▶ LEAD

Rethinking Mediation Advocacy

By Patrick Nichols

Patrick Nichols is a partner in Associates in Dispute Resolution LLC in Lawrence, Kansas. He mediates civil and probate litigation as well as business and organizational conflict. He is Past President and Legislative VP of KSAJ, a distinguished fellow of the International Academy of Mediators, and an adjunct professor at Washburn Law. He is AV rated by Martindale Hubble and has been listed as a Kansas/Missouri Super Lawyer in Mediation since 2005.

As a young lawyer nearly 30 years ago, I was dismayed when one of the firm's partners told me, "We don't make money in court, we make money in settlement." As time has gone by, his statement has proven prophetic. Mediated settlements now are far more prevalent than trials.[1] Mediation and settlement through negotiation were once intended as an *alternative* dispute resolution process. No longer an alternative, they are now the primary and overwhelming dispute resolution processes.

In order to maintain high standards of advocacy, we must attend to this fact and its implications. This article is intended to help the practitioner prepare and represent clients and cases as effective advocates, as competent in negotiation and mediation as in trial.

Considerations in Mediation Advocacy

More Mediations, Fewer Trials

Mediation as a process has changed dramatically over time. The "promise of mediation,"[2] offering an opportunity for reconciliation, common ground, and "win win" solutions has, as many have predicted for a decade, become another step (arguably the primary step) in the litigation process. It has become a shorthand description for a complex collection of activities including collation of evidence; presentation of the case; education of mediator, client and parties; negotiation; evaluation and resolution. It is a process through which parties communicate indirectly (through the mediator) about the most important fact in the case (what one will pay and the other will take) through a series of coded statements, offers and counteroffers, bluffs, postures and mediation advocacy techniques and tactics.[3]

In "The Vanishing Trial," an exhaustive study of trial statistics in the state and federal courts found that approximately 93 percent of cases resolve without trial.[4] A small number of these are dismissed or resolved on summary judgment, the vast majority through settlement.[5] With settlement the primary resolution and mediation its handmaiden, CLE and law school courses in trial advocacy and trial skills have become less important. Yet they proliferate, and very little is done to provide mediation advocacy skills for the practicing trial lawyer. This does not bode well for the attorney's ethical obligation under Kansas Rules of Professional Conduct to provide "competent representation."[6]

Whether and When to Mediate

There is an abundance of material highlighting the advantages of third-party-assisted settlement conferences, but mediation is not always the best method to negotiate and resolve a claim. While it is often useful to have a third party moderate the discussion, translate the communication and information, and offer suggestions about negotiation

or case value, it makes sense to be thoughtful about choice of process. It is more difficult to obfuscate, mislead or misdirect when negotiating directly, either face to face or by telephone with adverse counsel. Therefore, mediation should not be seen as a substitute for these efforts.

In addition, mediation generally lacks direct contact with the other party and the opportunity to address concerns specifically, but it adds a communication barrier (the mediator) in the problem solving solutions we have used since children, such as dialogue, collaboration and cooperation. Therefore, mediation should be the result of a thoughtful choice, not an automatic default.

Nevertheless, there are many reasons why mediation is a good process to help the parties come together on a settlement. When to mediate can be an important question. First, consider if the matter is ready. Cases resolve when information flow is equalized and, to the greatest extent possible, the parties see the case in the same way by sharing information. If mediation occurs before discovery is concluded, experts are designated or deposed, or legal issues are resolved, consider and discuss with your client and opposing counsel how the lack of reciprocal information will be addressed. Will the adverse party accept your assurance that you intend to hire an expert witness to overcome their defense; should you accept the same assurance and value the case accordingly? A pending summary judgment or limine motion, even if the court has indicated its ruling verbally, represents an unknown and can complicate resolution as a perceived issue, real or imagined, still in dispute.

Mediation Preparation

One the great trial lawyers of our time used to say, "There are no geniuses in the courtroom, only drudges in the office."[7] When counsel and client are prepared the mediation process goes well, is satisfying, and good results are obtained. With mediation as the predominant dispute resolution process, practitioners must be close to trial ready to be an effective advocate, discharge the ethical obligations to the client and maximize opportunities for success.

