CAUCUS MEDIATION— PUTTING CONCILIATION BACK INTO THE PROCESS: THE PEACEMAKING APPROACH TO RESOLUTION, PEACE, AND HEALING

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In this Article there are a number of case studies set forth to illustrate points being made. These studies are actual mediated cases. The names of the parties and in some instances other details are omitted to protect the confidentiality of those settlements.

I. INTRODUCTION

Much has been written concerning the difficulties encountered with the American legal system. Critics note the overcrowded courts, long delays, soaring

costs, and great stressors both clients and attorneys face.[1] Indeed, in the early 1980s, Chief Justice Warren Burger observed that the American judicial system is too costly, too lengthy, too destructive, and too inefficient for a civilized people.[2] Justice Burger also noted the following:

> One reason our courts have become overburdened is that Americans are increasingly turning to the 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.[3]

There are a number of reasons why our legal system is being overtaxed, and in many instances not fulfilling the high ideals envisioned by our forefathers over two hundred years ago. First, there is "[a]n explosive increase in the number of lawsuits being filed in this country each year (over 18 million)" which has caused legal gridlock "in many court systems, particularly in the highly industrialized areas of the nation."[4] Second, many new and novel causes of action "have resulted in a proliferation of claims not previously recognized in courts of law."[5] Third, there has been "[a] proliferation of statutory enactments as well as regulatory promulgations that have increased the case load in the courts."[6] Fourth, "escalating costs of litigation caused by unlimited discovery forays and motions before the court" are absorbing greater amounts of courts' time and energy to the detriment of hearing cases for trial.[7] Fifth, "[t]he

1. *See* Joseph T. McLaughlin & Karen M. Crupi, *Alternative Dispute Resolution*, *in* ARBITRATION, MEDIATION, AND OTHER ADR METHODS 49, 102 (ALI-ABA Course of Study, Nov. 18, 1993), *available at* C879 ALI-ABA 49 (Westlaw) (referring to ADR as "a 20th Century solution" for "a 20th Century problem"); Wendy Ho, Comment, *Discovery in Commercial Arbitration Proceedings*, 34 HOUS. L. REV. 199, 202 (1997).

2. Mid-Year Meeting of the American Bar Association, 52 U.S.L.W. 2461, 2471 (Feb. 28, 1984).

3. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). Supreme Court Justice Antonin Scalia observed that "I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation." Antonin Scalia, *Teaching About the Law*, QUARTERLY, Fall 1987, at 6, 8.

4. Richard M. Calkins & Fred Lane, Mediation: A Quest for Peace 4 (2000) (on file with author).

5. *Id.*; *see also* Douglas King, Comment, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 581 (1984) (crediting "an unprecedented proliferation of new causes of action" as a contributing factor to the increasing complexity of modern civil litigation).

6. Calkins & Lane, *supra* note 4, at 4.

7. *Id.*; *see also* O.C. Hamilton, Jr. & J. Shelby Sharpe, *Discovery Rule*

unpredictability and volatility of jury awards" has created great uncertainty and disruption in the business and insurance communities.[8] And, sixth, "serious proliferation of criminal cases, particularly drug related, which have over taxed the court system, sometimes bringing civil cases to a virtual standstill has also contributed."[9]

It is not uncommon for lawsuits, burdened with discovery and multiple appeals, to take ten or even twenty years before being resolved. One lawsuit, *In re Midwest Milk Monopolization Litigation*,[10] involved numerous court rulings and two appeals to the Eighth Circuit Court of Appeals. It was in its twenty-first year with an anticipated three more years when it was settled through mediation.[11] In another antitrust case, a reported $40 million was spent in pretrial discovery, and it was anticipated that it would require $100,000 a day in trial costs for a two-month trial, when the case was eventually mediated successfully.[12]

However, the price paid in long delays, high costs, and inefficiency pales in comparison to the human price paid in the stress suffered by clients and lawyers alike in the courts. As a trial lawyer and later mediator, I personally recall two fatal heart attacks and a suicide directly related to litigation. The subject matter

Proposals—Two Different Philosophies, 15 REV. LITIG. 341, 343 (1996) (noting "that the escalating costs of litigation in discovery" was a factor considered by the State Bar of Texas Court Rules Committee when it proposed changes to Texas's discovery rules); Daniel A. Fulco, Note, *Delaware's Response to Inefficient, Costly Court Systems and a Comparison to Federal Reform*, 20 DEL. J. CORP. L. 937, 939 (1995) (asserting that "[t]he extreme cost of litigation is largely due to the discovery process").

8. Calkins & Lane, *supra* note 4, at 4; *see also* Richard J. Haayen, *Destroying Myths*, *in* WORKING TOWARD A FAIRER CIVIL JUSTICE SYSTEM 16, 20 (Insurance Info. Inst. ed., 1987) ("The problem is that the liability system appears to be capricious to the point where the insurers' ability to predict the real probabilities of liability outcomes has been weakened substantially.").

9. Calkins & Lane, *supra* note 4, at 4; *see also* Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 390–408 (1993) (noting the caseload crisis in public defenders' offices across the country, including cities in Georgia, Florida, California, Kentucky, Michigan, New York, Pennsylvania, and Vermont); Keith C. Owens, Comment, *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 that the California courts "will come to a near standstill" because of the increased caseload due to the three strikes rule).

10. *In re* Midwest Milk Monopolization Litig., 510 F. Supp. 381 (W.D. Mo. 1981), *aff'd in part, rev'd in part sub nom.* Alexander v. Nat'l Farmer's Org., 687 F.2d 1173 (8th Cir. 1982).

11. *See* Calkins & Lane, *supra* note 4, at 55–58.

12. Memorandum of Mediation (May 2003) (on file with author).

in two of those cases was business related. There is perhaps no more debilitating and demeaning of an experience than to be cross-examined by a skilled attorney. More than one person has faced depression and other health problems after the experience. The highly charged adversarial system we know today has victimized many, especially in divorce court.

The question is then: Is there a better way to resolution? Of course, the answer is in the affirmative. Nearly 150 years ago, Abraham Lincoln gave this sage counsel: "Persuade your neighbor to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time."[13]

Trying a dispute in the courtroom is the most expensive, time consuming, and stressful way to resolution. Any form of Alternative Dispute Resolution (ADR) will cost less, be more quickly and conveniently implemented, and be less stressful on the parties and counsel. Keeping the parties out of the courtroom and thinking in terms of less formal methods of resolution provides an atmosphere less adversarial and more conducive to ongoing communication and cooperation.

It is the primary thesis of this Article, however, that merely resolving a dispute through ADR is not sufficient. ADR can be quite adversarial, for example, when the mediator takes on the role of devil's advocate. Instead, this Article explains a newer methodology which discards the adversarial tools of the lawyer and incorporates the nonconfrontational tools of the peacemaker. The goal is not simply resolution, but finding a sense of peace and, indeed, healing.

The Article examines caucus mediation[14] and the reasons for its

13. Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, AM. BANKR. INST. J., May 2003, at 12, 12.

14. Mediation can be described as a voluntary informal process whereby a "neutral" third party assists the parties in their negotiations to reach an acceptable resolution that both can accept without having it imposed upon them. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 6, 15–16 (3d ed. 2003).

Many questions are asked about mediation and caucus mediation in particular, such as the following:

(1) What can be mediated? Early on, mediation in the United States was limited primarily to small claims and neighborhood disputes. The evolvement of conference mediation extended to divorce and employment disputes. *See, e.g.*, *id.* at 24–27. Caucus mediation has expanded its coverage to include all forms of disputes that find their way into the courts, from personal injury to bankruptcy. *See* Wilk & Zafar, *supra* note 13, at 12 (footnote omitted). Any matter that is in litigation is a candidate for mediation. This includes cases involving divorce, child custody, products liability, professional malpractice, wrongful death, workers compensation, construction, contracts, securities, commodities, zoning, construction, patents, copyrights, trademarks, environmental (Superfund cases), partnership,

manufacturer-distributor, licensing, and taxes.

(2) When should a mediation be held? There is no set time when a mediation should be conducted. Some are held before a case is filed, some after there has been a jury verdict, and others when the case is on appeal. Because a primary consideration is to reduce costs, however, the earlier the mediation is successfully held, the better it is for all concerned. Of course, to mediate too early, before the facts are developed, can be a waste of resources. As a rule, a mediation can be held when the critical facts are reasonably established. If a case is more complex, the case might have to be filed and some formal discovery conducted.

(3) Where should a mediation be conducted? A mediation can be held anywhere there is sufficient space and facilities to conduct it. Essentially, there must be a conference room where all participants can be present for the opening session. Thereafter, separate break out rooms are needed to accommodate each party and counsel for the private caucuses. It is irrelevant whether the mediation is held at a party's or an attorney's office—there is no "home court advantage" in mediation because the mediator is not empowered to decide the case.

(4) Who should attend the mediation? For caucus mediation to be successful, the decision makers should be present. It is difficult to conduct a mediation by telephone and develop the rapport and trust required to reach a resolution. If an insurance carrier is defending an insured, it is sufficient that only the insurance adjuster be present. There are times when the adjuster may be available only by phone because of distance or the small amount of the matter in question. In such a situation, the mediation can still proceed forward, but the possibility of settlement is substantially reduced.

In caucus mediation, counsel for the parties should attend. Only an attorney can answer many of the questions a mediator will ask, such as the strengths and weaknesses of the case and the best and worst case scenarios of what a jury could find. Ultimately, it is the attorney who will encourage a party to make the final compromise and settle. Having only one side represented by counsel places an undue burden on the mediator because she will be inclined to protect the unrepresented party from the overreacting of the opposing attorney, thereby undermining her pledge of neutrality.

The presence of family is often quite helpful if the primary focus is the welfare of the party involved. The only caveat is that presence of family may not be helpful when an elderly parent is involved as a party and her sons and daughters are more interested in what they will inherit rather than the welfare of the parent. This adds a new dimension.

(5) How long does a mediation take? A mediation can take anywhere from a few hours to several days. In most caucus mediations, the matter is resolved in one day. In a more complicated case, where there are many parties, two or three days might be needed. After the first day, however, there is little need for the parties to all be present at the same time because additional joint sessions are usually unnecessary. If the mediation does not settle that first day, the mediator can carry on by caucusing at a party's or attorney's office, or by telephone. I have successfully mediated cases for a year or more after the initial session by telephone.

(6) Can there be ex parte communication between the mediator and a party? Because a mediator is not a decision maker, but rather a facilitator, there is nothing improper about speaking to the mediator ex parte, that is, outside the presence of the other party and counsel. In fact, the very basis of caucus mediation, the caucus itself, is an ex parte communication.

(7) How does a party commence a mediation? Generally, the attorneys representing the parties will initiate the process either by contacting a mediator or a service

extraordinary success. It next discusses the role of the peacemaker in the process and the qualities required to wear the mantle of peacemaker. Finally, it surveys the nonadversarial and nonconfrontational tools at the disposal of the peacemaker.

II. BACKGROUND ON MEDIATION

Mediation long predates western civil law.[15] It has its origin in Eastern Asia, which viewed mediation as superior to recourse to the law for the resolution of disputes.[16] Today, both China and Japan place emphasis on a conciliatory approach to conflict resolution rather than an adversarial approach as used in most western societies.[17] In Japan, a conciliatory relationship between disputants is the foundation to resolving differences. [18] In any dispute, time is first spent building that relationship, without which a final agreement cannot be

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that arranges mediations and has a panel of mediators from which to select.

For a more thorough discussion of these and other questions regarding mediation, see Calkins & Lane, *supra* note 4, at 70–76.

15. Mediation has been 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).

16. Professor Northrop noted that Confucius Chinese considered "litigation" as "second best" in resolving disputes:

> The "first best" and socially proper way to settle disputes, used by the "superior man," was by the method of mediation, following the ethics of the "middle way." This consisted in bringing the disputants to something they both approved as the settlement of the dispute, by means of an intermediary. This middle man served largely as a messenger. Proper behavior prescribed that he refuse even to arbitrate the differences at the request of the disputants. "Good" dispute settling consisted in conveying the respective claims of the disputants back and forth between them until the disputants themselves arrived at a solution which was approved by both.

F.S.C. Northrop, *The Mediational Approval Theory of Law in American Legal Realism*, 44 VA. L. REV. 347, 349 (1958).

17. *See* JAY FOLBERG & ALISON TAYLOR, MEDIATION: A COMPREHENSIVE 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, 29 (1982) (noting that in the eastern Asia, litigation is generally considered "a shameful last resort, the use of which signifies embarrassing failure to settle the matter amicably").

Today mediation boards in China, called People's Mediation Committees, are the primary institution for resolving disputes and handle over 7.2 million cases per year. *See* Donald C. Clarke, *Dispute Resolution in China*, 5 J. CHINESE L. 245, 270 & n.95 (1991).

18. *See* FOLBERG & TAYLOR, *supra* note 17, at 2 ("The tradition of conciliation and mediation is so imbued in Japan that there are rumored to be more flower arrangers in Japan than attorneys." (citation omitted)).

reached.

Any number of societies have traditionally considered mediation the favored process for dispute resolution.[19] The Society of Friends wrote a book that stated that when differences arise between persons, their friends shall "forthwith speak to and tenderly advise, the persons between whom the difference is, to make a speedy end thereof; and if that friend or those friends do not comply with their advice, that then they take to them one or two friends more, and again exhort them to end their difference."[20]

In the American colonies, emphasis was placed on communal peace and harmony between parties.[21] The growth of commerce and industry, however, resulted in more complex dealings and a greater sense of competition rather than cooperation.[22] Litigation then began to play a greater role in the resolution of disputes, and the impetus for conciliation was lost.[23]

19. *See, e.g.*, MOORE, *supra* note 14, at 20 (noting that "Jewish, Christian, Islamic, Hindu, Buddhist, Confucian, and many indigenous cultures all have extensive and effective traditions of mediation practice"); David Luban, *Some Greek Trials: Order and Justice in Homer, Hesiod, Aeschylus and Plato*, 54 TENN. L. REV. 279, 280–81 (1987) (describing the legal system of the early Greeks as essentially a peaceful arbitration process).

20. RULES OF DISCIPLINE OF THE YEARLY MEETING 3 (New Bedford 1809). Informal dispute resolution was used in many cultures, such as Scandinavian fishermen, African tribes, and Israeli *kibbutzim*, all of which valued conciliation over conflict. *See* JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 8 (1983). Native Americans have likewise looked to peacemaking as the primary means of dispute resolution. It is considered sacred justice. It deals with the underlying causes of conflict and seeks to mend the relationship. Diane LeResche, *Editor's Notes, Native American Perspectives on Peacemaking*, 10 MEDIATION Q. 321, 321–22 (1993).

21. Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, 48 ARB. J., June 1993, at 14, 15–16; *see also* AUERBACH, *supra* note 20, at 8 (noting the early colonists' initial mistrust of the law).

22. *See* Donegan, *supra* note 21, at 21 (stating that "[t]he rapid development of industry and commerce led to the formation of complex trade and commercial laws which required legal interpretation").

23. *Id.* The implementation of mediation in labor disputes was the one exception to the trend towards litigation. In 1913, Congress created the Department of Labor and provided that the Secretary of Labor has the power to act as mediator. WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 25 (2d ed. 1986). Mediation was used to expeditiously end labor disputes, which impacted seriously on economic growth. *See* MOORE, *supra* note 14, at 23 (noting that federal mediation procedures were initiated to "prevent costly strikes and lockouts"). In 1947, Congress created "[t]he Federal Mediation and Conciliation Service (FMCS), an independent federal agency, [which] has jurisdiction over disputes in industries engaged in interstate commerce, private nonprofit health facilities, and agencies of the federal government." DEBORAH M. KOLB, THE MEDIATORS 7–8 (1983).

