MEDIATION: THE RADICAL CHANGE FROM COURTROOM TO CONFERENCE TABLE

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I. THE EMERGENCE OF MEDIATION

A. *Introduction*

No change in the American judicial system has been more dramatic, radical, or pervasive than the full implementation of mediation into our judicial system. With its origin over two thousand years ago, mediation was once considered archaic or, at best, of limited utility. It has since risen from its phoenix ashes to become the predominate process of dispute resolution today. Indeed, it has, in combination with other Alternative Dispute Resolution (ADR) mechanisms, relegated courtroom trials to the category of "alternative"—when all else fails. As former Chief Justice Warren E. Burger observed, "for many [claims], trials by the adversary contest must in time go the way of the ancient trial by battle and blood."[1]

1. Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984). Initially, the courts and lawyers saw mediation as a nice vehicle to resolve claims in small claims court or neighborhood disputes. *See, e.g.*, JENNIFER E. BEER, PEACEMAKING IN YOUR NEIGHBORHOOD: REFLECTIONS ON AN EXPERIMENT IN COMMUNITY MEDIATION 3–4 (1986). *See generally* Raymond Shonholtz, *Neighborhood Justice Systems: Work, Structure, and Guiding Principles*, 5 MEDIATION Q. 3 (1984) (advocating new justice systems focused on addressing conflicts at family, school, and neighborhood levels before they require action by the state). Few, however, foresaw the impact mediation would have in all types of disputes, from personal injury to complex multimillion dollar antitrust class actions. Judges are leaving the bench to become private mediators. *See generally* ALAN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 329–37 (3d ed.

Although utilized over the years on the periphery of the legal spectrum, it has only been the past three decades that mediation has taken its position at the forefront of dispute resolution.[2] The cause for change

2002) (describing the development of contemporary mediation through the nineteenth century to present); John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 839–41 (1997) (noting the increasingly widespread use of mediation in litigation). Today, hundreds of state statutes establish mediation programs in a wide variety of contexts. *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, & PRACTICE app. B (2d ed. 2005) (including a list of mediation and conciliation statutes for the fifty states, as well as the District of Columbia, Puerto Rico, and the Virgin Islands). Many states have created state offices to encourage greater use of mediation. *See, e.g.*, ARK. CODE ANN. §§ 16-7-101 to -207 (1999 & Supp. 2009); HAW. REV. STAT. §§ 613-1 to -4 (1993 & Supp. 2007); KAN. STAT. ANN. §§ 5-501 to -04 (2001); MASS. GEN. LAWS ANN. ch. 7, § 51 (West 2002 & Supp. 2009); NEB. REV. STAT. ANN. §§ 25-2901 to -2942 (LexisNexis 2004 & Supp. 2009); N.J. STAT. ANN. § 52:27E-73 (West 2001); OHIO REV. CODE ANN. §§ 179.01–.04 (LexisNexis 2007); OKLA. STAT. ANN. tit. 12, §§ 1801–13 (West 1993 & Supp. 2010); OR. REV. STAT. ANN. §§ 36.100–.270 (West 2003 & Supp. 2009); W. VA. CODE ANN. §§ 55-15-1 to -5 (LexisNexis 2000). *See generally* Suzanne J. Schmitz, *A Critique of the Illinois Circuit Rules Concerning Court-Ordered Mediation*, 36 LOY. U. CHI. L.J. 783 (2005) (discussing the function of court-ordered mediation in Illinois circuit courts).

2. Mediation was practiced in China over two thousand years ago. Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1205 (1966). Over the centuries any number of societies have traditionally considered mediation the favored process for resolving disputes. *See* CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 20 (3d ed. 2003) ("Jewish, Christian, Islamic, Hindu, Buddhist, Confucian, and many indigenous cultures all have extensive and effective traditions of mediation practices.").

In the United States, the Religious Society of Friends has utilized mediation, providing in its rules that when differences arise between persons, their friends shall:

> forthwith speak to and tenderly advise, the persons between whom the difference is, to make a speedy end thereof; and if that friend or those friends do not comply with their advice, that then they take to them one or two friends more, and again exhort them to end their difference.

RULES OF DISCIPLINE OF THE YEARLY MEETING 3 (1809). "In the American colonies, emphasis was placed on communal peace and harmony between parties." Richard M. Calkins, *Caucus Mediation—Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259, 266 (2006); *see also* Susan L. Donegan, *ADR in Colonial America: A Covenant for Survival*, 48 ARB. J. 14, 15–16 (1993) (discussing the practical impediments to litigation and the impact of communal relationships on dispute resolution).

Various cultures, such as Scandinavian fishermen, African tribes, and Israeli Kibbutzim, valued conciliation over conflict. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 8 (1983); *see also*, Diane LeResche, *Native American Perspective on Peacemaking*, 10 MEDIATION Q. 321, 321–22 (1993) (emphasizing the communal and

was necessity. Again, Chief Justice Burger noted that "[the American legal] system is too costly, too lengthy, too destructive, and too inefficient for a civilized people."[3]

There are four primary reasons why change was required: the proliferation of cases filed each year, the soaring costs of litigation, the increased time to resolve cases, and the increased stress and destructive nature of the process.

1. *Proliferation of Cases Filed Each Year*

A primary reason our legal system has been overtaxed is that "there has been an explosive increase in the number of new lawsuits being filed each year, now over 18 million."[4] This has been caused by a number of factors. First, there has been an increase in the number of new and novel causes of action being asserted as legal entitlements. As Chief Justice Burger observed:

> One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.[5]

Second, there has been an increase in new statutory and regulatory promulgations. Third, there has been a substantial increase in criminal cases, particularly drug-related cases, which have clogged the courts, bringing civil trials to a virtual standstill in some jurisdictions.[6] Fourth, the courts have permitted greater discovery forays, which has not only added to the court's burden, but also has extended the time cases remain on the

spiritual dimension of peacemaking).

3. Burger, *supra* note 1, at 66.

4. RICHARD M. CALKINS & FRED LANE, LANE AND CALKINS MEDIATION PRACTICE GUIDE § 1.01 (2006).

5. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

6. *See* Keith C. Owens, Comment, *California's "Three Strikes" Debacle: A Volatile Mixture of Fear, Vengeance and Demagoguery Will Unravel the Criminal Justice System and Bring California to Its Knees*, 25 SW. U. L. REV. 129, 151 (1995) (noting that many predict California courts "will come to a new standstill" because of the increased caseload due to the three strike rule).

docket.[7]

2. *Soaring Costs*

It is not uncommon today for pretrial discovery in major cases to exceed $50 million. Hourly rates of trial lawyers now exceed $1,000 per hour, while associates bill as much as $500 per hour.[8]

3. *Increased Time to Resolution*

Cases lasting ten or even twenty years are no longer uncommon. Motion practice, including interlocutory appeals; pretrial forays, including depositions, interrogatories, document productions, and requests to admit; trials; appeals; and retrials all make litigation unacceptable to many. One case, *Midwest Milk Monopolization Litigation*, involved twenty-four court rulings, two appeals to the Eighth Circuit Court of Appeals, and remand for a determination of damages by a special master.[9] In its twenty-first year it was mediated, and in two and one-half months resolved.[10]

4. *Destructive Nature of the Process*

Perhaps the most compelling reason for change to mediation is that the American judicial system has become "too painful, too destructive . . . for a truly civilized people."[11] As former Judge Learned Hand of the United States Court of Appeals for the Second Circuit stated: "I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."[12] Similarly Supreme Court Associate Justice Antonin Scalia noted that he "think[s] we are too ready today to seek

7. *See* O.C. Hamilton, Jr. & J. Shelby Sharpe, *Discovery Rule Proposals—Two Different Philosophies*, 15 REV. LITIG. 341, 341–42 (1996) (addressing the proposals aimed at decreasing the time and burdens relating to discovery).

8. *See* Calkins, *supra* note 2, at 294–96 (discussing the various costs of attorney's fees in litigation).

9. Alexander v. Nat'l Farmers Org., 614 F. Supp. 745 (W.D. Mo. 1985), *aff'd in part*, *rev'd in part*, *sub nom*. Nat'l Farmers Org. v. Associated Milk Producers, 850 F.2d 1286 (8th Cir. 1988), *amended by* 878 F.2d 1118 (8th Cir. 1989); *In re* Midwest Milk Monopolization Litig., 510 F. Supp. 381 (W.D. Mo. 1981), *aff'd in part, rev'd in part sub nom.* 687 F.2d 1173 (8th Cir. 1982).

10. Calkins, *supra* note 2, at 262.

11. Burger, *supra* note 1, at 66.

12. Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter (Nov. 17, 1921), *in* 3 ASS'N OF THE BAR OF THE CITY OF N.Y., LECTURES ON LEGAL TOPICS 89, 105 (1926).

vindication or vengeance through adversary proceedings rather than peace through mediation."[13]

The removal of cases from the courtroom to the conference table is not, however, just a change of venue. It has required a redefinition of justice itself, and a redefinition of the lawyer's ethical responsibility to the client. As Chief Justice Burger stated: "To fulfill our traditional obligation means that we should provide [ADR] mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with minimal stress on the participants. That is what justice is all about."[14]

To carry out this new role, it is no longer satisfactory for the lawyer simply to advocate. Chief Justice Burger made it clear that lawyers must shed their robes of advocacy and put on the cloaks of problem solvers and peacemakers. He admonished that lawyers must now become "legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers—not the promoters—of conflict."[15]

B. *Lawyers as Legal Architects, Engineers, Builders . . .*

When parties engage in courtroom litigation, there is zero opportunity for lawyers to be legal architects, engineers, or builders. The structure of the courtroom stifles creativity. This structure is governed by strict rules of procedure and any deviation therefrom can result in a mistrial, dismissal, or even sanctions.

Mediation, on the other hand, has dramatically opened the door to creative thinking and innovation, permitting counsel to literally be legal architects, engineers, and builders. They can become such because mediation is by *contract.* In other words, the parties can resolve their differences any way they wish and include in their settlements anything they feel important, even matters unrelated to the dispute at hand. There are no boundaries to straightjacket the parties and counsel—no rules of evidence, rules of procedure, or precedent. The parties can sit down and

13. Antonin Scalia, *Teaching About the Law*, CHRISTIAN LEGAL SOC'Y Q., Fall 1987, at 6, 8.

14. Burger, *supra* note 5, at 274.

15. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 5 (1993) (quoting Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 378 (1980)).

agree to use a recognized ADR mechanism,[16] or they can fashion their own to meet the exigencies of the case.[17]

This Article examines the full potential of mediation and ADR, and illustrates how lawyers today are responding to Chief Justice Burger's

16. CALKINS & LANE, *supra* note 4, § 1.02[B]–[D]. There are any number of recognized and well-established ADR mechanisms, both nonbinding and binding. A nonbinding mechanism permits the parties to revert to the courtroom if settlement cannot be reached. A binding mechanism does not have this latitude. If a binding process is utilized, the parties are bound by the result, there is no appeal unless previously agreed to, and there is no reversion to the courts.

Recognized nonbinding mechanisms include the following:

Negotiation: The ADR mechanism most widely used to settle disputes is negotiation. That is, the parties themselves or their representatives confer directly to resolve their differences without litigation. The success of this mechanism is evidenced by the large percentage of cases settled prior to trial, approximately seventy to seventy-five percent. Much of the success derives from the courts' encouragement of ongoing settlement discussion. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING WITHOUT GIVING IN 4–7 (Bruce Patton ed., 2d ed. 1992) (describing position taking as the most common but often inefficient and less amicable form of negotiation); Robert H. Mnookin, *Why Negotiations Fail: An Explanation of Barriers to Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993) (discussing the primary barriers to dispute resolution: strategic barriers, the principal–agent problem, cognitive barriers, and reactive devaluation).

