical malpractice or police misconduct.

c. Where the facts are complicated, a time line is essential to keeping them straight. The disputants have lived with their case for years; the mediator is hearing it for the first time.

A time line levels the playing field dramatically.

d. As new facts come out at the mediation table, a detailed time line provides background and context for where each fits into the overall narrative

e. The time line is the Mediator's tool. It is not necessary to show it to the parties, though this could be helpful. Accordingly, time lines should be simple, neutral and inclusive of points important to all sides. A slanted time line or one that leaves out items important to a given party can undermine mediator neutrality.

f. The time line should be constructed as mediation summaries are read and reviewed.

2. The A of Badger

a. The A of BADGER stands for "ask for and acknowledge parties' opening statements". In A, mediators listen carefully to opening remarks prepared by parties and counsel, then reframe in neutral language. Reframing can be particularly challenging when left until the last minute when the mediation actually begins. A well prepared mediator anticipates what each participant is likely to say, based on written submissions, and writes out key words and emotions to be used for reframing in advance. As a result, the mediator becomes a better listener and observer, working IN THE MOMENT. A set of prepared reframing comments serves as a core, subject, of course, to modification when an oral presentation differs from expectations, as often happens.

b. Steps

1) Anticipate what the parties and lawyers are likely to say in their opening remarks at the table. Consider what emotions people will be experiencing and select words you might use in reframing to name that emotion. **2)** Prepare written reframing statements for each participant in advance, covering BOTH facts and feelings. Refer to "A Mediator's Inventory of Feelings" and keep it handy. The Inventory can be found behind Tab 8 in this Binder.

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3) Be in the moment! **<u>Listen carefully</u>** to each statement and modify your prepared remarks as necessary to accurately capture both facts and emotions not anticipated or fully appreciated.

4) Reframe after each individual participant speaks, to show you've listened, heard and understood.

"For example, in an age discrimination case, you can anticipate plaintiff believes she was a good employee miffed that the company dismissed her summarily. You might prepare a reframe like this: "You believe you always did what the company asked of you, and you resent beinglet go nonetheless."

2. The D of BADGER

a. The D of BADGER stands for "Develop the Agenda". The hallmarks of a good agenda are neutrality, simplicity and elegance. A strategic mediator decides in advance what topics to list on the agenda and how to use each topic to launch questions when the time comes to gather information and generate movement. Topics are selected for the agenda based on the mediator's sense of what should be covered. As with reframing, it is difficult to develop a neutral, simple and elegant agenda of discussion topics in the right order without advance preparation. By reading the written submissions, a mediator can develop a solid, working agenda in advance, subject to modification where oral presentations differ.

b. Steps

1) Identify key topics needing to be discussed (see Tab 9 in this binder)

2) Write them out in advance. Is the list complete? Do the topics provide everyone an opportunity to talk about everything that needs to be discussed? **3)** Convert to simple, neutral and elegant words.

4) Picture how the agenda will look on a flipchart **5)** Listen carefully during opening statements and modify your agenda as necessary.

6) Share your agenda with disputants verbally – without explanation. If you've developed the right agenda, it doesn't require explanation.

7) Do not write agenda topics on the flip chart until after you tell the disputants what they are.
8) Use agenda topics to manage discussion in G **9)** Check off topics as you complete discussion to demonstrate progress and build momentum.

3. The G of BADGER - Gathering Information:

a. The G of BADGER stands for "gather information and generate movement" – two distinct phases. The mediator first facilitates the exchange of information and gives the parties an opportunity to get comfortable with the process, perhaps to vent and generally to get their stories out on the table. Only after the mediator believes enough time has been spent bringing out stories, views, claims and defenses, is it time to engage in techniques to generate movement. Both parts of G are accomplished using open ended, neutral-sounding questions. A well prepared mediator identifies the topics to discuss in advance, the person or persons with whom to discuss each topic, and the order in which to pursue them. To maintain neutrality, questioning should be symmetrical. Topics are pursued alternately from one side to the other. In some cases, the same topic may be pursued with each side, seeking reaction after an assertion about the facts and evidence or law.