To properly represent a client at mediation, a process similar to trial preparation is required. Advocacy is most effective when counsel and the client are 80 percent trial ready: witnesses identified, important discovery and disclosures completed, demonstrative exhibits and documents prepared, and legal issues clarified and resolved. These steps represent the foundation for both effective mediation advocacy and trial preparation.

Unfortunately, with mediation sometimes being your client's "day in court," both figuratively and literally, mediators are frequently dismayed at the shoddy quality of mediation advocacy from some lawyers. Mediation submissions sometimes arrive the evening before the mediation, containing little or no supporting documents and perhaps one- to two-page letters. They may raise new claims which the party intends to present or pending claims that have even then not been fully documented. Submissions which contain too much, too little or poorly organized supporting documents are common.

Other problems include poorly prepared clients, lack of lienholder information and the recurring and pernicious problem of a party appearing without a representative with genuine settlement authority.

The Mediation Book

The first and most important step of effective mediation advocacy is preparing the mediation materials. Again, this must be prepared with the same diligence as preparing for trial. Effective materials allow the mediator to easily and quickly understand your case, raise questions with the adverse party and address the strengths of your client's case (and the weaknesses of theirs). Some feel that it is an asset to convince the mediator of the merits and strength of the claim as well.

Counsel should complete the mediation book 30 days before mediation. This notebook should include a letter of moderate length (3-4 pages) outlining the case including the witnesses, a summary of expected testimony, elements of damage and support, and a confidential assessment of weaknesses. An effective mediation book lets the evidence do the talking. Documents, photographs and exhibits are more effective than summaries from counsel. Include attachments of portions of reports of experts, medical providers, incident or accident reports, deposition testimony and legal authorities.

Be selective; just as an effective advocate would not simply present a jury with every bit of information but extract the key data, do so also for a mediator. Do not ask the mediator to read all of the medical records or depositions. Present excerpts and highlight them. This brings three advantages: first, the mediator can quickly master the elements of your case; second, he or she can effectively present them to the adverse party; and third, counsel will have firmly fixed those references in mind. Suggested material for submission can be found at the author's website. [8]

If you plan to use demonstrative exhibits at trial, have them prepared and included in your notebook. These can range from summaries and lists to photographic negatives of X-rays, demonstrative charts, and even animations. Now is not the time to skimp on cost or preparation, since the mediation is most likely to be the event that resolves your case.

Preparing Yourself

As mediation becomes *the* dispute resolution process, the disparity in experience between plaintiff and defense becomes more significant. Many claims adjusters mediate ten cases or more a month and defense counsel, particularly in-house counsel, have similar experience. With a combined experience of 200-plus cases per year on one side, typical plaintiff's counsel (who may

mediate one or two cases a month or year) has a substantial experience deficit. Since mediations are shorter than trials and much more predictable, these experiences create a power imbalance against less frequent participants.

This can be overcome, as with trial experience, by using the primary advantage that counsel possess: greater available time for creative preparation and presentation. Look for weaknesses. Your adversary's strengths are your risks. Optimism bias is called one of the most robust findings in social science.[9] Like any cognitive bias, it obstructs resolution and is difficult to discount or overcome.[10] Search out weaknesses in your case you may have undervalued and minimize or correct them. This is challenging but will return great rewards. It easy to see how to win a case. The challenge is to see how you will lose. Better now than after trial. If necessary, get an extension for the mediation in order to have them addressed.

Client Preparation and Orientation

Compounding the imbalance of experience, there is also an imbalance of process needs and goals. While both sides generally want to settle, the intensity with which resolution is sought varies significantly. For the plaintiff, who has but one case, the day of mediation is disproportionally important. In contrast, while the defense hopes to settle the case, the intensity of that desire is significantly less. This lower desire, coupled with greater experience, gives the defense opportunities to use mediation tactics to their advantage.

If the mediation materials are completed 30 days before the mediation date, counsel should then begin one of several conferences with the client. Typical clients today understand the mediation process from television, so it is not wholly foreign to them. But there are difficult conversations to have. In the same way a lawyer tends to suffer from optimism bias, the client will do so to a greater extent. After months or years of thinking about their case, he is intimately familiar with its strengths and will tend to overvalue them. To discount weaknesses is a natural human tendency. This presents an obstacle to effective resolution since the neutral observer will not share those biases. Counsel must therefore walk a delicate line in de-biasing the client without undermining client confidence.

