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SUCCESSFUL SETTLEMENTS THAT LAST: HOW MEDIATION BEST PRACTICES TECHNIQUES CAN IMPROVE YOUR SETTLEMENT STRATEGY

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The genesis of the use of modern commercial mediation practice in the United States is often attributed to the development of family law mediation programs that sprang up in Oregon, California, and other state jurisdictions in the late 1970's.

At its core, mediation is facilitated negotiation. The mediator serves as an agent of the parties, retained to assist them in resolving the dispute. The central feature of mediation is self-determination of the parties in which the final result of any resolution is not decided or imposed by the mediator. The mediation process provides a vehicle for parties and their legal advisors to shape creative outcomes in response to the dispute or conflict. It is not unusual for the settlement outcome to exceed the remedies commonly available to a judge or jury. Currently, mediation is in use in an increasingly wide variety of disputes including commercial, community, environmental, public policy, and international conflicts. Over the past ten to fifteen years, the use of mediation and even co-mediation[1] to resolve complex commercial disputes has grown exponentially. Mediation is now commonly used in every aspect of business-related litigation. In part, this growth can be attributed to modification of court rules and legislative enactments

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[1] Joe Epstein and Susan Epstein, *Co-Mediation*, The Colorado Lawyer, Vol. 35, No. 6, 21 (June 2006).

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that have encouraged the use of mediation.

In some jurisdictions, mediation is offered as a voluntary option. In others, mediation is mandated. According to a 2006 study by the American Arbitration Association, 63% of smaller companies and 73% of surveyed *Fortune 1000 c*ompanies attributed their use of mediation to court-mandated mediation programs.[2] Mediation may be offered early or late in the pretrial process, and may be conducted by a judge or a trained private mediator. It is no longer uncommon for mediation to be conducted prior to the commencement of litigation.[3]

In recent years, the scope of mediation has expanded to encompass class actions, mass tort settlements, and a host of complex multi-party matters. Mediation of multi-party matters may sometimes prove to be a particularly attractive option when the anticipated costs of litigation are likely to far outweigh costs of settlement. Perhaps the most notable recent use of multi-party mediation has been the Hurricane Mediation Program. This program was established by the Louisiana Department of Insurance to mediate property-damage disputes between insurers and Louisiana policyholders arising from damages to residential property caused by Hurricanes Katrina and Rita.

Mediation has also grown as a necessary adjunct to our appellate system. Currently, all thirteen United States Courts of Appeals have mediation programs governed by Rule 33 of the Federal Rules of Appellate Procedure.[4]

In addition to the formal mediation programs sponsored by the courts, government agencies, bar associations, business organizations, universities, civic and religious groups, and other organizations have developed extensive training programs that have encouraged and enhanced the use of mediation. As a result, mediators and advocates alike have become more sophisticated in developing mediation strategies to resolve difficult issues in a timely and cost-effective manner.

The American Bar Association's Section of Dispute Resolution recently established the Section's Task Force on Improvement of Mediation Quality, which conducted focus groups and surveys of mediation users. As more fully developed below, the Dispute Resolution Section's February 2008 Report indicated that many advocates utilizing mediation in civil cases expected mediators to spend additional time in preparing for the mediation, to have certain experience and subject-matter expertise relevant to the assigned case, to "customize" the process for each given assignment and to provide "analytical" or "evaluative" assistance to mediation participants.[5]

I. MEDIATION BEST PRACTICES

The Task Force on Improving Mediation Quality (Task Force) was formed by the Section of Dispute Resolution in January 2006 to address issues of quality in mediation and to provide recommendations for improving mediation practice. The seventeen task force members included lawyers who represent clients in mediation, lawyer and non-lawyer mediators, academics, and administrators of court-annexed mediation programs. The Task Force focused its examination on mediation quality and private practice civil cases (including commercial, tort, employment, construction, and other types of disputes that are typically litigated in civil cases, but not family law or community disputes). The Task Force conducted its research by organizing a series of ten group discussions (focus groups) in nine cities[6] across the United States and Canada.

