MEDIATION: A REVOLUTIONARY PROCESS THAT IS REPLACING THE AMERICAN JUDICIAL SYSTEM

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I. INTRODUCTION

It has been said that the American judicial system is the finest yet devised by mankind. It seeks the truth in all instances and to do justice to all who enter its hallowed halls. Indeed, Americans not only have the right of access to civil courts but also to be judged by their peers in all federal courts and in most state courts. So fundamental is the right to trial by jury that it is enshrined in the Bill of Rights to the United States Constitution. The Seventh Amendment assures that all persons being heard in federal courts have the right to trial by jury.[1]

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[1] The Seventh Amendment codifies the right to a jury trial in civil cases (the Sixth Amendment in criminal cases). It provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

U.S. CONST. AMEND. VII. The Founding Fathers looked to England for including trial by jury in the Bill of Rights. There, the jury system in both civil and criminal cases was an essential countervailing force against the tyranny of the Crown. William Blackstone wrote that it was "the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either by his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (1765). King George III of Great Britain abolished trial by jury in the Colonies, one of the main grievances precipitating the American Revolution. America's Founding Fathers were deeply concerned with arbitrariness of justice, such as those "of [King] Philip in the Netherlands, in which life and property were daily confiscated without a jury, and which occasioned as much misery and a more rapid depopulation of the province." 2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 397 (1836) (state-

In spite of this hallowed right, civil trials, and in particular jury trials, are becoming obsolete in this modern day and age. Former Chief Justice Warren E. Burger of the United States Supreme Court opined, in 1984, that civil trials will no longer be a primary means for resolving differences. He suggested that "for many claims, trial by adversarial contest must go the way of ancient trial by battle and blood . . . ."[2] Indeed, there has been a dramatic transfer of disputes from the courtroom to the conference table, from jury trial to mediation.

For many, and in particular judges, the words of Chief Justice Burger are heresy. In their view, Alternative Dispute Resolution (ADR), including mediation, is undermining not only the courtroom trial, but the sacrosanct right to trial by jury.[3] One federal magistrate stated that "[c]ivil jury trials in the federal courts in

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ment of Thomas Tredwell, New York ratifying convention, June 17, 1788) [hereinafter ELLIOT's DEBATES]. According to Senator Richard Henry Lee, the primary purpose of trial by jury in America was to protect the public from corrupt and aristocratic judges:

> The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely entrusted to the magistracy,—a select body of men, and those generally selected by the prince, of such as enjoy the highest offices of the state,—these decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is not to be expected from human nature, that the few should always be attentive to the good of the many. The learned judge further says, that "every tribunal, selected for the decision of facts, is a step towards establishing aristocracy—the most oppressive of all governments."

4 ELLIOT's DEBATES, *supra* note 1, at 148 (statement of James Iredell, North Carolina Ratifying Convention, July 29, 1788).

2 Chief Justice Warren E. Burger, Speech to the American Bar Association (Feb. 12, 1984), *reprinted in* Annual Report on the State of the Judiciary, 70 A.B.A. J. 62, 66 (1984).

3 In Iowa, jury trials decreased 38 percent from 1993 to 2002 and at an ever-increasing rate since. *See* Robert W. Pratt, *Letter to the Editor,* DES MOINES REG., Aug. 15, 2003. Nationwide, the number of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002. More startling is the 60 percent decline in the absolute number of trials since the mid-1980s. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). A similar decline in both percentage and absolute number of trials is found in federal criminal and bankruptcy cases. *Id*. According to Professor Galanter this "phenomenon is not confined to federal courts; there are comparable declines of trials, both civil and criminal, in state courts, where the great majority of trials occur." *Id*. at 460.

Civil cases across the country actually decided by jury verdict currently constitute less than one percent of cases filed. The statistics for bench trials is similar. *See* Peter L. Murray, *The Privatization of Civil Justice*, 91 JUDICATURE 272 (2008).

One federal judge noted that in 1981, there were 450 civil cases on the civil docket. Today he has approximately 100 cases, one-third of which are prisoner cases, with a significant percentage of the remaining being student loans, mortgage foreclosures, and union benefit contribution cases, the vast majority of which are resolved by default judgment. Interview with United States District Court Judge John A. Jarvey, Southern District of Iowa. (Sept. 30, 2010).

Iowa are disappearing. That is a statistical fact. Most cases that previously were tried are now settled with the aid of mediation."[4]

There is obvious concern to "the dramatic reduction in civil jury trials." Its impact, it is argued, is profound. It is (1) undermining the "purest form of Democracy" in our great land; (2) eliminating benchmarks in evaluating settlements; (3) eroding lawyers' trial skills and stunting the growth of young lawyers who must replace those who are retiring; (4) permitting defendants, and, in particular, insurance companies, to use mediation to coerce settlements that counsel feel are inadequate or not what a jury would award; (5) reducing appeals, which causes the law to stagnate; and (6) reducing the number of citizens serving as jurors, who contribute more to society than those who have not so served.[5]

The question to be asked, then, is why is the civil trial, and in particular, the jury trial, enshrined as it is in our Constitution, coming under attack? One federal judge, who mediated over 500 cases as a federal magistrate, answered the inquiry as follows:

> Mediation took Iowa by storm for several reasons. First, while courts were loath to sponsor settlement conferences until the eve of trial, mediation is now conducted earlier and often prior

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[4] Interview with Chief Magistrate Paul Zoss, United States District Court for the Northern District of Iowa (Aug. 20, 2010).

One federal judge observed that mediation is one of the "leading factors reducing the trial bar to the endangered species list." It is undermining the jury trial, "which is the purest form of Democracy known to our land." Interview with United States District Judge Mark W. Bennett, Northern District of Iowa (July 20, 2010).

Another federal judge responded to an editorial written by the executive director of the Iowa State Bar Association, which said, it was "impressive" that in a "decade 1993 to 2002, civil trials for damages dropped from 552 to 338. He stated:

> I am quite surprised that an organization composed of lawyers would be pleased that the primary tool used to resolve disputes since the founding of our country is declining and furthermore that the decline is "impressive." In fact it is a compelling matter that all people who care about our country and its laws should be shocked about. It is important to remember that the Seventh Amendment to the U.S. Constitution and the entitlement amendment to the Iowa Constitution are binding on all branches of the government.
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> It is also important that we all realize it is only in the exercise of that right that we benefit from its enshrinement in both of those documents. In fact, we all learn many things from a single decision of a single jury, and it proves that de Tocqueville was correct when he said that the jury is like "a public school that is always open." Judges gain their legitimacy as decision-makers from jurors, not the other way around.
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> In fact, survey after survey has proven that when people serve on juries they have an increased value in our system of law and in the ability of the jury to render justice according to the law. . .

Pratt, *supra* note 3.

[5] Chief Magistrate Judge Paul A. Zoss, *supra* note 4.

> to filing. Second, the process typically takes from four to six hours and facilitates more rapid exchange of proposals. Third, people are naturally attracted to a process that gives them more control over the outcome of the dispute. Finally, compared to the jury trial, mediation is extremely inexpensive.[6]

Chief Justice Burger answered the inquiry in more direct terms. He stated, in 1984, that the "American judicial system is too costly, too lengthy, too destructive, and too inefficient for a civilized people."[7]

There are no simple answers to this inquiry, and any answer may not be what we want to hear. Courtroom trials are in crisis in both federal and state courts and the question is, can they be resurrected to once again be the cornerstone of our civil system of justice? This article discusses, first, the reasons for the decline of civil trials; second, the advantages of mediation over courtroom trials; and third, the necessary change in mindset of attorney and mediator if mediation is to reach its fullest potential.

II. The Causes for the Decline of Civil Trials

The causes for the decline in civil trials cannot entirely be laid at the doorsteps of ADR and mediation. The causes are many and begin with the court system itself, which lost touch with the needs of society. Indeed, the American legal system priced itself out of the market.

A. *Abandonment of Civil Trials Was Market Driven*

In the early 1980s, the legal system itself began driving citizens from the courts. The large volume of cases filed, the soaring costs, and the long delays made the courts an unattractive arena for resolving differences. The profession was forced to look seriously for other means of resolution. One answer was mediation, a system that was more efficient, less costly, less time-consuming and more friendly. Marketplace factors then took hold and accelerated the transfer of cases from the courts to conference tables.

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6 Interview with United States District Court Judge John A. Jarvey, Northern District of Iowa (Sept. 30, 2010).

7 Chief Justice Burger, *supra* note 2, at 66.

For the courts to once again become viable in the marketplace, it must address the following problems:

1. The Courtroom Priced Itself Out of the Market

A prime factor in causing change was the skyrocketing costs of litigation. Attorneys (and experts) kept increasing their rates to the point that some lawyers were charging in excess of $1000 per hour and associates $500 or more. Similarly, the costs of experts soared, particularly in malpractice cases. In contingency fee cases, plaintiff attorneys were required to invest inordinate amounts of money before the case was even ready for trial, and if the case was lost, that investment could threaten the very viability of the small law firm. In major litigation, an investment of $40 million to $80 million in pretrial discovery became plausible.[8]

Contrasted to this are the costs of mediation. Many cases are settled in one day at a cost which is *de minimis* compared to the cost of pretrial discovery and trial. A case costing $40,000 to $50,000 to pre-try and try might be settled in five or six hours at a cost of $2000 to $3000, depending on what the mediator might charge. One federal judge stated: "I cannot personally afford to use the system I treasure."[9] He added:

> There is now a dispute resolution marketplace and mediation seems to be prevailing in that market. If we want more jury trials, we should not devote our efforts to complaining about mediation. Rather, we should redesign the system to be more efficient, cheaper and with a greater sense of user satisfaction than mediation.[10]

2. The Long Delays in the Courtroom Left Parties Frustrated

The long delays which accompany pretrial discovery and trials made courtroom litigation unacceptable to the many who only wished to go forward with their lives.[11] Added to the delays were

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[8] In one case in which a manufacturer sued another for tortious interference with contractual rights, the manufacturer sought $8 million in damages. Defendant counterclaimed and pleaded antitrust violations under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and sought $150 million in damages (when trebled - $450 million) and $50 million in costs and attorney's fees, a $500 million claim. Ultimately, the case was mediated just before trial and settled with no money exchanging hands. And yet the parties had spent $40 million in pretrial discovery. *See* Richard M. Calkins, *The ADR Revolution*, 6 RUTGERS CONFLICT RESOL. L.J. 2 (2008).

[9] Interview with United States District Court Judge John A. Jarvey (Sept. 30, 2010)

[10] *Id*.

[11] *See* In re Midwest Milk Monopolization Litig., 510 F. Supp. 381 (W.D. Mo. 1981), *aff'd in part, rev'd in part*, 687 F.2d 1173 (8th Cir. 1982), *remanded to* Alexander v. Nat'l Farmers Org.,

the interruptions in the parties' lives occasioned by depositions, motions to produce, and interrogatories. Having no control over the process and not understanding the reasons for delays left many parties unrequited and frustrated.

Mediation, on the other hand, placed the outcome in the parties' hands. They had the opportunity to resolve a matter even before it was filed in court. They controlled when a case ended. More important, they were empowered to decide their own fates. They were no longer subject to the dictates of jurors and attorneys making life decisions for them. Ultimately, they decided whether to settle in one day or allow the case to proceed to litigation. They certainly did not have to wait months and even years for the outcome, nor did they have to spend inordinate amounts of money to resolve their differences.

3. Inefficiencies in the Courts Made Courtroom Trials Unacceptable to the Many

In the 1980s, many court systems were inefficient, which increased costs and caused long delays. The causes of this inefficiency were several. Many jurisdictions, particularly in industrialized areas of the nation, were simply overtaxed with the number of cases filed each year, which was over 18 million.[12] This in itself often caused gridlock, delaying trials five or more years. There were several reasons for this gridlock: First, there was an increase in the number of novel causes of action being asserted as "legal entitlements." As Chief Justice Burger observed in 1982:

> One reason our courts have become overburdened is that Americans are increasingly turning to their courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.[13]

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614 F. Supp. 745 (W.D. Mo. 1985), *aff'd in part, rev'd in part sub nom.* Nat'l Farmers Org., v. Assoc'd Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988), *as modified*, 878 F.2d 1118 (8th Cir. 1989). This case involved twenty-four related rulings and several appeals to the Eighth Circuit Court of Appeals. It was in its twenty-first year with an anticipated three more years to conclusion, when it was successfully concluded through mediation in several weeks.

12 RICHARD M. CALKINS & FRED LANE, LANE AND CALKINS MEDIATION PRACTICE GUIDE §1.01 (2006).

13 Chief Justice Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

Second, there was an increase in new statutory and regulatory promulgations creating new causes of action, which invited the filing of many more claims.[14]

Third, there was a significant increase in criminal cases, particularly drug-related, which clogged the courts, especially federal courts, thereby further delaying civil trials. In some jurisdictions, the prosecution of criminal cases brought civil calendars to a virtual halt.[15]

Fourth, expanded discovery forays increased the burden on the courts, not only delaying trials, but requiring courts to spend more time ruling on pretrial and discovery motions—matters which should have been resolved amicably by the parties. In mediation, by contrast, there are no depositions, interrogatories, requests to produce or dispositive motions. Many times mediation is conducted before the case is even filed. Rather than adding to the court's burden, mediation has been its elixir, removing cases from the court's calendar and helping it to become more efficient.

And, fifth, much of a court's inefficiency is due to its rigidity. It is inflexible and can handle a dispute in only one way and with a singular result—a verdict. The efficiency in mediation is driven by the fact that it is flexible and permits the parties and counsel to be creative in the way they resolve differences and what they include in any settlement. This flexibility can permit a matter to be resolved in one day without discovery, and not months and years after filing. Resolution can include so much more than a mere verdict.

4. The Stress, Destructive Nature, and Unpredictability of Litigation Turn Parties Away When They Have a Choice

There is no question that a courtroom trial is highly stressful for all concerned, and in many instances destructive to lay persons who participate. Former Judge Learned Hand of the United States Court of Appeals for the Second Circuit observed: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and of death."[16] Associate Justice of the United

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14 An example of this are the thousands of cases filed each year under Title VII of the Civil Rights Act of 1964.

15 *See* Keith C. Owens, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance and Demagoguery Will Unravel the Criminal Justice System and Bring California to its Knees*, 25 Sw. U. L. Rev. 129, 151 (1995) (noting that many predict California courts "will come to a standstill because of the increased caseload due to the three strikes rule").

16 Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 Ass'n of the Bar of the City of N.Y., Lectures on Legal Topics 89, 105 (1926).

States Supreme Court, Antonin Scalia, noted that, "I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation."[17] The author has witnessed two fatal heart attacks and one suicide directly related to litigation.

B. *The Court Directly Contributed to the Abandonment of Civil Trials*

In addition to the factors listed above, the courts contributed directly to the abandonment of civil trials. First, judges have long encouraged parties to settle their disputes short of trial. Most court systems assign a judge or magistrate to conduct settlement conferences or mediate disputes before they are scheduled for trial. Indeed, according to Professor John Lande, "Courts have taken on the role of case managers in addition to adjudicating the odd cases that do not settle before trial, ruling on pretrial motions, and providing substantive and procedural rules to help parties settle."[18]

Second, in many areas of the country, courts routinely order cases to mediation or other ADR procedures, such as arbitration.[19] In federal courts, for example, the Alternative Dispute Resolution Act of 1998 mandates that each federal district adopt local rules

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17 Justice Antonin Scalia, *Teaching About the Law*, 8 CHRISTIAN LEGAL SOC'Y Q. 6, 10 (1987). Chief Justice Burger added that the American judicial system has become "too costly, too painful, too destructive, and too inefficient for a truly civilized people." Chief Justice Burger, *supra* note 2.

18 *See* John Lande, *Shifting The Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned Almost Everything I need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 202 (2006). According to Professor Lande, a major function of courts today is not to try cases, but to help litigants and lawyers "bargain in the shadow of the law." *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979).

19 Hundreds of state statutes establish mediation programs in a wide variety of contexts. *See* SARAH R. COLE, CRAIG A. MCEWEN & NANCY H. ROGERS, MEDIATION: LAW, POLICY & PRACTICE vol 3 app. B (2d ed. 2005). Many states have created state offices to encourage greater use of mediation *See, e.g.*,ARK. CODE ANN. §§ 16-7-101 to -207 (1999 & Supp. 2005); HAW. REV. STAT. §§ 613-1 to -3 (1993 & Supp. 2004); KAN. STAT. ANN. §§ 5-501 to -504 (2001); MASS. GEN. LAWS ANN. ch. 7, § 51 (West 2002); NEB. REV. STAT. ANN. §§ 25-2901 to -2942 (LexisNexis 2004); N.J. STAT. ANN. §§ 52:27E -73 (West 2001); OHIO REV. CODE ANN. §§ 179.01 -04 (LexisNexis 2001 & Supp. 2005); OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993 & Supp. 2006); OR. REV. STAT. ANN.. §§ 36.100-.270 (West 2003 & Supp. 2005); W. VA.. CODE ANN. §§ 55-15-1 to -6 (LexisNexis 2000). *See also* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005) (discussing the function of court-ordered mediation in Illinois circuit courts).

implementing its own ADR program.[20] The Seventh and Eighth Circuit Courts of Appeal direct pending appeals to mediation before they will be heard by the Courts.[21]

Third, in the last twenty years, courts have been less reluctant to dispose of cases by summary judgment. In federal courts twenty-five years ago, disposition by summary judgment was equal to only a fraction of disposition by trial, whereas today disposition by summary judgment "is a magnitude several times greater than the number by trial."[22]

Fourth, a large block of cases, once tried in the courts, are now resolved by mandatory arbitration. For example, pre-dispute arbitration provisions have virtually removed all securities investor-brokers disputes from the courts.[23] Likewise, disputes between credit card issuers and their customers, and large utilities and their rate payers have been removed pursuant to agreement and referred to arbitration. Employers can now even force employees, in adhesion contracts, to sign mandatory arbitration provisions, which waive the right to file suit despite federal statutory provisions.[24]

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20 *See* 28 U.S.C. § 651(b) (2001).

