Why Mediation?
Taking Advantage of the Lawsuit Marketplace
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“Discourage litigation. Persuade your neighbors to compromise whenever you can…”

“Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time...”

"As a peacemaker the lawyer has the superior opportunity of being a good man. There will still be plenty of business."

Find the case that is suitable for Mediation and then find a way to get it there - sooner rather than later!

Gross/Syverud (90-91) - Plaintiffs make more mistakes in refusing to settle
Previous Studies

- Rachlinsksi (1996)
  - Plaintiff had higher percentage of error (56.1%)
  - Defendants had a lower percentage of error (23%) but greater risk of bad result ($354,000)
Comparing the actual trial results to rejected settlement offers, the study found that **61% of the plaintiffs** obtained a result that was **not economically better** than the settlement offer, i.e. it was either **the same or worse** than what was offered;
The Recent Study: What You Need to Know

- When the plaintiffs rejected an offer and did better (39%), it was *not that much better*

- Does *not* factor in time and cost of trial

- Win? Loss?
In contrast, 76% of defendants did better

However, when the defendants rejected the last demand and went to trial, and did worse (24%), it was much worse -
So...

- *Plaintiffs* experienced adverse trial outcomes more frequently than defendants.

- BUT cost to defendants of “decisional errors” were *significantly higher* than plaintiffs’ costs.
The Recent Study: What You Need to Know

- **Mean cost of error to plaintiffs:** $43,100
- **Mean cost of error to defendants:** $1,140,000!
- **BIG DIFFERENCE:** Expected cost of error is greater for defendants by a multiple of **26!**
Examples: Cases Suitable for Mediation

- Clear liability: Only $$ in dispute
- One side needs education - may not be a case
  - Parties have $$ reasons to resolve, long protracted expensive process ahead
- Parties agree there is dispute - “buy peace”
Examples: Cases Suitable for Mediation

- Nature of matter is confidential - parties want protection
  - One side or other will not gain by publicity of dispute
- Financial pressures compel early resolution
  - Parties need to be creative about how to resolve - complexities need ironing out
Examples: Cases Suitable for Mediation

- An intermediary needs to be involved to bring rationality to the negotiations
- Parties have an ongoing relationship
- Need to involve insurance carriers
  - THE COURT ORDERS IT!!!
Bottom Line:

It just makes economic sense for the parties to resolve before protracted litigation, consumption of financial and personnel resources and energy.
The Three “C’s” of Negotiation

- Candor
- Communication
- Confidentiality
The three “C’s” “advance the policy that the decision-making authority in the [negotiation] process rests with the parties….”

Uniform Mediation Act, Approved by the ABA, Philadelphia, Pa. February 4, 2002
Top 10 Reasons Cases Don’t Settle at Mediation

10. You are not ready
Top 10 Reasons Cases Don’t Settle at Mediation

9. Your client is not prepared
10. You are not ready
Top 10 Reasons Cases Don’t Settle at Mediation

8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready

No.8
Your opposition is not prepared, or does not understand your case
Tip: Need Strong Mediator Intervention Here
No. 7

The Mediator is not prepared or is ineffective

Tip: Back off, cut the day short or have a “heart to heart” with Mediator

7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready
No.6
Emotions of the parties or their counsel interfere with the process
Tip: The Mediator must intervene
Top 10 Reasons Cases Don’t Settle at Mediation

5. Understand case economics
6. Emotions, parties or Counsel
7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready

No.5
The parties do not understand the economics of the case
Tip: An impartial expert selected by mediator
Top 10 Reasons Cases Don’t Settle at Mediation

4. The parties lack credibility
5. Understand case economics
6. Emotions, parties or Counsel
7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready

No.4

The parties lack credibility

Tip: Mediator needs to assess HOW to overcome
Top 10 Reasons Cases Don’t Settle at Mediation

3. Parties are not candid
4. The parties lack credibility
5. Understand case economics
6. Emotions, parties or Counsel
7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready

No.3

The parties are not candid with each other and the Mediator

Tip: The Mediator must intervene

Why Mediation?
No. 2
Client expectations are too high

Tip: Mediator must bring client and Counsel to a realistic position.