Counsel should meet with the client on several occasions to discuss case factors, negotiation strategy and details of the process. This will let the client consider the valuation issues raised and begin to accept the implications, at least on some level. The best way is to make a list of case factors that affect the value of similar cases. Counsel and client can then work together to discuss those case factors which are positive, neutral or negative. Effective counsel should inform the client of the strategies that will address the negative factors that could create problems at mediation and trial. At this point, counsel should remind the client that trials are highly uncertain events and it is extraordinarily difficult to predict whether the strategies identified to overcome case weaknesses will persuade all jurors, or at least a sufficient number, to allow a significant verdict. It is those risks and an appropriate acceptance of them that creates the climate and motivation to mediate and settle.

At least three other risk-related factors must be discussed. First, the client should be cautioned that it is the plaintiff's job to shoulder the burden of proof and that an unpersuaded jury will either rule against the client or return a verdict not commensurate with the time, energy and cost expended to obtain it. Second, the cost of bringing the matter to trial will reduce the client's net recovery. Finally, case valuation and negotiation strategy deserve several conversations. Help the client determine his risk tolerance. If he likes to gamble and can afford to lose, that dictates a higher risk/higher reward negotiation strategy.

As frustrating as it is to counsel, there must not be a single person in the free world who has not heard about the little old lady who spilled coffee in her lap and got millions of dollars from McDonald's. As with all cognitive biases, this conclusion is entrenched in the public mind and can be temporarily—but not permanently—overcome. A better approach to overcoming this bias is with counter information. Such examples as, "That was Los Angeles (you know how THEY are); this is Kansas. What's the biggest verdict you've heard of in this county? Do you recall the case of X who went to trial and lost?" Examples from your jurisdiction or acquaintance of cases of significant merit help the client understand outcomes can be in doubt. An antidote to the McDonald's bias of sure-fire verdicts is the O.J. Simpson case: most people know one jury found he was not responsible and another jury found the opposite. No matter what the client's view of the case, one jury did not agree with that view.

Case valuation and negotiation strategy go hand in hand. Provide the best information you can to the client about a range of values and probabilities of outcomes. Then talk about what discounts may be necessary in order to secure a settlement. In discussing a negotiation strategy, three numbers are important: the opening offer, the "target", and an ostensible "walk away" number, below which your client will not go, pending further information.

It is also useful to discuss the client's preference for risk and remind him or her that while the other party may have sufficient resources that a loss in this case will not do them harm, your client may be in a different situation. So-called "frequent flyers" can play the odds and absorb the losses, while the typical plaintiff has no such option. Finally, discuss a tentative plan for movement on offers during the session as a further comfort factor to the client.

Contact with the Mediator

The next step in effective mediation advocacy is direct contact with the mediator. If the mediator does not initiate contact, you should do so well in advance of the mediation. There are simple matters to address such as

attendance of a person with authority, joint sessions, accommodations and mediation style. Even more important is to give the mediator an overview of your case and make certain you are providing materials the mediator feels will be helpful in understanding and mediating the case. Listen carefully to the mediator's questions, as they are likely to be the same questions that a juror would have. Reflect on this conversation and if you can think of any other material to present or prepare, do it. Often the mediator's job questions and comments will give help you see areas to develop.

Opposing Counsel and the "Person with Authority" Problem

Preparation will include work with opposing counsel. You may discover new issues or claims or uncover additional documentation. Share this with the other parties so they will have time to evaluate it and include it in their settlement assessment. They will seldom reevaluate a claim at mediation. Make certain all elements of your claims and damages have proper documentation that you can provide. By minimizing the areas of disagreement, you maximize the likelihood of effective settlement. While there will always be matters upon which you cannot agree, if they do not have (or cannot locate) documents such as an itemized medical bill, a copy of photographs, or notarized witness statement, now is the time to find out and provide it so their case assessment can be up-to-date in time for the mediation session.

The biggest challenge is to confirm that a person with full settlement authority (PWA) will be present at the conference. Even more than shoddy mediation submission materials, this represents the single most prevalent reason for failure of cases to settle. Do not assume that simply because counsel assures you there will be a "person with authority" present that this is true. Remember, counsel for the opposing party works for the client, not the other way around. Claims staff may be reluctant to travel or dedicate an entire day to a single case when they could be managing multiple files by phone from the office.