1) To prepare the information gathering component of G requires reading party submissions carefully and thinking about what needs to happen at the mediation table. The thoughtful mediator asks herself: "What topics need to be discussed? What information needs to be shared?" **2)** In a discrimination case, for example, plaintiff might be asked to describe the claims of discrimination and who in management knew about them. Where management denies discrimination and asserts a reasonable, nondiscriminatory basis for its actions, management representatives might be asked to describe what it knew or what their investigation revealed and the extent to which this has been shared with plaintiff.
3) If there are emotional "hot buttons", determine whether it is safe to share them at the table. In a sex harassment case, for example, consider asking plaintiff to share her frustration with management's indifference to complaints while a management representative is present. If the

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defendant seller is upset that the company failed to respond properly to the plaintiff customer's complaint, consider asking him to share that perspective with plaintiff. **4)** Often the parties are not considering the same information. They may not even be aware of the facts relied on by the other side. Another part of the mediator's plan is to identify in advance information the parties need to exchange. The dollar value the parties place on a case is typically based on the facts and risks known at the time the evaluation is made. Presumably, when new information surfaces, the parties reevaluate their case and are ready to move to a new offer.

5) As new information is shared, the mediator seeks reaction from the other side. Anyone who has watched The News Hour with Jim Lehrer, has seen the technique in action: After someone has shared a perspective, analyzed a fact, provided an argument, the moderator turns to the other side and says, "What's your reaction to that?"

6) A set of these kinds of questions prepared in writing in advance will help the mediator accomplish the goal of exchanging important information, controlling the process and resisting efforts to change the subject.

7) Most litigators are familiar with the practice of writing out word-for-word certain key questions at deposition or trial to insure getting their hypothetical "right." The technique is similar in mediation. The difference is that mediators ask open ended questions that elicit narrative answers; while litigators ask tight, closely controlled questions to achieve a specific result. Once you write out your question, rehearse how you might deliver it at the table. If it isn't neutral or clear or open ended, rework it until you are satisfied that it's ready for use live.

8) If there are issues that offer an opportunity to find common ground, to discuss a long standing positive relationship or other basis for an early agreement, strategic mediators pursue these first to build momentum. **9)** Follow the 80 – 20 rule. Ask questions; do not make pronouncements.

b. Steps

1) Identify what to bring out at the table under each agenda item. Remember: This is **NOT** an opportunity for cross examination! Think. Ask yourself the following

questions: – What needs or interests are driving the dispute?

- What questions might bring these out? What will you do with this information once it emerges?
- Are there emotional issues which need to be vented?
- Are there topics on which the parties agree?
- Is there an opportunity to focus on relationship building?
- What topics can the disputants discuss with each other safely? What topics should be reserved for caucus?
- What topics are likely to start a productive dialogue? What topics should be avoided in joint session?
- Does either party need to get something off his/her chest? If so, should it happen privately or in joint session?
- Do the parties have the same information?
- What facts will help each side better assess their risks?
- Explore absence of facts: missing witnesses, missing documents, testimony of a witness neither side has interviewed, etc.
- Are there non-monetary options to potentially meet the needs of both sides which might contribute to win/win settlement terms?

2) Prepare separate lists of **open ended**, written questions for each party and lawyer to bring out the information you want on the table. Play the questions out in your mind as you prepare. How do they sound? How will they be heard by the disputants? What answers are they likely to give?
How will you respond? Questions should:

- Develop facts likely to help the process; not to satisfy mediator curiosity.
- Give parties a chance to share their story: "Say more about…."
- Be prepared to let someone vent. "How did that make you feel…?"
- Bring out options that might lead to non-monetary resolutions.
- Scapegoat yourself: "Help me understand …." **3)** Arrange your questions in the order you believe will

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be most effective. Give thought to who you want to direct each question to and the sequence of questions. **4)** For every set of questions for one side, have a comparable set for the other. However, do not jump from topic to topic. Any topic worth raising is worth developing fully! Prepare multiple open-ended questions per topic. Do not change topics until you have discussed each thoroughly. The rule of symmetry applies to emotion questions as well as fact/risk questions. Review your list. Have you included emotional topics as well as factual ones?

