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Session 2

**Advocate Don't Agitate:
Mastering Mediation**

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About the Presenters...

Ann J Brandau is an attorney and owner of Ann J Brandau Law Office, LLC in Onalaska. Ann, after more than 30 years as a family law litigator, decided to use her mediation training and focus on family law mediation. She mediates with both represented parties and self-represented parties in divorce, legal separation, custody, and modification cases. Ann has extensive experience in all areas of family law including issues of property division, support, tax matters, custody, placement and adoption. She has acted as a litigator, arbitrator, mediator and guardian ad litem throughout her career. Ann has been a member of several State Bar committees and currently is a member of the Dispute Resolution Committee. She is a past president of the La Crosse County Bar Association.

Nathaniel (Nate) Cade, opened his own firm, Cade Law Group LLC, in 2013, and focuses his practice on all aspects of civil and appellate litigation. He is currently named to Super Lawyers and Best Lawyers in the Civil Rights category and was previously named in the Civil Litigation Defense category. Nate has conducted and had involvement in numerous trials, mediations and arbitrations throughout Wisconsin and the United States. He lectures extensively on ethics and has also done so on products liability, environmental law and construction insurance law. He's previously served as the interim Wisconsin State Delegate in the ABA House of Delegates, where he chaired the Technology Committee, and has also served on the Board of Governors for the State Bar of Wisconsin. Nate completed a three-year term on the ABA's Standing Committee on Ethics and Professional Responsibility and served as a Special Prosecutor for the Office of Lawyer Regulation. In addition, he served for seven years on the State Bar of Wisconsin's Standing Committee on Professional Ethics, including three years as its chair and is currently active with the State Bar's Fee Arbitration Program. Outside of his litigation practice, Nate is also an active member of the Thomas Fairchild Inn of Court, serving as a Master of the Inn. He is the treasurer for the Milwaukee Regional Innovation Center, Inc. (formerly known as the Milwaukee County Research Park) and served eleven years on the board of Legal Action of Wisconsin. Nate is a graduate of the University of Pennsylvania and the University of Michigan School of Law (where he is the fourth generation of his family to have attended the law school). When he is not practicing law, he's usually spending time with his family, playing golf poorly, and rooting for his beloved Michigan Wolverines

Hon. David E. Jones (Ret.), is associated with Resolute Systems, LLP, where he provides mediation, arbitration, and discovery supervisor services. Prior to that, he was a U.S. Magistrate Judge in the Eastern District of Wisconsin, where he presided over federal civil actions under consent, adjudicated a range of criminal procedure issues, and conducted mediations. Judge Jones came to the bench after working as a partner in the Madison, Wisconsin, and Washington, D.C., offices of Heller Ehrman and then Perkins Coie LLP, where he focused on antitrust and patent litigation. He also maintained an active pro bono practice, primarily in the representation of inmate clients challenging conditions of confinement. Before entering private practice, Judge Jones served as an Assistant U.S. Attorney in Madison, on active duty as an Assistant to the General Counsel of the Army in the Pentagon, and as a law clerk to Chief Judge David B. Sentelle, U.S. Court of Appeals for the D.C. Circuit. Judge Jones was a Distinguished Military Graduate from Creighton University, where he also received his law degree, serving as Editor-in-Chief of the Creighton Law Review.

Holly C. Pomraning is an attorney at Lake Effect HR & Law in Madison, where she advises businesses on human resources and employment law matters. She has experience in the public sector, private practice, and as in-house counsel. Holly began her career practicing employment law at Foley & Lardner (Madison) and later served the Wisconsin Department of Justice as an Assistant Attorney General where she represented the state in antitrust, fraud, employment, and benefits-related matters. Holly is a trained and experienced mediator who serves on the Board of Wisconsin State Bar's Dispute Resolution Section and serves on the Board of Directors for Economic Justice Institute, Inc., which supports the EJI clinics at the University of Wisconsin Law School and houses the project LIFT Wisconsin. Holly lives in Madison with her husband Mike and has five kids ages 11-25.

Mediator **Jill Hamill Sopha** is a member of the National Academy of Distinguished Neutrals and the Association of Attorney Mediators. Jill is the former Chair of the Labor & Employment Section of the WI Bar Association, and is an Adjunct Professor at both Marquette University Law School where she teaches Mediation Advocacy, and UW Milwaukee's School of Continuing Education. Prior to opening Sopha Mediation in 2016, Jill was Chief Counsel, Human Resources, for Harley-Davidson, Inc. and worked at law firms in Madison, WI and Chicago, IL. Jill received her law degree, cum laude, in 1996, from the University of Wisconsin.



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DISPUTE RESOLUTION SECTION BLOG

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10 Tips to Maximize a Positive Result with Mediation

JILL HAMILL SOPHA

Proper preparation can help you maximize results for your clients during their mediation session. Jill Sopha shares her favorite tips for advocates in mediation.

In my experience of over 20 years as an employment attorney, being a full-time employment attorney-mediator since 2016, and teaching Mediation Advocacy and Negotiation at Marquette University Law School, I've put together my top favorite tips to help lawyers prepare their clients for mediation.

Here are my top 10 tips to maximize results for your clients during their mediation session:

1) Decide the Best Time to Mediate. Consider mediation when you have enough information to adequately advise your client and, if possible, before attorneys' fees are a significant impediment to settlement.

2) Strategically Choose Your Mediator. In order to be effective, your mediator must be able to quickly build trust with the parties and counsel. Consider what mediator personality, experience and style will resonate with your client and the other side's client and attorneys.



Jill Hamill Sopha, U.W. 1996, is an employment mediator at Sopha Mediation LLC in Milwaukee, focusing on workplace dispute mediation. She also teaches mediation advocacy at Marquette University Law School.

3) Work With Your Mediator.

Make sure your mediator is familiar with the key legal and factual parts of your case, any settlement discussions, and the parties (and personalities) attending. Consider sharing as much information as possible with the other side before the mediation session. In many cases, the more time the

other side has to consider that there is real risk to proceeding with litigation, the better. Let the mediator know in advance any issues that may help or hinder your client's (and the other side's) willingness or ability to settle the dispute.

4) Educate Your Client. Talk to your client about the cost, risk, time, and stress associated with litigation; the factual and legal weaknesses in the case; and about how mediation is different from litigation – i.e., that in mediation, the mediator is not a decision-maker, and that the parties (and counsel) will work together to find a resolution that everyone agrees is preferable to litigation.

5) Be Strategic With Your Negotiation. Start with a number that is aggressive but can be reasonably justified. A starting number that is viewed as highly unreasonable may discourage the other side from participating in mediation. Your starting position should also allow you to make a big enough move at the beginning so you can match or reduce the size of your moves as you proceed. Be sensitive to the “pace” of the negotiation.

6) Use Your Mediator's Expertise. Encourage your client to talk to the mediator. This will be their “day in court,” and in many cases, being heard is an important part of moving toward resolution. Use your mediator as a negotiation partner – ask their advice and trust their judgment. For example, let the mediator use their expertise and judgment on how to best position offers and demands. Along those lines, let the mediator be the “bad guy” (or back you up when you need to be the “bad guy”). The mediator can reinforce to your client the weaknesses or risks in their case and of proceeding to litigation.

7) Get Creative. Generally, avoid take it or leave it offers or demands, as they are rarely well-received. Rather, if negotiations appear truly stalled, work with your mediator to jump-start negotiations – in many cases, even a small move or a non-monetary ask or demand can serve this purpose.

8) Avoid Surprises. Frequently, employment matters involve much more than the legal case. If there is something you or your client will need to resolve the matter, disclose it to the mediator sooner than later (especially if it may be unexpected by the other side). Your mediator can help advise you as to when and how to raise the issue.

9) Get Your Final Number on the Table. This is your client's opportunity to find out their best option for settlement at this time. Each side should be sure that they did everything in their control to try to reasonably resolve the matter at the mediation session.

10) Have Patience with the Process. The parties are at mediation because they are at an impasse, so both parties will need to change – which takes time and can be very difficult and stressful. The vast majority of cases resolve at mediation, even if the parties feel discouraged at one or more points during the day. Encourage your client to stay engaged, and not to give up!

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Mediation Advocacy: Partnering with the Mediator

JAMES K.L. LAWRENCE*

I. INTRODUCTION

It is the job of the attorney in the midst of a dispute to manage the conflict and to get the best results as quickly and cost effectively as possible for the client. Mediation is a vehicle to do just that. However, the skills and strategies that are most effective in the courtroom are not effective at the mediation table.¹ It is necessary for the litigator to acquire a new set of “mediation advocacy” skills because traditional notions of trial advocacy do not ensure success in mediation.² Mediation is, after all, assisted negotiation. And, in mediation, the advocate is a negotiator—not a litigator—who has sought assistance. This Article melds the seminal conceptual work behind interest-based negotiation and mediation with the practitioner-oriented mediation advocacy literature to create a useful tool for the litigator-turned-mediation advocate. It is intended to make the conceptual framework more meaningful and accessible to the litigator.

This Article focuses on the relationship between the advocate and mediator, and it explores why and how the advocate can partner with the mediator to achieve optimal results. The bottom line is that the advocate, at the mediation table, should let go of adversarial tactics, not because they are morally wrong or “unfair” but because they stand in the way of achieving the best results in mediation. Most often, a mediator is trained in interest-based negotiation and works in the field because she finds creative problem solving superior to adjudication. To a mediator, adversarial tactics are obstructionist

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¹ See generally Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (examining the literature on how attorneys should represent their clients in mediation, if at all, and concluding that proper mediation advocacy requires adjusting style and strategy around the barriers to dispute resolution in each particular case).

² See *id.* One scholar finds the term “mediation advocacy” “oxymoronic” and prefers merely to refer to “representation in mediation.” Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3, 3, 4.

and ineffective, and the advocate employing them is considered less than a partner in the mediation process.

Moreover, research shows that party satisfaction and compliance with mediated agreements

stem largely from *how* the process works, and two features in particular are responsible. Those features are as follows: (1) the greater degree of participation in decisionmaking that parties experience in mediation; and (2) the fuller opportunity to express themselves and communicate their views, both to the neutral and to each other³

To take advantage of these findings, the mediation advocate and her client must be engaged with the mediator in the problem-solving process; merely accepting or rejecting proposals from the mediator or the other side is insufficient "engagement."

Part II of this Article suggests that in order to be an effective mediation advocate it is necessary to change from a litigator's mind-set of approaching disputes as a combatant, bent on winning, to an advocate's mind-set of working toward uncovering interests while creating and evaluating options to satisfy those interests. Part III proposes that a mediation advocate should make her client mediation savvy. She should prepare her client for a mediation that will be purposive rather than reactive and oriented toward building the future rather than defending the past. Part IV suggests that there is a need for thoughtful preparation and planning in anticipation of the mediation session. Part V explores the advantages for the mediation advocate who establishes credibility with the mediator as a mediation partner rather than as an experienced litigator. Finally, Part VI addresses the techniques of working with the mediator during the mediation session. It focuses on the elements of interest-based negotiation in collaboration with the mediator and on a willingness to solve process issues, which may arise during various stages of the mediation, again in collaboration with the mediator. Throughout this Article, five case studies provide examples of mediation advocates actively partnering with mediators during the mediation process.

II. CHANGING THE LITIGATOR'S MIND-SET

Mediation requires a change in mind-set from adversarial proceedings because the objective is different. At trial, the goal is to persuade the judge.

³ Robert A. Baruch Bush, "What Do We Need a Mediator for?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 19 (1996).

In mediation, the goal is to persuade the other party to the dispute.⁴ Because the conceptual framework underlying mediation is completely different than litigation, the rules of the game are changed and lawyers are asked “to do different things, to approach each other with different mind-sets, and to seek different outcomes for their disputes”⁵ It is important to be cognitive of changing one’s mind-set because the “adversary model” is a powerful heuristic.⁶ If lawyers, who have been trained and primarily practice as litigators, are not conscious of its effects, they will operate subconsciously out of the adversary model.

The Harvard Negotiation Project and Professor Roger Fisher’s seminal work, *Getting to Yes*,⁷ offer another model for approaching dispute resolution. Most mediators are trained in and utilize some variant of this model for principled or interest-based negotiation. Part VI discusses in detail the elements and advantages of using the interest-based model. At its core, the model rejects the idea that looking for joint-gain solutions is naïve. It requires a willingness to negotiate on the merits and to move beyond mere positional and distributive bargaining. By coming to the table with interest-based negotiation “homework done,” advocates give mediators the necessary tools to help them get the results they want.

⁴ See David Strawn, Defense Research Inst., Inc., *Ten Keys to Success at Mediation*, 1998 MEDIATION & ARB. SEMINAR G2-1, G2-3.

⁵ Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 429 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*] (citing Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 759–60, 794–801 (1984) [hereinafter Menkel-Meadow, *Toward Another View of Legal Negotiation*] (discussing the change in mind-set necessary to transition from an adversarial negotiation to a problem-solving negotiation).

⁶ *Id.* at 409 (stating, in the context of ethical issues in alternative dispute resolution, that “[t]he first and most important dilemma is one that has plagued me throughout my career as a lawyer—scholar—practitioner: the powerful heuristic of the adversarial model”).

A heuristic is an often subconscious rule of thumb or short cut for decisionmaking based on past experiences. For an enlightening explanation of the role of heuristics in both business and personal daily decisionmaking and the value in consciously recognizing and evaluating their use, see MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 1–41 (4th ed. 1998).

⁷ See generally ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

Think of mediation as “enhanced” and “value-added” negotiation.⁸ Both the lawyer and the mediator are advocates—the lawyer is an advocate for her client; the mediator is an advocate for a resolution.⁹ In addition, keep in mind that “[t]he mediator/advocate relationship is also a negotiation. The mediation advocate must recognize that he is also negotiating with the mediator”¹⁰ By partnering with the mediator and taking advantage of the mediator’s training and perspective, the advocate often can achieve results superior to unassisted negotiation.

III. MAKE THE CLIENT MEDIATION SAVVY¹¹

Client preparation is essential for effective mediation. It is important for the client to take a much more active role in mediation than in adjudication. The client must communicate effectively with the mediator, and she must be comfortable with the process in order to do so. The principal player is the client because she must be satisfied in order for a settlement to occur. The preparation will depend on the experience and personality of the client. A client with experience in positional or competitive negotiations will need to adopt the same mind-set change discussed above.¹² In addition, an attorney should prepare her client to understand the attorney’s role as a mediation advocate. That role includes the following: pressing the client’s interest, working with the mediator and the other side sufficiently to forge satisfaction of both sides’ interests, and facilitating a settlement.

The preparation requires more than just talking through the elements of a mediation. Books, brochures, videos, and even a rehearsal are appropriate tools.¹³ “A client who understands the mediation process, has received

⁸ See Strawn, *supra* note 4, at G2-4; see also Bush, *supra* note 3, at 6–32 (asserting that mediation is properly compared to unassisted negotiation, not adjudication, and examining the value that mediators bring to the table in overcoming barriers to obtaining better results than in unassisted negotiation).

⁹ See Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 982–83 (1998).

¹⁰ *Id.* at 972.

¹¹ First and foremost, it is imperative to have the correct decisionmakers participating in the mediation. The representative of the client must have the authority to bind the company, the courage to use that authority, and, ideally, a personality that will foster conciliation. See Tom Arnold, *20 Common Errors in Mediation Advocacy*, 13 ALTERNATIVES TO HIGH COSTS LITIG. 69, 69 (1995).

¹² See *supra* Part II.

¹³ See Strawn, *supra* note 4, at G2-4; see also Marjorie Corman Aaron et al., *CPR’s Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider’s Guide* (visited Jan. 15, 2000) <<http://www.cpr.adr.org>> (statement of Harry Mazdoorian).

guidelines for conduct during mediation, and has faced the realities of the dispute, can contribute significantly to achieving resolution.”¹⁴ Because the client is the ultimate decisionmaker, it is imperative that she “buys in” to the process.

Ideally, mediation is future-oriented rather than past-oriented.¹⁵ A client who has been intimately involved in the underlying events may need extra prodding to move forward and look for solutions rather than dwelling on assigning blame for the past.¹⁶ However, if the client is the defendant, explain the potential value in allowing or even encouraging the plaintiff to “vent”—to describe her feelings about the conflict. Prepare the client for this opportunity to let the other party get his story out and feel that he has been heard in the mediation room instead of the courtroom.¹⁷

It is not necessarily advisable for the attorney to be the “lead” negotiator. The attorney certainly is there to reassess the legal strength of the case as more information is developed (because litigation or arbitration is always an alternative) and to provide legal advice on advantages and risks of proposed solutions. However, often the client is better equipped to do much of the negotiation. An attorney who plays too active a role may add, rather than reduce, barriers to resolving the conflict. Jean Sternlight provides a detailed matrix for evaluating the roles based on the characteristics of the client and the barriers to negotiating a resolution in the particular dispute.¹⁸

¹⁴ John Paul Jones, Defense Research Inst., Inc., *Mediation Advocacy: Fundamental Principles and Guides*, 1998 MEDIATION & ARB. SEMINAR L-1, L-7.

¹⁵ See Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 5, at 429.

