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ENHANCE A JURY’S UNDERSTANDING OF YOUR CASE

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# Perspectives on the Mediation Process and Its Participants: How and Why People Mediate\*

Hon. Jack L. Lintner, Retired  
Lynn T. Jenkins  
Joseph M. Junfola  
J. Scott Murphy  
Michael J. Goldman

## I. INTRODUCTION

Esoteric newspaper articles and CLE seminar handouts discussing mediation abound. Too often, these publications offer no more than useless generalities and platitudes like “be prepared” or “work hard” or “plan your argument in advance”—something akin to a version of Steve Martin’s advice regarding how to become a millionaire: “First, get a million dollars.”<sup>1</sup> This Article seeks to avoid that trend and instead offers a compilation of objective, practical, and useful insights from primary participants in the mediation process. The experience of writing and coordinating this article was our form of *The Breakfast Club*, the John Hughes film about five teenagers who “each representing a different teen stereotype, come to understand each other” after “spending Saturday doing detention time in the high school library.”<sup>2</sup>

Mediation—which involves strategic exploration, isolation, and resolution of complex issues—shares much in common with golf or parenting. Like improving one’s golf stroke, improving one’s skills as a mediator is a hands-on process that must be approached with

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<sup>1</sup> *Steve Martin, Saturday Night Live*, Season 3: Episode 9 (NBC television broadcast Jan. 21, 1978).

<sup>2</sup> Janet Maslin, Review, *John Hughes’s ‘Breakfast Club’*, N.Y. TIMES, Feb. 15, 1985, at C18.



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*setting up and participating in numerous successful court-run mediation and settlement programs. In 1999, Judge Lintner was appointed to the Appellate Division and was a Presiding Judge from 2006 through his retirement in 2008. He is a member of the Executive Committee of the Civil Procedure Section of the New Jersey Bar Association and the New Jersey Commission on Professionalism in the Law. Judge Lintner has lectured extensively on a variety of topics for the New Jersey Judicial College and the Institute for Continuing Legal Education. He is a recipient of the 2008 James J. McLaughlin Award from the Civil Trial Bar Section of the New Jersey State Bar Association and the 2001 Distinguished Service Award from the Institute for Continuing Legal Education. He is also a Fellow of the American Bar Association.*

the proper respect. Similar to developing parenting skills, the ability to negotiate through mediation can be cultivated only through practice and experience. And just as different golfers and different parents espouse different definitions of success, experienced mediators know that there is more than one way to be successful, and the ultimate definition of success may be different for different people.

This Article begins with a brief history of the growth of mediation in Part II. Part III discusses perspectives and recommendations, including the strategies, goals, and the process of mediation. In Part IV, the authors discuss mediation from the perspective of the traditional participants—the mediator, the claims professional, and attorneys. An account of an insurance underwriter’s perspective is also included.

The perspectives offered throughout this article are personal perspectives. Understanding mediation from a variety of vantage points can inform the formulation of a strategic mediation plan. It is important to emphasize, however, that this Article is not intended as an all-inclusive, step-by-step guide. This Article is instead intended to provide a starting point for thoughtful reflection and to encourage respectful application of the mediation process.

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## II.

### A BRIEF HISTORY OF THE GROWTH OF MEDIATION

Regardless of the particular context involved—be it a family, business, or personal injury dispute—the American legal system imposes the same procedural constraints on all civil disputes. First, a party files pleadings averring contested facts and circumstances and legal causes of action; then the case progresses to factual discovery; and finally it ends in judicial determination. As the volume of cases has dramatically increased, overburdened courts have been unable to meet demand, and expensive delays have resulted. In order to ameliorate this problem, courts and litigants have encouraged—and sometimes, required—informal settlement discussions, as well as formal settlement conferences. Alternatives to litigation—for example, arbitration and mediation—were developed.

Arbitration (both binding and non-binding) was one of the first alternatives to traditional litigation, and it surfaced as a reasonable alternative to costly and delayed trial resolution. Although arbitration provides an alternate route to parties seeking to avoid litigation, it proved to be of limited utility. Like litigation, arbitration is fundamentally an adversarial process. Moreover, limited time and resources prevented judges and magistrates from devoting significant efforts to third-party facilitation of complex cases. Indeed, in some instances the judges or magistrates were pressured to remove cases from the docket, and truly neutral third-party facilitation of settlements suffered. Over time, the original concept of arbitration as a simple, cost-effective solution has devolved into more complex and expensive procedures.

These challenges resulted in court programs directing parties to mediation. Private parties also voluntarily mediated disputes. Unlike both traditional litigation and arbitration, in mediation a neutral third party could devote the time and effort needed to discuss the disputed issues, deal with practical considerations, and help the parties to find a common ground essential to resolving the dispute without the need for a trial.