In the last fifteen to twenty years, there has been a dramatic revival in the United States of ADR and, in particular, mediation.[24] A number of states require the parties to mediate before going to trial.[25]

III. MEDIATION FORMATS

There are a number of mediation formats used by mediators. What they have in common is that they are all nonbinding and if settlement is not reached, the parties can always go to trial or utilize some other ADR mechanism, such as arbitration. The two general categories of mediation are adversarial mediation, in which the mediator is in an adversary position to the parties and counsel, and peacemaker mediation, in which the mediator seeks to reconcile the parties and does not confront them but remains supportive and conciliatory.

In adversarial mediation, the mediator, most often a former judge, confronts the parties and seeks to reach settlement through intimidation, pressure,

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24. Mediation now has gained acceptance in resolving neighborhood conflicts and settling claims in small claims court. *See, e.g.*, JENNIFER E. BEER, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION 3–4 (1986) (discussing the Community Dispute Settlement mediation procedure, which is a program used to resolve neighbor disputes). *See generally* Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3 (1984). Few, however, foresaw the impact mediation would have in all types of civil disputes, from personal injury actions to complex multi-million dollar antitrust class actions. So dramatic and pervasive has been its impact that experts suggest ADR, and in particular mediation, is literally revolutionizing our entire approach to dispute resolution. Judges are leaving the bench to become private mediators and arbitrators. Large volume court venues are drafting top litigators as mediators to assist in reducing their case backlogs. *See generally* JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 329–37 (3d ed. 2002) (describing the development of contemporary mediation through the nineteenth century to present); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 839–841 (1997) (noting the increasingly widespread use of mediation in litigation).

25. 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 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 generally* 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).

and often threats, if necessary. She sets a settlement figure and tries to force both sides to accept it. As one scholar notes, it is perfectly proper for her to use deception and illusion to reach a settlement.[26] This approach is highly confrontational and stressful, and although successful, albeit at a lower success rate, it leaves the parties with a feeling that they were abused rather than fulfilled. Indeed, this adversarial and confrontational approach simply mirrors what a party must face in the courtroom. Therefore, it has the same disadvantages: first, although settlement may be reached, the parties are so injured that they will not mediate again; second, such a process is void of any opportunity to establish peace between the parties and healing where needed; and third, rarely can anything more than a monetary resolution be reached.

Peacemaker mediation, on the other hand, involves a conscious effort by the mediator to be supportive of both sides and still the storm of anger and frustration. Through compassion and understanding, the mediator guides the parties to a meaningful settlement, which establishes a foundation for peace and even healing. It creates the very best atmosphere for creative thinking and resolution. It reincorporates the lost element of conciliation back into the process.

Within these two categories, there are three primary formats utilized today: trial, conference, and caucus.[27] The trial format, also known as nonbinding arbitration, is conducted by a single hearing officer or a panel of three persons.[28]

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26. *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"); *see also* Robert D. Benjamin, *The Constructive Uses of Deception, Skill, Strategies, and Techniques of the Folkloric 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. Wetlaufer, *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*, 1980 AM. B. FOUND. RES. J., 926, 926–27 (addressing truthfulness in negotiations).

27. Calkins & Lane, *supra* note 4, at 70. The mediator utilizing any of the three formats can approach the mediation in an adversarial manner or as a peacemaker. For example, mediators utilizing conference or caucus mediation can play devil's advocate by confronting the parties and putting them on the defensive until they capitulate. On the other hand, the mediator can fulfill his role as a peacemaker and be supportive and nonconfrontational.

28. *Id.* Michigan utilizes the trial format. Before a dispute goes to trial, the court may require a "case evaluation." MICH. CT. R. 2.403; *see also* James McNally, Letter to the Editor, *Mediation in Michigan Is Really a Form of Case Evaluation*, 5 DISP. RESOL. MAG., Winter 1998, at 2 ("In Michigan, 'mediation' . . . is a mandatory form of case evaluation that has been called 'mediation' since 1971.") (citation omitted). A panel of three persons listen to lawyers present their cases and then make a nonbinding award. MICH. CT. R. 2.403(D), (K)–

Counsel for the parties argue their cases and a nonbinding award is made.[29]

Conference mediation, which is quite effective and preferred in family and employment disputes, keeps the parties together at the conference table.[30] The mediator acts as a "referee" and helps the parties reach a meaningful resolution. A form of conference mediation is transformative mediation.[31]

Caucus mediation, which is described in some detail in the remainder of this Article, begins with all the parties together in conference. The mediator makes opening remarks, and the attorneys are invited to make opening statements. After this is completed, the parties are separated and placed in different rooms. The mediator then shuttles back and forth between them and conducts private sessions called "caucuses." This caucusing continues until the case is settled. Once completed, the parties meet again in a joint conference and affirm the terms of the settlement, or, if the case is not settled, whether the process is to continue by telephone or otherwise.[32]

(L). If either party or both wish to reject the panel's recommendation for settlement, they are entitled to proceed to trial. MICH. CT. R. 2.403(N). If they do so, they must improve their position by at least ten percent or a penalty is assessed. MICH. CT. R. 2.403(O).

29. Calkins & Lane, *supra* note 4, at 70.

30. Conference mediation is regularly used in divorce cases. Leonard L. Riskin, *Teaching and Learning from the Mediations in Barry Werth's* Damages, 2004 J. DISP. RESOL. 119, 134. This is because many times attorneys are not present in order to save costs. Even though conference mediation is used, the mediator may wish to meet with each party alone to clarify a point or two.

Where domestic violence has occurred and a spouse is intimidated by the mere presence of the other spouse, caucus mediation may be the only viable format. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 57 (2004); René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 107 (2001); Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 364–65 (1999).

In employment discrimination, mediators also tend to use the conference method. For a general discussion on employment discrimination and the current legal discourse, see Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005).

31. For a more detailed discussion of transformative mediation, see Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

32. *See* Calkins & Lane, *supra* note 4, at 78–93. Scholars have debated whether conference mediation is preferable over caucus mediation. Those advocating the former are primarily involved in divorce and employment law, and perhaps have not had exposure to the great expanse of law where caucus mediation is favored. *See* Riskin, *supra* note 30, at 133–34; Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP.

Mediators play different roles depending upon the mediation format utilized and the needs of the parties. Mediators, if requested, can be evaluative and inform the parties what they feel the case is worth. This is the role the mediator plays in the trial format, such as in Michigan.[33] Although less frequent, the mediator utilizing the caucus format might also be requested to be evaluative.[34] More generally, however, the mediator in both conference and caucus mediations remains nonjudgmental and allows the parties to evaluate the case and reach their own conclusions. In this role, the mediator is a "facilitator" and assists the parties in their evaluation.[35]

RESOL. 573, 647 (2004). Most authorities agree that caucus mediation plays an important role in the mediation process. *See, e.g.*, Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325–29 (1994) ("Sequential caucusing is particularly adept at responding to informational problems because it is a uniquely meditative way to elicit and channel private information."); Emily M. Calhoun, *Workplace Mediation: The First-Phase, Private Caucus in Individual Discrimination Disputes*, 9 HARV. NEGOT. L. REV. 187, 189 (2004) (recommending a private caucus between the mediator and the complainant in a discrimination case); Christopher W. Moore, *The Caucus: Private Meetings That Promote Settlement*, 16 MEDIATION Q. 87, 88–90 (1987); Jeffrey S. Rosen & F. Alec Orudjev, *"Come Now, Let Us Reason Together": Mediating Investment-Related Disputes*, *in* SECURITIES ARBITRATION 2003: SIMPLIFYING COMPLEXITY 444 (Practising Law Institute 2003) (indicating that National Association of Securities Dealers Mediation Rule 10406(e) allows the mediator the discretion to meet and communicate separately with each party); Wilk & Zafar, *supra* note 13, at 60 (addressing several benefits of caucus mediation, including the opportunity afforded to the parties by letting them meet informally and discuss options to resolve the disagreement); Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 809–13 (2001) (discussing a number of benefits of caucus mediation, including enhanced communication between the parties and preventing the disputants from worsening their relationship).

Both forms of mediation are extremely important and the mediator needs to be well acquainted with both. Conference mediation should be used in divorce and employment law disputes where an ongoing relationship is important. Caucus mediation is important in other areas of the law where confidentiality is required between the parties in order to fully develop the case.

33. *See supra* note 28 and accompanying text.

34. *See* Maureen E. Laflin, *Can Informed Consent Preserve the Integrity of Mediation?*, ADVOCATE (Idaho), Nov. 2000, at 12 (noting that "[i]n many situations, a third party neutral with an evaluative orientation will be more effective and more to the parties' liking than a strictly facilitative neutral").

35. If a mediator is not asked to be evaluative, she should remain nonjudgmental, at least at the early stages of the mediation. There are several reasons for this. First, though being only facilitative, the mediator is often asked, especially early in the mediation, what she believes the case is worth. This can often be a trap to test the objectivity and neutrality of the mediator. If she gives a figure that is not in line with what the asking party expects, the mediator may be considered biased or lacking objectivity.

Second, if the mediator gives a figure in line with what the party asking would like to receive, it will be quite difficult later in the mediation to get the party to go below or

IV. THE REASONS FOR THE SUCCESS OF CAUCUS MEDIATION

The primary thesis of this Article is that caucus mediation, except in family law and employment disputes where there is to be an ongoing relationship,[36] can best reincorporate the lost element of conciliation into the mediation process.[37] This Article seeks to demonstrate how peacemaker techniques—techniques which avoid adversarial and confrontational methods of persuasion—can help the parties find not only resolution, but conciliation, peace, and healing. It is suggested that the mediator is more than a dispute resolver; she seeks to be a peacemaker and everything she does should lead to the establishment of peace and healing between the parties. Indeed, many conclude that peacemaking is the highest calling in the legal profession and one of the highest callings in life.[38]

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above the figure (depending on who is asking). Rarely will a case settle for what a party expects or desires at the initial stages of the mediation.

Third, expressing an opinion as to the value of a case, particularly early in the process, leaves the mediator vulnerable to simply being wrong. No one knows what a jury might do and to express an opinion when not retained to be evaluative in the first instance leaves the mediator vulnerable to attack later if the case is tried and the mediator is proven wrong. Remaining nonjudgmental is most challenging to the attorney-mediator because she is trained to be an advocate and to be evaluative.

36. Divorce mediation most often employs conference or transformative mediation. *See supra* note 30 and accompanying text. I agree with this approach, particularly when lawyers do not participate. However, in most other forms of litigation—including personal injury, malpractice, antitrust, securities, and trademarks—where lawyers are present and actively participate, the caucus form has proven imminently successful. I am aware of mediators using the caucus format and obtaining as high as ninety-five percent or more success in their mediations.

37. Some scholars advocate caucus mediation but ignore the great potential it has for conciliation. They see the mediator's role as devil's advocate, using deception and illusion to reach resolution. As noted previously, some scholars suggest that consensual deception is the essence of caucus mediation. *See* Cooley, *supra* note 26, at 5. Robert Benjamin states the following:

> "*Mediators, like trickster figures, are in some measure illusionists* . . . . Their use of deception and strategic intervention is calculated not for self-gain at the expense of conflicting parties but rather for the parties' benefit. As a result, ideally, the parties learn, but at the very least they survive the conflict. *All human beings, and especially mediators, deceive, manipulate, and even sometimes lie. That is a given.*"

Id. at 4–5 (alteration in original) (quoting Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 17 (1995)).

38. The mediator's role as peacemaker is utilized not only in disputes between private persons and entities, but between nations. Indeed, when awarding the Nobel Peace Prize to President Carter in 2002, the Norwegian Nobel Committee described the former president's mediation skills "as a vital contribution to the Camp David Accords." *2002 Nobel Peace Prize Awarded to President Carter*, THE CARTER CENTER, Oct. 11, 2002,

This Part discusses why caucus mediation is so successful in gaining not only resolution but conciliation, peace, and healing. The following Parts explain the goals of caucus mediation,[39] discuss the format of caucus mediation,[40] describe the qualities of a mediator/peacemaker,[41] and set forth the peacemaker's techniques for resolving disputes.[42]

There are any number of reasons why caucus mediation is conducive to establishing conciliation, peace, and healing between the parties. First, the process, from the beginning of the opening joint session to the final caucus, is designed to be a kinder, more user-friendly approach to resolution. It literally is the opposite of the courtroom trial and adversarial mediation where the mediator takes on the role of devil's advocate. In both the courtroom and adversarial mediation, the parties are fighting with each other to win. They are not on the same side seeking a common resolution that both can accept. In the courtroom, the goal is to impeach, discredit, and undermine the opponent to make him a loser. In peacemaking, the goal is to be supportive of the opponent to make him a winner so that there can be a winning result for both sides. The courtroom battle, as well as adversarial mediation, leaves all participants and counsel mentally bruised and scarred, whereas nonadversarial mediation permits the parties to find a sense of peace and closure, and, indeed, can facilitate a healing of the wounds.[43]

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http://www.cartercenter.org/doc1235.htm. It also noted that he "stood by the principles that conflicts must as far as possible be resolved through mediation and international co-operation based on international law, respect for human rights, and economic development." *Id.*

In addition, mediation was "widely used in both Rome and Egypt and by the Greek city-states in connection with their wars." John D. Feerick, *The Peace-Making Role of a Mediator*, 19 OHIO ST. J. ON DISP. RESOL. 229, 229 (2003). Louis IX was renowned for his role in arbitrating and mediating disputes. *Id.*

39. *See* discussion *infra* Part V.

40. *See* discussion *infra* Part VI.

41. *See* discussion *infra* Part VII.

42. *See* discussion *infra* Part VIII.

43. Case Study: This tragic case, in which seven teenagers selling magazines during summer vacation were killed, illustrates the healing effect of peacemaking. Thirteen teenagers were in a van traveling at night to another town to sell magazines. It was late and a police car clocked them at 84 miles per hour on a two-lane highway. The driver, who did not have a driver's license, tried to switch places with the girl next to him, and they lost control of the vehicle and crashed. In addition to killing seven teenagers, one ended up a quadriplegic and another had a serious head injury. The parents, on behalf of the teenagers, sued the magazine distributor company as well as the owner of the company personally.

The case was mediated and a settlement was reached, which required the approval of all parents and the court to become effective. One father, who sued on behalf of his deceased daughter, and one mother, on behalf of her deceased son, refused to approve. They were so angry they just wanted to punish the owner for the rest of her life.

Second, the mediator/peacemaker is trained to be supportive and work with both the parties and counsel and not confront them or put them on the defensive. Instead of playing devil's advocate, the peacemaker seeks to build rapport and trust with all concerned. When the parties feel the mediator is truly interested in them and in the resolution of the case on the fairest terms possible for all, it is far less difficult for them to compromise. It is this final compromise that closes the gap to settlement.[44]

Third, the mediator/peacemaker is trained in the art of resolving disputes. He learns to read body language and can identify whether a verbal "no" is really a silent "maybe" or a disguised "yes." Mediation is an intensive insight-oriented process, which can be developed through training and experience. The mediators who have been most successful are those who have developed and honed these insights to the point that they can successfully read the parties and handle any surprise or contingency.

Fourth, through the confidential caucus, at which the mediator can speak in confidence with each side, she is positioned to gain information about the case unavailable to a judge, jury, or arbitrator. She can ask each party and counsel what their weaknesses are in their case or the concerns they have about their case.[45] The mediator can also ask each attorney what she believes a jury will do

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A separate mediation session was held with just the two parents and the defendant. The parents' anger and hatred was overwhelming. After seven hours they finally gave in and signed the settlement papers. The mother asked to have an opportunity to meet the owner to tell her how evil she was and what great suffering she had caused to so many. The mediator arranged the meeting.

At first only the mother spoke, telling the owner how she felt. The owner finally responded. She stated that she too had been devastated and ended up in the hospital facing depression. When asked why she had not communicated with the parents, she explained that her lawyers would not allow her to make contact.