¹⁶ In fact, it has been suggested that an individual intimately involved in the underlying dispute is not the right client representative to have in the mediation room in the first place because it undermines the objectivity of that individual. See Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <<http://www.cpr.adr.org>> (statement of Marjorie Corman Aaron).

¹⁷ See DOUG STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 102, 163 (1999); see also JAMES K.L. LAWRENCE, *Alternative Dispute Resolution: Legal Developments, Drafting Guidelines and Psychological Benefits*, 47 LAB. L.J. 384, 395 (1996) (arguing that mediators should develop strategies to allow parties to vent strong emotions).

¹⁸ See Sternlight, *supra* note 1, at 354–65. Sternlight's matrix suggests that the attorney should question whether the client would benefit from playing an active role in the mediation, whether the client requires protection by the attorney, and whether either the client, the attorney, the opposing party, or the opposing party's attorney has unrealistic expectations based on lack of information, is engaging in strategic behavior, has unmet monetary or nonmonetary goals, or is behaving irrationally. See *id.*

IV. PREPARATION AND PLANNING

Mediation preparation is critical. One commentator has described this process of preparing for mediation as a “New Beginning.”¹⁹ The advocate cannot expect success if she merely goes to the mediation and rehashes legal arguments and entrenched positions. Remember that in mediation legally irrelevant arguments may be very persuasive. As discussed below, identifying interests and developing options for creative solutions is the core of interest-based negotiation and mediation.²⁰ The bulk of this work should be done with the client before mediation; during the mediation, reassessment can occur. The mediation will be more efficient and effective if the advocate anticipates the information the mediator will ask of her and brings it with her. Whether this information is disclosed to the mediator or to the other side are questions the answers to which are best deferred to timely points during the mediation session.

V. ESTABLISH CREDIBILITY WITH THE MEDIATOR²¹

Some scholars and mediators are of the opinion that the lawyers merely get in the way and obstruct the mediation process.²² However, it is likely that the real problem is entrenched litigation tactics that do not bend or adjust to the mediation process. It is critical at the outset for the advocate to establish credibility with the mediator and to communicate an intention to “buy into the process” and partner with the mediator to broker a settlement. If—or for the author, because—there is reason to accept a paraphrase of Roger Fisher,

¹⁹ Jones, *supra* note 14, at L-4. After a change in mind-set—in other words, the “unlearning” of “lawyering” skills—the assessment of the case from a negotiation/mediation standpoint is a “New Beginning.” *Id.*

²⁰ See *infra* Part VI.A.

²¹ For guidance on choosing a mediator whom the parties will trust and who will be effective, see Jones, *supra* note 14, at L-9 app. 1 (providing a checklist of factors to be considered in order to “[s]elect the [b]est [m]ediator”); Richard H. Ralston, Defense Research Inst., Inc., *Effective Advocacy and Mediation*, 1995 ADR FOR THE DEFENSE SEMINAR F-1, F-4 to F-5 (discussing consultation of court and administrative agency compilations of mediator lists, as well as the researching of mediators’ local reputations, in order to ensure proper selection of a mediator); and Strawn, *supra* note 4, at G2-5 (suggesting obtaining success rates of mediators—and offering the instruction to ask for the percentage that go to trial, not just the percentage that settle during mediation, because mediation may make a later-brokered deal possible even if it does not happen at the mediation table).

²² See, e.g., Sternlight, *supra* note 1, at 279–82.

“good negotiators mediate their own disputes,”²³ a negotiation advocate at a mediation should choose to dance with the person the advocate has accepted as the mediator. That dance strongly suggests that the advocate partners with the mediator in creating productive working relationships without losing sight of getting what the client wants.²⁴

As early as the first telephone conference or submission of the premediation statement, an advocate can do potentially irreparable harm to her relationship with the mediator. As one mediator has stated,

Sometimes I am blind sided by the overly-aggressive tenor of an exchanged statement. This tips me off that the lawyer who has taken this approach either (1) has a poor understanding of mediation processes and settlement dynamics, or (2) is a likely obstruction to settlement. In either event, that lawyer loses credibility, and has tipped his mitt with me.²⁵

The premediation statement and conference are the opportunities to begin the mediation dialogue and give the mediator the information she will need by way of background to help reach a settlement. The basic information she needs to know consists of the following: the stumbling blocks to unassisted settlement, the negotiation history of the dispute, the client’s interests and needs, and creative solutions that may be explored during the mediation.²⁶ In addition, take the extra step and acknowledge “[w]hat settlement terms [the advocate believes] the other party or parties will need to settle the dispute.”²⁷ It also may be helpful to provide the mediator with

²³ See Michael Watkins, *Negotiating in a Complex World*, 15 NEG. J. 245, 253 (1999) (emphasis omitted) (paraphrasing Roger Fisher, *Negotiating Inside Out: What Are the Best Ways to Relate Internal Negotiations with External Ones*, in NEGOTIATION THEORY AND PRACTICE 71, 71–72 (J. William Breslin & Jeffrey Z. Rubin eds., 1991); see also Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEG. L. REV. 71, 99–104 (1998) (indicating the author’s caution against the “lawyerization” of mediation which not only minimizes party participation but also requires that the mediator be a capable evaluator in addition to a facilitator of the process of creative problem solving).

²⁴ See Watkins, *supra* note 23, at 253. Watkins offers ten propositions for managing the complexities inherent in negotiation, one of which is that “[s]killed negotiators often are called upon to mediate even as they negotiate, and intervention by outside parties is commonplace.” *Id.* at 252.

²⁵ Marjorie Corman Aaron et al., *CPR’s Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider’s Guide* (visited Jan. 15, 2000) <<http://www.cpr.adr.org>> (statement of John Wagner). John Wagner is the director of the Irell & Manella LLP Alternative Dispute Resolution Center in Newport Beach, California. See *id.*

²⁶ See *id.* (statement of Barbara “Bobbi” McAdoo).

²⁷ *Id.* (statement of John G. Bickerman).

information regarding the client's unique characteristics, sensitivities, and emotional needs.

To be most effective and efficient, mediators want and need to know what the barriers to settlement are and "whether the real sticking point is legal or factual or emotional..."²⁸ Above all, the premediation correspondence should demonstrate an open-mindedness, a reasonableness, and a desire to settle. The client must understand that showing reasonableness, preparedness, and knowledge of the process is not a sign of weakness and will further her cause during the mediation process.

VI. WORKING WITH THE MEDIATOR DURING THE MEDIATION SESSION

A. *The Elements of Interest-Based Negotiation in the Mediation Setting*

1. *Identification of Interests*

Interests are the needs, desires, and fears *behind* each party's position.²⁹ Professor Menkel-Meadow describes the relationship between a monetary demand and a party's true interests as follows: "Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives."³⁰ This "proxy" is requested because, for the most part, it is the only relief a court can grant. In mediation, that is not the case. The premise is quite simple: as more needs or interests are identified, more solution options are created.³¹ Although the positions may be in direct conflict, many of the underlying interests may be compatible.³² Furthermore, because nonmonetary interests are likely to be valued differently by each side, the negotiation is taken out of a zero-sum game—giving something more to their side is not necessarily giving something up for our side.³³

²⁸ *Id.* (statement of Barbara "Bobbi" McAdoo).

²⁹ See FISHER ET AL., *supra* note 7, at 40.

³⁰ Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 5, at 795.

³¹ See *id.*

³² See FISHER ET AL., *supra* note 7, at 42.

³³ See Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 5, at 795. A zero-sum game is likened to a distributive negotiation where the benefit is seen as a pie of fixed size and a larger slice for the other side means a smaller slice for our side. See DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 165 (1996); see also RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTEGRATION SYSTEM* 148 (1965).

The basic approach to identifying the interests of the other side is to put oneself in their shoes and ask why the other side is taking a certain position and why other options may be less attractive.³⁴ Do not forget the role of emotional and psychological interests, such as the need for recognition and security³⁵ or the need to feel heard and valued.

The advocate helps the mediator by identifying and sharing the interests of both sides. The other party may be inexperienced or unwilling to explore interests. If the advocate has identified the interests she believes motivate the other side, she may create more solutions by thinking of interests the mediator may not otherwise address. Furthermore, when either the advocate or her client presents her interests, it is important to be specific and forward-looking.³⁶

A major barrier to dispute resolution in negotiation is that one party does not have full information regarding the interests of the other side and thus cannot see existing opportunities for settlement.³⁷ A party may be reluctant to share information for fear that it may be used against her. In the mediation, during private caucuses, a party can create an omniscient entity. Information can be shared confidentially. The mediator can identify which pieces of information will be useful in creating solutions, capitalizing on “overlap,” or “moving the other side.” The mediator then can explain to each party why she believes that sharing given pieces of information will be valuable. Fully informed of the benefits—not just of the risks—each party can decide whether or not to agree to give the information to each other. Disclosing to the mediator minimizes the risk and permits the benefits of information sharing.

Case Study 1: John Smith worked for Thermo-Seal for 15 years. During that time, he invented a bolt that would create a hermetic seal impervious to 5,000 pounds per square inch of pressure. When Thermo-Seal underwent corporate restructuring to become a distributor of machine tools and parts, there was no job for John. When John was terminated with a modest severance package, he sued, claiming age discrimination and wrongful discharge. As the parties entered mediation, they were \$400,000 apart. The company was adamant that there was no place in the organization for John.

³⁴ See FISHER ET AL., *supra* note 7, at 44.

³⁵ See *id.* at 48.

³⁶ See *id.* at 52.

³⁷ See Bush, *supra* note 3, at 13; Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 239–41, 248 (1993); see generally BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995).

John was equally adamant that he was entitled to have the opportunity to try a sales position, even if a reasonable period of training proved necessary.

What were John's other interests, if any? How might they be discovered?

In private caucus with John, John's attorney planted the thought with the mediator that John may relish recognition for his past service and the invention of a product, which served Thermo-Seal well for many years. In private caucus with the company, the mediator learned from Thermo-Seal's attorney that the company was building a new sales office in the suburbs. An apparent impasse broke when the mediator suggested an option, at first privately to the company, that it consider naming the sales office "Thermo-Seal—Smith Sales Center." With recognition for John's service to the company in place, the financial settlement soon was worked out.

2. Optioning for Mutual Gain

The next step in interest-based negotiation is to convert the identified interests into solution options, ideally for the mutual gain of each party. Initial brainstorming should be done with the client before the mediation. However, as new interests are uncovered, additional optioning sessions will be necessary. Optioning can be done through capitalizing on shared interests and dovetailing different interests.³⁸ A shared interest may be preservation of the relationship, maintaining a favorable reputation in a given industry, or even getting a product to market. By definition, each side understands and values the shared interest, and thus solutions centered around those interests are very viable. Optioning by dovetailing interests involves looking for "items that are of low cost to you and high benefit to them. . . . Differences in interests, priorities, beliefs, forecasts, and attitudes toward risk all make dovetailing possible."³⁹

The beauty of mediation is that the advocate does not need to do this optioning alone. The mediator is trained in creating, and persuading, both sides to consider options. First, she brings the perspective of an "outsider," so she may be able to see solutions that a party, who is too close to the dispute, cannot. Second, she brings the experience of past successes to the mediation table and can draw from those solutions. The job of the advocate is to be open to possible solutions and to encourage the client not to dismiss new solutions automatically as unworkable.

³⁸ See FISHER ET AL., *supra* note 7, at 72–73.

³⁹ *Id.* at 76.

Case Study 2: Tom Hart, the CEO of ABC Company, enjoyed a contract that gave him the right to purchase the company in 1999 from its founder, Abigail B. Clement, at fair market value. If an agreement on fair market value could not be reached, the parties agreed to mediate the dispute and, if necessary, submit the dispute to binding arbitration. In the event of arbitration, the prevailing party would be awarded attorneys' fees. Abigail demanded \$2,000,000. Tom countered with \$1,300,000. With little progress having been made, the mediator was contacted. She learned that Abigail planned to retire in Florida and use the proceeds from the sale to supplement other retirement income. Tom's counsel suggested that his client might accept the \$2,000,000 demand if the payments could be spread over ten years (a present value of approximately \$1,300,000. Tom's counsel added that his client would pay \$25,000 per year for a ten-year covenant not to compete (amounts Tom would be able to treat as a business expense). The delayed pay-out option satisfied one of Abigail's important interests: prudent retirement planning.

3. Legitimacy

In mediation, unlike adjudication, each party must be satisfied with a proposal or there will be no settlement. Using and insisting on objective criteria to support and evaluate a proposal legitimizes the proposal and increases the chances that it will be accepted. For example, the "blue book" value of a used car is an objective standard.⁴⁰ Intangible but real feelings and concerns also add legitimacy to a proposal. However, because such intangible interests are more difficult to quantify, they must be conveyed to the other side with greater detail and specificity.

4. Relationships

A primary value of mediation over adjudication is the ability to preserve and even repair the relationship of the parties. In addition, treating the other side poorly makes no sense in mediation because it is difficult to reach an agreement with someone who is infuriated. Fisher and Ury instruct, "separate the people from the problem."⁴¹ When the mediation advocate sets the problem aside from the egos and personalities, it is possible to partner with the other party and the mediator to attack the problem. Relax. Even if an ongoing relationship with the other side is not necessary, cultivate enough of

⁴⁰ See *id.* at 85.

⁴¹ *Id.* at 36–38.

a relationship so that the parties may work together to resolve the dispute. "Formality is simply anger with its hair combed."⁴²

Case Study 3: Roberta DeVecchio has worked for Cosmetec for eight years and has received several annual awards as one of its outstanding sales persons. When the job of District Sales Manager became available, she applied but was turned down in favor of John Turner. John, who is the son of Cosmetec's major shareholder, is a recent college graduate, and he was hired into Cosmetec's managerial trainee program eighteen months ago. Receiving little solace from Cosmetec's manager of human resources, Roberta triggered the company's dispute resolution program and requested mediation. At the outset of the session, the mediator suggested separate caucuses so that she might explore the positions of the parties. Roberta was upset that she did not have an opportunity to express her disappointment in not being recognized by Cosmetec as a loyal and devoted employee who wanted to develop her career at the company. Her attorney sensed her frustration and proposed to the mediator that a joint session might be necessary to allow Roberta to express her feelings. While the mediator said she would suggest this to the company, Roberta's attorney went on to say that it would be critical for the company's representative to demonstrate that he was listening to Roberta and to acknowledge that she had feelings that the company understood.

In this study, Roberta's attorney suggests a strategy and explains how that strategy may improve the relationship between the parties, at least for the purpose of working out a settlement. Roberta's attorney might have gone on to say that demonstrating that the company listened to Roberta and expressly acknowledged that Roberta has been heard is not a sign of weakness nor a sign that the company will accede to Roberta's demands. Rather, it is a sign that the other side (Roberta) is worthy of being listened to and that her feelings are important.

5. Communication

Fisher and Ury have identified three central communication stumbling blocks to successful negotiations.⁴³ First, negotiators often are not really talking to each other but rather talk "merely to impress third parties or their

⁴² LEE BLESSING, *A WALK IN THE WOODS: A PLAY IN TWO ACTS* act 1, sc. 1 (1986) (depicting a career Soviet diplomat and an American negotiator walking in the woods on the outskirts of Geneva while discussing their interests and their relationship during a break in the superpowers' arms limitation negotiations).

⁴³ See FISHER ET AL., *supra* note 7, at 32–33.

own constituency.”⁴⁴ This form of pseudo-communication is completely useless and counterproductive in mediation. Second, many negotiators fail to engage in true, concentrated listening.⁴⁵ Third, misunderstandings between negotiators can lead to misguided results, or no results at all.⁴⁶

When listening to the other side and the mediator, carefully focus in order to receive the meaning of the communication. It is instinctive for litigators to formulate counter-arguments automatically, as a neutral or opposing party is speaking. When advocates react in this manner, they lose the opportunity to truly hear and appreciate what is being said. Thus, they lose the opportunity to use that information purposively. Part of active listening involves repeating back to the communicator an understanding of what that person said. This practice increases understanding and makes the other person feel heard.⁴⁷

Finally, it is important to be conscious of the fact that messages can be altered unintentionally in translation. Consequently, advocates should ask the mediator to repeat back their messages before she carries them to the other side.

Case Study 4: Bruce and Sally’s divorce mediation was progressing in fits and starts. On the issue of alimony, the parties had narrowed their differences to five-hundred dollars per month. Sally would have custody of their son and daughter with open visitation and alternate single day weekend custody for Bruce. Bruce wanted two-day weekend custody for his son during the fall when Sammy played select soccer on a team Bruce coached. When Bruce made the proposal, Sally wanted to respond with a reduced alimony demand to settle that issue first. With the mediator willing to deliver a revised alimony proposal—a step in compromise—Sally’s attorney interrupted: “What message are we sending? Will Bruce perceive that we ignored or rejected his two-day weekend custody proposal? Is there a better way to show receptiveness to the custody proposal and still tentatively settle alimony first . . . and possibly set aside additional funds for the children’s college education?”

In this study, Sally’s attorney is sensitive to the message being sent with the communication and how it may be received, and he has taken the initiative to share his concern with the mediator, who had been ready simply to deliver the proposal. Sally’s attorney did not want the communication

⁴⁴ *Id.* at 32.

⁴⁵ *See id.* at 33.

⁴⁶ *See id.* at 35.