5) Listen carefully. Be prepared to add to your list of topics as you discover what's really important to the disputants or new subjects emerge from the discussion.
Write them down for later.

c. Helpful Hints

1) Compliment parties for suggestions and adjustments that contribute to progress.

2) Anticipate answers that may be emotional. Be prepared to reframe whenever the opportunity arises. Reframing is not confined to A of BADGER.

3) Review "Good Questioning Skills" P. 10-2 & 10-3.

4) Areas of inquiry during the information gathering part should influence the topics you select for your agenda. If you plan to ask questions about the impact of an accident or of employment termination on the plaintiff's life at the start of the mediation, there should be something on the agenda to which you can point: "Let's talk about 'impact.' Tell us how this has had an effect on your life." Once that's done, the mediator should turn to the defense and raise a question with the defense. "Talk about your assessment of the impact. How do you view what you've heard?"

4. The G of BADGER – Generating Movement

a. The G of BADGER also stands for generating movement. Sometimes gathering information by itself will generate movement. As noted, every settlement offer and counter offer is based upon the facts and risks known at the time it is made. When new facts are learned or known facts shown to be wrong or misconstrued, the offer on which it is based ought to change. Rarely will the exchange of information

by itself result in the public softening of positions. Therefore, in addition to preparing questions to encourage information sharing, mediators must develop "difficult questions" for the disputants; questions which sow the seeds of doubt and help each side face their risks and weaknesses realistically. Even the most difficult questions must be asked in a neutral tone and in neutral language without revealing the mediator's opinion. Mediators are entitled to their feelings and opinions; mediator neutrality mandates that it not be shown. While questions tailored to each individual case are preferred, generic questions appropriate to both sides might include:

1) What are the weaknesses in your case/what do you see as the strengths of the other side? Usually these have been identified, discussed and analyzed in opposing counsel's mediation summary. Therefore, asking them in joint session should come as no surprise to anyone.
2) Where are your risks? What are the factors in this case that can come back to haunt you? Have you considered…? **3)** Is there is a crucial piece of evidence missing? Each side can be asked how important that evidence is to their ability to prevail; what efforts have been made to find or develop the evidence; the consequences of NOT finding it; and the outcome if the evidence turns out different than anticipated. Is there a key witness or document, for example, that has not turned up by the time of mediation?
That witness or document is a risk worth exploring. **4)** Is there a motion pending? Is it dispositive? What impact will the motion have on the proceedings for either side if granted? If denied? If denied, how will denial impact the settlement posture of the prevailing party? What is the likelihood the motion will be granted? How many motions like it has this judge granted? Denied? Has this judge addressed the same issue previously?
5) In an age discrimination case, for example, how does the 55 year old plaintiff explain that he was replaced by someone older or close to the same age? In an automobile negligence case, how will the defense explain a high blood alcohol level in the blood of the defendant driver? **6)** Is there evidence relied on by one side or the other which is likely to be challenged at trial as inadmissible? Common examples are how other employees were treated; the

driving record of the tortfeasor; or how a defect was repaired. Explore the value of the evidence – if it comes in, how does it help or hurt; if excluded, how does that help or hurt; what is the decision likely to be?

b. Helpful Hints

1) Do **NOT** tell a party what their weaknesses are. To do so risks loss of confidence in your neutrality and is likely to result in an unproductive argument. Instead, mediator inquiries should be simple, open ended and neutral questions seeking to learn how a party will address or deal with each issue. For suggestions on how to develop such questions, see P. 10-9, "Formulating Neutral, Open-Ended
Questions in Mediation: An Approach."