21 *See* ROBERT J. NIEMI, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS 61-77 (The Fed. Judicial Ctr. 2d. 2006).

22 *See* Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. EMPIRICAL STUD. 459, 484 (2004). Part of this change in federal courts was spurred on by a trilogy of United States Supreme Court decisions. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). *But see* Stephen Burbank, *Drifting Toward Bethlehem or Gomorrah? Vanishing Trials and Summary Judgment in Federal Civil Cases*, 1 J. EMPIRICAL STUD. 59, 643 (2004). *See also* Arthur Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. REV. 782 (2003).

There is also a correlation between the increased number of class actions filed and the decrease in the number of trials. Class actions "remove a large number of claims from the possibility of being tried individually and replace them with a much smaller number of cases in a category that rarely eventuates in a trial." *See* Galanter, *supra* note 22, at 487.

Finally, Congress and state legislatures have placed greater restrictions on the filing of lawsuits, which has also impacted the number of civil trials conducted. For example, the Private Securities Litigation Reform Act (PSLRA) (codified at 15 U.S.C. §§ 77k, 77l, 77z-1, 77z-2, 78j-1, 78t, 78u, 78u-4, 78u-5) reformed the procedure by which stockholders filed pleading standards, reduced the availability of joint and several liability, provided stricter guidelines for appointing lead plaintiffs, provided automatic stays of discovery, and included "safe harbor" provisions that shelter predictive statements from liability so long as they are identified as such. *See generally* Harvey L. Pitt, *Promise Made, Promises Kept: The Practical Implications of the Private Securities Reform Act of 1995*, 33 SAN DIEGO L. REV. 845, 847-51 (1996).

23 *See* Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of "Alternative Dispute Resolution,"* 1 J. EMPIRICAL LEGAL STUD. 843, 906-07 (2004).

24 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

C. *ADR and Mediation Have Become the Whipping Dog for Those Who Oppose Change*

There are many reasons, as outlined above, for the abandonment of civil trials. Yet, those who oppose change point a heavy finger at ADR and mediation. This section responds to those criticisms.

1. Mediation Undermines the Purest Form of Democracy – The Jury Trial

A primary argument attacking the rise of mediation is that mediation not only diminishes courtroom trials, but undermines the fundamental right to trial by jury. The issue is: do juries still serve the function once envisioned by the framers of the American Constitution and are jury trials so sacrosanct that they cannot be challenged?

It should first be observed that only in the United States are jury trials still utilized in civil cases. And even here, not all states utilize juries, Louisiana being an example.[25] In this regard, it might be helpful to examine the British model, which abandoned jury trials in most civil cases in England and Wales in 1933.

The decline in jury trials in Great Britain began as early as 1846, when the County Courts Act of 1846 permitted judge-only trials. Thereafter, over the next 80 years, as the integrity of the legal profession and respect for judges increased, judge-only tribunals became more prevalent. In 1933, the Administration of Justice (Miscellaneous Provision) Act ended jury trials, except for libel, fraud, slander and malicious prosecution.[26]

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25 The United States Supreme Court has not seen fit to incorporate the Seventh Amendment right to jury trial into the Fourteenth Amendment, making it applicable to the states, even though the Court has incorporated the Sixth Amendment (trial by jury in criminal cases) and most of the other provisions of the Bill of Rights.

It is not, however, the purpose of this article to challenge the integrity of our ensconced jury system, but to point out that it should not be so sacrosanct that it cannot be questioned.

26 Reasons advanced for judge-only trials included: first, judges are more prone to uphold the rule of law. People need to know that the legal system has consistency and reliability, that if you have similar facts, you will get similar results. The argument is that when using jurors to decide the same set of facts, the balance of probability is that you are more likely than not going to retrieve inconsistent results. Such is not a system of justice, but a lottery system of who ends up with the best jury.

Second, judges are more prone to be less biased, knowing as they must, that they are subject to direct review by an appellate court. They take an oath to render justice impartially and they strive to adhere to that oath. They are much more likely to adhere to the facts and law than jurors, who are generally unconcerned with matters of review.

Juries in the United States are vulnerable to many outside influences which undermine their legitimacy.[27] Any number of factors come into play such as (1) the attractiveness of the parties—whom the jurors like and dislike; (2) the lawyers' likeability; (3) the effectiveness of voir dire and the success of a party to gain a sympathetic jury;[28] (4) the influence of the media; (5) the campaigns of insurance companies and big business to influence verdicts; and (6) the innate prejudice of jurors which cannot be discovered in voir dire.[29]

Third, judges with their training and experience are better prepared to weigh issues of liability and quantum in a far more systematic and detached manner. They address such issues daily. Jurors, on the other hand, have no training and experience and face such issues perhaps once or twice in their lifetimes.

And, fourth, jurors are screened through voir dire, which means an outcome of a trial might depend on how successful counsel is in obtaining a sympathetic jury. There is no comparable screening of judges.

27 This is not to suggest that mediation does not have its detractors. *See e.g.*, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?,* 36 SANTA CLARA L. REV. 1055 (1996). There have even been expressions of concern that mediation undermines the rights of women in family law disputes. *See* Trina Grillo, *The Mediation Alternative Process Dangers for Women*, 100 YALE L.J. 1545 (1991). Others have expressed fear that the informality of ADR fosters racial and ethnic prejudices. *See* Richard Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

28 Under the American jury system, substantial costs can be incurred in jury selection, especially when experts are employed to profile prospective jurors to assure a desired outcome. Likewise, much of a trial attorney's training is directed to how to be persuasive and influence jurors rather than ferret out the true facts of the case.

29 Attorney H. Case Ellis has made a twelve-year study of jury verdicts and the reasons that motivate jurors. *See* H. Case Ellis, *Whose Peers Are These?* 14 OFFICIAL PUB. LAKE COUNTY B. ASS'N 23, 23-33 (Sept. 2007). His conclusions are revealing. First, jurors are more concerned about the parties than the issues being tried. To jurors, "this is a contest between two or more PEOPLE. What matters most to them is whom they like and whom they dislike! The really tough deliberations occurred when they liked everybody and they had to rationalize hurting one of them or struggle to compromise enough that they upset neither."

Second, jurors are prone to help a party when they feel counsel is incompetent, especially when they like the party. In one case the jury "felt sorry for this clearly negligent defendant because he was remorseful and his attorney had been so incompetent that the defendant must have been worried throughout the trial by his defense lawyer's conduct."

In another case, the jury helped a woman whose attorney, the jury determined, was unqualified to handle the trial. "They took it upon themselves to protect the woman and awarded her more than her lawyer had requested."

Third, juries are subject to agenda jurors, that is, a juror who has ulterior motives and seeks to steer the jury to a specific result, which will make a statement of some sort that transcends the specific case being presented.

Fourth, the jury system is prone to the occasional case where the jury awards an excessive amount that surpasses anything that is reasonable, the so-called "run-away jury."

Fifth, the influence of lawyer or judge television, such as "Judge Judy," should not be underestimated. Mr. Ellis noted, "I never bring up the subject of television in my interviews, but more

2. Mediation Eliminates Benchmarks for Settlement of Cases

The contention that jury verdicts provide a benchmark of what comparable cases in a particular venue are worth for settlement purposes is belied by the fact, and everyone agrees, that no one knows what a jury will do. In fact, mediators use this argument in seeking compromise from parties in mediation. There are simply too many variables to give predictability.

3. Mediation Has the Effect of Eroding Lawyer Trial Skills

Unquestionably, fewer trials mean fewer lawyers are gaining trial experience. This means young lawyers coming out of law school may gain little actual trial experience before they are required to take over trial practices of retiring attorneys. This situation has to be a concern. However, the question should be asked, is the primary focus of our court system to train lawyers or to serve the interests of the public? If the latter, this may not be as serious a concern as it would seem initially. Further, mediation has little direct impact on criminal cases and the need for trained lawyers to handle them. Law students, truly desiring to be trial attorneys, will quite naturally gravitate towards the criminal bench.

4. Mediation Is a Tool of Big Business and Insurance Companies

It is true that early on insurance companies pushed mediation. To encourage plaintiffs' attorneys to use it, insurers often agreed to pay all mediation costs if a matter settled. Plaintiffs' counsel were suspect that the insurance industry was using the process to push plaintiffs to settlements counsel felt were inadequate or not what a jury would award.[30] However, as the process was used more and

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than half of the interviewees will reference either a law serial or a 'judge' show as proof that they have some experience with 'what's going on in the courtroom.'"

Sixth, one of the most serious concerns with jurors is their use of the internet to bring in matters outside the courtroom. In the very public trial of Governor Ryan of Illinois, for example, one of the jurors actually printed out Illinois case decisions from the internet and threatened another juror by citing those cases.

Seventh, the adverse publicity issuing from insurance companies and big business has impacted jurors. Mr. Ellis stated, that in "the last three years . . . it is rare that I speak to a juror who does not at least mention that 'I am aware of all the frivolous lawsuits,' at some time during our interview. I believe the anti-litigation message of big business and the insurance industry is finally starting to get to the jury pool. . . . This may be today's greatest challenge for plaintiffs' attorneys." *Id.*

30 *See, e.g.,* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1053 (1996).

more, counsel found, first, they were settling cases at a more favorable price than what they might obtain in a jury trial;[31] second, they were settling cases earlier, even before a case was filed in some instances; third, because many mediations were conducted early on, they saved time and money; and fourth, they found that generally their clients were more satisfied with the process.[32]

5. Successful Mediations Mean Fewer Appeals

Of concern for many is that fewer trials could undermine the law's vitality. The common law requires a flow of decisions and appeals so that the law can evolve to meet the exigencies of modern society.[33] This argument, however, is diluted by the fact that several federal circuit courts have appointed mediators to settle cases before appeals are heard. Further, courts have always encouraged parties to negotiate and try to settle their cases before trial. To this end courts provide settlement conferences and even mediator assistance, with a judge appointed to mediate cases.

The real problem with mediation is that it is more successful than anyone envisioned. Indeed, mediation is nothing more than a negotiation between parties, which has always been encouraged, with a third person (mediator) assisting in the process. Indeed, the courts encouraged the process and are now feeling the impact of its success.

6. Mediation Undermines the Opportunity for Citizens to Participate in the Legal System in a Meaningful Way

It is contended that citizens who serve as jurors and participate in the court process have a better appreciation for the rule of law and ultimately make better citizens as a result of the experience. However, citizens still play an important function as jurors in criminal trials. There is no suggestion that mediation has impacted

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31 One venue, Polk County, Iowa, kept a record of the results of all cases tried for a ten-year period. It found that forty percent of the cases tried were defense verdicts and that seventy percent were $25,000 or less (including the defense verdicts). *See* Diane Cox, Polk County Jury Verdicts: Jury Verdicts from August, 1993 to June, 2002 (2002), http://www.law.drake.edu/library/docs/polkCountyJuryVerdicts.pdf (compiling jury verdicts in civil cases in Polk county from August 1993 to June 2002).

32 Much of the resistance to mediation today comes from the defense bar and is driven by raw economics. If a case can be settled even before it is filed and discovery taken, this is a direct threat to defense firms dependent upon hourly billing for survival.

33 *See* Peter L. Murray, *The Privatization of Civil Justice*, 91 JUDICATURE 272 (2008). ("Ultimately the paucity of contemporary judicial decisions supplying and enforcing the norms of law may lead to a blurring and weakening of the authority of law itself.").

the number of criminal cases that go to trial, and criminal cases traditionally make up a significant percentage of jury trials.

7. There Is No Review Process to Be Certain a Settlement Is "Fair"

In mediation, it is contended, there is no review process to be certain a settlement is "fair." Parties are often compelled to settle because of factors other than the objective merits of their cases, such as financial weakness, lack of information, delay, and risk aversion. But these same considerations play in the settlement of any lawsuit that is filed. If a party must compromise for whatever reason, it makes no difference whether it is postured as courtroom litigation or mediation; they will settle.

Critics of mediation also question whether mediation can provide a "fair" resolution based on the merits, and without some form of review, it leaves an unwary public vulnerable. However, "fairness" is not the issue. Mediation seeks to provide a resolution *both parties can accept*, for whatever reasons. It is needs based and not result driven. If a party is insolvent and needs cash now and cannot wait the two or three years required to litigate the matter, that person will compromise and take less to satisfy this need. Or, if a party's need is to receive recognition in a wrongful termination action, for example, mediation can fulfill that need. The cash award may not be as significant as the non-monetary considerations. Mediation can meet these needs; the courtroom cannot.

To argue that mediation denies the right to review is to misunderstand the process. In mediation the parties are empowered to make their own decisions. If a settlement is not to their liking they can refuse to sign and go to trial. They are not compelled to agree. Further, parties are generally represented by counsel who can advise them as to the "fairness" of any settlement. It is counsel's responsibility to be certain the client's interests are satisfied.

In the courtroom trial, review is limited to the verdict, a dollar amount. In mediation, so much more comes into play than the dollar amount. Review would require consideration of the parties' motivation and needs, subjective considerations that would make a review process unmanageable and impractical.

Finally, in family law cases, which make up a significant percentage of mediations, there is review. The court in all jurisdictions must approve any settlement entered into by the parties.

8. Mediators Will Favor Those Who Provide Repeat Business

There is the suggestion that mediators will favor those who provide repeat business. This is to suggest that mediators cannot remain neutral and impartial.[34] This is belied by the following:

First, ethics of mediators require they remain neutral and impartial. Any departure therefrom is an ethical violation. Like all lawyers, mediators will abide by the code of their profession.[35]

Second, counsel generally represent the parties in a mediation and they have the ethical responsibility to look out for the interests of their clients. It is the attorneys' responsibility to reject a settlement which is unfair. Counsel can and should check any overreaching by the mediator.

Third, the mediator who gains a reputation of favoring the insurance industry, for example, will not long survive. He or she will be quickly blackballed by the plaintiffs' bar. Because all parties must approve the mediator, the objection of any party will foreclose the mediator from participating. This is the best assurance of impartiality.

III. Advantages of Mediation

Much of the phenomenon of change from the courtroom to conference table was, as discussed above, market driven. The public turned to a process which was more accommodating, less costly, more efficient, and produced a better result. However, as mediation emerged other factors enhanced its acceptance and credibility.

An important consideration is that mediation enables the parties to take control of their cases and resolve them any way they wish. They are no longer passive bystanders buffeted by attorneys in a courtroom. More important, they are not straight jacketed by courtroom rules and procedures, but can resolve their differences any way they wish, even arm wrestle, as occurred in a trademark

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34 *See* Peter L. Murray, *The Privatization of Civil Justice*, 91 Judicature 272, 276 (2008): Mediators are under the same pressure to produce results that are acceptable to the repeat players. Mediators know that large repeat players such as insurance companies will not refer cases to mediators who fail to produce acceptable settlements. By the same token, mediators who are able to convince individual claimants to reach agreements favorable to the repeat players can expect repeat business.

35 *See* Model Standards of Conduct of Mediators, which provides:
STANDARD II. IMPARTIALITY
A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

dispute between Southwest Airlines and a southeastern regional airline.[36] Mediation creates the best atmosphere for creative thinking and resolution.

The emergence of mediation then has required the lawyer to redefine his or her role. Chief Justice Burger redefined "justice" and the lawyer's ethical responsibility to the client to accommodate this change. He stated:

> To fulfill our traditional obligation means we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with minimal stress on the participants. This is what justice is all about.[37]

A. *Mediation Is Totally Flexible*

The genius of mediation is that it is by contract. The parties can resolve their differences any way they wish; there is total flexibility. For example, a mediation can be interrupted by calling a potential witness on the phone, or having the witness attend the session over the noon hour,[38] or permitting the mediator to interview witnesses before reconvening.[39] The parties can change the

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[36] *See Execs' "Plane" Fun Avoids Lawsuit*, PITT. PRESS, Mar. 21, 1992, at A4. When Southwest Airlines first came on line, it had a trademark similar to one used by a southeastern regional airline, so much so, that trademark litigation costing millions of dollars was anticipated. Recognizing that the losing party would have to spend only $30,000 to develop a new trademark, the two CEOs agreed to arm wrestle to decide the dispute, two out of three. For the cost of a party, the matter was resolved.

[37] Chief Justice Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274 (1982).

[38] *Case Study:* Plaintiff was in a bar when the bartender got angry with a customer and threw a red fire extinguisher taken from the wall. The customer ducked and the fire extinguisher hit plaintiff, fracturing his jaw. Plaintiff sued, and at the mediation the insurance carrier denied coverage in that there was exclusion for intentional or criminal acts. It was willing to pay only costs of litigation. To avoid this result, plaintiff contended he had a witness who would testify that on a prior occasion, the same bartender got angry with another customer and the owner was so informed. Thus, the owner was aware of the propensity of the bartender to get angry and lose control, for which there was coverage—negligent retention. Arrangements were made for the witness to appear at the mediation over the lunch hour. He met with the insurance adjuster, who, satisfied that he would support the plaintiff, settled the case for a reasonable amount. (Unless otherwise noted, references in this article to "Case Studies" are references to mediations performed by the author throughout his career. For more information, please contact the author.)