For an hour the two women spoke. The owner of the business explained how, as a sixteen-year old, she had been pushed into the streets by uncaring parents and how she had kept her head above water and started the business. She explained that only her faith in God had pulled her through, and now the mother needed to have faith to pull her through this tragedy. They exchanged cards and at the end, the two women hugged each other in tears, promising to keep in touch and continue helping each other. Only peacemaking could have brought this healing of wounds.

44. From the commencement of the joint opening session, when all parties and counsel are together, the mediator will set the tone for the entire process in his opening remarks. For an example of an opening statement, see *infra* note 65.

45. Not only can the mediator gain an understanding of the case by learning the weaknesses on each side, but the parties, in confidence, can use the mediator as a sounding board or float figures and suggestions without having to commit to them. In other words, the mediator, without disclosing the source, can ask the other side if it would consider a certain figure or range of settlement.

in both the best and worst case scenarios. When both sides have answered these inquiries, the mediator has a unique perspective and understanding of the case. She is in a position to give guidance to a meaningful and fair settlement.

Generally, knowing that the information sought will be kept confidential from the other side, lawyers will discuss candidly their weaknesses and concerns and how they evaluate the case. The responses given are normally shorn of advocacy, rhetoric, and the emotional factors lawyers employ in front of judge, jury, or arbitrator. Through the process, the mediator can quickly get to the heart and real merits of the case.

Fifth, mediation is simple to initiate, inasmuch as the parties and counsel need only set a mutually agreeable time to meet and agree upon a mediator. Its user-friendly mechanism makes it far less threatening to the parties than a trial, and the parties can more actively participate than in the courtroom. Likewise, because the process is informal, it is easy to conduct. Counsel, rather than presenting a case through witnesses and documents, is primarily responding to questions of the mediator and reacting to the direction the mediator is going.

Sixth, the peacemaking process encourages a spirit of cooperation, which grows as the mediation progresses. This is the opposite of what occurs in the courtroom where the parties are adversaries. Rather than coming to the table with the intent of winning, the parties approach mediation with the goals of compromising and finding resolution. As the mediation progresses, the parties and counsel have a growing investment in terms of time and money in a successful outcome.

Because of the investment the parties have in the process and their expectancy of success, momentum is generated, which grows as the mediation progresses. Caught up in the momentum, the parties are encouraged to compromise further. Many times, because of the investment, the parties will settle on terms which they never would have considered when the mediation began. An experienced mediator will feel the momentum and recognize that a case will settle long before the parties recognize it.

Seventh, an important advantage of mediation is that all parties and counsel are present at the same time, in the same place, and for the same purpose. It is helpful for the mediator to be able to speak to each party and counsel directly and convey messages or information back and forth between the participants. If a question is raised or a point made, the mediator can immediately go to the other caucus room to get a response.[46] There are no delays.

46. The mediator can bring the parties together for an additional joint conference or have counsel for one side explain a point to the other side if the mediator believes that would be more effective than presenting a point herself. The mediator can also bring just the

By communicating back and forth between the parties, the mediator is able to narrow the issues to those which will be determinative of the outcome of the case. At times a party will realize that a point, once considered significant, is no longer valid and that it must be reevaluated. If a new point is raised, the mediator can weigh the reaction of the other side.

With multiple defendants or plaintiffs, there is simply no other way to have meaningful negotiations other than to have them all present at one time at the same place. Many times the mediator must piece together a settlement proposal with each party providing its input. To try to do this by telephone or by some other process is unrealistic. Too much time is consumed and momentum is lost.[47]

Eighth, confidentiality is another important benefit of mediation.[48] By law and by contract, a mediation is a settlement conference which forecloses later disclosure.[49] Also, by the terms of the mediation agreement, the mediator, her

attorneys together for discussion.

47. Case Study: In an automobile accident case, a plaintiff pulled out onto a highway and was broadsided by an oncoming car. She claimed that snow was piled high alongside the driveway that she was exiting and she could not see if it was clear to exit, so she took a chance. Plaintiff was seriously injured with medical expenses exceeding $172,000.

Plaintiff sued the driver of the car who hit her, her employer for allowing the snow to be piled up and not removed from its premises in violation of a city ordinance, the snow removal company for not properly removing the snow, and her own insurance carrier on her underinsured policy provision. Her husband sued all of the above for loss of consortium. The defendant driver counterclaimed against the plaintiff, claiming she was at fault for pulling out without being able to see the road. The plaintiff's employer cross-claimed against the snow removal company.

By having everyone present in one place at the same time, the mediator was able to piece together a settlement all could accept. To have tried to settle this matter on the telephone between the various parties would have been an impossible task because everyone had to compromise.

48. *See* Ellen E. Deason, *Enforcing Mediated 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").

49. In *Schumacker v. Zoll*, the Court of Appeals of Ohio enforced a confidentiality provision and ordered all references to a mediation communication to be struck from the record after the defendant breached the provision by disclosing to the trial judge certain matters discussed in the mediation. Schumacker v. Zoll, No. L-00-1199, 2001 WL 1198641, at *2–3 (Ohio Ct. App. Oct. 5, 2001). There are, however, a number of cases wherein confidentiality is being eroded. For example, in *Olam v. Congress Mortgage Co*., the court compelled a mediator to testify when a party challenged a mediated agreement claiming duress. Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1129–39 (N.D. Cal. 1999). The testimony of the mediator was taken in camera and only after the parties (but not the mediator) waived the protection of confidentiality. *Id.* The court ultimately found no duress. *Id.* at 1151. The *Olam* case suggests that the mediator does not enjoy an absolute privilege of confidentiality, but the privilege is subject to an independent determination by the court

notes, records, and work product cannot be subpoenaed for a later trial or deposition should the case not settle. Preserving absolute confidentiality is important to the process. Likewise, mediation sessions are closed to all outsiders, including the press. This is not true, however, if the case is litigated in the courtroom.

There is another aspect of confidentiality which is important to the success of the process. When the mediator meets in private caucus with each side, she gives assurance that whatever is discussed will not be disclosed to the other side.[50] This permits the parties to make settlement proposals, float figures, and suggest creative ways to reach resolution, knowing that the mediator will not disclose such to the other side. The mediator can take a proposal and discuss it with the other side as her own to see how the parties react.[51] In this way, the party originating the proposal has not made a commitment to the idea and can give it further consideration.

In floating a settlement figure given by one of the parties, for example, the mediator can ask the other side whether they would consider it if the first party would consider it. In this way, the first party is not committing to the figure. If the other party knew that the figure came from its opponent, the opposing party likely would bid off the figure and not give consideration to accepting it.[52] In

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regarding whether the "testimony of the mediator should be accepted." *Id*. Such an interpretation could seriously undermine the very foundation of mediation and hopefully will be revisited. Another breach in confidentiality occurred in a sanctions hearing for bad faith participation in a mediation. In *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, the mediator found that the defendant acted in bad faith in attending a mediation hearing and recommended sanctions against it. Foxgate Homeowners' Ass'n v. Bramalea, Cal., Inc., 25 P.3d 1117, 1121 (Cal. 2001). In his report to the judge, the mediator detailed what occurred at the mediation, thereby breaching the confidentiality provision. *Id*. The trial court entered sanctions, but they were later set aside. *Id*. at 1119. For further discussion of mediation confidentiality, see generally Anne M. Burr, *Confidentiality in Mediation Communications: A Privilege Worth Protecting*, DISP. RESOL. J., Feb.–Apr. 2002, at 64; 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*, DISP. RESOL. J., Nov. 2004–Jan. 2005, at 60; Dennis Sharp, *The Many Faces of Mediation Confidentiality*, DISP. RESOL. J., Nov. 1998, at 56; Diane K. Vescovo, Allen S. Blair & Hayden D. Lait, *Essay—Ethical Dilemmas in Mediation*, 31 U. MEM. L. REV. 59, 80–97 (2000); Wilk & Zafar, *supra* note 13, at 12.

50. Wilk & Zafar, *supra* note 13, at 58.

51. *Id.* ("[T]hrough shuttle diplomacy, the mediator is in a position to give feedback and bring the parties closer together and, ideally, to agreement.").

52. Case Study: The importance of confidentiality was illustrated in a case in

other words, the mediator can "test the waters" without requiring commitments from either side.

Another important aspect of confidentiality is that a party in caucus can use the mediator as a sounding board to test her case. Getting a mediator's reaction in confidence can be quite helpful to a party in evaluating the case. It can act as a reality check.

Ninth, the user-friendly character of mediation lends itself to a very flexible format. In fact, the mediation process can be adapted to almost any contingency required in a particular case. There are no rules of evidence, established protocol, or precedent that must be followed. For example, if an important witness, who has not yet been deposed, is needed to verify a certain point or position, she can simply be called on a speakerphone with all parties present and asked what her testimony will be. It will be explained that she is not under oath,

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which the plaintiff was injured in two separate automobile accidents where liability was admitted in both. In one, the defendant paid policy limits of $25,000. In the second, the defendant had no insurance and was judgment proof. Plaintiff sued her insurance carrier under the underinsured provision covering the first accident, and under the uninsured provision covering the second accident. The two provisions provided $100,000 coverage each; therefore, her claim was for $200,000, which the defendant recognized was well within what she could recover from a jury because of the seriousness of her injuries. The problem that arose was that the underinsured provision provided that income from collateral sources, such as Social Security, would offset payments made under the policy so that there would not be a double recovery. Plaintiff was receiving Social Security disability payments, which over her life expectancy of forty-two years would far exceed the $100,000 policy limits under the provision. The uninsured provision had no such offset.

Plaintiff's counsel told the mediator *in confidence* that he was concerned with the above problem and would settle for $100,000 or slightly less under the uninsured provision. Defense counsel, who represented the insurance carrier, informed the mediator, *in confidence*, that his client would pay $100,000 if the mediator could get the plaintiff to agree to drop the underinsured claim. However, he was not very hopeful the plaintiff would agree, though he felt the law supported the defense. He added that the carrier might pay a little more to get rid of the case and avoid litigation costs.

The mediator was faced with a dilemma. Plaintiff would accept less than $100,000 and the defendant would pay more than $100,000. He solved this by putting a neutral mediator's figure of $100,000 on the table, and the case settled. He was able to do this because he learned where each side was willing to go in confidence. In straight negotiations, neither side would have disclosed that $100,000 was an acceptable figure for fear the other party would negotiate off that figure. In other words, if the plaintiff dropped substantially below $200,000, the carrier would know she was abandoning the underinsured claim because of the Social Security offset. In that event, the carrier would have expected to settle for less than $100,000. If the defendant signaled it would pay $100,000, the plaintiff would have demanded more because the costs of litigation would have to be added to the policy limits. Both sides would have been reluctant to "show their hands" for fear the other would take advantage of it. Dealing in confidence with the mediator turned a complex negotiation into a very simple and short mediation, and both sides were pleased with the result.

but because an effort is being made to settle the matter amicably, her testimony is important. A doctor might be called, who has not yet been deposed, and asked about her expert opinion concerning a certain matter. The mediation can be interrupted to allow the mediator to interview personally one or two witnesses to get a better understanding of the case.[53]

If the mediator feels an insurance supervisor, who did not attend the mediation but who is making the final decision on the file, is not properly evaluating the case, the mediator can ask for a recess and travel to the supervisor's office to make a presentation. This might include a thirty-minute video highlighting some of the more important deposition testimony. After this, hopefully the mediator can resume the mediation with more authority.

Tenth, mediation is an excellent forum for parties to vent and express their feelings. A mediator is quite willing to listen empathetically and, in essence, give the parties their day in court. When the parties have released their emotions, there is a decided change in their demeanor, and the mediation can become quite productive. Many people just want to be heard by someone.[54]

Eleventh, mediation is an excellent vehicle for helping the parties continue their relationship if this is important. In employment situations, businesses, and

53. Case Study: This flexibility was demonstrated in a case in which the plaintiff, involved in a single car accident, ended up a paraplegic. He was twenty-one years old and was traveling with teenagers, one of whom was driving the car. They had been drinking before the accident, and the defense argued that the plaintiff purchased the beer the underage teenagers were drinking, thereby contributing to the delinquency of minors. The defense responded to a $1 million demand with an offer of $250,000. At the mediation, the plaintiff denied he purchased the beer but admitted he had purchased four wine coolers that he drank himself. Plaintiff offered to settle for no less than $850,000, and the mediation came to a halt. Because none of the teenagers, including the defendant who owned the car, was present at the mediation, the mediator recessed the mediation and visited with the three at their homes. The girls did not know who purchased the beer. The owner of the vehicle, a sixteen year old, explained that the plaintiff, the only one of age, purchased the beer and put it in the trunk of his car. He said that he could not have purchased the beer because of his age, and there was no liquor allowed in his home.

After the interviews, the mediator made an appointment to meet with the plaintiff at his attorney's office. He asked again whether he purchased the beer and got the same answer that he only purchased wine coolers for his own consumption that Saturday night. The mediator, not believing the plaintiff, asked a second time. This time the plaintiff, in frustration, explained that he did not purchase any beer that Saturday night—he purchased it on Friday night. Plaintiff's attorney looked shocked at this revelation, and the case settled immediately for $365,000.

54. *See* Steven Weller, John A. Martin & John Paul Lederach, *Fostering Culturally Responsive Courts: The Case of Family Dispute Resolution for Latinos*, 39 FAM. CT. REV. 185, 196 (2001) (expressing the necessity to allow parties to vent in Latino family mediations).

schools, the parties may continue working together following legal action. Legal proceedings can destroy or undermine that relationship because of the nature of the courtroom. By bringing the parties together in mediation, where an effort is made to heal the relationship rather than just resolve a dispute, a difficult problem can be overcome and a healthier working relationship established. This is particularly true of minority persons who often feel they have been discriminated against both as to wages and job promotion.[55] Employers, who are striving to comply with the law and avoid the antagonisms generated by lawsuits, welcome the opportunity. Some companies are including mediation clauses in their collective bargaining agreements and employment contracts.[56]

Twelfth, mediators play an important function in helping the parties properly evaluate their cases and encouraging compromise when it is warranted. Generally, a mediator will not be evaluative and tell the parties what she believes a case is worth, but will leave this to the parties and counsel. But, she can help develop the strengths and weaknesses on both sides and assist the parties to realistically evaluate their respective cases.[57] In this capacity, the mediator fulfills a very important function. For the plaintiff, if liability is lacking, she can help counsel and the plaintiff recognize this possibility. If a party is not listening to counsel and has exaggerated expectations, the mediator, by the questions she asks, can help counsel acquaint the party with the true merits of the case. Likewise, on the defense's side, the mediator can help the adjuster properly evaluate a case, and where more should be paid, she can support the adjuster's

55. *See generally* Moore, *supra* note 14, at 27.

56. *See generally id.* at 28–29.

57. Wilk & Zafar, *supra* note 13, at 58.

Case Study: One lawyer became quite indignant with the way his clients, three African American college women, had been treated when they applied for a summer position at a fast food restaurant. They were not even given an interview, while three Caucasian high school girls were hired with minimal interviews. The attorney sought punitive damages and demanded $150,000 for each plaintiff in the lawsuit he filed.

At the mediation, the mediator sensed that the three women wanted to settle the case for several reasons. First, they obtained better paying jobs that summer in another state. Second, they did not want to keep coming back to the jurisdiction for depositions and court appearances. Third, there was little likelihood that punitive damages would be permitted because the restaurant hired African American employees both before and after the incident in question. And fourth, one of the supervisors at the restaurant was an African American woman.

The mediator took the lawyer aside, reviewed the facts, and calmed him down. The latter began to realize that the best service he could provide to his clients was to settle the matter and permit his clients to go on with their lives without the interruptions of litigation. The case settled for $25,000 for each woman, and they were most pleased with the result. In this case, the mediator helped the attorney look at the case more realistically without offending him or undermining him in front of his clients.

request for additional authority.