⁴⁷ *See id.* at 34; *see also* STONE ET AL., *supra* note 17, at 178–80.

misunderstood as a rejection or avoidance, which could result in an angry reaction.⁴⁸

B. *Procedural Considerations*

1. *Opening Statement*

It is often a good idea to have the client present the opening statement. It can be an opportunity for the client to build credibility with the mediator because they likely have not interacted before. Once again, it has proven to be very effective to focus on a desire to settle and express an appreciation for the feelings and interests of the other party. The statement should be used to express the dispute from the point of view of the client. If the statement is thoughtful, sincere, and reasonable, rather than embellished and overly aggressive, it will be received better by the other party and the mediator.

2. *Caucusing*

a. *Initial Caucus*

As previously discussed, the mediator will be more willing and able to get the results the advocate wants if she believes the advocate's position is reasonable and is supported by objective criteria.⁴⁹ At this point, because the alternative is arbitration or adjudication, it may be useful for the advocate to set out the legal strengths and weaknesses of both cases. It often makes strategic sense for an advocate to concede, in confidence to the mediator, the weaknesses of her case and the strengths of the other party's case. It is an excellent way for the advocate to do the following: boost credibility with the mediator, save time, and demonstrate that her initial offer or demand takes these strengths and weaknesses into consideration. If the advocate has not demonstrated up front to the mediator that she appreciates a given strength or weakness, the mediator is likely to expect her to make an adjustment to her offer when it later surfaces.⁵⁰

Disclosing the client's bottom line to the mediator at the outset is not advised. First, this position may change based on information gained through the mediation. Second, the client's bottom line may be considerably more or

⁴⁸ "What we have here [would have been] a failure to communicate." Strother Martin as Captain upon the death of Paul Newman as Luke in *COOL HAND LUKE* (Warner Bros. 1967).

⁴⁹ See *supra* Part VI.A.

⁵⁰ See JOHN W. COOLEY, *MEDIATION ADVOCACY* 117 (1996).

less than the other side is willing to accept.⁵¹ Once the mediator or the other side has this figure, it subconsciously may be difficult for the advocate to try to bargain far from it.⁵²

b. *Intermediate Caucuses*

Just as the advocate provides the mediator with the objective criteria behind her initial offer, when she makes movement or proposes subsequent offers, she gives the specific reasons behind her offer.⁵³ Continuing to give legitimizing support for proposals keeps the mediation from degenerating into positional bargaining with the expectation of indefinite “tit for tat” movement.

c. *Final Caucus*

One commentator has suggested holding back from the mediator information favorable to you or unfavorable to the other side until the final caucus.⁵⁴ The reasoning behind this tactic is that it will result in a big “move” in your favor at the time in the negotiations when the “moving” is tapering off.⁵⁵ However, this strategy may backfire and result in a loss of credibility with the mediator and the other side at this critical juncture. Ultimately, an

⁵¹ See *id.*; see also Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <<http://www.cpr.adr.org>> (statement of Marjorie Corman Aaron). Likewise, it is obviously ill-advised to reveal a true bottom line to the other side in an early joint session. This disclosure “straightjackets” the mediator because there is nowhere to move. For example, John Wagner relays the following story:

[T]he plaintiff's attorney was so enamored with the mediation process, and so intent [on] participating in good faith, that he offered his dead bottom-line number to the defendant before the mediation started. It was an almost unreasonably low number, and there was no place to go. The defendant was shocked but pleased by this low ball “opening” number, and was anticipating a really cheap out. It took a long time to convince the defendant that the plaintiff's lawyer was just an inept negotiator that didn't know any better, but once that was believed, the case settled on that first number.

Id. (statement of John Wagner).

⁵² See COOLEY, *supra* note 50, at 117.

⁵³ See *id.* at 122.

⁵⁴ See *id.* at 121.

⁵⁵ *Id.* at 121.

opportunity for favorable settlement may be lost by this tactic. Partnering with the mediator may limit or eliminate this dilemma.⁵⁶

3. Confidentiality

While a mediator will keep everything confidential unless she has express permission to disclose it, it may be useful to discuss the specific words that the mediator will use to convey information or an offer to the other side. After a long caucus, this will avoid any miscommunication with regard to which information is confidential.

4. Consider Which Information Can Be Communicated More Effectively Through the Mediator

a. Reactive Devaluation or Reactive Valuation

Reactive devaluation is the phenomenon that a given proposal is generally “rated less positively when proposed by someone on the ‘other side’ than when proposed by an apparently neutral third party.”⁵⁷ The mediator can reduce reactive devaluation by offering a proposal as her own.⁵⁸ Conversely, reactive valuation or escalation can occur in response to a reasonable offer. The thought process in escalation is that “their opponent’s very flexibility means that their own position must be stronger than they had thought.”⁵⁹ Asking the mediator to communicate a proposal as her own also combats this phenomenon.⁶⁰

⁵⁶ See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 172–74 (1986).

⁵⁷ Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION, *supra* note 37, at 2, 15; see also Mnookin, *supra* note 37, at 246–47.

⁵⁸ See GOLANN, *supra* note 33, at 201; Mnookin, *supra* note 37, at 249. Jeffrey Z. Rubin called this the “tar baby” function of the mediator, “absorbing responsibility for a concession until the party who has made it is ready to assume credit for it.” DEAN G. PRUITT, *Kissinger as a Traditional Mediator with Power*, in DYNAMICS OF THIRD PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST 136, 138 (Jeffrey Z. Rubin ed., 1981) (quoting Jeffrey Z. Rubin, *Experimental Research on Third Party Intervention in Conflict: Toward Some Generations*, 87 PSYCHOL. BULL. 379, 379 (1980)).

⁵⁹ COOLEY, *supra* note 50, at 29.

⁶⁰ See LAX & SEBENIUS, *supra* note 56, at 173–74.

b. *Floating an Untested Idea, Communicating Favorable Information*

Often an advocate has an idea for a creative solution, but fears that if she mentions it and it is not well received she will appear foolish or “soft.” The mediator is an excellent conduit through which creative but potentially risky solutions can be communicated.⁶¹ In addition, it is valuable first to express an idea to the mediator who may be able to refine and enhance it as well as decide the best way to frame it for the other side.⁶²

As discussed above, often information that is conveyed by an opposing attorney is met reactively, with suspicion and hostility.⁶³ If there is information favorable to the advocate’s case that has not come out through discovery and it appears that it will be helpful in “moving the other side,” she may wish to convey this to the mediator who can pass it on to the other side. In this way, it will carry more weight and appear that the mediator did a good job of digging for relevant information rather than that the advocate was withholding a “bombshell.”⁶⁴ Conversely, the negative effect of disclosing newly surfaced information may be softened if communicated through the mediator.⁶⁵

c. *Presenting the Mediator with a Conditional Offer or Range*

If, strategically, the advocate does not want to communicate a willingness to offer a proposal unless she knows that the other side will agree to it, she can communicate it in confidence to the mediator. She then may have the mediator agree not to reveal her agreement unless the other party provides an offer in a given range or agrees to the mediator’s proposal.⁶⁶

5. *Adjust Process as Needed*

A mediator can provide a needed reality check to a client, if delivered cautiously. The risk, however, of the mediator switching from a facilitative

⁶¹ See *id.* at 27–28.

⁶² See *id.* at 28.

⁶³ See *supra* Part VI.B.4.a.

⁶⁴ See LAX & SEBENIUS, *supra* note 56, at 28.

⁶⁵ See *id.* at 30.

⁶⁶ See Robinson, *supra* note 9, at 978–79 (advocating a “cautiously cooperative” approach to mediation advocacy in which the attorney begins cooperatively but is prepared to engage in competitive negotiations if the other side does not respond cooperatively); see also LAX & SEBENIUS, *supra* note 56, at 174.

role to an evaluative role is substantial, and the advocate must be in a partnering relationship with the mediator in order to offer her advice on accepting this new role.⁶⁷

The unique advantage of mediation is the flexibility of the process; the parties own the process and have control over the rules. A mediator usually will welcome suggestions of a change in approach during the mediation session, if the current approach is not succeeding.⁶⁸ Process and approach suggestions by the parties are “not only fair but desirable.”⁶⁹ The advocate’s relationship with the mediator will influence whether that advocate’s suggested change will be received favorably. Partners will fare better than combatants.

Case Study 5: Marjorie is facilitating a mediation of a dispute between G&P Products (G&P) and a former employee concerning unfair competition, including the breach of a noncompetition clause. The parties have stalemated, in large part over the enforceability of the noncompetition clause. The mediator is reluctant to express her views about that clause even though she has taught that subject in law school. G&P’s attorney suggests to the mediator that an evaluation of the enforceability of the noncompetition clause is necessary. She proposes that the two attorneys caucus with the mediator to work out a process that will not compromise the mediator’s impartiality if her evaluation clearly favors one side.

In this study, the risk remains that the mediator, despite the process caucus, may compromise her neutrality if she accepts the invitation to evaluate. Here, at least, one advocate made the overture and both advocates agreed to permit the evaluation, narrowed to a single issue, which may break the impasse. A seasoned mediation advocate guides the mediator on the timing and appropriateness of purposive evaluation during an essentially facilitative process.

⁶⁷ See GOLANN, *supra* note 33, at 408; see generally Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COSTS LITIG. 111 (1994).

⁶⁸ See generally Marjorie Corman Aaron et al., *CPR’s Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider’s Guide* (visited Jan. 15, 2000) <<http://www.cpr.adr.org>>.

⁶⁹ *Id.* (statement of John G. Bickerman).

VII. CONCLUSION

Good lawyering extends to the mediation process. A lawyer is expected to serve as an advocate for her client during mediation; this is not a role for a “potted plant.” The mediation advocate needs to establish credibility with the mediator not only with respect to the process the mediator is using, but also on the merits of the dispute. The mediation advocate will explore and advocate interests underlying her client’s position and create and evaluate options for resolving those interests as well as interests identified by the other side. The mediation advocate will craft unambiguous and understandable commitments and engage in active listening to build—or rebuild—good communication and working relationships.

Robert Mnookin, Chair of the Program on Negotiation at Harvard Law School, characterized the effective negotiator as a person who displays assertiveness and empathy, stressing that these characteristics are surprisingly compatible.⁷⁰ This characterization of an effective negotiator is especially applicable to the mediation advocate. Yet this advocate should not only display those skills toward her client and the other side. Rather, the advocate should be ready to do the following: empathize with the mediator as she works through the facilitative process, partner with her in brainstorming and evaluating options for settlement, and clearly and credibly assert suggestions for strengthening the mediation process and crafting a good substantive outcome.

As stated by John Honeyman to Audrey Botvinnik, “I’m an extremely effective negotiator. That doesn’t mean I say no well. It means I say yes well. At the right time. When the right work has been done. When I negotiate, I find an agreement.”⁷¹

⁷⁰ See Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 226–28 (1996).

⁷¹ BLESSING, *supra* note 42, act 1, sc. 1.

A Litigator's Guide to Mediation Advocacy:
Reflections on Effectively Achieving Client Goals at the Mediation Table

By

Sheldon J. Stark

Mediator and Arbitrator

I. Introduction

Litigators too often approach the mediation process with the same tool they employ in every other aspect of the litigation process. We call that tool traditional zealous advocacy. Zealous advocacy is expected of lawyers and does the job well in almost every aspect of our civil justice system. Because mediation offers a unique opportunity to take a step back from the conflict and search for mutually beneficial solutions, however, a very different tool is necessary if client goals and objectives are to be achieved. This paper will explore how mediation advocacy differs from traditional principles of zealous advocacy; and suggest an approach to mediation advocacy designed to maximize the opportunity for resolution afforded by mediation.

II. Mediation is an Assisted Negotiation

What is “mediation?” Plugging the word “mediation” into an internet search engine brings up over 155,000,000 results. When boiled down to its least common denominator, mediation is nothing more than an assisted negotiation. As we know, a negotiation is completely voluntary. Negotiations result in resolution, therefore, if but only if both sides voluntarily decide to manage their risk, recognizing that the available terms of settlement are better than spending the money and risking a dispositive motion or trial. Unlike a trial, arbitration or dispositive motion, no judge, jury, or arbitrator decides the outcome. No one determines who is or is not telling the truth, who is right and who is wrong, and no one imposes a result on the parties. The parties are totally free to decide for themselves whether to settle and on what terms.¹

Since parties to a dispute may readily negotiate on their own, what is the assistance offered by a mediator? In my view, mediators are most helpful when they manage the exchange of information and perspective, making certain each party has all the information available so as exercise good judgment about settlement.

Specifically, mediators explore, *inter alia*:

- What is the other side's story and is it plausible? If the other side's story is plausible, of course, there is risk the court, decision-maker, or jury will be persuaded and rule in their favor. When parties hear the story as spun by a zealous advocate, however, they are often antagonized. They perceive themselves under attack, they escalate, experience

¹ Indeed, Standard I of Michigan's Mediator Standards of Conduct is party “Self Determination.”
<https://www.courts.michigan.gov/4aa077/siteassets/court-administration/standardsguidelines/dispute-resolution/med-soc.pdf>

consternation. In other words, they respond emotionally, perhaps even lashing out or responding in kind. They do not process what they hear. Mediators help parties process important information and all the consideration due by reframing in neutral language.

- Where is the other side coming from; what is their perspective? Knowing how each side is viewing the conflict increases the likelihood proposed offers and counteroffers can be tailored to meet a party's underlying needs and interests. If a party's underlying needs and interests are met, the likelihood of a favorable response to a settlement proposal increases significantly.
- Are the parties assessing their strengths and weaknesses realistically? In my experience, parties (and their lawyers) fall in love with their claims and defenses. What happens when we are in love?² We focus only on our strengths and downplay or ignore the warts, challenges and risks, sweeping them under the rug where they are easy to minimize. Parties are often stubbornly convinced there is only one way to look at the salient facts. They strenuously resist seeing even the possibility of good faith alternative perspectives. A major role for mediators, therefore, is to sow the seeds of doubt by bringing out the risks presented and weighing the magnitude of such risks realistically.
- Are the parties aware of the economic costs of continuing the litigation? In my experience, parties rarely arrive at the mediation table fully informed with a detailed written litigation budget. If provided with any range of numbers, they have been given only a rough estimate, discussed mostly at the time the litigation began. In fact, a realistic and timely cost estimate is essential. Why? Business judgment is typically a choice between various available options. Good judgment requires a cost/benefit analysis to determine which option best serves a party's interest. Assume a party can settle for \$25,000, for example, while the price tag on continuing the litigation is likely to be \$50,000 or more with no guarantee of a positive result. Sound business judgment might dictate acceptance of a \$25,000 settlement regardless of liability or risk.³
- Have the parties considered potential collateral consequences? Will the litigation disrupt management's focus on business operations and contributing to the bottom line? Alternatively, does continuing the litigation risk exposure of confidential, sensitive, private facts? Litigation today is intrusive and may result in disclosure of embarrassing allegations of sexual harassment, corporate mismanagement, flawed engineering, medical malpractice, incompetence and the like. Customers, suppliers, lenders and vendors important to the success of a business enterprise may potentially retreat from a continuing business relationship if they find themselves and their employees sucked into the vortex of someone else's litigation. Key employees of the enterprise may feel forced to take sides. Members of the leadership team may resign rather than become

² In "The Merchant of Venice," Shakespeare reminds us of an important truth: "love is blind."

³ Coming from the world of litigating and mediating employment disputes where plaintiff is typically represented on a contingency fee basis, I welcome commercial disputes because both parties are paying their counsel by the hour. Somehow writing monthly checks for attorney fees helps parties better focus the mind at the mediation table.

embroiled in the litigation process. Sometimes collateral consequences can be more costly than direct economic ones.

- What do the parties expect to happen if the case doesn't settle? How likely is the court to grant a dispositive motion? What is the judge's track record in similar disputes? Are there other parties whose interests might be affected if a precedent is set?
- Has everyone examined their Best Alternative to a Negotiated Agreement (BATNA) or Worst Alternative to a Negotiated Agreement (WATNA)?⁴
- What evidence – documents, testimony, exemplars - are the litigators relying on to support their claims and defenses; and what are the risks a court will grant a motion to exclude? How does the value of a dispute change if key evidence is excluded? If the evidence comes in? How does an evidentiary ruling impact the chances of success if an appeal is taken?
- Do the parties know what to expect from the trial process? Many lay persons and individuals unaccustomed to litigation have a distorted view of trials – in part because we try so few cases today⁵. Sometimes painting the courtroom picture can remove impediments to resolution: What are the chances of getting a realistic trial date and keeping it? How many times might they need to prepare for a trial only to be adjourned long enough that preparation must be started over each time virtually from scratch? What does a real trial look like as contrasted with the dramas they see on TV or in the movies? A party cannot simply turn to the jury and tell their story. That is not allowed. The story can only be developed through plain, non-leading questions often painstakingly prepared and rehearsed. After direct examination, parties then face relentless, sometimes withering cross examination. If they thought they'd been "beaten up" and abused in their discovery deposition, their discomfort at trial is likely to be worse. What rational actor wants to go through that experience again?
- How likely is a losing party to seek an appeal? What are the chances of overturning an adverse decision on appeal? How much will it cost, and how long will an appeal take? What are the risks the decision of an appellate court will be made public establishing a precedent and perhaps, stirring up additional litigation?
- What are the party's goals and objectives for the mediation process? What do they hope to gain from engagement in an assisted negotiation? Are their goals and objectives realistic? Have the parties considered what might be required of them in the back-and-forth of a negotiation to achieve their goals? Parties must make reasonable proposals to settle in order to receive reasonable counterproposals in return. Parties are often surprised at the competitive/reciprocal nature of negotiations. Unreasonable demands are inevitably met with equally unreasonable replies; productive proposals often stimulate productive counterproposals in response.