[39] *Case Study*: Plaintiff, a paraplegic, was injured in an automobile accident. The driver, an underage teenager was intoxicated, and an issue arose as to who purchased the beer she consumed. Plaintiff, 21 years old, denied he had purchased the beer, but the defendant's position was that the plaintiff had, thus contributing to the delinquency of minors, a criminal offense. None of the witnesses (three underage teenagers and the underage defendant owner of the car)

mediation into a binding arbitration if they are having difficulty agreeing.[40] They can interrupt the process to engage in a summary jury trial,[41] or focus study,[42] as a reality check and then resume the process. The parties can conduct a mock trial to test the waters.[43]

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were at the mediation. An impasse was reached, and the mediator was authorized to interview the witnesses before reconvening. The three witnesses stated they did not know who purchased the beer. The car owner insisted plaintiff bought the beer because the owner was underage and could not have, and his parents had no alcohol in their house. The mediator believed defendant was telling the truth and in the next caucus with plaintiff and counsel pressed the former for the truth. Plaintiff finally admitted he had indeed purchased the beer, not on the day in question, but the day before. The case settled.

[40] *Case Study*: Plaintiff bank sued the defendant bank for breach of a Mortgage Loan Purchase Agreement entered into on July 10, 2006. Plaintiff purchased a home equity loan portfolio of some 250 home mortgages. Plaintiff claimed that 72 of them breached the warranties contained in the agreement. It sought $7.6 million in refunds. The warranties allegedly breached were (1) a number of loans involved rental homes in breach of the warranty that the borrower lived in the homes; (2) a number involved liens in a third lien position instead of a second lien position as warranted; and (3) a number did not meet the income-to-loan ratio required, etc. Defendant denied the allegations and pleaded that a number of the violations were not timely asserted. Defendant offered $500,000.

The parties agreed to mediate, at which time plaintiff lowered its demand ultimately to $5 million and defendant raised its offer to $3,250,000. Both sides would move no further. Rather than have the matter proceed to costly litigation, which would have required plaintiff to prove up 72 individual claims, the mediator encouraged the parties to arbitrate. They agreed and worked out the following format: the parties placed a high/low of $5 million and $3.25 million on any recovery. Before the arbitrator got involved, the parties agreed to meet and resolve as many of the claims as possible, establishing the dollar amount owed. Those claims that could not be resolved were then to be submitted to the arbitrator. He or she would then informally discuss each loan with the parties and determine if anything was owing and how much. Using this process a very long and expensive process was reduced to manageable proportions, and the matter was resolved at a fraction of the cost of going to trial.

[41] *See* Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986). The summary jury trial, which normally takes one day to complete, permits the parties to submit their dispute to an impaneled jury, which renders a nonbinding verdict. Each lawyer presents his or her case in summary form, the jury is instructed and renders a verdict. The parties can then meet with the jurors and learn the reasons they decided as they did. The jury might even be videotaped for later review. *See* Richard A. Enslem, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1, 13-15 (1988). A trial taking up to eight weeks could be condensed to one or two days and reach the same result.

[42] A focus study is another vehicle for providing a reality check for one or both of the parties. A psychologist generally conducts the process and provides carefully selected jurors with the facts and law of the case. Once completed, jurors are asked what they feel a jury of peers would do in an actual trial, best case, worst case, and what the jurors participating would do. *See* Richard M. Calkins, *Mediation: The Radical Change From Courtroom to Conference Table*, 58 DRAKE L. REV. 1, 369-370 (2010).

[43] A mock trial is generally conducted by one party to test its case before a mock jury. Lawyers in the office will play opposing counsel and party and the case is tried and the jury renders a verdict. The purpose is to test out various approaches in trying the case and to obtain a verdict which can provide a reality check. It can, however, be misleading. Because the other side is not participating, the verdict can be skewed. In one case, for example, a mother saw two

The parties can even use polygraph tests to determine who is telling the truth and who is lying, which could never be used in the courtroom.[44]

The only boundaries to mediation are the extent of the creativity and ingenuity of the parties, counsel and mediator. Parties faced with a failing mediation can revert to arbitration or some other ADR mechanism or create a wholly new process to meet the exigencies of their case.

Consider the following scenarios where a process was manufactured on the spot to fill a special need of the parties.

1. Summary Arbitration

A § 2 Sherman Act monopolization case was mediated, but the parties failed to come to an agreement. One million dollars

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of her babies killed in a truck/car accident. The mock jury awarded her $13 million, and when the insurance carrier offered $3 million, she turned it down as an insult. At trial she was awarded $1.5 million and found twenty-five percent at fault. See CALKINS & LANE, *supra* note 12, at § 1.02[c][5].

44 The polygraph test cannot, of course, be used in a civil or criminal trial, but it can be used in mediation. There are two ways it can be used. First, if two parties are saying diametrically opposite things it can be used to determine who is lying, for only one can pass the test. Generally, the one who is lying will not take it but use an excuse such as "I am sick," or "I am nervous" or "the test is not reliable," or "the test is inadmissible in evidence."

Case Study: Plaintiff was the chief financial officer of a small but successful company. The CEO insisted that she have an affair with him, which she did over a period of time to keep her job. She finally terminated the affair, but he would not relent. She quit, claiming a constructive discharge, and sued for sexual harassment under Title VII of the Civil Rights Act. She demanded $800,000 and the CEO offered $300,000.

At the mediation, the CEO contended that the affair was consensual and began long before she was hired. She denied this, and when the mediation bogged down, a polygraph test was offered to both. Both agreed; however, the day before the tests were to be given, plaintiff backed down stating she was nervous and, in any event, it was not reliable. The CEO took the test and passed. The case quickly settled for $350,000. (The CEO was potentially liable for not honoring her request to stop the affair.) Plaintiff's attorney called the mediator and thanked him, for he would never have allowed his client to perjure herself on the witness stand, and he told her this.

Second, the polygraph test can be used to demonstrate that a person is telling the truth, when questioned by the other side. *Case Study*: Six children in an African-American family—three girls and three boys—were sexually abused by a Caucasian cleric. One of the girls, who was 14, became pregnant and the child had some Caucasian features. Everyone assumed the cleric was the father. Three days before the mediation, a DNA test was completed and the cleric was determined not to be the father. The church then concluded that the family was making the entire story of abuse up. To counteract this, four of the plaintiffs, now adults, were given lie detector tests—one son was in prison and one daughter was bi-polar and could not be tested. Three of those tested were found to be telling the truth, that they had been raped and that other acts of sodomy had been committed against them. The youngest son's test came out inconclusive—he could not pass; however, this gave more credibility to those who passed. The case then settled for $3 million.

had already been spent in pretrial discovery with another million dollars anticipated before trial. This sum did not include the costs of a two-month trial and an appeal to the Ninth Circuit Court of Appeals. Plaintiff's counsel was deeply concerned about the costs in money and time going forward because he had a contingency fee arrangement. The mediator conferred with the attorneys and the following arbitration procedure was agreed to:

First, there would be no more discovery inasmuch as all the principal depositions had been completed as well as production of documents. All documents, including expert reports, would be admitted into evidence without objection, the parties relying on the sophistication of the arbitrators to give them the proper weight.

Second, a neutral arbitration panel of three antitrust experts, approved by both sides, would decide the matter.

Third, only depositions and documents, including expert reports, would be used in the arbitration; no live witnesses. Counsel would present their cases in summary arguments of two days each. The entire arbitration would take six days.

Fourth, on the first day, motions would be heard; on the second and third days, plaintiff's counsel would present its case (on liability only) in summary form; on the fourth and fifth days, defense counsel would do the same; and on the sixth day, the panel would reach its decision—no written opinion.

Fifth, if liability was found, the panel would set a date for hearing on damages, costs and attorneys' fees, as permitted under the Clayton Act.[45]

Following this format, the entire matter was resolved within two months of the initial mediation and not three or four years later, and at only a fraction of the cost of proceeding in the courts.[46]

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[45] 15 U.S.C. § 15(a).

[46] *Case Study*: Plaintiff pleaded that the defendant, a regional telephone company, used its monopoly power to drive it out of the local Yellow Pages market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Defendant offered to settle for $1.2 million, which plaintiff refused, contrary to counsel's recommendation. The above summary format was utilized and the panel found for defendant.

Plaintiff's counsel, although disappointed, spoke to the mediator and observed that although he lost on a legal point, to have gone to trial and lost would have been very difficult for him and his client. The costs and time expended would have jeopardized his practice and threatened his client's solvency.

2. European Arbitration

Plaintiff, a contingency fee lawyer, left his law firm to start his own practice.[47] A major dispute arose as to what he owed in costs advanced by the law firm in his contingency fee cases. When he received a settlement check in a major case shortly after leaving and deposited it in his own account rather than that of the firm, the firm reported him to the ethics committee of the state bar association. He contacted a mediator for help. The mediator then contacted the firm to see if it would consider mediation. It declined, but said it would arbitrate and agreed to allow the mediator to act as arbitrator.

The arbitrator recognized immediately that he had a very volatile situation on his hands. The bitterness of the parties could result in a very expensive and prolonged proceeding if he did not assert control immediately. To get control of the situation, the arbitrator proposed the following:

First, the arbitrator suggested that it was unnecessary for the parties to retain outside counsel to conduct discovery and trial. He proposed to conduct his own discovery as judges in Europe do. Further, he assured the parties he would proceed with as little interruption of their practices as possible. This process, he hoped, would keep costs down.

Second, with a representative from each side present, he would personally question witnesses each side listed as relevant. Both sides could hand him additional questions to ask, but he would do all questioning. Likewise, he would list the documents from both sides that he wanted produced. He would also examine any additional documents the parties wished to present.

Third, the parties would retain a single CPA approved by both sides rather than separate CPAs.

Fourth, when discovery was completed, the arbitrator would submit to the parties his proposed findings and they would be

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[47] *Case Study*: Plaintiff's departure from the law firm was mutually agreeable. He had been receiving a monthly draw and funding his contingency fee cases with the law firm's funds. Many of his cases took years to complete and not all were successful. At the time he left, he received a large fee, which he deposited in his personal account, rather than the firm account, to set up his new law firm. The law firm was quite upset and reported him to the state ethics board. The charges were ultimately dismissed; however, members of the firm did not trust him.

The parties agreed to the above procedure, and while the arbitrator was proceeding with discovery, he continued to inquire about possible settlement. As the parties were working through the findings of fact, many of which they were able to agree, they settled the matter. The settlement was induced by the fact that they were about to expend $50,000 to hire a joint CPA. Saving that sum encouraged both sides to resolve the matter.

asked to agree to as many as they could. They would also be invited to make any changes they wished, so long as they agreed. Those findings for which there was no agreement would become the ultimate findings for the arbitrator to decide.

Fifth, when the findings were completed, time would be provided for each side to make closing arguments. The arbitrator would then make his award.

The process was approved by the parties, and the arbitration was conducted with minimal interruption in each side's practice. Because there was no outside counsel involved, there were substantial savings in costs. Also, because the arbitrator tried to be as accommodating as possible, it lowered the stress level of the parties, and much of the animosity that originally existed was mollified. The greatest benefit in the process was that it was done in a confidential setting and the public was unaware there was even a problem.

3. Mediation/Arbitration

An insurance company in Chicago became dissatisfied with mediation because it was not settling the number of cases the company thought necessary. This result meant it had to retain outside counsel and proceed to discovery and trial, an expensive process. The company therefore encouraged plaintiffs' counsel to arbitrate their cases, but counsel refused, unwilling to give up a jury trial. The insurance carrier and a number of plaintiffs' attorneys got together and worked out a process called mediation/arbitration (med/arb). The process works as follows:

First, the neutral acts as mediator and goes through the normal steps of mediation. He or she asks the parties in private caucus what the strengths of their cases are; what the weaknesses or concerns are; what they feel a jury will do; what settlement discussions there have been; and what the new demand (plaintiff) or offer (defendant) is.

Second, the mediation continues until the case settles. If it does not, then, as agreed, the mediator switches hats and wears his or her arbitrator hat. No hearing is required because the arbitrator will have learned the facts of the case during the mediation phase, although closing arguments will generally be permitted. The arbitrator then makes a binding non-appealable award.

Third, problems arose with the process because the arbitrator, on occasion, found no liability, when the defendant, in fact, made an offer during the mediation phase. This situation deterred plain-

tiffs' counsel from agreeing to the process. To correct this, the parties, before the arbitration phase, now negotiate high/low parameters. The arbitrator cannot award anything beyond them. This modification of the process assures the plaintiff receives something.

Fourth, again problems arose and it was modified a second time. Because the parties were concerned that the mediation phase might fail, they often did not mediate in good faith lest they disclose too much to the mediator, who might later have to switch hats. The process was modified so that the arbitrator was presented with plaintiff's final demand and defendant's final offer. The arbitrator had to select one figure (plaintiff's final demand) or the other (defendant's final offer). The arbitrator could not make an independent determination, although he or she could propose they split the difference if the parties agreed.

Fifth, the effect of this last modification is to force the parties, first, to be realistic in their last demand or offer, for fear the arbitrator will choose the other; and, second, it pushes the parties closer together to the point they might settle.

Sixth, again, the process is cost effective, for it assures the matter will be resolved, usually in one day, and the parties will avoid a trial.

4. Rapid City Arbitration

A mediator was asked to arbitrate two cases involving the same insurance carrier. In both, the parties set high/low parameters.[48] The arbitrator was not informed of the high/low. In both cases his award exceeded the high, which left all parties unhappy—the insurance carrier, because it had to pay the high, and plaintiffs because they had agreed to cap the high. When asked by the same insurance carrier to arbitrate a third case, the arbitrator suggested a new procedure, which he felt would better meet the needs of the parties.[49]

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[48] High/low arbitration is a very common form of arbitration. The parties negotiate the high and low. If the award of the arbitrator should exceed the high, it is reduced to the high; if it is lower than the low, it is raised to the agreed upon low. The purpose here is to hold the arbitrator in check so that he does not become too arbitrary.

[49] *Case Study*: Plaintiff, a cowboy from western South Dakota, and the defendant, a farmer, were involved in a rollover when the farmer fell asleep at the wheel. The two had gone to town 75 miles away to hit the taverns. Plaintiff ended up with a cracked rib, a scar on his face, and soft tissue back injury. During the hearing, the carrier argued assumption of risk in that plaintiff knew they were going to drink, which put him at risk when they drove back, and contributory negligence in that the plaintiff bought the farmer some drinks.

First, a full arbitration hearing would be held.

Second, when both parties rested, the arbitrator would bring the parties together and review the evidence and how he was reacting to it. He would give special consideration to plaintiff's claims for liability and damages, and the defenses raised by the defendants.

Third, after the review, he would give the case back to the parties and request they reconsider settlement possibilities. He would leave the room so that the parties could freely negotiate.

Fourth, if settlement was reached, that would become the award. If not, the arbitrator would enter his independent award.

Fifth, what the arbitrator anticipated was that given the chance, especially after clearing the air with his discussion, the parties would compromise and reach a settlement.

The parties agreed to the process, and it was used in two arbitrations. In both, given a second chance to negotiate, the parties reached settlements. What the arbitrator found was that when the parties agreed to a settlement figure, they were satisfied. If, however, no agreement had been reached, and the arbitrator had entered the same figure as the award, both parties would likely be unhappy and critical.[50]

After the parties rested, the arbitrator reviewed the evidence. First, he noted that there was questionable assumption of risk in that the plaintiff had informed the defendant he had to be home that night in as much as he had to work the next day. Also, the plaintiff had asked the farmer if he was too tired to drive when driving home. Second, the arbitrator also noted that there was questionable contributory negligence when plaintiff bought the drinks. As it turned out the farmer only took a sip from each drink he was served and was not found to be intoxicated when tested at the hospital. On the other hand, the arbitrator noted that plaintiff's demand of $30,000 was high in that venue because his rib healed quickly, the scar was hardly noticeable, and his soft tissue injury abated. In fact, although he was unable to compete in bronco riding competition, still, he was riding a horse again and had, in fact, broken in a wild mustang.

The arbitrator gave the case back to the parties to see if they could settle. In thirty minutes the case settled for $9,000. The arbitrator recognized that if that had been his award, both sides would have been unhappy. However, because they agreed, neither could complain or blame the arbitrator. This amount was then entered as the award.

[50] *Case Study*: Defendant was a newly licensed medical doctor. Because of his debts he was working seven days a week, ignoring his wife and children. She complained and requested that for their anniversary they go to the big city for a weekend on their own. This they did. After a long leisurely dinner, they returned to the hotel, and before retiring had a nightcap at the hotel bar. Defendant got into an argument with the bartender, who called over an off-duty uniformed police officer to remove the defendant. As the officer approached, defendant swung and hit him in the jaw, fracturing it. Defendant was maced and wrestled to the ground. Defendant was jailed overnight, charged with criminal assault and battery, was reprimanded by the state medical board, ordered to take counseling for alcohol addiction, and received bad publicity in the local newspaper.

5. Fixed High/Low Arbitration

In a case in which plaintiff was involved in a head-on collision and seriously injured, the parties attempted mediation. The mediation failed when the insurance carrier offered only costs of litigation because there was a serious question as to liability.[51] Rather than proceed to pretrial discovery on all issues, including damages, the mediator proposed that the parties negotiate and fix the damages, a high and low. If liability were found, the fixed high would be entered, and if no liability, the low. Having established the damages, the only issue to be tried was liability and comparative fault.