Mediation: Mediation introduces a third-party neutral to the negotiation process. The mediator assists the parties in finding common ground for resolution. If settlement is reached, it has the binding effect of any settlement and can be enforced in the courts. *See* CALKINS & LANE, *supra* note 4, § 1.02[C].

Summary Jury Trial: If the parties are quite far apart and need a reality check, they might engage in a nonbinding process called summary jury trial. Normally conducted in one day, a case is presented in summary form before a jury, the jury is instructed, and then the jury renders a nonbinding verdict. The value to the process is that counsel and the parties may question the jurors to learn the reasons for their decision. After completing the session, the parties continue negotiating or mediating. *See* Richard A. Enslen, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1, 13–15 (1988); Thomas D. Lambros, *The Summary Jury Trial—An Alternate Method of Resolving Disputes*, 69 JUDICATURE 286, 286–87 (1986) (stating that a trial normally taking six to eight weeks could be condensed to one or two days and reach the same conclusion).

17. One example of creative dispute resolution involved Southwest Airlines soon after its founding. Southwest was using a trademark which was similar to one being used by a southeastern regional airline. The two CEOs contemplated trademark litigation, which would have cost millions of dollars in fees. Rather than take this course, they agreed to resolve the matter by arm-wrestling. An agreement was signed, a party held, and the matter resolved—two out of three, for the cost of the party. *See Execs' "Plane" Fun Avoids Lawsuit*, PITTSBURG PRESS, Mar. 21, 1992, at A4.

admonition to be creative architects and builders, to be "the healers—not the promoters of conflict."[18] The Article examines two primary areas of change: (1) new strategies to find resolution, and (2) opportunities for creative settlements.[19]

II. DESIGNING NEW STRATEGIES IN MEDIATION

A. *Innovative Approaches to Mediation*

So much can be done in the arena of mediation which could not even be considered in the courtroom.[20] Mediators, as innovators, can conduct ex

18. Burger, *supra* note 15, at 5.

19. Some states, through their supreme courts, strongly recommend, as a matter of professionalism, that attorneys inform clients of alternative procedures for dispute resolution. These currently include Hawaii, Texas, and Colorado. *See, e.g.*, HAW. RULES OF PROF'L CONDUCT R. 2.1 (1994) ("In a matter involving or expected to involve litigation, a lawyer should advise a client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."). The State of Georgia now permits continuing legal education credits for training in dispute resolution. GA. CT. R. 8-106(b)(10), *available at* http://gabar.org/public/pdf/handbook_web.pdf. Some scholars now suggest that failure to discuss ADR possibilities with a client constitutes legal malpractice. Robert F. Cochran, Jr., *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for the Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819, 823–24 (1990); Monica L. Warmbrod, Comment, *Could an Attorney Face Disciplinary Action or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?*, 27 CUMB. L. REV. 791, 809 (1997).

20. When Chief Justice Burger admonished lawyers to be "legal architects, engineers, and builders," he also directed them to be "harmonizers," "peacemakers," and "healers . . . of conflict." Burger, *supra* note 15, at 5. In other words, more is required of the lawyer than just resolving disputes. A lawyer must also bring conciliation, peace, and healing to the parties. *See generally* Calkins, *supra* note 2, at 300–20 (describing the qualities of a mediator/peacemaker).

To fill the role of peacemaker, the lawyer must have a very different mindset than the courtroom advocate. He or she must discard the idea that to win you must defeat your opponent. As peacemaker, the mediator can only win if all participants are winners. This new mindset requires the mediator to be at peace with himself or herself when entering the conference room. He or she must be *patient*, *positive*, *persistent*, *perceptive*, and *sensitive* to the parties and counsel, *supportive*, *compassionate*, *professional*, and *credible*.

Additionally, there are tools the peacemaker can work with such as being supportive of the parties rather than role playing devil's advocate, being an active and supportive listener, using nonconfrontational language, asking questions which do not put a party on the defensive, helping each side to develop a strategy to maximize the result for both, using the apology to good advantage, and encouraging the parties to

parte communications with the parties, use polygraph tests, help counsel deal with a difficult client, act as a sounding board, help each side better evaluate their cases, make settlement proposals, and incorporate other ADR mechanisms into the process. The hallmark of mediation is its flexibility. It is needs-based, which permits the mediator and parties to craft a process fitting the needs of the parties.

1. *The Introduction of Caucus Mediation*

One of the most creative and innovative processes yet developed is caucus mediation.[21] Previously, the two prevalent formats utilized were trial and conference—the first to help the parties better evaluate their cases, and the second to open avenues of communications, particularly in the family and employment settings where an ongoing relationship was required.[22] The need arose, however, for a more inclusive process that

forgive when appropriate. It is not the scope of this Article to delve further into this important area of consideration.

21. The person most responsible for developing caucus mediation is Alan Alhadeff of Seattle, Washington. CALKINS & LANE, *supra* note 4, at xv.

22. The trial format utilizes a single mediator or a panel of three, who sit as hearing officers and listen to summaries of the case as presented by counsel. MICH. CT. R. 2.403(B). The panel then gives its evaluation of the case, which the parties can either accept or reject. If they choose to reject the mediator's recommendation and go to trial, generally they must improve their positions by a certain percentage—for example, ten percent. *Id.* r. 2.403(D). If they fail to do so, they are then penalized by having to pay the costs and attorneys' fees of opposing counsel. *Id.* The State of Michigan has long used such a format. *See* James McNally, Letter to the Editor, *Mediation in Michigan Is Really a Form of Case Evaluation*, DISP. RESOL. MAG., Winter 1998, at 2.

Conference mediation, which is regularly used in family and employment law, places emphasis on helping parties communicate better. It is also preferred when attorneys are not participating in the process. *See* René L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J ON DISP. RESOL. 95, 107–08 (2001) (discussing conference mediation in situations of domestic abuse); Leonard L. Riskin, *Teaching and Learning from the Mediation in Barry Werth's Damages*, 2004 J. DISP. RESOL. 119, 133–34 (emphasizing the importance of the free flow of information in a nonadversarial atmosphere); Kerry Loomis, Comment, *Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 CAL. W. L. REV. 355, 365 (1999) (suggesting that the absence of counsel may affect the victim's behavior and thus create a need for special precautions).

Transformative mediation uses the conference format (that is, the parties remain together), but places greater responsibility on the participation of the parties. *See* Gay G. Cox & Robert J. Matlock, *The Case for Collaborative Law*, 11 TEX. WESLEYAN L. REV. 45, 57 (2004) (discussing the positive attributes of successful clients in

would address the parties' needs in general litigation, where the parties would not necessarily meet again. Such a process would also be necessary in complex or protracted litigation. What evolved over a period of time was caucus mediation.

There are a number of factors which set caucus mediation apart from courtroom trials, arbitrations, trial mediation, and conference mediation.[23] First, the lynchpin of caucus mediation is that it permits the mediator to have ex parte communications with the parties and counsel.[24] In courtroom litigation and arbitration there can be no such communications—it would be unethical and illegal for the parties and counsel to do so.[25] Likewise, in trial and conference mediation, ex parte communications are not part of the process. In caucus mediation, however, the primary focus is the ex parte communication.

In caucus mediation, because the parties are marshaled into separate caucus rooms, the mediator can have direct ex parte communications with each, and those communications are confidential and not shared with the other side. This permits the mediator to ask questions which have never before been asked in legal jurisprudence. The mediator can ask counsel what he or she believes are the weaknesses in the case or what his or her concerns might be about the case.[26] The mediator can also ask what

collaborative law cases); Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263 (1996).

23. The first step of caucus mediation is for all parties and counsel to meet with the mediator in the opening session. *See* CALKINS & LANE, *supra* note 4, § 3.02[A]. The mediator makes opening remarks and counsel for each side makes an opening statement. The parties are then marshaled into separate rooms for a private meeting with the mediator called a *caucus*. In caucus, counsel are asked: (1) the strengths of their case, (2) the weaknesses or concerns they have in their case, (3) what counsel believes is a party's best case and worst case before the decision-maker, (4) what settlement discussions there have been, and (5) what a party's next demand (plaintiff) or offer (defendant) will be. In insurance cases parties will be asked policy limits and whether there are any subrogated liens. *Id.* Finally, inquiry may be made into the costs of litigation. *Id.*

24. *Id.* § 3.01[A].

25. MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2008).

26. *Case Study*: Plaintiff was an electrician called to the home of a farmer in rural Iowa. He was asked to detatch an electric wire the owner of the premises was concerned might become a hazard. Plaintiff climbed a ladder leaning against the pole to which the wire was attached and cut it. This caused the pole to snap and plaintiff fell to the ground, hitting his head. Plaintiff sued the county because it was responsible for poles carrying electricity. It was discovered that the wood pole had become rotten,

counsel believes is the party's "worst case" before the relevant decision maker.[27] Clearly, a judge, jury, or arbitrator could never ask such questions,[28] and a mediator in trial or conference mediation could not ask these questions with the other side present. With this information, the mediator is positioned to guide the parties to a meaningful settlement.

Second, not only are communications ex parte, but, as noted above, the shroud of confidentiality embraces the entire process—whatever is discussed in caucus on one side cannot be disclosed to the party on the other side.[29] Because the participants know that what they disclose will be kept confidential, they are more willing to be candid in discussing difficult aspects of their cases. They are also more free to think creatively and to suggest ways to resolve differences. They can even ask the mediator to float settlement figures without disclosing that they suggested the possibility.[30]

Third, a primary focus of the caucus is to permit the mediator to build

causing it to snap when the tension of the wires was released. Plaintiff sought $620,000 in damages for a closed head injury and was not willing to compromise.

During the plaintiff's caucus, the mediator asked what the weaknesses were in the case as counsel saw it. Counsel answered that there were several. First, plaintiff stated in his deposition that it was his practice to hit the base of a pole with a hammer before climbing to see if it was rotten. In this instance he did not do so; if he had he would have known the base was rotten. Second, any electrician knows that wires attached to the pole are also holding it in place. To cut one of the wires risks the pole being pulled over in the direction of the remaining wire. Plaintiff should have kept the wires tight when he disconnected the wire in question. Third, plaintiff should have used a safety harness when climbing the ladder to cut the wire. This would have kept him from falling. Fourth, plaintiff had a bucket truck which he could have used. Fifth, Butler County, Iowa is conservative, and there has never been a verdict over $300,000 awarded there. Sixth, a jury will not get angry at Butler County in this instance. Seventh, plaintiff's doctor said he was making good progress up until he received a divorce notice from his wife—then he had a nervous breakdown, resulting in his hospitalization. A jury will have to deduct a percentage from any damages because of non-accidental causes. Eighth, plaintiff's comparative fault will be high and if more than fifty percent, there is no recovery.

After discussing these weaknesses, plaintiff recognized the problems with his case and followed counsel's recommendation to accept $200,000.

27. A plaintiff might contend that its worst case in a soft tissue injury case is $30,000 with its best case being $150,000. And the defendant might answer that its best case is zero, no liability, and its worst case $50,000. This alerts the mediator to the possibility of a settlement in the $30,000 to $50,000 range.

28. MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2008).

29. *See* CALKINS & LANE, *supra* note 4, § 3.01[A].

30. *Id.* § 3.02[A][1][d][iii].

rapport and trust with the parties and counsel. It is much easier to show interest and concern when the parties are separated, rather than together. This is particularly true when one side is being difficult and needs more attention. The caucus is an excellent venue to permit a party who is angry or frustrated to vent. The mediator can encourage this and can in effect give the party his or her day in court.

Fourth, by having parties in separate caucuses, it is much easier to deal with a difficult client. Many times, counsel seek mediation to help them control their clients. The mediator in caucus can provide the support counsel may need. By reinforcing what counsel has been telling the client all along, the client may begin to understand the need to compromise when there are difficulties in the case.