As the answers to these kinds of concerns are heard, considered, weighed, and processed, the parties – with the advice and recommendations of counsel – are ready to make good, business-

⁴ See "Getting to Yes," by Roger Fisher and William Ury.

⁵ In both state and federal court, no more than 1% of cases result in a trial on the merits.

like judgments concerning resolution. Whether to settle and on what terms is *their* decision to make, not the mediators, not counsel.

III. *Distinguishing Features of Mediation Advocacy*

a. *Persuade the Decision-maker on the Other Side*

The single most important distinction between the mediation process and litigation is that the decision-maker in litigation is a third-party neutral. The decision-makers in mediation are the parties themselves. It only makes sense, therefore, that all efforts to persuade should be directed to the decision maker on the other side. The goal is to persuade the other side to manage their risk and settle, rather than roll the dice. Again, this is because mediation is a voluntary process, even if court ordered⁶. The mediator cannot impose a resolution. Only the parties make that decision. While obvious, too many advocates nonetheless draft their written materials and tailor their oral advocacy to moving the mediator into their corner not the decisionmaker.

The obvious question is “why?” Advocates believe persuading the mediator will cause them to take their side and be their advocate in the other caucus room. Depending on the mediator, their belief may be well-founded. However, mediators are trained to resist such efforts. Most of the mediators I know at least try to maintain the appearance of neutrality if not neutrality itself. Mediators are trained to make one side’s arguments in the other room, but translated or reframed into more neutral terms, while maintaining their distance at the same time. “As I understand the argument they’re making” Perversely, the very arguments made to influence the mediator cause resentment and escalate emotions in the other room, making the mediator’s job that much more difficult. Parties on the receiving end of overly aggressive written advocacy, for example, often start the mediation by threatening to leave.⁷

Mediation is a dispute resolution process, not a justice process where right and wrong are adjudicated, where a decision-maker determines the truth. The emphasis, therefore, needs to be on the 1) benefits of resolution; and 2) the risks of litigation. Parties will rarely agree on the facts or the inferences to be drawn from those facts. They might very well agree, however, on what the risks are. Risk assessment creates doubt. Doubt creates fertile soil to plant the seeds of resolution. When the risks and perspective are presented with civility and respect in a rational dialog, parties are better able to incorporate important concerns and make rational decisions.

In my practice to lay the foundation for a civil and respectful exchange, I ask parties and counsel to set aside their zealous advocacy and approach the mediation process as “joint problem

⁶ Parties may be ordered by a court to participate in mediation, but no court can force a party to settle if they choose not to do so.

⁷ For advice on drafting an effective written mediation summary, see <https://www.starkmediator.com/articles-links/crafting-effective-mediation-summary-tips-written-mediation-advocacy/>

solvers,” recognizing that everyone has precisely the same challenge: is there an off ramp to the present dispute? Joint problem solvers agree to make reasonable concessions, don’t try to score every point, listen respectfully, attempt to understand the other side’s perspective, and employ the language of diplomacy.

For instance, accusing the other side of lying will generally antagonize the accused, causing a reaction and a likely counterattack in kind, charges of “mudslinging” or both. By contrast, far more effective is the advocate who calmly pulls together the impeachment evidence and presents it this way: “Most cases are won or lost based on who the jury believes is most credible. Here’s the evidence we expect to present to demonstrate that (our client) is more likely to be believed than yours.” A respectful presentation highlighting the risk to good name and reputation can move the needle. On the receiving end, good trial lawyers welcome the opportunity to hear such a presentation in order to learn what they’re up against. Even if mediation doesn’t resolve the dispute, the parties receive value in being better able to prosecute and defend the claims. That said, most disputes do settle at mediation. The very process of a respectful exchange of views plants the seeds of doubt leading to recognition that a good settlement is better than a good case: you can always lose a good case.

b. Exercise the Option of Speaking Directly to the Other Side

Michigan litigators rarely agree to joint sessions. Most prefer an all caucus/shuttle diplomacy model where the parties may never actually ever see one another. Missed is a rare opportunity to advance client goals and gain valuable insight. Mediation is the only stage in the process where the parties and counsel are permitted – indeed encouraged – to communicate directly with one another. There are many things the parties might say directly to one another, given the chance, which could give them satisfaction *and* move the dispute closer to resolution.

Regarding advocates, who have the most input into process design, it never ceases to surprise when experienced counsel passes up a chance to make the case or plead their cause and the benefits of settlement directly to opposing parties. With advance planning, they have ample time to prepare their remarks select the most effective language and marshal their points in the most compelling and persuasive order. More significantly, they will have the undivided attention of opposing counsel and client alike. In joint session, talented advocates can reveal how compelling a case they might make to a jury; demonstrate their ability to tell a good story persuasively; and showcase their skills as effective and compelling communicators. In the hands of a mediator trained to manage joint sessions, the environment will be a safe one.

For tips preparing a *party* to make a joint session “pitch” at mediation, see <https://www.starkmediator.com/wp-content/uploads/sites/4/2020/04/Stark-Mediator-Effective-Presentation-Directions.pdf>

When advocates are asked for an explanation of their aversion to joint sessions, typical answers include: 1) “We will only antagonize each other and get everyone’s back out of joint.” True enough where aggressive zealous advocacy is employed. As noted *supra*, however, mediation

advocacy tailored to persuading the decision maker will rarely cause a mediation to go sideways. 2) “We already know their version of the facts.” Perhaps, but rarely put together as a compelling narrative story in a party’s own words previewing what the jury will ultimately be told. Prudent participants in the joint session will listen carefully to see if there is anything new; and to determine how effectively the speaker can communicate their thinking. 3) “My client might slip and make a mistake.” Lawyers who prepare their clients for the mediation process anticipate potential mistakes their clients might make and prepare them to avoid doing so. I’ve presided over scores of joint sessions. I have yet to see a slip of the tongue that made a difference. See, <https://www.starkmediator.com/wp-content/uploads/sites/4/2022/01/Why-You-Should-Consider-Joint-Sessions.pdf>

c. Search for Common Ground

No matter how deep their differences, no matter how entrenched in their positions, no matter how escalated their emotions, parties often share common ground, areas of agreement overlooked or drowned out by the dispute. Before the termination, for example, the former employee may have loved working for the company; and the company may well have valued the employee’s service. The two businesses now litigating the quality of machine parts were always satisfied with price and delivery in the past. The CEOs of each enterprise, in charge of businesses founded by their grandfathers, have more in common than they might have thought. When the founding partners first came together to establish the enterprise now imploding, they enjoyed each other’s company and respected one another’s ability.

Identifying common ground is sometimes a revelation to the parties and often serves to build trust and establish momentum toward future agreements and resolution.

d. Prepare an Offer/Concession Strategy in Advance

The best negotiators are strategic. They develop an offer/concession approach with their clients long before they reach the mediation table, a strategy which anticipates each move and countermove likely to occur round after round until settlement is reached. Strategic advocates plan out the negotiation in their head, anticipating how each offer will be received, predicting the other side’s response, and carefully working the negotiation through step-by-step until their settlement goal is achieved. Fortified with a plan, they are not buffeted by emotions in the moment and at the table by misbehavior or overly aggressive advocacy from their opponent. A well-conceived plan smooths out an otherwise emotional roller coaster ride. They have a plan and they implement their plan, ignoring distractions. Strategic negotiators generally get what they’re after. Regrettably, strategic negotiators are rare. Too many advocates limit their planning to an opening number and a bottom line, relying on their gut instinct and experience for all the moves in between. Some advocates do not prepare even that much. Seat-of-the-pants negotiation may work in some cases, but it is not a strategy to maximize results over time.

An offer/concession strategy is a prediction. Predictions about the future are fraught with peril. Mistakes will be made. Should unanticipated risks be identified, for example, the value of the claim or defense is impacted accordingly, which, in turn, effects the overall settlement value of the dispute. Accordingly, strategic negotiators must also be flexible. Adjustments in the strategy may be necessary.

In any event, with an offer/concession strategy, party expectations are better managed, and the negotiator retains tighter control of the process. Clients are less frustrated, less likely to become discouraged, and less likely to grow impatient. Parties who are frustrated, angry or impatient are more likely to make mistakes, offering too much, leaving money on the table, or giving up too soon. With an offer/concession strategy, even disappointing moves are anticipated in advance and planned for. By focusing on process, both parties remain in the negotiation. The danger of one party or the other withdrawing is diminished. Indeed, by developing an offer/concession strategy, counsel reduces the risk of error and reading or sending the wrong signal.

If the strategy fails to bring the parties within the settlement “landing zone”, it could be a sign that one or both parties are not ready to settle; or someone’s evaluation is in error. In either case, counsel can learn a great deal from failure. It could be that one side or the other has underestimated the risks and a fresh assessment is necessary. It could be the problem can be resolved by a little additional discovery – the parties disagree, for example, about how a witness will testify. If so, the mediation can be adjourned until the witness is deposed. Perhaps the parties weren’t as ready for mediation as initially thought. The top or bottom line a party brings to the mediation table is the end product of a careful calculation as to risks, a weighing of strengths and weaknesses, an assessment of the judge, the legal foundation of claims and defenses, economic and non-economic loss, the potential jury pool, the state of the law, and more. If participants are paying attention to the information exchanged during the mediation process, their final evaluation *should* change to incorporate the fresh insights learned.

e. Have a rationale for each proposal or counterproposal

Effective negotiators combine their dollar proposals with a rationale or explanation, so the other side doesn’t conclude the offer is totally arbitrary. In an employment case, for example, how much is allocated for lost wages to date minus interim earnings? Is there money allocated for future lost wages, emotional distress, and attorney fees? Have the numbers been reduced to present value? What interest rate was used? If a party is claiming lost profits, how are they measured and what assumptions are they based upon? Unexplained numbers typically irritate the recipient and lead to counterproposals that are generally unproductive, resulting in equal consternation on the other side and a poisoned negotiation atmosphere. Unexplained numbers are rarely productive. By contrast, a rationale generally leads to a robust and constructive discussion of the assumptions and bases rather than simply complaints about the numbers themselves.

Whatever the explanation for a proposal, any settlement number communicated will be the loudest message heard by the recipient. Accordingly, I present the rationale for the numbers before presenting the numbers themselves. Once the number is presented, parties may stop listening. Because I *want* the participants to understand where the number came from, how it was derived, and what the offeror was thinking, it only makes sense to save the numbers for last.

f. Make Use of the Mediator

Mediators *want* to assist the parties in making good judgments about settlement. Typically, they are the only participant in the process who will have been in both rooms with exposure to how litigants are participating. There are many issues about which a mediator might be helpful:

- i) Can the mediator share the temperature, mood and thinking in the other room?
- ii) Will the mediator serve as a negotiation coach? Ask for suggestions in formulating the most effective proposals to communicate.
- iii) Use the mediator as a “sounding board”. Run your questions, concerns and proposals by the mediator for input.
- iv) Ask if the mediator can share what seems to be causing the most consternation “next door” and how to move forward.
- v) What is the mediator’s reaction to the rationale employed to justify each proposal?
- vi) If the mediator has trial or subject matter expertise, seek input as to risk and the magnitude of risk.
- vii) As the negotiation process moves forward, request input as to where the negotiation might be leading.

g. Consider Remedies Not Available through the Litigation Process

In litigation, judicial remedies are confined to money damages and limited equitable relief from an often-reluctant judge. In mediation, as in any negotiation, by contrast, the only limit on proposed settlement terms is the creativity of the participants. By considering the underlying needs and interests of each party, i.e., recognizing what may be driving the dispute, participants may be able to expand the pie with proposals unavailable through litigation. For example, mediation may result in a business solution where the parties continue to work together. No judge could order that. In a dispute between a franchisee and a franchisor, modification of oppressive enterprise rules can result in a WIN/WIN success for both parties. In an employment case, a plaintiff claiming wrongful discharge may be offered conversion of an otherwise black mark on their resume (“termination for cause”) with a negotiated resignation or letter of recommendation in its place. Disputes made public in the media can be settled by drafting a joint press release that gives each side cover. Settlement agreements can include non-disparagement clauses, confidentiality, and cooperation in future litigation.

h. Learn From the Process

Many mediators describe the exchange of information during the mediation process as a “learning conversation.” If the dispute does not resolve itself, participants have learned something new or better understand something known in a new light. As noted *supra* when parties are truly listening, the numbers they’ve brought to the table – their top and bottom lines - should change. In the relatively rare event that mediation does not result in resolution, the parties are better equipped to prosecute and defend their claims and perspectives going forward.

i. Prepare Clients for the Process

Parties are the ultimate decision-makers. As full participants at the mediation table, they should understand the mediation process inside and out. That requires a good deal of advance preparation and party education. How does the process work? How does this mediator do things? What is the mediator’s role?⁸ How should the party act? When should they speak up? Should they prepare opening remarks? What is expected of them? What can they expect from the other side? What can they say and what should they not say?

If parties are to make the most of the opportunity to learn, and to exercise good judgment unclouded by emotions and distractions, they must be ready. Some of the topics that should be covered include:

- i)** If a party is going to make opening remarks in a joint session, they should know well in advance so they can prepare their comments accordingly. Counsel should work with their clients well before the day of mediation to “preview” party presentations for content, format, and tone. Advocates should not be afraid to critique presentations honestly and constructively to be most effective.
- ii)** Patience is a virtue. No two parties negotiate at the same pace or in the same way. Opening offers and counteroffers do not necessarily reflect where the mediation will end up.⁹ Experienced negotiators on the other side may well take advantage should they get the impression that someone is losing their resolve.
- iii)** One of my favorite quotes: “Expectations are resentments under construction.” Parties unaccustomed to negotiating the resolution of law suits may not be comfortable with the pace of things. It may have taken

⁸ See, for example, <https://www.starkmediator.com/articles-links/i-know-what-your-job-is-reframing-the-role-of-mediator/>

⁹ See my paper on what every client should know about the negotiation process. <https://www.starkmediator.com/practice-tips/2021/05/03/negotiation-101-what-parties-should-know-about-negotiations-at-the-mediation-table/>

months or years to create the dispute. It may take all day to remove impediments to resolution. Some participants need more time to make decisions than others. For parties, this may be their only case whose outcome could have profound impact on their lives. They need extra time to make up their minds. That may require many hours of patient waiting.

- iv) Clients expect their counsel to be zealous advocates. If counsel is observed acting as a joint problem solver who treats the other side respectfully, makes reasonable concessions, and seems to be trying to understand their perspective, parties may fear counsel has lost faith in their claims or defenses. Prudence dictates that parties be given an explanation for the change from zealous advocacy to mediation advocacy.
- v) While the word “compromise” has taken on negative connotations in today’s world, finding an off ramp from a dispute often requires that each side make sacrifices. In “Getting to Yes,” Fisher and Ury taught us the value of interest-based bargaining and the possibility of WIN/WIN resolution. In the mediation of disputes over money damages, however, Winston Churchill’s observation still remains apt: the best settlements are those from which both sides walk away equally unhappy. Prudent counsel will, therefore, include preparing clients to be flexible and open minded about resolution.

IV. Conclusion

Savvy litigators and their clients understand that mediation is a unique opportunity to engage in an effective dispute resolution process: a process designed to save time and money, exchange critical information, reduce consternation, limit disruption, manage risk, and achieve mutually beneficial resolution. When parties proceed as joint problem solvers, properly prepared by advocates who appreciate the power of replacing zealous advocacy with mediation advocacy, their underlying needs and interests are met, and their goals and objectives achieved.

Research Reports

The Negative Impact of Attorneys on Mediation Outcomes: A Myth or a Reality?

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Mediators often do not welcome the presence of attorneys at the mediation table. Because of the apparent contradictions between both professions, many mediators believe that the presence of attorneys is prejudicial to the mediation process. Using empirical data collected from workplace mediation cases, we have explored the actual impact of the presence of attorneys. Our results indicate that the presence of an attorney does not significantly affect the outcome of a mediation, with two exceptions. First, the presence of attorneys in a mediation process reduces the parties' level of satisfaction with the mediator. Second, the presence of an attorney would appear to hinder the level of reconciliation possible between the parties.

Key words: mediation, conflict, outcome, lawyers, workplace.

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Myths about the Impact of Attorneys on Mediation

The impact of the presence of attorneys at the mediation table has been a source of much debate and great tension between dispute resolution professionals (Moore 1996; Boulle and Nesic 2001). At the heart of the debate lies the question of whether the presence of attorneys is compatible with the mediation process. Indeed, the differences between mediators' mission, ethics, and practices and those of attorneys may result in conflicting values. Whereas the mediator emphasizes cooperation between all parties and their autonomy from the mediator, the attorney has an advocacy relationship with just one of the parties and is legally obligated to work toward the best outcome for that client (Stimec 2001). The result is sometimes a perceived incompatibility between the two approaches and, by extension, between both types of professionals.