In addition to the focus group discussions, the Task Force collected more than 100 responses to questionnaires from mediation users and mediators. This process included conducting telephone interviews with thirteen individuals who have been parties to the mediation process.[7] The focus group participants, questionnaire respondents, and parties who were interviewed consistently identified four issues as important to mediation quality:

- preparation for mediation by the mediator, parties, and counsel;
- case-by-case customization of the mediation process;

2 See American Arbitration Association, Dispute-Wise Business Management in Proving Economic and Non-Economic Outcomes in Managing Business Conflicts, 19, 28 (2006), available at http://www.adr.org/sp.asp?id=29431.

3 *See* John Lande, *The Movement Toward Early Case Handing in Courts and Private Dispute Resolution*, 24 Ohio St. J. on Disp. Resol. 81, 104 (2008).

4 Fed. R. App. P. 33.

5 See ABA Section of Dispute Resolution "Task Force on Improving Mediation Quality," April 2006-February 2008, a*vailable at* http://www.abanet.org/dch/committee.cfm?com=DR020600; For an excellent overview of the Task Force Report, *see* John Lande, *Doing the Best Mediation you Can*, Disp. Res. Mag., (Spring & Summer, 2008).

6 Focus groups were conducted in Atlanta, Chicago, Denver, Houston, Miami, New York, San Francisco, Toronto, and Washington, DC.

7 *Id.* at 3.

- "analytical assistance" from the mediator; and
- "persistence" by the mediator.[8]

A. Preparation by the Mediator and Mediation Participants:

The majority of participants in the Task Force focus groups and party interviews identified preparation by the mediator, the parties, and the parties' counsel as important for success of the mediation's outcome. But the Task Force found that actual pre-mediation discussions among mediators and among parties and counsel varied widely. Traditionally, many mediation training programs have not paid substantial attention to the context of pre-mediation discussions.[9] The Task Force reached consensus that mediator preparation prior to the mediation was essential.[10]

The Pre-Mediation Conference:

Fifteen years ago, it was quite common for commercial mediators, immediately following their engagement, to simply set the date, time, and location for the face-to-face mediation and take no further action until the mediation was convened. Upon arrival at the mediation location, the old-school mediator would often engage in a relatively inflexible fixed mediation process.

In the increasingly sophisticated world of commercial mediation, the failure of the mediator to schedule a meeting with legal counsel and/or the parties by telephone or in person in advance of the face-to-face mediation is more the exception than the rule. This meeting provides the opportunity to customize the mediation process. The more common practice today is for commercial mediators to conduct one or more pre-mediation conferences with the attorneys who will be attending the mediation. Some mediators telephone legal counsel individually. Other mediators may conduct pre-mediation telephone conferences jointly with all attorneys who will be attending the mediation. There is no "right" or "wrong" approach. In some multi-party mediations, a common method is for the mediator to establish one or more face-to-face conferences with attorneys and/or their clients to establish a protocol or negotiation strategy for a successful face-to-face mediation.

In whatever form, the pre-mediation conference permits the mediator to obtain an invaluable "feel for the case." Often, the commercial mediator will request counsel to provide a general factual overview, information regarding the amount of damages sought, the status of discovery, the status of insurance coverage (if any), who will be attending the mediation, and a general overview of any previous settlement discussions between counsel. The mediator may also wish to discuss the nature and context of any confidential submissions to the mediator, obtain a candid appraisal of the strengths and weaknesses of the case, secure an overview of unique legal issues, and identify the overall "theme" of the case. Topics for discussion may also include the identity and settlement authority of the participants; whether particular individuals should not attend the mediation; mediator negotiation-style expectations; client-settlement expectations; structure and process of the mediation; venue; seating and equipment; time constraints; what creative settlement packages, if any, exist; and, the "emotional temperature" of the parties or other participants.

Some mediators may inquire whether the attorney or his or her client intends to make or respond to an opening statement during the mediation. Many mediators reserve opinion as to whether opening statements will be given at the face-to-face mediation until such time as the mediator has had an opportunity to discuss the relative value of an opening statement. In those cases which have not yet been filed in court or which are mediated pursuant to an "early settlement" court order, some form of opening statement may prove to be quite beneficial. For example, in many commercial cases, particularly employment cases,[11] it is common for legal counsel for plaintiff and respondent to propose joint opening statements. This is because "early settlement" cases often require that the mediation be conducted before significant discovery has taken place. Mediations undertaken with only nominal discovery may benefit from the enhanced opportunity to exchange information in the form of short, concise opening statements to clarify and establish positions.