It was then proposed that an arbitrator be appointed to decide only the issue of liability. Through this process, by only litigating liability, there were considerable savings in costs because the issue of damages did not have to be pre-tried and tried.[52]

The officer sued the doctor, and the parties agreed to arbitration. After the hearing, the arbitrator reviewed the facts with the parties. He noted that the bartender was partially at fault because of the way he treated the defendant, that the defendant was clearly liable because of his unprovoked attack on the plaintiff, and that punitive damages were not appropriate because defendant had already been punished enough. He then gave the case back to the parties and left the room.

One hour later the parties settled for $45,000, considerably less than what the arbitrator would have awarded. Upon inquiry, the arbitrator was informed that defendant had no money to pay any award, but he could take a second mortgage on his house for $45,000. Anything more than that, he would have had to declare bankruptcy and plaintiff would have received nothing because there were secured creditors ahead of him in a bankruptcy proceeding.

[51] *Case Study*: Plaintiff entered a separated highway with the southbound lane going west of an island and the north bound east of the island. Plaintiff pulled into the island to refresh herself at a fast food restaurant. She then exited the parking lot, but went south in the northbound lane. There was only a DOT arrow sign pointing north across the street, which was blocked by the traffic. She had a head-on collision and was seriously injured. She sued the restaurant for not having proper signage at the exit of the parking lot. There had been seven other similar accidents, but none so serious.

The insurance carrier offered only costs of litigation because it felt liability was weak. This offer was rejected. Plaintiff's counsel was concerned about liability and the substantial outlay of money he would have to incur in proving damages. He encouraged his client to agree to fixed high/low arbitration in order to save costs and assure that his client would recover something.

The high was set at $450,000 and the low at $37,500 (costs of litigation). The insurance carrier agreed because if liability was found, damages would easily exceed $600,000. The cap was insurance for the defendant. The matter was submitted to an arbitrator, who found no liability. The low was entered as the award.

[52] In negotiating the high/low, the higher the demand, the lower will be the offer, and the lower the demand, the higher will be the offer. It is a negotiated process.

If the parties wish to have the judge or even a jury try the issue of liability, this is generally agreeable to a court because it cuts down considerably the time needed for trial.[53]

6. Hybrid Baseball Arbitration[54]

The federal 1996 Telecommunications Act required local telephone monopolies to make their switching equipment available to competitors wishing to enter the local market. If agreement on the terms of use cannot be reached by the parties, they are required to arbitrate. However, a new arbitration format was established. Instead of having extensive hearings with live testimony, cross examination, findings of fact and conclusions of law, which could take

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[53] *Case Study*: The decedent had his own business and earned $400,000 to $500,000 per year. He became obsessed with motorcycles and decided to ride to Sturgis, South Dakota for the August motorcycle rally. Traveling with five experienced bikers, they came to 20 miles of blacktop. One side of the highway had been completed, and they were traveling on the other. They came behind a farmer pulling a wagon going 20 mph. Each biker then went up on the blacktopped portion and around the farmer. When it was decedent's turn, he did not angle his front tire enough and it slipped, throwing him to the ground. He was not wearing a helmet and hit his head and died.

His widow sued for inadequate signage and the fact the completed portion of the road was not beveled for bikers, who the contractor in question knew would be going to the rally. Damages were substantial, exceeding $5 million; however, liability was questionable. Mediation failed, but the mediator proposed the parties use fixed high/low arbitration. The parties agreed and negotiated the high and low. The widow initially demanded $5 million and the insurance carrier offered $50,000. She eventually came down to $2.5 million and the carrier went up to $150,000. These became the fixed high and low.

Ultimately, the arbitrator found no liability and the fixed low of $150,000 was awarded.

[54] When liability is clear and the only issue is the amount of damages, the parties might consider an established ADR procedure called "baseball arbitration." Baseball arbitration has been taken from the major leagues when there is a salary dispute between a player and his club. The player sets any salary demand he thinks is fair and the club what it is willing to pay. The arbitrator, after hearing, must select one figure or the other and cannot make an independent determination.

There is a second format also called baseball arbitration. In this instance, the plaintiff and defendant will each set their demand and offer. The arbitrator is not informed. Hearing is held and the arbitrator makes a preliminary award. If it is one dollar over the midpoint between the parties' demand and offer, it is raised to the plaintiff's demand, and if one dollar less than the midpoint, it is reduced to the defendant's offer. Thus, if plaintiff sets his demand at $100,000 and defendant his offer at $20,000, the midpoint is $60,000. If the arbitrator's tentative award is one dollar more than $60,000, the final award is raised to $100,000. If one dollar less, it is lowered to $20,000. As often happens, one party or both may decide that their demand or offer is out of line and they had better change it to be more realistic. The plaintiff, for example, may decide to lower the demand to $80,000, which then lowers the midpoint to $50,000. Defendant may decide that now the midpoint is too low and raises its offer to $30,000. Now the midpoint is $55,000. The parties can change their demand or offer up to the time the arbitrator is prepared to announce his or her tentative award.

months and even years to complete, a form of baseball arbitration is used.

A hearing is scheduled and the issues in dispute identified. As to each, counsel argue their positions—no live testimony. The arbitrator then must choose one position or the other on each issue and cannot make an independent determination. As to each issue, the arbitrator can request briefs before ruling. The arbitrator's decisions are then reviewed by a utility commission.

The process has several benefits: First, it places the burden on the parties to narrow the issues and advocate responsible positions. The arbitrator, therefore, is no longer burdened with months of hearings, listening to live witnesses and making extensive findings of fact and conclusions of law. Counsel now carries more of the burden.

Second, because of the format, many more issues are resolved by the parties before the arbitrator is required to rule. As a particular issue is raised, each party presents its best position. The parties can observe how the arbitrator is reacting by the questions he or she asks. Being so sensitized, the parties are in essence negotiating between themselves, and more times than not resolve an issue without a ruling. They then go on to the next issue.

Third, a hearing that might otherwise take months or years to complete might be concluded in a matter of days, for there are no live witnesses. And, the arbitrator's findings and conclusions can be quickly reviewed by the appropriate commission and finalized.[55]

Fourth, the process is streamlined and efficient and avoids the local carrier delaying a decision to avoid the creation of a competitive market. It also cuts costs immeasurably.

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[55] *Case Study*: On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996, which for the first time opened local telephone services to competing telephone carriers. The Act required existing local telephone monopolies to negotiate directly with the new carrier to provide interconnecting services with the latter until it could set up its own switching equipment. If agreement could not be reached, they were required to submit the matter to arbitration.

The arbitration format requires the parties to submit their positions on each issue to the arbitrator, who is required to select one or the other. In one city, the parties began with some fifty issues to be decided. By the time the hearing was held, the issues had been reduced to sixteen. During the hearing, ten of those were resolved by the parties and only six submitted to the arbitrator for decision. These were briefed and decided. The arbitrator's decision on these six issues were then reviewed by the state utility commission and resolved. Thus, what might have taken months to conclude took a matter of several weeks at considerably less cost.

7. Arbitration/Mediation (Arb/Med)

An arbitrator was asked to arbitrate a complicated copyright dispute. Recognizing that there would be an ongoing relationship between the parties, he proposed the following format.

First, a hearing would be held on the copyright issue with each side presenting witnesses and offering documents.

Second, the arbitrator would then review the evidence and prepare a written award.

Third, the arbitrator would seal the award and then discuss the case with the parties, informing them how he was reacting to their positions.

Fourth, the arbitrator would then switch hats and mediate the case to see if he could get the parties to agree. If they did agree, that became the award and the sealed provisional award was destroyed. If they did not agree, the sealed award became final.

Fifth, although costs of arbitration have been incurred, if the parties could agree on a settlement they would be far more satisfied than if an award were imposed upon them. Further, in the mediation phase, the parties could agree to include in the settlement other matters not actually a part of the arbitration.[56] Finally, in the mediation phase, the arbitrator, now mediator, already

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[56] Arb/med was used in a complex copyright infringement matter filed in federal court. A company developed a new concept for controlling the flow of fluid through its pumps. To operate, a sophisticated computer software program had to be burned into a computer chip installed in the equipment. An outside programmer was hired to assist in developing the software. He used some of the company's already existing software, adding new modules he developed.

When the program was almost completed, a dispute arose over the programmer's compensation, and the company refused to pay his last two invoices. To gain leverage, the programmer placed a copyright notice on the program, declaring he was the sole owner. The company then filed a declaratory judgment action praying that it be declared the owner of the copyright. The parties agreed to arbitrate the matter, and the arbitrator suggested arb/med.

At the conclusion of the one-day trial, the arbitrator announced the following tentative findings: He found the programmer was the sole owner of the copyright in question; that because the company had paid for the development of the program, it had a non-exclusive implied license to use it as contemplated when the programmer was hired; the programmer, as owner, was entitled to sell or license it to others. The only issue the arbitrator left open was whether a confidentiality agreement, which the programmer signed, foreclosed him from selling or licensing the copyright to others for a five-year period, and the amount of royalties the programmer should receive as additional compensation. The arbitrator made a tentative decision and sealed it.

At this point the arbitrator put on his mediator hat. He pointed out to the company that as long as the programmer controlled the copyright, he was in a position to sell it or license it to competitors, unless the arbitrator ruled that the confidentiality agreement foreclosed this. To the programmer, he pointed that if confidentiality applied, the copyright would be worthless in five years because software upgrades so rapidly. The industry was already working on the next generation.

would know the outcome if not settled, and could be more forceful in guiding the parties to a resolution both could accept.[57]

Both parties recognized it was in their best interest to compromise and settle the matter, and it did settle. The sealed arbitrator's award was never disclosed and the parties were relatively satisfied.

57 Two brothers built a successful real-estate-construction business. Wishing to pass the business on to their sons, the brothers ran into serious problems, not the least of which their sons could not get along. In fact, the sons could agree on nothing, and the business was jeopardized. The brothers decided to seek a tax-free divisive reorganization under the IRS code. Any other form of separation would trigger serious tax consequences.

Because the sons could agree on very little, it was decided to arbitrate the matter; however, all recognized this process would take many months of live testimony and examination of documents. To avoid this, the parties agreed to use a form of arb/med. The parties appointed an arbitrator. They then identified for the arbitrator the issues to be resolved:

1. Valuation of the construction business (Brother A) and real estate (Brother B) as separate entities.
2. Division of real estate holdings: industrial, commercial, residential.
3. Division of personal property.
4. The name each new entity would use.
5. Equalization of key-man insurance carried on each of the brothers for the benefit of the corporation.
6. Rate of commission each would receive in selling real estate owned by the other.

1. *Valuation of construction and real estate business*. The arbitrator got agreement that a single CPA, approved by both sides, would value the businesses as separate entities. It was agreed that his decision would be final. Both parties had to approve the CPA used. While this valuation was being done, the parties went onto the next issue.

2. *Valuation of industrial and commercial holdings*. The industrial and commercial real estate holdings were divided: first, each side listed the real estate they wanted to keep; second, the two lists were compared and an allocation made; third, property they both wanted was divided by bartering between the parties; and fourth, at the end, the accounts were balanced. This process took six hours with the arbitrator hardly participating. His only function was to value one building A valued higher than B, which was going to B. Both accepted his decision without comment.

3. *Division of residential real estate holdings*. There was a substantial number of both improved and unimproved residential lots. The parties flipped a coin as to who would go first. Thereafter, they alternated until most of the property had been divided. Three pieces of property remained, and they were placed on the market and sold with the profits split evenly. The value used on the property was asset valuation. Here, the arbitrator did not have to participate in any way.

4. *New names to be used*. The parties agreed to the new names without intervention of the arbitrator.

5. *Key-man insurance*. Because Brother A was nine years older than Brother B, there was disparity in insurance coverage. Because, for the same premium, Brother B received considerably more coverage than Brother A, an adjustment was mediated. The arbitrator actively participated as mediator.

6. *Commissions*. Pursuant to an earlier agreement, the commission that each was to receive for sale of property belonging to the other was set. A dispute arose as to one piece of property that was being developed. An agreement had been entered giving B a higher commission than that to which they had previously agreed. On this issue, briefs were submitted and the arbitrator made his decision. However, this process in no way delayed the overall resolution of the case.

8. Utilizing Lawyers in Conference Mediation

In one case, a mediation was set up to divide a snowmobile and lawnmower repair business between two partners. Originally, they operated out of one store, but later opened a second store. One of the partners moved to the second store. Later, because they could not get along, they agreed to split the business, but were unable to value the stores so that each would receive one-half of the assets of the business. Ultimately, they could agree on nothing and could no longer face each other.

At the mediation, the mediator immediately recognized that the parties had to conclude the matter that day because any delay would jeopardize the financial position of both. In fact, if the case went to court, both would face bankruptcy because of the fees and time expended. The mediator therefore requested that the parties give him arbitration authority in case the mediation failed. A handwritten agreement was prepared and signed. The parties were then placed in separate rooms and the mediator/arbitrator met alone with the attorneys. In conference setting, each issue was raised and counsel negotiated on behalf of their respective clients. When counsel agreed on an issue, each presented it to their respective clients for approval. The next issue was then addressed. The mediator/arbitrator said little except in one instance he had to speak to a party to convince him to agree on a particular matter agreed to by counsel.

In employing this procedure, the mediator/arbitrator felt confident that, if counsel agreed, it was in the best interest of their respective clients, because counsel could look at the matter without being burdened by emotion. In eight hours, the matter was resolved and the business divided.

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7. *Valuation of the businesses as separate entities*. The CPA valued the construction business at a value both sides accepted. However, a serious problem arose as to the real estate business. Brother A valued the real estate business at $1 million, and Brother B at $350,000. Much to the consternation of Brother A, the CPA valued the real estate business at $180,000. This valuation meant Brother A would have to offset the difference with other assets. Brother A threatened legal action to review the valuation. Although not likely to succeed, legal action would have delayed the divisive reorganization for over a year. The arbitrator then stepped in and successfully mediated the matter. Because Brother B was anxious to complete the divisive reorganization to go on with certain projects, he was willing to compromise and ultimately credited $450,000 for the real estate business. With this agreement, the division of property was completed, and the matter was resolved in days and not months.

B. *The Parties Have Total Flexibility as to What Is Included in the Settlement Agreement*

The courtroom trial has no flexibility—it can only provide the parties with a dollar verdict. Mediation, on the other hand, permits the parties to include in their settlement agreement anything they wish, even noneconomic matters outside the scope of the dispute. For example, the defendant can provide a written apology, or a letter of commendation, or name a conference room after a long-time terminated employee suing for age discrimination under Title VII of the Civil Rights Act.[58] The parties can spread payments out over a period of months or years so as not to force the defendant into insolvency. The parties can agree to put part of the proceeds of a settlement into a structured annuity and take advantage of the tax free status of such an investment, which cannot be accomplished if the matter goes to trial.[59]

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[58] *Case Study*: New owners of a company fired the chief accountant because they desired to computerize the accounting department and he was unable to learn how to use sophisticated computer hardware. He sued for age discrimination under Title VII of the Civil Rights Act. Six months later he died from other causes, although his widow felt he died from a broken heart. At the mediation, she demanded $200,000 on behalf of the estate and the two owners offered $50,000—there was no insurance. Ultimately, she came down to $125,000 and would move no further. Defendants offered $100,000 but said they could not afford to go higher. With the mediation failing, the mediator asked the widow if a written apology would help. She answered in the affirmative and added it would also help if the two new owners would take sensitivity training. They immediately agreed to both conditions and added they would name the conference room after her husband. She was delighted, and the case settled for $100,000. Actually, she would have accepted less because her real goal was recognition of her husband's loyalty and fine work.

[59] The tax free aspects of the structured annuity can only be enjoyed through a settlement, and are lost if the case goes to trial. Because an annuity is not taxable on interest earned on the investment, it gives a higher rate of return than other investments. In addition to the tax benefit, there are other advantages.

First, there are no brokerage fees in setting up the annuity; it is not subject to market fluctuations; and brokers cannot churn the account.

Second, funds are only placed with the top rated annuity companies having maximum ratings from national rating services such as AM Best, A+; Moody's, Aa3; Standard and Poor; AA-; and Duff and Phelps, AA. In some settlements, the settling insurance carrier might also guarantee the payments.

Third, a party can set up the annuity to meet his or her specific needs. Payments can be provided monthly, yearly or in lump sums at designated times, etc. The payments can start immediately or be delayed until the party reaches a certain age or retirement.

Fourth, plans can be set to meet the needs of sophisticated investors. For those who believe interest rates will rise, for example, periodic payments can be geared to meet this contingency. A payback annuity can provide monthly payments for a set period of time, say twenty years, then the entire investment is paid back.

There are times when the noneconomic considerations are of greater value than the dollar amount. For example, in cleric pedophile sexual abuse cases the noneconomic conditions may be more significant as a means to assure that the abuse will stop and the perpetrator will not injure children who are still vulnerable.[60] In mediation the possibilities are limitless and circumscribed only by the creativity of the parties, counsel and mediator.

IV. Raising Mediation to its Highest Denominator

Mediation is a noble calling. It truly permits the lawyer to be a good person. Abraham Lincoln observed: "As peacemaker the lawyer has a superior opportunity of being a good man."[61] How-

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Case Study: Plaintiff settled her case and invested $100,000 in a payback annuity. Beginning one month later she was paid $490.36 per month, which continued for twenty years. At the end of this period she received back her $100,000.