In training and classrooms, it is common to hear the novice mediator voice concerns that the presence of an attorney at the mediation table will hinder the mediation process. Certain mediators — in particular those without any legal training — have even developed a fearful attitude toward the presence of attorneys in the process, with some even equating the presence of an attorney with the failure of a mediation process. Nevertheless, other mediators instead claim that the presence of attorneys is advantageous to the mediation process. They do not perceive the attorney as an enemy but rather as a partner in the process.

Is the negative impact of the presence of an attorney on the mediation outcome a myth or a reality? Empirical research has yet to confirm or refute this idea. To make up for this shortcoming in the research, we have empirically tested the assumption that the presence of an attorney will hinder the effectiveness of a mediation by comparing mediation results obtained in the absence of an attorney with those obtained in the presence of attorneys.

The Presence of an Attorney and the Effectiveness of the Mediation Process

In this study, we examined the impact that an attorney's presence has on the mediation process by breaking down the effectiveness of the mediation into seven dimensions. First, we compared two *quantitative* aspects of mediation outcomes: settlement rates and the time required to reach an agreement. Second, we contrasted five *qualitative* aspects of mediation outcomes: mediator's usefulness, procedural justice, parties' satisfaction with the agreement, parties' confidence in the agreement, and the level of reconciliation between the parties. For each dimension, we have explored in this article what could explain those negative impacts that we found were caused by the presence of attorneys in mediation.

Impact on Settlement Rates

Mediators often express the fear that the presence of an attorney will negatively affect the settlement rate. (For example, when co-author Jean Poitras has conducted program assessments, he has often heard mediators claim that the presence of attorneys lowers their settlement rates.) Various explanations have been given to substantiate this perception. First, some attorneys may not be highly motivated to reach an amicable settlement. Thus, the attorney's desire to use the case to create a legal precedent could also lead to the failure of a negotiation (Mendelsohn 1996).

Furthermore, some mediators have argued that some attorneys may hesitantly agree to mediation for purely tactical reasons, such as to gain information that will enable them to obtain more advantageous results in litigation (Stimec 1999). In addition, theorists have argued that attorneys' adversarial "litigation mentality" (or litigation orientation) diminishes settlement rates because attorneys pass up opportunities to reach a settlement that accommodates the parties' common interests in favor of seeking one-sided victories (Mnookin, Peppet, and Tulumello 2000; Abramson 2005). Consequently, *Hypothesis One is that the presence of attorneys in mediation significantly reduces settlement rates.*

Impact on the Time Required to Reach a Settlement

Inviting one or more attorneys to take part in the mediation process increases the number of interactions and strategies because there are more people around the table and the attorneys may introduce into the mediation exogenous interests with respect to the parties' situation. We examined how these interactions and strategies affect the duration of the mediation process.

First, attorneys may delay the settlement of a dispute through mediation for financial reasons. For example, the payment of professional fees on the basis of hours worked could motivate the attorney to delay the settlement of the dispute to increase the number of hours billed to the client (Mendelsohn 1996; Korobkin 2002; Abramson 2005). Such nonfinancial reasons as a desire to build or preserve a reputation for "hardball negotiating" in highly publicized cases could also motivate an attorney to delay settlement of the dispute (Mendelsohn 1996).

In addition, attorneys' (or their clients') commitment to or belief in their case based on questions of justice or other principles could also delay settlement until "defending the principle becomes too costly" (Mendelsohn 1996). Finally, attorneys may wish to justify both their role and their fees with unnecessary interactions. For these reasons, *Hypothesis Two is that the presence of an attorney significantly increases the time required to conclude a mediation.*

Impact on the Perceived Effectiveness of the Mediator

We hypothesize that the involvement of an attorney in a mediation could also affect the clients' perceptions of the mediator's effectiveness. It seems possible that a rivalry could arise between a mediator and an attorney over who has made the greatest contribution to settling the dispute and that the mediator could thus receive less credit for his or her role in facilitating settlement than he or she would have had the attorney not been involved. Furthermore, some scholars have hypothesized that the attorneys' presence could transform the mediation in ways that could also reduce the clients' satisfaction with the process, for example, if the attorney were to suggest that the mediator is unqualified because he or she does not know the law well enough to evaluate the client's case (Pinzòn 1996; Nolan-Haley 1998; Denckla 1999).

In addition, the mediator might be hindered should the attorney adopt an adversarial stance during the mediation. On the other hand, the attorney could display a more problem-solving attitude that could facilitate the mediator's work, even playing the role of an "unofficial comediator." But, in terms of the clients' attitude toward the mediator, the result would be the same in either case: the credit the mediator receives for the outcome would be diminished. Thus, *Hypothesis Three is that the presence of an attorney in a mediation will considerably diminish the parties' perception of the mediator's effectiveness.*

Impact on the Level of Satisfaction with the Mediation Process

Attorneys who maintain an adversarial, competitive stance may also negatively influence the parties' perception of the mediation process itself (Abramson 2005). They could suggest to their clients that mediation is a "second class" or "discounted" form of justice for those who do not have the financial ability to pursue their cases in court. The value of the mediation process could therefore be diminished in the client's eyes.

Furthermore, whereas the mediator may be most interested in *processes*, the attorney may emphasize *procedures* (Stimec 2001). (While a process orientation would emphasize a system — e.g., principles of mediation — and be flexible, a procedural orientation would focus on a sequence of tasks and steps — e.g., interrogation followed by counterinterrogation — to be followed in a strict order.) Thus, the parties could end up being torn between the two approaches. Discussions and compromises between the mediator and the attorney could thus cause the parties to doubt the value of the mediation process itself. For these reasons, *Hypothesis Four is that the presence of an attorney will significantly diminish the clients' perception that the mediation process is fair.*

Impact on Satisfaction with the Agreement

Attorneys' ideas about what constitutes a satisfactory agreement may differ from those of their clients. First, attorneys may incorrectly perceive that their clients will be satisfied with a financial settlement alone (Golan 2002) and may seek to reach a financial settlement at the expense of other dimensions of value to their clients (Weinstein, Song, and Phillips, 1996; Rodney 1999; Contuzzi 2000). Research has shown that achieving a monetary victory — or even the resolution of the conflict — does not always meet all the clients' needs (Folger and Jones 1994). Settlements sometimes fail to take into account a conflict's relational dimensions (Vanderkool and Pearson 1983) such as expected future behaviors or the need for apologies or other gestures of conciliation.

Moreover, psychological factors involved in decision making can influence the parties' satisfaction with a settlement. How an attorney presents a settlement offer — as preferable to the status quo or as less preferable than what might have been achieved through litigation — could ultimately influence the client's level of satisfaction with the settlement. Therefore, *Hypothesis Five is that the presence of an attorney will significantly reduce parties' level of satisfaction with a mediated agreement.*

Impact on the Parties' Confidence in the Agreement

When attorneys speak on their clients' behalf, the client's role in using his or her own power to achieve resolution through mediation may be diminished (Nolan-Haley 1998; Gordon 2000). In addition, attorneys' preference for a "calculus-based trust" versus the more relational "knowledge-based trust" typically developed by mediators (Lewicki and Bunker 1995) may diminish the parties' trust in each other. (While calculus-based trust presumes that parties trust each other when they feel the other has no incentive to harm them, knowledge-based trust assumes that parties will trust each other when they know each other better.) The attorney may also foster distrust by maintaining that the other party is an adversary who will refuse to cooperate in finding and implementing a solution (Allred 2000). Thus, *Hypothesis Six is that the presence of an attorney will significantly reduce parties' confidence in the agreement.*

Impact on Reconciliation between the Disputants

Attorneys who maintain an adversarial stance in a mediation — treating parties as defendants and plaintiffs with conflicting interests rather than as partners seeking mutually satisfactory solutions — could also exert a negative influence on the parties' level of reconciliation (Menkel-Meadow 2000). Such attorneys might privilege achieving a monetary settlement at the expense of addressing the conflict's less quantifiable elements, such as the disputants' relationship (Golan 2002).

Attorneys can also hinder the process because they may discourage expressions of regret, sympathy, and apology that they fear may later be interpreted as admissions of responsibility should mediation prove unsuccessful. But such statements often lie at the heart of effective reconciliation processes.

Finally, another possible impediment is the attorneys' practice of speaking on behalf of their clients. While this may be necessary during trial, the contrary is true in mediation. Indeed, in mediation, conflicts are often solved when the parties speak directly to each other. By filtering the communication, the attorney protects his or her client but hinders the direct dialogue that can be critical to reconciliation (Regis and Poitras 2003). For these reasons, *our final hypothesis, Hypothesis Seven, is that the presence of attorneys will significantly reduce the level of reconciliation between the parties.*

Method

This study was conducted in partnership with the Commission des Normes du Travail du Québec (CNT), an organization whose mission is to inform the public on labor standards, supervise the application of labor standards, receive complaints from employees, and compensate workers according to the province of Quebec's labor standards and regulations. One of the organization's roles is to promote fair and balanced labor relations between employers and employees. The organization examines grievances arising from dismissals, allegedly illegal work practices, and psychological harassment complaints and provides mediation services in these cases.

Data Collection

Participants in the study are employees and employers involved in workplace disputes mediated by a professional mediator appointed by the CNT. Participants were recruited by thirty-six CNT mediators in eight regions of Québec. Mediators were invited to take part in the experiment on the basis of two criteria: they had at least two years of experience as mediators and at least one year of experience on a full-time basis. The mediators' main role in the study was to serve as intermediaries between the researchers and the parties by distributing the questionnaires at the end of each mediation according to a predetermined protocol to ensure the scientific validity of the data collection process. Respondents returned their questionnaires to researchers using a prepaid return envelope to maintain anonymity. We collected the data in May and June 2006.

Sample Description

Once the data had been collected, 177 valid questionnaires were retained for statistical analysis purposes. At 48 percent, the response rate is satisfactory for this type of study. Mediation led to agreement in 68.8 percent of the cases. Respondents were nearly equally divided between employers

(50.3 percent) and employees (49.7 percent). Women respondents (60.5 percent) outnumbered men respondents (39.5 percent). Respondents' average age was 41.1 years. Approximately 25.9 percent of respondents were university graduates, 31.4 percent of respondents were graduates of a two-year college, and 42.7 percent of respondents held a high school diploma. Finally, respondents' average length of service in the current position was 6.7 years, and their median salary was \$37,500 (Canadian), which was close to the median salary in Quebec at that time.

To assess attorneys' impact on the mediation process, we divided our sample into two groups: mediation in the absence of an attorney ($N = 145$) and mediation conducted in the presence of an attorney ($N = 32$). It is important to note that we found no significant sociodemographic differences between the groups.

Control Variable

One potential confounding variable in our study is the initial level of conflict between parties. More specifically, it is quite possible that cases involving attorneys are more contentious, and this possibility could affect intergroup comparisons. We used an initial conflict level scale to take into account the level of conflict. Adapted from Karen Jehn's (1995) Intragroup Conflict Scale, our scale measured the level of cognitive disagreement and relational tension between parties at the onset of the mediation process. Using this scale made it possible to assess whether the conflicts involving attorneys were substantially more conflictual than cases in which attorneys were not involved. The initial conflict scale comprised four items; for each one, parties specified their level of agreement with the statement using a six-level Likert-type scale ranging from "completely disagree" (1) to "completely agree" (6). We computed the scale by combining the item results (Cronbach's alpha = 0.94). The scale items are reported in Table One.

Settlement Rate and Time Required to Reach an Agreement

After the mediation process, parties were asked to report the outcome of the discussions. More specifically, we asked whether they had reached an agreement or not. Parties' responses were coded as a dichotomous variable (0 = no agreement and 1 = agreement). Furthermore, we asked parties to estimate how long the mediation process had lasted and then coded the estimated duration of each mediation process in minutes. While the settlement rate was assessed on the basis of all cases, we only computed duration for those cases in which an agreement was reached.

Assessment of Mediation Outcomes

We used the Mediation Outcome Standard Evaluation Questionnaire (MOSEQ) (Poitras and LeTareau 2009) to qualitatively assess mediation outcomes. This questionnaire comprises fifteen items. For each item, parties

Table One
Measurement Scales

Measurement Scales	Scale Statements
Initial conflict level <i>Cronbach's alpha = 0.940</i>	IC1 There was a great deal of disagreement between myself and the other party. IC2 There was a certain level of hostility between myself and the other party. IC3 I did not at all share the same point of view as the other party. IC4 There was very little empathy between the other party and myself.
Mediator's usefulness <i>Cronbach's alpha = 0.904</i>	MU1 The mediator's intervention was determinant in advancing discussion. MU2 The mediator had an important impact on the progress of discussions. MU3 The mediator's contribution was critical to advancing discussion.
Procedural justice <i>Cronbach's alpha = 0.857</i>	PJ1 The mediation meeting was run without bias. PJ2 Mediation was run in a neutral and objective manner. PJ3 Mediation took place in an impartial climate.
Satisfaction with the agreement <i>Cronbach's alpha = 0.940</i>	SA1 I am happy with the solution we came to. SA2 The settlement of the conflict was satisfactory to me. SA3 I am content with the agreement we reached.
Confidence in agreement <i>Cronbach's alpha = 0.939</i>	CA1 I believe our agreement will be applied. CA2 I am convinced the agreement reached will be respected. CA3 I believe we will abide by the provisions of the agreement.
Reconciliation between parties <i>Cronbach's alpha = 0.924</i>	RP1 I feel that the other party and I have reconciled. RP2 I feel like my relationship with the other party has been restored. RP3 I believe I have rebuilt my relationship with the other.

Note: Scales having a Cronbach's alpha over .80 are considered statistically consistent.

specified their level of agreement with the statement using a six-level Likert-type scale ranging from “completely disagree” (1) to “completely agree” (6). The scales were computed by combining the individual results. Only mediations that ended in agreement were used to compute the scales. The MOSEQ measures five dimensions of agreements reached through mediation: the mediator’s usefulness (three items; Cronbach’s alpha = 0.90), the fairness of the process (three items; Cronbach’s alpha = 0.86), the respondent’s satisfaction with the agreement (three items; Cronbach’s alpha = 0.94), the respondent’s confidence in the agreement (three items; Cronbach’s alpha = 0.94), and the level of reconciliation between the parties (three items; Cronbach’s alpha = 0.92). The questionnaire items are reported in Table One.

Statistical Analysis

We conducted several statistical tests to assess the impact of the presence of attorneys on the mediation process. More specifically, we compared settlement rates between mediation conditions using a chi-square statistical test. Furthermore, we compared the initial conflict level, the time required to reach an agreement, the mediator’s usefulness, the fairness of the process, the satisfaction with the agreement, the confidence in the agreement, as well as the level of reconciliation of the parties between conditions using the equality of means (*t*-test) statistical test. Because we ran multiple comparisons, we set our level of statistical significance at a conservative $p < 0.01$ (likelihood of a false positive less than 1 percent).

Results

The statistical analyses yielded mostly nonsignificant distinctions between mediations conducted without the presence of attorneys and mediations conducted in the presence of attorneys. We did, however, find significant differences between the two mediation conditions for two variables. Table Two summarizes the results of our statistical analyses.

Nonsignificant Results

We found no significant statistical difference for most of the variables in this study. First, we found no significant difference between mediation conditions with respect to the initial conflict level between parties; thus, parties involved in more intense conflicts do not seem to be more likely to seek to use an attorney during mediation. Second, the settlement rate was virtually identical between the two mediation conditions, rejecting Hypothesis One. Third, mediation conducted in the presence of attorneys requires on average some thirty additional minutes to reach a settlement than when attorneys are not present. Although this difference represents a 20.1 percent increase, it is not significant mainly because of the high variation of mediation durations under both conditions (i.e., variance).

Table Two
Comparison between Mediation without Attorneys and Mediation with Attorneys

Variable	Mediation without Attorneys	Mediation with Attorneys	Significance Level
Initial conflict level	3.42	3.25	0.271
Settlement rate	68.8%	69.0%	0.986
Time required to reach an agreement	147.8 minutes	177.5 minutes	0.100
Mediator's usefulness	5.29	4.65	0.005*
Fairness of the process	5.44	5.10	0.155
Satisfaction with the agreement	4.72	4.18	0.175
Confidence in the agreement	5.36	4.98	0.126
Reconciliation of the parties	3.79	2.68	0.002*

*Significant difference at $p < 0.01$.

Thus, Hypothesis Two is also rejected. Fourth, we found no significant difference between mediation conditions with respect to the respondents' assessments of the fairness of the process (rejecting Hypothesis Four), their satisfaction with the agreement (rejecting Hypothesis Five), and their confidence in the agreement (rejecting Hypothesis Six). In general, these results suggest that the presence of attorneys affects neither the likelihood of reaching a settlement nor the parties' level of satisfaction with the agreement.

Significant Results

We did find that one process variable and one outcome variable both presented significant differences between mediation conditions. First, parties' appreciation of their mediator's usefulness seems to be affected by the presence of attorneys. When an attorney was present, the respondent's assessments of the mediator's usefulness decreased by 12.1 percent, from mean = 5.29 to mean = 4.65, which represents a significant change ($p < 0.01$). Thus, the presence of attorneys would appear to diminish the client's appreciation of the mediator's role in resolving the conflict.