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Over time, the concept of mediation became more common. To fill the increasing need for mediators, private attorneys, professional mediators, and retired jurists became mediators, either privately or through accrediting institutions.<sup>3</sup> Of course, a lawyer’s or judge’s skill set does not always lend itself to effective mediation. Hence, as mediation increased and became more commonplace around the country, new mediators had to learn on the job and develop a new skill set. As mediation has continued to grow in popularity, mediators have continued to grow and adapt to accommodate the needs of contemporary dispute resolution.

### III. PERSPECTIVES AND RECOMMENDATIONS

Mediators, underwriters, claims professionals, and attorneys have different perspectives on how information produced during mediation can be used. Mediators use the information generated before and during a mediation session to help the parties understand each other’s positions and resolve the underlying dispute; in contrast, underwriters can use the information produced in a mediation to better analyze the risks associated with an insured’s business and to more accurately set premiums for insurance policies. Claims professionals may use the information produced in mediation to help the parties objectively view what a claim is worth.

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<sup>3</sup> See, e.g., JAMS ARBITRATION, MEDIATION, AND ADR SERVICES, <http://www.jamsadr.com> (last visited February 27, 2012).



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The parties involved in mediation also have different perspectives on which mediation strategy is best. The strategy employed may depend upon what type of mediator is used and whether the settlement involves just determining the amount of damages payable or a more nuanced problem of understanding and incorporating the parties' varying understandings and positions regarding the facts and the law governing the dispute.

Despite this superficial diversity of perspectives, mediation participants often have much in common. In this section of the Article, each perspective is explained, but the overarching goal is to create a common understanding of the mediation process with a goal of fostering successful settlements.

*A. The Mediator's Perspective: Hon. Jack L. Lintner, Retired*

Whether a mediation session is successful depends upon several factors, including the preparation, experience, and professionalism of all parties involved. This section will provide an overview of these considerations, as well as practical advice on how to ensure that mediation is appropriate and well-timed.



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### 1. Deciding to Mediate

Whether mediation is appropriate is a fact-intensive inquiry and depends on the particular circumstances presented. For example, in a case where both liability and damages are clear, mediation is generally unnecessary—especially if both parties are represented by experienced professionals. On the other hand, mediation may be helpful even where liability is undisputed if one side is reluctant to settle because of inexperience, or because of a client’s stubbornness regarding reasonable settlement value.

Mediation is not an appropriate tool to discern the other party’s settlement position or to obtain discovery. Parties should go into mediation with the good faith intention of attempting to resolve the case.

### 2. Timing Issues

Once it is determined that mediation is appropriate, it is crucial to initiate mediation at the appropriate time. The right time for mediation depends on the type of case, the number of parties, and the complexity of the issues. Although usually a fair exchange of material facts and expert reports is essential before entering into the mediation process, there are circumstances where mediation can commence before this exchange of information occurs.

For example, if the mediation involves a claim based on personal injuries and either liability or damages (or both) are clear, early mediation can sometimes save litigation time and expense and produce essentially the same result that would be reached if the matter settled after the parties engaged in costly discovery.

Early mediation may also be appropriate in cases where damages are clear but liability is not. The following example is illustrative. A child is born with catastrophic retardation. The obstetric nurse is sued for failing to call a doctor after viewing the fetal heart rate monitor that may have indicated fetal distress. Liability experts disagree as to whether the fetal tracings established a non-reassuring pattern, requiring calling the doctor to intervene, and whether the retardation is causally related to the failure to have the baby delivered earlier. The nurse is insured with a \$1,000,000 professional negligence policy. While a plaintiff's verdict would yield a verdict well in excess of the nurse's insurance coverage, the parties know that a jury could go either way on liability, and the case has settlement value at something less than the policy limit. If the parties are willing to negotiate, early mediation can be successful.

### 3. Selecting the Mediator

Usually the parties to a private mediation select the mediator through consensus or by contractual pre-arrangement. In contrast, court-ordered mediation may involve a court-selected mediator.<sup>4</sup> In the latter instance, parties are usually free to jointly suggest a different mediator and to move for a consent order appointing a different mediator if the court-selected mediator is unsatisfactory.<sup>5</sup> Regardless of how the mediator is initially selected, the parties to the mediation must have confidence that the mediator will act as a neutral third party and will honor the confidentiality of the parties' positions.

It is essential that a mediator possess excellent communication skills. These skills will be used throughout the mediation process. A good mediator will follow up with the parties by telephone, especially if they are close to reaching a resolution, or either party signals movement on its side of the negotiations. Moreover, it is often said that if you can keep the parties talking, you can resolve the dispute.

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<sup>4</sup> There are different types or formats of court-ordered mediation. Some state courts or federal district courts have mediation programs where parties are ordered to attend and to use a "panel" approved mediator assigned randomly. Sometimes a few "free" hours are donated by the attorney or professional mediator. Some programs do not even require that the mediator be a lawyer or retired judge. Additionally, the parties may be given little discretion on timing—the mediation may be required at too early a juncture and before the parties can make the process truly meaningful.