Thirteenth, the experienced mediator can help the parties craft creative settlements. Because any settlement entered is contractual, the parties can agree to any terms they wish as long as they do not violate public policy. An experienced mediator, sensitive to the needs of the parties, can help them craft a settlement that will accomplish much more than what a judge, jury, or arbitrator could do.[58] For example, the parties might agree to a written apology, a letter of commendation or recommendation, or to taking a sensitivity class to improve employer-employee relationship skills. The defendant might agree to name a conference room after a terminated employee suing for age discrimination. The parties could agree to place part of a settlement in a structured annuity which would provide a flow of tax-free income. The parties might even agree to be bound by the results of a polygraph test.[59] The possibilities are limited only by the creativity of the parties.[60]

Fourteenth, the mediator can help the attorneys get their clients under control when they have unreasonable expectations. Many times the attorneys will request mediation because they are having difficulties with their clients.

58. *See* Wilk & Zafar, *supra* note 13, at 60 ("[M]ediation gives the parties the control of determining the outcome of the dispute and avoids the uncertainty inherent in all litigation.").

59. Case Study: In one case, the plaintiff, the former chief financial officer of a small but highly successful manufacturing company, sued the CEO and the company for sexual harassment. She claimed the CEO insisted on having an extramarital relationship to which she consented, believing that if she refused she would lose her very lucrative position. She finally terminated the affair and the CEO allegedly retaliated by making her job more difficult. She finally quit and sued for constructive discharge. She demanded $800,000.

At the mediation, the CEO admitted to the affair but claimed it was consensual and had begun long before she was hired as chief financial officer. Plaintiff vehemently denied that the affair had begun before her employment. Recognizing that the plaintiff had a right to terminate the affair, which the CEO should have honored, the company offered $300,000 to settle the matter but refused to pay any more. The mediation came to a halt. The mediator then suggested, and the parties agreed, to resolve the matter with a polygraph test. They agreed to be tested on the issue of whether the affair had been consensual and began long before her employment. If she passed and the CEO failed, she would be paid $800,000. If she failed and he passed, she would be paid $100,000. If she chose not to take the test, she would still receive the $300,000; or, if he chose not to take the test, he would pay the $800,000.

An arrangement was made for the same operator to give both tests, the plaintiff in the morning and the CEO in the afternoon. The night before the test was to be given, the plaintiff backed down and accepted the $300,000. At this point, she admitted to her attorney that the affair had begun two years before her employment. The attorney thanked the mediator for finding a way to get to the truth because he never would have knowingly allowed her to perjure herself at trial.

60. Wilk & Zafar, *supra* note 13, at 12.

Because the mediator can ask the attorney what the weaknesses are in the case, in private caucus, the attorney is given an opportunity to discuss them in front of the client. Up to this time, the client might have refused to even consider weaknesses, but because the mediator is asking, the client is forced to listen. Likewise, the mediator can ask the attorney in confidence what a jury might do in both the best and worst case scenarios. Again, the client is required to hear what the worst case is, and it may come as a shock. Certainly, it can be a reality check. As the mediation progresses, the mediator can reinforce the concerns that the attorney has. With both the attorney and mediator having reservations about the case, most clients are willing to begin compromising and work to resolution.

The mediator can also help the attorney in another way. By noting the fine work an attorney is doing, if this is the case, the mediator can reinforce the attorney's position with the client. Many times clients do not appreciate how skilled and creative their attorneys are, and when this is pointed out by the mediator, they have a new appreciation for the way they are being represented. Realizing this, clients are more willing to listen to their attorneys when asked to make that final compromise to settlement.

Finally, the mediator can help counsel by deflecting any criticism or anger that might be engendered as the mediation progresses. Rather than allowing counsel to be criticized by the client, the mediator can act as the lightning rod so that the attorney-client relationship is not undermined. This is important, because it is the attorney who will generally get the client to make the final move to settle. If the attorney-client relationship has been undermined, this will become more difficult.

V. GOALS OF CAUCUS MEDIATION

Caucus mediation is particularly conducive to peacemaking. It permits the mediator to work with the parties and counsel in private confidential settings, which facilitate her building rapport and trust—the keystones of peacemaking. Everything the mediator says and does is supportive, and she avoids placing a party or counsel on the defensive. In other words, she does not play devil's advocate.

The general goals of caucus mediation are, first, to convince the parties they are on the same side and no longer adversaries seeking to defeat the other.[61] By working together, they are encouraged to shed the myopic vision inherent in the adversarial process. They are asked to broaden their outlook to consider the needs of all participants and creatively meet those needs.

61. Wilk & Zafar, *supra* note 13, at 12 ("[T]he goal in mediation is to negotiate and reach a settlement through the process itself.").

A second goal is to help each side better understand his or her case and realistically evaluate the end result if presented to a jury or judge.[62] Every case should settle and will settle if all concerned have a full appreciation of their risks.

A third goal is to provide a forum for the parties to be heard and, when necessary, to allow them to vent and express their anger and frustration.[63] The mediator can provide that setting, which is therapeutic.

Finally, an overall goal is not only to find resolution but to open the doors to conciliation, peace, and healing. A mediation has failed if the parties, although reaching settlement, walk away angry and feeling abused.

VI. FORMAT OF CAUCUS MEDIATION

The general format of caucus mediation is (a) pre-mediation contacts, (b) the opening joint session, (c) the private caucuses, and (d) the closing joint session.

A. *Pre-Mediation Contacts*

Prior to the commencement of the mediation, the mediator should contact the parties or counsel, if the parties are represented, and request any documents the parties would like to submit. Generally, counsel will prepare a position paper concerning a party's case which will acquaint the mediator with the facts and any legal issues that must be addressed. The parties should be encouraged to highlight those portions of the documents and depositions the mediator is encouraged to read. Quite clearly, a party should not send the entire file, for it will waste considerable time and money for the mediator to digest all the information contained therein. Briefs supporting motions to dismiss or motions for summary judgment are quite helpful to the mediator.

Lawyers should be encouraged to contact the mediator at any time prior to the mediation if they have questions or are unfamiliar with the process. If one side contacts the mediator, the latter may very well conference with the other side as it may have similar questions. In these communications, an attorney may also discuss the merits of the case even without the other side participating because there is no such thing as improper ex parte communications. In fact, the foundation of caucus mediation is these ex parte confidential communications with the mediator.[64]

62. *Id.* at 58.

63. *Id.*

64. In complex multi-party mediations, the parties might even consider pre-mediation caucuses. In this instance, the mediator would caucus separately with each side to

B. *The Opening Joint Session*

The first joint session is conducted by the mediator with all parties and counsel present. It is helpful if the participants reintroduce themselves and provide a little background on their participation in the process. The mediator will then make opening remarks followed by statements from each of the attorneys representing clients. Everything the mediator says and does is directed to building rapport and trust and setting the stage for calming the parties and turning what has been a negative and stressful experience into a positive one.

1. *The Mediator's Opening Remarks*

The mediator should make an opening statement which will create the proper atmosphere for peaceful resolution.[65] Her tone, tenor, and manner are

discuss preliminary matters to move the process along. Generally, the mediator will ask for a presentation of the strengths of a party's case so that the mediator will have a better understanding of what the case is about. These preliminary caucuses also help the mediator to become better acquainted with the participants and begin building rapport with them. If there are significant legal questions to be considered, these can also be discussed. If the case involves a construction site or another property, the parties and mediator can use the pre-caucus session to view the premises. If this is done, all involved parties should be present.

65. A mediator's statement at the opening joint session might be as follows:

May I first thank you for agreeing to mediate and working out your dispute in an amicable way that will benefit everyone. Before we begin, it might be helpful if we reintroduce ourselves.

I like to begin a mediation by explaining that I keep it low key. It is a gentle, user-friendly process, and I will keep it that way throughout. It is literally the opposite of going to trial, which is extremely stressful for all concerned, including lawyers who enjoy trying cases.

We will try the case today in a very different way. Instead of one side fighting the other as you do in the courtroom, in this trial all are on the same side, not figuratively but literally, working towards a resolution all can accept. Instead of having jurors, who are strangers, make a decision that may affect you for the rest of your lives, in this trial you will be the jurors, and the decision you make must be one with which you can live.

In being the mediator, I give you a pledge of absolute neutrality—what I do for one side I will do for the other. Also, I will not sit here in judgment in the case and tell you what you have to do. Again, you will make the decision, not me, but I will assist all concerned to reach a decision acceptable to all.

This is a settlement conference, so whatever is discussed is confidential and cannot be later referred to in any proceedings. More importantly, whatever is discussed in private caucus will not be disclosed to any other party, except what you direct me to discuss.

I do ask three things of you. I ask you to be patient, because there is a certain amount of waiting around when I am caucusing elsewhere. I ask you to be flexible, for that is required to reach resolution. Lawyers will always tell you that a good settlement is where everyone gives a little more than originally intended. Finally, I ask you to be creative and think of different ways we can get to resolution.

critical. Her remarks should focus on the need for resolution and peace and emphasize that mediation is a gentler, kinder way of voluntarily resolving differences. Unlike a trial, which is highly charged, stressful, and very unkind to all, mediation is a user-friendly process in which all end up *winners*. In a very real sense the parties are, for the first time, on the same side.

In these opening remarks, the mediator should speak in a way that will help calm the parties. Many come into the mediation with trepidation and some with great anger and frustration. By emphasizing the gentle and friendly nature of the process at the outset, the mediator can neutralize any unfriendly exchanges.

In addition to calming the parties, the mediator's remarks should also begin to build rapport. This can be done by expressing her concern for the welfare of the parties and the importance of getting this difficult chapter in their lives behind them.

A way some mediators emphasize the user-friendly nature of mediation is to contrast it with a courtroom trial. A courtroom trial is quite stressful and can leave many mental scars. Rarely does someone "win" at trial, even when they receive a verdict. Cross-examination and the confrontational nature of the process are quite unkind to all who participate, even the lawyers. More importantly, the parties are putting their lives and future in the hands of jurors who are strangers, who may not fully understand the case or the far-reaching implications of what they are deciding.

In mediation, the parties are the judge and jury, and they are empowered to make the important decisions. Whereas jurors can only reach a verdict, the parties in mediation can craft a settlement which can include more than the award of money.[66]

In addition to calming the parties and building rapport and trust, the mediator needs to explain her role in the mediation. She should give a pledge of absolute neutrality—what she does for one side she will do for the other. She should further explain that she will be nonjudgmental and not try to force the parties to settle at what she personally believes the case is worth.

The mediator should also explain that the mediation is a settlement conference and therefore must be kept confidential and cannot be referred to in

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At this time, the attorneys or representative for each party are invited to make an opening statement. It can be formal or informal—any way you wish. Also, I ask the parties to listen not only to their own lawyer but also the lawyers on the other side. After carefully listening, please reevaluate your own position.

Finally, mediation is a very, very successful process, and working together, as I know we will, we will get this matter resolved.

66. *See* discussion *supra* notes 58–59 and accompanying text.

later proceedings. All that occurs in the private caucuses will be kept confidential even from the other parties, except for those matters a party wishes to disclose.[67]

Finally, the mediator should ask the parties to be patient, remain flexible, and be creative in fashioning a resolution that all can accept. She might point out that a good settlement is where each party gives more than intended. After this the mediator will invite opening statements from each side.

2. *The Attorney's Opening Statements*

Opening statements by the lawyers or parties' representatives play an important part in the mediation process. They not only acquaint the mediator with the facts and law of the case but, if handled properly, set the tone for a successful mediation. Through these opening statements, each side is able to begin evaluating the other side, including the persuasiveness of their cases, the skills of the lawyers, and the appealability of the parties.

In the spirit of peacemaking, a lawyer should express words which encourage settlement, are conciliatory, and show concern for the welfare of the other parties. She also should present her client's side of the case in an effective and persuasive manner, but not with the intent to intimidate or antagonize. If insurance is involved, an adjuster might also be encouraged to say a few words of concern for the plaintiff's well-being, if this is appropriate.[68] Demonstrating a spirit of cooperation in the opening remarks on both sides can go a long way in establishing peaceful resolution.

A question arises as to how formal and detailed a lawyer should be in her opening remarks. Some lawyers prefer to make very detailed and formal presentations, almost as they would in court. This can be quite persuasive

67. Wilk & Zafar, *supra* note 13, at 58.

68. Case Study: A new adjuster attended his first mediation. The plaintiff, a sixty-two-year-old woman, suffered soft tissue injuries in a car accident. Liability was admitted. Both plaintiff's counsel and the mediator felt a fair settlement was $20,000 to $25,000.

The adjuster, in the opening session, expressed his deep concern for the plaintiff's well-being and recovery. He explained that this was his first mediation and he would do all in his power to get the case settled for such a wonderful person. Then, in caucus, he offered $10,000, explaining that this was all the authority given him. He refused to call his supervisor for more authority. Irritated, plaintiff's counsel was about to terminate the mediation when the plaintiff said she would accept the $10,000. She was told the case was worth more, but she insisted.

When the parties got back together for the final joint session, she went up to the adjuster and gave him a big hug, stating she so wanted the young man to be successful in his first mediation, and she thanked him for being so caring.

because it demonstrates that they are prepared and ready to go to trial. Others prefer short statements and rely on the mediator to argue their positions in private caucus. A more formal well-organized opening statement can go a long way in moving an opposing party to compromise and settlement. It demonstrates how persuasive an attorney will be before a jury. Also, it may point out factors that an opposing party had not considered or fully appreciated.

There are even situations where the attorneys may waive opening statements altogether. Again, the forgoing is an excellent opportunity to speak to the clients on the other side without interruption, which probably will be the first and only time counsel will have the opportunity.

C. *First Caucus*

1. *Goals of the First Caucus*

There are four primary goals the mediator seeks to accomplish in the first caucus with each party. First and foremost, she seeks to begin building a sense of trust, rapport, and confidence in her role as peacemaker. By showing interest in each party's case, and in the parties themselves as individuals, she can convey her sincere desire to find a peaceful resolution all can accept. As this rapport is developed, the parties often are willing to compromise more than they originally intended when entering the process.

Second, the mediator seeks to gain a better understanding of the facts and law of the case. Because of confidentiality, the mediator can ask questions of all parties that have never been asked in a judicial setting. She can inquire as to what the weaknesses in the case are from the lawyer's perspective. As further discussed later, this gives the mediator an understanding of the case, to which a judge, jury, or arbitrator would never have access.

Third, the first caucus gives the mediator a chance to begin reading the parties. What is their real goal—to get as much money as possible, to find vindication, to have the matter resolved at any cost? The mediator also should determine if a party has unreasonable expectations or if the lawyer is unlikely to cooperate unless she gets what she is demanding. Whatever scenario exists, the mediator must accordingly adjust.

Fourth, the mediator seeks to identify any hidden agendas that might exist. Not infrequently, parties come to a mediation seeking something other than money. Sometimes they seek vindication or they just wish to vent and have someone listen to their side of the case. Many times an apology or expression of concern will further the process. There are even times when a party may not even be aware of the fact that there is a hidden agenda or that something they

need or want can be part of the resolution.[69]

2. *Format of the First Caucus*

The format of the first caucus is the same for all parties, plaintiff and defendant alike. The format is as follows: (1) strengths of the case; (2) weaknesses of the case; (3) jury verdict—best and worst case; (4) settlement discussions; and (5) new demand and offer. Other matters that can be covered, depending on the circumstances, include insurance coverage, subrogated liens or debts, and costs of litigation.

a. *Strengths of the Case*. During the first caucus, the best way to begin building rapport is to invite counsel to discuss the strengths of the case. This invitation should be extended even if the mediator already knows what they are from the material she has reviewed and the opening statements of counsel. If the mediator begins the caucus by asking what the weaknesses in the party's case are, it suggests a lack of interest in the party's case or perhaps even an "alliance" with the opposition. In either situation, it does not establish rapport with the attorney or party.