Physical presence should not always be required, as many cases do not warrant it. But that decision should be made by agreement in advance. Sending a "placeholder" whose job is simply to appear at the mediation and then call the person who will make the decision is not a PWA. Their absence creates yet another communication barrier between the parties who are seeking to settle the case and allows the decision maker the strategic benefit of distance. This allows greater inflexibility and defeats the purpose of evaluation of the claim. It denies the PWA the immediacy of the decision and the input of the mediator. It has all the disadvantages of traditional settlement and none of the advantages of mediation. In a traditional negotiation, at least the conversation is between counsel and the claims adjuster. In these situations, it is plaintiff's counsel, to the mediator, to defense counsel, to the claims adjuster.

The remedy is simple: a court order requiring the person with authority to be present.[11] If the parties agree a PWA will appear by phone or in some other way, an agreement can be incorporated into a court order. Some judges require physical presence, which can be excused only by the court.

The difficulty with participation by telephone is it allows the decision maker or counsel to create barriers to effective communication at mediation. It allows counsel to control the mediator's access to the PWA. Telephonic participation can be more effective if certain ground rules are followed. If telephonic participation is suggested and approved, the following language can be used in the order:

If either party proposes to appear telephonically rather than in person the following standards shall apply:

1. The person appearing telephonically must confirm to the mediator and counsel that he or she has full settlement authority as defined in this order. A false representation in this regard will be deemed to be mediation in bad faith subject to sanctions.
2. The party appearing by telephone will be present by speaker phone at the beginning of the mediation and continuously present by speaker phone whenever the mediator caucuses with their counsel and shall remain present by phone throughout the entire caucus. As with in-person appearance, counsel and the person with authority may caucus privately without the mediator, but the person with authority shall remain on conference call throughout the entire period of the individual caucus or in a subsequent joint caucus.
3. The person with authority shall provide the mediator with his or her direct telephone number and a cell phone number or beeper by which they can be reached at any time. If privacy concerns arise an inexpensive disposable phone can be obtained for a nominal cost for this purpose and that cost would be borne by the person with authority.

If counsel resists such an order, most attorneys can recount a mediation that failed for lack of a PWA. Most judges will gladly sign an order compelling presence of the PWA in one way or another.

Liens and Lienholders

As a final step in preparation, contact any lien holders. Confirm with them that you have both their final claimed lien and any and all documentation needed to evaluate it. If there is a dispute about the amount of the lien, try to resolve that dispute in advance. Clarify any understanding regarding discounts or attorney fee payments for recovery of the lien. Discuss the negative case factors you have identified and how they would reduce the appeal of the case to a juror. Help the lien holder understand the risk of trial and the benefit of the necessary compromise. Consider an advance agreement, where possible, to discount the lien by certain proportions in accordance with the reduction in

plaintiff's overall demand or some other formulae to simplify the matter at conference. Finally, make certain that cell numbers and private numbers are available so that the lien holder can be reached if needed during mediation.

The Mediation Conference

When the day of the mediation conference arrives you will find that "Well begun is half done."[12] If the pre-mediation preparation has been thorough and complete, the mediation session is likely to proceed smoothly with few unexpected events. A well-prepared client, a knowledgeable and effective mediator, and the availability of a person with authority maximize the opportunities for a successful resolution of the claim. There are several areas, however, that counsel should consider as negotiations progress.

The Joint-Session Decision

Many mediators feel strongly that a joint session can be a positive settlement tool. Others disagree. Clients seem to find them productive, but lawyers resist them.

When considering a joint session, remember that as primates we learned to solve problems through direct communication with one another. This may be one of the few times in your client's life when he or she has to solve a problem and does not have the opportunity to participate directly in discussions designed to accomplish that end. If your mediator is comfortable with joint sessions, many advantages can accrue. In some cases, significant cost savings occur as the parties are able to move directly and collaboratively to the two or three key issues that keep them apart. Other times, especially in medical cases, they can share their feelings about what happened. This is often identified as one of the client's (but not the lawyer's) primary goals. It is the only opportunity that you as counsel have to speak directly to the opposing decision maker and vice versa. Your client may be able to give a more accurate and vivid impression to the claims adjuster different than that provided by a defense counsel. While there is no guarantee these things will increase the case value, if your mediator is comfortable with joint sessions there is little reason to think it will create problems.