<sup>5</sup> Lawyers who do not have experience with mediators in a particular geographic location can ask local lawyers who have mediated the same type of case for the names of mediators who have a reputation for success in that field.

A mediator should also have trial experience and legal knowledge. These traits will permit the mediator to evaluate a case from both a liability and damages standpoint. Additionally, a mediator with trial expertise can help counsel see with more objectivity how a jury is likely to react to the evidence as well as the opening and closing arguments. In many contexts, a judge who has also been a trial lawyer has the optimal experience to succeed as a mediator. Experience also ensures that the mediator can “talk the talk,” whether to a lay party, an attorney, or an insurance representative.

Mediators with proven track records for settling cases can generally be accepted as having the experience, training, and skill set required to overcome conflicts and move the parties towards resolution of their differences.

#### 4. Preparation

The importance of preparation in successful mediation cannot be overstated. Successful mediators will have read everything provided by the parties before the mediation session and will have given thought to the legal and factual positions. A prepared mediator is ready to ask questions to clarify the parties’ respective positions and is able to provide the attorneys and parties with give-and-take concerning their respective positions.

To ensure adequate preparation, it is important to provide the mediator with a confidential mediation statement that summarizes the material facts, demonstrative evidence, and expert reports. The mediation statement also explains the party’s general position in the case and its views respecting settlement.

In some instances, a mediator’s preparation may involve reviewing expert reports. Where expert reports cover complex areas that are not generally understood, it may be necessary to have the expert attend the mediation session to explain the bases of the expert’s conclusions to the mediator.

Finally, in many instances *ex parte* communication is a crucial component to the mediator’s preparation. Such communication is a part of mediation, and it is proper to contact the mediator before or after the session to provide information that will help the mediator fulfill his or her role.

#### 5. Conducting the Mediation

Following introductions, some mediators ask for opening statements; others do not. My preference is to omit opening statements, unless a party insists. In my view, opening statements tend to create posturing by the parties. After introductions, it is my practice to separate the parties and have confidential conversations with the respective parties and their attorneys. In my experience, a mediator can learn more in a confidential session by asking questions about areas that may not have been adequately explored in the mediation statement and clarifying areas that were addressed in the statement.

Confidentiality is of the utmost importance. Indeed, confidentiality is the key to a mediator’s ability to learn where each party would like to go or is willing to go. A party’s “want” position and “take” position are often different. A mediator’s ability to learn these positions is one of the keys to successful mediation, yet it is only when a party trusts a mediator to

keep the information in strict confidence that the mediator can acquire this information. To avoid divulging confidences or placing either party in a position where it is bidding against itself, a mediator should *always* ask permission to relate areas of confidential communication to the adverse party, if the mediator believes that the information will be helpful to the process.

## 6. Settlement

It is essential that a mediator has the resources to prepare a tentative written settlement agreement to be signed by the parties and attorneys once an agreement is reached. The tentative settlement agreement may indicate that it is subject to agreement on final language in a formal agreement and that disputes over the language are to be resolved and decided by the mediator. It may also indicate that it is binding and may be placed into evidence to enforce it. Such tentative agreements have been enforced by the courts.<sup>6</sup>

## 7. Summary

Mediation is a procedure that efficiently resolves disputes at a substantially lower cost than either litigation or arbitration. However, the mediation process is only as good as the mediator. Therefore, it is of the utmost importance that parties select a mediator with a proven track record and a reputation for professionalism.

### B. *The Underwriter's Perspective: Linnie T. Jenkins*

In the insurance context, underwriting is the process of “(1) deciding which accounts are acceptable, (2) determining the premiums to be charged and the terms and conditions of the insurance contract, and (3) monitoring each of those decisions.”<sup>7</sup> In a broader business context, underwriting is essentially “what insurers do to be financially successful.”<sup>8</sup> The ultimate goal of underwriting “is to ensure that the risk transfer is equitable and the insurer is able to develop and maintain a growing, profitable book of business.”<sup>9</sup> Mediation can provide the underwriter with useful information to make this determination.

This section will provide an overview of the underwriter's role and insight into how mediation can help the underwriter make accurate determinations to the benefit of both insurance companies and insureds.

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<sup>6</sup> See, e.g., *Facebook, Inc. v. Pac. Nw. Software, Inc.*, Nos. 08-16745, 08-16873, 09-15021, 2011 U.S. App. LEXIS 7430, at \*11–13 (9th Cir. Apr. 11, 2011).

<sup>7</sup> JOSEPH F. MANGAN & CONNOR M. HARRISON, AMERICAN INSTITUTE FOR CHARTERED PROPERTY CASUALTY UNDERWRITERS/INSURANCE INSTITUTE OF AMERICA, UNDERWRITING PRINCIPLES 1(2d. ed. 2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2.