Some mediators begin the first caucus by asking counsel what the strongest points she can make are when caucusing with the other side—those things which

69. Case Study: Plaintiff in one case was injured in a traffic accident and suffered minor soft tissue injuries. She was pregnant at the time, but this was not a factor in the case. She was off work because of complications with her pregnancy. She was a single mother with a young son and worked at a local hospital as a maintenance person.

At the mediation she demanded $15,000 while the insurance carrier offered $10,000 and would not move any further. The mediator then released the parties to go to lunch. When the plaintiff indicated she would skip lunch, the mediator happened to ask why. He learned that she had no money for lunch or for dinner that evening and could not get food stamps for two more days. He also learned that because of her inability to work, she was three months behind in her mortgage payments. The mediator gave her $20, which she initially refused, but later accepted and went to lunch.

When the parties returned from lunch, he spoke to plaintiff's counsel who indicated they could settle for $13,000 and would probably be forced to accept the $10,000, because the plaintiff needed funds immediately.

The mediator met with the adjuster and told him he could get the case for $10,000. He then added that if he would settle for $13,000, he could have a real impact on the life of a very deserving person. The added amount would permit the plaintiff to have funds for her and her little boy to live on until she returned to work. She could also bring her mortgage payments up to date. The adjuster realized he was trapped and agreed to the $13,000. He wrote a check out, the papers were signed, and the plaintiff walked out of the office with her settlement funds. In this case, the plaintiff had a hidden agenda which she never discussed until the mediator asked the right questions. She had no idea she could get funds to take care of her family's immediate needs.

will get their attention. She might even inquire about strengths not yet discussed, thereby demonstrating strong interest. She should take careful notes and ask supportive questions that demonstrate an understanding of the party's position.

After the mediator has listed the party's strengths, she might even review them to be certain all are covered. This again shows interest and support, which begins to build the rapport needed. It is essential the mediator not rush this first step because its primary goal is to build rapport.

b. *Weaknesses of the Case*. Examining the weaknesses of a party's case is one of the most important steps in the process. It is certainly the most sensitive step and distinguishes mediation from all other forms of dispute resolution. Through a frank discussion, the mediator can begin to understand what the case is really about, stripped of advocacy and rhetoric. Unlike a judge, jury, or even arbitrator, the mediator can get closer to the true facts and be positioned, after caucusing with both sides, to give meaningful guidance. For example, counsel may argue in front of the judge or jury that the light was yellow at the intersection when her client entered it and broadsided the plaintiff. In private caucus, in strictest confidence, she might disclose to the mediator that there is reliable evidence that the light was red and that she is concerned this evidence may come out at trial.

When the mediator inquires about weaknesses, counsel is generally forthright and willing to discuss them because of the shroud of confidentiality.[70] At times, counsel wants the question to be asked so that she can discuss them in front of the client, when the latter previously would not listen to them.[71] Because

70. There are times when counsel will suggest there are no weaknesses, ignoring the obvious. There are several reasons counsel may do this. The attorney may not have worked with the mediator before and is not prepared to make such a disclosure in the first caucus. After several caucuses, when rapport has been established, she may be less reluctant. Or, counsel may feel the client is not emotionally ready to face up to weaknesses in the case. More time is needed to prepare her.

Should counsel state there are no weaknesses or omits an obvious one, the mediator should not challenge her by pointing them out, as doing so would put counsel on the defensive and undermine the mediator's effort to build rapport. It also puts the mediator on the other party's side of the case. The better course is to accept counsel's position and leave for subsequent caucuses a discussion of weaknesses. This can be effectively done by pointing out that the other side, not the mediator, raised certain points as its strengths and plaintiff's weaknesses. These now need to be discussed so that the mediator can properly address them when returning to the other side.

71. Case Study: A case illustrating how a discussion of weaknesses gave immediate direction to a case involved a twenty-year old woman who made a left-hand turn in front of an oncoming truck and was killed. She was going west and pulled into the inside turning lane to go south. The defendant trucker contended that she turned on a red light and

the mediator is now asking, however, the attorney must discuss them and the client must listen.

c. *Jury Verdict Range—Best Case/Worst Case*. Another question a mediator will ask to gain a better understanding of the case is what counsel believes a jury will do—best case/worst case for the client. This is also asked in confidence and not shared with the other side. This will help the mediator determine how far apart the opposing sides are in their evaluation of the case. If one side or the other gives an unrealistic evaluation, this signals that the mediation will be long and patience will be required.

In asking counsel her evaluation of the case, it gives her an opportunity to discuss the possibility of an adverse verdict if she so chooses to do so. In this way a difficult client will be given a reality check, which perhaps the attorney could not do previously. Many clients have expressed concern over the range given when hearing that the verdict could be very low or very high, depending on the side of the case the party is on. As to plaintiffs, they often have unrealistic expectations based on what they have read or advice given by friends who have no idea what happens in court.

When discussing the jury range, the mediator might inquire whether the venue is more liberal or conservative.[72] Generally, the more rural a venue is, the

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not the green arrow. The decedent's estate argued that the trucker ran a red light and not a yellow light, as he contended.

In the caucus with the plaintiff, counsel, when asked about weaknesses, pointed out that the decedent probably turned on a red light rather than a green arrow, because a driver in the lane next to the turning lane gave a statement that he was stopped because the light was red. He further pointed out that the green arrow went on only when the green light going west went on.

In the caucus with the trucker, counsel candidly discussed the weaknesses in the case. He noted that the trucker, according to the truck's black box which recorded the truck's speed, was traveling 50 miles per hour in a 40 mile-per-hour speed zone thirty seconds before the accident. The black box printout then showed that the truck slowed to 40 miles per hour as it approached the intersection and then sped up to 48 miles per hour as it entered the intersection. The trucker stated that as he approached the intersection, he started to slow down but realized he could not stop in time so he sped up, hitting the decedent. Counsel also noted that there were cars going the same direction as the trucker that had stopped for the red light in the outside lane.

The trucker contended he was going into the intersection on a yellow light. In strict confidence, defense counsel admitted this was impossible because the lights turned red for both west and east traffic at the same time, and witnesses going both west and east had stopped because the light was red and not yellow. Recognizing that the decedent would have some comparative fault, both parties compromised, and the case settled after these weaknesses were thoroughly developed.

72. A mediator should obtain her own jury verdicts, which are more objective.

more conservative the verdicts are. Some venues like New York City, Los Angeles, California, and Cook County (Chicago), Illinois, are known for their liberal verdicts, and this needs to be taken into consideration. Perhaps the most liberal venue in the country is Madison County, Illinois, just outside St. Louis, Missouri.

d. *Settlement Discussions.* After evaluating potential jury verdicts, inquiry should be made as to settlement discussions to determine if there is any pattern. Many times a demand has been made by the plaintiff without an offer yet being made by the defendant.

Here, it is suggested that the issue of settlement discussions should not be raised in the joint session because there may be discrepancies. Arguments have even erupted in the opening session because of a discrepancy. This could threaten the process before it even gets started. If a discrepancy exists, it is better to learn this with the parties separated. The mediator can then ask for any documentary record of the prior demand and offer. Going back and forth between the parties, the mediator can help reconstruct the bidding and get the parties to a common starting point.

e. *New Demand or Offer*. At the end of the plaintiff's first caucus, the mediator should request the party to make a new demand or offer. If the plaintiff has already made a demand and the defendant has not yet responded, then the first move should come from the defense side. If the plaintiff is going first and makes a very unrealistic demand, the mediator should not react or try to get the plaintiff to change her demand. If a demand is totally unrealistic, counsel knows that the defendant will make an unrealistic offer in response.[73] Regardless, it is not appropriate for the mediator to push either side at this early stage. To push a party sacrifices rapport and trust, which are the primary goals of the first few caucuses.

When requesting a new demand or offer, there are times that counsel will

Mediators working in the Midwest outside the very large metropolitan areas, like Cook County, Illinois, can, for example, contact the Polk County Clerk of Court in Des Moines, Iowa, and get a copy of Polk County jury verdicts.

73. When a party makes a first offer or demand that is unreasonable, the mediator should not react or try to get the party or attorney to moderate it. She should just take the demand or offer to the other side with the explanation that it is to be expected that initially plaintiffs start out high and defendants start out low. If the attorney asks the mediator what she would suggest, she should avoid responding and inform counsel she trusts counsel's judgment in the matter. To respond is a no-win situation. If the mediator is below what plaintiff's counsel feels is sufficient, it will appear the mediator favors the other side or is pushing. This undermines the rapport the mediator is trying to build.

ask if the mediator wants the party's final figure. This should be immediately rejected, because a party giving a final demand or offer will draw a line in the sand and the party will now have an emotional investment. Almost without exception, a settlement, if there is to be one, will require movement off the final figure by both sides. The safe course, when a party offers to disclose the final demand or offer, is to request that it not be disclosed so that a line is not drawn.

A problem may arise during the first caucuses if the plaintiff's demand is so high or the defendant's offer so low, is that the other side is reluctant to respond. The mediator should require some response, however slight, rather than go back to the first party and ask for a more realistic demand or offer. Parties do not like to go twice in a row, for they are bidding against themselves. This they will not do. As long as there is some response, the process can move forward. Sometime during the day, the parties will begin to make more realistic moves, recognizing that they are simply wasting time and money.

After a new demand or offer has been made and the mediator begins a caucus with the other side, the new demand or offer should not be disclosed until the caucus is completed. If the new figure is disclosed in the beginning and it is unreasonable, the caucusing party might get discouraged and not wish to complete the caucus, feeling that settlement is not possible. Therefore, the mediator should put off disclosing the figure, even when requested, in order to complete the work that must be done first. It should be remembered that the longer the parties are involved in the process, the greater is their investment in it, thereby increasing the likelihood for final compromise.

f. *Insurance Coverage*. In the first caucus, the mediator should inquire what the policy limits are if there is insurance coverage. If a plaintiff's demand exceeds policy limits, this indicates that the plaintiff hopes to settle for policy limits or intends to go after the defendant's personal assets above policy limits. In the latter instance, the defendant should be present with separate counsel to advise her. In any event, when the plaintiff makes a demand of policy limits or less, the defendant should put the insurance carrier on notice, in writing, to settle or face a potential bad faith claim.

It is also helpful for the plaintiff to know if the defendant has a deductible which requires her to pay, for example, the first $100,000. The mediator, therefore, knows that until the offer exceeds $100,000, the carrier has paid nothing except the costs of defense.[74] Generally, if the carrier attends the

74. Some insurance policies, called withering policies, provide that the amount of coverage declines as attorney fees and costs are incurred. For example, a policy may provide coverage of $500,000 but is subject to being reduced as costs are incurred. At the time of the

mediation, the mediator can assume that it is willing to contribute to the settlement.

g. *Subrogated Interests, Liens or Debts.* In any mediation, it is important to inquire whether there are any subrogated interests, liens, or debts that must be paid out of any settlement obtained. Many times, the lien or debt is so substantial that it dictates the settlement terms. Typical liens or debts include medical expenses paid by a health care provider and workers compensation medical payments and benefits paid by the employer's carrier. Generally, these lienholders join the plaintiff's side of the case, because they are interested in the plaintiff recovering as much as possible so that they can obtain one hundred percent of their lien.[75]

h. *Costs of Litigation.* Litigation costs are an important consideration and should be inquired into on the plaintiff's side of the case. If experts have to be retained and a number of depositions have to be taken, costs could become significant. It is possible that the anticipated costs through trial might exceed the value of any expected jury verdict. If a case is cost-driven, this should be discussed with the party. There is always a point where risk-free settlement (a bird in the hand) is worth more than incurring substantial costs and risking an adverse verdict (two birds in the bush).[76]

On the defense side, costs are even more real because not only must experts be reimbursed, but attorney fees and costs must be paid. Sometimes these proposed costs might be substantial enough that if paid by way of settlement, the case could be resolved. There are even some statutes that have fee shifting

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mediation, perhaps $35,000 has been spent in attorney fees and $15,000 in costs. There is, therefore, only $450,000 still available for settlement. If the defendant expects to spend another $100,000 to defend the case if settlement is not reached, it means only $350,000 will be available to pay any judgment entered. These are considerations a plaintiff must weigh at the time of the mediation because it might be difficult to recover anything from the defendant above available insurance.

75. In a case involving a workers compensation lien, the file may still be open for future medical coverage. Many times a carrier will compromise its lien to get a closed file and not have to pay future medical expenses or benefits. Many states provide that the plaintiff's attorney is entitled to a fee from the carrier, either one-third or one-fourth, if she represents the carrier in the litigation and the case goes to verdict. Therefore, in the mediation the carrier should deduct that percentage in asserting its lien.

76. In most jurisdictions, a plaintiff must reimburse her attorney for costs advanced by the attorney, win or lose. Therefore, if the case is expert intensive, costs might be significant, and although the attorney might be on a contingency fee basis, the risk to the plaintiff of losing and ending up owing the attorney money might be too great a risk for the plaintiff to accept. This might be particularly true if the plaintiff is already in debt and bill collectors are in constant contact. It might be a good strategy for the mediator to point this out.

provisions, that is, the defendant must not only pay its own costs and attorney fees, but those of the plaintiff if the latter is successful at trial.[77]

There is one caveat, however, when inquiring about costs when an insurance carrier is defending. Some insurance companies will not consider costs of litigation—they would rather pay counsel than have the reputation of paying costs in meritless cases. Therefore, they object to being asked what their costs might be. For this reason, an inquiry concerning costs might be delayed until later in the mediation if it becomes clear there is liability and the case is not meritless.[78]

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77. 42 U.S.C. § 1988(b) (2000). Also of note is 15 U.S.C. § 15(a), which provides in part:

> any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (2000).

In those instances when there is a fee shifting statute, a defendant must be concerned with what is her best net result. For example, if the defendant believes her best case in front of a jury is worth $20,000 and will cost $40,000 to defend, and the plaintiff's costs and attorney fees are $40,000, the defendant's best net case is $100,000. If she could settle the case for $50,000, she will save $50,000. This, however, may be considerably more than what the defendant feels is a fair settlement. However, the defendant must look at the economics rather than what she feels is a correct evaluation of the case, which may only be $30,000.

78. Case Study: A mediator used costs of litigation to settle an employment discrimination case. Plaintiff, an African American, was allegedly given an inordinate amount of janitorial work although he was a trained diesel mechanic and hired to work on heavy diesel engines. He also complained of racial slurs made by other employees and that he was not given appropriate merit raises. However, the company was able to demonstrate that his wage increases were strictly in line with other mechanics at his level. Consequently, his only real injuries arose out of the racial slurs and the inordinate amount of cleanup work he was required to do. These were provable, but the damages arising from this conduct were minimal.

In the defense caucus, the mediator asked counsel what he thought it would cost to defend the charges. Counsel responded with $40,000 to $50,000. He then asked what he thought the plaintiff would spend in attorney fees and costs to prosecute the case, and he responded about the same. The mediator then pointed out that although the plaintiff might only recover $5,000 to $10,000 in damages, the defendant's net cost to reach that verdict could be $80,000 to $100,000 in costs and attorney fees. After several caucuses, the mediator suggested the case settle for $30,000, pointing out to the defendant that at that level it would save $50,000 to $70,000 in costs. The case settled for $25,000.

D. *Subsequent Caucuses*

Rarely is a case settled in one or two caucuses. How many caucuses are required depends on the complexity of the case and the willingness of the parties to compromise early on. In subsequent caucuses, the mediator's primary goal is to keep building rapport and trust. The parties must understand that the mediator is trying to achieve the best possible result for all concerned.