The mediator might learn at the pre-mediation conference that one attorney prefers to make an opening statement and the other prefers that no opening statement be conducted. This is very important information for the mediator to have well in advance of mediation. Any dispute regarding whether opening statements

8 *Id.*

9 *Id. at 6.*

10 Survey respondents felt it was important, very important or essential for mediators to know the file and read the documents to encourage a constructive approach to the mediation and to discuss who will attend the mediation session.

11 For a more detailed explanation of the use of mediation in employment cases, see Larry Rute, Patrick Nichols & John R. Phillips, *Mediation Round Table: Improving the Quality & Effectiveness of Mediation, Vol. XXVI No. 4,* KTLA J. at 11 (March 2003)

will be conducted may require early intervention on the mediator's part.

If there is an agreement that opening statements will be given, it is always important for the mediator to determine and perhaps direct the proposed format of the presentation. For example, it is not unusual in complex commercial cases for plaintiff or defense counsel to suggest the use of demonstrative evidence in the form of a PowerPoint presentation or various video or audio presentations. When the mediator becomes aware that one party or the other intends to utilize an extensive PowerPoint presentation, the mediator may choose to encourage counsel to reduce the length of their planned presentation to 30 minutes more or less. PowerPoint presentations that are too long in duration tend to antagonize or polarize the other side. Naturally, if one side intends to present electronic information, it is important the opposing party be aware of this in order to avoid surprise or unnecessary time constraints.

On those occasions when the mediator has not independently initiated contact, it is increasingly common for attorneys to affirmatively seek a pre-mediation conference with the mediator. Counsel may wish to discuss the mediator's approach to mediation, possible settlement approaches or modification of the overall mediation procedure. There is no prohibition to *ex parte* communication with the mediator.

B. Preparation by Counsel and Parties:

Task Force focus groups and party interviews emphasized the importance of preparation by the parties and their counsel. The Task Force found that counsel should routinely help their clients understand the issues in their case and their opponent's case in preparation for both mediation and trial. But counsel's explanation of what will happen during the two processes will differ, requiring a more creative discussion about the client's possible settlement options for mediation purposes.[12]

Just as attorneys commonly prepare their clients for trial, it is equally important that advocates meet with their clients before mediation to consider and discuss overall strengths and weaknesses of the case and to develop a risk-benefit analysis to aid in an overall negotiation strategy. Should the client be unfamiliar with mediation, attorneys must educate their client regarding the mediation process, including the various stages of mediation. Consideration should also be given to preparing the client for the fact that the mediator may likely engage the client in dialogue about the case during the mediation process.

To objectively evaluate a case before mediation, the attorney may wish to ask his or her client "Okay, what is really important to you about this dispute, and why?"[13] The concept of determining client needs and interests is nothing new. In their remarkable book, *Getting to Yes,* Roger Fisher and William Ury provide a powerful problem-solving model by discussing BATNA, the Best Alternative to a Negotiated Agreement.[14] Fisher and Ury suggest that negotiators identify their best alternative in the event the negotiated settlement is not successful. BATNA lays the groundwork for a series of questions that can be utilized in formulating a risk analysis for clients. Typical questions that may lead to a constructive risk analysis include, but are not limited to, the following:

- What is the likely monetary outcome if the trial is successful?
- What are the chances of succeeding at trial?
- What are the monetary and non-monetary costs of litigation?
- The likelihood of collecting a monetary judgment?
- The likelihood of appeal?

Other questions that negotiators may consider discussing with their clients before mediation include:

- What client interests are at stake in this negotiation?
- What interests may be at stake for the other side?
- What additional information would you like to obtain from your opponent?
- What additional information would you be willing to reveal to your opponent?
- What information, if any, would you be careful not to reveal?
- What concessions would you be willing to make and in what order?
- What concessions will you push to receive?

12 *Id.* at 10.
13 *Id.* at 11.
14 Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In at 18 (1983).

