# LITIGATOR'S PRACTICAL GUIDE TO SUCCESSFUL MEDIATION

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# Introduction

After a career of 40 plus years of active litigation practice, I want to share my legal career experience to help those attorneys in active trial practice maximize case resolution techniques short of actual trial that may otherwise be illusive in a time when mentorship is scarce. It is well known that in today's legal environment well over 97% of cases are resolved at some point prior to actual trial. Many of these cases settle through the process of mediation.

The subjects I address in this work are not taught in law school. They are the result of lessons learned in the school of actual legal practice, and are consequently ideas and information worth sharing so that the road for others has fewer bumps and potholes for the advocates who follow the path of litigation counsel.

Mediators help build a common ground where both sides seek justice which really equates to fairness. A mediator provides the procedural fairness component necessary to create an atmosphere or forum where people can feel that they have been treated honestly, openly, and with consideration. Fair procedures are central to the legitimacy of decisions reached and individuals' acceptance of those decisions.

While topics of preparing for mediation, preparing the client for mediation, and effective mediation brief presentations may be generic, this work also contains a discussion of what mediators do and what special considerations must be addressed in dealing with the subject matter of a given dispute. I believe that there are different mediation strategies that must be employed to match the subject matter of the case being considered - every mediation must be custom designed for the subject matter and anticipate the human elements that accompany that particular conflict.

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# What Does A Mediator Do? Part I

A mediator does much more than a messenger carrying the water bucket of numbers.

A mediator adds value to the negotiating parties by representing the process and assisting the disputants in overcoming barriers to case resolution.

The focus of this article is to identify **HOW** a mediator helps parties overcome strategic barriers to case resolution and clear obstacles so that others can achieve their goals and objectives on terms acceptable to all. Subsequent articles will address cognitive and structural barriers.

Strategic barriers are those that inhibit the exchange of information between parties required to find optimal resolution.

The "standard economic explanation" theory of settlement decision making posits that:

> A defendant will be willing to settle for an amount equal to the cost of an adverse trial judgment multiplied by the percentage chance of losing the case, plus trial costs, minus out of court settlement costs. A plaintiff will be willing to accept a settlement offer in the amount of a favorable judgment, minus trial costs, plus out of court settlement costs. Lawsuits will settle if the defendant's maximum offer is higher than the lowest offer the plaintiff will accept"
> {Korobkin and Guthrie "Psychological Barriers to Litigation Settlement"
> 93 Mich.L.Rev. 107,119 (1994)}

In short, both parties agree on a discounted value of risk/exposure and wish to avoid the higher cost of trial and further unanticipated and uncontrollable adverse occurrences.

This model presumes that **BOTH** parties know the same information.

However, the simplest reason for litigants to disagree about the likely trial outcome is lack of information. The natural tendency is for litigants to maximize their own predetermined outcome. To this end a negotiator may employ hardball tactics, use tools of misdirection, and withhold information to gain an advantage over the other party because they are either afraid of being exploited by non-reciprocation by the other party or hope to somehow manipulate the situation.

This results in a lack of reliable information available to either and/or both contestants making it impossible to craft a resolution that maximizes their gains and minimizing their losses.

Mediators assist the parties in overcoming strategic barriers by:

1. Acting as a buffer between the parties moderating or eliminating hardball tactics, reframing and translating the information exchanged to remove threats, ultimatums, and extreme offers and demands.
2. Promoting an exchange of information and suggesting reliance on representations with a right to verification.
3. Reframing and refocusing the parties on what each hopes to achieve including their goals, aspirations, interests, and needs thus helping the parties build momentum toward a mutually agreeable resolution. This is particularly important in the context of commercial and contract disputes.
4. Focusing on assumptions about the case and the legitimacy, veracity, reliability, and objectivity thereof while maintain confidentiality. This might include employment of decision tree analysis and predictive analytics software.

Should the process become stuck and the economic model not yield positive resolution results, the mediator then must look to reasons for deadlock that are cognitive in nature. That will be the subject of Part II of this discussion on **WHAT DOES A MEDIATOR DO?**

# What Does A Mediator Do? Part II

Part 1 of this series addressed strategic barriers to mediated case resolution.

Part 2 of this discussion explores reasons for impasse that are cognitive in nature.

In addition to the standard economic explanation of settlement discussed in Part 1, there is a second Social-Psychological explanation of why cases settle through the mediation process. This approach focuses on the process of communication and information exchange as a way to change perception and attitude. This approach centers on providing a forum in which options can be explored and solutions developed. This approach involves appeals to superordinate goals and values – intangibles that get people from opposing sides to come together and work toward a common end result that all parties need. It plays on the parties aspirations for legitimacy and their desire to be part of a larger political/economic community. In this approach, the use of moral persuasion and symbolic rewards or gestures is important. This approach has particular application to commercial and probate /trust disputes where reputation and the need to balance transactional viability with the need for money co-exist.

In actual practice almost every mediation proceeds in some hybrid form of both models.

Both models are however impacted by at least 15 cognitive barriers. (Picker & Relyea, 2010)

Cognitive barriers are factors that unconsciously influence the way information is processed and therefore directly affect assessment of resolution options and ranges of settlement value. Individually and collectively these factors promote escalation of conflict rather than contribute to resolution.

Although volumes could be written addressing each one, one or two sentences will suffice to identify the culprit and alert one to its presence.

1. **Cognitive Dissonance**. Failing to consider data contradicting one's viewpoint. Justifying conduct and/or blaming everyone else.

2. **Advocacy Bias.** Spending too much time identifying one's strengths but paying insufficient attention to one's weakness –why the goal might not be achieved.

3 .**Assimilation Bias.** Behaving as is adverse information was never presented.

4. **Endowment Effect**. Over valuating things in which one has a property interest – including the value of claims in dispute.

5. **Certainty Bias.** Overestimating assessments of probable outcomes of litigation particularly when predicting the likely result at trial on a percentage basis.

6. **Egocentric Bias**. Thinking that one has greater assessment and evaluation abilities than would be given by an outside observer.

7. **Inattentional Blindness**. Failing to assess the “big picture” of the case—missing the forest for the trees.

8. **Mistaking a Small Part of the Truth for the Whole**. Especially in cases involving a multiplicity of issues/parties, forcefully asserting one’s own arguments while losing sight of the bigger picture, e.g. the themes of the case and appeal of the client.

9. **Reactive Devaluation**. Minimizing the value of a proposal because it came from the opposite side. “Consider the Source”

10. **Competitive Arousal.** Grandstanding.

11**. Change Blindness**. Overlooking significant factual developments as discovery/mediation proceeds and failing to re-evaluate based on new information.

12. **Risk (Loss) Aversion.** Usually from the reference point of the momentary status quo of negotiations, most parties are risk-adverse when protecting settlements regarded as current “gains” and are risk-seeking when making decisions involving results regarded as current losses. This is the calculus of money negotiations.

13. **Hindsight Bias**. Failing to consider that hindsight is 20-20. Assessment of whether or not conduct is wrongful is likely to be determined differently by one person making an objective decision before the fact and another person (jury) assessing the same conduct after the fact.

14. **Attribution Bias**. Allowing anger and blame to override ration decision making simply because the parties are involved in an escalated dispute.

15. **False Definition of Compromise**. Failing to understand that principle need not be compromised by re-evaluation of the claim.

A mediator’s tool box contains antidotes for each malaise without which the conflict will escalate and a war of attrition will occur until either one or both sides will exhaust themselves or vanquish the other. This zero sum result often triggers the law of unintended consequences where the victor becomes the vanquished.

Mediators ask hard questions that litigants do not like or want to hear much less answer and are often the very questions that jurors would think about but not be able to ask.

Mediators challenge litigants to focus, control heated emotions, and facilitate informed decisions.

Finally, mediators own and control the process of case resolution while the parties own the result.

# Preparation: The Key To Settling Your Case At Mediation

"Boy Scout motto: **BE PREPARED**! Most problems come from lack of preparation"

*F. Shields McManus, Circuit Judge,* ***View From The Bench, Oct. 13, 2011 (CLE #18742)***

This article offers a list of key elements that, if addressed in advance of mediation, will enhance the likelihood of a successful outcome.