After the first caucus, a certain number of issues will be eliminated as not controlling. The mediator will try to reduce the issues to those that will control the outcome of the case—the determinative issues. In doing this, the mediator indirectly will be helping the parties to evaluate their cases and properly analyze and weigh the evidence, particularly those matters that are raised for the first time at the mediation.[79]

In subsequent caucuses on each side, the mediator primarily will be discussing the weaknesses of the caucusing party's position as raised by the other side. As noted above, if in the first caucus a party fails to raise or recognize certain weaknesses in the case, particularly those that are obvious, the mediator should not play devil's advocate and start arguing with counsel. This undermines

79. Case Study: Plaintiff, a farmer, was seriously injured when her tractor was rear-ended by a semi-truck. Plaintiff had entered a four lane separated highway at night traveling 11 miles per hour. The truck was traveling at less than the 65 mile-per-hour speed limit and simply did not see the tractor in time. Although seriously injured, the plaintiff was ticketed and the trucker was not.

In the first plaintiff caucus, counsel expressed concern over the fact that his client did not have a slow moving vehicle sign attached to the rear of the tractor as required by law. He argued, however, that the trucker should have seen the flashing amber lights and the rear red lights. Defendant's counsel, in the first defense caucus, argued that because it was dark, his client could not see the plaintiff. He argued that the plaintiff was more than 50% at fault and, therefore, could not recover.

In subsequent caucuses, it was developed that the plaintiff was hauling a five-foot bale of hay attached to the rear of the tractor. There are three positions for the bale: on the ground, halfway up, and all the way up. If the bale was all the way up, it blocked the rear lights of the tractor, whereas if it was in the half position then the lights were still visible. Plaintiff stated she put it only halfway up. However, one of the defendant's engineers examined the tractor after the accident and was able to determine it was in the high position. Plaintiff could not refute this.

In the fourth caucus with the plaintiff, it was developed that there were three large lampposts lighting the intersection where plaintiff turned onto the highway. In other words, the defendant had to have seen the plaintiff when she was crossing onto the highway and turning to drive north. The lamps were barely visible in some photographs taken during the day, but at night they would light up a large portion of the highway. Defendant admitted that this was an added concern. As a result of this new evidence, the insurance adjuster handling the case made calls and put additional money on the table, and the case settled. The case illustrates how evidence can be developed during the caucuses.

the rapport the mediator is trying to build. Rather, she should wait until the second and later caucuses to raise them. Now they can be raised as the other side's strengths that the party needs to address.

As these determinative issues are weighed, the parties must face the question as to the likelihood that they will win or lose on each. The greater their risk of losing, the more they need to begin compromising and work towards a resolution they can accept.

In each subsequent caucus, the mediator must remain nonconfrontational. Little is gained by putting the party or counsel on the defensive. Questions should be asked that are supportive rather than confrontational, understanding rather than overbearing. Such questioning is discussed in a subsequent section of this Article.[80]

Ultimately, the mediator is not trying to convince a party she will lose the case or will not get a result that she would like to achieve; rather, she is trying to help the party understand what the risks are that she will lose or will not achieve the result she seeks. The burden of weighing risks rather than end results is far less onerous on the mediator and less threatening to the parties.[81]

It should also be noted that the more the mediator can get the parties to speak and participate in the process, the more productive the caucus will be. Even encouraging them to vent and express their feelings and frustrations can further the cause. A mediator needs to learn what the parties are thinking, for only in that way will she know how to further the process. The best thing that can happen is to have the parties lighten up and perhaps laugh or speak of other matters during a break or interlude. This is a strong signal that rapport is being established.

E. *Final Joint Session*

The mediation should conclude with a final joint session.[82] All participants should be present. The mediator will announce that the case settled, that the mediation is being continued another day or by telephone, or that the parties were unable to reach a settlement.

If the case has settled, the specific terms of the settlement should be

80. *See* discussion *infra* Part VIII.G.

81. In discussing the risks with each side, it is far more effective to read from depositions or documents than to summarize them. When a mediator can point out the actual words a party gave in her deposition, which constitutes an admission against interest, it has a far greater impact than just to summarize the point.

82. *See generally* Wilk & Zahar, *supra* note 13, at 58.

reviewed and a preliminary settlement agreement executed by the parties.[83] A decision should be made as to who will prepare the formal settlement documents, including the papers of dismissal. The mediator should not participate in the formal memorialization of the settlement other than to confirm its terms.[84]

F. *Continuing the Mediation*

If the case is not settled the first day, the mediator should request that the parties keep the process going by meeting again or by telephone.[85] Rarely, if ever, will the parties harden their position or backtrack on what has already been accomplished. The worst that will happen is that they will not change their

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83. *See generally id.*

84. Some mediators have the parties execute a handwritten one-line form to confirm that there is a settlement. This can be destroyed when the formal documents have been executed and the case dismissed. The purpose of this is to assure that parties will not renege on an oral settlement. An oral agreement in most jurisdictions is just as binding as a written agreement; however, parties, particularly plaintiffs, feel that if they have not signed something they are not bound and can repudiate the agreement at a later time. A typical one-line form might read as follows:

Settlement Agreement

Jane Doe agrees to accept, and the Ajax Transportation Company agrees to pay, $350,000 in full and complete settlement of all claims arising in Case No. LAV 07138, Iowa District Court, Des Moines County, Iowa. The parties agree to keep said agreement confidential.

Dated: _____

_____ _____
Plaintiff Defendant

_____
Mediator

Of course, in a more complex case, more terms may have to be spelled out in this preliminary agreement. The parties may even choose to prepare and execute the final documents while all of the parties are still at the mediation.

85. If the mediation is to be continued by telephone only, the mediator should initiate those calls within a day and periodically keep in touch even if there has been no progress. Keeping in touch demonstrates that the mediator is trying to move the case along, and it reminds the attorneys that the case is still pending and should not be overlooked as they get involved in other matters. In making telephone calls, there is one caveat: the mediator should communicate only with the attorneys and not the clients unless special permission has been given to do so. Not infrequently, the mediator will be requested to contact the adjuster in the case directly rather than communicate through the attorney.

position. More times than not, the passage of time will bring progress. Generally, it is unnecessary to bring everyone back together again. It is enough that the mediator caucus with each side at their respective offices and report back to the other.

To set up future contacts, the mediator should verify with both sides the final demand or offer that has been made. To prepare for future contacts, the mediator can do several things. First, she can draft a summary of the position of each side by pointing out what the other side is arguing and the issues that must be resolved. Although a single memorandum might suffice, the better practice is to prepare a separate memorandum for each side. Second, if a legal question has arisen, the mediator might request the attorneys to prepare a legal memorandum answering the question or, with permission, do her own research. Third, in preparation for a caucus with one side or the other, the mediator might have opposing counsel put together a thirty-minute video of significant deposition testimony or a notebook of critical documents.[86]

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86. Case Study: Properly preparing for subsequent caucuses after the first day of mediation has ended was illustrated in an interstate highway collision. Plaintiff was driving with her two-year-old daughter and six-month-old twins when her car slid on ice during a blizzard and struck a truck, which had jackknifed across the interstate and was blocking traffic. Nobody was hurt, and the plaintiff moved one of the twins to the cab of the truck to keep him warm and returned to get the other two children. Just as she got to the car, a semi-truck, going 40 miles per hour, slammed into the back of her car killing the two children instantly.

Plaintiff and her husband sued both truck drivers for wrongful death on behalf of the children, and the plaintiff sued for damages on a bystander claim. All attorneys involved recognized that the bystander claim was quite substantial.

At the mediation, the truck driver that had jackknifed and was blocking the highway settled for $600,000. The truck driver that killed the children offered only $300,000, and the mediation broke down. Recognizing that the adjuster who attended the mediation had inadequate authority, the mediator arranged to travel to the insurance carrier's office and caucus with the vice president who was directing the negotiations.

In preparation for the caucus, the mediator asked plaintiff's counsel to condense the deposition video of two truck drivers to thirty minutes. The first was that of a driver who learned of the accident and tried to slow traffic down approaching the scene. He traveled down the middle of the highway with amber lights flashing. He stated that the truck driver who crashed into the car passed him using the shoulder of the highway, going 50 miles per hour in the blizzard, and as he did, looked over and gave the witness the finger. The witness then described the scene and the two babies that were killed. In doing so, he started to break down weeping.

The second driver, who crashed into the car, had a beard, unkempt hair, and was very defensive. He did not feel he was going too fast for conditions and argued that the blizzard came up suddenly. Then at the end of the video the driver was asked what "the finger" meant, and he said it meant "_ _ _ _ you." He next was asked whether he had ever given anyone the finger, and he answered, "Yes." Counsel did not ask the next obvious question because that had already been established.

VII. QUALITIES OF THE MEDIATOR/PEACEMAKER

As a general proposition, the peacemaker is quite unique to the judicial process. He or she comes to the table not as an advocate, bent on winning the case, but instead as a facilitator trained to settle the case. Until recent times, only advocates participated in settlement conferences, seeking to win for their clients through the negotiation process. This strategy was to make the other side believe they intended, and were prepared, to go to trial unless the other side capitulated. Trained in advocacy, the advocate knows no other way than to focus on winning. On the other hand, the peacemaker's training and focus is not to win for one party or the other, but to look at the case in its entirety and help resolve the conflict. The skills employed by an effective mediator seek compromise rather than submission, cooperation rather than confrontation, and creativity rather than rhetoric. The following discussion considers the qualities a peacemaker should express.

A. *Have the Aura of a Peacemaker*

A good mediator should understand the importance of having an aura of peace about her. The moment she enters the room for the initial joint session, her very presence should begin to still the turbulent waters. Parties enter the process with anger, animosity, frustration, bias, and pride, which often prevent them from looking at their cases realistically, thereby making settlement more difficult. The presence of the peacemaker should help calm these emotions and assist the parties to focus on resolution.

In order to truly be a peacemaker and directly impact the emotional atmosphere of the settlement conference, the mediator should adopt a peacemaker's mentality.[87] She cannot be in an angry or aggressive mood and expect to still the troubled waters of others. The mediator, therefore, must not only be prepared concerning the facts and law of the case, but should enter the process with a positive and uplifting attitude.[88] This is particularly true in

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When the vice president saw the video, there was little more to do. The carrier offered $3 million and the matter was later resolved.

87. For some, adopting a peacemaker's mentality can be natural and easy; for others, it may require discipline and practice. If a person falls into the latter category, there is no better place to practice than at home with one's family or in the workplace with employees and associates. Certainly, if one is able to maintain peace and calm in her personal life, she is better positioned to calm the storms of others.

88. There is, perhaps, no more difficult setting for mediation than in divorce and child custody matters. Often parties come into the fray seeking to hurt and even 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

difficult mediations where there are deep-seated, emotionally charged issues.[89]

B. *Be Patient*

A mediator must possess and exhibit extraordinary patience throughout the process. If the mediator loses her temper or in frustration makes a sarcastic remark or observation, the mediation may end. She must be patient not only with the parties, but also with counsel.

The mediator must sense how fast she can move a plaintiff down and a defendant up. If either is not ready, the mediator should patiently respond to concerns they have before seeking further movement. If a certain amount of venting must occur before a party is ready to proceed ahead, this should be permitted. The mediator needs to be an effective and positive listener.

Perhaps the most challenging display a mediator can face is the attorney

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the legal action commenced often develop a hatred for each other and for counsel that they never would have dreamed possible. In this setting, the mediator must overtly demonstrate the qualities of a peacemaker, gently and compassionately guiding them towards resolution. If the mediator is not a natural peacemaker or has not been trained to be one, she may find it more difficult to assist in the resolution of matrimonial conflicts. Likewise, family disputes among siblings and partnership disputes generate great animosity and require peacemakers who can gain the respect and confidence of the parties and counsel.

89. Case Study: The peacemaker approach is illustrated in a case in which a five-year old child, in her second week of kindergarten, was run over by her school bus and killed. Four children, including the decedent, exited the bus at a rural stop and started to cross in front of the bus. The bus driver, a woman who was pregnant at the time, became distracted when a car coming the other way did not slow down until it neared the crossing children. Believing all the children had crossed, the bus driver started up and struck the decedent.

The driver of the bus was devastated by the accident, quit her job, and became seriously depressed. She was later hospitalized and received counseling. She could not be deposed because of her depression. Two years after the accident the case was mediated. The driver would not leave her home and was having difficulty raising her own child born after the accident. When the mediator learned of the driver's condition, his first goal was to get her dismissed from the case in an effort to help her cope with the tragedy.

The mediator first convinced plaintiff's counsel that keeping the driver in the case would hurt rather than help the case because of her mental condition. A jury might feel great sympathy towards her. Further, she had little money to pay a judgment, and the school district was well insured. He agreed to dismiss her.

The mediator then talked to the defense and convinced them to admit liability so it would be unnecessary to call the driver as a witness to testify as to what happened. The school district agreed. The driver was then contacted and told of the good news with the hope it would help her in her recovery. With this completed, the mediator concentrated on the case and got it settled. An important priority for the peacemaker in this case was to help the driver, who faced a serious personal tragedy, to come and find healing. This, it is suggested, is the true essence of peacemaking.

who seeks to manipulate her. Some attorneys believe that if they can intimidate the mediator, she will be easier to manipulate. The attorney may threaten to terminate the process and leave or may accuse the mediator of bias or lack of objectivity. In such instances, the disciplined peacemaker will not react to these challenges. She will not show anger, intimidation, or frustration, but will allow the attack to play out and patiently keep the mediation on course. When challenged, a mediator should always remember what she is about—she is there to work with and be supportive of the parties and counsel. In this regard, two things should be kept in mind. First, to defend herself, or to lash out at the attorney in front of the client, is a fatal mistake. Instead, she should agree with the attorney and be supportive of her in front of the client.

Second, no matter what happens or what is said, the mediator should exercise all the discipline she has and not react or show displeasure. If she signals even the slightest intimidation she will be playing the attorney's game and the latter will probably continue in her efforts. Sometimes a little humor can break the intensity of the moment, such as, "I am only the mediator, and I am not the one to shoot."[90]

C. *Be Positive*

One of the secrets to successful mediation is to remain positive, even in the darkest moments. From the opening statement to ultimate resolution, the

90. Case Study: In one case of intimidation, the mediator was flown to an eastern city to mediate a case involving the sexual abuse of three elementary school boys. The pedophile was the coach of their basketball team. Being a parochial school, the diocese was named as a defendant.

The plaintiff's attorney was a well-known trial lawyer who had an extremely impressive record of victories in the courtroom. He demanded $3 million to settle the case, although the abuse consisted of rubbing the boys' private parts with their clothes on. With one of the boys, this occurred several times, and with the other two, only once each.

The diocese responded to the plaintiffs' demand by offering $250,000 for the three boys. After one hour, the plaintiffs lowered their demand to $2,500,000 and the diocese offered $350,000. At the next plaintiffs' caucus, the attorney asked to speak to the mediator alone. He then proceeded to berate the mediator and accuse him of incompetence because in an hour he had gotten the diocese to go up only $100,000. He told the mediator that they had paid a lot of money to fly him in because he was supposed to be experienced in these kinds of cases. Finally, he told him if he did not get some substantial money in the next thirty minutes, "you are history."

To say the least, the mediator was intimidated and frustrated by the encounter. It took all that he had not to react or defend himself and his actions. Instead, he used a peacemaker technique and agreed with the attorney and stated that he would be just as frustrated and upset as counsel, if he were in his shoes, with the progress being made. Because the mediator did not react or show he was intimidated, the attorney calmed down and the mediation continued at a somewhat faster pace than before and settled at $620,000.

mediator should constantly affirm that settlement is not only feasible, but will happen. At no time should the mediator show discouragement or indicate there is doubt as to the outcome. Negative words or signals are contagious and will make settlement that much more difficult.

Most mediations run through a cycle. At the opening session, everyone is fresh and hopes are high that the case will resolve—on their terms. As the mediator works through the first caucus on each side and initial demands and offers are made, discouragement often sets in. Many times the lawyer or client will remark that the last offer or demand was an insult and not worthy of a response. The mediator, however, should point out that any movement is a positive sign, and as long as the parties keep moving, settlement will be realized. The mediator should keep identifying positive signals.