Fifth, once an annuity is fixed, it cannot be altered. Thus, there is no opportunity for a party to change his or her mind and get the funds and squander them. Likewise, families and friends cannot get access to the money other than what is paid out periodically.

Sixth, the annuity is not subject to bankruptcy.

Seventh, the annuity is particularly beneficial for children. Responsible parents do not want their children to receive large sums of money when reaching majority (18 years old), because of their lack of maturity. Thus, the annuity can be set up to provide four annual lump sum payments for college beginning at age 18. Additional payments might be scheduled at age 25, when a child might get married, 30 when the child might buy a home, 35, and so on.

Eighth, because an annuity set up for a child must be approved by the court, a structured annuity protects the child from irresponsible parents getting their hands on the funds.

Ninth, any investment for a child, other than a structured annuity, has an additional administrative expense in preparing tax returns and reports submitted to the probate court.

Tenth, the annuity can benefit individuals with health problems. Because statistically such individuals have shorter lives, the annuity will provide a greater lifetime benefit than what the normal annuitant would be paid. That is, a high risk person will receive more per month than a person with a normal life expectancy, thereby making the annuity a better investment.

Eleventh, lawyers likewise can defer paying taxes on fees earned by placing them in a structured annuity. *See* IRS and US Treasury Notice 2005-1 (clarifying that deferred attorney's fees are not within the parameters of the Revised Revenue Section 409A). Although the recipient will have to pay taxes when the money is paid out, this tax can be deferred until retirement age when the person's tax bracket may be lower. It also permits the lawyer to spread his fee out over several years rather than pay the tax at one time at a higher tax level.

60 *Case Study:* Thirteen men, ages thirty-five to forty-two, sued their church for sexual abuse by a pastor when they were alter boys. They still live in the parish and wanted to be certain changes were made to protect children attending the church. As part of the settlement, it was agreed that a committee of three would meet each month with the bishop to discuss problems and implement changes. This arrangement was their primary concern. Economic compensation was only secondary. Such a result could not have occurred in a courtroom trial.

61 Abraham Lincoln, *Fragment: Notes for a Law Lecture, in* 2 Collected Works of Abraham Lincoln 81 (Roy P. Basler ed., Rutgers U. Press 1953).

ever, mediation involves more than the transfer of cases from the courtroom to the conference table. It requires a transformation of the mindset of counsel acting as mediator from advocate to peacemaker. Whereas courtroom advocates are required by the system to confront, impeach, discredit and defeat, peacemakers, according to Chief Justice Burger, are required to be "problem-solvers, harmonizers, and peacemakers, the healers—not the promoters—of conflict."[62]

This section discusses the evolving role of the mediator from messenger to present day peacemaker. It describes the qualities of the peacemaker and the tools with which he or she works.

A. *Evolution of the Mediator/Peacemaker*

Mediators today play different roles depending on the needs of the parties. They can be messengers, evaluators, devil's advocates, facilitators and peacemakers.

1. The origin of the *messenger role* dates back to the time of Confucius when the mediator did nothing more than carry messages between the parties. In the Confucian school, mediators were not permitted to interject themselves into the process—the parties were left to their own negotiating skills. Today, the messenger is really an outmoded role in Western culture because the person adds little to the process.[63]

2. The *evaluator*, on the other hand, plays a decided role. Many times parties want a decision to guide them and are not concerned with opening lines of communication or finding conciliation. In this role, the mediator is asked to listen to the case, weigh the evidence, apply the law, and render a nonbinding award as to the value of the case. The evaluator evaluates the case in one of three ways: first, he or she can hold a hearing and permit the par-

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62 Chief Justice Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 5 (1993) (quoting Chief Justice Warren E. Burger, *The Role of the Law School with Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. Rev. 377, 378 (1980)).

63 Mediation was documented in China over two thousand years ago. *See* Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966). *See also* JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMMON GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 1-2 (1984) (noting the widespread use of conciliation and mediation to resolve disputes in China and Japan); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L. J. 29 (1982).

ties to offer evidence, or argue their cases in summary form;[64] second, they can meet with the parties in conference and allow them to present their positions; and third, the evaluator can meet with the parties in separate caucuses and discuss the strengths and weaknesses of their cases. Whatever format is utilized, the end result is the same: a nonbinding dollar award.

The advantage of the process is that it is fast and reaches a definitive result, which the parties can accept or reject.[65] The disadvantages are, first, the mediator considers only the merits and law of the case and does not weigh such factors as (1) the emotional stability of the parties;[66] (2) the need to get immediate resolution because of financial concerns; (3) the impact prior litigation, which raised similar issues, may have on the dollar value of the case;[67] (4) the costs of defending or prosecuting the case;[68] (5) the need to establish an ongoing relationship; (6) the solvency or insol-

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64 The State of Michigan previously utilized the evaluator format. A panel of three mediators listened to summary arguments of counsel and then made a nonbinding award as to the value of the case. MICH. CT. R. 2.403(B). The parties could accept or reject the award: if they rejected it, they could go to trial but had to improve their position by ten percent or they were penalized—they paid the costs and attorney's fees of the opposing party. *Id*. R. 2.403(D); *see* James McNally, Letter to the Editor, *Mediation in Michigan is Really a Form of Case Evaluation*, 5 DISP. RESOL. MAG. 1, 2 (Winter 1988).

65 *See* Maureen E. Laflin, *Can Informal Consent Preserve the Integrity of Mediation?* THE ADVOCATE: A PUBLICATION OF THE IDAHO ST. B., Nov. 2000, at 12 (noting that "[i]n many situations, a third party neutral with evaluative orientation will be more effective and more to the parties' liking than a strictly facilitative neutral").

66 *Case Study*: Plaintiff suffered soft tissue injuries. He demanded considerably more than the case was worth, and would not follow the advice of counsel. The mediator was about to give up when he asked if discovery had been completed. Counsel said no, that plaintiff's wife, who had a claim for loss of consortium, had to be deposed. Plaintiff said he would not allow this inasmuch as she was facing depression and a deposition would be too stressful. When counsel explained that defendant had the right to depose her, plaintiff instructed his attorney to settle the case at any price. The case settled.

67 *Case Study*: In a prior case, a major insurance company suffered a multi-million dollar verdict, including punitive damages, in Texas when it could have settled for $250,000. One of its sales agents had convinced an insured to switch insurance carriers, but had failed to inform her that there would be serious tax consequences. In the case being mediated, plaintiff, a widow, had received $750,000 in a medical malpractice case involving her deceased husband. She invested the money in an insurance policy. An agent from the defendant insurance company convinced her to switch the funds to a universal life policy with the defendant carrier, but failed to inform her of the tax consequences. The attorney representing her in the action against the insurance company informed her she might recover as much as $1 million based on the result in the Texas case. Her actual loss was $150,000. In discovery, it was learned, that, unlike the prior case, the agent's failure to disclose the tax consequences was not intentional as he was unaware of this at the time of the sale; therefore, there would be no punitive damages as were awarded in the Texas action. However, the defendant carrier instructed its representative to settle the matter regardless of the price as it did not wish to risk a replication of the prior action. The case settled for twice the value plaintiff's expert said was plaintiff's actual loss.

vency of the defendant; and (7) noneconomic considerations that have value to one or both parties.[69]

Second, when the mediator is evaluative, the only result is dollar resolution. Creative solutions such as an apology or letter of commendation, which may be beneficial to the parties, will not be considered.

Third, the evaluator is not concerned with building rapport and trust or healing the wounds. Such considerations, for the most part, are irrelevant.

3. The *devil's advocate* plays the most aggressive role of all. Many ex-judges choose this approach because it is quick and can be effective. It permits the mediator to mislead and even deceive the parties if the end result is a settlement.[70] The drawbacks of

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[68] *Case Study*: Plaintiff, an African American, was a trained diesel mechanic. He sued his employer under Title VII of the Civil Rights Act based on race discrimination—he alleged he was given an inordinate amount of janitorial work as compared to white mechanics, he did not receive pay raises in line with the other mechanics, and there had been racial slurs, which his superiors did nothing to rectify. He demanded $30,000. In answer to the complaint, the company produced records which demonstrated his janitorial duties were in line with the other mechanics, and his pay raises were also in line; however, it admitted that his claim based on racial slurs was valid, but his injuries were no more than $5,000. It refused to pay what plaintiff demanded. The mediator then inquired of defendant what it would cost to defend, and counsel answered approximately $40,000. He then asked what plaintiff would spend in attorney's fees and costs, and counsel answered, about the same. The mediator then pointed out that because the Act had a fee-shifting provision (if plaintiff won, defendant had to pay plaintiff's attorneys fees and costs), costs incurred would be $80,000 or more to defend. The mediator then suggested that if the company paid the $30,000 demand, it would save some $50,000. The case settled.

[69] *Case Study*: In a southern diocese, thirty-seven victims of child sexual abuse by pastors filed suit. Although the dollar amount each was to receive was important, non-economic factors were even more important. Thirty-eight conditions were agreed to including: (1) defrocking the clerics involved so they could no longer have access to housing and other facilities; (2) having a sexual misconduct policy instituted which would permit representatives of the victims to meet periodically with church officials to discuss current concerns; (3) have the bishop write a letter of apology to each victim and his family, if requested; (4) when there is an allegation of sexual abuse, suspend the pastor while an investigation is conducted; (5) having investigations of all sexual abuse incidents conducted by an independent agency; (6) establishing a hotline, with telephone numbers posted around churches and schools which victims could use to report, in confidence, any perceived abuses; (7) publishing a public apology in the newspaper by the bishop to the victims and their families; (8) providing safe touch education for children to help them identify sexual abuse; (9) training employees, volunteers, independent contractors, and clerics to identify signs of abuse; (10) providing counseling for victims and their families; (11) criminally prosecuting those offenders who could still be indicted; and (12) allowing no cleric to travel alone with children under the age of eighteen years, or to stay overnight with a child without a proper chaperone, etc.

[70] As one scholar notes, it is perfectly proper to use deception and illusion to reach settlement. *See* John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 5 (1997) (noting that "[c]onsensual deception is the essence of caucus mediation"); s*ee also* Robert D. Benjamin, *The Constructive Uses of Deception, Skill, Strategies, and Techniques of the Folkloric*

such an approach are obvious. It is very stressful and often leaves the parties feeling abused and no better off than if they had gone to trial. Also, there is no opportunity to examine creative solutions or bring peace and conciliation to the parties.

4. The *facilitator* is most often a peacemaker. He or she gets most involved in the case and is sensitive to creative solutions, seeking not only resolution, but peace, conciliation and even healing. The facilitator is not judgmental, but allows the parties to settle at whatever level they choose for whatever reasons they wish.[71] Under no circumstances does he or she use intimidation or pressure, but rather shows compassion to build rapport and trust.

It is here suggested that the facilitator, who is a peacemaker, most clearly rises to the "good person" level espoused by Abraham Lincoln and Chief Justice Burger.

B. *The Qualities of the Facilitator as Peacemaker*

The most important role the facilitator can play is that of peacemaker.[72] The following discuss the qualities of the true peacemaker.

1. Be at Peace With Oneself

To be an effective peacemaker begins with self; one must have his or her own life in order. The person must be at peace and in control. The mediator cannot expect to calm others if his or her

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Figure and Their Applications by Mediators, 13 MEDIATION Q. 3, 17 (1995); Steven Hartwell, *Understanding and Dealing with Deception in Legal Negotiation*, 6 OHIO ST. J. ON DISP. RESOL. 171, 185-94 (1991) (discussing the use of deception in negotiations); Gerald B. Wellaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990) (noting that "a willingness to lie is central to one's effectiveness in negotiations"); James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 5 AM. B. FOUND. RES. J. 926, 926-27 (1980) (addressing truthfulness in negotiations).

71 *Case Study*: Plaintiff, an elderly man in his 60s, was in a head-on collision and sustained serious closed head injuries. Liability was admitted. At the mediation he demanded $500,000 and the insurance carrier offered $150,000. The mediator felt the plaintiff was closer to the settlement value of the case than the insurance representative. After several caucuses, the adjuster instructed the mediator to see if he could settle the matter for $250,000, which he did, and the plaintiff accepted. The mediator felt that this was low, and this was verified when defense counsel told him the carrier was willing to go as high as $450,000. Afterwards, by chance, the mediator met plaintiff and his family at a restaurant. They hugged him and said how grateful they were for the fine work he had done settling the case. Thus, in being nonjudgmental, the mediator allowed the parties to settle at a level of their choosing.

72 To be an effective peacemaker, appreciate, respect and care about each person with whom you deal. They will sense your compassion and react accordingly.

own personal life is stormy. For some, having the aura of peacemaker is natural and takes little effort. Such persons only wish to help others in conflict find resolution. For others, particularly the trained advocate, putting on the cloak of peacemaker is unnatural and more difficult. There are many habits to break, especially those ingrained through advocacy training.

If one has to be retrained, the best place to practice is at home with one's family. If one can live in harmony with family members, this is a first major step.[73] The next step is to feel a sense of peace at the office or in daily contact with others. To avoid becoming frustrated with office staff or the waiter who makes an error in filling an order can be a good exercise in self-control. What might prove aggravating in the past can be a challenge to handle with calmness and equanimity in the present.

The mediator must remember that most parties entering a mediation are angry and often frustrated. They are nervous and under great stress. That first contact with the mediator is, therefore, important and a major factor in the entire process. If the mediator is calm, friendly and in control, this has a major impact on the parties. Parties react immediately, for they want to like their mediator, and when he or she is warm and accessible, it goes a long way to help them relax and invest in the process.[74] The first contact is important.[75]

In preparing for this initial session, some of the most successful mediators will take time to get their own house in order. Some will meditate, while others will pray. One very skilled mediator practices tai chi to prepare himself for that initial contact.

There are times when the parties are so angry they cannot face each other, or the lawyers are at odds and unable to work together.[76] Animosity can arise when the attorneys are constantly

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73 Instead of saying to one's spouse, "What, leftovers again tonight," which always gets the response, "well, you prepare dinner," or "let's go out to dinner," one might say in a soft voice, "Ah, leftovers again tonight; I like it warmed over the fourth time better than when it was first served." Same message, but a gentler approach, which generally gets a smiling response.

74 There is perhaps no more difficult setting for mediation than in divorce and child custody matters. Often the parties come into the fray seeking to hurt and, through the attorneys, brutalize each other. Attorneys add to the mix by dragging the parties through difficult discovery forays and demeaning courtroom battles. Parties, who may have been communicating before legal action commenced, often develop a hatred for each other and for counsel they never dreamed possible. In this setting, the peacemaker, gently and compassionately, must calm the storm at the outset.

75 You never get a second chance to make a first impression.

76 *Case Study*: Three realtors were developing a new housing project with a golf course as the centerpiece. They could not get along and ended up in court. Spending over $100,000 each

running to court, filing motions for sanctions, etc., all of which delay resolution and increase costs. In this scenario, the mediator must be particularly calm, warm and friendly in order to gain control. The mediator must convince them they are delaying the day of closure. Until this anger is assuaged, it is a major obstacle to settlement.[77]

2. Establish Rapport and Trust

A calm and concerned demeanor not only settles the parties down, but begins to build the rapport and trust so vital to a success-

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in attorney's fees, the matter was finally resolved in the appellate court. The losing party, the plaintiff, could not accept the result and filed a second action. Matters got out of control, so much so that the court entered a no contact order, enjoining each from contacting the other. One of the realtors then died of a heart attack.

The plaintiff violated the no contact order and visited the house of the other realtor. It was raining and the other realtor's wife invited him into the hallway. Hearing the voice of the plaintiff, the realtor rushed out of a back room with a gun and ordered him out of the house. When the plaintiff hesitated, he cocked the gun and pointed it at the intruder's head. The plaintiff left immediately and filed a complaint with the police.

The prosecuting attorney recognized that this was a personal matter rather than criminal. She recommended they mediate. A time was set.

At the mediation site, a hotel, the mediator arrived and observed two police officers frisking the two parties for weapons. He was unaware of the criminal aspects of the matter and made inquiry. Recognizing the raw hatred the parties had for each other, he spent forty-five minutes alone with each just trying to calm them down. He explained that if they did not act civilly towards each other, the matter would never be resolved and both would end up as one already had. Thereafter, the matter was resolved in eight hours. The two men shook hands in the conference room, and again at the elevator, and finally in the lobby when they parted. Although not friends, they were able to accommodate each other's needs and move forward with the project. The criminal charges were resolved also.

77 *Case Study*: Plaintiff's counsel was African American, who represented twenty-five blacks and Latinos who had been sexually abused by a white cleric when they were children. Defense counsel was a well-known trial lawyer who represented the church. Before the mediation even commenced, plaintiffs' counsel accused the other of bias and that the church settled with persons of color at a lower rate than whites. The verbal accusations almost turned to physical blows.

Out of the presence of the parties, the mediator took control of the situation and, in essence, good naturally scolded both for the unprofessional conduct. He then talked to each separately. He pointed out to plaintiffs' counsel that his belligerent approach would obstruct any chance of settlement. He was "slaying the golden goose" which was highly unproductive. If he wanted to recover now by way of settlement, and not at trial, he needed to cooperate with defense counsel because the latter had great influence over any settlement prospects. He suggested he write a letter of apology with a pledge of cooperation this point forward. He did, and the mediation was successful.