### 1. Determining Which Accounts are Acceptable

The first step of an underwriting decision is to determine whether an account is acceptable. This analysis applies at two distinct phases of insurance underwriting: first, when determining whether to insure a risk in the first instance, and second, when determining whether to renew existing business. Mediation can provide the underwriter with useful information to make this determination.

Whether in the “new applicant” or “renewal” context, an underwriter must assess the various hazards of the insured’s business.<sup>10</sup> To gain a more accurate assessment of the hazards associated with an insured’s business, the underwriter will categorize the insured’s business and begin to gather information. Relevant information includes the business’s management structure and financial condition as well as how the business manages risk and whether independent contractors or employees perform the work.<sup>11</sup>

When a loss has occurred and litigation ensues, information presented by the insured in a mediation session can provide greater clarity and insight into several factors that an underwriter evaluates when deciding whether to accept a risk. Indeed, the information obtained in mediation can be invaluable for assessing the insured’s risk management practices and developing ways to improve the insured’s risk management.

Even more significantly, mediation can provide the underwriter with an opportunity to develop its working relationship with the insureds. After carefully reviewing the plaintiff’s case, the underwriter can make recommendations that will assist an insured if it needs to develop and improve its risk management program. This improved risk management potentially reduces the insured’s future loss frequency and severity. By listening to the insurer’s recommendations and showing an interest in implementing the insurer’s recommendations, the insured demonstrates that it is interested in improving its business and maintaining its relationship with the insurer in a mutually beneficial way. This demonstration may result in a lower premium.

In sum, improving the working relationship between the underwriter and insured can reduce premiums for insureds and improve profitability for insurers. In the broader business context, underwriting is what insurers do to ensure profitability, and the information received in mediation often provides a cost-effective way to reach that goal.

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<sup>10</sup> Hazards are conditions that increase loss frequency (i.e. number of losses). Hazards can present themselves as physical, moral, or legal in nature. ANN E. MYHR & DORIS HOOPES, AMERICAN INSTITUTE FOR CHARTERED PROPERTY CASUALTY UNDERWRITERS/INSURANCE INSTITUTE OF AMERICA, SURPLUS LINES INSURANCE OPERATIONS, 6.4–6.5, (1st ed. 2010).

<sup>11</sup> With regard to employees, an accurate assessment of hazards requires considering the quality of the employees and how much training they receive. MANGAN & HARRISON, *supra* note 7, at 62–67.

## 2. Determining Premiums and Terms and Conditions of the Insurance Contract

For underwriters, a key component of maintaining profitability involves analyzing the loss (indemnity) payments as well the loss adjustment expenses.<sup>12</sup> One key way underwriters measure their results is by using the “combined ratio,” expressed as loss and loss adjustment expenses divided by premium earned.<sup>13</sup> The combined ratio is an important indicator of whether an account or book of business is profitable. If the loss ratio is greater than one, the account or book of business is not profitable. Consequently, as loss payments and loss adjustment expenses grow as a percentage of premiums earned, the less profitable the account or book of business.

Litigation can be a very expensive proposition for the insured and insurer. A successful mediation can greatly reduce the additional costs associated with going to trial—for example, attorneys’ fees or injury to the insured’s business. For the underwriter, experience has demonstrated that successful mediations can result in lower loss adjustment expenses and lower settlements than trials. This result translates into a more favorable loss ratio, which can ultimately lead to more favorable premiums and policy terms for insureds.

### C. *The Claims Professional’s Perspective: Joseph M. Junfola*

From a claims professional’s perspective, the value lies in avoiding litigation expenses and the risk of unpredictable verdicts. The benefits of successful mediation are invaluable. Mediation can propel a stubborn dispute forward to resolution. Even if a mediation session does not result in settlement, it can allow parties to gather valuable information. Moreover, the formal mediation session often proves to be the starting point for a process that eventually results in resolution.

In order to yield the full benefit of mediation, however, it must be “done right.” The following are “hot button” issues from the standpoint of the claims professional, or at least this one.

#### 1. Timing

“Doing a mediation right” begins with doing it at the right time. Premature mediation wastes time and money and can poison future efforts to negotiate and mediate. Similarly, initiating mediation too late in the process nullifies one of the main benefits of mediation; namely, avoiding the costs of litigation.

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<sup>12</sup> Indemnity payments include amounts paid to settle cases as well as damages awarded after litigation concludes. Loss adjustment expenses include the fees paid to independent adjusters, experts, and attorneys.

<sup>13</sup> MANGAN & HARRISON, *supra* note 7, at 24.