Top 10 Reasons Cases Don’t Settle at Mediation

2. High client expectation
3. Parties are not candid
4. The parties lack credibility
5. Understand case economics
6. Emotions, parties or Counsel
7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready
Top 10 Reasons Cases Don’t Settle at Mediation

1. Unable to control client
2. High client expectation
3. Parties are not candid
4. The parties lack credibility
5. Understand case economics
6. Emotions, parties or Counsel
7. Mediator is not prepared
8. Opposition is not prepared
9. Your client is not prepared
10. You are not ready

No. 1
Counsel is unable to control client
Tip: Confer with mediator as to whether there is potential to overcome this situation
The Profile for Selection - *Plaintiff*

- Your client’s emotional state
- Your client’s financial circumstances - NOW
  - Liability picture -
    What are the chances of recovery
  - Consider “proof” on damages
- The Presence (or absence) of insurance
Consider the economics for proceeding to trial, **DO THE MATH EARLY, NOT LATER**

This is a consideration for ALL parties!
Lawyer Jan Schlichtman, “A Civil Action”

“The odds of a plaintiff’s lawyer winning in civil court are 2 to 1 against”...

Why Mediation?
“The odds of a plaintiff’s lawyer winning in civil court are 2 to 1 against. Think about that for a second. Your odds of surviving a game of Russian roulette are better than winning a case at trial. 12 times better...”
“So why does anyone do it? They don’t. They settle. Out of the 780,000, only 12,000 or one and a half percent ever reach a verdict...”
"The whole idea of lawsuits is to settle, to compel the other side to settle..."
“...And you do that by spending more money than you should, which forces them to spend more money than they should, and whoever comes to their senses first loses...”
“...Trials are a corruption of the entire process, and only fools who have something to prove end up ensnared in them. Now when I say prove, I don’t mean about the case, I mean about themselves…”
Reality:
Mediators do very little before the mediation day to insure the parties are ready. They rely on counsel to prepare what is needed by the Mediator.
Some Realities About Mediation

So the question is...

What do YOU need to do as a Mediation Advocate to get the case ready for a timely resolution?
Mediation is...

- A key to successful resolution
- A way to test your case
- A way to fulfill professional obligations
- A Win|Win
- A part of the *Litigation Management Plan*
What is Litigation Management?
Good Results Come from 10 Basic Principles

What is Litigation Management?

The effective planning, organization, delegation and supervision of litigated matters so as to gain the advantage crucial to achieving an acceptable and timely resolution of the dispute.
Mediation As A Part of the Litigation Management Plan

- Use the tools to get you there
  - Gain the advantage
  - Get LEVERAGE
  - Show confidence
- Focus on getting to a “PLATEAU” of evaluation for all parties
Good Results Come from 10 Basic Principles

Ten principles that will guide you through pursuit of *timely* settlements
Good Results Come from 10 Basic Principles

Principle No. 1
Understand the Mediation Theatre

Mediation is a forum for discussion
1. Understand Mediation Theatre

Principle No.1
Understand the Mediation Theatre

Mediation is compromise
Always be positive; don’t get discouraged - process needs to play out.
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre

Principle No.1
Understand the Mediation Theatre
You will ALWAYS learn something valuable
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre

Principle No. 1
Understand the Mediation Theatre

Basic Rules:
- Show Patience
- Listen Carefully
- Stay the Course
- Keep Talking

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Principle No.2
Prepare Your Client

This is a foreign forum to your client
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Principle No.2: Prepare Your Client

Some clients expect to “testify” and win by the strength of their emotions and story.
Principle No.2
Prepare Your Client

Some clients are intimidated, scared and anxious
Mediation is an opportunity for:

- Your client to have “a day in court”
- Client storytelling without the restrictions of trial rules

Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
Principle No.2
Prepare Your Client

Help your client:
- Be comfortable
- Understand the process
- Emotionally cope
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Prepare Your Client for the Economics of Settlement
- Documentation
- Mutual Releases
- Confidentiality
- Payment
- Structures, if any

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Checklist to Prepare Your Client

- Advise that Mediation is “non-binding”
- Advise what to expect from start to finish
- Advise what happens if case fails to settle
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Checklist to Prepare Your Client

- Outline what you expect of your client
  - Outline what your client must avoid
  - Outline how a Mediation proceeds
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Checklist to Prepare Your Client

Nothing positive until 2:30PM!
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Checklist to Prepare Your Client

- Discuss both weak and strong points
- Outline how Mediation can help meet Client’s long-term goals
- Prepare your Client for “give and take”
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client

Checklist to Prepare Your Client

- Be realistic about compensatory claim
- Assess expectations of damages
- Be realistic as to results

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points

Principle No.3
Find Pressure Points

Use Discovery devices:
RFA’s, Depo Notices,
RFP’s, Interrogatories

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points

Principle No.3
Find Pressure Points

Whatever it takes to gain the advantage, obtain “LEVERAGE”
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need

Principle No.4
Get the Information You Need

Do a careful evaluation of the real damages - dollars and cents!
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need

Principle No.4
Get the Information You Need

- Assess what you need - efficiently get it
- Streamline discovery and investigation

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need

Principle No.4
Get the Information You Need

Show good faith

Why Mediation?
<table>
<thead>
<tr>
<th>Principle No.4</th>
<th>Get the Information You Need</th>
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<tbody>
<tr>
<td>Consider offering up your client for interview or deposition, perhaps just a first session (let them see and hear your Client)</td>
<td></td>
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### Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
If they don’t want to see the witnesses, then consider providing video interviews.
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need

Principle No.4
Get the Information You Need

Shove the good stuff down their throat!

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On

Principle No.5

Keep the Pressure On

Select cases that are “ripe” for early Mediation and PUSH
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On

Principle No.5
Keep the Pressure On
- Don’t get frustrated by opposing party’s stalling
- Move reasonably swiftly to the goal of a *timely* resolution
Principle No. 6
Use Your Experts

- Engage them early
- Choose the correct ones
- Be efficient
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts

Principle No.6
Use Your Experts
- Pick a “quarterback”
- Consider hiring a consultant
- Confidential review of your case
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts

Principle No.6
Use Your Experts
- Run interference for you
- Efficient use of resources
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator

Principle No.7
Choose the Appropriate Mediator

For Plaintiffs:
Consider former “defense” lawyers - the defense loves it!
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator

Principle No. 7
Choose the Appropriate Mediator

Use "specialty" mediators!
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator

Principle No.7
Choose the Appropriate Mediator

Research who they are and what they have done, talk to colleagues

Why Mediation?
Choose a mediator who will have the ear of the other side
1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator

Principle No.7
Choose the Appropriate Mediator

- If the other side wants to pick - consider it
- The other side will listen to its choice
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator

Principle No.7
Choose the Appropriate Mediator

Choose a “closer”
Your job should be 95% done when you walk in the Mediator’s door

Principle No.8
Prepare the Mediator

Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator

Why Mediation?

GUY KORNBLUM & ASSOCIATES ATTORNEYS
1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator

Principle No.8
Prepare the Mediator

Be prepared to help the Mediator through the day to negotiate for YOUR Client

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
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5. Keep the Pressure On
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7. Choose Appropriate Mediator
8. Prepare the Mediator

Principle No.8
Prepare the Mediator

- Bring out the weak points in private sessions
- Discuss with Mediator how to handle

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
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4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator

Principle No.8
Prepare the Mediator

Use the “private letter” - IT WORKS!
Use Videos - THEY WORK!

