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A NEW ROAD TO SUCCESSFUL CASE RESOLUTION: USING MEDIATION AND ARBITRATION IN TAX MATTERS

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Producing Better Outcomes: Increasing the Use of Alternative Dispute Resolution Techniques in Your Practice

Confidentiality Issues and Other Ethical Concerns in ADR Processes

Tips on Effective Representation in Mediation

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Producing Better Outcomes: Increasing the Use ofAlternative Dispute Resolution Techniques in Your Practice

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Lawyers' Ethical Obligation to Advise Clients about ADR

Lawyers are the gatekeepers of the adversaries' decision on how to resolve disputes in our society. Many legal scholars have recognized this fact and concluded that lawyers are obligated to advise their clients about appropriate dispute resolution at all stages of representation.[1]

Now this professional obligation has been explicitly recognized in the new ABA Model Rules of Professional Conduct, adopted by the ABA in February of 2002,[2] and is being considered for adoption, in whole or in part, by the various states.[3] Model Rule 2.1, Comment 5, "Offering Advice" states, "Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that constitute reasonable alternatives to litigation." Model Rule 1.4 deals with communication with clients and provides in section (b) that lawyers have a duty to provide sufficient information to a client to allow them to make informed decisions about their case. This includes information about alternative dispute resolution.

Many states already require the members of their bars either to discuss ADR options with their clients or to certify on their pleadings that they have done so.[4] Some federal courts have similar requirements. For example, in the Northern District of Texas, at least one judge requires that the

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[1] See, e.g., Frank Sander, *The Future of ADR*, 200 J. OF DISP. RES. 3; James Henry, *Some Reflections on ADR*, 2000 J. OF DISP. RES. 63. See also, Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorney's Duty to Learn about ADR and What They Must Learn*, 1999 J. OF DISP. RES. 29; See generally, Symposium on ADR and the Professional Responsibility of Lawyers, 28 FORDHAM URBAN L. J. 891-990 (2001).

[2] ABA Model Rules of Professional Conduct (February 2002), hereinafter referred to collectively as the "Model Rules" and individually as a "Model Rule."

[3] The ABA Model Rules of Professional Conduct became instantly applicable to most tax lawyers upon final adoption by the ABA, by virtue of Tax Court Rule 201, which adopts the Model Rules as the Rules of Professional Conduct by that Court.

[4] F. Sanders, *supra*, at 4. See, Elizabeth Plapinger & Donna Stienstra, *ADR in the Federal District Courts: A Practitioner's Guide*, 2 DISP. RES. MAGAZINE 7 (SPRING 1996). An example of such a policy is that of the Northern District of Ohio, who provided a summary of ADR activity to the Federal Judicial Center containing the following statement: "Obligations of Counsel. Attorneys are required to discuss the court's ADR options with their clients and must be prepared to discuss at the case management conference whether the case is suitable for ADR."

parties report on the advisability of alternative dispute resolution in the Joint Status Report[5], and another requires a statement as to "whether the parties are considering mediation or arbitration to resolve this litigation and, if not, why not".[6]

General Overview of ADR Processes Currently in Use in Federal Courts

Generally, ADR processes can be divided into two categories: those that are adjudicative or evaluative in nature (sometimes called rights based) and those that are facilitative and based on negotiation (sometimes called interest based). For those unfamiliar with the major ADR processes, an excellent summary, prepared by the Federal Judicial Center as Appendix A to its Guide to Judicial Management of Cases in ADR (FJC 2001) is reproduced at the back of this paper. A copy of the complete Guide can be downloaded from the Center at www.fjc.gov.

In 1995, the Federal Judicial Center published a report on the appropriateness of ADR in the federal court system. That report concluded that even though fewer than 5% of all cases filed in federal courts are tried, ADR can provide a satisfactory, and in some cases, a superior, alternative to trial by providing more process and opportunity to be heard.[7] The report found that when asked about their perception of the fairness of the process, litigants are generally dissatisfied with both judge hosted settlement conferences and attorney to attorney negotiations, the most common forms of non-adjudicatory settlements in 1995.

Other research has consistently shown that both trial on the merits and ADR processes garner high scores for fairness from litigants.[8] Satisfaction with the outcome and perceptions of fairness are especially important where the parties have ongoing relationships.[9] Nowhere is this truer than in the workplace. One study reports that respondents generally gave more favorable evaluations of their ADR experiences than their non-ADR litigation experiences. Specifically, 53% rated the results of

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[5] See, Judge Specific Requirements, Fitzwater, J., available at www.txnd.uscourts.gov.