2) The questions you select to gather information in G should influence what you choose to include in your agenda.

3) Decide which questions to ask in joint session and which to ask in caucus. If the weaknesses and risks are well known and discussed in the briefs by the parties, there's no reason to confine the issue to caucus. If you are concerned about embarrassing a lawyer in front of the other side, or asking for information a lawyer might be reluctant to discuss openly, waiting for caucus is appropriate. **4)** In preparing the questions, anticipate the likely answers to be offered. Do the suggested answers stimulate additional follow up questions? If so, what are they? Reframe the follow up questions in simple, neutral question format.

5) Follow the 80 – 20 rule. Ask questions; do not make pronouncements.

c. Steps

1) Identify uncertainties in each side's case.

2) Draft a set of neutral sounding, **open-ended** questions that assist the disputants in realistically facing them. Unless the parties already agree on a fact, do not push for agreement on what happened. The best you can expect is agreement to disagree. Do not cross-examine to generate movement. The more open ended your questions, the better:

- Example: "Talk about the missing witness."

– Example: “Describe the investigation into….”
– Example: “How did you feel about….”

3) Decide which questions to ask in plenary session and which in caucus.

4) Marshall the questions in the order you believe most effective.

5) Anticipate likely answers to tough questions by playing out the discussion in your mind and prepare neutral sounding, **open-ended** follow up questions.

6) For every difficult or emotional question asked of one party, prepare a comparable hard or emotional question for the other.

7) For Caucus

- Raise issues parties are reluctant to discuss in front of each other or did not answer candidly in joint session. E.g., “How do you assess the manner in which your key witness testified in his deposition?” - Discuss issues that might embarrass someone in joint session. E.g., “You rejected his sexual advances for months. Why did you eventually give in?”
- Explore underlying interests & needs. E.g., “Would you relocate if you could earn twice as much in salary?”
- Raise hypotheticals. E.g., “If they came up with $50,000, what would you be prepared to offer?” - Look to future. E.g., “How will your life look tomorrow if we settled this case today?”
- Serve as a negotiation coach. E.g., “How are they likely to react to that offer? Is that the response you’re looking for?”
- Gauge the emotional temperature of the parties. Should the strength of feeling be shared with the other side? Would it be more effective if a party shared these feelings directly rather than through you?

STAGE TWO: FOLLOW THE PLAN

A. A strategic plan requires a great deal of thinking and preparing. If you have a good plan, follow it. Work it at the table just as you imagined it in your mind – but **BE FLEXIBLE!**

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B. The opening statements of the parties and counsel may present an entirely different picture of the case than what you anticipated from the written submissions. Sometimes the written submissions contain posturing, invective and exaggeration not displayed in person. The lawyer who wrote the summary may not be the lawyer who attends the mediation. If so, you must be ready to reconsider and depart from your plan. On the other hand, if the facts emerge more or less as anticipated, stick with the plan:

1. Balance questioning. If you have a good question to gather information or raise doubt with one side, have an equally good question to do the same with the other.

2. Any issue worth raising is worth developing fully. Do not jump from topic to topic. Once you raise an issue stay with it until you've learned all you think necessary about that topic. Only when you've gained all the information relevant should you move on.

C. After spending time gathering and exchanging information, turn to questions that address weaknesses, risk and doubt. After you've asked a couple of good questions that have forced each side to face their problems, it is generally time to see if you've achieved any softening in settlement posture which can be turned into movement.

D. You may well discover new areas of risk and weakness as a result of the exchange of information. Your list of movement generating questions should also be flexible and open. Be prepared to add new topics to your list for later rounds.

E. Now What?

1. BE IN THE MOMENT! Be flexible! Look for opportunities to intervene. Otherwise, follow your plan.

2. Select an item to discuss from the Agenda.

3. Opening questions in G should be directed to parties, NOT lawyers. Ask questions with which they will be comfortable. "Tell me about your work history." "What's the nature of your business?" Consider letting a party vent feelings. Formulate questions that give the parties a chance to communicate with each other.