The ability to present your client's case in a joint session is an important mediation advocacy skill. Counsel must express a desire for cooperation and a sincere willingness to settle a case; acknowledge that reasonable people can differ, yet seek to identify as many areas of agreement as possible; recognize the validity of defenses by acknowledging claimed weaknesses in a neutral or non-adversarial way; and reaffirm throughout a desire to meet and work together to try and find a way to resolve the case can have a very significant benefit. It is a skill both you and your mediator should have, not to use in every case but to have available as part of your "tool kit."

The Problem of Reactance

It is critical to pursue your own negotiation strategy and avoid the pitfall of reactance. Reactance is an aversive affective reaction in response to regulations or impositions that impinge upon freedom and autonomy.[13] To become caught in a framework of reactance is to lose control.

Reactance is typically triggered by certain events, usually a threat, overt or covert, expressed or implied. For example, they include an offer perceived to be "out of the ballpark" or "lowball" from the adverse party, statements delivered along with counteroffers that it is "time for your client to get real" or "If this continues we're calling it off." It may simply be caused by an unspoken fear that the case will not reach an acceptable settlement range. These are all manifestations of the difficult challenge parties face at mediation: communicating about the most important element of the case, what one side will pay and the other side will accept, while this conversation is occurring in coded messages, offers, and counteroffers and otherwise. It is best, although difficult, to simply let these comments pass without response and continue to negotiate according to your plan. Let the mediator help you manage the other side, that is her job.

It is important to stay flexible. If the progress of negotiation proceeds differently than anticipated, you may choose to deviate from your bargaining strategy. This should be a conscious and thoughtful choice, subject to re-evaluation, not a mere reaction. If negotiations unfold differently than expected, ask yourself if facts really have changed or if there are other things which have caused this to occur. One party may make a more generous opening offer or move more quickly to their settlement range, not because they value the case differently, but because they may be pressed for time. While you may choose to modify your negotiating strategy tentatively, do not commit to a new value and find yourself disappointed if your interpretation of their behavior is proven incorrect. A reactive response is to be frustrated or disappointed when their modified expectations are not met; an "in control" advocate recognizes that he has misread the other party's intention and adapts.

By avoiding reactance, counsel can maintain control of their negotiation process. There are several approaches to the bargaining process, a strategic plan that should have been made before the mediation begins. There are a variety of paths by which counsel can reduce their demand in accordance with the predetermined strategy. These include diminishing concessions, mirroring concessions, or negotiating towards your target in preplanned increments, either fixed or declining. The key is to stay in control of the process and make thoughtful, conscious decisions.

This can be difficult when the adverse party's conduct could be seen as insulting ("These offers are ludicrous"), threatening ("If these numbers don't become more realistic we're out of here") or demeaning ("What is this guy smoking?"). These comments can serve a variety of purposes, some intimidating,

designed to bully. Other times they are coded messages whose real purpose is to determine if settlement is possible at an acceptable range. Whatever the purpose, maintain control, act and avoid reactance.

Working with the Mediator

An equally important choice is how you work with the mediator. Some appreciate a mediator who is forceful in evaluation; others prefer the mediator defer to counsel on that issue until asked. Decide if the mediator will remain in the room during all, part or none of your discussions with the client. If the mediator suggests options to respond, question the logic and purpose to see if they fit *your* mediation plan. Keep track of any questions you have asked the mediator to put to the other side so you can be sure they were answered. Some counsel want to ask for the mediator's thoughts on the other party's settlement range and, while any direct disclosure would be improper, some discussion of the general meaning of certain "moves" is not out of line. Carefully consider and evaluate any opinions on settlement that the mediator gives you and ask if she has told the other party the same thing. Expect a good mediator to help you and the client avoid reactance, decode the true meaning of "messages" sent with offers, and suggest bargaining strategies.

Handling Impasse

Impasse happens. This is an important day in your client's case, and if negotiations become stuck, an unprepared client may become frustrated. It is easy to misinterpret the lack of financial movement. Again, reactance to a fact whose cause is unknown can create manifold problems. First, the client may decide that the case has less value than she thought and begin to collapse her settlement posture. Conversely, she may become incensed that the insurance company is not taking her seriously and act in ways which will make future settlement difficult, changing her case assessment, or becoming emotional and angry.

Sophisticated mediation parties, who may do hundreds of cases a year, understand and easily accept impasse because they know the odds are high that the case will still settle. The occasional player may lose hope. This is a mistake. Remember: this is a process and almost every case will settle. Take advantage of the impasse.