Fifth, in caucus the mediator can begin probing for hidden agendas.[31] Many times factors other than the facts and law of the case can control its outcome. For example, a letter of apology or commendation may be what a party wants, rather than just money. Sensitive to the needs of the parties, a mediator can often uncover them and quickly resolve a dispute.[32]

Sixth, caucus mediation has total flexibility. The process can be interrupted or carried on by telephone. A witness who has not been deposed can be brought in and questioned. The mediator can interview witnesses and then resume the process. The process can be interrupted and another ADR mechanism employed to give the parties a reality check. For example, if the parties are not listening to the advice of counsel, the mediator can suggest that the process be interrupted and the parties conduct a summary jury trial,[33] or focus study,[34] or mock trial,[35] (all

31. *Id*. § 3.02[B].

32. *Case Study*: Plaintiff, a widow, sued her husband's ex-employer on behalf of his estate. He had been employed twenty-nine years and was terminated by new owners who bought the business. As the chief accountant, he was unable to adjust to the computerization of the accounting department. He was terminated and two young women took over and computerized the company. Decedent died of other causes, but his widow felt he died of a broken heart. She sued for age discrimination under Title VII of the Civil Rights Act. Her demand was $200,000, but ultimately she came down to $125,000. The company offered $100,000 and said it would go no further. With the mediation about to fail, the mediator asked the widow if an apology would help. She said it would, and it would also help if the new owners would take sensitivity training so that they would know how to treat employees. They agreed and the case settled. As it turned out, she would have taken less because her real interest was recognition of her husband's fine and loyal work, not money.

33. *See* Lambros, *supra* note 16, at 286 (describing a summary jury trial as a procedure that involves "a summarized presentation of a civil case to an advisory jury

for showing the parties (as well as the lawyers and the judge) how a jury reacts to the dispute"). The procedure is nonbinding and is quite successful at conjuring a settlement of the dispute. Judge Lambros found that a trial could be condensed to a half day—and rarely longer than a full day—and reach the same result. *See also* Enslen, *supra* note 16, at 13–15 (explaining the shortened procedure in comparison with a jury trial).

A jury is impaneled, hopefully out of the court jury pool, or if that is not available, from the community. *See* Lambros, *supra* note 16, at 287–88. The jurors are voir dired—although only briefly—as a regular jury would be. Enslen, *supra* note 16, at 13. They may or may not be informed that their verdict is nonbinding on the parties and is intended only to help them better evaluate their cases. *Id*.

Once the jury is impaneled, counsel present their cases in summary form taking one or two hours each. *Id.* The parties may also be given a fifteen minute period for rebuttal and surrebuttal. Lambros, *supra* note 16, at 289. Once counsel have completed their presentations, the jury is instructed on the law and retires to deliberate. *Id.* It is given an ample period of time to reach a verdict, which is then announced to the parties. *Id.*

Each side is then permitted to confer with the jurors to have a candid discussion as to the reasons for their verdict. *Id.* The jury deliberation might even be videotaped for later review. *Id.* at 290. Two or more separate juries might be used to get a better cross section of potential jurors in the venue. Enslen, *supra* note 16, at 14.

Case Study: Plaintiff hit her head on her side window when she hit a bus crossing in front of her. She claimed she had a closed head injury and sued the bus company and driver for $150,000. The insurance carrier offered to settle the case for $60,000. Mediation was attempted but was unsuccessful. The mediator suggested the parties submit to a nonbinding summary jury trial. Defendant agreed to leave its offer on the table for forty-eight hours after the summary trial.

The jury rendered a verdict of $30,000. Its message was that the jurors felt plaintiff was exaggerating and was not seriously injured. Within forty-eight hours, she accepted the $60,000 offer.

34. A focus study is also used in mediation to help the parties better evaluate their cases. *See* CALKINS & LANE, *supra* note 4, § 1.0[C][4]. An outside consultant, generally a psychologist, conducts the study. Usually just one party participates in the process, although both can participate if agreed upon. Information is provided to the consultant such as the pleadings, a statement of the plaintiff's claim, the defense, relevant depositions, interrogatory answers, and documents and other information that could influence the results. Jurors are professionally selected to give a cross section of individuals likely to hear the case in the venue where the case is to be tried. The entire process is videotaped.

Initially, the jurors introduce themselves, giving their backgrounds, educational experiences, work experiences, hobbies, likes, dislikes, and any other relevant background information. Next, the consultant gives his or her summary of the case in as much detail as he or she thinks necessary. Jurors ask any questions they wish. Lastly, damages are discussed, including punitive damages if relevant. At the conclusion, each juror is asked what he or she believes jurors in the venue would do, highest and lowest verdicts, and what each would do if sitting on the case. In the last phase each juror is asked why he or she would reach the verdict given.

recognized ADR mechanisms), and then resume the mediation.

Seventh, the caucus format also helps the mediator to work with counsel to better evaluate the case. Often the mediator will identify problems counsel is overlooking. It would be highly inappropriate to identify such problems with the other party present as in trial or conference mediation. However, in caucus mediation, the mediator can speak to counsel in private with assurances that anything discussed will not be disclosed to the other side.[36]

The hearing could take eight hours. If a party wishes to use the process at the mediation, a thirty minute condensed version could be prepared. This might be done if an insurance carrier is not valuing the case properly.

Case Study: Plaintiff, who was following his wife on the open highway, witnessed the defendant, traveling over 100 miles per hour, hit her head-on, killing her instantly. The defendant exceeded alcohol limits when tested.

Plaintiff sued on his own behalf as a bystander and on behalf of his wife's estate. Because the case was venued in a conservative rural county which had never rendered a $1 million verdict, his attorney had a focus study done to be used at the mediation.

At the mediation, counsel used the thirty minute condensed version of the focus study as his opening statement. It demonstrated that of the ten jurors, only one felt a verdict would be under $1 million. The others would have given verdicts ranging from $1.3 million to $10 million. The insurance carrier then requested to view the entire eight hours and interview the moderator. It then paid $1.5 million.

35. A mock trial is conducted by one side for its own benefit. *See* CALKINS & LANE, *supra* note 4, § 1.02[C][5]. Long used to prepare counsel for trial, it is now used as part of the mediation process.

The attorney's office conducting the process will provide counsel and a client for the other side. A jury is impaneled and hears the case. Live witnesses are examined and cross-examined; documents are offered as evidence; and the jury is instructed. After the jury renders a nonbinding verdict, the party can question the jurors and learn the reasons for their verdict.

The drawback with this mechanism is that the results can be misleading. Unsophisticated plaintiffs hearing a large verdict, for example, might harden their positions and not accept a realistic offer.

Case Study: Plaintiff, a mother, witnessed two of her babies killed when a truck hit her vehicle in a blizzard. She had stopped on an interstate highway when a semi truck jackknifed in front of her. While removing one child to the warmth of the truck cab, she saw a second semi truck hit her car going forty miles per hour. She sued as a bystander and for the estate of her two babies.

Plaintiff's counsel conducted a mock trial at his office before the mediation. The mock jury returned a verdict of $13 million. When the insurance carrier of the errant truck offered $3 million, she rejected it as an insult. Ultimately, the jury found that the plaintiff was twenty-five percent at fault for driving in the blizzard, and the trucker who killed her babies was forty percent at fault. The trucker's share of the verdict was $550,000. She left over $2 million on the table.

36. *Case Study*: Fifteen gasoline stations and retail stores sued six defendants

2. *Use of Polygraph Tests*

Of course, polygraph tests cannot be used in civil or criminal trials because of their vulnerability for error. But they can be used in a mediation with great success. When parties are stating diametrically opposed things such that one must be prevaricating, the introduction of the polygraph test is quite effective. Counsel representing the parties will quite naturally believe that their clients are telling the truth. Few lawyers will intentionally allow their clients to perjure themselves on the witness stand.

Because it is in the interest of all concerned to learn the truth, counsel will generally agree to allow their clients to be tested. When the parties are confronted, both will generally agree to the test, but before it is given one will back down. The excuses are the same—I get nervous, I am sick, polygraph tests are not reliable, or the tests are not admissible in evidence. The other party will readily agree to take it and make arrangements to do so. Once this scenario is played out it is quite clear who is lying, and the deck is cleared to move forward with the mediation.[37] Most times, the test

who were licensed by the State of South Dakota to operate retail casinos. The plaintiffs' theory was that the defendants conspired with the state to boycott them from receiving licenses to operate retail casinos in violation of sections 1 and 2 of the Sherman Act. The federal district court dismissed the case on summary judgment, which was affirmed by the Eighth Circuit Court of Appeals. Defendants then sued the plaintiffs for abuse of process and common law bad faith and sought to recover their attorney's fees spent in defending the original action. They sought $1.5 million plus interest.

At the mediation, the mediator pulled the attorney representing the claimants seeking recovery of the attorney's fees aside and pointed out that there may be a serious problem in sustaining a cause of action. The mediator noted the *Noerr-Pennington* doctrine, which is a First Amendment defense, permits a party to sue another so long as the suit is not objectively and subjectively a sham. *See* CALKINS & LANE, *supra* note 4, § 2.03[P]. That did not appear to be the case here in that the original plaintiff subjectively felt the claim against the defendants and the state was valid. Counsel accepted the mediator's evaluation of the case and encouraged the parties to accept the $450,000 offered by the other side. Such an evaluation could not have taken place in trial or conference mediation.

37. *Case Study*: Plaintiff was the chief financial officer of a small but highly successful corporation. The CEO of the company, according to her pleadings, insisted they have an affair, and plaintiff acquiesced when the two went on business trips. Both were married. At some point, plaintiff insisted that the affair had to cease, but the CEO persisted. Plaintiff then quit her position and threatened suit under Title VII of the Civil Rights Act for constructive discharge and sexual harassment. She demanded $800,000.

At the opening session, the CEO insisted that the liaison was consensual and that they had been having an affair for two years before plaintiff began her

is not given once it has been determined who will not take it.

The tests can have probative value in situations where a party believes that the other is simply lying. For example, in childhood sexual abuse cases, the defendant (a church, the YMCA, a school) may believe that the alleged victim, now an adult, is prevaricating for purposes of financial gain. Often the abuser is no longer available to deny the charges, so a test can be offered only to the plaintiff. If the plaintiff passes the test, all will know the charges have validity. If not, the case should be dropped.[38]

3. *Restructuring a Mediation Involving Multiple Defendants*

A mediator, faced with multiple defendants, will have to create a new

employment. Plaintiff's attorney stormed out of the opening session of the mediation, stating he would not listen to such lies.

The mediator approached both attorneys and suggested that the parties be given polygraph tests. He explained that one of the two would refuse to do so. The proposal was made and both parties agreed to take the test. Arrangements were made. The night before the tests were to be given, plaintiff backed down, explaining that she was too nervous to be tested and that in any event the tests were inadmissible in evidence.

Plaintiff's counsel, recognizing that his client was prepared to perjure herself, confronted her, and she admitted the falsity of her statements. He directed her to settle, inasmuch as he would not permit her to perjure herself on the witness stand. The case settled for $300,000—the CEO recognized that he had a duty to cease his harassment when plaintiff tried to end their affair, so plaintiff's claim still had some value.

38. *Case Study*: Six children, ages nine to fifteen (three boys and three girls) and all from the same family, charged a cleric with sexually abusing them. The cleric was Caucasian and the children were African-American. One girl claimed she was raped at fourteen and became pregnant. The other females claimed they were also raped and the males alleged that the cleric engaged them in oral sex. The cleric was in his eighties at the time of the mediation and had dementia. The claimants were now in their forties and fifties. The defendant church questioned the validity of the claims.