*a. Premature Mediation*

Premature mediation produces problems. Early in the process, there may simply not be enough information for the claims professional to intelligently evaluate the claim and justify settlement. Given the potential dangers in settling without adequately analyzing all the facts, it is particularly important to be circumspect when confronted with a plaintiff who wants mediation before the exchange of information. As one commentator has warned,

Be aware of plaintiffs who seem eager to enter into mediation prematurely, **usually immediately after a suit is filed or a claim is made.** Plaintiffs often use this tactic in an attempt to avoid discovery. Possibly, discovery may reveal unfavorable facts or that the relevant law does not support their complaints.

The idea is to rush into mediation and have the mediator work with little or no information. Little is known about the fact pattern; there is not enough information to assess damages. They insist on early mediation as a good faith attempt to settle the matter and avoid costly litigation.<sup>14</sup>

Premature mediation is frequently the result of an inflexible case-management order that mandates mediation under the threat of sanctions. There is no question that mediation is a valuable tool; however, forced mediation under the threat of sanctions is anomalous to the underpinnings of successful mediations—motivated parties, cooperative efforts, open-mindedness, and willingness to compromise. As one court stated, “a case management conference order requiring that parties in complex cases attend and pay for mediation is . . . contrary to the voluntary nature of mediation. *The essence of mediation is its voluntariness.*”<sup>15</sup>

*b. Duration of Mediation*

Ensuring that a mediation session runs for the appropriate length of time is admittedly not always easy to accomplish. But it is critical that the mediation be structured so that time is utilized in the most efficient way possible. Discussions should be focused and goal-oriented. Posturing and histrionics must be minimized as they are major distractions and time-wasters.

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<sup>14</sup> Troy A. Galley, *Key Elements for Successful Mediation*, 51 CLAIMS MAG. 44 (2003).

<sup>15</sup> *Jeld-Wen, Inc. v. Sup. Ct. of San Diego Cnty*, 53 Cal. Rptr. 3d 115, 119 (Ct. App. 2007) (emphasis added).

If at all possible, the insurer and insured should present a united front at the mediation session. Any lingering coverage issues should be resolved before mediation. Battles between insurers consume valuable time that is better utilized settling the dispute between the primary parties. If the carriers' controversies cannot be resolved, then perhaps a separate mediation session may be warranted.

## 2. The Participants

Prepared decision makers should attend the mediation. Any claims professionals in attendance should have a sufficient amount of authority—in terms of money and ability to make concessions or other decisions—and not merely be a conduit between the parties at the mediation and the insurance company. This principle does not preclude the claims professional from making a phone call or two to the insurance company to discuss, consult, and seek guidance in appropriate circumstances; however, only decision makers with sufficient authority should attend. As one commentator has explained,

Very often, the dynamics of mediation are such that an ability to make a quick decision results in a more favorable concession. If the representative has to run every proposal up the chain of command, that powerful dynamic is lost.

If the representative has less than full authority to make decisions, it is imperative that the necessary decision maker be available for *immediate* consultation. . . . [T]he line adjuster typically has a firm grasp of all the micro case/coverage issues. But often, the adjuster is not empowered to address the macro issues of whether . . . to take the matter to trial or the real consequences of failing to achieve a negotiated outcome.<sup>16</sup>

## 3. Preparation

Virtually nothing is more frustrating to parties to mediation than lack of preparation. The process of preparing begins *before* the actual mediation session.

Pre-mediation homework is vital. Whether in the form of formal briefs, or in more informational position statements, each side must provide a comprehensive and understandable explanation of its position<sup>17</sup>—and mediators should read those submissions before the session. If there are lingering conflicts between insurers, those conflicts should be resolved

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<sup>16</sup> DENNIS M. WADE, BEHIND THE CURTAIN: AN INSIDER'S GUIDE TO MEDIATION 30–31 (2010). In the opinion of the author of this portion of this Article, full authority may not be necessary. A claims professional who has “sufficient” or “reasonable” authority to settle makes a good faith effort to mediate.

<sup>17</sup> If expert reports are critical to a position, then those should be shared as well. If experts need to be present at a mediation to explain their conclusions, then this should be arranged.

before the mediation, unless the controversy is a formal part of the mediation process. Finally, authority to settle should be determined before the mediation begins. If this authority cannot be achieved, then the claims professionals must know whom in their company to contact for authority if a settlement is reached.

#### 4. The Mediator

Good mediators are—to borrow a phrase from the advertising world—priceless. But what makes a good mediator? A good mediator should exhibit several traits. First, a mediator should be knowledgeable about all aspects of the dispute—including technical issues. Second, a mediator should be well-trained and skilled in conflict resolution. The ability to communicate effectively is vital. Finally, a mediator should be able to identify and closely focus on the issues that separate the parties, and similarly should be able to identify commonalities to exploit.