The two attorneys actually became friends and wished each other a Merry Christmas with a firm friendly handshake. As a footnote, plaintiffs' counsel, at a subsequent mediation with the same defense counsel, felt a pain in his neck. Defense counsel said, "this session is over. Get John to the emergency room immediately," which they did. Plaintiff's counsel was having a stroke and the immediate recognition of this fact probably saved his life. Two months later, the mediation picked up again.

ful mediation. The parties must feel the mediator cares—that the mediator's concern is to fashion a resolution "fair" to both parties. The calmness and gentleness of the mediator's expression, the quiet manner in which he or she speaks, all impact the parties and counsel in a positive way.

Rapport and trust are required because towards the end of a mediation, when the parties are still apart, the mediator can draw on this goodwill to get further compromise. The parties know the mediator has integrity and would not mislead—he or she is not negotiating for the other side. When the mediator has been successful in building rapport and trust, the mediator's assessment will often carry the day.

Rapport and trust can be established in several ways: First, the mediator can build such by showing interest in the parties and counsel—in their families, hobbies, sports, college background, anything that can establish common ground between mediator and parties.[78]

Second, trust is established by the mediator being supportive. In meeting with a party in private caucus (the other party is not present), the mediator can inquire of the strengths of a party's case and what counsel believes is the party's best case before judge, jury, or arbitrator—whomever is the fact-finder. Even suggesting other possible strengths, or at least making inquiry, demonstrates that the mediator is interested in the party's position and is being supportive.[79]

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[78] *Case Study*: One mediator was having difficulty mediating a cleric sexual abuse case. Plaintiff's attorney was asking too much and was refusing to compromise. As the day wore on, the mediator was able to speak to the plaintiff, now an adult, asking about his employment. The latter happened to mention that he worked part-time at Sox Park, home of the Chicago White Sox baseball team. As it turned out, the mediator was an avid Sox fan and so informed the plaintiff. From that moment on, they bonded and spent time talking about the prospects for the playoffs and whether the Sox had a chance to win. Plaintiff stated he could get the mediator tickets to any game the mediator wanted to see. By the time the day ended, plaintiff insisted that the case be settled, and it was at a fair figure. Before rapport was established, plaintiff said little and generally just reacted to what counsel was saying. After, he took an active role and even disagreed with counsel on occasion. And, the mediator took up the plaintiff's offer and attended a Sox game. This occurred in the summer of 2005, when the White Sox won the World Series.

[79] *Case Study*: Plaintiff was broadsided when the defendant, in a delivery truck, ran a stop sign and hit her car. She suffered significant soft tissue injuries, which seemed to linger. There was nothing in the record to indicate alcohol was involved; still, the mediator, as a matter of course, made inquiry. Plaintiff's counsel was surprised when plaintiff stated that the driver had been seen at Sally's Bar just twenty minutes before the accident. Although not above legal limits, his ingestion of alcohol could have made him sleepy or inattentive. Upon further inquiry, it was determined that the driver visited the bar every afternoon at 4:30 p.m., just before finish-

Third, another important factor that establishes rapport and trust is to avoid putting a party or counsel on the defensive. To play devil's advocate (as many mediators do) is counterproductive and might suggest that the mediator is on the other side. A question can be asked in a way that is supportive rather than challenging. Rather than ask, "What are your weaknesses," it is more effective to ask, "What weaknesses, if any, should I be aware of before I meet with the other side?" The key here is to ask questions in a way that puts the mediator on the same side as the party to whom inquiry is being made.[80]

And fourth, a final technique to build rapport and trust is to avoid arguing with counsel or the party at all costs. Whenever a party or counsel disagrees with what the mediator is suggesting and wants to argue the point, the mediator should immediately defuse the argument. To argue puts the party on the defensive and the longer the argument or disagreement continues, the greater the party's investment in the position and the more difficult it becomes to back down or admit error. One argument can undo all the rapport and trust already built up.

3. The Mediator Must Be Patient

One of the most important qualities of the successful mediator is patience. At no time can the mediator become impatient or frustrated with counsel or a party. More important, the mediator should never rush the process but allow the parties to move at a pace with which they feel comfortable.

This raises the question whether the mediator should keep the parties in session until late at night when they give in out of sheer exhaustion, or continue the process another day. The preferred approach is not to exhaust the parties, but to continue the process when the parties are rested and not frustrated. There are three reasons for this: first, if the parties are forced to continue the process late into the night, they will feel abused even though they may

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ing up his deliveries for the day. Plaintiff and counsel were most pleased with the mediator for raising this line of inquiry. When the mediator asked how this might be proven, plaintiff responded that a witness, who was a railroad engineer, could verify that the driver was at the bar on the afternoon in question. He was contacted and appeared at the mediation to verify what plaintiff was saying. The case settled.

80 One technique that mediators use to build rapport and trust is the "we," "our," "us" technique. Rather than ask "how are *you* going to answer that point," it is more effective to say, "how are *we* going to answer that point?" or "what is *our* position on that point?" or the final argument the other side is making to *us* is. . . ." This technique, however, can be used only in the private caucus when the other party is not present.

settle; second, by continuing the process another day, the parties have a chance to relax and avoid feeling forced into a settlement they do not accept;[81] and third, slowing down the process creates greater opportunity for creativity that might make settlement more meaningful.

Patience also means that the mediator will not allow himself or herself to be intimidated by an attorney. Unfortunately, there are attorneys who feel that if they can intimidate the mediator by accusing him or her of bias, incompetency, or favoritism, the mediator will work harder for them to prove his or her fairness and objectivity. The mediator should handle such challenges with patience, calmness and equanimity. The mediator is neutral and should not feel he or she has anything to prove. He or she should recognize that such tactics are part of counsel's mediation strategy and should not be dignified.[82]

The more difficult situation arises when an attorney becomes visibly angry or frustrated with the process, because the other side is "acting in bad faith," or is "nickel and diming," and the mediator becomes the brunt of the outburst. In this instance, it is better if the mediator does not defend the other side or suggest the media-

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[81] There is a technique called "pillow talk," which allows the parties to sleep on a matter rather than force them to settle immediately. It works when a family member wishes to settle and another does not, such as a husband and wife. By allowing them time to talk the matter over quietly, inevitably, the party seeking settlement will win out and the matter resolve.

Case Study: Parents of a child, who was critically injured when given a diphtheria, pertussis and tetanus shot as a baby, sued their doctor. At 17 years, she had the mentality of a six month old baby and spent most of the day sleeping in a fetal position. The case was settled for $80,000 and the family received $34,500, after fees and expenses were deducted. Subsequently, the parents learned that their daughter was eligible to receive compensation under the National Vaccine Injury Compensation Act, a federal statute which provided $2 million in compensation to care for children injured by the shot. They then sued their attorney for legal malpractice for not informing them of the statute.

At the mediation, the insurance carrier ultimately offered policy limits of $1 million, but the father rejected it claiming that no amount of money could pay him for what they did to his daughter. The mother, who remained quiet, appeared to favor settlement and conclude the matter. The adjuster suggested that the parents be given five days to consider the matter, and then she added, "there will be pillow talk, and the mother will win out and the case will settle." In three days the offer was accepted and the matter resolved.

Parenthetically, it should be added that it does not matter whether the person wishing to settle is the wife or the husband, or another member of the family. Giving them quiet time to talk about the matter is all that is needed to get agreement.

[82] One mediator worked with a plaintiff attorney who always began the process by saying that he did not like mediating, that he preferred going to trial. And he invariably accused the mediator of favoring the insurance company. He even accused the mediator of being the insurance company's harlot. The mediator understood this tactic and simply did not react, but made light of the matter.

tion is still at the early stages, for this only adds oil to the fire. The patient course is simply to agree with counsel that more progress needs to be made and that the mediator will do all he or she can to encourage the other side to be more productive. Agree with the party or counsel rather than defend.[83]

Finally, if a mediation is failing because of the intransigence of the parties or counsel, the mediator should still remain patient and in control. To become angry or frustrated with the participants undermines any chance of picking up the mediation at a later date, after there has been more discovery or circumstances have changed. The better course is to thank everyone for their hard work, even the party or counsel who is causing the obstruction. Again, this may seem disingenuous when they have not cooperated, but it does clear the air and ends the mediation on a positive note. It prevents animosity against the mediator from becoming an obstacle to later progress.

4. The Mediator Should Remain Positive

A mediator can never show discouragement, frustration or anger. Such emotions are contagious. When a mediation is going poorly, or the parties are making outrageous demands or offers, the mediator should still convey the thought that this is to be ex-

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[83] *Case Study*: The mediator flew from St. Louis to Boston to mediate a sexual abuse case. Three elementary school boys at a parochial school had been sexually abused by their basketball coach. The abuse consisted of rubbing in the genital area with clothes on and was, in the scale of abuse, at the lower end insofar as damages were concerned—$75,000 to $100,000 per boy.

The attorney for the boys was one of the top plaintiff trial attorneys in the East and demanded $1 million for each boy. The insurance company's opening offer at the mediation was $200,000 total. After one and one-half hours, counsel lowered his demand to $2.5 million and the insurance company responded at $250,000. Up until this time plaintiffs' counsel had been quite pleasant, showing the mediator some of his prized Revolutionary antiques.

Suddenly, without warning, he turned on the mediator, almost shouting at him. He exclaimed that an hour and one-half had elapsed and the insurance carrier had only moved $50,000 and he had dropped $500,000. He shouted, "this is unacceptable. I will give you thirty more minutes, and if the other side does not make a significant move, you are history! You can get on your plane and fly back to St. Louis! I don't want to see you again!"

The natural response of the mediator might have been that only one and one-half hours lapsed, and these mediations take eight hours or more. Or he could have said that because plaintiffs were so high it was difficult to get the carrier to move significantly. Instead, he said, "I agree with you. If I were in your shoes, I would be just as angry as you, and I would have said just what you said, only in stronger words." When this was said, counsel immediately calmed down for he recognized that the mediator understood and appreciated his frustration. From that point on the mediator was able to make significant progress, and the case settled for $625,000, a figure with which plaintiff's counsel was very pleased.

pected, that this is the way it always is.[84] And, indeed, this is generally the way mediations begin—the demand is unrealistically high and the offer unrealistically low, yet the case settles over ninety percent of the time.

Mediations take on a rollercoaster profile. At the beginning, expectations are high, for the parties have consented to mediate and hired a mediator to conduct the process. After the first few rounds and the parties are still significantly far apart, discouragement and frustration set in, and the parties begin to feel the mediation will fail. Then, later in the day progress is made and hope is revived only to be dashed at the end of the day when a substantial gap still exists. Throughout the entire rollercoaster ride, the mediator needs to remain positive and encouraging and on a level plain.

The best technique the mediator can use is to convince the parties that the rollercoaster ride is to be expected and emphasize "this is the way it always is." The parties must understand that there is nothing different about their case from all the others that settle. If the parties believe their case is different, their discouragement will be reinforced.

There is an interesting phenomenon that takes place in many mediations. They take on a life of their own once they commence. There develops a coming together, a synergism, a spirit of working together that is spurred on by the time, money and effort put into the process. Many times the mediator will know a matter will settle long before the parties recognize this possibility. It is something the mediator can sense. Even when settlement possibilities seem bleak, the experienced mediator will trust the process. What seemed impossible before lunch will often look promising after.

5. The Mediator Should Be Persistent

One of the cardinal rules of good mediating is to never terminate the process unless fired by the parties. The biggest complaint the author receives about mediators is that they give up too soon.

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[84] All mediators experience the scenario where counsel makes an outrageous initial demand or offer. It is here suggested that the mediator not react or request counsel to be realistic and reconsider. The better course is to convey it to the other side with the observation that the receiving party should not be concerned but simply respond. The mediator should note that mediations often begin this way and they almost always still settle.

Parties and counsel begin with outrageous demands and offers for several reasons: First, they are often testing the mediator to see how he or she reacts—are they plaintiff or defense oriented; second, counsel may make such a demand or offer because the client is not yet ready to be reasonable or realistic; and, third, counsel may intentionally be difficult, trying to make the mediator work harder. Whatever the reason, the mediator who is positive will not react.

If a matter cannot be resolved the day of the scheduled mediation, the mediator should suggest that he or she will continue the process by caucusing separately with each side at a later time, or by telephone.[85] Mediators ought not worry that stretching the process into a second meeting or continuing it by telephone will widen the parties' divide. The parties may not change their positions, but it is extremely rare that they will make them worse. The fact is, almost

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[85] If a mediation is to be continued, the mediator should confirm at the end of the day plaintiff's final demand, and defendant's final offer. The mediator should then inform the parties whether he will caucus further with them or contact them by telephone.

It is far more effective to caucus personally with each side at their convenience. In doing so, the mediator should prepare for the session. He or she can do so in several ways: first, if the mediator is going to meet with a supervisor who was not present at the original session, the mediator can have plaintiff's counsel prepare a video of segments of important depositions; second, if the case involves personal injuries, the mediator might have the defendant prepare a structured annuity to present to the plaintiff; third, if a legal question has arisen, the mediator might prepare a legal memorandum covering the point, or request counsel to do so; and fourth, the mediator might prepare separate position papers outlining the concerns he has as to each party.

If the mediator is to make contact by telephone, he or she should inquire as to the point person to be contacted. Generally, this is the attorney, although on occasion, the adjuster may wish to speak directly to the mediator. Direct contact with the client should never be made except with permission of counsel.

If time lapses and there are no new developments, the mediator should periodically call each side inquiring whether any progress is being made and ask if there is anything the mediator can do. If nothing else, it will remind counsel that the mediation is still pending and the mediator is thinking about it. This ongoing contact can encourage counsel to move forward on settlement.

Case Study: Plaintiff, the mother of twin babies and a two-year-old girl, sued a trucker who crashed into her van on an interstate highway during a blizzard, killing one of the twins and the two-year old. Plaintiff had initially slid into a semi van that had jackknifed on the icy interstate. She had just taken one of the twins to the truck and was returning to get the other two when the second truck hit her vehicle. She sued for the estates and as a bystander.

The trucker that had jackknifed settled for $500,000; however, the insurance carrier for the other trucker offered only $350,000. The adjuster said this figure was his total authority. The parties agreed to continue the mediation, and the mediator made an appointment to meet with the adjuster's supervisor. In preparation, the mediator had plaintiff's counsel put together a thirty-minute video of depositions taken in the case. One segment was of a trucker who learned of the initial accident and tried to slow traffic down by straddling the interstate with amber lights flashing. The trucker who crashed into the van passed the trucker trying to slow down traffic, traveling on the shoulder and giving him the "finger" as he passed. Another segment of the video was of the defendant driver, who was asked what the "finger" meant. He answered. He was then asked if he had even shown the finger while driving. He answered in the affirmative. The next obvious question was not asked, but the implication was clear. A third segment was of the trucker whose semi jackknifed. He broke down weeping describing the scene of the crash. Finally, it was established that the defendant trucker was driving 40 miles per hour in the blizzard when he crashed. After this presentation, the insurance carrier increased its offer to $3 million and the case ultimately settled.

always the parties will compromise further with the passage of time. Time works for the mediator, not against.[86]

6. The Mediator Should Be Perceptive

Being perceptive means that the mediator should identify issues counsel may be missing. One thing is clear: attorneys, shackled with advocacy, often miss the obvious and the not so obvious. The mediator, therefore, should be alert to what counsel is overlooking or not fully developing. The mediator's objectivity and perceptiveness can be of great benefit in this regard.[87]

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[86] *Case Study*: Plaintiff hired the defendant to clean his two corn bins in preparation for the fall harvest. Inadvertently, the defendant used a cleaner which contaminated the corn that was later stored. The corn was disposed of, and plaintiff sued for $750,000, the cost to replace the original corn. At the mediation, the insurance carrier offered $250,000, which was rejected out of hand. At the end of the eight hour day, the mediator, in confidence, got a commitment from the carrier to go to $450,000 and plaintiff to $600,000. He then adjourned the mediation and said he would be back in touch in a day or so. The following day he called the adjuster (with permission) who agreed to move to $500,000 but not one penny more. He waited an extra day before contacting plaintiff because he knew that the next day was plaintiff's golf day. Being a golfer himself, the mediator took a calculated risk. As it turned out plaintiff had one of his best golf days ever. Without hesitation he accepted the $500,000. Only a golfer can understand the psychology at work in this case. The delay was the perfect move.

[87] *Case Study*: In one case, counsel was overlooking several matters. Plaintiff, a widow with three small children, sued on behalf of her deceased husband's estate. He had been killed when the pickup truck driven by his father was rear-ended by a conversion van traveling late at night towards Nebraska. The pickup truck was pulling a wagon and traveling 35 mph (below the minimum speed) with one red tail light out. The van was driven by defendant with his wife and four children, as passengers. No one in the van was injured.

The case was filed in federal court based on diversity of citizenship. The estate was from Nebraska and the defendant driver, Illinois. Defendant then third-partied the decedent's father, who was driving the pickup. The estate then amended and added the father, also a Nebraska citizen, as a defendant, to reach the insurance.

At the mediation, the estate demanded $1 million and the insurance carrier for the Illinois driver offered $150,000. Thereafter, the plaintiff lowered the demand to $750,000 and defendant offered $350,000. At this point, counsel for the plaintiff would not move further.

The mediator, in casual conversation with the widow, learned of an important hidden agenda. Because two and one-half years had elapsed since the accident, the young widow had begun dating a man from Florida and he had proposed marriage. She very much wanted a father for her three daughters and wanted to accept; however, she was informed by counsel that she could not remarry until after the case had concluded. A weeping widow's case was worth considerably more than a blushing bride's.