Principle No. 8
Prepare the Mediator

Principle No. 7
Choose Appropriate Mediator

Principle No. 6
Use Your Experts

Principle No. 5
Keep the Pressure On

Principle No. 4
Get the Information You Need

Principle No. 3
Find Pressure Points

Principle No. 2
Prepare Your Client

Principle No. 1
Understand Mediation Theatre

Why Mediation?

Good Results Come from 10 Basic Principles
Principle No. 9
Be Diplomatic

Work to gain the respect of everyone involved
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Put your Client’s and your best feet forward

Why Mediation?
<table>
<thead>
<tr>
<th>Principle No.9</th>
<th>Be Diplomatic</th>
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<tbody>
<tr>
<td>Be gracious</td>
<td>(if it’s natural to do so)</td>
</tr>
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1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
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5. Keep the Pressure On
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7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic

Good Results Come from 10 Basic Principles
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| 6. Use Your Experts |
| 7. Choose Appropriate Mediator |
| 8. Prepare the Mediator |
| 9. Be Diplomatic |

PROFESSIONALISM at all times
<table>
<thead>
<tr>
<th>Principle No.9 Be Diplomatic</th>
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</thead>
<tbody>
<tr>
<td>- No hostility</td>
</tr>
<tr>
<td>- No anger</td>
</tr>
<tr>
<td>- No venting (except privately)</td>
</tr>
<tr>
<td>- Avoid confrontation</td>
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</table>

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic

Good Results Come from 10 Basic Principles
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Anything to reduce tension

Principle No.9
Be Diplomatic

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Consider whether or not an “Opening Statement” should be given

How will it be delivered?

Principle No.9
Be Diplomatic
1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic

Principle No.9
Be Diplomatic

If you give an “opening”, take the “high road”
# Good Results Come from 10 Basic Principles

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<th>Principle No.9</th>
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<tr>
<td>Prepare your Client for the difference between your role at Mediation and at Trial - “different hats”</td>
<td></td>
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| 1. | Understand Mediation Theatre |
| 2. | Prepare Your Client |
| 3. | Find Pressure Points |
| 4. | Get the Information You Need |
| 5. | Keep the Pressure On |
| 6. | Use Your Experts |
| 7. | Choose Appropriate Mediator |
| 8. | Prepare the Mediator |
| 9. | Be Diplomatic |

**Why Mediation?**
Principle No.9

Be Diplomatic

Advocacy in the Mediation forum is different from advocacy in the courtroom, so... be sure your Client understands that...
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Be Diplomatic

Principle No.9
Be Diplomatic

DIPLOMACY WINS!
- Credibility wins
- Honesty Wins
- Set the bar high

Why Mediation?
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Know the Numbers

Outline settlement vs. trial scenarios

Principle No.10
Know The Numbers

Why Mediation?
### Good Results Come from 10 Basic Principles

<table>
<thead>
<tr>
<th>Principle No.10</th>
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<tbody>
<tr>
<td>Know The Numbers</td>
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Be prepared to recognize when the best deal is on the table

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Know the Numbers
Good Results Come from 10 Basic Principles

1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Know the Numbers

Principle No. 10
Know The Numbers

Be prepared to “massage” an offer/demand that is not quite “there”
1. Understand Mediation Theatre
2. Prepare Your Client
3. Find Pressure Points
4. Get the Information You Need
5. Keep the Pressure On
6. Use Your Experts
7. Choose Appropriate Mediator
8. Prepare the Mediator
9. Be Diplomatic
10. Know the Numbers

Principle No.10
Know The Numbers

Remember, this is a COMPROMISE, not a battle zone
VICTORY: A Settlement...

...that “works” for your Client
VICTORY: A Settlement...

...that advances your Client’s goals  
(be sure you know them!)
VICTORY: A Settlement...

...that works with the economics of further litigation
VICTORY: A Settlement...

...that truly buys “peace”
VICTORY: A Settlement…

...that meets the personal and economic expectations of your Client
And the winner is...
VICTORY: A Settlement...