Should the mediator be a facilitator, an evaluator, or both? In other words, should the mediator be a catalyst for the process and facilitate discussion, or should the mediator evaluate the merits of the parties' cases? From the claims professional's perspective, a mediator should do both. The evaluation of the merits of each side's position by a neutral mediator provides each party with the opportunity to recognize the strength and weaknesses of their respective positions, and the risks they face by not settling.

[A] mediator often acts as an evaluator who, at some point in the process, expresses an opinion about how the matter may play on the stage of a trial. Indeed, most litigants prefer a neutral party who, by reason of experience, is capable of making objective predictions about how an issue will be decided or how a jury in a particular jurisdiction may react to a given scenario.<sup>18</sup>

Although biases are an unavoidable part of the human condition, the mediator must be able to recognize and guard against his or her biases to “create a neutral playing field for claimants or litigants.”<sup>19</sup> In other words, a mediator can be neutral and impartial—and therefore an effective mediator—as long as he or she recognizes any bias in him or herself. Failure to recognize any bias can present an insurmountable barrier to resolving conflict.<sup>20</sup>

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<sup>18</sup> WADE, *supra* note 16, at 15.

<sup>19</sup> Elizabeth A. Moreno, *The Mediators' Role: Tackling the Illusion of Objectivity*, IRMI (April 2004), <http://www.irmi.com/expert/articles/2004/kichaven04.aspx>.

<sup>20</sup> *Id.*

## 5. Conclusion

Mediation is an effective alternative to litigation to resolve disputes. Success depends on motivated and prepared parties and an environment that is conducive to compromise and reconciliation under the guidance of an intelligent and skilled mediator. Mediation presents an opportunity that should not be wasted.

### *D. The Attorney's Perspective: J. Scott Murphy and Michael J. Goldman*

As experienced attorneys know and newer attorneys quickly learn, litigation is stressful and all-consuming. Over the past two decades, the legal profession has migrated from rewarding time-intensive reflection, strategic planning, and forward thinking, to favoring volume claims and litigation handling driven by rigid guideline reporting time frames, detailed billing guidelines, and “best practices” considerations including deadlines, discovery end dates, motion dates, and other processing stressors.

One consequence of this shift is that legal professionals tend to handle ever increasing volumes of cases and claims—including hundreds of demand letters, offer letters, interrogatories, document requests, and depositions—simultaneously. Often, this press of business reduces opportunities to collaborate on individual cases to identify early resolution opportunities or strategic end-of-the-day strategies. In short, individual results can suffer because of economic and other pressures that can truncate the kind of individual attention that may be warranted.

In this context, attorneys must be proactive in seeking out opportunities to reflect, analyze, strategize, evaluate, and develop cases with input from clients and their risk managers, third-party administrators, and insurers. Mediation provides one such opportunity, because it functions like a settlement conference but also affords the parties the chance to use a neutral third party to break through the adversarial process and reach a pragmatic resolution to the dispute. While preparing for mediation—and even during mediation—attorneys have the opportunity to evaluate a case issue by issue. Even if the mediation does not result in settlement, it can be invaluable for analyzing the case for future resolution or for efficient and effective trial preparation.

### 1. Selecting a Mediator

Regardless of whether the mediator will be court-appointed or agreed to by the parties, an attorney should evaluate who is the best type of mediator for the case. To make this determination, the attorney must assess the nature of the case and determine what tactics the adversary will most likely employ. If the case involves complicated factual issues, or if the outcome of the case depends primarily on the resolution of a legal issue, an experienced, retired judge may be the best mediator. Retired judges have credibility and experience that helps to soothe egos and put insurers and principals at ease. Alternately, lawyers who are known and respected by both plaintiff and defense counsel may be equally suitable.

Another consideration when selecting a mediator is whether the mediator should possess a particular type of expertise. Disputes in certain areas—for example, intellectual property

or construction defects—may require a mediator with expertise in that area. Failure to select an appropriate mediator with specific expertise may prevent the issues in the dispute from being identified or fully developed—which can hinder settlement.

Finally, when selecting a mediator it is important to evaluate which approach to mediation will work best for the dispute at issue. Mediators tend to adopt one of two approaches. “Broker mediators” believe that their primary purpose is to settle the case at all costs. They tend to have little interest in developing or exploring the issues in a case. Instead, they usually prefer to have the parties just exchange demands and offers while they explain to each side privately that they could lose at trial and should settle now. Mediators fitting this description deemphasize reading all the materials, hearing all of the arguments, and offering a neutral, third-party opinion based upon the facts or law of the case. They tend to become part of the process or game-playing and they often try to press one party to move up with its offer and the other party to move down with its demand. In many circumstances, this approach tends to result in reaching a middle ground; however, anecdotal evidence suggests that the success rate for closing cases is lower when this style of mediation is used.