Second, the level of reconciliation between the parties also seems to have been affected by the presence of attorneys: the level of reconciliation of the parties was 29.3 percent less when attorneys were present

(mean = 3.79 to mean = 2.68) which was a significant change ($p < 0.01$). This result suggests that the presence of attorneys can hinder the reconciliation process.

Discussion

The empirical data we collected in this study indicate that the presence of an attorney in a mediation does not significantly affect the settlement rate, the time needed to reach an agreement, the perceived fairness of the process, the parties' level of satisfaction with the agreement, or the parties' level of trust that the agreement will be honored. These results indicate that attorneys have much less impact than is claimed by those mediators who do not welcome their involvement in the mediation process.

Nevertheless, the results also demonstrate that the presence of an attorney does affect mediation outcomes in at least two ways: by reducing the parties' level of satisfaction with the mediator's performance and by reducing the level of reconciliation between parties. These findings have practical implications, which we discuss below.

Reduced Level of Satisfaction with the Mediator

The fact that the presence of attorneys appears to reduce parties' appreciation of the mediator's role is not surprising in itself. The outcome of a mediation process may be attributable — at least from the parties' perspective — to the presence of both the mediator and the attorney. Indeed, a party may pay equal attention to both mediator's suggestions and the attorney's advice. From this perspective, the mediator and the attorney "share the stage."

But while this decrease in the level of satisfaction with the mediator is significant ($p < 0.01$), it is nevertheless small in practical terms (–12.1 percent). Furthermore, the settlement rate and the level of satisfaction with the agreement do not appear to be hindered by the presence of attorneys, which indicates that the decreased level of satisfaction with the mediator does not affect mediation outcomes. In fact, the main impact may be on the mediator's ego: when he or she shares the mediation process with attorneys he or she can no longer claim to be the sole savior in a conflict.

Reduced Level of Reconciliation of the Parties

The fact that the presence of attorneys diminishes the parties' level of reconciliation may represent this study's most important result. The presence of attorneys reduced by close to 30 percent the level of reconciliation of the parties during a mediation process, a considerable decrease that makes this result not only highly significant ($p < 0.01$) but also important in practical terms.

We suggest three explanations for this effect. First, attorneys tend to limit conversations to legal aspects, reducing opportunities for relationship-building chitchat between the parties. Second, most attorneys

advise their clients to refrain from apologizing during a mediation, regardless of the circumstances. Third, attorneys often speak on behalf of their clients, which is the essence of legal representation. (The third explanation encompasses the first two.) Indeed, by filtering conversations, attorneys manage to focus them on the legal facts and rid the discussions of any and all apologies.

Furthermore, the presence of attorneys may influence the mediation approach chosen by the mediator — some mediation processes place a greater emphasis on reconciliation than do others. But, on the other hand, some mediation approaches may moderate the attorney's inhibitive effect on the reconciliation process. For example, in the case of an evaluative mediation, which does not seek the reconciliation of the parties as an objective (Riskin 1996), the impact on reconciliation levels will probably be minimal. In the case of transformative mediation, however, the attorney's inhibitive impact could become problematic because reconciliation mechanisms are at the heart of this process (Bush and Folger 1994). The presence of attorneys may thus favor the use of more evaluative mediation approaches.

Strategies to Mitigate the Impact of Attorneys on Reconciliation Levels

In cases in which the reconciliation of the parties is a major mediation issue, the presence of attorneys must be taken seriously. Rather than being defeatist or considering mediation impossible, it is important for mediators to adopt strategies designed to limit the inhibitive impact of the presence of attorneys on the reconciliation process. To this effect, they may use one of three strategies, described below.

Explain the Mediation Framework. As previously discussed, many attorneys adopt an argumentative approach in mediation. This usually reflects both an occupational bias and inadequate knowledge of the mediation process. By correctly explaining the mediation framework and the role attorneys play within it, the mediator could help the attorney develop a more problem-solving approach. Dwight Golan (2002) has suggested that attorneys who do so make it easier to find solutions and may actually encourage the parties' reconciliation.

It may also be useful for the mediator to meet with the attorneys before undertaking the mediation process. Indeed, it is preferable to discuss the attorney's role in the mediation away from the parties to prevent the attorney from losing face in front of his or her clients. This also avoids crystallizing the attorneys' attitude. Obviously, to be effective, this strategy depends on the attorney's willingness to play the mediation game and is therefore designed only to eliminate issues arising from his or her unfamiliarity with the mediation process.

Define the Concepts of "Acknowledgment" and "Apology." A fundamental problem involves apologies: attorneys fear that their clients' apologies may be detrimental to their case should the mediation fail. In other words, they fear that the apologies will be used to prove responsibility at a future trial. Sometimes, the rules governing mediation confidentiality are not enough to reassure some attorneys. To address this concern, the mediator could include in the mediation contract a clause stipulating in explicit terms that any and all apologies or regrets expressed during the mediation process may not be interpreted as admissions of responsibility (Regis and Poitras 2003).

The mediator should explain to the parties why such a clause was included in the contract; they should understand that the clause is not designed to devalue possible apologies. The mediator should avoid creating a situation in which the parties devalue the apologies and regrets that could be expressed during the mediation process. When both parties recognize their share of responsibility in a conflict, studies have shown that the likelihood of reaching an agreement is dramatically higher (Borg 2000; Poitras 2007).

Encourage Direct Dialogue between the Parties. Our third proposed strategy follows logically from the first two. Once attorneys have "bought into" the mediation's problem-solving mission and have agreed that apologizing does not equate to admitting responsibility, the mediator may consider suggesting to the attorneys that they allow their clients to speak directly to each other. This strategy may prove to be the most important of the three given because direct dialogue between the parties is seen as a major advantage of the mediation process (Picard et al. 2004).

Attorneys, however, cannot be asked to remain silent during the mediation process. To the contrary, they should proactively help their clients to make proposals, fully assess the offers made to them, and sometimes object to certain suggestions. They may sometimes even discuss potential solutions with the opposing party's attorney. It is important that attorneys fully understand the active dimension of the problem-solving approach in order to enable the mediator to take advantage of their presence. Thus, the attorney will no longer be perceived as an obstacle to mediation but instead as a partner in the process.

Limits and Further Studies

In this study, we controlled for the initial level of conflict between parties. We cannot, however, claim to have ruled out all rival explanations in regard to the impact of attorneys on reconciliation. For instance, we did not control for parties' initial willingness to reconcile. It is quite possible that parties coming to mediation with an attorney are less interested in

reconciliation than parties who have not sought legal counsel. Therefore, it might be interesting to include the parties' initial interest in reconciliation as a control variable in future studies.

The legal context of this study is civil law. Would the results be the same in a common law context? Although researchers have noted some philosophical differences between judges practicing mediation under the jurisdiction of civil law and those practicing mediation under the jurisdiction of common law elsewhere in Canada (Roberge 2007), these differences do not seem to apply where the mediation is not practiced by a judge. Because mediations at the CNT are conducted by professional mediators (rather than judges), we can reasonably assume that our results are not significantly affected by the civil law context. Nevertheless, it would be interesting to duplicate the study in a common law context.

In addition, this study is based on workplace mediation. Would the results be the same in other mediation contexts? It would be interesting to further study the impact of attorneys in other mediation contexts. Also, it would be interesting to evaluate whether the study's results apply only to the presence of attorneys. Can they be generalized to other contexts using representatives? For example, do union representative hinder the reconciliation process? Conducting a study comparing the impact of union representatives and attorneys would also be worthwhile.

Finally, our sample was too small to separately analyze the differences between those cases in which both parties in the conflict were represented by an attorney and those cases in which only one party had an attorney present. In such "unbalanced" situations, it would be interesting to compare Party A's responses with Party B's to see the difference between the party who directly benefited from the attorney's involvement and the party who may have felt at a disadvantage. Is reconciliation hindered if there is only one attorney involved? Does the party who does not have an attorney appreciate the presence of the mediator more than the party who does? These are possible questions for a future study.

Conclusion

For many mediators, the presence of an attorney in the process complicates the mediation and is sure to result in failure. These mediators believe that attorneys have a negative impact on the process. Our research submitted this perception to an empirical test. The results generally indicate that the presence of an attorney has no significant impact on the mediation process, except with respect to one aspect. Indeed, only the impact on the level of reconciliation of the parties is significant in practical terms. The presence of an attorney in the mediation process therefore inhibits the levels of reconciliation between the parties.

To defuse the negative impact of the presence of attorneys on the process, we have proposed three complementary strategies. We suggest

that the mediator first coach the attorney to participate more appropriately in the mediation process, namely, by encouraging him or her to adopt a problem-solving approach. Our second suggested strategy is that the mediator explain to the attorney the possible beneficial role of apologies and regrets in a mediation and include a clause in the mediation contract stipulating that apologies expressed in a mediation setting may not be considered as admissions of responsibility. Finally, we suggest that mediators encourage attorneys to allow their clients to speak directly to each other.

To further examine the role of direct communication between parties in mediation, it would be interesting to assess what happens when attorneys speak on behalf of their clients (i.e., short-circuiting direct discussions between the parties). Should the result be significant, the inhibitive effect may be extrapolated to any situation in which parties are represented by a third party speaking on their behalf. Therefore, this effect would not be attributable to the presence of an attorney but rather to the communications protocol.

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Effective Advocacy at Mediation of Personal Injury Cases

Mediation is used to resolve the majority of civil cases in the U.S., and the basic process does not differ much among jurisdictions or based on the type of dispute. The dynamics of mediation proceedings do vary, however. The author discusses some aspects of personal injury cases that require attorneys to take special care during mediation when representing clients who have been injured or parties alleged to be at fault or financially responsible for the damages.

By Anne MacArthur

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The number of civil cases tried to verdict in Wisconsin has dwindled to less than one percent, part of a nationwide trend.^[1] Mediation is now the primary means through which civil litigation cases are resolved, being institutionalized or a de facto extension of the civil justice system.^[2]

Mediation is a form of alternative or extrajudicial dispute resolution. Some states have mandatory mediation statutes, while other jurisdictions, like Wisconsin, have adopted its use as a standard provision in civil trial scheduling orders. The formality of mediation proceedings varies widely by jurisdiction, with some resembling non-binding arbitration proceedings and awards.

In this article, I provide suggestions on how to be an effective advocate when mediating personal injury cases. It is the area I know best after spending most of my career representing injured plaintiffs and now serving as a mediator in general negligence cases.

While this article focuses on personal injury cases, it is important to understand that the *process* of mediation remains the same regardless of the subject matter of the dispute. What changes in these scenarios are the interpersonal dynamics. For example, the issues encountered and their emotional import are dramatically different when mediating child custody cases, corporate disputes, or general negligence actions. This area is beyond the scope of this article except as it relates to personal injury cases.

Next, and as important, the expectations of the parties to mediation vary not only by their legal status as plaintiffs or defendants but also by their use of and familiarity with litigation.

For individual litigants, the underlying lawsuit is likely the only time they have been involved in litigation. In contrast, institutional litigants such as insurers and other corporate entities engage in litigation routinely.^[3] One result is that individual litigants focus on process or procedural fairness, in particular, the opportunity to be heard, while institutional litigants focus on outcome and settlement numbers.^[4]

Characteristics of Mediation

Three key aspects of mediation distinguish it from jury trials and arbitrations:

- • In mediation, the parties voluntarily participate in a negotiation process to try to settle their dispute rather than having an outcome imposed by a third-party decision-maker.
- • The mediation process allows for maximum participation by the plaintiff in the negotiation and decision-making process compared with the limited role of giving testimony in a question-and-answer format.
- • Parties retain the right to trial by jury if they do not settle at or after mediation.

Although few litigated cases proceed to verdict,^[5] a party's right to trial by jury influences settlement negotiations in part because juries introduce unpredictability. This is as true for defendants as for plaintiffs. Juries have long been a particular concern of corporate defendants, resulting in protective legislation like damages caps and the use of contractually mandated arbitration provisions that waive the right to a trial by jury by operation of law. The necessary prerequisites to mediation are that both sides desire to participate, seek to resolve their dispute, and are willing to compromise.^[6]



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Mediation can be evaluative or facilitative. Evaluative mediation involves a neutral assessment of the merits of a case based on information each side presents. Facilitative mediation, in contrast, involves a focus on negotiation through individual caucusing facilitated by the mediator to identify disputed and undisputed issues. Mediators seek to ascertain the interests underlying the parties' positions, with almost all disputes involving reputation, relationship, or communication concerns.^[7]

The parties then debate the merits of each side's proof on each of the plaintiff's claims. The goal is to help the parties reach an agreement: parties control the outcome while the mediator controls the process.

The "contemporary mediation movement" originated in the 1970s and 1980s in neighborhood justice centers.^[8] The mediation process was imported into the legal system to address family law cases that were more prevalent after no-fault divorce laws were enacted. These cases, especially those involving children, were viewed as inconsistent with the adversarial nature of the traditional legal system.

In the past few decades, judges began ordering mediation of personal injury and other civil suits under their inherent authority to control their dockets. Mediation is now required in the majority of civil litigation scheduling orders.

Formal, Substitute, and Alternative Dispute Resolution

Trial, arbitration, and mediation are forms of dispute resolution used to adjudicate rights in civil disputes. Jury trials rarely occur, but a party's entitlement to have the case tried before a jury is a substantial factor in settlement negotiations. As others have observed, bargaining occurs in the shadow of the courthouse.^[9]

Arbitration and mediation are considered alternative forms of dispute resolution because they involve extrajudicial case resolution, but they differ significantly. Arbitration proceedings are similar to court trials. Mandatory arbitration clauses function to displace the legal system. These clauses limit judicial review to determining the enforceability and scope of a clause and confirmation of an arbitration award once issued. A party cannot pursue a jury trial on claims falling within the clause.

Mediation is a pure alternative form of dispute resolution because it offers the opportunity to attempt informal resolution while preserving the party's right to try the case before a jury. The proceedings are non-binding unless the parties reach a signed settlement agreement. The parties are free to explore settlement negotiations without fear that amounts offered and declined will be discussed at trial. Mediation proceedings in mandatory mediation jurisdictions resemble arbitrations with the important caveat that the recommended award is not binding, and the plaintiff may decline it and proceed to trial.

Mediation proceedings in Wisconsin are typically informal. By statute, with limited exceptions, matters discussed during mediation are confidential and inadmissible at trial.^[10]

The parties engage in settlement negotiations to determine whether the case can be resolved without a trial; in these negotiations, the mediator caucuses with each side privately. Information revealed is confidential unless the mediator is authorized to disclose to the opposing side.

Significantly, mediation is the only forum that gives plaintiffs an opportunity to tell their story unconstrained by rules, procedures, interruptions, or time limits and to participate directly in settlement negotiations. The opportunity for the plaintiff to be heard is widely viewed as beneficial regardless of the outcome.^[11]

Shared and Competing Interests in Mediation

The parties to a mediation, including the subrogated entities, have shared and competing interests. The parties share an interest in exploring informal resolution. In mediating a personal injury lawsuit, the predominant interest is financial: the plaintiff wants the most the insurer will pay, while the insurer wants to pay the lowest amount the plaintiff will accept.

The parties hold shared interests in case mediation, including the ability to control case outcome, limit the risk of a higher or lower verdict than the parties anticipated, and ascertain the exact amount of the defendant's exposure and the plaintiff's recovery after all other obligations are satisfied.

Mediation offers the plaintiff's counsel the opportunity to negotiate subrogation liens, which often makes a settlement achievable. The parties save considerable money in avoiding further litigation expenses, with this reality weighing on individual plaintiffs because every litigation cost reduces the plaintiff's net recovery dollar for dollar.^[12]

The parties also have individual interests when mediating a case. Insurers are corporate clients and sophisticated legal consumers. The insurer's interest is largely economic and dispassionate, a business decision. Although financial interests are dominant for insurers, they are not exclusive. Insurers are also contractually obligated to exercise good faith in protecting an insured from an excess judgment.^[13] The insurer has reputational issues at stake, for example, by limiting an insured's involvement in litigation as much as possible, thereby promoting the client satisfaction of an at-fault insured.^[14]

From a plaintiff's perspective, these cases are personal and emotional, especially when serious injuries or death result or when the defendant's conduct in causing the occurrence is highly negligent. Throughout the claims and litigation process, plaintiffs often think the

insurer has failed to accept responsibility or to demonstrate accountability for the insured's negligence.

Plaintiffs experience the litigation process as invasive, often feeling as though they are on trial. It is difficult for plaintiffs to understand, for example, why an insurer is not paying medical bills and wage loss contemporaneously when liability is clear.

Concepts like the burden of proof, claim elements and requisite proof, and partial or complete defenses are largely (and understandably) lost on clients. Some clients, regardless of the challenges the case presents, see proof of their claims as self-evident, assuming counsel can merely make a motion to have all records introduced as evidence and let the jury decide.

Client control might not be easy, but it is essential to the success of mediation. Counsel must explain the implications of the offer and document the file if the client, against the lawyer's advice, does not agree to settle. It is necessary to ensure that counsel understands the extent of their authority rather than have a misunderstanding after mediation has concluded. Being certain the client understands what is being communicated is also part of a lawyer's ethical obligation.