Before the mediation, a DNA test was given to the rape victim's son and the cleric. It proved negative. This reinforced the church's position that the claims were bogus or inflated. The church offered $750,000 for the entire family. Plaintiffs' counsel then had plaintiffs take polygraph tests. Four were given—one male could not be tested because he was in the state penitentiary, and one female, because she was bipolar.

Of the four tests given, three came back positive. The tests established that they had been raped and sodomized by the cleric. One male could not pass, which gave more credibility to the other three victims. Recognizing that the family had been devastated by the cleric, the church settled with the family for $3 million.

format entirely. For example, it is difficult to caucus with all the defendants in the same room for several reasons. First, although they may have common strengths, generally there are strengths that are individual to a particular defendant. One defendant's strengths may implicate one of the other defendants. Second, it is inappropriate to ask each defendant its weaknesses in front of the other defendants because the answer may benefit one or more of them. This can be a serious problem if the defendants begin pointing fingers at each other at trial. Third, it is difficult to ask all defendants to identify each defendant's percentage of liability. The defendant most responsible will insist that each should pay an equal share of the settlement, while those less responsible will only agree to pay their allocated share. Fourth, to ask each defense attorney what he or she believes a jury will do, best case and worst case, is not productive. The attorneys will compete for who can be the most aggressive and firm because potential insurance clients are sitting at the same table.

The best approach with multiple defendants is to have one joint caucus at the beginning of the mediation. The parties can then discuss common strengths they all have versus the plaintiff. The mediator might ask what each believes a jury will do—best case and worst case. But the mediator should request each attorney write the response down on a piece of paper and not sign it. The mediator can then collate the responses and give the high/low ranges without anyone knowing who is the source of a particular range. The defendants can also make a global offer to settle the case, which can be conveyed to the plaintiff.

Thereafter, the mediator can schedule individual caucuses for each defendant. In the separate confidential caucuses, the mediator can ask about the weaknesses of each defendant. More important, the mediator can ask each defendant to allocate fault among all defendants. The mediator can collate this information, drop the percentage given to the party itself, and establish what defendants as a whole have allocated among themselves. Generally, the defendants will accept this group allocation. When the global settlement is reached with the plaintiff, each defendant is responsible for its share.

4. *Adjusting the Mediation to the Difficult Defendant: The Domino Approach*

During the course of a mediation, the defendant most responsible may seek to obstruct the process or hold the mediation hostage to get what it wants. The defendant may insist that each defendant pay equal shares. One tool to offset this is the domino approach. Rather than attempt to

settle all defendants, including the intransigent one, the mediator can inquire of the plaintiff whether it will settle with some but not all defendants. An effort can then be made to settle with as many defendants as are willing to be reasonable. The plaintiff might be encouraged to compromise on the first one or two settlements just to activate the domino effect. Normally, as each defendant settles, it takes its expert with it, which means the remaining defendants will have to get their own. Further, with fewer defendants, costs are shared by fewer and fewer parties.

One objection a plaintiff may have to this process is that it leaves an empty chair to which the remaining defendants can point. However, if the dominos begin to fall, the remaining defendants become fewer and fewer, and pressure rises for all to settle.

There is one caveat—the mediator must be certain that the target of the falling dominos is aware that plaintiff is seeking to settle with as many defendants as possible. If the defendant is not so informed, the surviving defendant or defendants may be quite angry and blame the mediator for not being neutral and fair.[39]

5. *Using the Domino Approach with Multiple Plaintiffs*

The domino approach can also be used with multiple plaintiffs making claims against a finite settlement pot. For example, when residents in an apartment complex have claims against a defendant third-party for fire damage to their personal property, the domino process can effectively

39. *Case Study*: Decedent and plaintiff were riding a motorcycle on Interstate 90 after attending the motorcycle rally in Sturgis, South Dakota. Traveling eighty miles per hour, the rear tire of the bike blew out, spilling the riders onto the highway. Decedent was badly hurt and rushed to a local hospital where he subsequently died. Plaintiff, decedent's girlfriend, survived, and she sued the tire company on her own behalf. Decedent's estate sued the tire company as well and also sued the two attending doctors and the hospital where he was treated, alleging medical malpractice.

At the mediation, the insurance carrier for the tire company insisted that each defendant pay one quarter of the settlement. The doctors and hospital believed that they had minimal exposure and refused to pay more than the costs of litigation. The tire company's carrier refused to settle.

The plaintiff eventually negotiated a settlement with the doctors and hospital for $25,000 each. The mediator informed the carrier that this was occurring but the carrier refused to compromise. When the malpractice settlement was finalized, the insurance carrier's representative was furious with the mediator and felt betrayed, even though the mediator had kept the insurance representative informed of the negotiations. After spending considerably more money, the carrier ultimately settled at a level commensurate with its liability and exposure.

be used. The insurer will have a certain fund available; however, a problem arises as to how it can be equitably distributed among the property owners. An effective approach is to have counsel for the plaintiffs designate those claimants most willing to compromise and seek a fair settlement from those who will hold out and try to obstruct the process. Those most willing to compromise are brought into the caucus room first, where the insurance representative makes an offer. Upon acceptance, the person is asked to leave the waiting room without disclosing the settlement and mentioning only that settlement was reached. The next claimant is brought in and, when settlement is reached, he or she leaves with the same instructions. After there have been a number of successful settlements, the more difficult claimants are brought into the room. By now, with fewer claimants, cost per claimant has risen and the claimant begins to feel pressured to settle. A certain degree of indirect peer pressure sets in.

6. *Pillow Talk*

Many times an injured party will be accompanied to the mediation by a spouse or family member. If the party is being unreasonable and the mediator senses the spouse or family member wishes to have the matter resolved because of the stress it is causing the claimant, the mediator might consider allowing the parties to sleep on the matter rather than pushing him or her to an immediate settlement. Doing this will allow the family members to talk to the claimant in a quiet setting and, if a spouse, while they are in bed. Invariably, the spouse or family member seeking resolution will win.[40]

40. *Case Study*: Plaintiff was a nurse working for an obstetrician. A patient was giving birth to her first child, and the doctor directed the nurse to keep the father out of the delivery room. Plaintiff became distracted and the father entered the room. After the delivery, the doctor took plaintiff to another room, screamed at her, grabbed her shoulders, and shook her, snapping something in her neck. Plaintiff sued the doctor, the doctor's medical group, and the hospital for $350,000. Ultimately, the medical group and the hospital dismissed the doctor, and he moved to another state.

At the mediation, the insurance carrier offered $200,000 and would not go further. The mediator sensed that the plaintiff's husband wanted to resolve the matter because it was affecting their marriage. The plaintiff was visibly angry and frustrated. Instead of pushing the plaintiff harder, he suggested that the couple think about the matter over the next two weeks, and then they would resume the mediation. He was certain that after engaging in pillow talk with her husband, plaintiff would settle. That is what happened, and the matter settled for $225,000.

B. *Being a Legal Architect, Designing New ADR Mechanisms, Building, and Problem-Solving in Mediation*

The many new ADR mechanisms that have been created to help the settlement process illustrate the creativity and innovation of counsel in mediation over the years. In each case, counsel created a new process to meet a special need of the parties. And as each process evolved, new mechanisms were created when mediation broke down.

1. *Summary Arbitration*

In complex or protracted cases where the facts are not really in dispute but the law is, the parties might consider summary arbitration. Rather than spend another million dollars in pretrial discovery, try the case over a two-month period, and have the case resolved on the law in an appellate court, the parties might instead agree to resolve the matter in summary form before an arbitration panel made up of three experts.

The procedure might be as follows:

(1) A panel of three experts approved by both parties will be selected to arbitrate the matter.

(2) Six days will be set for the hearing: the first day for motions, the second and third day for plaintiff's summary presentation, the fourth and fifth days for the defense to do the same, and the sixth day for decision of the panel.

(3) No live witnesses will testify and all documents, including depositions, will be admitted for consideration by the panel.

(4) The panel will make its decision on the sixth day without a written opinion. If liability is established, a date will be set to fix damages.

(5) There will be no appeal.

Thus, at a fraction of the cost and minimal amount of time expended, a matter could be resolved.[41]

41. *Case Study*: Plaintiff, a publisher of a local yellow pages directory, sued defendant, a regional telephone carrier which sold a regional directory. Plaintiff alleged that defendant entered the local market to drive plaintiff out of business, thereby exercising its monopoly power in violation of Section 2 of the Sherman Act. The case entered mediation and the plaintiff rejected defendant's initial $1.2 million offer. Each side faced another $500,000 in pre-trial discovery costs, which the defendant could afford but the plaintiff could not. Although the facts were not in dispute, the issue of whether the facts established a viable antitrust claim was. The

2. *European Arbitration*

Like summary arbitration, European arbitration was created in order to minimize costs. It permits an arbitrator to do his or her own discovery, question witnesses, request documents, and make inquiry of the parties. In other words, the fact gathering is done by the arbitrator rather than by the parties.

Once the facts have been collected, the arbitrator writes up his or her findings of fact and submits them to the parties for review. They are asked to make any changes they wish, so long as they both agree. The parties then agree to as many findings as they can, and those not agreed to become the ultimate findings. Closing arguments are heard and the arbitrator enters his or her award.[42]

The benefits of European arbitration are: (1) there is considerable savings in costs because formal discovery is avoided; (2) the process eliminates the need for a formal hearing that can also be costly and consume considerable time; (3) the arbitrator is more sensitive to the availability of the parties and tries to be accommodating with his or her requests; (4) the process heavily involves the parties so that they have more control over the ultimate outcome; and (5) the arbitrator is always sensitive to settlement possibilities as he or she works with the parties.[43]

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parties expected discovery to take another year. A two-month trial was set in federal court with an appeal to the Ninth Circuit Court of Appeals all but assured.

When the initial mediation failed, the mediator suggested that the parties devise a mechanism to resolve the dispute short of trial. They agreed to set up the following summary format:

First, the parties would agree on the selection of three arbitrators experienced in antitrust law.

Second, all evidence would be offered in summary form by counsel. Expert reports would be admitted, but there would be no live testimony.

Third, on the first day of the hearing the arbitrators would consider all motions. The second and third days would permit counsel to present plaintiff's case in summary form. On the fourth and fifth days, defense counsel would do the same. On the sixth day, the arbitrators would render their decision without a written opinion. There would be no appeal.

Both parties agreed to the format and began the six-day hearing. The panel ultimately ruled for the defendant, a result which the courts would probably have reached three years later—but only after the parties had spent an additional $1.5 million. In the end, the matter was resolved within four months of mediation.

42. *See* CALKINS & LANE, *supra* note 4, § 1.02[D][3][j] (describing the procedure utilized in European arbitration in greater detail).

43. *Case Study*: Partners in a law firm had a dispute, and one left the firm.

3. *Rapid City Arbitration*

Rapid City arbitration was also created to meet the exigencies of a particular situation. An arbitrator heard two cases involving the same insurance carrier, and in each his award exceeded the high parameter set by the parties. To his surprise, he was asked to arbitrate for the insurance carrier a third time. This time he approached the arbitration in a different way, creating Rapid City arbitration.

In Rapid City arbitration, a matter is heard as in any arbitration. The parties offer their evidence, witnesses testify, and counsel make oral arguments. At the close of the case, the arbitrator sits down with counsel and discusses his or her reaction to the evidence. The purpose is to clear the air of any obstructions to settlement. The theory is that if counsel understand that there might be problems with their cases, they will more readily encourage their clients to compromise. Of course, in doing this the arbitrator does not disclose the ultimate resolution of the case.

After completing this process—and before announcing any award—the arbitrator returns the case to the parties for one last effort to settle. If the case settles, this becomes the arbitrator's award. If not, the award is disclosed.