4. Be Symmetrical! Ask comparable questions of each side. From time to time, ask for reaction from the other side.

5. *If a topic is worth raising, it's worth developing thoroughly.* Stay with it until complete. Don't jump around from one topic to another. You're asking the party to tell a story – encourage completion of the story before moving on. Be mindful, however, of emotions at the table. Do both sides find the discussion productive?

6. Continue using open ended, non-evaluative questions. Do **NOT** cross examine!

7. Keep your eyes open for signs of softening and doubt.

STAGE THREE: START THE NEGOTIATION

A. With the parties "softened up", it is time to explore settlement options. Before negotiating dollars, determine the state of offers and counteroffers in joint session with both parties at the table. Who made the last offer? What was it? Make certain the parties are on the same page by pursuing the negotiation history in joint session. Often the parties will have different memories on this. You don't want to waste time shuttling back and forth on whose memory is better!

B. Standard negotiation practices apply in mediation:

1. If there have been no discussions, it is traditional for plaintiff to go first, making an initial demand. Be prepared to remind the defense when the inevitable complaints of "outrage" and "over reaching" are expressed that this is merely the initial offer in a long, difficult dispute.

2. Once a demand is made, it is expected that defendant will respond, generally with a counter offer. When the plaintiff expresses equal "outrage" and dismisses the counter offer as a "nuisance", be prepared to remind plaintiff that this is merely the opening and is useful in putting "book ends" on the negotiation.

3. Don't ask defendant to start negotiations by putting out the first offer even if encouraged by plaintiff to do so. Negotiations are likely to start in a discouraging ball park. It is always a mistake. If the defendant offers to start, you should explore the offer in caucus and satisfy yourself that you understand why and believe an exception to the general rule is warranted.

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4. **4.** Avoid delivering offers or counter offers radically out of line or insulting, as the receiving party may withdraw from negotiations, refuse to respond or lose confidence in you. Placing negotiations back on track is VERY difficult.

5. **5.** If there is an offer on the table, the appropriate move in mediation is from the offeree.

C. Asking a party for a better offer because the offeree didn't like the first one is not effective, confuses the offeror and costs you credibility. No one wants to "negotiate against themselves." See, for example, "The 10 Things Mediators Hate to Hear" at P. 10-11.

D. Make as much progress as you can with offers and counter offers. When you can make no further progress, return to your plan. Raise the next set of questions to sow doubt, explore risk and help the parties to face and appropriately assess strengths and weaknesses.

E. Explore/brainstorm options – Sometimes, when the parties cannot agree on financial issues, turning to non-economic terms can be helpful in meeting needs, satisfying underlying interests and changing the financial calculus.

1. In an employment case, can something be done about a neutral reference, generating a letter of recommendation, cleaning up a personnel file or changing a discharge to a resignation?

2. In a business case, is there a business solution that reduces or eliminates the payment of money?

3. In an injury case are there safety changes that might prevent future occurrences?

4. Is an apology appropriate? If so, you want to hear it first. Bad or poorly delivered apologies are counter-productive. Be prepared to coach a good apology.

CONCLUSION

Mediators who develop a plan and follow their plan bring confidence and optimism to the process. They build trust and move forward knowing where to go

when resolution seems most remote and the participants discouraged. Having a mediation plan frees the mediator to be "in the moment", listening to the words, paying attention to the body language, tuning in to the emotional temperature of the participants. With the foundation of a strategic plan, the mediator is able to step back as necessary to observe where common ground has been found or progress achieved. The strategic plan can be an anchor to limit distraction or a road map through the thicket of moves and counter moves in negotiation. Effective mediators, however, must be flexible. They depart from their plan when appropriate. A well thought out plan does not prohibit the mediator from taking advantage of unexpected opportunities to intervene or change direction. Above all else, a strategic plan prepares the mediator to be the best he or she can be.

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