The mediator recognized that counsel was not sensitive to her client's needs. However, there was also a legal impediment in the lawsuit. Because the Nebraska estate had named the father, a Nebraska resident, as defendant, diversity of citizenship was lost and the federal court would have to dismiss the case. The mediator informed counsel she had three options: first, she could try the case and hope the defendant did not identify the jurisdictional problem, because if he did, he could have the case dismissed at any time, even on appeal. Although she could refile the case, this process would delay resolution another two years, which was unacceptable to the plaintiff. Second, counsel could dismiss the case and file over again in state court—but this

Although not being judgmental, the mediator can help the parties evaluate their cases. Many times counsel want to use the mediator as a sounding board to test theories or lines of reasoning. The perceptive mediator can play an important role, particularly when there is a problem with establishing liability or damages and the prospects of a zero verdict loom large.[88]

7. The Mediator Should Be Sensitive

The expert mediator is sensitive to a number of factors occurring in a mediation. First, he or she should be sensitive to body language. It is not so much what is said, but the way it is said that signals the true feelings or positions of the parties and counsel. The mediator must perceive when a "no" is really a "maybe," and a party simply needs more time. The mediator should note a hesitation when asking counsel or a party a question. If the mediator asks, for example, "will you accept $150,000 to settle the case," and the attorney hesitates before responding, this signals the person has to think about the response, which is a positive sign. Or, if after the question is asked, the client looks at the attorney, or the attorney looks up—these are also positive signals. It is when the party is shaking his or her head, "no," before the question is asked, that the party is responding negatively. An astute mediator will keep an eye on the client as well as the attorney when asking a question, for most times the client will more definitively react than the attorney.

Second, the mediator must be sensitive to problems that might arise with the party and/or counsel. Early on, the mediator should determine if a party wants to resolve the matter at all costs because

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course would cause the same unacceptable delay. Or, third, she could allow her client, who wanted to settle at almost any price, to resolve the matter so she could act in the best interests of her little family. Counsel recognized the options and encouraged her client to settle for $475,000. The case settled.

88 *Case Study*: Plaintiff was a police officer who pulled into the parking lot of a fast-food restaurant. Stepping out of his police cruiser, he slipped on ice, fell, and suffered a serious closed head injury. Ultimately, he could not return to duty and had to retire. He sued the restaurant demanding $750,000 in compensation. The insurance carrier offered $50,000 and said the case was defensible.

Plaintiff's counsel asked the mediator for guidance. The latter examined the facts and law and noted the following: (1) the ice had formed in the parking lot just twenty minutes before the accident; (2) the store manager had not yet been notified of the condition; and (3) the law in the jurisdiction was that if ice formed less than thirty minutes before an accident, the store, if not warned, is not liable. The mediator concluded there was a serious question concerning liability. Counsel agreed and talked his client into accepting the best offer made. The case settled for $37,500, costs of litigation.

of stress or financial pressures, or is going to be unreasonable and not listen to counsel.[89] The mediator will approach the latter situation differently, at a slower pace, than the former. Likewise, the mediator should determine if counsel will be cooperative or will obstruct the process.[90] There are times when the attorney appears to be an obstructionist, when, in fact, he or she is merely conditioning a difficult client to compromise. A sensitive mediator will be quick to identify the scenario.

Third, the mediator must be sensitive to a conflict between attorney and client. In such instances, the mediator should not be too quick to jump in on the side of the attorney, who is having difficulty explaining the need for compromise to a client. To do so will appear as if the attorney and mediator are "ganging up" on the client, which, in some instances, will simply increase his or her intransigence.[91] The better course is to remain silent so that if a split

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89 Many times counsel will simply inform the mediator that the client is unreasonable and that is the reason for the mediation. Counsel may need the assistance of the mediator to reinforce what he or she has been telling the client. If not so informed at the outset, an attorney may signal in other ways. When the mediator asks the attorney what the weaknesses in the case are and he or she turns to the party to explain them, this signals that up until this time the party was not willing to listen, but now that the mediator has asked, he must.

90 The mediator needs to be sensitive to lawyers who choose not to be cooperative. Certain lawyers expect to receive a premium above what other lawyers might receive. Such a lawyer has found great success in the courtroom and expects to be rewarded in any settlement. The mediator here should determine if this is a case the attorney wishes to try. He or she can't try every case, and if the mediator determines it is not, then he or she should just wait the attorney out until counsel is ready to settle, which generally will occur closer to trial.

Other lawyers may be boastful and waste time telling the parties, counsel and mediator how good they are. Many times this conduct is a cover-up for the lawyer who lacks confidence. Recognizing this, the mediator should be supportive and affirm to the degree possible the skills of the attorney, particularly in front of the client.

The inexperienced lawyer or the attorney with his or her first million dollar case can be difficult at the outset because they want to be certain they are not being taken advantage of. In those instances, the mediator needs to spend more time building rapport and trust with counsel before beginning to move towards settlement.

Finally, there is the pure obstructionist who has no intention of settling the case except on unreasonable terms. Here, there is little the mediator can do other than try to reach the client who may not agree with the attorney's approach. It is most difficult to separate the client from the attorney emotionally, but it can be done. *See* LANE & CALKINS, MEDIATION PRACTICE GUIDE, *supra* note 12, at § 8.03.

91 *Case Study:* Plaintiff broke her ankle in a slip and fall on ice. Liability was questionable in that plaintiff was traversing a walk way that had not been plowed after a recent heavy snowfall. Plaintiff had a reasonably satisfactory healing and demanded $90,000. When the insurance carrier offered $35,000, counsel insisted she take it. She refused. The mediator jumped in and explained that it was difficult to recover in a northern climate. Both attorney and mediator pushed the plaintiff to the point that she asked, "whose side are you on?" She refused to settle demanding $60,000 and not a penny less; she added, "the jury will believe me." The case went to trial and the jury did not believe her and rendered a defense verdict.

occurs, the mediator is in a position to step in and keep the mediation active.[92]

And, fourth, the mediator should be sensitive to the psyche of the parties. This requires that the mediator spend sufficient time with each party in caucus. To spend a disproportionate amount of time with the plaintiff may suggest that the mediator is pushing the plaintiff harder than the defendant. For example, to spend forty-five minutes in caucus with the plaintiff and only ten minutes with the defendant might send the wrong message. Recognizing that often the defendant is familiar with the caucus process and can get through it more rapidly than the plaintiff, the time needed may be considerably less. Still, to avoid upsetting the plaintiff it is better to delay before returning to the plaintiff. If the time spent is balanced, plaintiff will feel the mediator is working equally with both sides to find compromise.[93]

8. The Mediator Is Professional

It is important for the mediator to be professional. This means the mediator must (1) be prepared for the mediation, (2) be

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[92] *Case Study:* In the case previously referred to in which plaintiff was induced to switch insurance carriers, plaintiff's counsel was asked what was the most plaintiff could recover. He responded, $150,000. When plaintiff heard this she jumped up and slammed her purse on the table. She shouted at the lawyer that he had assured her that she would recover over $1 million. The attorney tried to explain that that was based on a recovery in Texas where the agent paid punitive damages because he was aware of the tax consequences when the switch was made. In the instant case, the agent was unaware of the consequences and was merely negligent—there would be no punitive damages. Plaintiff would not listen and screamed at her attorney's betrayal. She was ready to leave the room.

The mediator remained silent as this scenario played out. He then took counsel into the hall and asked if he wanted the mediator to continue with the mediation without him. He readily agreed and asked the mediator to do the best he could. Counsel then departed and the plaintiff agreed to continue the process. After the mediator was able to settle the plaintiff down, the mediation continued and the case settled. Had the mediator supported counsel, there is no way plaintiff would have continued the process.

[93] *Case Study:* A magistrate was mediating a case pending before the court. The plaintiff was extremely unreasonable and was not listening to counsel. The magistrate was becoming frustrated and finally decided to give settlement one last try. He got the defendant to raise its offer and returned to the plaintiff's caucus room. He then explained that he was going to make one last try. If plaintiff would agree, he would force the defendant to raise its offer (to the already agreed upon figure), but he did not want to do so unless he knew plaintiff would accept. After an hour of cajoling the plaintiff, he finally agreed. The magistrate left the room and then turned around and went back in and said: "I gotch ya, we have a settlement." When plaintiff realized that the magistrate already had agreement from the defendant, he became visibly upset and almost walked out. This could all have been avoided if the magistrate had delayed thirty minutes or so before walking back in and announcing the settlement. Plaintiff would have assumed the time was spent with the other side and been satisfied.

nonjudgmental, (3) be neutral and impartial, (4) maintain confidentiality, and (5) maintain professional standards.

a. Be Prepared

The mediator needs to be prepared for the mediation. This requires the mediator to read the material submitted and understand the legal and factual issues. If the matter is outside the range of competency of the mediator, he or she should decline the assignment. This does not mean a mediator must have expertise in the area of law being mediated, but it does mean the person must have the background and competency to understand the area of law without spending considerable time and money to become acquainted.

It is also helpful, in preparing for a mediation, if the mediator can gain some understanding concerning the background of the parties and counsel. It is helpful to know if the parties have litigated before and how they fared. Also, the trial skills and success of counsel are helpful information. Such inquiry, however, cannot be intrusive.

b. Be Nonjudgmental

Being nonjudgmental means several things: it means the mediator will not judge the merits of the case and dictate a result, as the evaluator is asked to do;[94] just as important, the nonjudgmental mediator will not judge the parties. Quite naturally, some people are more pleasant and attractive than others. If the mediator favors one over the other for this reason, the disfavored will know. To the peacemaker, all parties are credible and worthy and must be treated with respect, compassion and understanding. This attitude is the only way the parties can be brought together to find common ground and a win/win result. If the mediator cannot view the par-

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94 *Case Study*: Plaintiff, a pastor, slipped on water in a food mart next to the flower department. Water had dripped onto the floor, but was not readily visible. Plaintiff sustained serious back injuries and sued the store for negligent maintenance of its floors. The insurance carrier defended on the ground that the hazard was open and obvious. Ultimately, plaintiff demanded $125,000 and the carrier offered $75,000. The mediator proposed they split the difference at $100,000. Plaintiff agreed but the carrier refused. The mediator became quite judgmental trying to convince the adjuster to pay more. He informed her that in his opinion the case was worth $125,000 to $150,000. The adjuster responded that a jury in the rural county where the case was venued would not award even $75,000. The mediator argued that rural juries can be just as realistic as city juries and the adjuster would be sorry for not settling. The case was tried and there was a defense verdict. The mediator never heard from that carrier or defense counsel again.

ties impartially and with understanding, then he or she should decline the assignment. Indeed, if the mediator is prejudiced against a certain lifestyle or appearance, he or she, as a professional matter, should not be the mediator, because prejudice, no matter how it is camouflaged, will be detected and affect resolution.[95]

c. Be Neutral and Impartial

The mediator must be neutral and impartial. This includes more than just raw neutrality. It includes the appearance of neutrality as well. A mediator may in fact be neutral, but if there is the appearance of partiality this can be just as injurious. Consider the following scenarios:

One, when a mediation has been set and one of the parties or attorneys contacts the mediator with questions, the mediator should contact the other side and disclose the initial contact and ask if they have similar questions. Or, the mediator can set up a conference call with all parties and counsel and answer all questions. It is not that *ex parte* communications are improper, for they are not. However, if the other side learns of the initial communication, he or she may feel that the party has gained an advantage.

Two, when traveling, the mediator should travel alone, even if it would be more convenient to travel with one of the parties or counsel. Again, traveling together gives the appearance that an advantage was gained even though the case was not discussed.[96]

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[95] *Case Study*: Plaintiff was a single very attractive female. Her supervisor induced her to have an affair to which, on two occasions, she consented. She then terminated the affair but he continued to insist. She finally quit her job and asserted a constructive discharge, suing under Title VII of the Civil Rights Act for sexual harassment. She sought $200,000 in damages. In private caucus she explained that what her boss wanted was for her to join him and his wife in a ménage á trois. She further explained that she was popular in such arrangements because she was single. The mediator also learned that plaintiff was a nude dancer at her brother's bar. The mediator, a gentleman in his 70s, was shocked by these disclosures, and commented that he did not believe an Iowa jury, made up of farmers and older people, would be very sympathetic to her cause. He said, "conservative jurors will feel that you young people are out of control and really have no cause to complain." With this, plaintiff became visibly upset with the mediator, feeling that he was judging her and her lifestyle. Although the case settled, she left the mediation visibly upset at the mediator. Such "judging" was unnecessary and detrimental to the process. The same message could have been conveyed through counsel and allowed the mediator to retain rapport with the plaintiff. Any opportunity to include matters other than money in the settlement was lost.

[96] *Case Study*: A mediator flew to St. Louis from Chicago to attend a mediation. While deplaning, he saw the adjuster, who was also attending the mediation. They took a cab to the office building, rode up on the same elevator and exited together engaged in social conversation. The plaintiff saw them as they entered and when he learned they flew on the same plane, he assumed too much and became visibly upset. He almost refused to go forward with the media-

Three, when arriving at the mediation site, and one of the parties has not yet arrived, it is a better practice to wait in the waiting room rather than join those already present in social conversation. Again, the late arrival, particularly a plaintiff, may be concerned that more was discussed than social pleasantries.

Four, when sitting at the conference table, the mediator should always sit in a neutral place. If a rectangular table, at the end of the table without anyone sitting to the immediate right or left. If a circular table, equidistant from each party.

Five, in addressing the participants, the mediator should look at all participants in a balanced fashion. The temptation is to look at only the party who is unfamiliar with the process and ignore the others. This will make the one party uncomfortable in that everyone else is familiar with what is occurring and the party in question is an outsider.

Six, when taking meals, the mediator should eat alone unless the other side has agreed that the lunch hour or dinner is to be used as a caucus to save time. If sandwiches are brought in by the host, the mediator should still insist in paying for his or her own meal. This should be done even if the other side will not know. The party providing the sandwiches will know and will be impressed that the mediator is that concerned about his or her neutrality.[97]

Seven, neutrality even applies in handling demands and offers. There are times when a plaintiff, in confidence, will signal that he or she is willing to accept less than what the mediator knows the defendant will pay—an "overlap."[98] Rather than arbitrarily selecting some figure in between or "splitting the difference," the better course is to go back to the last official demand and offer and let the parties make new demands and offers until they cross. When they do, this is the settlement figure.

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tion. With extra effort, the case was ultimately settled. This impediment to settlement could have been avoided by the adjuster and mediator taking separate elevators and arriving at the mediation site five minutes apart.

97 *Case Study*: A mediation was completed and defense counsel invited the mediator out to dinner before the latter had to travel some distance to return home. While eating, plaintiff and counsel walked into the restaurant and saw the two sitting at a table. The expression on plaintiff's face spoke volumes—it was clear that he felt he had been imposed upon in that the mediator was a special friend of the defendant. This feeling was apparent regardless of the fact that plaintiff had obtained a favorable settlement.

98 *Case Study:* One mediator had an "overlap" and decided arbitrarily to split the difference. Later, one of the attorneys inquired whether the defendant would have paid more, and the mediator honestly answered in the affirmative and he explained the overlap. The attorney became visibly upset at the mediator for his "betrayal". This scenario should have been avoided.

d. Maintain Confidentiality

The mediator as a professional must maintain strict confidentiality. This means several things. When the agreement to mediate is signed by the parties, it should include a confidentiality clause, which provides that the mediator and his or her notes and records cannot be subpoenaed at a later date.[99] It also means that the mediator cannot disclose information given in confidence. Finally, it means that the mediator should not testify at later hearings, which might mean meeting a subpoena with a motion to quash.[100] If confidentiality is breached, it undermines the entire mediation process. Parties will not feel comfortable confiding in the mediator.

e. Maintain Professional Standards

The mediator as a professional must maintain the highest ethical standards. This means, according to the Model Standards of Conduct for Mediators (September 2005),[101] that (1) parties should be permitted self-determination of any resolution, uncoerced and the result of an open and free process, including the selection of mediator and the format used; (2) the mediator at all times must remain impartial and not have any conflicts of interest or even the

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99 *See* Ellen E. Deason, *Enforcing Mediation Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001) (stating that "[o]ne of the fundamental axioms of mediation is the importance of confidentiality").

100 *See* Schumacher v. Zoll, No. L-00-1199, 2001 WL 1198641, at *2-3 (Ohio Ct. App. Oct. 5, 2001), where Judge Knepper of the Ohio Appellate Court struck all references to the mediation on the ground that counsel breached the confidentiality agreement. In spite of confidentiality, the protection afforded has been eroded. In Odam v. Congress Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999), the court ordered the mediator to testify concerning a settlement when one of the parties alleged duress. The mediator's testimony was taken in camera when both parties waived confidentiality. *Id*. at 1129-39. In Foxgate Homeowner's Ass'n v. Bramalea, Cal., Inc., 25 P.3d 1117, 1121 (Cal. 2001), a mediator, who requested sanctions against one of the parties who allegedly participated in a court ordered mediation in bad faith, was required to testify. *See also* Anne M. Burr, *Confidentiality in Mediation Communications: A Privilege Worth Protecting*, 57 DISP. RESOL. J. 64 (Feb.-Apr. 2002); Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80-84 (2001); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions*, 69 MO. L. REV. 365, 436-37 (2004); James K. L. Lawrence, *Mediation Advocacy: Partnering With the Mediator*, 15 OHIO ST. J. ON DISP. RESOL. 425, 440 (2000); Klaus Reichert, *Confidentiality in International Mediation*, 59 DISP. RESOL. J. 60 (Nov. 2004-Jan. 2005); Dennis Sharp, *The Many Faces of Mediation Confidentiality*, 53 DISP. RESOL. J. 56 (Nov. 1998); Diane K. Vescovo, Allen S. Blair & Hayden D. Lait, *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 80-97 (2000).