In contrast to the “broker mediator,” an “evaluative mediator” believes that the parties are entitled to a neutral impression of the issues and claims. During private break-out sessions, evaluative mediators will offer a candid assessment of each party’s case, including its financial value. This approach allows an attorney to explore arguments and theories without risk. It also allows clients and principals a chance to hear about the negative aspects of their cases. This opportunity is especially beneficial if the attorney is having difficulty broaching the downside of the case directly. While attorneys wear multiple hats (advocate/warrior, investigator, analyzer, and counselor), sometimes discharging all of the duties contemporaneously is difficult. In fact, when attorneys focus too much on their role as advocate to the exclusion their role as counselor, they may focus too much on the positive aspects of the case and fail to give adequate attention to the negative issues that should also be factored into analysis of the client’s risk, liability, and exposure.

## 2. Preparing for the Mediation

After selecting the appropriate mediator and approach, counsel should approach mediation as an opportunity to thoroughly review the case—including evidence produced during discovery. This review will become the basis for providing advice and counsel. Attorneys should spend time with their clients and principals so that everyone is on the same page with regard to strategies, goals for mediation, and an acceptable resolution of the matter. Advance preparation may require making some assumptions about the adverse party’s approach—even if the adverse party’s approach will eventually be fleshed out during the mediation. A well-prepared attorney anticipates the adversary’s goals and strategy and, when feasible, uses this preparation to work toward a resolution that accommodates some of the adversary’s goals. Pushing an adversary into a corner with no room to negotiate and no opportunity to save face will assure a failed mediation.

As part of the preparation for the mediation, attorneys should draft a confidential mediation statement. Attorneys should not adopt the unwise practice of sending out a generic

confidential mediation statement. Instead, they should tailor the statement to the issues and goals of the particular case and the type of mediator who will be mediating the dispute. Instead of using the confidential mediation statement to present an opening statement or a closing argument, use it to address the case from a pragmatic legal issue and proofs position.

### 3. Selecting a Mediation Strategy

A well-conceived mediation strategy starts with deciding upon the style or approach that will guide the attorney's participation in the mediation and then factoring in whether the mediator is a "broker mediator" or an "evaluative mediator." For example, if an attorney decides on a dollar value approach to settlement, and the mediator is a "broker mediator," often a successful mediation strategy involves deciding on a favorable or acceptable end result and then providing the mediator with a roadmap. To use this strategy effectively, the attorney should decide how to increase the offer in each round of negotiations. As the "broker mediator" carries the offers back and forth, the attorney needs to have a strategy in place for the next round. For example, each offer can be an increment of the prior offer. Or, offers can be approached as brackets: if  $x$  is offered, then  $y$  will be the counteroffer. The point is to stay in control and plan while also maintaining credibility and developing a rapport with the mediator. Refusing to address or respond to developments during the fluid mediation process will guarantee failure.

If a case involves multiple defendants, another useful technique when mediating the dollar value of a claim with a "broker mediator" is to analyze each party's exposure when preparing for the mediation. Use this information to provide a substantive reason for your client's financial position. If this approach is used instead of asserting a principled settlement offer, the mediator is more likely to press the opposing party to move toward a figure that is acceptable to your client and that will resolve the case. To show that your offer has a substantive basis, provide the mediator with any available case law and jury verdicts that support your analysis. The mediator can use this information as ammunition to leverage an opponent's offer and encourage settlement on acceptable terms.

A different mediation strategy that is particularly effective when an "evaluative mediator" is selected involves approaching settlement from the vantage of substantive positions and probabilities. Here, the mediator facilitates discussion between the parties as each party develops a position and an understanding of the opposing party's position. When using this approach, provide opposing counsel with a statement that identifies the issues to be discussed. This statement also serves as a confidential statement to the mediator and provides support for your client's position in order to persuade and convince the mediator that your client's position is reasonable and perhaps even correct. Maintaining credibility and building rapport with the mediator are also important when this approach is used. Instead of hiding from or ignoring weaknesses in your case, deal with them and distinguish them in the same manner used when writing a persuasive brief in support of a motion for summary judgment. A mediator who is properly and fairly educated regarding the case is more likely to become your client's advocate while speaking with the parties on the other side.

#### 4. Confronting Challenges

Be prepared to deal with attorneys who avoid engaging in a substantive discussion of a case. Do not make offers or demands. Instead, insist upon a substantive exchange, and encourage the mediator to work the process and force your adversary to take a more intellectual approach to the mediation. Do not link issues together. Do not accept generalizations. Make your adversary's counsel support all positions with facts from the case and applicable law. Insist that opposing counsel support any positions taken with admissible evidence and not merely with evidence that would be discoverable, but inadmissible at trial.

If global agreement cannot be reached, try addressing one issue at a time and narrowing those that can be agreed upon or narrowing those upon which you can agree to disagree. However, do not stop there. Take the time to discuss these difficult issues with the mediator and then listen to the impression of the neutral party. Also, listen to your adversary. Even if a settlement cannot be reached, leaving mediation with a better understanding of your adversary's position and a broader perspective on the case will help guide trial preparation and discovery in the future. An unsuccessful mediation can be a dry run for a future trial—but at a much lower cost than a mock trial.