The ability to handle impasse gracefully is an important mediation advocacy skill. Little is gained by a dramatic display of slammed folders, shut briefcases and an entourage departing the mediation space in an uncivil manner. If the goal is to harden positions, that is a good way to do it. Usually, however, people would prefer to continue to try to settle the case. If that is the goal, ask to meet jointly with the other party to dialogue. Try to focus the obstruction and how to deal with it. Thank them for working with you and express optimism that you can continue to work together and find a way to resolve this claim. Civility costs nothing and in the end communicates strength more than weakness.

The first step in dealing with impasse is to secure the mediator's assistance in identifying the cause. Are there facts and circumstances that are still in dispute or about which value is perceived differently between the parties? If so, a process of document exchange or limited discovery on that issue may clarify the point sufficient to allow further negotiations. Is a pending legal issue being overvalued by one side or the other? If so, adjourn the mediation until the court can be prevailed upon to issue a written ruling. Most judges would be happy to do this if they know that it will facilitate further negotiations. If impasse is reached in a multiparty defendant case, give the mediator the opportunity to work only with that side and use techniques and tactics that do not involve the plaintiff to help the multiple parties assess their liability and responsibility.

Create a timeframe and a game plan for further actions to improve the situation. Sometimes a short mediated agreement can reflect points of agreement in a complex case. If nothing else, a memorandum can be prepared which sets out the parties' positions and the steps to be taken along with a plan for those actions. It is very important to clarify post-impasse actions and timeframes, particularly if the parties are in charge rather than the mediator. In the post-mediation period, determine how you will use the mediator. Will she be an active player in the dialogue, communicating information and acting as a "go between"? Or will you keep her advised of the status of activities designed to narrow the information gap and then involve her when the time is right? One advantage of using a mediator for this purpose is that she can raise the issue with persistence without being perceived as weak or desperate.

Conclusion

Our practice, representing the injured, sick and bereaved, is a demanding one. Since so many cases settle and so few go to trial, it is easy to become complacent about case resolution. While it is a significant commitment of time and energy to properly prepare for mediation, this extra commitment *will* bring increased compensation for your client. It's not just your ethical duty; it's the right thing to do. You owe them nothing less than your best. ▲

Endnotes

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. of Empirical Legal Stud. 459 (2004). These statistics are difficult to compile due to the variance in state-by-state record keeping. In federal court in 2002, 1.7 percent of cases terminated at trial.
2. *See generally* Robert A. Baruch Bush and Joseph P. Folger, The Promise of Mediation: The Transformative Approach to Conflict (2004) (discussing the core values of mediation versus professionalism and legalism).
3. Anderson J. Little, Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes (2007).
4. Galanter, *supra* note 2.
5. *Id*.
6. KRPC 1.1 provides for competent

representation of a client including alternative dispute resolution techniques. *See also* KRPC 1.4 (providing that the client should have sufficient information to participate intelligently in decisions concerning "the means by which" objectives are to be pursued).

7. Theodore I. Koskoff (1913-1989) Connecticut medical malpractice and personal injury trial lawyer.
8. http://www.adrmediate.com.
9. *See generally* Daniel Kahnemann and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 Econometricia 263 (1979); Judgment under Uncertainty: Heuristics and Biases (Daniel Kahneman, et al, ed. 1982). Optimism is an unrealistic bias that causes a person to believe that he is less at risk of experiencing a negative event compared to others. It is based on a variety of factors including the desired goal, cognitive and psychological mechanisms, the disproportionate information they have about themselves versus and their overall mood. The classic example: 0 percent of people applying for a marriage license believe they will get divorced but in reality almost half will.
10. Robert H. Mnookin and Lee Ross, *Introduction*, *in* Barriers to Conflict Resolution (Kenneth J. Arrow et al. eds., 1995).
11. A sample order can be found on the author's page on the website of Associates in Dispute Resolution. LLC, http://www.adrmediate.com.
12. This quotation is historically attributed to Aristotle.
13. Jack W. Breahm, A Theory of Psychological Reactance (1966); Jack W. Breahm, Responses to Loss of Freedom: A Theory of Psychological Reactance (1972). *See also* www.psych-it.com.au/psychlopedia/article.asp?id=65.