C. Case-by-Case Customization of the Mediation Process:

The Task Force commented that some mediators, parties and counsel may rely upon essentially identical mediation approaches in each case. The Task Force found that "[i]n most cases, however, mediators would best be advised to make an effort to evaluate each case on its own and develop a process, in coordination with the parties and counsel, that is best suited for that particular case. Similarly, parties and counsel should pay close attention how best to prepare for mediation on a case-by-case basis." [15]

1. Timing of the Mediation:

The Task Force survey respondents indicated that the preferred time for mediation is generally after "critical" discovery is completed, but before full completion of discovery. There was a significant disagreement among the surveyed mediators and users whether mediation would be appropriate before suit is filed.[16]

The timing of the mediation is a critical element to success. In general, cases should be mediated neither too early nor too late. [17] Nonetheless, mediation may be successfully conducted well before suit is filed. In an employment case, successful mediations have been conducted well in advance of the filing of the discrimination charge with the EEOC or other appropriate agency. If the mediator or the parties believe that each party has sufficient information to make an informed decision, mediation is likely appropriate. In the alternative, if the available information is grossly insufficient, the mediator might wish to suggest a pre-mediation discovery agreement. Certainly, the more discovery conducted, the more likely it is that "bottom line" positions become frozen and settlement opportunities lost. While each party requires sufficient information to make an informed decision, unnecessary or overly costly information gathering may needlessly run up the cost of litigation while providing only marginally useful additional benefits.

2. Confidential Information to the Mediator.

Mediators commonly suggest that counsel prepare a written confidential statement for the mediator's review in advance of the date of the mediation. [18] It is often requested that the statement include a summary of the facts surrounding the dispute, a factual time line, a list of key witnesses, legal and damage analysis, an analysis of the strengths and weaknesses, and a summary of negotiations to date. Many mediators recommend that the confidential statement be no longer than 2-5 pages.[19] Depositions, exhibits, motions, and expert witness reports should be summarized rather than attached, whenever possible. Many mediators use the confidential statement to summarize the facts of the case, including key dates and witnesses.[20]

3. Initial Meeting at Mediation.

Many mediators utilize the initial meeting (sometimes referred to as the initial joint session or the mediator's monologue) with attorneys and the parties for the purpose of:

- allowing the opportunity for introductions;
- reviewing the agreement to mediate;
- discussing confidentiality;
- establishing or revising the suggested format for the mediation;
- describing the role of the mediator;
- explaining the process; and,
- answering any questions the parties or their attorneys may have.

Even though counsel may have been through the mediation process many times (indeed many counsel are now themselves mediators), many of the clients are experiencing mediation for the first time. The comfort level of the participants may be enhanced if they are given the opportunity for informal personal contact at the initial meeting prior to undertaking the more formal mediation process.

The initial meeting provides the mediator with an opportunity to describe the mediation process as a means of problem solving that is distinctly different than an adversarial courtroom proceeding. The initial meeting also permits the mediator to ensure that those unfamiliar with the mediation process clearly understand the role of the mediator as a facilitator and not as a judge or jury.

15 *Id.* at 12-13.

16 *Id.*

17 Rute, Nichols & Phillips, s*upra,* note 10 at 12, 17, 20.

18 Task Force *supra* at 12.

19 One exception to the length of the confidential statement would be the need to provide extensive background information in highly complex multi-party or in class/collective action matters.

20 Rute, Nichols & Phillips, s*upra* note 8 at 12, 17, 20.

A good mediator utilizes the initial meeting to build rapport and establish trust among the participants. The participants' choice of a skilled mediator and the agreed-upon design of the mediation process can be critical to the success of the mediation.

4. Opening Statements:

There are divergent views about the usefulness of opening statements by either counsel or the parties. In focus groups, some felt that in high-conflict cases with angry clients, explosive statements can generate more hostility, thus impeding settlement.[21] In other situations, opening statements can help frame the issues with clarity and facilitate the process.

Mediators understand legal counsel may sometimes take the position that there may be little new information to be gleaned through the mediation process. According to this view, negotiation is used simply to determine "how much" by way of a monetary settlement. So, too, when the parties' emotions are particularly high, there may be an understandable reluctance by counsel to present an opening statement for fear that anything said will become contentious, polarizing and/or unproductive. Some mediators have observed opening statements that were so inappropriate or so disingenuous that chances for resolution were substantially undermined. Mediators have also described exceptional opening statements that have created an atmosphere of trust and setting the stage for mutual resolution of the problem.[22]

The opportunity for legal counsel to exchange important information during the opening statement often provides the groundwork for a satisfactory settlement. Indeed, without an effective opening statement, much more information must be exchanged through the mediator during private sessions (caucus). This third-party exchange of information prolongs the mediation and creates a risk of miscommunication.