He took with him a number of contingency fee cases, some of which the law firm had advanced a considerable amount in costs. Subsequently, the partner leaving received a substantial check in one case and deposited it in his own bank account rather than with the firm. He then used the money to begin his own firm. The remaining partners were furious at this and reported him to the state ethics committee.

The departing partner requested mediation be used to settle the matter. The firm refused mediation but said it would agree to arbitration. The arbitrator recognized the anger that had been generated and therefore suggested European arbitration. He explained the process and all agreed:

Rather than hire counsel and engage in extensive pre-arbitration discovery, he suggested he would do his own discovery.

To make the process less intrusive, the arbitrator stated he would work at the parties' convenience so as not to interrupt their practices.

After speaking with the attorneys about the matter and reviewing documents each side presented to him for review, he made preliminary findings which he submitted to counsel for review. They were asked to make any changes they wished so long as they both agreed.

He suggested that a single, neutral certified public accountant (CPA) be retained rather than one on each side. This would also save considerable costs.

He then held closing arguments and asked each to make a final offer.

Before the CPA was actually retained, the arbitrator suggested a settlement figure that both sides accepted. The costs of the arbitration were minimal and the matter kept confidential.

The rationale behind Rapid City arbitration is that by clearing some of the obstructions to settlement, the parties are more likely to compromise. And if the parties settle, they will feel much better about the outcome than if it were imposed upon them.[44]

4. *Fixed High/Low Arbitration*

Fixed high/low arbitration was also created to meet a special need. When damages are substantial but undisputed and liability is seriously contested, the parties can negotiate the amount of damages and then arbitrate only liability. If liability is found, then the high damages amount is awarded; and if no liability is found, the low. Because damages have already been resolved, the arbitrator will not consider them.

There are several benefits to this process. First, the costs of pretrial discovery concerning damages are avoided. When damages are substantial, these savings can be considerable. Second, by eliminating the issue of damages, the hearing is significantly shorter. Third, by negotiating the damages, a defendant is assured that a jury will not enter an excessively

44. *Case Study*: Defendant was a medical doctor who had recently graduated from medical school and was heavily in debt. He worked day and night to pay his bills, leaving little time for his wife and four children. Frustrated, his wife insisted that the couple travel to Minneapolis on their anniversary.

The couple checked into a hotel and ate at an upscale restaurant for their anniversary dinner. After several hours and much wine, they decided to have nightcaps at a bar before retiring for the evening. Standing at the bar, the defendant argued with the bartender, who called a uniformed off-duty police officer to escort the defendant out of the bar. When the officer approached, the defendant hit him in the jaw, breaking it. The officer maced him, wrestled him to the ground, took him to the police station, and booked him. After several hours in jail he was released on bond.

The defendant was reported to the state medical board and ordered to undergo treatment for alcoholism. He resolved the criminal charges with a plea to a lesser charge. The police officer then sued the defendant, demanding $200,000.

The matter went to arbitration. After the parties rested, the arbitrator sat down with the parties and counsel to review the evidence. He explained that the defendant was clearly liable; however, the bartender shared some of the blame since he provoked the defendant. He also added that he would not award punitive damages since the defendant had been punished by his guilty plea, the reprimand of the medical board, and the adverse publicity in the local paper.

The arbitrator then returned the case to the parties, and in one hour they resolved the case for $45,000 (the arbitrator would have awarded $75,000). The parties arrived at this figure because that was all the defendant could receive through a second mortgage on his house. Any amount more than that would have forced him into bankruptcy, and the police officer would have received nothing because secured loans would have had priority over his judgment.

high verdict. As one insurance adjuster stated, it acts as an insurance policy on damages. Fourth, when liability is seriously contested, the plaintiff is assured that he or she will at least receive something—the costs of prosecuting the case.[45]

5. *Baseball Arbitration*

Parties have even included baseball arbitration in the ADR arsenal. Essentially, when a player's salary is in dispute, the player and major league ball club can agree to arbitrate. This form of arbitration permits the ball player to demand any salary he wishes to receive, and the club to set any salary it wishes to pay. After a full hearing, the arbitrator then must select one figure or the other as his or her award.

This same process has been adopted in civil arbitration. A plaintiff is permitted to make any demand he or she wishes and the defendant any offer. Because the arbitrator must choose one or the other and cannot

45. *Case Study*: Decedent was a very successful businessman earning from $400,000 to $500,000 per year. He and his wife lived very comfortably in the nicest area of Indianapolis, Indiana. They belonged to a prestigious country club. The decedent became interested in motorcycles. He bought one, and much to the consternation of his wife, he rode with his motorcycle friends on weekends. They were not of the country club set.

One summer, five of his friends decided to ride to Sturgis, South Dakota, for a rally, and they invited decedent to join. He did. Riding through South Dakota they came upon twenty-five miles of highway being blacktopped. One side of the road had been completed, but traffic was still required to travel on the other. The six riders came upon a farmer pulling his combine at nineteen miles per hour. Becoming anxious, the group drove up on the blacktop and around the farmer. When it was decedent's turn he did not negotiate the ridge created by the new blacktop, his front wheel slipped, and he was thrown to the ground. He was not wearing a helmet, and he died of a head injury.

Decedent's wife, on behalf of his estate, sued the contractor for inadequate signage and failure to bevel the blacktop despite its knowledge that motorcyclists would be going to the rally and would need a safe environment for their bikes.

Pretrial discovery had not yet begun when the parties agreed to mediate. The wife, on behalf of the estate, demanded $5 million and the insurance carrier offered $50,000 on the ground that liability was lacking. The mediation failed, but the mediator convinced the parties to use fixed high–low arbitration. After serious negotiations, with the mediator working with the parties, they agreed to set a high of $2.5 million and a low of $150,000. The carrier agreed to the low to get the plaintiff to reduce the original demand. It recognized that if liability were found, the jury would have to award an amount near $5 million because the decedent was only forty-five years old.

Ultimately, the arbitrator found no liability and the $150,000 became the award.

make an independent decision, it forces the parties to be very realistic in the figures they choose for fear that the arbitrator will select the other. In fact, during the hearing the parties can repeatedly change their offers, depending on how they believe their evidence is being received. Because the parties must be realistic when using this process, it often forces them closer together so that on occasion they might settle the matter before an award is made.[46]

6. *Hybrid Baseball Arbitration*

Another unique form of baseball arbitration has evolved in complex or protracted cases where there are multiple issues, and not just damages, to be decided. Major public utility proceedings might adopt such a procedure. Here, the arbitrator is informed of the positions of the parties on each issue to be resolved. The arbitrator is then required to select one party's position or the other's and cannot reach a compromise or independent conclusion. This requires the parties to take realistic positions on each issue out of concern that the arbitrator will select the other's position. This has the effect of forcing compromise.

The benefits of the procedure, particularly in public utility cases, are: (1) rather than holding months of hearings with live witnesses and making findings of fact and conclusions of law, the arbitrator depends on the presentation of counsel to explain and argue their clients' positions, which can be done much more efficiently over considerably shorter periods of time; (2) the costs of such a process are dramatically less than those incurred in full-blown utility hearings; (3) more responsibility is placed on counsel and the parties to be realistic in their appraisals and presentations of their positions; (4) the record presented to a public utility commission

46. There is another format of baseball arbitration that has evolved. Plaintiff can select any figure he or she wants for a demand and the defendant can do the same for its offer. The arbitrator is informed of neither. The hearing is held and a tentative award is made. If the award is more than the middle between the demand and offer, then it is raised to the higher figure. If below, then lowered to the offer. If it is half way, then that becomes the award.

For example, if plaintiff's demand is $100,000 and defendant's offer $20,000, the middle point is $60,000. If the arbitrator's preliminary award is above $60,000, the award becomes $100,000, if less, then it becomes $20,000. During the course of the hearing, plaintiff may decide his or her evidence is not being received as expected. Plaintiff may, therefore, wish to lower the halfway point. By reducing the demand to $80,000 the midpoint becomes $50,000. Defendant may then wish to raise the midpoint, so it will raise its offer to $30,000 which increases the midpoint to $55,000. This process can facilitate settlement.

for review is considerably shorter and more easy to review; and (5) the time to resolve difficult and complex matters is shortened by months or even years.[47]

47. *Case Study*: On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996, which, for the first time, opened local telephone services to competing telephone carriers. *See* 47 U.S.C. § 251 (1996). The Act required the existing local telephone monopoly to negotiate directly with telephone companies seeking to compete to provide an interconnection of services between them. If the companies were unable to agree on the terms of the interconnection agreement, they were required to submit the matter to arbitration. *Id.* § 251(c)(1).

In some states, the form of arbitration used was a modified baseball arbitration. The parties were required to settle as many matters as they could and then submit those issues which were not resolved to an arbitrator for final decision. When submitting unresolved issues to the arbitrator, however, the parties were required to state their best offer on each issue. The arbitrator was then required to select one party's position on each issue. The arbitrator was not permitted to make an independent determination. Because there were multiple issues to be decided, both sides were likely to win on some.

In one state, a competing carrier sought to establish an interconnection arrangement with the existing regional carrier. The parties negotiated for several months, with some fifty issues remaining unresolved. The carrier seeking to enter the market invoked the arbitration provision of the act.

Prior to the first day of arbitration, the two parties resolved all but sixteen of the issues. As the three-day arbitration hearing progressed, the arbitrator identified the issues most bothersome to him. For several, he negotiated a resolution between the parties. He also gave tentative rulings on several other issues, which immediately prompted further compromise and resolution. By the time the arbitration hearing was completed, there were only six unresolved issues that the arbitrator took under advisement. Upon final briefing, these issues were clearly defined and each party submitted its best offer. The arbitrator was only permitted to adopt one position on each issue as the basis of the award. The award was reviewed by the state commission, which affirmed three of the issues and modified the other three.

Had this matter been litigated before an arbitrator with the parties taking traditional adversarial roles, the process would have taken considerably longer, and would have incurred much higher costs, for several reasons. First, there would have been many more issues to decide because there would have been no incentive to compromise—by not conceding an issue a party just might win it. Second, rather than presenting streamlined cases, counsel would have presented live witnesses who would have been subject to lengthy cross-examination, thereby greatly increasing trial time. Third, during the hearing, the arbitrator would have been subjected to considerably more advocacy from counsel with little or no opportunity to obtain compromise from the parties. Fourth, each side would have presented its wish list, rather than more reasonable positions, which would have made the fact-finder's job that much more difficult. Fifth, to prepare an award based on independent findings of fact and conclusions of law would have taken considerably longer to complete. By allowing the arbitrator to concentrate on only six critical issues, rather than a full spectrum of issues, the quality of his work was much higher and the chances of error were substantially

7. *Car Dealership Mediation*

A unique mediation process has been devised for car dealerships when they are having difficulties with a car manufacturer. A panel of three mediators is set up—one mediator is the owner of another car dealership, a second mediator is from the manufacturer, and the third mediator is selected by the other two and presides at the mediation. After the opening session when both sides set forth their positions, the parties are placed in separate rooms and the caucuses begin. When caucusing with the car dealer, the car dealer mediator conducts the sessions, and when caucusing with the manufacturer, the manufacturer mediator conducts the process. The panel ultimately seeks compromise and may even suggest a settlement figure or other settlement possibilities. The panel cannot, however, impose a settlement on the parties.

8. *Modifying Caucus Mediation: Mediation/Arbitration*

Not only do the parties have flexibility in crafting an ADR mechanism, but they also can alter the process as the parties' needs change. For example, mediation was expanded into mediation/arbitration because of the needs of the insurance industry in Chicago. Not satisfied with mediation results (too many cases were not settling and carriers had to incur the additional costs of retaining counsel and going to trial), insurance carriers pushed for arbitration. Plaintiff attorneys were reluctant to give up jury trials for arbitration. A compromise was worked out which satisfied both—mediation/arbitration. A matter was first mediated and, if settlement was not reached, the mediator switched hats and became an arbitrator and entered a binding award. This satisfied the carrier because it was assured that the matter was resolved and costs contained. It satisfied plaintiff's counsel because a good faith effort was made to settle the case through mediation.