1. **SELECT A MEDIATOR WITH SUBJECT MATTER KNOWLEDGE**

Depending on the nature of the case, for a mediator to come up with the right questions to facilitate resolution may well require that the mediator have significant experience in a particular field. Mediators with knowledge and experience in that area not only can provide those questions, but do so with the respect of the parties based on that experience and expertise. A key hallmark of an effective mediator is the ability to hear what is not being said in order to cut through the real motivating issues.

2. **IDENTIFY AND REQUIRE THE PRESENCE OF THE DECISION MAKER**

In addition to the fact that Rule 1.720 now requires the presence of a party or party representative with full authority to settle without further consultation, if the real decision maker is not a participant, the entire process becomes meaningless and will be an exercise in futility and a waste of time and money.

3. **PROVIDE ADEQUATE INFORMATION EXCHANGE**

Adequate information means sufficient information to make an informed settlement decision. If one withholds information, one must answer the question whether the withheld information adds to or detracts from the legitimacy of the claim or defense during the mediation process. The mediation process is after all an opportunity to convince the other side of the legitimacy of the claim and value of the case.

4. **PREPARE AN EFFECTIVE MEDIATION BRIEF**

Mediation briefs can be a very effective tool in the dispute resolution process if the focus is aimed at two (2) areas:

First, focus on persuading the other side. This is another opportunity to affect the other side's thinking. Present facts and arguments that make the opposition reluctant to proceed to trial and why resolution on your terms is in their interest. Video and graphics are indispensable.

Second, focus on information that directly addresses the considerations most applicable to settlement, as opposed to what a judge might need to understand prior to trial. What obstacles prevented prior settlement? If there is a factual dispute, identify that. If there is a legal dispute, identify that. If the participants simply have different views about the range of possible outcomes at trial, the mediator can help the parties bridge that gap by the use of "decision tree" analysis. If the problem is really an ability to pay, both sides need to address THAT problem.

## 5. MAKE AN OBJECTIVE CASE VALUATION AND RISK ANALYSIS

First, make a risk assessment protocol. This is an explicit list of the assumptions and calculations that underlie the value decision.

Second, make a comparison to similar cases. This is the jury verdict research. See: www.hurt911.org for resource materials available.

Third, apply decision tree risk analysis.

This process STARTS with a damage analysis and then discounts BACKWARDS for liability, costs, present value, and trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts testify, how well the other side's lawyer tries the case, how the jury will react, etc.

## 6. DEVELOP A NEGOTIATING PLAN

Negotiation communications that start with a number higher (Plaintiff) or lower (Defendant) than the parties own case evaluations are inviting emotional reactive responses that shut down the process and lead to impasse for no good reason. All that will be accomplished is an argument between two sides that have traded an organized cognitive process for an emotional war of attrition.

The solution is to start with a plan beginning with "your best day in court" and **systematically** moving through your negotiating range to your walk away number.

Make a plan and stick to it. Stay in control of an otherwise reactive process calculated to be self -defeating. As in any military or sporting contest, victory is often achieved because of the self -inflicted wounds by the other side on itself.

# Preparing The Client For Mediation

While much has been written on the subject of attorney preparation for mediation, there is scant written on the subject of preparing the client for mediation. The focus of this article is what information a client needs to know and understand PRIOR to mediation.

An unprepared client may very well become a “difficult” client in the midst of mediation and either precipitate or contribute to impasse when in fact the case should have settled despite the best efforts of counsel.

This article proposes a ten item check list to prepare the client for the mediation experience thus enhancing the prospect of case resolution.

1) The client must understand the purpose of mediation.

Rule 10.210 provides:

“Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”

Rule 10.230 provides:

“Mediation is based on concepts of communication, negotiation, facilitation, and problem-solving that emphasizes:

(a) self determination;
(b) the needs and interests of the parties;
(c) fairness;
(d) procedural flexibility;
(e) confidentiality; and
(f) full disclosure.”

2) The client must understand the mediator’s role, i.e. what a mediator does and does not do.

Rule 10.220 provides:

“The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute. The ultimate authority, however, rests solely with the parties”.

Simply put, the client must understand that the mediator owns the process, but the parties own the result.

a) Mediator opening statements explain the process and remind the parties of the ground rules of civility.

b) Joint meeting statements of the parties. This is perhaps the first and last time that the parties will actually have the opportunity to “tell their story as they see it” to the other side without interruption.

c) Caucus: This is where the real work begins and preparation pays off. Unless the client is well prepared, the negotiation over what amount of money will be paid may very well be perceived as a frustrating auction process of concessions and adjustments that stimulates emotional responses rather than reasoned assessments that soon spiral into an emotional crash that deprives the parties of the opportunity to reach resolution before their best numbers are reached. A predetermined plan of negotiation of negotiation is essential to combat the natural reaction of emotionally responding to the offer and counter-offer process. It is absolutely essential to make a negotiating plan and stick to it.

The client must understand the importance of staying in control of an otherwise reactive process that by its nature is calculated to be self defeating if left unchecked.

The client must be encouraged and reminded that as in any military or sporting contest, victory is often achieved because of the self inflicted wounds of the other side on itself.

d) Impasse or written settlement agreement. Impasse is in theory a point when despite the efforts of the parties, they cannot come up with a solution or number that one party will pay to the other to settle the case. One or both parties leave the meeting, and the mediator files a report with the judge of the case limited to the simple fact that no agreement was reached.

But are we really done with mediation? Probably not. We know that only a few percent of cases actually go to trial. Perhaps one side or the other needs to think, re-think, digest, and re-evaluate what they really want or need. Many mediators follow through with the parties counsel after a short period of time to see if they can rekindle the process of resolution.

It is common to find that although the parties want to continue to seek resolution, they are reluctant to initiate the process for fear of being perceived as weak.

F.S 44.404 and Rule 10.420 are instructive on the subject of mediation duration in both court ordered and voluntary mediations as well as the requirement that a mediation agreement be formalized by the parties.

3) The client must understand the confidentiality of the entire process. F.S. 44.405 is straight forward:

"Except as provided in this section, all mediation communications shall be confidential.

A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel."

In short, what is said or shown there stays there. This is not to say that otherwise discoverable or admissible evidence cannot be used in later proceedings or trial. Mediation is designed to provide a form in which the client can "tell their complete story, point of view and express emotions and concerns that may not come out because of the rules of evidence or trial procedure.

4) The client must understand the relevant facts and on what evidence is or is not likely to be admissible. For example: what a client believes about the other party's intentions is not fact.

What one part may have heard about the other party is not admissible evidence.

Claim criteria must be objective to credibly support the claim or allegation.

5) The client must be prepared to understand what the law can or cannot give him/her. Saying it differently, the client needs to understand the remedy the client hopes/wants to achieve.

Not all wrongs have an earthly remedy much less a legal remedy.

Aside from Constitutional and Statutory interpretations or determinations, court can only do two things 1) grant or deny personal liberty, and/or order transfer of property (including money) from one person to another.

If the remedy the client is expecting is other 1, or 2 above, adjustment of expectations is in order.

6) The client must be informed of the facts in possession of the adversary. The corollary of this proposition is: "make sure the other side has all the information in you possession."

The mediation process is heavily dependent on:

1) A frank exchange of information;
2) Justification of value;
3) A genuine interest to resolve the claim and avoid the risks of trial including attorney client conflict over disappointing or unanticipated results.

7) The client must be given reasonable expectations of case value and/or realistic outcomes **AND THE REASONS WHY**.

Valuing a case is not an exact science, but it is the job of a lawyer prior to mediation to learn as much as possible about the case (it is usually not possible to know everything), compare it with similar cases that have produced settlement and verdict, and reach a conclusion about the range of value into which the case will fall.

Case evaluation STARTS with an assessment of damages, and then **DISCOUNTS** with case and trial **LIABILITIES** including costs, present value, trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts will testify, how well the other side's lawyer tries the case, how the jury will react to witness and the attorneys along with a myriad of other contingencies and contingencies.

The mediation is sure to fail and create attorney-client friction if the attorney and client just "wing it and see what happens".