In some cases, clients plan to use claim proceeds for a specific purpose – buying a home, for example. In those instances, the value of what the plaintiff seeks in compensation bears no relationship to claim value.

The plaintiff's counsel walks a delicate line in supporting the client through the process while also having to control client expectations, one of the most important functions a plaintiff's counsel performs. Before mediation begins, counsel should discuss the client's expectations while explaining counsel's valuation analysis. Other issues to discuss include the strength of the respective parties' evidence on liability when disputed, the claims being made and in what amount, potential merits-based defenses such as failure to mitigate, and valuation.

Preparing for and Advocating During Mediation

Clients lack an independent basis to evaluate case value and must rely heavily on counsel for guidance. Mediation can be a productive and meaningful process when the parties prepare their proofs of claims and defenses and argue those issues at mediation as they would at trial. Positions taken should be supported by admissible evidence. The strengths and weaknesses of each party's proof will be discussed during individual caucuses. Claim

value should also be discussed in advance of mediation to manage client expectations and establish settlement parameters.

An initial step the parties must decide is at what point in the case mediation should proceed. Some mediations occur after initial discovery and the plaintiff's deposition are completed. If the case can be reasonably resolved at this juncture, both parties will avoid considerable litigation expenses. If mediation is unsuccessful, the parties can return to mediation after additional discovery has occurred. In more complex liability or damages cases, the parties might defer mediation until some or all expert-witness discovery has occurred.

Time is a limited commodity when running a high-volume caseload. Nonetheless, for mediation to be productive, the plaintiff must be able to articulate the claims brought, the amount of special damages sought, and the evidence establishing a prima facie case for each aspect of special and general damages claimed. The defendant must be able to identify the weaknesses in the plaintiff's proof and the evidence that supports any defenses asserted.

Subrogated parties must be included in the mediation process. Plaintiff's counsel is required by law to satisfy accident-related liens and also has an ethical obligation to do so.^[15] Plaintiff's counsel should request that the subrogated parties provide updated healthcare liens to all the parties. When any governmental lien is involved, counsel must factor in the time it takes to obtain updated lien information to ensure its availability in advance of mediation.

Personal injury cases can last a long time, in large part due to the plaintiff's healing period. If there is a substantial increase in the subrogation claim, the plaintiff's counsel needs to investigate and ascertain what accounts for the discrepancy. When the increase is due to additional treatment, as opposed to the inclusion of unrelated charges (which should be promptly disputed), opposing counsel should be advised and provided with records that have been collected or with a release to obtain them.^[16] If there is a substantial change in circumstances that cannot be addressed fully before mediation is scheduled to begin, the parties might want to consider rescheduling.^[17] It makes little sense to start a mediation when the information needed to assess the full nature and extent of the plaintiff's injuries is not yet available for review.

Valuation and Settlement Negotiations

Valuing a personal injury case is difficult. No lawyer, regardless of talent, can predict how a jury will determine what a case is worth or how comparative fault will be assessed when

liability is disputed. For the plaintiff, discussing claim value is likely to be an especially painful undertaking, especially when severe injuries, the death of a loved one, or driver conduct going beyond simple negligence is involved.

There is also no objective measure of value. A case is worth what a plaintiff accepts in settlement or, viewed in another way, what the insurer is willing to pay to settle. If the case proceeds to trial, the value of the case is what the jury awards. In mediation, the value of a case is what the parties agree it is worth.

Both the merits analysis and claim valuation must be evidence-based. As in a trial, the only evidence that matters in mediation is *relevant and admissible* evidence. Mediation, arbitration, and trials all incorporate the jurisprudential concept that an adversarial system produces the most reliable result when assessing disputed and undisputed facts. When mediation is used to resolve legal disputes, the proof process is no less adversarial than arbitrations or trials.

Much of the work at mediation by the plaintiff's counsel involves explaining why the insurer views the case as they do and what evidence exists to support the claims the plaintiff is asserting. When liability is contested, it is often helpful to start with a full value analysis and then debate the modifier for contributory negligence.

I believe that rather than focusing immediately on case value, mediation is more productive with a greater likelihood of success if the mediator initially talks with the plaintiff about their experience of the event that caused the injury to the present. This information provides context for case valuation and helps establish a trust relationship between the mediator and the plaintiff.

Conclusion

Mediation has established its significance by providing parties with the opportunity to participate in negotiating an agreed-upon resolution of their dispute, even if they do not resolve it. Mediation offers a forum where the parties may express their views freely, which does not occur at any other phase of the litigation. The parties retain their right to take the case to trial if they cannot reach an agreement.

While not every case will settle at mediation, many will, and some will settle after further discovery, returning for further mediation or direct settlement negotiations between the parties. In one sense, mediation that does not result in a settlement fails to achieve its goal. But even when a case is not resolved, mediation will have been a productive undertaking

because the parties should leave knowing more about the case than they did at the beginning of the process.

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Endnotes

[1] See C. J. Williams, *Advocating Altering Advocacy Academics: A Proposal to Change the Pedagogical Approach to Legal Advocacy*, 25 Suffolk J. Trial & App. Advoc. 203, 212-13 (2020) (less than 1% of federal cases proceeding to trial). In 2023, 110 civil cases in Wisconsin were tried to jury verdict. *Disposition Summary*, Wisconsin Courts, 2023 Certified Year End Statistics,

<https://www.wicourts.gov/publications/statistics/circuit/docs/disposumstate23.pdf>. Jeff M. Brown, *Endangered Species: Civil Jury Trials Are Increasing Rare*, InsideTrack, June 19, 2024, <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=16&Issue=11&ArticleID=30505>.

[2] James J. Alfini & Catherine McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 Ark. L. Rev. 171, 171-72 (2001) (footnote and citations omitted).

[3] Nancy A. Walsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash. U. L. Q. 787, 817-820 (2001).

[4] *Id.*

[5] See *supra* note 1.

[6] Michael D. Rust, *Mediation Skills Manual* (Winnebago Conflict Resolution Center Inc. 3d ed. 2022) (on file with author).

[7] *Id.* at 15.

[8] Walsh, *supra* note 4, at 817-20 (footnotes and citations omitted).

[9] Alfini & McCabe, *supra* note 2, at 172.

[10] [Wis. Stat. § 904.085](#).

[11] Walsh, *supra* note 4, at 794-95 (footnote and citations omitted).

[12] Statutory costs are nominal. [Wis. Stat. § 814.04](#). The exception is cases in which a fee-shifting statute is involved.

[13] Reputational interests are heightened when an insurer has a dual-insured case: it provides coverage to both the plaintiff and the alleged at-fault party.

[14] Obtaining dismissal of an individual defendant is of particular interest to an insurer, especially for clients involved in credit-based transactions such as mortgages. These cases last years by the very nature of a plaintiff's healing, and they tend to remain pending in litigation for many years after suit is filed.

[15] See, e.g., SCR 20:1.15(d); Model Rules of Professional Conduct Rule 1.15(d).

[16] As mediation progresses, the defense will likely identify the date they believe the plaintiff reached the end of accident-related healing. The information should be provided to subrogation counsel to put them on notice that there is a dispute over the relatedness of treatment after the date indicated.

[17] When substantial direct negotiations have occurred, the parties remain considerably far apart on value, and an impasse has been reached, the parties may wish to move jointly to vacate the mediation order on the grounds of futility.

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Myths about the Impact of Attorneys on Mediation

The impact of the presence of attorneys at the mediation table has been a source of much debate and great tension between dispute resolution professionals (Moore 1996; Boulle and Nesic 2001). At the heart of the debate lies the question of whether the presence of attorneys is compatible with the mediation process. Indeed, the differences between mediators' mission, ethics, and practices and those of attorneys may result in conflicting values. Whereas the mediator emphasizes cooperation between all parties and their autonomy from the mediator, the attorney has an advocacy relationship with just one of the parties and is legally obligated to work toward the best outcome for that client (Stimec 2001). The result is sometimes a perceived incompatibility between the two approaches and, by extension, between both types of professionals.

In training and classrooms, it is common to hear the novice mediator voice concerns that the presence of an attorney at the mediation table will hinder the mediation process. Certain mediators — in particular those without any legal training — have even developed a fearful attitude toward the presence of attorneys in the process, with some even equating the presence of an attorney with the failure of a mediation process. Nevertheless, other mediators instead claim that the presence of attorneys is advantageous to the mediation process. They do not perceive the attorney as an enemy but rather as a partner in the process.

Is the negative impact of the presence of an attorney on the mediation outcome a myth or a reality? Empirical research has yet to confirm or refute this idea. To make up for this shortcoming in the research, we have empirically tested the assumption that the presence of an attorney will hinder the effectiveness of a mediation by comparing mediation results obtained in the absence of an attorney with those obtained in the presence of attorneys.

The Presence of an Attorney and the Effectiveness of the Mediation Process

In this study, we examined the impact that an attorney's presence has on the mediation process by breaking down the effectiveness of the mediation into seven dimensions. First, we compared two *quantitative* aspects of mediation outcomes: settlement rates and the time required to reach an agreement. Second, we contrasted five *qualitative* aspects of mediation outcomes: mediator's usefulness, procedural justice, parties' satisfaction with the agreement, parties' confidence in the agreement, and the level of reconciliation between the parties. For each dimension, we have explored in this article what could explain those negative impacts that we found were caused by the presence of attorneys in mediation.

Impact on Settlement Rates

Mediators often express the fear that the presence of an attorney will negatively affect the settlement rate. (For example, when co-author Jean Poitras has conducted program assessments, he has often heard mediators claim that the presence of attorneys lowers their settlement rates.) Various explanations have been given to substantiate this perception. First, some attorneys may not be highly motivated to reach an amicable settlement. Thus, the attorney's desire to use the case to create a legal precedent could also lead to the failure of a negotiation (Mendelsohn 1996).

Furthermore, some mediators have argued that some attorneys may hesitantly agree to mediation for purely tactical reasons, such as to gain information that will enable them to obtain more advantageous results in litigation (Stimec 1999). In addition, theorists have argued that attorneys' adversarial "litigation mentality" (or litigation orientation) diminishes settlement rates because attorneys pass up opportunities to reach a settlement that accommodates the parties' common interests in favor of seeking one-sided victories (Mnookin, Peppet, and Tulumello 2000; Abramson 2005). Consequently, *Hypothesis One is that the presence of attorneys in mediation significantly reduces settlement rates.*

Impact on the Time Required to Reach a Settlement

Inviting one or more attorneys to take part in the mediation process increases the number of interactions and strategies because there are more people around the table and the attorneys may introduce into the mediation exogenous interests with respect to the parties' situation. We examined how these interactions and strategies affect the duration of the mediation process.

First, attorneys may delay the settlement of a dispute through mediation for financial reasons. For example, the payment of professional fees on the basis of hours worked could motivate the attorney to delay the settlement of the dispute to increase the number of hours billed to the client (Mendelsohn 1996; Korobkin 2002; Abramson 2005). Such nonfinancial reasons as a desire to build or preserve a reputation for "hardball negotiating" in highly publicized cases could also motivate an attorney to delay settlement of the dispute (Mendelsohn 1996).

In addition, attorneys' (or their clients') commitment to or belief in their case based on questions of justice or other principles could also delay settlement until "defending the principle becomes too costly" (Mendelsohn 1996). Finally, attorneys may wish to justify both their role and their fees with unnecessary interactions. For these reasons, *Hypothesis Two is that the presence of an attorney significantly increases the time required to conclude a mediation.*

Impact on the Perceived Effectiveness of the Mediator

We hypothesize that the involvement of an attorney in a mediation could also affect the clients' perceptions of the mediator's effectiveness. It seems possible that a rivalry could arise between a mediator and an attorney over who has made the greatest contribution to settling the dispute and that the mediator could thus receive less credit for his or her role in facilitating settlement than he or she would have had the attorney not been involved. Furthermore, some scholars have hypothesized that the attorneys' presence could transform the mediation in ways that could also reduce the clients' satisfaction with the process, for example, if the attorney were to suggest that the mediator is unqualified because he or she does not know the law well enough to evaluate the client's case (Pinzòn 1996; Nolan-Haley 1998; Denckla 1999).

In addition, the mediator might be hindered should the attorney adopt an adversarial stance during the mediation. On the other hand, the attorney could display a more problem-solving attitude that could facilitate the mediator's work, even playing the role of an "unofficial comediator." But, in terms of the clients' attitude toward the mediator, the result would be the same in either case: the credit the mediator receives for the outcome would be diminished. Thus, *Hypothesis Three is that the presence of an attorney in a mediation will considerably diminish the parties' perception of the mediator's effectiveness.*

Impact on the Level of Satisfaction with the Mediation Process

Attorneys who maintain an adversarial, competitive stance may also negatively influence the parties' perception of the mediation process itself (Abramson 2005). They could suggest to their clients that mediation is a "second class" or "discounted" form of justice for those who do not have the financial ability to pursue their cases in court. The value of the mediation process could therefore be diminished in the client's eyes.

Furthermore, whereas the mediator may be most interested in *processes*, the attorney may emphasize *procedures* (Stimec 2001). (While a process orientation would emphasize a system — e.g., principles of mediation — and be flexible, a procedural orientation would focus on a sequence of tasks and steps — e.g., interrogation followed by counterinterrogation — to be followed in a strict order.) Thus, the parties could end up being torn between the two approaches. Discussions and compromises between the mediator and the attorney could thus cause the parties to doubt the value of the mediation process itself. For these reasons, *Hypothesis Four is that the presence of an attorney will significantly diminish the clients' perception that the mediation process is fair.*

Impact on Satisfaction with the Agreement

Attorneys' ideas about what constitutes a satisfactory agreement may differ from those of their clients. First, attorneys may incorrectly perceive that their clients will be satisfied with a financial settlement alone (Golan 2002) and may seek to reach a financial settlement at the expense of other dimensions of value to their clients (Weinstein, Song, and Phillips, 1996; Rodney 1999; Contuzzi 2000). Research has shown that achieving a monetary victory — or even the resolution of the conflict — does not always meet all the clients' needs (Folger and Jones 1994). Settlements sometimes fail to take into account a conflict's relational dimensions (Vanderkool and Pearson 1983) such as expected future behaviors or the need for apologies or other gestures of conciliation.

Moreover, psychological factors involved in decision making can influence the parties' satisfaction with a settlement. How an attorney presents a settlement offer — as preferable to the status quo or as less preferable than what might have been achieved through litigation — could ultimately influence the client's level of satisfaction with the settlement. Therefore, *Hypothesis Five is that the presence of an attorney will significantly reduce parties' level of satisfaction with a mediated agreement.*

Impact on the Parties' Confidence in the Agreement

When attorneys speak on their clients' behalf, the client's role in using his or her own power to achieve resolution through mediation may be diminished (Nolan-Haley 1998; Gordon 2000). In addition, attorneys' preference for a "calculus-based trust" versus the more relational "knowledge-based trust" typically developed by mediators (Lewicki and Bunker 1995) may diminish the parties' trust in each other. (While calculus-based trust presumes that parties trust each other when they feel the other has no incentive to harm them, knowledge-based trust assumes that parties will trust each other when they know each other better.) The attorney may also foster distrust by maintaining that the other party is an adversary who will refuse to cooperate in finding and implementing a solution (Allred 2000). Thus, *Hypothesis Six is that the presence of an attorney will significantly reduce parties' confidence in the agreement.*

Impact on Reconciliation between the Disputants

Attorneys who maintain an adversarial stance in a mediation — treating parties as defendants and plaintiffs with conflicting interests rather than as partners seeking mutually satisfactory solutions — could also exert a negative influence on the parties' level of reconciliation (Menkel-Meadow 2000). Such attorneys might privilege achieving a monetary settlement at the expense of addressing the conflict's less quantifiable elements, such as the disputants' relationship (Golan 2002).

Attorneys can also hinder the process because they may discourage expressions of regret, sympathy, and apology that they fear may later be interpreted as admissions of responsibility should mediation prove unsuccessful. But such statements often lie at the heart of effective reconciliation processes.

Finally, another possible impediment is the attorneys' practice of speaking on behalf of their clients. While this may be necessary during trial, the contrary is true in mediation. Indeed, in mediation, conflicts are often solved when the parties speak directly to each other. By filtering the communication, the attorney protects his or her client but hinders the direct dialogue that can be critical to reconciliation (Regis and Poitras 2003). For these reasons, *our final hypothesis, Hypothesis Seven, is that the presence of attorneys will significantly reduce the level of reconciliation between the parties.*

Method

This study was conducted in partnership with the Commission des Normes du Travail du Québec (CNT), an organization whose mission is to inform the public on labor standards, supervise the application of labor standards, receive complaints from employees, and compensate workers according to the province of Quebec's labor standards and regulations. One of the organization's roles is to promote fair and balanced labor relations between employers and employees. The organization examines grievances arising from dismissals, allegedly illegal work practices, and psychological harassment complaints and provides mediation services in these cases.