The process went through two more major changes, each dictated by necessity. First, plaintiffs' counsel found that they risked receiving nothing in the arbitration phase of the case, even when the carrier offered something in the mediation phase. After several defense verdicts were handed down, plaintiffs' counsel were reluctant to use the process. This was corrected by placing high and low parameters on the arbitration phase. The parties set a negotiated figure above which the arbitrator could not go and another figure below which he or she could not go if no liability was

reduced.

found.

Second, the process was changed once again when it was found that neither side was willing to candidly disclose the weaknesses in their respective cases or the worst result they anticipated in front of a jury. This was because they were always concerned that the matter would go to arbitration. This was corrected by requiring that the plaintiff make a formal demand and that the defendant make a formal offer. The mediator/arbitrator was required to select one figure or the other and could not make an independent determination. As a result, the parties could not benefit by holding back at the mediation phase of the case because they controlled what their final demand or offer was. This had the effect of making the parties very realistic in setting their final figures. It also had the effect of pushing the parties close together out of concern that the mediator/arbitrator would select the other party's figure.

9. *A Hybrid Mediation/Arbitration*

When parties in a business wish to separate because they can agree on nothing, a hybrid form of mediation/arbitration might be used. First, the parties are placed in separate rooms. Second, the attorneys for the parties meet with the mediator and conduct a conference mediation. Third, each issue in dispute is raised and the attorneys negotiate a resolution. Fourth, when the attorneys tentatively agree, they present the proposal to their respective clients for approval. If they approve, they go on to the next issue; if not, they continue with the process. Fifth, if one or both of the parties rejects a proposal tentatively approved by the attorneys, the mediator/arbitrator meets with them and seeks to get agreement. And sixth, if the parties still do not agree, the arbitrator makes a decision and resolves the issue. Each issue is resolved either voluntarily or by the mediator/arbitrator.

The benefits of the process are several: (1) generally, counsel for the parties know what is in the best interest of their clients and participate in the process without the emotional baggage of the clients; (2) the mediator's goal is to get the attorneys to agree on each issue and then rely on them to get agreement from their clients; and (3) the mediator/arbitrator will only interfere on rare occasions when either the attorneys cannot agree or the clients refuse to follow the recommendation of counsel. Through this process, difficult partnership disputes can be resolved even when straight mediation would fail. Also, by having counsel actively participate in the decision-making process, the resolution much more closely meets the parties' needs than would a straight arbitration award. In other words,

counsel has a much better grasp of the needs of the parties than the arbitrator can gain in a hearing.[48]

10. *Arbitration/Mediation*[49]

There are some situations in which the parties may elect to arbitrate first, and, before a final binding decision is made, allow the arbitrator to try to mediate a settlement. Such a mechanism might be used when the parties wish to assure that there will be closure to the dispute but are willing to give mediation a chance after the hearing is completed. If the arbitrator is unsuccessful in getting the parties to agree on a settlement, he will enter a binding award.

Utilizing this process, which is somewhat similar to Rapid City arbitration, a neutral arbitrator is selected to conduct a binding arbitration. The arbitration can have high and low limitations or use any mechanism the parties elect. At the conclusion of the arbitration, the arbitrator prepares a written award which is not disclosed to the parties. The award is sealed in an envelope and deposited for safe-keeping. The arbitrator then commences a normal mediation, acting now as a mediator. Standard mediation procedures are followed and standard mediation techniques are

48. *Case Study*: Two friends entered a repair business, servicing motorcycles, lawnmowers, and snowmobiles, among other things. They had one shop. Subsequently, they opened a second shop on the other side of town, and one of the partners moved to the new location. After several years, friction arose between the partners and they decided to split the business, each operating out of their respective locations. Great anger and frustration arose because they could not agree on the values to be placed on the assets being divided. The disagreement became so severe they could no longer communicate. Lawyers were retained to commence litigation. The lawyers, however, suggested they mediate first.

At the mediation, the mediator immediately recognized that the partners needed closure, that neither could operate their respective businesses as long as the matter was unresolved. He also recognized that if the mediation failed, a lawsuit could bankrupt both and they would lose their businesses. He therefore recommended a unique form of mediation/arbitration. The parties agreed and a new agreement was written up and signed, changing the process from a mediation to a mediation/arbitration.

Because the parties could not face each other, each was placed in a separate room. The lawyers and mediator then met in another room and in conference mediation they addressed each issue. Once the lawyers worked out an agreement on a particular issue, it was taken to the clients for approval. Then the next issue was addressed. If a client rejected a result recommended by counsel, the mediator/arbitrator met with the client and tried to persuade him to approve. On one issue he could not get agreement so he made a decision as arbitrator. Through this process, a difficult partnership dispute was resolved in one day.

49. *See* CALKINS & LANE, *supra* note 4, § 1.02[B][3][k].

utilized. However, because the award is sealed, anything disclosed to the arbitrator—now mediator—during the mediation cannot change that award. If a settlement is voluntarily reached, the arbitration award is destroyed and not disclosed to the parties. If a settlement is not reached, the award is disclosed and it becomes binding on the parties.

A disadvantage to arbitration/mediation is that there may be some additional costs incurred in arbitrating before mediating. However, the arbitration process will acquaint the arbitrator/mediator with the facts, which will assist him or her in the mediation phase of the case.[50]

50. *Case Study*: The arbitration/mediation mechanism was used in a complex copyright infringement case filed in federal court. A large international manufacturer of pumps developed a new concept for controlling the flow of fluids through its pumps. The concept required a sophisticated computer software program that could be burned into a computer chip and installed in the equipment. Facing a time bind because of an upcoming trade show, the company hired an outside programmer to assist its employee-programmers to complete the project. The program was completed in time but did not include all the functions the company desired. The outside programmer then proposed a radically different approach, which at first was considered risky, but was later approved. He utilized some of the original software and added many new modules to it. He completed the program in seven months at a cost of $200,000 to the company, including his compensation and expenses.

When the program was almost completed, a dispute arose as to the last two invoices he submitted for compensation. To gain leverage, he placed a copyright notice in the program, declaring that he was the sole owner of the copyright. When the dispute could not be resolved, the company filed a declaratory judgment action to establish that the company was the owner of the copyright. The programmer counterclaimed for copyright infringement and further asked that the company either be enjoined from using the program in its products or pay royalties. To avoid the heavy costs of litigation, which the programmer could not afford, he agreed to submit the matter to binding arbitration.

At the commencement of the arbitration, the arbitrator proposed the following: (1) the matter would be tried and the arbitrator would make tentative findings, (2) the arbitrator would announce those findings to give the parties an opportunity to submit additional evidence and case law, (3) the arbitrator would make an awards and seal it, and (4) a date would be set to mediate the matter before a final decision was announced. The parties agreed and the case was arbitrated.

At the conclusion of the one-day trial, the arbitrator announced the following tentative findings: the programmer was the sole owner of the copyright in question; because the company had paid a substantial amount of money for the development of the program, it had a nonexclusive implied license to use it as contemplated when the programmer was hired; the programmer, being the owner of the copyright, was entitled to sell or license it to others; and the programmer was entitled to additional compensation. The only issues the arbitrator left open were whether a confidentiality agreement, which the programmer signed, foreclosed him from licensing or selling his copyright for a five-year period, and what damages plaintiff should receive if it was

11. *A Hybrid Arbitration/Mediation Engineered for a Particular Case*

When there is a complex business dispute that involves many issues and which the parties are required to arbitrate, there are many problems with straight arbitration. First, there will have to be extensive discovery before the arbitration can commence. Second, the process will take months to complete, particularly if live witnesses are examined. Third, if the arbitrator is required to make extensive findings of fact and conclusions of law, it will add to the length of time required. Fourth, the costs of such a process will exceed considerably the costs of a courtroom trial and, therefore, the benefits of arbitration are lost.

An alternative to straight arbitration is a hybrid arbitration/mediation. First, counsel will outline the issues to be resolved. The order of complexity and difficulty will be established so that some of the easier issues can be addressed first. Second, rather than hold an evidentiary hearing on a particular issue, the arbitrator/mediator will mediate the issue, seeking agreement of the parties. Third, as agreement is reached on each issue, the arbitrator/mediator will address the next issue. Generally, the easier issues will be considered first to build some

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determined that defendant violated the copyright. The agreement barred the programmer for five years from disclosing certain trade secrets contained in the software program.

The arbitrator then sat down with each side and conducted a modified mediation. He pointed out to the company that as long as the programmer controlled the copyright he might be in a position to license or sell it to competitors. This would depend on how the arbitrator ruled on the trade secret issue. An unfavorable ruling on this issue would give the company's competitors access to advanced computer technology which, at the time, belonged only to the company. In speaking with the programmer, the arbitrator pointed out that there might not be a market for his copyright because computer technology becomes obsolete quickly, and the industry was already working on the next generation of software. The arbitrator further noted that if he ruled that the confidentiality agreement barred the programmer from licensing or selling his copyright for five years, it would be worthless.

Both parties recognized that it was in their best interest to compromise, and the case settled for $75,000. All concerned were satisfied with the result. In this case, having reached a settlement, a sealed final decision was never disclosed by the arbitrator. Sometimes, the key to the arbitration/mediation process is to reserve ruling on at least one major issue which, in the above case, was the issue of the effect of the confidentiality agreement. Neither side wanted to risk an adverse ruling on that issue.

One significant advantage to arbitration/mediation is that when the arbitrator commences the mediation phase of the process, he or she knows what the outcome will be if he or she is required to disclose the sealed award.

momentum of success. Fourth, if the parties cannot agree on a particular issue, the arbitrator/mediator will meet alone with the attorneys for both sides and ask their counsel on the issue. The arbitrator/mediator will make a strong effort to get consensus among the attorneys. If he or she is successful, this will generally be the decision the arbitrator/mediator will make. If the arbitrator/mediator cannot get consensus among the attorneys, he or she will make a decision on the issue as an arbitrator's award. Fifth, as issues are resolved it places more pressure on the parties to keep moving forward and keep control of the process, rather than being forced by the arbitrator/mediator to accept a result which might not be in their best interest.[51]

51. *Case Study*: Two brothers built a successful real estate construction business. Wishing to pass on the enterprise to their sons, many problems arose, not the least of which was that the sons could not work together. It was therefore decided to divide the business between construction (Brother *A*) and real estate (Brother *B*) and to seek approval from the Internal Revenue Service (IRS) for a divisive reorganization. Without IRS approval, there would be substantial tax consequences.

After months of haggling, the sons could agree on very little. Rather than commence litigation, which would undermine the divisive reorganization plan, the parties decided to arbitrate the entire matter.

The following issues had to be resolved:

- Valuation of the construction business and real estate business as separate entities;
- Valuation and division of industrial, commercial, and residential real estate holdings;
- The new name each business would use;
- Valuation of personal property and division thereof;
- Equalization of key-man insurance carried for the benefit of each brother; and
- Rate of commission each would receive in selling real estate owned by the other.

An arbitrator was appointed, and the first thing he suggested was that they use arbitration/mediation. He gave several reasons. First, items the parties could agree on should be resolved immediately. As arbitrator/mediator, he would informally help in the process. Second, it would be extremely expensive and time consuming to formally arbitrate each issue in dispute. Third, by working together in mediation, the parties would create a better atmosphere to maintain peace within the family. The parties agreed. The issues in dispute were resolved as follows:

1. *Valuation of construction and real estate business*: An outside CPA was retained to set the value of the construction business belonging to *A*'s family and the real estate business belonging to *B*'s family. The value placed on the construction business was accepted, but the value of the real estate business became a serious obstacle to resolution. Family *A* valued the real estate business at $1 million and Family *B* valued it at $350,000. To the surprise of everyone, the CPA valued it at $180,000. This created a major barrier to resolution. The arbitrator/mediator decided

to leave this item last and resolve the others. His thinking was that if all other matters were resolved, there would be sufficient momentum to gain compromise on the last major item rather than lose the entire settlement.