8) BATNA and WATNA - DECISION TIME

BATNA is an acronym meaning "Best Alternative to a Negotiated Agreement". It represents the available alternatives when a party is unable to negotiate an agreement. It usually means going to trial.

WATNA is an acronym meaning "Worst Alternative to a Negotiated Agreement". It represents the available alternative when a party is unable to reach an agreement on what the party thinks they want. It ALWAYS means going to trial In addition the myriad trial uncertainties, there has recently emerged another reason why the adopting the position "I'll take my chances in court" is an unrealistic emotional response to be avoided. It suggests that your BATNA is really you WATNA.

In 2008 Vanderbilt University Law School conducted and published a study based on a survey of 295 Florida state circuit court judges. The study concluded that judges rely heavily on intuition when making decisions on the bench and allow distractions to influence their decisions. In other words, decisions are reached and then the reasons therefore are established rather than the other way around.

9) The client must understand that they must prepare themselves for the mediations session by:

a) Participating in at least one pre-mediation session with his/her/ their attorney.

b) Arranging for appropriate child care and time off work.

c) Turning off all personal electronic devices

d) Discussing the case with affected 3rd parties and/or bringing them to the mediation.

e) Remembering to depersonalize comments of the mediator, other parties and above all keep in check reactive emotions. This will lead to impasse factor. Mediation takes 10% courage and 90% commitment to the process.

## Mediation Stalls When Certainty (Digging In) Prevails

Every mediated negotiation must fluctuate between doubt and certainty to proceed to resolution.

Initially, the parties to the process usually have achieved some sense of certainty with regard to the position taken. However, a party must experience doubt in order to arrive at a mediated solution.

The nature of a negotiation is that a mutually satisfactory outcome can never be reached unless each party has a plan of negotiation and is prepared to change position in accordance with the plan and not as a reaction to a stated position of the other side. Such change involves successive movement, usually in a short time span, from entrenched dug in positions to positions of doubt that the previously dug in position is an impregnable fortress.

The process can be exhausting and the more dug in the position becomes, the more exhausting the process becomes until all is hopeless and the process disintegrates into impasse.

Certainty re-evaluations must occur if an imposed third party decision is to be avoided. Such resolutions are often unsatisfactory to both sides and they are always unsatisfactory to the losing side.

# Effective Mediation Briefs

Mediation briefs are **NOT** repaginated motions for summary judgment.

Mediation briefs are an opportunity to persuade the "other side" by presenting facts, arguments, and summaries of evidence in visually embedded form without the constraints of the formal rules of evidence that make the opposition reluctant to proceed to trial and why resolution on your suggested terms are in their best interest.

Do everything within your power to objectify the claim, position, or defense.
Make the content **EASY** and **SIMPLE** to understand. Scientific and psychological studies advise that the most persuasive presentations are those that can be readily understood, grasped, and adopted by a sixth grade elementary school student.

In a mediation setting it is **NOT** important that every part of your case be a winner. Where there are glaring weaknesses, acknowledge them right up front and deal with them in a light that does the least damage before the opposition can put their spin on them. Your case will then have the advantage of consistency and credibility. The mediation model is predicated on **ALL** of the parties having **ALL the Same information**. If all the cards and supporting documentation are not "on the table" it is unrealistic to think that there can be a satisfactory result or at least resolution on terms acceptable to all.

In dealing with insured claims, the adjuster and claims representatives are in reality the 1st jury. These interested parties go through a process to determine the settlement value of a case, and this always happens before mediation. In modern claims management, rarely, if ever, is only one person involved and in control of settlement valuation. There is a small army and computer programs that demand documentation to support valuation and settlement authority. Although it may seem counterintuitive, if you do the adjuster's and claims representative's job for them by summarizing numbers and supplying **ALL** supporting documentation, case resolution results will improve.

Persuasive presentation is key #1 – this also requires furnishing the information in a way that the opposite party can understand and utilize.

Basing case valuation on well researched specific case analysis documentation is key #2.

Delivering the mediation brief to the adjusters and opposing counsel AT LEAST 30 days prior to the mediation date is key #3 regardless of the subject matter of the mediation.

The central idea shared is that creating a document that will move your opponent toward agreement rather than a continuation of hostilities, will create an environment within the mediation forum most likely to lead to conflict resolution.

# The Use Of Jury Instructions In Mediation

Paul McMahon, 2012 Chair of the Martin County Bar Association's Trial Lawyers Committee invited Marjorie Gadarian-Graham, a noted contributor to Florida Jury Instruction jurisprudence and distinguished appellate counsel, to address the Committee on the early use of jury instructions to prepare pleadings and guide the discovery process at its February 2012 meeting.

Ms. Graham's presentation sparked the idea that jury instructions would also be helpful to prepare for and conduct mediations.

Part of the mediation process is to bring a reality check to the participants and manage the expectations of the parties.

Jury instructions are the reality check on the elements of the cause of action. They also provide guidance on the burden of proof, credibility of witnesses, and damages. They can therefore be very useful in adjusting the expectations of the parties. The language of the jury instruction provides an objective authoritative criterion to refocus and manage perspectives of the parties that is a necessary ingredient to a successful mediation.

# Mediating Probate Disputes

OVERVIEW:

Mediation is simply supervised negotiation between parties who want to settle a dispute.
This is the voluntary and consensual element of mediation
Process is the essence of mediation.
The mediator owns the process, but the parties own the result.

Mediating probate disputes is a close cousin to family mediation and commercial mediation because it is usually more interest related than positional, but usually has more players and more complex emotional issues.

The following observations are also relevant to trust and guardianship.

Probate disputes are factually intensive and can involve numerous expert witnesses, multiple parties, and numerous trial exhibits. The discovery process, like other civil litigation, is often long, expensive, and a consuming part-time job for the participants.

The pretrial and trial process only widens the gap of the participants' differences and often completely fractures any remaining sense of family for the future generations.

Overall, probate mediation can only be successful it there is a sense of family values in the participants—if only for the moment. If there is not, as will be evidenced if there is a long standing dispute, the prospects of a mediated resolution are dim at best.

BENEFITS OF MEDIATION

1. Early Resolution
   a) How long does it take to fully litigate a probate dispute?
      1, 2, or 3 years? I tried a trust case early in my practice that was 13 years old before getting to a two solid week trial—in two different locations and by a visiting judge assigned by the state supreme court .
   b) While most cases will be non-jury, will a probate court commit to giving days of continuous trial time to the contested case, or will it be subject to trial continuances with long breaks in between?
   c) Do the participants realize that they are taking on a part-time job assisting lawyers in answering discovery requests and preparing for trial?

2. Avoidance of Trial Expense and Judicial Decisions Based on Sympathy.

   Who is going to front the discovery, expert witness fees, and trial expense?

From experience, I know that witness deposition costs about $2500. Expert witness fees are a multiple of that number. Substitution of the Probate Judges version of appropriate or proper exercise of trustee's discretion that may cause removal of the trustee, appointment of a receiver, and termination of a trust is a very real possibility.

3. Potential for Creative Solutions

   A career in the legal profession has taught me that aside from constitutional and statutory determinations, courts have two things they can do:

   a) grant or deny liberty; and
   b) order transfer of property (including money) from one person to another

   Both are zero sum results.

   Parties lose control of the outcome of the dispute when they engage the gears of the legal system.

   Mediation opens the door to creative solutions not available to a court. It can result in a division of assets without rigid adherence to the terms of the governing instruments or laws of intestacy. It can craft resolutions participants will accept and move on with their lives.

4. Family Harmony---At least to some extent

   As I suggested before, trial is the point of no return to the concept of FAMILY, because it will be a zero sum event—someone will win and someone will lose. Mediated agreements are by their nature agreements to disagree but leave open the possibility of reconciliation and future family harmony—to some extent.

5. Privacy

   Avoid a public record of family discord and/or embarrassment. There is usually some buried body that is suddenly resurrected much to the chagrin of all.

6. Benefits to Attorneys

   Probate disputes are unique in that they often begin as routine probate proceedings. Often without warning, an objection is filed and the routine administration turns into a nightmare. The probate litigation attorneys are brought into the mix and the probate administration attorney is frozen in his tracks.