One of the most effective ways to stifle negativism is to keep pointing out that the mediation is following the pattern of most mediations and that nothing unusual or out of the ordinary is happening. If the parties think their mediation is different from most, they will become concerned and even give up. They must be made to understand that what is occurring always occurs in successful mediations.[91]

Being positive is conveyed not only by what is said, but also by the mediator's appearance and expressions. If a mediator walks into a caucus room frowning for any reason, the parties will interpret this as a bad sign. When there is any progress, the mediator's upbeat expression and demeanor should reflect this fact, however slight it may be.

D. *Be Persistent*

An important quality of a mediator is to be persistent. The most often heard criticism of mediators is that they gave up too soon. A good rule is to never terminate a mediation until the mediator is fired.

Lawyers are constantly testing mediators. They will suggest that there is little use of continuing the mediation because the parties are so far apart. This is not necessarily a signal for the mediator to terminate the process, but rather a show of force to get the other side's attention. The mediator should not react but

91. For example, when a plaintiff demands $500,000 in a minor soft tissue case worth, at most, $30,000, the mediator should not react or look discouraged. When disclosing the demand to the defendant, the mediator might make it appear that such an initial demand is to be expected and is not unusual. As long as the parties believe that this is what normally happens (and it is in fact what normally happens), the parties will continue to have hope. Only when the mediator suggests that what occurred is out of the ordinary and she is concerned will discouragement set in.

continue the process, explaining that termination is premature until the mediator finds out where each side is going.

E. *Be Perceptive*

A good peacemaker must be perceptive. She should be capable of identifying, understanding, and exercising good judgment concerning the relevant factual and legal issues.

The mediator has ready access to the strengths and weaknesses of each side through the caucuses. Therefore, she is in a unique position to identify issues, both factual and legal, which the parties may have overlooked, or perhaps failed to focus on properly. Many times such issues, once identified, understood, and evaluated, can lead to settlement. For this reason, the mediator should constantly question and not be hesitant to raise relevant issues. If a legal question arises that the mediator feels should be examined further, she might ask one of the attorneys to research it for her or ask permission to do the research herself.[92]

F. *Be Sensitive*

A peacemaker must be able to read, and be sensitive to, the feelings and motivations of the parties and their attorneys. Initially, the mediator should try to determine: (1) whether the party will be cooperative; (2) whether the attorney is having difficulty with her client; (3) whether the attorney is difficult to work with and whether she will obstruct the process or hold out until she gets what she wants; (4) whether the attorney is in conflict with the client—that is, the client may wish to settle but the attorney is holding out for more money; and (5) whether the client wishes to settle at any price because she no longer can stand the stress she is under.

Clients who are uncooperative generally say nothing and sit with their arms folded, not even looking at the mediator or their attorney. In such situations, the mediator will have to be patient and work to get them to be involved in the process and begin speaking their mind. They need to vent and should be

92. There is one caveat to the mediator identifying legal or factual questions that counsel has overlooked. The mediator must be careful not to interfere with the case as the attorneys on each side have developed it. If the mediator discovers a factual or legal question, she should not disclose it to the side that will be benefited by it. Her role is not to *assist* counsel in the prosecution or defense of their case. She should disclose it only to the party that will be hurt. This approach encourages the party "injured" by the disclosure to be more reasonable. She must assume that if the mediator discovered the point, so will opposing counsel. Thus, disclosure furthers settlement. Whereas, disclosure to the party benefited only hinders resolution. They will thank the mediator, assume a stronger negotiating position or terminate the mediation and continue to litigate the case.

encouraged to do so. This is the only way a mediator will learn how to approach them and begin getting compromise. It is also helpful if the mediator can get them to speak about themselves, their families, their grandchildren, sports, or any other topic of interest.

If the lawyer is having difficulty with her client, she will generally signal this in some way. Either she will tell the mediator directly, or she will rely on the mediator to ask questions that will permit her to speak about the problems she is having in developing the client's position. For example, when the mediator asks for weaknesses in the case and the attorney turns to the client to answer, the mediator knows that the attorney probably was unable to speak of such matters previously because the client was not prepared to listen.[93]

Not infrequently, the attorney will be the problem. Some enter the process with skepticism or with an improper motive, such as to use the process to learn the opponent's approach to the case. Others use the process with no intent of settling but instead want to see how far the mediator can move the other side and then ask for more on the eve of trial. Some attorneys like to have free discovery.[94] Whatever the situation, the mediator must determine early on how she will handle such an obstructionist. As noted above, whatever course she takes, she must be patient with the attorney and support her in front of the client.

It is important initially to try to determine if the plaintiff, in particular, wishes to get the matter settled at any cost. This could be motivated by several factors: (1) the party is under great stress and for peace of mind she wishes to end the matter; (2) a considerable period of time has elapsed and the client has become frustrated with long delays and unanswered telephone calls; (3) the plaintiff is being harassed by bill collectors and wishes to get rid of her debts; or (4) the plaintiff is paying increasing out-of-pocket expenses that she cannot

93. There are times when an attorney and client come into open conflict. The client may wish to settle and the attorney wants to hold out for more money. In such a situation, the client has the last word, and if she wishes to settle the attorney must honor this. However, the mediator can give the attorney an opportunity to sign off on the matter by stating on the record that the client is settling contrary to his recommendation.

94. Case Study: One attorney entered mediations with no intent to settle. He used the process to see how much the mediator could get and then he asked for more at the time of trial. In the case, the client, a young boy who had darted into the street and was hit by a concrete truck and seriously injured his leg, was offered $300,000. The lawyer rejected this. At the time of trial, he demanded $800,000 and the insurance company offered $500,000. This was rejected, and after the trial, while the jury deliberated, he offered to settle for $650,000. The insurance company declined this and waited for the jury verdict. The jury returned a verdict for the defense. Although this was just another case for the lawyer, it was a tragic result for the little boy and his family. Lawyers who try to manipulate the mediation process risk a great deal for their clients.

afford. Whatever the reason, if the mediator can detect the need for resolving the matter, it will help her in working with the party and finding resolution. Unquestionably, these are matters a lawyer will try to hide from the mediator and the other side for fear that it will decrease or increase the value of the case, whichever side the party is on.

As the mediation progresses, the mediator must be sensitive to whether the attorney and party are being candid or whether they are using the mediator to further their own ends. In such situations, they are using the mediator to negotiate rather than mediate. The mediator must also be observant in multi-defendant cases where one or more defendants may hold up a settlement to get a result they wish. In other words, they are riding on the coattails of the other defendants.[95]

G. *Be Friendly and Personable*

An effective peacemaker should at all times be friendly, personable, pleasant, and polite. This can be difficult, especially at the end of a complicated and frustrating mediation when all of the parties and attorneys are accusing each other of bad faith. The mediator must be the one person to stay above the fray. The message to be conveyed is that if the mediator can remain pleasant and positive in spite of the problems, the parties likewise should keep trying for an amicable resolution.

Because friction nearly always exists between the parties, an outgrowth of the adversarial system, the mediator should present the opposite side as favorably as possible. For example, it helps a plaintiff to know that the adjuster is cooperating and willing to make telephone calls to get a matter resolved. Also, if opposing counsel is cooperative, it is helpful to point this out. The mediator should try to defuse any irritations that might exist on either side. It is important that the mediator not speak critically of the other party or counsel. This only adds fuel to the fire and is unnecessary and counterproductive to the settlement process.

95. At some point, the mediator needs to determine how far parties will compromise before they are pushed. One technique to determine this is to ask, "If I could get the other side into a range of $40,000 to $50,000, for example, would you consider this? I am not asking you to accept it, just consider it." If the party or counsel hesitate, look at each other, or have to think about it, these are all positive signs of acceptance. The mediator must be sensitive to whether a "no" means "no" or whether it means "maybe." Most of the time a "no" falls into the latter category.

H. *Be Professional*

A mediator must be professional at all times. She must be absolutely neutral, nonjudgmental, and never betray the confidence the parties place in her.

I. *Be Neutral*

Neutrality is maintained when the mediator deals with the interests of all parties on an equal basis. What she does for one side she must do for the other. There must be symmetry. Not only must she be neutral in fact, but she also needs to be concerned with the appearance of neutrality. Neutrality begins when the mediator is first retained by the parties and continues through to settlement.

When the mediator is retained to handle a mediation, one of the parties may wish to contact her to ask questions about the process. Such contacts are invited, and there is nothing improper concerning such ex parte communications.[96] To avoid the appearance of partiality, however, the mediator should contact the other side and explain that certain questions were asked and ask whether counsel or the party has similar questions. In the alternative, the mediator could set up a conference call with all parties and counsel participating to discuss the ground rules.

Neutrality and the appearance of neutrality require that the mediator travel to the mediation site alone and not with one of the parties or attorneys, even if that would be more convenient. Even though traveling together would be no different than a private caucus, there is the appearance that the involved party would gain an advantage.[97]

At the mediation site, the mediator should avoid small talk with those who have arrived first while waiting for the others. The mediator should remain in the waiting room until all are present and then enter the conference room with the latest arrivals.

At the commencement of the joint opening session, the mediator should be seated in a neutral place, usually at the end of a rectangular table with no one seated on her immediate right or left. If at a circular table, she should sit an equal

96. *See supra* note 14.

97. Case Study: One mediator, exiting the plane on which he was traveling, accidentally bumped into the adjuster going to the same mediation. They took a taxi together, rode up the elevator together, and entered the mediation site together. When the plaintiff learned they had been on the same plane, he assumed too much and became furious and almost terminated the mediation. The better course would have been for the mediator to take a different elevator to the mediation site so no questions would have been raised concerning their pre-mediation contacts.

distance from each side.

In her opening remarks, the mediator should carefully explain her neutrality and give a pledge that she will maintain it at all times. In speaking to the participants, she should look at all participants and not just one person or side. Nothing can be more disconcerting for a party or side than to be ignored by the mediator as she speaks.[98]

When taking meals, neutrality is maintained by eating alone, unless all agree that the mediator can use the lunch hour as, for example, a caucus. When doing so the mediator, at a minimum, should pay for her own meal—she can pick up the entire tab if she wishes. If lunch is brought in by the host, the mediator should still pay for her own food. Normally, the host will insist on paying, but this should be rejected even if the other side is not present and will not know. The fact is that the host will know and will be impressed that the mediator is so concerned about the appearance of neutrality that she rejects a free meal.

Finally, neutrality extends to working with the attorney and her client. If the mediator wishes to speak alone with counsel outside the presence of the client, she should first explain that as part of the process, the mediator needs to speak alone with counsel. However, she will do this on both sides. If a client believes only her attorney is being spoken to alone, she will quickly become concerned about what is being said and why they cannot speak in her presence. Likewise, if a conflict arises between the attorney and her client, the mediator should remain neutral and say nothing. The worst thing she can do is side with the attorney because this will appear that the two are ganging up on the client, when they really only have her best interests at heart.[99] By remaining neutral between the attorney and client, the mediator can still help the client if she has built the proper rapport and trust. At some point, the party will have to turn

98. Mediators are tempted to speak only to those individuals who are unfamiliar with the process to explain it to them. It is natural not to look at those who are familiar with it or have worked with the mediator before. However, the mediator should remain balanced in her eye contact with all sides and not single out one or two individuals. Such special attention can make them feel uncomfortable because they are the only ones who are strangers to the process.

99. Case Study: In a slip and fall on ice case in Iowa, the attorney tried to convince his client that most such cases are lost and that she should accept an offer of $35,000 for a broken ankle, which completely healed. The mediator joined in reinforcing what the attorney was saying until the client asked why both favored the defendant. Instead of capitulating, the plaintiff got back up and demanded $60,000. She said, "The jury will believe me." The mediation failed, the case went to trial, and she received nothing. Bitterly she asked, "How much did they pay the judge?" In this case, it appeared as though the attorney and the mediator were ganging up on the plaintiff. It would have been more effective if one of them backed off and supported her and more deliberately explained the problems with her case.

somewhere for guidance if she has lost faith in her own attorney. The patient mediator is then positioned to help.

J. *Be Nonjudgmental*

In some mediations, the mediator is asked to be evaluative and place a value on the case once she has heard all of the evidence. If the mediator is not so requested, she should remain nonjudgmental for several reasons. First, whatever value the mediator places on the case, she will be favoring one side over the other, or so it will be perceived. If the plaintiff asks, and the figure given by the mediator is favorable, there is little incentive for the plaintiff to go below the figure for, after all, that is what the mediator said the case was worth. And if the defendant asks and the figure given is acceptable, there is no real incentive for the defendant to go above it. Yet, if a case is to settle, both parties must go beyond what they would like to settle for.

Second, a request that the mediator place a value on the case could actually be a way to test the mediator's bias. For example, if, at the plaintiff's request, the mediator gives a value that counsel feels is too low, the plaintiff will conclude that the mediator has poor judgment, is inexperienced, or is defense-oriented. Likewise, the defendant and counsel may feel the mediator is plaintiff-oriented if the figure is too high. It becomes a no-win situation for the mediator, whichever way she goes. More importantly, by giving her evaluation, she will, at a minimum, lose rapport with one side or perhaps both.

Third, the experienced mediator recognizes that no one knows what a jury will do. In giving an evaluation, the mediator might just be proven wrong if the case later goes to trial. The bottom line is that the mediator does not have to make such a judgment call and risk antagonizing one party or the other and undermining the rapport and trust she is trying to build.[100]

Fourth, many times a settlement figure reflects considerations other than money. A plaintiff may wish to end the case because of the stress it is causing or because bill collectors are constantly hounding her and she wishes to pay them off. She might, therefore, go beyond the value the mediator puts on the case. Likewise, a defendant may pay more than the mediator's valuation because she wishes to avoid the possibility of a run away jury verdict.

Being nonjudgmental also means not judging the worthiness of the parties. Some people are simply more attractive and likeable than others and to lean

100. If, towards the end of a long mediation, one party or the other asks for the mediator's valuation, and the mediator is certain that she has the trust of the party, she might, in that instance, state what she feels the case is worth or whether the defendant's last offer is in a range of fairness.

towards them in the settlement process could cause an injustice. All persons are worthy and have the right to find resolution that fulfills their best interests. The mediator need only find a way for both to end the dispute and part in peace. This is the essence of being nonjudgmental.

K. *Keep Confidentiality*

An important part of the caucus mediation is that it permits the parties and counsel to speak to the mediator in strict confidence. It is with the assurance of confidentiality that they are willing to discuss the weaknesses in their cases or what they feel a jury will do—best and worst case. Confidentiality permits them to speak candidly to the mediator and discuss various strategies to find resolution. The parties and counsel can even signal how far they are willing to go to reach settlement knowing that such information will not be disclosed to the other side.[101]

L. *Be Principled*

Mediators must operate under the highest ethical standards in the profession because of the very nature of their work. They must be principled, trustworthy, dependable, and act with integrity. Their primary consideration is always the interests of the parties they assist and not their own financial gain. Service to others must be their highest motivation.

At all times, the mediator should respect the attorney-client relationship. This means the mediator should not directly communicate with the client without the knowledge and consent of the attorney. The mediator should remember that she is the guest at the mediation table whose purpose is to assist and not manipulate the process.

Finally, the mediator should encourage the attorneys to continue direct communications between them, particularly after the first day. Again, the mediator is assisting in the process and not dictating how it is to proceed.

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101. The mediator, as a matter of law and agreement, must maintain confidentiality concerning all matters discussed in the joint opening session and in caucus. This is because a mediation is a settlement conference and anything discussed cannot be later disclosed or used at trial. Also, most mediators have the parties sign an agreement that the mediator cannot be subpoenaed or her notes produced. Finally, states are beginning to provide confidentiality in statutes and regulations governing mediation. For more detailed discussions of confidentiality in mediation, see generally Burr, *supra* note 49, at 67–68 (noting the benefits of granting mediators a privilege to protect mediation communications); Deason, *supra* note 49, at 80–84 (emphasizing the importance of confidentiality in mediation and calling for the adoption of the Uniform Mediation Act); Hodges, *supra* note 49, at 436–37 (cautioning that confidentiality is essential in collective bargaining mediations).