2. *Division of real property (industrial and commercial)*: The real property was divided by *A* and *B* each indicating what property he wanted outright. When the two lists were compared, there was bartering to balance the accounts. This took approximately six hours, with the arbitrator/mediator hardly participating. His only function was to value one building, which was going to *B* and which *A* had valued higher than *B*. Wearing his arbitrator hat, he made a decision which both sides accepted. He also participated as mediator concerning whether a second building was going to *A* or *B*. Neither party wanted the building. It was finally decided that *B* would take the building with an easement and some land to create a parking lot. The arbitrator/mediator did not have to rule on the matter as arbitrator.

3. *Division of real estate (residential)*: There were a substantial number of lots, both improved and unimproved. The parties flipped a coin and the winner chose first. Thereafter, they alternated until most of the property was taken. The value used on the property was assessed valuation. Three pieces of property remained and it was agreed to put them on the market for sale, with the proceeds being split. The arbitrator/mediator did not have to intercede in any way.

4. *New names to be used by* A *and* B: The parties were able to work this out amicably.

5. *Key-man insurance*: There was a disparity in the insurance coverage on the brothers because *A* was nine years older than *B*. For this reason, the same premium purchased considerably more coverage for *B* than *A*. The arbitrator/mediator actively participated in resolving the difference.

6. *Commissions*: Pursuant to an earlier agreement, the commission that each was to receive for the sale of property belonging to the other was set. A dispute arose as to one piece of property that was being developed. An agreement had been entered giving B a higher commission than previously agreed to. On this issue, briefs were submitted and the arbitrator/mediator made his decision. This matter, however, in no way delayed the overall resolution of the differences.

7. *Revisiting the valuation of the real estate business*: Acting as mediator, the arbitrator/mediator pointed out to *B*, who benefited immensely from the low valuation placed on the real estate business by the CPA, that *A* was most unhappy and was contemplating filing legal action in court reviewing the valuation. Although not likely to succeed, *A* could hold up the divisive reorganization for a year or more. *B* was quite anxious to complete the division immediately so that he could commence work on a number of projects. If the reorganization was held up, these projects could be indefinitely delayed. The arbitrator/mediator therefore pointed out that there was additional value in resolving this issue. In confidence, he explained to *A* that he did not believe he had the authority as arbitrator to set aside the CPA's valuation, even though it was low, for two reasons: first, he was not qualified to review the work of the CPA, and second, the parties agreed to be bound by the valuation set by the CPA. After hours of mediation, the parties agreed on a compromise figure and the division was completed.

What made the arbitration/mediation so successful was that it forced the parties to negotiate with each other, rather than each spending time trying to convince the

12. *Binding Mediation*

Mediators and counsel have even crafted a unique ADR mechanism called "binding mediation." The process at first blush seems contradictory. By definition, and certainly by tradition, mediation is voluntary and nonbinding. However, the parties can use the mediation process and by agreement make it binding.

In binding mediation, the mediator will conduct a traditional mediation, including joint sessions, private caucuses, and the transmission of demands and offers between the parties. If settlement is not reached, the mediator will decide the matter by reaching a fair settlement figure.

That award could be quite different from an arbitrator's award, which must reflect what the facts and law establish and is more restrictive in what the decision maker may consider. In binding mediation, the decision maker can consider other factors in addition to the facts and law of the case, such as: (1) the costs of litigation if the case had to be tried before a jury and appealed; (2) the relative risks of litigation with respect to liability and damages if the case were tried; (3) the time it will take to get to trial; (4) the possibility of an appeal and the additional costs and risks involved; (5) the time value of money; (6) the impact of resolution now rather than the stress and uncertainty of completing discovery and trying the case; (7) the opportunity of the parties to incorporate creative terms into the final resolution; (8) the high/low parameters, if any, to which the parties have agreed (should they consent to disclose this to the decision maker); and (9) the collectability, in light of the passage of time, of any judgment entered by a court of law. In other words, the final figure in binding mediation could be quite different than an arbitrator's award.

In addition, in binding mediation there is great procedural flexibility. The decision maker can request more information, documentation, or discussion, and the parties and counsel can more actively participate in the process than in straight arbitration.

arbitrator to rule in his favor. This required significant give-and-take that cannot occur in a straight arbitration or courtroom trial.

In addition, each party negotiated and mediated in good faith to avoid having the arbitrator/mediator enter a ruling that might not be in his best interest. It was this possibility that pushed the parties hard to a successful division. Peace was maintained, to a degree, between the two families.

III. INNOVATIVE SETTLEMENTS

A. *Engineering New Settlement Formats*

The architectural and engineering skills of the mediator are not limited to devising new and unique ADR mechanisms as discussed above. They also include crafting settlements that meet the exigencies of the parties. Again, the parties can include in a settlement anything they wish, even those items not involved in the lawsuit. This could include an apology,[52] a letter of recommendation, or naming a conference hall after the plaintiff. The possibilities are unlimited, and compared to the verdict of a jury in a court of law, mediation is not only more practical but also obsoletes the courtroom process to a degree. The following consider just a few of the possibilities.

1. *Spreading out Payments*

When a large verdict that would threaten the viability of a defendant is anticipated, a program can be worked out by way of a mediated settlement to make it feasible. Payments could be spread over several months, or even years, which could benefit both parties.[53] By spreading

52. *Case Study*: The decedent was killed while riding her motorcycle on an Iowa country road. She was heading south to St. Louis for her engagement party when she was hit by the defendant's pickup truck, which was driving north. At the mediation, her parents and fiancé were present, as well as the mediator and insurance adjuster. The decedent's family became visibly upset when the defendant did not attend. The mediator tried to explain that the defendant's attendance was not required because the adjuster would make the decision to settle.

With little progress being made, the mediator asked counsel to contact the defendant and see if he would attend. He was contacted, and he immediately came to the mediation. He entered the room with the family and in tears apologized for what happened. He explained that every day he thinks about what he did and that he would never get it out of his mind. The family, realizing that the defendant was also suffering, accepted the apology and immediately settled the case for a reasonable figure.

53. *Case Study*: Twenty-five victims of child sexual abuse sued their former pastor and church. During the mediation, the parties agreed on a settlement figure of $7.2 million, but the church indicated that it could not pay this amount upon settlement because it would face insolvency if it did. The claimants demanded that interest be paid and security provided if the payments were to be spread out over several years. The church replied it would not pay interest and it could not offer security for the payments. Its position was that if it could not make the payments it would have to seek bankruptcy protection and therefore any security commitment would be worthless. The only security it could offer was that it did not want to file bankruptcy. Recognizing that if they filed their lawsuits and did not accept a settlement, the church would be forced to file bankruptcy immediately, the claimants agreed to spread out the payments

out the payments, the defendant can budget the payments based on current income flow. For the plaintiff, it reduces the amount received in any one year, thereby possibly lowering taxes.

2. *Reverting Trust*

Another innovative procedure, which is particularly useful in class actions, is to create a reverting trust. In the mediation phase of the case, a defendant may be willing to put more money into the settlement if it knows that any amount not claimed by class members will revert back to it. For example, in large consumer class actions where the number of class members may not be known or the number of class members who ultimately will make a claim is unknown, the defendant might settle for a higher figure knowing that usually a high percentage of consumers will not make a claim,[54] since (1) the consumers are not interested in taking the time to fill out the required forms, and (2) most times there is not enough money available to make the effort worthwhile.[55]

over four years, and the church pledged to use its best efforts to pay.

54. If a reverting trust is part of the class action settlement, the procedure is as follows:

First, because the class is already certified and notice has gone out, the parties have some idea of how many class members there are. Based on the size of the class, the parties negotiate a settlement figure. This is submitted to the court for approval. Thereafter, the class is given notice of the settlement and members have an opportunity to object. After a hearing, the court enters a final order.

Second, attorney's fees are first deducted from the settlement fund and the remainder of the fund is transferred to the reverting trust.

Third, a proof of claim form is then sent to each class member to fill out and file with the court. After review, class members making claims are paid out of the trust.

Fourth, once all making claims are paid, the balance reverts back to the defendant.

55. *Case Study*: The defendant manufactured an appliance that proved defective. A class action, with a class consisting of approximately 3,500 purchasers of the appliance, was filed, and the matter was mediated. Plaintiffs' counsel ultimately demanded $15 million and defendant offered $10 million. The parties finally agreed on a settlement of $13 million with a reverting trust. The settlement was approved by the court and proof of claim forms were sent to the class members. Attorneys' fees of one-third of the settlement were approved by the court. Based on the year and make, claims ranged from $2,500 to $3,200. On the proof of claim form, claimants had to list the number of the appliances purchased, make, year, and other information.

In paying more than anticipated, the defendant was counting on twenty-five percent of the trust reverting back. As it turned out, nearly fifty percent of the trust reverted back.

3. *Escrow Account*

In settlement discussions, the mediator might determine that a defendant will pay more if a certain portion of the funds is used for specific purposes. For example, a church might pay more to a victim of sexual abuse if it knows that the funds will not be used to purchase drugs and alcohol. This safeguard can be accomplished by putting a certain portion of the funds into an escrow account. The funds can be earmarked for education, therapy, counseling, or personal needs. After a certain period of time, whatever is not used reverts back to the defendant.[56]

4. *Structured Annuities*

A person receiving a large verdict must consider how the funds are to be invested. Investing in stocks and bonds can be risky, and bank certificates of deposit and government notes are subject to a low rate of return. Further, any interest earned on such investments is subject to federal taxation.

56. *Case Study*: Plaintiff, a fourteen-year-old boy, sued a lawyer who failed to inform him about a two-year statute of limitations. Plaintiff had been sexually abused by a pastor, and plaintiff had been asked to testify at the pastor's criminal trial. He conferred with the lawyer in question, who was a criminal lawyer, as to what he should expect when he testified. The boy's father asked if they could sue the pastor and the church. The lawyer informed them that he was not a civil lawyer, but that when the criminal case was over, they could speak to another lawyer in the firm.

Because of numerous continuances in the criminal case, more than two years had passed when the father and his son returned to the lawyer in question. When informed that the statute of limitations had run, they sued the lawyer and his law firm for legal malpractice.

The defendants filed a motion for summary judgment on the grounds that there was no attorney–client relationship and that, in any event, a suit against the church would have failed because the church had no notice that the pastor was a pedophile.

At this point, the parties tried to mediate. The insurance carrier offered $250,000 and plaintiff demanded $1 million. The mediation failed, and the case went to trial. On the first day, however, the judge granted a motion for summary judgment and dismissed the case.

A second mediation was attempted. Plaintiff demanded $500,000 and the insurance carrier offered $50,000. The church was concerned about the welfare of the boy, who had become addicted to cocaine and later heroin, and made a proposal that, although not liable, it would put $100,000 cash into a settlement if the insurance carrier matched it. It also offered to put an additional $100,000 into an escrow account. The money would only be available for education, treatment, counseling, and living expenses for ten years. What was not used would revert back to the church. Each expense had to be approved by the appointed escrow agent. On this basis, the case settled.

Only by way of settlement can a party direct the defendant to purchase a structured annuity on his or her behalf and not be subject to a federal income tax on the income earned. The same tax advantage is lost if the funds are obtained through a jury verdict or are invested by the plaintiff directly. Such an investment thereby increases the percent of return because no tax is paid.