   Mediation may allow the probate administration attorney to participate in the dispute resolution without becoming a party in the dispute. If the probate administration attorney drafted the governing instruments, that attorney may be subjected to claims ranging from undue influence to negligent preparation of the

governing documents. This is especially true if there have been periods of time between first documents and amendments. See Wisconsin Lawyer Vol. 84 No.12 December 2011 for a discussion of Risk Management issues facing Estate Planning Attorneys.

## SPECIAL CHALLENGES IN PROBATE MEDIATION

1. Dead Men Tell No Tales

   Someone got a larger piece of the pie either by the terms of the governing documents or the decedent leaving some asset in joint tenancy outside the estate or by gifting before death. WHY? Didn't the estate planning attorney inquire into ALL of the assets as part of his work? Why was this asset not transferred to the TRUST? Why did the decedent create a joint account with one of the beneficiaries rather than simply add that person as an authorized signature on the account? (This sets up the E&O claim).

   Without the decedent, the truth is probably impossible to determine but the inquiry if not avoided early will only result in yet another claim to be resolved with the estate planner at the center.

2. Emotional Participants

   Participants in probate disputes equate their share of the estate with their deceased parents love and /or trust. Other participants see an estate dispute as a new reason to fight an old fight of sibling rivalry or a demand for some concept of equality at THAT moment despite the fact that their prior behavior merited something other than equality or trust.

   A dispute might arise between children of one marriage and the surviving spouse of a later marriage. The decedent's children may view the decedent's property as theirs while the surviving spouse may feel a right to a sizable portion of the property.

   Litigated solutions to these problems ignore the complex emotional issues that underlie the dispute.

3. Multiple Parties—The Hazard of Unanimous Consent

   A mediator must know enough about the case prior to mediation to ensure that all necessary parties are available to reach an agreement that closes the case. Multiple parties make settlement a very big challenge because one presumably unreasonable party can veto the entire process while at the same time using that potential veto power as a huge bargaining chip to leverage his/her demands.

4. Lack of Information

   What are all the assets of the estate?
   What items that were pre-administration gifts will be challenged as gifts or transfers under a claim of “undue influence”?

   What are the actual value of the real and personal property of the estate?

   Are there jointly held asses outside of the estate?

5. Disagreements about Estate Assets, Value, and Distributable Amounts in Combined Trust and Estate Distributions

   A few years ago I had a case where the named co-executors (also beneficiaries of the estate and family trust) were at odds over what assets should be included in the estate and the overall combined amounts that the beneficiaries of the estate and trust should receive. The central problem turned out to be that the objecting co-executor owed the trust a very substantial sum of money and if the terms of the governing instruments were to be enforced, he would have had to put money into the estate and trust accounts as opposed to receiving any distribution. Objections to the Proposed Inventory filed by the other co-executor with requests for probate court instructions was answered by the court issuing an order to mediation to be followed by a Contempt show cause hearing set 30 days after the mediation date if the matter was not resolved.

   After 2 days of mediation the matter was reported as an impasse. Two days before the Contempt hearing a comprehensive deal was brokered by the son in law of one of the beneficiaries because he needed the money for nursing home care of the sister of the co-executors.

   Lesson learned: There was an elephant in the room that no one paid attention to during mediation. Sometimes a sense of family responsibility overrides the entire fight—although the beneficiaries never spoke to one another after the comprehensive settlement order was signed and the money distributed.

6. Tax Consequences:

   Mediated settlements can have tax consequences. The mediation participants should have those potential issues addressed prior to mediation or have access to someone during those proceedings to give that knowledge without adjourning.

SUMMARY:

Probate mediation presents challenges for how emotions and family dynamics are weighed and balanced with legalities. Rarely if ever will adjudication resolve the family conflict or the dispute. It is probably more accurate to say that adjudication is a death sentence for any sense of family for ensuing generations.

Although here are times when these disputes are NOT a candidate for mediation, it is often the last best hope for resolution and restoration family values even for the moment it takes to finalize the resolution documents.

# Mediating Commercial Disputes

OVERVIEW:

Mediation is simply supervised negotiation between parties who want to settle a dispute.

This is the voluntary and consensual element of mediation.

Process is the essence of mediation.

The mediator owns the process, but the parties own the result.

Commercial disputes are factually intensive, can involve numerous expert witnesses, multiple parties, and unbelievably complex trial exhibits. It is long, incredibly expensive, and becomes a drain on both the human and economic resources of the enterprise.

The pretrial and trial process only further obliterates the forest for the trees. Trial is a terminal event that burns bridges, destroys ramparts and obliterates the escarpments of future relationships between the parties.

Unlike Family, Tort and HOA/Developer Mediation where the focus is on termination of relationships, Commercial Mediation, somewhat like Probate Mediation, should usually focus on the opportunity for reconciliation and additional business being worked out between the parties. The Commercial Mediation opportunity should be seen as a place to structure future relationships NOT terminate and preclude future relationships.

Mediation can be helpful in settling issues relating to:

- Partnerships
- Corporate – Shareholder/Director
- Contracts
- Fee Disputes
- Transactional
- Employment, Non-Compete
- Intellectual Property
- Financial
- Insurance Coverage

## BENEFITS OF COMMERCIAL MEDIATION

### EARLY RESOLUTION

We have all been routinely told that early mediation is a desirable characteristic of the dispute resolution process. I do NOT believe that is true in many areas of dispute resolution such as Family and Tort where there may be a need for time to pass to deal with resolution and acceptance of the emotional aspects of the matters. But I DO believe that when it comes

Commercial Mediation, SOONER IS BETTER, before emotions take control away from the pursuit of a sensible business solution.

After over four decades of practice I have rarely seen a judge (much less a jury) interested in hearing commercial disputants drone on and on arguing about the ingredients of accounting, drawings, formulas, models, and damage calculations that go into the commercial dispute mix. Nor (somewhat contrary to what we were taught about the determination of the intent of the parties) does the fact finder want to hear much about what the parties intended – it will usually do its own interpretation of the governing instruments language and decide accordingly under the theory that the original language of the parties gives the only objective criteria for decision.

Civil commercial cases often are moved to the bottom of the adjudication pile. If they do go to trial, how many days of continuous trial time are you likely to get? What will be the time between trial days? How many days of business interruption can a commercial litigant devote away from the enterprise? This only adds fuel to the fire of already unhappy litigants who have experienced first-hand the grind of the pretrial, trial, and expense mill.

### AVOIDANCE OF TRIAL EXPENSE

The cost of commercial litigation is rarely a bill covered by insurance. Experience tells me that a witness deposition costs about $2,500. Expert witness deposition costs are multiples of that number. Expert witness costs, fees, and expenses cannot be predicted in advance. In short, commercial litigation requires an open checkbook from both sides of the controversy. Very few commercial enterprises can withstand a financial assault of this magnitude.

## AVOIDANCE OF LITIGATION RISK

A few years ago, Mattel won a $100 Million judgment against it arch rival MGA. That judgment was subsequently reversed after all imaginable appellate proceeding were exhausted.

On re-trial, MGA won an $89 Million verdict against Mattel-----IN THE SAME CASE!!!!

If both sides had it to do over, do you think they would do it again or find a way to resolve the dispute early on?

Can anyone speculate on what the Board of Directors thought of the opinions of the company attorneys? We need not even start a discussion of their thoughts on costs, expenses and fees.

Parties need to compare the almost impossible ability to predict a litigated outcome with the deal on the table over which they still have some control and make an informed decision on whether litigation presents a more attractive alternative.

## POTENTIAL FOR CREATIVE SOLUTIONS

A career in the legal profession has taught me that aside from constitutional and statutory determinations, courts can do two things:

a) grant or deny liberty and/or

b) order transfer of property (including money) from one person to another

Both are zero sum results.

Adjudication substitutes a judge's (or perhaps jury's) version of the intent of the parties and their respective business expectations. These third party decisions may even create terms and conditions that were never contemplated by the parties. The simple fact is that parties lose control of the outcome of a dispute when they engage the gears of the legal system.

Mediation opens the door to creative solutions not available to the court. It can result in business solutions without adherence to the terms of the governing instruments, and

can in fact act as a forum to renegotiate contract terms resulting in additional business being worked out between the parties.