101 These standards were drafted by representatives of the American Bar Association Section on Dispute Resolution, American Arbitration Association, and the Association for Conflict Resolution.

appearance of conflicts;[102] (3) the mediator must maintain confidentiality and conduct the process in a diligent, timely, and competent manner, respecting the integrity of the parties and counsel; (4) the mediator must be truthful and not misleading concerning his or her qualifications and competency or the number of mediations successfully completed; and (5) all fees and services must be agreed upon before commencement of the process and cannot be dependent upon outcome—there can be no contingent fees, percentage of settlement, or bonus for success.[103]

C. *The Peacemaker's Tools*

Abraham Lincoln once said, "If you would win a man to your case, first convince him you are his sincere friend."[104] Or, stated slightly differently, 'If you would win a person to your side, first convince him you are on his.' Each tool of the peacemaker is designed to do just that. Each is designed to build rapport and trust.

There is a line with the plaintiff on one side and the defendant on the other. When caucusing with the plaintiff, everything the mediator says and does should convey the message that the mediator is on plaintiff's side of the line, and vice versa. This means questions should be phrased that are supportive rather than challenging, and no statement should be made which puts the party or counsel on the defensive. The following are supportive techniques to build rapport and trust.

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102 Any possible conflicts of interest, such as prior dealings with the parties or counsel, prior dealings in the subject matter involved, special interest arising out of the mediator's prior legal practice, etc. should be immediately disclosed. Because the mediator is not a decision-maker, such conflicts will generally be waived.

103 Some states through their supreme courts strongly recommend, as a matter of professionalism, that attorneys inform clients of alternatives to litigation. These states include Hawaii, Texas and Colorado. *See, e.g.,* HAWAII RULES OF PROF. CONDUCT R. 2.1 (1994) ("In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."); s*ee also* Georgia, GA. CT.R. 8-106(b)(10), *available at* http://gabar.org/public/pdfhandbook_web.pdf. Some scholars suggest that failure to inform a client of alternatives to trial constitutes legal malpractice. *See* Robert R. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation,* 47 WASH. & LEE L. REV. 819, 823-24 (1990); Monica L. Warmbrod, *Could an Attorney Face Disciplinary Action or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?,* 27 CUMB. L. REV. 791, 809 (1997).

104 Abraham Lincoln, Temperance Address, Springfield, IL (Feb. 22, 1842).

1. The Art of Agreeing

In any mediation, there may come a time when the mediator tries to make a point and counsel disagrees. The inclination is to press the matter to convince counsel he or she is in error. If after one, or, at most, two tries, counsel still resists, the mediator should back off for several reasons: first, counsel may in fact understand and appreciate the consequences, but does not wish to concede such because to do so might be a sign of weakness; second, if the mediator presses on, counsel might be embarrassed in front of the client, which makes capitulation that much more difficult; and, third, if pressed too far, an argument may erupt, which undermines everything the mediator is trying to accomplish.

If an argument does ensue, the mediator must end it immediately, for it will undermine the good will the mediator has built up to that point. The best way to disarm counsel is to switch positions and say, "I agree with you," or "I don't disagree."[105] This said, it ends the argument before it can get out of hand. A party cannot argue with himself. It takes two. This may seem disingenuous; however, it is far more important to maintain rapport and trust than to win the battle of words. Interestingly, the same point can be raised in a subsequent caucus, and the party will be much more open to discussing it objectively and not argumentatively. The point to be made is that the mediator is working with the party and counsel and arguments are not part of the settlement equation.

2. The Art of Disagreeing

If a party is going down a path to disaster, the mediator has the obligation to ward him or her off. The mediator will have to disagree. However, this can be done while being supportive and on the party's side of the line. For example, agree with as much of the case as the mediator can; inquire of counsel the strengths of the case and what he or she believes is the best case before the finder of facts; make a good faith effort to find positive answers to difficult questions; raise the point that undermines the party's case and

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105 Certain phrases or expressions should be avoided in their entirety because they are confrontational, such as: "that's an insult," "are you serious?" "get real," "you're playing games," "you're nickel and diming," "you are not listening," "read my lips," "give me a break," "that's not worthy of a response," "I am just playing devil's advocate," "with all due respect," "I beg to differ with you," "you are not being flexible," "you are acting in bad faith," "I don't disagree with you, *but*," "I respect your position, *but*," "I don't want to disagree with you, *however*," "it is obvious to everyone," "no one disagrees," "you must be kidding," "I am not here to argue with you, *however*," "you have a right to your opinion, *however*."

explain that the mediator is at a loss to answer it; and ask counsel to help the mediator come up with a resolution. When the conclusion is reached that there is no answer, the mediator has made his or her point.[106]

3. Show Interest in the Party's Case

An effective way to build rapport and trust is to show interest in the party's case. This can be done by inquiring as to the strengths of the case, and what counsel believes is the best case before the jury. A mediator should make this inquiry even if the mediator knows what the strengths are. Raising other possibilities can be reinforcing also—such as, was there drinking involved, or how would the opponent appear before the jury? Anything that demonstrates the mediator is seeking to establish as strong a case as possible in support of the party's position can be effective in establishing rapport.

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106 *Case Study:* Plaintiff was the executive secretary to the president of a very successful company. She took the job at $40,000 because she wanted to get involved in show business, in which the company was engaged. Upon commencing work, she continually complained about her salary, which in two years was increased to $80,000, which was the norm for her job, although she felt she should be making $125,000. She was finally terminated because of her attitude and she threatened to sue for sexual discrimination, age discrimination, and retaliatory discharge under Title VII of the Civil Rights Act.

After examining the facts, the mediator concluded plaintiff did not have a case and conveyed his thoughts to the plaintiff's attorney. First, as to the claim for sex discrimination, although the president, her boss, was a man, the CEO of the corporation was a woman as well as the five top positions in the corporation. Also, seventy-five percent of the employees were women.

Second, on the claim of age discrimination, she asserted that her boss called her barnacles on a ship and that they needed a new face around the office. The mediator noted that barnacles on a ship having nothing to do with age—all ships have barnacles immediately. As to the "new face" that did not connote age.

Finally, he noted that the retaliatory discharge claim would not withstand a motion for summary judgment. Plaintiff sent an email to the CEO of the company, an African American woman, saying (1) the president told plaintiff that now that he was getting a divorce he would have to have a hooker—she felt was an inappropriate remark; he told her he had moved into an apartment, and his bedroom was adjacent to the bedroom of the couple next door and he could hear them at night; (3) he showed her a photo of an elderly couple, sitting nude in their front room (a photography magazine), which he thought was funny; (4) he said the fish stinks from the head down, referring to the CEO, and (5) he called the CEO a "Buckwheat." The only problem with this claim was that the email disclosing the above was sent after she was discharged, and, therefore, could not be retaliatory.

Counsel asked what he should do and the mediator advised plaintiff to take what had been offered—she did.

4. Show Interest in the Parties and Counsel

Another technique to build rapport is to personalize the process. Without being intrusive, the mediator can inquire of the party about their background, their family, and their interests. The mediator should demonstrate not only concern but interest—that the mediator is interested in more than just another settlement. Also, if the mediator can lighten the atmosphere with light banter this can soften the atmosphere. One mediator does magic tricks, simple sleights of hand everyone enjoys. If the mediator can get the parties smiling or establish a personal bond with them, this goes a long way to establish rapport, which can lead to compromise where needed. This is not to suggest that the mediator should tell jokes for this might suggest the mediator is minimizing the process.

Although lawyers usually inquire about each other's practices, still, a mediator making such inquiry and showing interest in the attorney's personal life builds rapport. Lawyers generally have rather large egos and to inquire about past successes is appreciated, particularly in front of the client.[107]

5. Be Supportive of the Process

When one side or the other is making progress, the mediator should not hesitate to comment on this with the other side, even if the progress is only slight. By the same token, the mediator should not speak disparagingly of the other side or counsel. This only adds fuel to the fire. If the mediator cannot find something positive to say, it is better to say nothing.

Even if the mediation is failing, the mediator should thank counsel and the parties for their diligent efforts. One mediator will say, "I know you are doing all you can to move settlement along, and I appreciate this." Ending on a positive note opens the way for further negotiations.

Being supportive of the process also means not embarrassing counsel in front of the client. If counsel has made a mistake, or overlooked a matter, the mediator should talk to the attorney outside the presence of the client. Likewise, the mediator should not ask a question to which a prepared attorney would not know the answer. Inquiry should be made outside the presence of the

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[107] One mediator has on occasion written an insurance supervisor complimenting the work of counsel at the mediation, when he or she did a good job. Counsel always appreciate this support.

party for there is always the possibility counsel may not know the answer and be embarrassed.

6. Develop a "Team" Concept

The effective mediator can use the team concept to develop rapport and trust. It is the "we," "our," "us" approach. Rather than say, 'How are you going to answer that question,' it is more effective to say, 'How are *we* going to answer that question?' Or, 'What is *our* approach going to be concerning the next round?'

Of course, when this approach is used it should be used on both sides. But one caveat is that the mediator must be certain that the technique is used in reference to the party with whom the mediator is caucusing. To refer to the other side as "we" will have the opposite effect intended. It puts the mediator on the other side of the line.

7. Develop a Mediator's Strategy

In mediating a difficult or complex case, the mediator should develop a strategy for the case. This might be, who is the target defendant,[108] or should a party be dropped to maximize the re-

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[108] *Case Study:* Plaintiff was a university, which developed overseas campuses with foreign educational institutions. The individual defendants were the president and vice president of the institution, who resigned their positions and contracted with another academic institution to open campuses in the Far East. Plaintiff institution pleaded (1) the two officers transferred trade secrets to the defendant institution, (2) conspired with it to open overseas campuses, (3) committed fraud and deception, (4) intentionally interfered with contractual rights, (5) breached their fiduciary duties, and (6) breached their contracts with plaintiff.

The mediator conducted pre-mediation caucuses with the defendants and plaintiff. He determined there was insurance coverage only for the first five causes of action and none for breach of fiduciary duty and breach of contracts. He also learned that the insurance carrier refused to pay counsel defending the two officers for one-third of the work they did because that work was directed to breach of fiduciary duty and breach of contract, which were not covered under the insurance policy.

The strategy the mediator worked out was: first, seek to have counts five and six dismissed inasmuch as they were not covered by insurance, and the two defendants were judgment proof. In fact, the insurance carrier would agree that the two officers were totally responsible for what occurred and the defendant university and its president had no hand in it and were themselves victims of the scheme.

Second, the mediator determined he should encourage the insurance carrier to pay counsel's fees in their entirety because if not paid, counsel would withdraw from the case. This would be unfortunate inasmuch as they were the best trial attorneys.

Third, the mediator determined that the real target was the insurance carrier insuring the defendant institution and its president. Therefore, he asked plaintiff's counsel to direct his remarks to the two adjusters and not the defendants. He encouraged counsel to be as detailed as he wished to impress the adjusters with his courtroom skills. The adjusters were from out-of-state and unaware of counsel's excellent reputation as a trial lawyer.

sults,[109] or it may be as simple as when to disclose newly discovered evidence.

In the complex case, an effective means to develop a mediator's strategy is to conduct pre-mediation caucuses with each attor-

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At the mediation, plaintiff dropped the breach of fiduciary duty and breach of contract claims. He also forewarned counsel for the university and president not to be concerned with the length of plaintiff's counsel's opening statement. He explained it was directed at the adjusters.

The mediator's strategy worked, as the adjusters were duly impressed with plaintiff's counsel's opening statement which continued for one and one-half hours. It worked for all concerned inasmuch as plaintiff received a substantial settlement, which far exceeded what the adjusters initially said they would pay, and it benefited the defendant university and president who no longer had to face a long trial and possible verdict in excess of policy limits.

109 *Case Study:* Plaintiff insurance company brought a declaratory judgment against the estate of an insured to set aside a $10 million insurance policy on his life. Plaintiff pleaded that the insured had falsified his health condition in that he did not disclose he had been in the hospital with a liver complaint the very month he took out the policy. He died within 18 months of the policy issuing.

The estate counterclaimed against the insurance company, pleading that the company's insurance agents told the insured not to disclose his true health condition in that if he survived two years it would be incontestable and could not thereafter be challenged. The estate pleaded that the agents were agents of the insurance company.

The insurance company then amended its complaints and added the insurance agents as defendants, pleading that the agents were agents of the insured and conspired with the insured to commit a fraud on the insurance company.

The mediator held pre-mediation caucuses with counsel for each of the parties—the insurance company, the estate of the insured, the insurance agents—and worked out his strategy.

First, he concluded the insurance company should be dismissed from the case and the estate should give up its claim for the $10 million. This strategy was advisable because the estate would have to prove that the insurance agents were agents of the insurance company and not the insured. The facts clearly established that the agents were independent contractors, having only minimal contact with the insurance company other than selling its policies.

Second, the insurance company pleaded that the insurance agents and insured conspired to commit a fraud. This allegation meant the insurance agents' Errors and Omissions policy would not apply because fraud was excluded. The insurance policy was $8 million, which the estate would never obtain as long as the insurance company's fraud claim remained in the case.

Third, the estate's strongest case was against the insurance agents, who sold the policy, because they directed him to falsify his health condition, knowing that the true facts would eliminate any possibility of getting the policy. This claim was one of negligence and covered by the agents' E&O policy. The agents also sold the insured $52 million dollars of insurance for which the insured paid a $1.3 million in premiums. The agents knew the insured could not continue to pay this premium over any period of time. The insured's inability to pay the premium resulted in many of the policies lapsing. At the time of his death, there was no insurance coverage whatsoever.

The estate followed the mediator's strategy. It gave up its claim against the plaintiff insurance company, which returned the premium of $420,000. The estate then negotiated with the E&O carrier for the agents and settled for $3.8 million on $8 million of coverage. All parties were satisfied: Plaintiff, because it was dismissed from the case immediately; the insurance agents, because their insurance carrier was kept in the case and settled on their behalf, thereby avoiding personal exposure; and the estate because it received a substantial settlement.

ney. Parties may or may not be present. The purpose is to get acquainted with counsel and begin understanding their theories of the case. Generally, it is best just to discuss the strengths of each side's case.

8. Using the Apology and Forgiveness as Settlement Tools

Perhaps the most important peacemaker tool is to encourage the parties to apologize and forgive. If this can be done—and it is difficult—conciliation, peace, and healing are assured.[110] If a defendant can apologize and show honest remorse, it can help the plaintiff begin the process of forgiving. And it is through forgiveness that true healing is found. Forgiveness takes courage, but with it comes inner peace and confidence. It gives a party a new sense of dignity, whether in a domestic dispute, personal injury, or physical or sexual abuse case.[111]

The great South African leader, Nelson Mandela, who was imprisoned as a terrorist for 27 years by the British, invited his jailers to his presidential inauguration. Asked whether he hated them for what they did, he answered, "Of course I did, for many years. They took the best years of my life. They abused me physically and mentally. I didn't see my children grow up. I hated them." He noted they took everything except his mind and heart, and they would have taken them if he had not forgiven them. "If I keep hating them, they will still have me. I wanted to be free, so I let go." This is the power of forgiveness.[112]

In the divorce context, an apology and forgiveness can be of even greater importance because of the ongoing relationship that

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110 *See* Mark Bennett & Christopher Dewberry, *I've Said I'm Sorry": A Study of the Identity Implications and Restraints That Apologies Create For Their Recipients*, 13 CURRENT PSYCHOL. 10, 11 (1994) (documenting a number of positive social consequences that result from apologies); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 844-47 (2003) (discussing the positive impact of apology on the dispute resolution process); *see also* Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 271-72 (1981) (discussing various forms of apologies in the contexts in which they are used).

111 The author has mediated and arbitrated over 800 cleric pedophile cases. In each, the victim, abused as a child, suffered life-long debilitation, anger, depression, drug and alcohol addiction, incompatibility within the family, and other significant effects. Few have found healing. One male victim was sexually abused by his pastor for over six years—the abuse consisted of the worst possible acts. Yet, he completely recovered and lives a normal life with his wife and three daughters. He has a good job and lives in an affluent neighborhood. Asked how he recovered from the tragedy, he responded that he had forgiven the cleric, who was a very sick man, and now the church, which allowed it to happen. Once he forgave, he came out of his depression and his anger mollified.

112 *See* LANE AND CALKINS MEDIATION PRACTICE GUIDE, *supra* note 12, at 4-58.1.

must be endured, particularly if there are children. The mediator should make clear that an apology and forgiveness are not acts of surrender or a show of weakness. If both husband and wife can see the humanity in the other, a major step has been taken in the healing process.

Conclusion

Mediation is a powerful settlement process and if used correctly can be of great benefit to society. Judges and lawyers should not be concerned of its growing acceptance, because it places into the hands of the parties more control over their lives. As a result of mediation, the public now sees lawyers, not as the promoters of conflict, but as healers and peacemakers. Not only does mediation give the profession this great opportunity to be honored as never before, but the creativity and flexibility now being exhibited in settling disputes speaks to the genius of the creative legal mind.

This article addresses only one small phase of the process to demonstrate what has already been accomplished. The future has no limitations and can make the American legal system the finest, kindest, and most rewarding yet devised by mankind. Mediation provides a process of which the entire legal profession can be justly proud.

The Amish church gives an example of the power of forgiveness. When a member killed a number of little girls, the community rushed to the assailant's house to have a prayer of forgiveness session with his wife and family.