There are many advantages to structured annuities. First, structured annuities help people understand the value of money. With the lottery and casinos, many people lose a sense of what has value. The author has had a plaintiff refuse a million dollar offer because it was an "insult." Taking even $500,000 and structuring it over a period of years can provide real security to a person who has low earning capacity.[57]

Second, unlike other investments, there are no brokerage fees and there are no opportunities for brokers to churn the account.

Third, investments are made only with the most conservative and secure firms which have the highest ratings by national rating services, such

57. *Case Study*: Plaintiff lost her hand in an industrial accident. She was a single mother with three little girls, was on state and federal relief, and had never earned more than $1,200 in any one month when employed. She sued the manufacturer of a piece of equipment, claiming it was defective and caused the accident.

At the mediation, her attorneys announced that they would not settle for less than $1 million. After six hours, the defendant offered $500,000, and plaintiff demanded $950,000. The mediator suspended the mediation and scheduled a conference at the office of the plaintiff's attorney. He took with him a structured annuity based on a settlement of $650,000. The insurance carrier agreed to the settlement, but the plaintiff's counsel rejected it out of hand. The mediator, however, insisted that he be given the opportunity to present the plan. Counsel consented.

Of the settlement amount, $250,000 would be deducted for attorney's fees and costs. Of the remaining amount, $300,000 would be placed in an annuity which provided plaintiff $3,100 per month for life (with a three percent increase per year for inflation) with twenty years guaranteed (if she died before twenty years, the payments would continue to the children for that period). It also provided payments every two years from age fifty-five until age seventy-five (she was twenty-two at the time). This would provide her with a lump sum payment of $45,000 at age fifty-five, up to $170,000 at age seventy-five. It provided each of her three girls with payments of $15,000 per year for four years when they reached eighteen—presumably to go to college—and lump sum payments at ages twenty-five, thirty, and thirty-five. Finally, there were sufficient funds available for the plaintiff to purchase a house in rural Iowa for $75,000 and a used pickup truck that she desperately needed. When the plaintiff heard these numbers, she asked to speak to her attorney alone for five minutes. One hour later she accepted the offer, and the matter was resolved.

as A.M. Best, A+; Moody's AAA; Standard & Poor's AA; and Duff and Phelps, AA. Such investments are not subject to market fluctuations.

Fourth, there is total flexibility as to how a plan pays out—monthly, yearly, lump sum, or for a set number of years or life. The payments can begin immediately or be held until retirement age to act as a pension.[58]

Fifth, because the annuity, once set, cannot be altered or drawn on for any purpose, the party cannot squander the money in the first few years as so often happens. Likewise, friends and relatives cannot "borrow" the money for their own purposes. It protects the party from himself or herself.[59]

Sixth, the annuity is not subject to bankruptcy.[60]

Seventh, the annuity can benefit people with health problems because they have shorter actuarial life expectancies. Premiums are lower and income higher than parties with normal life expectancies.

Eighth, attorneys can also benefit by putting their fees into an annuity that will defer income until a later date. Although the attorney must pay income tax, it presumably will be at a lower tax rate because the income is spread out. This can be done even if the party does not use a structured annuity.[61]

Ninth, the structured annuity is ideal for handling funds to be received by children when they reach majority. Parents are most reluctant to allow children reaching majority to receive large amounts of money that they might be tempted to squander away without thought of the future. An annuity can be set up allowing certain funds to be paid out for college years and later when the young adult might get married (age twenty-five) and buy a home (age thirty or thirty-five). Another benefit of the annuity for children is that it avoids not only a tax on income, but also fees that must be paid for handling the estate. Likewise, annual reports to the court, which can also generate fees, can be avoided. And an insurance carrier

58. There is a plan called a payback annuity. For example, a woman, twenty-one years old, put $100,000 into a structured annuity which paid her $490.36 per month for twenty years. At the end of the period, she received back the $100,000. Her tax-free rate of return was 6.03%. *See* CALKINS & LANE, *supra* note 4, § 7.03[A][5].

59. *See id.* § 5.15[D].

60. *See* 11 U.S.C. § 522(d)(10)(E) (2006).

61. *See* I.R.S. Notice 05-1, 2005-2 I.R.B., *available at* http://www.irs.gov/irb/2005-02_IRB/ar13.html (clarifying that deferred compensation is not within the parameters of the Revised Internal Revenue § 409A).

might even pay more if a settlement for a child is put in an annuity, thus avoiding the risk of an irresponsible parent squandering the money without benefiting the child.[62]

B. *Building Noneconomic Provisions into the Settlement*

Flexibility of mediation is perhaps best demonstrated by the noneconomic conditions that can be facilitated in a settlement. The following are just a few that have been utilized.

1. *Keeping the Parties out of Court After a Divorce*

One of the most difficult aspects of divorce is that the parties constantly return to the courts to modify their decrees as circumstances change or to hold a party in contempt. A mediated divorce action can avoid this result. The parties can be asked to appoint a mediator/arbitrator that both trust and respect. As future disagreements arise or changes in the decree must be made, the parties can turn to the mediator/arbitrator to first mediate the matter, and if necessary to enter an award. In fact, parties have compromised in the initial divorce mediation just to get such a provision in the decree. With such a mechanism to avoid future disputes, the parties are assured that they will not have to return to court. They may not even have to have an attorney.

In child custody and visitation matters, the mediator/arbitrator could be a child psychologist whom both trust to decide future issues of visitation and child custody. Again, this kinder, gentler way to handle future differences is preferable to repeatedly returning to court and incurring costs of counsel. The stress level is also immeasurably reduced.

2. *Apology and Forgiveness*

More and more, mediators are seeing the impact that words of apology can have in a mediation.[63] If the mediator can encourage a

62. *Case Study*: Plaintiff, a three-year-old child, was sexually abused by the janitor of a low-rent housing complex. The child's mother sued on the child's behalf. The insurance carrier admitted liability but was not willing to offer much money because of its concern that the mother would squander it on drugs and alcohol. She was unmarried and slept with a different man each night. The case settled when the parties agreed that a structured annuity would be set up for the child, which would permit her to begin receiving funds when she reached eighteen years of age. The settlement also gave the mother $5,000 for loss of consortium.

63. *See* CALKINS & LANE, *supra* note 4.

defendant—even an insurance adjuster—to apologize, it can break the walls of intransigence and lead to resolution and healing. In some instances, the apology may be more important to a plaintiff than the monetary award.[64]

Forgiveness is the ultimate step in a mediation. If this occurs, there is resolution, conciliation, peace, and healing. Perhaps because of its religious overtones, it is more difficult for mediators to raise, and yet its impact is all pervasive.[65]

3. *Noneconomic Conditions that Change Behavior*

One of the best examples of creativity is the mediation format created for pastor sexual abuse cases. Three steps are employed. First, the healing segment is initiated to give the victim an opportunity to speak to a church official or person in authority. He or she is encouraged to vent and explain the injuries suffered over a lifetime. This could take five minutes or five hours, depending upon what the victim wishes to say. The church official only listens and does not respond other than to express empathy and concern. Defenses to the action are not discussed and the lawyers rarely

64. *See* Mark Bennett & Christopher Dewberry, *"I've Said I'm Sorry, Haven't I?": A Study of the Identity, Implications and Constraints That Apologies Create for Their Recipients*, 13 CURRENT PSYCHOL. 10, 11 (1994) (documenting a number of positive social consequences that result from apologies); Donna L. Pavlick, *Apology and Mediation: The Horse and Carriage of the Twenty-First Century*, 18 OHIO ST. J. ON DISP. RESOL. 829, 841–47 (2003); *see also* Barry R. Schlenker & Bruce W. Darby, *The Use of Apologies in Social Predicaments*, 44 SOC. PSYCHOL. Q. 271, 271–72 (1981).

65. The author has mediated over 800 child sexual abuse cases, and in only a few has the victim fully recovered. One such instance involved a forty-year-old man who, as a teenager, had been severely abused by his pastor for six years. His mother had abandoned him and the pastor took him in as a son. The pastor put a wedding ring on his finger and called him his wife. Yet the victim now was married, had three beautiful daughters, had a good job, and was living a normal life. Asked how he overcame the horrendous abuse, he answered that he had been able to forgive the pastor, who he recognized was a very sick man, and the church. And his recovery was complete.

The great South African leader Nelson Mandela, who was imprisoned as a terrorist for twenty-six years by the white South African government, invited his jailers to his inauguration as president of South Africa. Asked if he hated those who imprisoned him, he responded, "of course. . . . They took the best years of my life. They abused me mentally and physically. I didn't get to see my children grow up." TERRY MCAULIFFE, WHAT A PARTY! MY LIFE AMONG DEMOCRATS: PRESIDENTS, CANDIDATES, DONORS, ACTIVISTS, ALLIGATORS, AND OTHER WILD ANIMALS 164 (2007). He noted that they took everything but his mind and heart, and they would have taken those, too, if he did not forgive them. *Id.* That is the power of forgiveness.

say anything. The victim is heard without interruption.[66]

Second, after this initial session the noneconomic demands of the settlement are discussed. This might include setting up a committee of victims to meet with a high church official on a monthly basis to discuss concerns. It might include the church entity providing funds for support groups for victims. It might include some statement concerning pedophile pastors in a newsletter or other news outlet explaining what happened and alerting other possible victims to seek help. It might include a discussion of adequate punishment of the pastor, such as seeking criminal punishment, defrocking, or removing him from any setting where children are involved.[67]

Finally, monetary factors are discussed. Because both sides have such an investment in the process by this time, both are usually more willing to

66. One victim was given an opportunity to speak to the bishop in the opening session. The victim wore a coat and tie and flew from the East Coast. Although he had an excellent job, he was obviously suffering. He looked at the bishop and asked if he would like to know how angry he was. Without waiting for an answer, he opened his briefcase and pulled out a twelve-inch plastic tube. He took a smaller tube and fastened it to the bottom of the other, then took tape off the end of the longer tube and pointed a dagger at the bishop. He had no intent to harm, but rather wanted to make a point, and he did. His attorney convinced him to leave the dagger and not fly back with it, in view of the fact that if caught he would be jailed for committing a felony. However, his venting was therapeutic and his wife reported that he felt much better upon his return.

67. *Case Study*: In one case, thirty-seven men alleged that when they were boys they had been sexually abused by three clerics. The case was resolved when the church agreed to twelve noneconomic demands, which changed the modus operandi of the church. They included: (1) defrocking the clerics involved so they could no longer have access to housing or other facilities; (2) having a sexual misconduct policy instituted that would permit representatives of the victims to meet periodically with a church official to discuss current concerns; (3) having the bishop write a letter of apology to each victim and his family if requested; (4) suspending the pastor while an investigation is conducted following any allegation of sexual abuse; (5) having investigation of all sexual abuse incidents conducted by an independent investigative agency; (6) establishing a state hotline with telephone numbers posted around churches and schools that victims could use to report, in confidence, any perceived abuses; (7) publishing a public apology in the newspaper by the bishop addressed to the victims and their families; (8) providing Safe Touch education for children to help them identify sexual abuse; (9) training employees, volunteers, independent contractors, and clerics of the church to identify signs of abuse; (10) providing counseling for the victims and their families; (11) criminally prosecuting those offenders who could still be indicted; and (12) allowing no cleric to travel alone with children under the age of eighteen years, or to stay overnight with a child without a proper chaperone. The church agreed to all of the demands, with minor modifications.

compromise.

IV. CONCLUSION

Mediation is having a profound effect on the entire legal system. Those engaged as mediators uniformly recognize its value to society, to the profession and to the individual. Here for the first time lawyers are helping parties not only to resolve their differences, but also to find conciliation, peace, and healing. Being a peacemaker is indeed the highest calling in the legal profession and one of the highest callings in life.