PRIVACY

Litigation inevitably will test the limits of the concepts of business and trade confidential information. Modern electronic discovery techniques are designed to uncover information that will inevitably be disagreeable or give one side or the other an argument platform.

Commercial enterprises spend a great deal of money on advertising to promote brand, image, and goodwill. Negative publicity that may be associated with high profile litigation is certainly a factor to be considered in the decision to timely mediate the dispute.

BENEFITS TO ATTORNEYS

When a commercial transaction goes bad, it is axiomatic that the transactional attorney becomes one of the star witnesses in the case and is often the target of criticism for not drafting a document to anticipate the problem at hand.

Mediation may allow the transactional attorneys to participate in the problem resolution process. They will undoubtedly have useful information that can be obtained in a more efficient manner than through formal legal process

## SPECIAL CHALLENGES IN COMMERCIAL MEDIATION

REVENGE OF SCORCHED EARTH POLICIES

One of the unique things about the conduct of business is that one path very frequently crosses over the path of the other at some point in the not too distant future and at that point, the parties may HAVE to transact business with each other for their own survival and benefit. If one of the disputants does not survive the litigation gauntlet, what are the

options that the other party has on a go forward basis to obtain the benefits from another source willing to do business that originally brought the disputants together?

Business litigants most often run in the same industry circles. Litigation often results in disparaging comments and remarks to other industry insiders. Does anyone really believe that trashing some one's reputation will do them any possible good in the eyes of other people in their circle of the business community?

## WHERE IS THE MONEY? (COLLECTABILITY)

Even if there is a win in court, what is the probability of collectability? Enforcement of Judgments is an entirely separate body of law having its own complete set of rules. An uncollectable judgment may be a very expensive Pyrrhic victory for the winner.

Financial feasibility is a significant driver of commercial dispute resolution.

## MULTIPLE PARTIES – THE HAZARDS OF UNANIMOUS CONSENT & CONTRIBUTION TO GLOBAL SETTLEMENT

A mediator must know enough about the case prior to mediation to ensure that all necessary parties are available to reach an agreement that closes the case.

Multiple parties make settlement challenging because one presumably unreasonable party can veto the entire process while at the same time using that potential veto power as a huge bargaining chip to leverage demands. Apportionment of global settlement proposals in multi-party disputes presents similar challenges.

## LACK OF INFORMATION

Is there enough information available to find a feasible business solution to the apparent problem? Sometimes the apparent problem is not the real problem and the solution will require additional information. Only clear definition of the problem agreed upon by the parties will allow discussions to move from finger pointing to resolution.

RE-ESTABLISHMENT OF TRUST

Relationship should be an agenda item to be dealt with in mediation. Mediation should not be confined to a discussion of legal positions because each party is thereby limited in their ability to entertain a perspective different from their own, thus defeating interest based outcomes and re-establishment of relationships.

RESISTING INTERMENT

The parties may approach mediation as a settlement conference where the relationship is " killed, dead and buried," and the parties want nothing further to do with each other "now or in the future" ( Sound like Family Law?)

This approach to problem resolution is antithetical and counter productive in Commercial Mediation for the following reasons:

1) It ignores the roles that relationships play in commerce. Good business means having good relationships with customers, suppliers and staff. It sacrifices the big picture for a spec of paint. Otherwise, why would enterprises spend significant money on advertising and promotion?
2) It ignores that promoting good working relationships will assist parties to better deal with their differences and resolve disputes more satisfactorily than the alternative. Remember the basic mediation question: What is the best alternative to a negotiated agreement (BATNA)?
3) It ignores that the information gathered during the process can be used to shape transactions with future customers. LESSON LEARNED?
4) It ignores the reality that such public disputes impact BOTH parties business reputation and ability to deal with others.
5) It deprives the mediator of one of the most effective tools in the MEDIATOR TOOL BOX -- the technique of Role Reversal. That technique is designed to encourage each party to see the dispute through the eyes of the other. It enables a party to recognize their contribution to the situation, take appropriate responsibility, and re-humanize the other party thus rebuilding a sense of trust and relative responsibility.

## SUMMARY

Mediation is often the last best chance to find a business solution to the business problem that either threatens to lead, or that has already led to litigation. It is the LAST chance to explore resolution, correct mistakes, and control costs and outcome. Litigated solutions can never address those issues because it is a zero sum event where someone wins and someone loses. Commercial mediation should bee seen as a place to structure relationships rather than terminate relationships.

# Mediating Insured Claims

OVERVIEW:

Mediation of Insured claims requires a different negotiating style and mediation approach because the dynamics of the participants are completely different from those involved in other areas of dispute resolution such as commercial, probate, real property and family.

Mediators of insured claims quickly learn that creative problem solving opportunities that appear in other types of controversies are rare in the mediation of insured claims.

The subject matter of the dispute does not lend itself to settlement in terms other than money. The parties rarely knew each other and will have no contact with each other after the matter is concluded. The negotiation is simply how much money one side will pay the other. It is position based bargaining pure and simple - although it is anything but simple.

As a consequence of the nature of the beast, it is hard to get the process started.

This fact is reflected in the often heard complaint that the carrier has never made a pre-mediation offer or has failed to respond to a pre-mediation demand. I have even heard the complaint that the plaintiff never made a pre-mediation demand. It is equally difficult to keep making concessions and adjustments. It is easy to get angry or disgusted thus impeding the progress of resolution.

Otherwise normal discussion of an issue is early abandoned to communication by numbers. One mediation reality is that reasoned discussion of the strength and weakness of a case disappears after the second round of caucuses and then turns to reacting to each other's monetary proposals. Communication dynamics are thus monetized.

We hear one side say "I want to send them a message" but do they say "here is the problem with your position"? No. They send a number.

An auction process then begins and the attorneys on both sides and their respective clients and carriers start the often agonizing march of negatively reacting to the auction process. The auction process is however not the problem. That process is an integral part of all negotiations about money because the only resolution that an injured party can get is a monetary one.

Negative reactions are the problem. Negative reactions are characterized by annoyance and anger to proposals from the other side that are considered “out of the ball park” of settlement and soon spiral into an emotional crash that deprives the parties of the opportunity to reach resolution before their best numbers are reached. This, more than anything else, is the cause of unnecessary impasse. The first party to lose emotional control, unless early checked, will lose the negotiating contest.

The parties may become angry with the mediator for not convincing the other side of the justification of the last proposal and view the mediator a just a messenger. However, this view disregards that mediators are guardians of the process of resolution not the guarantors of resolution.

Mediators are at this point watching for and listening for kinks in the process, missteps that can occur, or problems that may develop. The mediator’s job here is 1) to help the parties overcome their reactivity, 2) encourage confidence in the process, 3) refrain from stopping prematurely in reaction to their frustrations and pessimism about the prospects of settlement, and 4) encouraging them to move through their range (employing the tool of bracketing) until the parties reach their best numbers or are sure that their best numbers will not settle the case.

## SO WHAT DO YOU DO TO MAKE MEDIATION MORE LIKELY TO SUCCEED?

### First: Adequate Information Exchange

Information is power. Withholding information may also be power guarding against the possibility that the case may not settle in order to spring it on the other side at trial. However, given the discovery and disclosure rules, one has to assess the probability or risk that such surprise information may not be allowed into evidence. The tactical question is how are you going to get it in over the almost certain objection of the other side?

If one withholds information, one must answer the question whether the withheld information adds to or detracts from the legitimacy of the claim or defense during the mediation process. The mediation process is after all an opportunity to convince the other side of the legitimacy of the claim and value of the case.

It is a well-known fact that insurance carriers have vast networks of shared proprietary data on almost every conceivable insured claim. That is how they set premiums. In addition, they have a staff of claims managers and adjusters to utilize the statistical data and information that they obtain by a variety of means (including discovery) to come up with a committee case evaluation and set a case reserve or better said – “case value”.