A well-presented opening statement also presents the opportunity for counsel to paint a picture (the "theme") of her or his case directly to the other party with little risk of miscommunication. The opening statement can also be used to communicate new information, both in terms of the facts and/or the law surrounding the case. For example, important information such as corroborative witnesses or newly-discovered evidence can be presented, as well as old information in a new context. It affords the parties an additional advantage of having their positions heard in an open forum, giving clients their "day in court." An attorney may choose, as a matter of negotiation strategy, to permit her or his client(s) the opportunity to speak directly to the other party without intervention or interruption during the opening statement.

An effective opening statement not only gives counsel and the parties an opportunity to share different sub-sets of information, it also presents an opportunity for participants, sometimes for the first time, to gauge the credibility of the parties and their respective positions. Rather than a static, depersonalized process, the mediation becomes, through the communication exchange between the parties, more about the real concerns of people rather than disembodied entities. Through the strategic use of opening statements, stereotypes, false assumptions and factual discrepancies can be clarified, thereby promoting a more productive negotiation process.

The joint session also presents litigators with the opportunity to encourage the parties to alter their perspectives and to set the stage for a psychological process directed at moving the parties toward settlement. There is, of course, the legitimate fear that a joint session may exacerbate the parties' negative emotions and, therefore, create greater obstacles to resolution of the dispute. There are certainly situations where extreme animosity may exist (sometimes, even between opposing counsel). When emotions run high, there is a strong risk of miscommunication. Nonetheless, whether to conduct an opening statement is an issue that should be discussed well in advance with the mediator or through separate discussions with and/or between opposing counsel.

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21 *Id.* at 12.

22 Rute, Nichols & Phillips, s*upra* note 8 at 13, 18 and 23-24.

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PRACTICE TIPS FOR A SUCCESSFUL OPENING STATEMENT

An effective opening statement often can be utilized to accomplish one or more of the following objectives:

- The opportunity to reintroduce you and your client to the other side.
- Demonstrate your complete command of the case.
- Demonstrate a willingness to listen.
- Anticipate emotional issues and do not make comments to the other party that will trigger a strong emotional response. Acknowledge that you understand, although you do not agree with, how the other party feels.
- Humanize your client.
- Demonstrate your preparedness and organization.
- Confront potential weaknesses in your case early on.
- Avoid exaggeration or over-statement.

Consider the following techniques:

- Do not understate or overstate your abilities at trial (do not "saber rattle").
- Compliment (when appropriate) the opposing party's legal counsel.
- Demonstrate that you understand the opposing party's position or concerns.
- Do the unexpected, i.e., apologize, express concern or regret.
- Use humor, when appropriate.
- State your support for the mediation process.
- State a genuine desire to act in good faith to resolve the case.
- State a desire to be creative in developing settlement solutions.
- State that you are not there to impose solutions, but rather to listen and work through problems.
- Emphasize that settlement will be in everyone's interest.
- Express sympathy, but do not sound disingenuous or insincere.
- Consider whether to provide important documents, important evidence or case law to the opposing party during the opening statement.
- Never engage in theatrics or personal attacks.
- Direct your comments to each member of the opposing party's negotiation team (not the mediator).
- Do not discuss monetary demands.

D. "Analytical" Techniques Used by the Mediator:

The Task Force data revealed that many sophisticated mediation users expect mediators to provide certain services, including analytical techniques. For example, mediators can be helpful by asking pointed questions and suggesting options for consideration. The Task Force parties observed that the following techniques were beneficial in most cases:

- Pointed questions that raise issues (95%);
- Analysis of case, including strengths and weaknesses (95%);
- Prediction about likely court results (60%);
- Possible ways to resolve issues (100%);
- Recommend a specific settlement (84%); and,
- Pressure to accept a specific solution (74%).[23]

On the other hand, nearly half of the users surveyed indicated there are times when it is not appropriate for a mediator to give an assessment of strengths and weaknesses or recommend a specific settlement. There is a wide disparity of opinions on how various factors might affect a users' view of whether it was appropriate for a mediator to provide an assessment of the strengths and weaknesses,[24] including the following:

- Whether assessment is explicitly requested;
- Extent of the mediator's knowledge and expertise;
- Degree of confidence mediator expresses in assessment;
- Degree of pressure mediator exerts to accept assessment;
- Whether assessment is given in joint session or caucus;
- How early or late in process assessment is given;
- Whether assessment is given before apparent impasse or only after impasse;
- Nature of issues (e.g., legal, financial, emotional);
- Whether all counsel seem competent; and,
- Whether mediator seems impartial.[25]

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[23] *Id.* at 14.

[24] *In recommending a specific assessment, 84% of users thought it would be helpful in half or more cases, and 75% in most or almost all cases; only 18% of mediators thought it would be helpful in most, all or almost all cases, and only 38% thought it would be helpful in half or more.* *Id.* at 15.

[25] *Id.* at 14-15.

E. Mediator's Private Meetings with the Parties

The parties and litigants who have participated in a successful mediation sometimes refer to "the magic" of the mediation process. If sorcery is involved, it is more than likely apparent during and following the mediator's meetings (caucus) with the individual parties.

Generally, one of the mediator's first strategic decisions is to determine which party to meet with first. The mediator may decide to meet with a party who appears to be more emotionally vulnerable. Often mediators meet first with the plaintiff if an initial demand has not previously been presented. It is possible the mediator might determine with whom he/she will first meet simply by "gut instinct."

The private meeting offers the participants a safe atmosphere in a confidential setting. Such a setting provides the mediator with the opportunity to discuss, directly with the individual parties, their perception of the strengths and weaknesses of legal and factual positions. The private meeting also gives the mediator an opportunity to develop personal insight into the personality and emotional state of the individual participants. This allows the mediator to focus on the parties' interests rather than legal positions, develop rapport, and consider creative approaches to settlement. The mediator must be non-judgmental and empathetic, may use humor when appropriate, and must assist the parties in developing flexible and creative solutions.[26]

Many mediators use an "interest-based" or "problem-solving" approach. In doing so, the mediator assists both parties with identifying and focusing on individual needs and interests, and searching for mutually satisfactory solutions. Other mediators may use an evaluative decision-tree approach. To assist the parties, the mediator may choose to ask non-judgmental questions. Generally these questions are open-ended as opposed to leading questions. The mediator may wish to summarize the answers to the questions in the form of summary or reframing statements that help the mediator ensure the information has been adequately communicated. The mediator may also make observations or suggestions should the parties get stuck during the negotiation process.

Effective mediation requires objective analysis, active listening, utilization of a wide range of people skills, and principled negotiation. A skilled, experienced mediator assists the parties in objectively evaluating their positions and in presenting those positions in a sequential and constructive manner. Mediators can and do serve as "coaches" to assist the parties in their negotiation strategy and assist in making credible offers and demands. Finally, the mediator must be alert and sensitive to volatile emotional issues as such matters can arise at any time in the process with unpredictable results.

Nonetheless, at the end of the day, the parties retain control over the outcome of their dispute. Self-determination by the parties is the central feature of mediation. In this respect, mediation is fundamentally different from adjudication, where power to determine the outcome of the dispute is ceded to a hearing officer, judge, jury or arbiter.

F. Mediator's Persistence and Patience:

Task Force respondents overwhelmingly stated that patience and persistence are necessary attributes of a good mediator. Persistence is needed to keep people at the table, to get the case settled by exerting some "pressure," and to get people back to the table after a first mediation fails to resolve the case. [27]

Participants expressed great dissatisfaction if mediators are merely "messengers" or "potted plants" or gave up too easily when negotiations become difficult. If the mediation ends without agreement, but has some potential to reach one, the vast majority of Task Force participants believe that the mediator should contact the lawyers after a week or two to ask whether they want additional assistance from the mediator.[28]

It is important that the mediator not become discouraged or give up on the mediation prematurely. Mediation sessions commonly "bog down" at some point during the day. At such a juncture, the mediator must address and fully understand the underlying issues and interests of the parties and affirmatively develop an alternative to the previously unsuccessful negotiation strategy. In purely monetary negotiations, for example, a skilled mediator might coach or suggest that the party make an offer or counteroffer in a reasonable negotiation zone by making the "first credible offer." An approach suggesting reciprocal or even asymmetrical concessions may be a successful tactic. Other techniques might include a decision-tree analysis of the probability of prevailing, a discount-model analysis, a cost-benefit