Data Collection

Participants in the study are employees and employers involved in workplace disputes mediated by a professional mediator appointed by the CNT. Participants were recruited by thirty-six CNT mediators in eight regions of Québec. Mediators were invited to take part in the experiment on the basis of two criteria: they had at least two years of experience as mediators and at least one year of experience on a full-time basis. The mediators' main role in the study was to serve as intermediaries between the researchers and the parties by distributing the questionnaires at the end of each mediation according to a predetermined protocol to ensure the scientific validity of the data collection process. Respondents returned their questionnaires to researchers using a prepaid return envelope to maintain anonymity. We collected the data in May and June 2006.

Sample Description

Once the data had been collected, 177 valid questionnaires were retained for statistical analysis purposes. At 48 percent, the response rate is satisfactory for this type of study. Mediation led to agreement in 68.8 percent of the cases. Respondents were nearly equally divided between employers

(50.3 percent) and employees (49.7 percent). Women respondents (60.5 percent) outnumbered men respondents (39.5 percent). Respondents' average age was 41.1 years. Approximately 25.9 percent of respondents were university graduates, 31.4 percent of respondents were graduates of a two-year college, and 42.7 percent of respondents held a high school diploma. Finally, respondents' average length of service in the current position was 6.7 years, and their median salary was \$37,500 (Canadian), which was close to the median salary in Quebec at that time.

To assess attorneys' impact on the mediation process, we divided our sample into two groups: mediation in the absence of an attorney ($N = 145$) and mediation conducted in the presence of an attorney ($N = 32$). It is important to note that we found no significant sociodemographic differences between the groups.

Control Variable

One potential confounding variable in our study is the initial level of conflict between parties. More specifically, it is quite possible that cases involving attorneys are more contentious, and this possibility could affect intergroup comparisons. We used an initial conflict level scale to take into account the level of conflict. Adapted from Karen Jehn's (1995) Intragroup Conflict Scale, our scale measured the level of cognitive disagreement and relational tension between parties at the onset of the mediation process. Using this scale made it possible to assess whether the conflicts involving attorneys were substantially more conflictual than cases in which attorneys were not involved. The initial conflict scale comprised four items; for each one, parties specified their level of agreement with the statement using a six-level Likert-type scale ranging from "completely disagree" (1) to "completely agree" (6). We computed the scale by combining the item results (Cronbach's $\alpha = 0.94$). The scale items are reported in Table One.

Settlement Rate and Time Required to Reach an Agreement

After the mediation process, parties were asked to report the outcome of the discussions. More specifically, we asked whether they had reached an agreement or not. Parties' responses were coded as a dichotomous variable (0 = no agreement and 1 = agreement). Furthermore, we asked parties to estimate how long the mediation process had lasted and then coded the estimated duration of each mediation process in minutes. While the settlement rate was assessed on the basis of all cases, we only computed duration for those cases in which an agreement was reached.

Assessment of Mediation Outcomes

We used the Mediation Outcome Standard Evaluation Questionnaire (MOSEQ) (Poitras and LeTareau 2009) to qualitatively assess mediation outcomes. This questionnaire comprises fifteen items. For each item, parties

Table One
Measurement Scales

Measurement Scales	Scale Statements
Initial conflict level <i>Cronbach's</i> <i>alpha = 0.940</i>	IC1 There was a great deal of disagreement between myself and the other party. IC2 There was a certain level of hostility between myself and the other party. IC3 I did not at all share the same point of view as the other party. IC4 There was very little empathy between the other party and myself.
Mediator's usefulness <i>Cronbach's</i> <i>alpha = 0.904</i>	MU1 The mediator's intervention was determinant in advancing discussion. MU2 The mediator had an important impact on the progress of discussions. MU3 The mediator's contribution was critical to advancing discussion.
Procedural justice <i>Cronbach's</i> <i>alpha = 0.857</i>	PJ1 The mediation meeting was run without bias. PJ2 Mediation was run in a neutral and objective manner. PJ3 Mediation took place in an impartial climate.
Satisfaction with the agreement <i>Cronbach's</i> <i>alpha = 0.940</i>	SA1 I am happy with the solution we came to. SA2 The settlement of the conflict was satisfactory to me. SA3 I am content with the agreement we reached.
Confidence in agreement <i>Cronbach's</i> <i>alpha = 0.939</i>	CA1 I believe our agreement will be applied. CA2 I am convinced the agreement reached will be respected. CA3 I believe we will abide by the provisions of the agreement.
Reconciliation between parties <i>Cronbach's</i> <i>alpha = 0.924</i>	RP1 I feel that the other party and I have reconciled. RP2 I feel like my relationship with the other party has been restored. RP3 I believe I have rebuilt my relationship with the other.

Note: Scales having a Cronbach's alpha over .80 are considered statistically consistent.

specified their level of agreement with the statement using a six-level Likert-type scale ranging from “completely disagree” (1) to “completely agree” (6). The scales were computed by combining the individual results. Only mediations that ended in agreement were used to compute the scales. The MOSEQ measures five dimensions of agreements reached through mediation: the mediator’s usefulness (three items; Cronbach’s alpha = 0.90), the fairness of the process (three items; Cronbach’s alpha = 0.86), the respondent’s satisfaction with the agreement (three items; Cronbach’s alpha = 0.94), the respondent’s confidence in the agreement (three items; Cronbach’s alpha = 0.94), and the level of reconciliation between the parties (three items; Cronbach’s alpha = 0.92). The questionnaire items are reported in Table One.

Statistical Analysis

We conducted several statistical tests to assess the impact of the presence of attorneys on the mediation process. More specifically, we compared settlement rates between mediation conditions using a chi-square statistical test. Furthermore, we compared the initial conflict level, the time required to reach an agreement, the mediator’s usefulness, the fairness of the process, the satisfaction with the agreement, the confidence in the agreement, as well as the level of reconciliation of the parties between conditions using the equality of means (*t*-test) statistical test. Because we ran multiple comparisons, we set our level of statistical significance at a conservative $p < 0.01$ (likelihood of a false positive less than 1 percent).

Results

The statistical analyses yielded mostly nonsignificant distinctions between mediations conducted without the presence of attorneys and mediations conducted in the presence of attorneys. We did, however, find significant differences between the two mediation conditions for two variables. Table Two summarizes the results of our statistical analyses.

Nonsignificant Results

We found no significant statistical difference for most of the variables in this study. First, we found no significant difference between mediation conditions with respect to the initial conflict level between parties; thus, parties involved in more intense conflicts do not seem to be more likely to seek to use an attorney during mediation. Second, the settlement rate was virtually identical between the two mediation conditions, rejecting Hypothesis One. Third, mediation conducted in the presence of attorneys requires on average some thirty additional minutes to reach a settlement than when attorneys are not present. Although this difference represents a 20.1 percent increase, it is not significant mainly because of the high variation of mediation durations under both conditions (i.e., variance).

Table Two
Comparison between Mediation without Attorneys and Mediation with Attorneys

Variable	Mediation without Attorneys	Mediation with Attorneys	Significance Level
Initial conflict level	3.42	3.25	0.271
Settlement rate	68.8%	69.0%	0.986
Time required to reach an agreement	147.8 minutes	177.5 minutes	0.100
Mediator's usefulness	5.29	4.65	0.005*
Fairness of the process	5.44	5.10	0.155
Satisfaction with the agreement	4.72	4.18	0.175
Confidence in the agreement	5.36	4.98	0.126
Reconciliation of the parties	3.79	2.68	0.002*

*Significant difference at $p < 0.01$.

Thus, Hypothesis Two is also rejected. Fourth, we found no significant difference between mediation conditions with respect to the respondents' assessments of the fairness of the process (rejecting Hypothesis Four), their satisfaction with the agreement (rejecting Hypothesis Five), and their confidence in the agreement (rejecting Hypothesis Six). In general, these results suggest that the presence of attorneys affects neither the likelihood of reaching a settlement nor the parties' level of satisfaction with the agreement.

Significant Results

We did find that one process variable and one outcome variable both presented significant differences between mediation conditions. First, parties' appreciation of their mediator's usefulness seems to be affected by the presence of attorneys. When an attorney was present, the respondent's assessments of the mediator's usefulness decreased by 12.1 percent, from mean = 5.29 to mean = 4.65, which represents a significant change ($p < 0.01$). Thus, the presence of attorneys would appear to diminish the client's appreciation of the mediator's role in resolving the conflict.

Second, the level of reconciliation between the parties also seems to have been affected by the presence of attorneys: the level of reconciliation of the parties was 29.3 percent less when attorneys were present

(mean = 3.79 to mean = 2.68) which was a significant change ($p < 0.01$). This result suggests that the presence of attorneys can hinder the reconciliation process.

Discussion

The empirical data we collected in this study indicate that the presence of an attorney in a mediation does not significantly affect the settlement rate, the time needed to reach an agreement, the perceived fairness of the process, the parties' level of satisfaction with the agreement, or the parties' level of trust that the agreement will be honored. These results indicate that attorneys have much less impact than is claimed by those mediators who do not welcome their involvement in the mediation process.

Nevertheless, the results also demonstrate that the presence of an attorney does affect mediation outcomes in at least two ways: by reducing the parties' level of satisfaction with the mediator's performance and by reducing the level of reconciliation between parties. These findings have practical implications, which we discuss below.

Reduced Level of Satisfaction with the Mediator

The fact that the presence of attorneys appears to reduce parties' appreciation of the mediator's role is not surprising in itself. The outcome of a mediation process may be attributable — at least from the parties' perspective — to the presence of both the mediator and the attorney. Indeed, a party may pay equal attention to both mediator's suggestions and the attorney's advice. From this perspective, the mediator and the attorney "share the stage."

But while this decrease in the level of satisfaction with the mediator is significant ($p < 0.01$), it is nevertheless small in practical terms (–12.1 percent). Furthermore, the settlement rate and the level of satisfaction with the agreement do not appear to be hindered by the presence of attorneys, which indicates that the decreased level of satisfaction with the mediator does not affect mediation outcomes. In fact, the main impact may be on the mediator's ego: when he or she shares the mediation process with attorneys he or she can no longer claim to be the sole savior in a conflict.

Reduced Level of Reconciliation of the Parties

The fact that the presence of attorneys diminishes the parties' level of reconciliation may represent this study's most important result. The presence of attorneys reduced by close to 30 percent the level of reconciliation of the parties during a mediation process, a considerable decrease that makes this result not only highly significant ($p < 0.01$) but also important in practical terms.

We suggest three explanations for this effect. First, attorneys tend to limit conversations to legal aspects, reducing opportunities for relationship-building chitchat between the parties. Second, most attorneys

advise their clients to refrain from apologizing during a mediation, regardless of the circumstances. Third, attorneys often speak on behalf of their clients, which is the essence of legal representation. (The third explanation encompasses the first two.) Indeed, by filtering conversations, attorneys manage to focus them on the legal facts and rid the discussions of any and all apologies.

Furthermore, the presence of attorneys may influence the mediation approach chosen by the mediator — some mediation processes place a greater emphasis on reconciliation than do others. But, on the other hand, some mediation approaches may moderate the attorney's inhibitive effect on the reconciliation process. For example, in the case of an evaluative mediation, which does not seek the reconciliation of the parties as an objective (Riskin 1996), the impact on reconciliation levels will probably be minimal. In the case of transformative mediation, however, the attorney's inhibitive impact could become problematic because reconciliation mechanisms are at the heart of this process (Bush and Folger 1994). The presence of attorneys may thus favor the use of more evaluative mediation approaches.

Strategies to Mitigate the Impact of Attorneys on Reconciliation Levels

In cases in which the reconciliation of the parties is a major mediation issue, the presence of attorneys must be taken seriously. Rather than being defeatist or considering mediation impossible, it is important for mediators to adopt strategies designed to limit the inhibitive impact of the presence of attorneys on the reconciliation process. To this effect, they may use one of three strategies, described below.

Explain the Mediation Framework. As previously discussed, many attorneys adopt an argumentative approach in mediation. This usually reflects both an occupational bias and inadequate knowledge of the mediation process. By correctly explaining the mediation framework and the role attorneys play within it, the mediator could help the attorney develop a more problem-solving approach. Dwight Golan (2002) has suggested that attorneys who do so make it easier to find solutions and may actually encourage the parties' reconciliation.

It may also be useful for the mediator to meet with the attorneys before undertaking the mediation process. Indeed, it is preferable to discuss the attorney's role in the mediation away from the parties to prevent the attorney from losing face in front of his or her clients. This also avoids crystallizing the attorneys' attitude. Obviously, to be effective, this strategy depends on the attorney's willingness to play the mediation game and is therefore designed only to eliminate issues arising from his or her unfamiliarity with the mediation process.

Define the Concepts of "Acknowledgment" and "Apology." A fundamental problem involves apologies: attorneys fear that their clients' apologies may be detrimental to their case should the mediation fail. In other words, they fear that the apologies will be used to prove responsibility at a future trial. Sometimes, the rules governing mediation confidentiality are not enough to reassure some attorneys. To address this concern, the mediator could include in the mediation contract a clause stipulating in explicit terms that any and all apologies or regrets expressed during the mediation process may not be interpreted as admissions of responsibility (Regis and Poitras 2003).

The mediator should explain to the parties why such a clause was included in the contract; they should understand that the clause is not designed to devalue possible apologies. The mediator should avoid creating a situation in which the parties devalue the apologies and regrets that could be expressed during the mediation process. When both parties recognize their share of responsibility in a conflict, studies have shown that the likelihood of reaching an agreement is dramatically higher (Borg 2000; Poitras 2007).

Encourage Direct Dialogue between the Parties. Our third proposed strategy follows logically from the first two. Once attorneys have "bought into" the mediation's problem-solving mission and have agreed that apologizing does not equate to admitting responsibility, the mediator may consider suggesting to the attorneys that they allow their clients to speak directly to each other. This strategy may prove to be the most important of the three given because direct dialogue between the parties is seen as a major advantage of the mediation process (Picard et al. 2004).

Attorneys, however, cannot be asked to remain silent during the mediation process. To the contrary, they should proactively help their clients to make proposals, fully assess the offers made to them, and sometimes object to certain suggestions. They may sometimes even discuss potential solutions with the opposing party's attorney. It is important that attorneys fully understand the active dimension of the problem-solving approach in order to enable the mediator to take advantage of their presence. Thus, the attorney will no longer be perceived as an obstacle to mediation but instead as a partner in the process.

Limits and Further Studies

In this study, we controlled for the initial level of conflict between parties. We cannot, however, claim to have ruled out all rival explanations in regard to the impact of attorneys on reconciliation. For instance, we did not control for parties' initial willingness to reconcile. It is quite possible that parties coming to mediation with an attorney are less interested in

reconciliation than parties who have not sought legal counsel. Therefore, it might be interesting to include the parties' initial interest in reconciliation as a control variable in future studies.

The legal context of this study is civil law. Would the results be the same in a common law context? Although researchers have noted some philosophical differences between judges practicing mediation under the jurisdiction of civil law and those practicing mediation under the jurisdiction of common law elsewhere in Canada (Roberge 2007), these differences do not seem to apply where the mediation is not practiced by a judge. Because mediations at the CNT are conducted by professional mediators (rather than judges), we can reasonably assume that our results are not significantly affected by the civil law context. Nevertheless, it would be interesting to duplicate the study in a common law context.

In addition, this study is based on workplace mediation. Would the results be the same in other mediation contexts? It would be interesting to further study the impact of attorneys in other mediation contexts. Also, it would be interesting to evaluate whether the study's results apply only to the presence of attorneys. Can they be generalized to other contexts using representatives? For example, do union representative hinder the reconciliation process? Conducting a study comparing the impact of union representatives and attorneys would also be worthwhile.

Finally, our sample was too small to separately analyze the differences between those cases in which both parties in the conflict were represented by an attorney and those cases in which only one party had an attorney present. In such "unbalanced" situations, it would be interesting to compare Party A's responses with Party B's to see the difference between the party who directly benefited from the attorney's involvement and the party who may have felt at a disadvantage. Is reconciliation hindered if there is only one attorney involved? Does the party who does not have an attorney appreciate the presence of the mediator more than the party who does? These are possible questions for a future study.

Conclusion

For many mediators, the presence of an attorney in the process complicates the mediation and is sure to result in failure. These mediators believe that attorneys have a negative impact on the process. Our research submitted this perception to an empirical test. The results generally indicate that the presence of an attorney has no significant impact on the mediation process, except with respect to one aspect. Indeed, only the impact on the level of reconciliation of the parties is significant in practical terms. The presence of an attorney in the mediation process therefore inhibits the levels of reconciliation between the parties.

To defuse the negative impact of the presence of attorneys on the process, we have proposed three complementary strategies. We suggest

that the mediator first coach the attorney to participate more appropriately in the mediation process, namely, by encouraging him or her to adopt a problem-solving approach. Our second suggested strategy is that the mediator explain to the attorney the possible beneficial role of apologies and regrets in a mediation and include a clause in the mediation contract stipulating that apologies expressed in a mediation setting may not be considered as admissions of responsibility. Finally, we suggest that mediators encourage attorneys to allow their clients to speak directly to each other.

To further examine the role of direct communication between parties in mediation, it would be interesting to assess what happens when attorneys speak on behalf of their clients (i.e., short-circuiting direct discussions between the parties). Should the result be significant, the inhibitive effect may be extrapolated to any situation in which parties are represented by a third party speaking on their behalf. Therefore, this effect would not be attributable to the presence of an attorney but rather to the communications protocol.

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