This does NOT mean that the carriers have a crystal ball—far from it. The carriers are hampered by their own internal requirements to set case reserves and hence case value very early in the claims process often times prematurely acting on only preliminary information. . An insurance company MUST determine AND set a reserve on each claim when it occurs. This is a cash item and an immediate hit on working capital. The longer it stays on the books, two other things simultaneously happen: 1) the insurance company has fewer investible assets, and 2) the reserve has built in resistance to expand at a later date. These reserves are set well before the defense attorney ever sees and evaluates the witnesses that may be called to support the claim. Once the reserve process happens the only way the reserve value is going to get changed is the receipt and evaluation of new information that that legitimizes or discredits the claim. A late breaking change in the valuation calculus is usually “not well received” by claims managers and their supervisors – unless it is favorable.

How Do The Carriers Set The Reserves? **COLOSSUS**

The point of the foregoing discussion is that if the insurance carrier does not get the needed organized claim information well in advance of the mediation, they will not be in a position to make an informed decision and negotiate a settlement. Organized case presentation designed to persuade the carrier of the legitimacy of the claim is critical.

In addition to the inherent problems produced by the claims reserve practices and procedures of the insurance industry, withholding of information by the defense is a very high risk game. Not only do they face the same evidentiary problems as plaintiffs, but they have the cloud of a bad faith claim hanging over them.

The mediation resolution process is heavily dependent on 1) a frank exchange of information, 2) justification of valuation, and 3)a genuine interest to resolve the claim and avoid the risks of trial including attorney client conflict over disappointing or unanticipated results.

The Lesson Learned for the foregoing discussion is that providing information to support the legitimacy of the claim is the touchstone to bring a case to a mediated resolution.

Second: Objective Case Valuation and Risk Analysis

Valuing a case is not an exact science, but the job of lawyers prior to mediation is to learn as much as possible about the case (rarely, if ever, can we know everything and miss nothing), compare it with similar cases that have produced settlements and

verdicts and reach a conclusion about its value (more accurately, the range of value into which the case will fall – like a mediation bracket).

The noted mediation authority Laura Kaster begins her latest essay “Addressing Impasse” with the “much overlooked but obvious point: Settling or mediating a case is, among other things a process for agreeing to the value of the claim. Impasse often occurs precisely because the parties do not agree on the value of the case” Kaster then goes on to cite Randall Kiser’s much touted article, “Let’s Not Make a Deal”, for one of its many startling findings: that 61% of plaintiffs made errors in rejecting settlement offers with a mean loss of $42,000 and 24% of defendants made decisions errors in rejecting offers, with a mean loss of more than $1,000,000.

On the basis of that information, we may assume that there is a high likelihood that parties to mediation are misinformed about the objective value of the claim/defense.

No one wants to make an error in value assessment. We know that accuracy is hampered by 1) the phenomenon of “group think”, 2) cognitive dissonance where we filter out what we do not want to hear, and 3) “sunk-costs” that prompts litigants and advisors to throw more money and effort into an endeavor in which they have already invested.

## HOW TO DEAL WITH VALUATION

Number one on the list is to work out a risk assessment protocol. This is an explicit list of the assumptions and calculations that underlie the value decision. Include the negative as well as the positive.

Number two on the list is a comparison to similar cases.

Number three on the list is to apply decision tree risk analysis. Here is an example of how it works:

What is the likelihood of success at trial?

Slam Dunk.

But what is the percentage of likelihood?

80%.

And will the other side appeal?

Certainly.

What is the likelihood of success on appeal?

Slam Dunk. 80%

The probability percentages are then multiplied to determine the cumulative effect of the assessment on the predicted outcome. In the above example it means that there is only a 64% chance of winning, subject to further reduction of costs by experts, court reporters, trial exhibits attorney fees, etc.

Approaching the same subject another way, the basis of case analysis can be addressed by asking four questions:

1. What do you get if you go to court? What is the result in monetary terms?
2. What are your chances of obtaining that outcome?
3. What does it cost you to get that outcome?
4. What are the chances of collection of that judgment?

Here is an example of how this works:

Best Day In Court Jury Damage Award = $600,000 --$700,000

Plaintiff thinks there is an 80% chance win. $480,000 -- $540,000 less costs of $60,000 to get to best case settlement demand of $420,000--$500,000.

Defendant thinks there is a 20% chance of loss. $120,000--$140,000 plus costs of $60,000 to get to best case settlement offer of $180,000--$200,000.

The settlement bracket is thus $420,000 - $180,000

Note that the foregoing process STARTS with a damage analysis and then discounts BACKWARDS for liability, costs, present value, and trial uncertainties such as how the judge applies the law, how the facts come in, how well the experts will testify, how well the other side's lawyer tries the case, how the jury will react, etc.

The point here is that case evaluation Starts with Damages and Discounts with case and trial LIABILITIES to establish the range of settlement value. This is a little counter-intuitive because lawyers are trained to think in the progressive elements of tort: Duty, Breach of Duty, Proximate Cause, and (then) Damages.

The foregoing exercises are designed and intended to help generate meaningful proposals from both sides that more clearly resembles its case analysis and hence the parties are less likely to make an outrageous demand that generates an equally outrageous counterproposal that hurls the case in the direction of impasse.

## THIRD: CREATE A PLAN OF MOVEMENT THROUGH YOUR NEGOTIATING RANGE

The mediation literature is replete with admonitions to disputing parties NOT to start negotiations with a number that is more than their best day in court given their own case analysis. Negotiation communications that start with a number higher (Plaintiff) or lower (Defendant) than their own case evaluations are inviting emotional reactive responses that shuts down the process and leads to impasse for no good reason.

How many times have we heard the following volley?

“Their demand is out of the ball park. We will make the equally ridiculous offer of $250. Send them that message.”

What has been accomplished? All we now have is two sides who have traded an organized cognitive process for an emotional war of attrition.

The solution is to start with a plan starting with “your best day in court” valuation and systematically moving through your negotiating range to your walk away number.

I have seen plans that divide the negotiating range by one-half on each move. A few moves and it is apparent to all where the range will end and identify the walk away number. The drawback of this approach is that it telegraphs the ending number and eliminates the possibility of settling at a number higher/lower than the party’s best number. Another approach is to divide up the negotiating range into equal increments. At any point the range can be re-divided into smaller equal increments to signal that the party is approaching its best number. Movement usually begets movement.

Lesson Learned: Make a plan and stick to it. Stay in control of an otherwise reactive process calculated to be self-defeating. As in any military or sporting contest, victory is often achieved because of the self-inflicted wounds by the other side on itself.

# The Root Of Mediation Impasse: Case Valuation

**"*Settling or mediating a case is, among other things, a process for agreeing on the value of the claim.***
***Impasse often occurs because the parties do not agree on the value of the case"***
Laura Kaster: **On Impasse.**

The focus of this essay is to review, explore and propose case valuation methodologies to resolve the largest impediment to case resolution and mediation impasse: Case Valuation.

Juries resolve cases by verdict less than 3% of the time {Bureau of Justice Statistics Bulletin "Civil Bench and Jury Trials in State Courts, 2005"}.

Two recent empirical studies that cast skepticism on attorneys' ability to make objectively accurate determinations on the outcome of litigated claims:

- The first study conducted by Randall L. Kastor, LET'S NOT MAKE A DEAL: AN EMPIRICAL STUDY OF DECISION MAKING IN UNSUCCESFUL SETTLEMENT NEGOTIATIONS published in the Journal of Empirical Legal Studies Vol.5, Issue 3, 551-591, September 2008 found that 61% of plaintiffs made decision errors in rejection of settlement offers, with a mean loss of $42,000 and 24% of defendants made decision errors in rejection of offers, with a mean loss of more than $1,000,000.

- The second study conducted by Elizabeth Loftus, INSIGHTFUL OR WISHFUL; LAWYERS' ABILITY TO PREDICT CASE OUTCOMES, published in PSYCHOLOGY, PUBLIC POLICY, and LAW, 2010, Vol.16, No 2, 133-157 which utilized a large sample of U.S. lawyers, showed clear evidence of unrealistic goals and a motivation to achieve a certain case outcome that led lawyers to discount the assessment of a third independent party if it did not fit with their preferred belief.

Settlement leverage – case valuation accuracy-can be substantially increased by gaining a perception of what a typical jury might do in a given fact situation. It helps to know something more than a guess, a subjective estimate, prior verdicts and settlements, or a computer program analysis.