#### 5. Conclusion

In conclusion, attorneys should remember that mediation is more of a process than an event. Many cases settle as a result of mediation, but not necessarily at the formal mediation session. Similarly, cases that do not settle in the first mediation session may settle in a future session or by other means. Attorneys should identify their goals, work toward those goals, and get as much as possible out of the process. By mediating with these points in mind, you will find that your cases settle, your issues narrow, and your litigation results will improve. And after all, that is what our clients want and deserve.

### IV. CONCLUDING REMARKS

As this Article points out, while the insured, insurer, mediator and counsel all share a substantial commonality of interest, the way they react to litigation and the perspectives they bring to the negotiation table are not identical. Integrating these interests and achieving a facilitated resolution at the appropriate stage of litigation is a challenge, but with planning and effort—especially if a professional claims handler is involved—the goal can be achieved for both the insured and the insurer. The following practical tips can help to attain positive results.

- A successful negotiation requires that you avoid unnecessarily pushing your adversary into a corner. It is best to determine whether your mediation issues are about only money or whether there are substantive issues that may play an integral part of the negotiations. Figure out, in advance, what your adversaries

and participants need from the process and why they are at the mediation. Then leave room to show respect for each party and allow each to feel comfortable with a resolution that also advances the client's interests.

- Because they often must wear two hats (advocate and counselor), trial counsel may have difficulty viewing their positions from a neutral, objective, standpoint. Trial counsel often benefit from an active and knowledgeable claims professional. They should watch and listen and avoid the compulsive need to speak constantly and justify a pre-mediation position. Attorneys should also try to be aware of their body language and demeanor. Sometimes they may need to defer to the claims professional or mediator, especially if either of them indicates that posturing or other events are making it more difficult for the parties to reach a settlement.
- Leave open as many options and opportunities as possible – even if the session is unsuccessful. Mediation is a process. Remember that not all cases settle, and not all mediations result in settlement. Meeting the parties, exploring the issues, developing dollar discussions, and obtaining a neutral party's impression of the facts or issues in the case can yield valuable benefits even if a case needs to be tried.<sup>21</sup>
- Mediation discussions should not be viewed as a game of chess, a win or lose war, or a psychological battlefield. Litigation is merely a part of the larger business process (for the insured, the insurer, and the claimants). Engaging in the process of litigation needs to involve considering the goals and perspectives of everyone who is involved. Mediation, in the most basic sense, is using the intervention of a third person in a process that allows the parties to develop and adjust their positions in a manner that is both reasonable and conducive to settling their differences.

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<sup>21</sup> Class action cases, whether involving only cash issues or a combination of cash and injunctive relief issues, are more complex. Unfortunately, the nature of class actions is fact and law dependent and not susceptible to discussion in the context of this global Article. In fact, the handling of class action negotiation and settlement is a topic worthy of a separate Article. However, we would not be complete if we did not at least address the topic in this discussion on perspectives relevant to mediation. Staying within the parameters of this Article, class action mediations require many of the same talents and efforts. However, class action cases often involve multiple plaintiffs and multiple-plaintiff law firms from around the country. Observing and responding in the context of the personalities and perspectives of all of the participants becomes even more important. Further, many counsel who handle class action cases have personal agendas, and it is imperative to do research about your adversaries and what their needs and desires may be – both attorneys and class representatives.

We hope that our multi-perspective approach to mediation has been useful and that this Article will spark a roundtable debate in your own office, whether you are employed by a large corporation, an insurer, or a law firm. Discussing the process and the people in the process will help each participant appreciate the others, especially if the discussion brings out both the similarities and differences.

Similarly to what Brian Johnson wrote to his teacher, Mr. Vernon, in *The Breakfast Club*, society and our industry tend to see each participant in a mediation—whether the plaintiff, defendant, defense lawyer, plaintiff lawyer, underwriter, claims professional, or mediator—“[i]n the simplest terms, in the most convenient definitions.”<sup>22</sup> These oversimplifications and stereotypes create unnecessary barriers to settlement and make the prospect of resolution unlikely. Conversely, understanding and appreciating why each participant is involved in the process, what brings each of them into the litigation and eventually into the mediation, and what each of them needs to derive from the process can lead to a broader view that makes it more likely that a result can be reached that may be deemed favorable by all sides.

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<sup>22</sup> John Hughes, *The Breakfast Club* 78 (Shooting Draft 1985) available at <http://www.dailyscript.com/index.html> (search [www.dailyscript.com](http://www.dailyscript.com); enter “Breakfast Club”; then follow “The Breakfast Club – Daily Script” hyperlink).

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