26 Rute, Nichols & Phillips, *supra* note 8 at 14, 18-19, 24.
27 *Id.* at 17.
28 *Id.*

analysis, or, with the permission of all parties, an independent evaluation or analysis of the case.[29]

Mediators commonly contact the parties following a mediation that does not fully settle the dispute. If the parties were particularly close to settlement, the mediator may contact the parties a few days or even a few hours after the mediation. On other occasions, the mediator may refrain from contacting the parties until after key depositions are concluded or, perhaps, in anticipation of the close of motion practice.

It is certainly not uncommon for a mediator to receive a telephone call on a confidential basis from one of the parties requesting that an attempt be made to "kick-start" settlement negotiations. In such a case, the mediator may choose to telephone or e-mail the other side without disclosing the prior communication. Litigation counsel may also request that the mediator write a confidential letter to the insurance representative, general counsel, or client regarding the mediator's evaluation of the case. This technique often generates a useful and productive response which can be used to facilitate additional discussion.[30]

II. Conclusion.

The use of mediation to resolve complex commercial disputes is likely to continue to increase. Mediation is often viewed in the corporate culture as an appropriate and preferred step prior to trial. There are various reasons supporting this perception.

First, the business community believes, whether true or not, that litigation is increasingly expensive and protracted. Many business entities who are otherwise prepared to litigate may, nonetheless, wish to first try negotiation and, if negotiation is not successful, consider a relatively inexpensive round of mediation.

Second, many business disputants prefer mediation because it permits a degree of party control which is gradually lost as the litigation process is engaged. Even if the mediation is unsuccessful, each party can learn a great deal about their own case and the other party's position.

Third, commercial disputes are very often between parties who have a legitimate business reason to maintain long-term relationships. Litigation has the potential to completely destroy an otherwise valuable business relationship. By contrast, mediation of relationship-based issues, if successful, avoids the disruption of the relationship and allows it to continue.

Fourth, one or both parties may be concerned about the disclosure of confidential information. Mediation avoids disclosure of sensitive information either to the public or to the other party. Generally, everything said in mediation is protected as confidential settlement discussions and cannot be introduced in litigation or discussed publicly.

Finally, in an era of declining judicial resources, it remains likely that the courts will continue to develop and enhance existing case management systems that will track cases based upon complexity, anticipated discovery, time before a trial, and the overall amount of court resources required.[31] The use of case management mechanisms (including neutral evaluation, mediation and arbitration) involves the use of different alternative dispute resolution processes, which may, in some instances, be mandated. This case management approach is reminiscent of Professor Frank E.A. Sander's 1996 *Proposal for the Development of a "Multi-Door" Courthouse,* in which he supports the utilization of a wide variety of alternative dispute resolution techniques.[32]

Practitioners who regularly attend mediation or who may have personally undertaken mediation training, have become increasingly knowledgeable in developing effective strategies that lead to successful mediation results. This experience further serves to enhance the practitioner's ability to represent her or his clients as a more effective advocate. Successful practitioners acknowledge the need to inform clients at the beginning of the professional relationship about the availability of mediation and other dispute resolution procedures. The practitioner's enhanced understanding of the mediator's role permits the client to be properly prepared for mediation and allows maximization of benefits that may be derived from the mediation experience.

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29 Rute, Nichols & Phillips, s*upra* note 8 at 14, 19, 24.

30 Rute, Nichols & Philips *supra* note 8 at 15 & 19.

31 See *Donna Stienstra, et al,* Fed. Judicial Ctr. Report to the Judicial Conference Committee on Court Administration and Case Management; *A Study of Five Demonstration Projects established under the Civil Justice Reform Act of 1990* (1997) (describing tracks in the Differentiated Case Management system in the U.S. District Court for the Northern District of Ohio).

32 See Frank E.A. Sander, Professor of Law, Harvard Univ., *Varieties of Dispute Processing, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (April 7-9, 1976), *in* 70 F.R.D. 111, 130-32 (1976).