The development and explosion of discovery rules has shifted the paradigm from "see what comes out at trial" to pre-trial resolution through the discovery process that is

designed to uncover facts that are well understood by all parties well in advance of trial. It follows that at a point in time, through some mechanism, the vast majority of cases settle.

What then is the most reliable method to measure the value of the case that provides the information to form the basis of the decision to settle?

The principal reason that cases do not resolve more efficiently earlier than later (and a greater expense to all parties) is that valuation techniques run the gamut from guess work to employment of predictive coding research, but these techniques still do not answer the fundamental question of “How much is my
case worth?” The one piece of information still missing is what a jury would award/do IF the case did proceed to trial. The key questions that need to be answered to satisfy the settlement valuation decision making process are:

1. How would a jury perceive the facts?
2. How would a jury perceive the conduct of the trial attorneys?
3. How would a jury perceive the believability of key witnesses?
4. How would a jury assign a monetary value to the dispute?

Up to this point in time, the traditional methods of valuation have been comprised of:

- **THE MULTIPLIER**
  The multiplier is Direct Damages x XYZ (i.e. 3, 4, or 5).
  While this approach is simple and of long standing use, it is severely limited by the arbitrary
  selection of the multiple used.

- **THE DECISION TREE**
  The decision tree is a probability diagram of possible litigation outcomes derived from the assignment of percentages to possible jury verdicts.
  While instructive, this approach is also highly dependent on a somewhat arbitrary selection of BOTH damage expectations AND assessment of individual attorney experience and confidence.

- **PRIOR JURY VERDICTS AND SETTLEMENTS**
  Jury verdict and settlement research is now more widely available to both plaintiff and defense than ever before at affordable prices. LexisNexis touts a content fabrication system that runs on a petabyte of storage capable of 10,000 calculations per second. (A petabyte equals about 1 trillion kilobytes. Apollo 11

ran on 74 kilobytes and could preform 50 calculations per second) (ABA Journal May 2013, HOW LAWYERS ARE MINING THE INFORMATION MOTHER LODE FOR PRICING, PRACTICE TIPS AND PREDICTIONS.
Utilizing this process removes reliance on personal estimations; however, no prior case has exactly the same facts and issues as all cases are in fact unique. It is therefore impossible to measure the impact of all the variables involved in the case at hand.

- **COMPUTER MODELS**
  Most insurance carriers utilize either proprietary or purchased software programs that use a point system to calculate settlement values. Such systems utilize huge data bases of information on a spectrum of losses and valuations to derive end monetary values that include the litigation experience history of attorneys representing claimants.
  However, this approach still suffers the same deficiency of assigning somewhat arbitrary values and discount probabilities depending on the assessment of the individuals inputting the data. As in all such systems, the maxim of “garbage in – garbage out” is observed.

The common goal of the foregoing methods is to formulate a “best guess” of the amount a jury of peers would award if the case at hand were to proceed all the way to verdict. These methods all have the shortcomings stated and fall short of predicting what happens in the minds of actual jurors.

In an effort to obtain that critical information the concept of conducting Mock Trial has emerged as has the concept of Focus Group Mediation.

- **MOCK TRIAL**
  Mock trials can take many forms all the way from simple presentation of one side of the case to an assembly of mock jurors to practice summary trials. This process may also suffer the deficiency of the absence of a presentation from the “other side”, presentation of the “other side” by someone other than the “other side” (it is impossible for someone other than the opposing party to faithfully represent the other party’s case), or getting the other side to actually agree to a practice trial including the expense of a leased mock trial facility, and a person to act as a judge.

- **FOCUS GROUP MEDIATION**

**Bring the jury into the mediation. Stop the game of second- guessing jury verdict valuation.**

Why does mediation fail? A not so obvious explanation is that the parties enter into the mediation negotiation process with overconfidence and a “mind set” that is adversarial rather than conciliatory. Focus Group Mediation provides a service allowing for presentation of the entire story to a panel of up to 21 jurors, trial consultant facilitation and input, optional videography of the deliberations and/or confidential split panel evaluations with traditional caucus based mediations that follow. This process is designed to take the guess work out of the valuation question in a mediation setting and can be designed to accommodate the preferences of parties without the higher expense of a mock trial.

# Aristotle On Mediation Of Insured Claims

*The more things change, the more they stay the same*. French Proverb

Despite the fact that FRCP 1.720(b)was amended on January 1, 2012 (requiring full authority certification, etc.), a recent discussion conducted in the LinkedIn group “Florida Supreme Court Certified Mediators” consistently reported that the new rule has had little, if any, effect on the mediation process.

Perhaps this is because at the same time insurance carriers have altered their internal claims practice. Authority and independent judgment once possessed by claims representatives has been substantially diminished if not entirely removed as insurance companies seek uniformity in claims handling and absolute control over settlement parameters established well in advance of a mediation date. Thus the claims representatives do in fact appear at mediation with full authority to settle, but only within the parameters previously established by a process designed to bring uniformity to claims payouts by category. This is a process of quantifying payout of measured risk – this is also how insurance premiums are calculated. An insurance company that pays out more than it takes in meets an untimely demise.

Understanding the reality of the claims process is the first ingredient in creating a set of circumstances that will produce optimum case resolution.

Simply put, if the plaintiff does not furnish information to support the demand, it will be stuck with settlement parameters established by the carrier’s internal claims evaluation procedure and washed through their proprietary software programs.

The Central key reality is that insurance companies pay claims based on their perception of risk in relation to exposure.

In an adversarial system a claimant has the burden of going forward. It therefore follows that the plaintiff has the obligation to convince the opposition of the legitimacy and value of the case. Convincing the opposition is applying the art of persuasion to see the matter your way.

Setting aside issues of overconfidence and fundamental attribution error, the issue to be addressed is:

“What are the tools of persuasion available in settling insure claims?”

The answer leads straight back 2400 years to Aristotle’s three ways to persuade:

*“Of the modes of persuasion furnished by the spoken word there are three kinds. The first depends on the personal character of the speaker; the second on putting the*

*audience into a certain frame of mind; the third on the proof, or apparent proof, provided by the words of the speech itself."*

These elements will be discussed in inverse order because of the usual practice of first building a claim on the elements of a cause of action and then crafting the presentation to accomplish the ends intended.

Lawyers who conduct successful mediation of insured claims do the following:

1. **Prepare the claims representative for the mediation.**

This step is persuasion on the proof – appeal to reason by demonstration and logic.

Document in detail the adjuster's file. Provide accurate, tangible, verifiable objective criteria to support liability and such damages are allowed by the Florida Standard Jury Instruction 501.2.

Claims reserves are set early by the insurance company. A plaintiff's job is to persuade the insurance company to change their initial evaluation. If a claim is not well documents it will be perceived as nonexistent or a fabrication. If the mediation is to be successful, all documents, videos, deposition summaries, reports, etc. must be in the hands of the claims representative no less than two weeks before the scheduled mediation if not before. If this material is presented for the first time at the mediation, it will be ignored and the mediation will assuredly impasse.

This requires communication directly with the claims representative handling the case. It is that person who must be persuaded in the first instance. It is that person who together with a risk management team who will make a collective monetary decision based on the risk assessed. Defense counsel may be only tangentially involved in this process.

2. **Maintain a professional demeanor in all communications with the insurance company and defense counsel.**

This step is persuasion through appeal to the presenter's credibility and authority.

If the claimant's representative does not appear to be knowledgeable about the matter, or appears to conduct himself in a manner disrespectful, demeaning, or insulting to the claims representative or defense counsel, all of the reasoning of the case will be disregarded and impasse will assuredly follow.

Simply put, boisterous bombastic denunciations will always backfire. Treating people with disrespect, even when their stories verge on questionable is normally counterproductive. See Allstate v. Marotta, 2013 WL 2420451 Fla.4thDCA (June 5, 2013).

### 3. Appeal to the claims representative's inherent emotions.

Claims representatives may be remote, trust their own cognitive process and bias blind spots, but they are not passive participants any more than jurors. They are active participants – critical players in a joint creation of what happened, what is fair, and what is moral.

This step is the appeal to the inherent human emotions of the claims representatives. It is no doubt the most subtle but needs the same attention that would be put into a plaintiff's Opening Statement.