VIII. PEACEMAKER TECHNIQUES TO RESOLVE DISPUTES

As noted previously, the primary goal of the peacemaker is to build rapport and trust so that she is better positioned to help the parties find closure. The mediator has certain tools and techniques that will assist her in the process.

Rapport and trust must be earned. This begins by the mediator remaining calm, patient, and compassionate. However, the tools she uses are, indeed, the antithesis of those of the trial lawyer. The latter relies on highly confrontational tools that are designed to cross-examine, impeach, discredit, and undermine. A trial lawyer puts the opponent on the defensive. The trial lawyer's purpose is to win by defeating the party-opponent. The peacemaker's tools, on the other hand, are designed to be supportive, to establish peace, and to bring the parties together so that all are winners. There is no satisfactory resolution unless all are made winners. The common denominator of the peacemaker's tools is that they are nonconfrontational and avoid putting a party on the defensive. There are several reasons for this.

First, the mediator who utilizes techniques that are confrontational, albeit well-intentioned, merely polarizes the positions of the parties. Confrontation requires a response which, by its very nature, is defensive. Being defensive draws a line between the mediator and the party, which can be a barrier to resolution. The mediator who plays devil's advocate forces the party into a defensive mode, which can lead to arguing between them, and that undermines the process.

Second, the party who is forced by the mediator to defend will rationalize the logic of her position and will thereby gain a vested interest in that position, which can become difficult to relinquish. Later compromise would appear to be surrendering or backing down.

Third, the mediator who challenges or confronts a party gives the appearance of being partial to the other side. Neutrality might be questioned. Even if, in fact, neutrality is maintained, there is the appearance of partiality. A mediator can play devil's advocate with both sides so effectively that both may accuse her of being partial in favor of the other. This approach may demonstrate the ultimate goal of neutrality; however, rapport is not established.

To build rapport and trust, the mediator should continually ask herself whether what she is saying or doing will be perceived as being supportive or whether it will seem adversarial or confrontational. If the latter is the case, the mediator needs to pull back and rethink her approach. A confrontational question or statement needs to be rephrased, a brusque manner softened, and the appearance of frustration replaced with patience and affirmation.

Eliminating confrontation and taking a softer, gentler approach will ultimately break the barriers of intransigence. The following techniques are designed to do just that: the art of agreeing; the art of disagreeing; being actively supportive; showing interest in the party and counsel; developing a strategy for each side; building a team concept with each side; using nonconfrontational language; calming the waters of anger and frustration; and eliciting an apology and forgiveness.

A. *The Art of Agreeing*

As a general proposition, whenever possible, the mediator should find ways to agree with each side. The more supportive she can be in this regard, the more rapport she will build.

The art of agreeing, however, is an effective peacemaking tool that can be used to defuse potential arguments. If the mediator finds herself locked in an adversarial encounter with one of the parties or counsel, she needs to find a way to neutralize the exchange as quickly as possible. Engaging in an argument, even as devil's advocate, can only undermine the primary goal.

Attorneys are particularly prone to argue, and not infrequently they will engage the mediator in an argumentative exchange. An effective way to neutralize this is, whenever possible and reasonable, to say, "I agree with you." These words are extremely disarming and can defuse an adversarial encounter quite rapidly. A party cannot argue with herself. By agreeing there is nothing left to argue, there is no basis for further contentious exchanges, and no further energy will be lost in confrontation.

In agreeing, the mediator is really signaling she wishes to be supportive and not confrontational. It indicates that she cares and is not judging, but wishes to work with the party toward resolution. It affirms that disagreement is not part of the settlement equation.

If the mediator has difficulty agreeing outright with the party, she can use a softer form such as, "I do not disagree." This can be just as disarming, yet it conveys a slightly different message. It says the mediator does not wish to argue the point, although she may or may not be endorsing it. She is trying to make clear that differences are not what matter; rather, it is working together for a common end that is paramount and the only consideration.

If the "I do not disagree" response is still too strong, the mediator can use even softer expressions of agreeing, such as, "I hear what you are saying," "I understand," or "Help me better understand." These expressions also signal a

desire to work together.[102]

B. *The Art of Disagreeing*

There are times when a mediator needs to signal to a party that the position taken is untenable and could lead to failure at trial. To not so signal would be a disservice to the party and counsel. This is not being judgmental, but rather being objective.

The mediator must disagree in a supportive way that will not offend; it is a special art. The goal is to encourage the party and counsel to reconsider and re-evaluate the case without taking offense. To say, "I disagree with you," or, "You are wrong and will lose at trial" is too confrontational—it only puts the party on the defensive.

Alerting the party that there may be problems with the case can be done in several ways. The mediator might say, "Help me better understand your position, for I am struggling to grasp it," or, "The other side has raised certain points that I cannot answer. Can you help me?" The mediator might even say, "I am deeply concerned about a certain issue which, if lost at trial, will cost us the verdict."

The mediator must consciously avoid crossing the line and being confrontational. Timing can be important in this regard. To suggest problems with the case too early in the mediation might be interpreted as lacking objectivity or not really understanding the party's position. To raise the concerns later in the mediation, after the mediator has demonstrated that she has worked the case and sought answers, is less threatening.

As noted previously, there is a line between the parties. When the mediator is going to raise difficult questions with one of the parties, she must be certain she is on that party's side of the line. This may take several caucuses. However, the mediator should not raise the problems with the case until she is certain the party in question appreciates the support she is giving and the concern she has for the outcome of the case as it affects the party.[103]

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102. It is herein suggested that one try these agreeing techniques in the social, church, family, or business settings to see their impact. The results will be surprising.

103. Case Study: Raising problems in a mediation is illustrated in a case in which the decedent, a psychiatric patient, hanged himself in the defendant hospital while on a suicide watch. Decedent had voluntarily admitted himself to the hospital as he had done on fourteen prior occasions. The nurse in question wrongly believed that the decedent was to leave the next day and returned his clothes to him. Decedent later hanged himself with his own belt.

The hospital offered $200,000 to the decedent's wife and she demanded $1,500,000. As the mediation progressed, it appeared that liability was fairly strong but

C. *Be Actively Supportive*

Another tool of the peacemaker is to be actively supportive of the parties and counsel. This can be done in a number of ways. In the first caucus with each side, the mediator shows her support by asking about the strengths of the case. She may already know what they are, but it builds rapport to allow a party or counsel to talk about the favorable aspects of their case. The mediator might even suggest other possibilities to be certain nothing is overlooked. For example, she might ask if the opposing party was involved in any drinking, which was part of the cause of the accident. The question might be asked even if the mediator knows there is nothing in the record to suggest this. It signals that the mediator will not leave any stone unturned.

Likewise, the mediator can show support by asking counsel what she believes a jury will do. First, she asks what the best case is, giving counsel a chance to expound on the strength of the case. Then she can ask what the worst case is. Finally, when addressing weaknesses, the mediator can still be supportive by working with counsel to develop a response that will test the opposing party's position.

D. *Show Interest in the Party and Counsel*

Just as important as being supportive, the mediator should show a sincere interest in the party, her welfare, and her future well-being. Inquiry about family and outside activities shows the mediator is interested in the person and not just the settlement value of the case. It shows concern for the future, which the parties will appreciate. Such inquiries should be natural rather than nosy, or else they will seem overly intrusive or artificial.

Likewise, showing sincere interest in the attorneys, their practices, their successes, their outside activities, and their families demonstrates that the scope of a mediation covers more than just closing another file. It shows the mediator

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damages were not. The decedent had been very ill and suicidal for a long period of time. He had not worked in several years, and his doctor testified that he was not likely to recover and return to a normal life.

The mediator spoke to the plaintiff's attorney, pointing out that although liability was clear, he was having difficulty convincing the hospital that damages were substantiated. He asked counsel to help him. As the two discussed the matter, it was clear that damages were problematic. This was compounded by the fact that a similar suicide case, which had gone to trial in the same venue, came back with a defense verdict.

Counsel agreed with the mediator and encouraged the wife to compromise, which she did. The case settled for $350,000. In this case, the mediator disagreed with counsel on the issue of damages. However, his disagreeing was not confrontational but supportive. It was viewed by counsel as being supportive.

is also concerned with the welfare of counsel.

E. *Help Develop a Strategy*

Another technique of the peacemaker is to help each side develop their own strategy to maximize the results of any settlement. This can be done without straining the neutrality of the mediator so long as her efforts are equal on both sides.

In considering strategy, the parties and mediator can discuss whether a large or small move should be made in response to the other side's move. A party, after discussion, might offer to make a substantial move if the other side will make a corresponding move. For example, the plaintiff may be demanding $450,000, but may be willing to move to $350,000 if the defendant will move from $100,000 to $200,000.

Strategic considerations might include a discussion about whether to disclose new evidence immediately or wait until a later time in the mediation if real progress is being made.

There are times in a mediation when something may unfold that was not anticipated, and counsel may seek the mediator's assistance as how to respond. Feeling comfortable in discussing these matters with the mediator is an important outgrowth of the rapport and trust that has been built.

F. *Build a Team Concept*

As the mediator works with counsel to develop a party's case, she really becomes part of the team. She does not lose her neutrality as long as she is helping the other side equally. In this setting, the mediator can use the "we, our, and us" technique. Instead of asking, "How are *you* going to respond to a certain point made by the other side?," the mediator might ask, "How are *we* going to respond?" Instead of asking, "What are *your* risks on this issue?," the mediator might ask, "What are *our* risks?"

This personal team approach might seem artificial for some mediators; therefore, it should only be employed if the mediator feels comfortable with it. There is a caveat to doing this: the mediator must use the "we, our, and us" approach only with reference to the party with whom she is caucusing.

G. *Using Nonconfrontational Language*

The surest way for the mediator to create conflict and intransigence is to use confrontational language. To tell a lawyer or party they are wrong and will lose the case if they do not compromise is to put them on the defensive.

Confrontational language undermines the mediator's effort to build rapport and trust. It needs to be avoided.[104]

The peacemaker's questions or statements are never challenging—they are supportive and show interest in the party and counsel. They should be asked with understanding, gentleness, and compassion. They should demonstrate that the mediator seeks to find a just resolution, fair to all concerned.

If the mediator wishes to discuss weaknesses in a party's case, she will first ask what the strengths are. In this way, the party and counsel will be less threatened when the weaknesses are raised. Rather than directly ask, "What are the weaknesses in the case?," the mediator might ask, "Are there any concerns or weaknesses in the case of which I should be aware?" This does not infer there are weaknesses, only that counsel is invited to discuss them if they do exist.

If a party refuses to discuss the weaknesses in her case in the first caucus, the mediator can raise them in the second caucus with the party by pointing out that the other side has made certain points, which "I could not answer. Can you help me frame a response?"

All questions asked should come across as being supportive even when they raise difficult issues. Other expressions a mediator might use to signal support and not criticism include phrases, such as, "Help me understand," "If I understand what you are saying," "I need to better understand your position on this difficult point," and "If the other side raises a certain point, how can we answer it?"

H. *Be a Supportive Listener*

The peacemaker not only builds rapport through the questions she asks, but also by being a good and sympathetic listener. Active listening is just as

104. There are many phrases lawyers and parties use frequently that signal confrontation. Expressions, such as, "that's an insult," "are you serious?," "you are playing games," "that is not worthy of a response," "get real," "you are nickel-and-dime-ing me," "read my lips," "you are not listening," and "give me a break," all signal conflict. Even softer expressions, such as "I beg to differ with you," "you have a right to your position," "I am just playing devil's advocate," "with all due respect," "I do not disagree, but," and "I respect your position, however" signal some degree of conflict.

Not infrequently, lawyers in negotiations try to isolate the opponent by using haughty expressions, such as, "it is obvious to everyone," "nobody disagrees," "everyone agrees," and "clearly," when everyone does not agree, the opposing party vehemently disagrees, and it is not clear.

The inflection in a mediator's voice can also signal confrontation: asking questions in a brusque or assertive manner, speaking rapidly, raising the pitch of one's voice, speaking in a demeaning, sarcastic, or frustrated manner signal challenge to the listener.

important as nonconfrontational questioning. Many times parties need to vent, have their say, and have someone in authority listen. The mediator can provide this therapeutic forum in which the party can vent.

Supportive listening is not passive listening. The peacemaker should actively listen by reiterating concerns being expressed and question the parties as to their present feelings and well-being. This does not mean that the mediator accepts or embraces all that is said, especially accusations made against the other side. Rather, the guiding conviction is that once the parties have had an opportunity to speak, and have been heard, they will be prepared to move forward to resolution.

I. *Eliciting an Apology and Forgiveness*

Probably the most effective peacemaking tool of all is to elicit an apology from one side and forgiveness from the other. If this can be done—and it is difficult—conciliation, peace, and healing are assured.

For example, if the defendant or counsel can be convinced to consider making a sincere apology for what occurred, and show their concern for the welfare and recovery of the plaintiff, a major step is taken to settlement.[105] More importantly, it makes it easier for the plaintiff to begin the process of forgiveness. Both the apology and the forgiveness greatly impact the emotions, helping all involved to calm down and lighten the burden of anger and frustration. As the emotions are mollified, the parties are better able to listen to their lawyers and reach a fair and honorable settlement.

Although the apology is being used more and more by adjusters and with satisfactory results, forgiveness as a peacemaker's tool is more reluctantly suggested, perhaps because of its religious overtones.

If parties to a dispute can apologize and forgive, it not only helps them achieve a meaningful resolution, but it builds peace, strength, and dignity within the person. It gives assurance that the issue in dispute will not occur again.

How does the mediator inject the apology and forgiveness into the process?

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105. *See* Mark Bennett & Christopher Dewberry, *"I've Said I'm Sorry, Haven't I?": A Study of the Identity Implications and Constraints 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, 841–47 (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 the various forms of apologies and the contexts in which they are used).

The hatred and anger generated in a wrongful death action, for example, which obstruct settlement, are often misdirected or misunderstood. Many times they are generated by the fact that the defendant does not attend the mediation, thereby suggesting indifference and unconcern. Although the adjuster, the real decision maker is present, this may not satisfy the emotional needs of the bereaved family members. By requesting that the defendant attend the mediation in order to provide a meaningful apology and expression of remorse, the mediator can satisfy one of the basic needs of the deceased's family: compassion. This in turn opens the door for forgiveness to become operative.

In the divorce context, an apology and forgiveness can be of particular importance to the ongoing relationship the parties must endure, particularly if there are children. The mediator can make clear that an apology or forgiveness is not an act of surrender or a show of weakness.[106] If both sides can be encouraged to see the humanity in the other, a major step has been taken toward a peaceful resolution.

IX. CONCLUSION

This Article seeks to introduce the caucus method of mediation because it is the process which is the most conducive to conciliation and peacemaking. Through the caucuses, the mediator has an excellent opportunity to become acquainted with the parties and counsel and learn how she can be most effective in resolving the dispute before them. The mediator in this setting seeks not only resolution, but also peace and healing.

The peacemaker is at all times sensitive to the needs of the participants. She seeks to be supportive and works with each by being on their side and not confronting them or putting them on the defensive.

Finally, those who put on the mantle of peacemaker experience a profound change in their personal lives. They find greater patience in dealing with others, and they are more conscious of making others winners, thus they find fulfillment in their own lives. Indeed, peacemaking is the highest calling in the legal profession and one of the highest in life.

106. The mediator, prior to a mediation, might suggest that the defendant or adjuster consider making an apology at the opening joint session. Thereafter, in private caucus, the mediator can address the question of forgiveness with each side independently. The parties may not be willing to take that step until late in the mediation after considerable groundwork has been laid by the mediator in building rapport and trust. Timing can be critical.