This step provides the motivation to open or close the carrier's checkbook.

This step requires development of a mediation presentation that has a theme, employs metaphor, and tells a compelling story that persuades a review of the listener's natural biases and exposes their blind spots.

It is well documented (Haidt 2012 **The Righteous Mind)** that motivations tend to group along five general themes:

1. Care or Harm
2. Fairness or Cheating
3. Loyalty or Betrayal
4. Authority or Subversion
5. Sanctity or Degradation

Every legal case will contain one or more of these themes. If employed in the mediation presentation they will have the identical effect as in an Opening Statement to the jury – only this time, the claims representatives are the "Jury".

Simply put, presentation of reason and evidence alone is not enough to persuade. Motivation to reach the desired result must be furnished: **NO MOTIVATION, NO PERSUASION.**

### 4. Always employ the best video aids available.

A picture is worth a thousand words (or more) because seeing is believing.

Aristotle only had oratory and perhaps a few drawings to install mental images in the minds of his audience. 2400 years later we not only have pictures, photographs, and dramatizations, but also animations to carry the motivational themes imbedded in presentations. Use of imagery in any form is an absolute necessity in all successful mediation presentations. Lack of it will most certainly yield marginal results.

5. **Make it self-evident that you are ready for trial NOW.**

Part of the claims evaluation process involves assessment of the perceived capabilities and trial effectiveness of opposing counsel. Since even the busiest litigators in major firms try at most 30 cases in their lifetimes, the number of cases tried is less significant if the mediation presentation demonstrates that you are prepared to go to trial on this case at this time. Risk assessment and therefore payout parameters are after all made on a case by case basis.

6. **Practice, Practice, Practice.**

No one would be a member of a team that did not practice before the competitive event. No one would act in a play without rehearsal.

Engage a Mediator to participate in practice mediation. That fresh look can open your eyes to some unexpected strengths or approaches your adversary could apply. It may very well expose natural bias blind spots.

# The Case For Mediation Of Discovery Disputes

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Mediation is a viable tool for resolving traditional and e-discovery disputes; the process offers litigants a cost effective alternative to protracted and contentious hearings and relieves burdens, such as sanctions, that Courts can impose. Parties can either agree or a Court can order meditaion. F.S. 44.102(2)(b) provides that a Court, "May refer to mediation all **or any part of** a filed action…" FRCP 1.700 reiterates this authority.

Because it has proven successful for substantive matters, mediation should be equally successful for discovery disputes. Mediation is a confidential forum to exchange information on the production of information the parties need to develop their cases. It also fosters cooperation that promotes settlement in the control and mutual acceptance of the parties.

Cooperation in discovery is paradoxically old and new at the same time. Prior to 1938, when the first Federal Rules on discovery were promulgated, a complaint and answer were commonly followed by what we now term "trial by ambush". Pre-trial discovery was designed to ameliorate trial by ambush, but the unintended consequence was that it took on a life of its own; attorneys demanded, "all relevant information that might lead to the discovery of admissible evidence" and courts were overwhelmed in motions to compel or to protect.

Litigation began to last years rather than months, trials all but disappeared, and discovery became the focus of litigation. Attorneys waging these discovery battles justified their conduct by claiming they were zealously representing their clients, which largely ignored the economic impact on their clients.

Times have changed.

In reaction, the Preamble to the Florida Rules of Professional Conduct deleted the word "zealously". The committee comment the FRPC 4.1.3 provides, "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect".

Thus, FRPC 4-3.4(d) imposes an obligation not to engage in wasteful or frivolous discovery. Recently, in *Life Care Centers of America v. Reese* 984 So2d 830,833 (Fla. 5th DCA 2007), the Fifth DCA cited this duty and advised that, "parties should fulfill their respective ethical obligations by meeting and working together to reasonably narrow the disputed issues before bringing discovery issues before the court".

Cooperation in the discovery process is now becoming the overarching theme. Cooperation in discovery allows attorneys to increase efficiency and lower costs, thereby acting in the best interests of their client. In practical application, cooperation in discovery allows parties to produce less at lower costs and to obtain meaningful information without the expense of motion practice. Thus, cooperation in discovery harmonizes the combined duties of zeal in advocacy with the goals of ethics and professionalism.

E-discovery is now impacting litigants and has its own unique issues distinct from traditional discovery. The new Florida e-discovery rules do not mandate a "meet and confer" as do their Federal counterparts, however, nothing prohibits the parties from engaging in such a productive discussion. In e-discovery, a structured and mediated agreement on production can resolve and define the topics, time periods, sources, form, preservation, and protocols for handling privileged data to allow parties and their counsel to satisfy the obligations imposed by law. Further, engaging a mediator knowledgeable about the e-discovery process and applicable laws, helps the parties to efficiently resolve potentially costly future e-discovery disputes at an early stage, to control the process, to alleviate burdens on the Courts and costs, and fosters a climate of cooperation that can only benefit the parties later in the process.

Mediation is the forum for cooperation in discovery and e-discovery. The courtroom is the forum for an imposed decision that may even include an order to mediate the discovery dispute. Parties and their attorneys are wise to consider mediation in discovery and particularly e-discovery for the benefit of their clients in meeting their goals or zealously advocating for them.

# Mediating e-Discovery Disputes

*By David Steinfeld, Esq. and Edmund J. Sikorski, Jr., J.D.*

Discovery of Electronically Stored Information (ESI) is the newest and developing area of practice in civil litigation. E-discovery began in complex commercial disputes, but is now appearing in a multitude of cases and will continue to develop and permeate all manner of civil cases.

Mediation is a useful and efficient method to deal with e-discovery issues. It can afford the parties control over the process and reduce their costs. In any mediation, the Worst Alternative to a Negotiated Agreement (WANTNA) is one where a Judge "splits the baby". This may have a greater impact in e-discovery because it can propel a case on a course that the parties did not intend or desire. In e-discovery mediation, the parties take control over the outcome of the process, what is being requested, how it is produced, and when.

The Commitee comment to Florida's new and amended Rule 1.280 provides, "The parties should consider conferring with one another at the earliest practical opportunity to discuss the reasonable scope of preservation and production of electronically stored information. These issues may also be addressed by means of a Rule 1.200 or Rule 1.201 case management conference." This guidance strongly suggests that parties would be wise to consider mediation in the early stages of the e-discovery process in appropraite cases to avoid unnecessary litigation and use of limited judicial resources.

Unlike ordinary mediation that is geared toward resolving the entire dispute, e-discovery mediation is limited to a singular issue within the dispute that must be resolved before a case can advance to a final mediation or trial. E-discovery mediation is a cost-effective mechanism to manage the situation. The parties' good faith attempts to resolve the issue may even shield them from the imposition of sanctions.

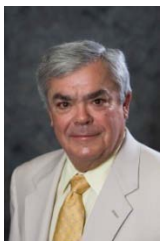
Some of the advantages of e-discovery mediation are:

- Identification and remedying of miscommunications and misunderstandings
- Designing workable solutions for issues of ESI sources, presentation, and form of production
- Definition of parameters and confidentiality issues
- Determinations of relevancy
- Development of timelines and sequences for production
- Avoidance of spoliation
- Allocation of costs

The goal of e-discovery mediation is for parties to conclude with an agreed e-discovery plan over which they have and will maintain control. This control, in turn, results in a product that reduces costs and allows for the efficient adjudication of any civil dispute.

From a practitioner's perspective, e-discovery mediation, just like e-discovery itself, may not be necessary or appropriate in every case, however, the costs of e-discovery and ESI experts, whether borne by a plaintiff or defendant, can be substantial and can even rise to the level of precluding a party from having the merits of its claim reached. Thus, where appropriate, e-discovery mediation can be an extremely beneficial mechanism for all the parties to a dispute and can form the foundation necessary for parties to begin the process of working together to ultimately resolve their dispute in a manner and form that is acceptable to them.

David Steinfeld, Esq. is Board Certified in Business Litigation Law by the Florida Bar. He practices in Palm Beach Gardens and is rated AV-Preeminent by Martindale-Hubbell. His videos and articles on business litigation, e-discovery, and commercial law can be accessed at and can be easily reached through www.davidsteinfeld.com



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