[6] See, Judge Specific Requirements, Solis, J., available at www.txnd.uscourts.gov.

[7] SEE DONNA STIENSTRA AND THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS?, (FJC 1995) available for download at www.fjc.gov.

[8] *Id.* at 19-23. In particular, judge hosted settlement and so-called "secret attorney negotiations" fared the worst on the fairness scale. One speculates that this result derives from the fact that neither process involves direct participation by the parties themselves, leaving litigants to feel disassociated from the process. Both ADR and trial satisfy the client's need to tell their story, a substantial emotional factor involved in litigation. The authors conclude that the fairness perception is linked to this need to be heard.

[9] Jacqueline M. Nolan-Haley, *Lawyers' Ethics in ADR,* 28 FORDHAM URBAN L. REV. 891 (2002) at 898.

ADR more favorably than the results of litigation and 68% rated the process in ADR more favorably.[10]

Interestingly, the same researcher found a significant disparity between outside counsel and their corporate executive clients when it came to satisfaction with litigation; outside counsel was far more likely to be satisfied than were the clients.[11] Other researchers have consistently reported this increase in client satisfaction across all areas of the law and with all sizes of disputes.[12]

Selecting an Alternative Dispute Resolution Provider

A systematic method of choosing an ADR provider is something of a mystery to many lawyers. There is as much folklore among the Bar about choosing an ADR provider as there is about picking sympathetic juries. Attorneys must be prepared to investigate the qualifications of the prospective neutrals because qualifications and training vary widely across jurisdictions and across practice areas.[13] This paper will attempt to outline the basics of that inquiry, and improve the likelihood of a successful match.

First, determine if the professional trained for the procedure that you and opposing counsel have selected. Incredibly, many individuals accept engagements to mediate or arbitrate a matter without having any formal training in the process. This is tantamount to hiring a patent lawyer to handle an ERISA case. While the case may settle if an untrained neutral is used, the odds of settlement will increase exponentially with properly trained personnel.

Recognize also that "ADR" is not a generic service. For example, while some mediators are also trained as arbitrators, the majority of the ADR professionals are either trained as mediators or as arbitrators but not both. Likewise, if you are looking for someone to perform early neutral evaluation, you should look for a provider with experience and training in that technique.

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[10] John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation,* 5 HARV. NEG. L. REV. 137 (2000).

[11] John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEG. L. REV. 1 (1998).

[12] J. M. Nolan-Haley, *supra* at 901.

[13] S. Schmitz, *supra*, at 51. The ABA Section of Dispute Resolution has surveyed 52 state bar associations (including for these purposes, the Commonwealth of Puerto Rico and the District of Columbia Bar, ass herein referred to as "states" for simplicity) for minimum entry requirements under state law and found that 42 states do not restrict the dispute resolution practice to attorneys; that 10 states certify providers, 6 states register them and 2 states approve ADR providers. STATE & LOCAL BAR ALTERNATIVE DISPUTE RESOLUTION SURVEY 2001 (ABA SECTION OF DISPUTE RESOLUTION). It further found that 27 states reported that their state had mandatory training for mediators or arbitrators appointed by the court – that is, neutrals that were not selected by the agreement of the parties. 8 states require mandatory training for neutrals that are not court appointed. The number of required training hours reported ranged from a high of 94 in Puerto Rico to a low of 14 in Mississippi. The full report, with details by states, is available from the website of the ABA Section of Dispute Resolution at www.abanet.org/dispute.

Presently, there is a philosophical debate in the ADR provider community over whether the skills required of a successful arbitrator can co-exist with the mindset of a truly great mediator. There are many nationally known, well respected professionals who believe that those who both mediate and arbitrate end up as "Jacks of all trades, masters of none." Beside the difference in mind set, securing a professional who has undergone the appropriate training lessens the likelihood of ethical lapses, such as confidentiality issues and ex parte problems, and assures the parties that they have selected a person who is prepared for the contingencies that experienced neutrals know will always occur.

You should be comfortable asking a prospective neutral for their resume. Neutrals are accustomed to being vetted and their resume will provide you information you need to know. At a minimum, the resume should inform you whether the neutral is licensed to practice law, what ADR training they have attended, the rosters or panels where they are listed, and other information sufficient to apprise you of the types of cases the neutral has handled. Successful neutrals will be happy to provide a list of representative cases that they have handled or a list of counsel who has participated in a dispute resolution process with them. You should not be afraid to ask for this information, because it is normal in the ADR provider business to have your references and credentials checked.[14]

Minimum Educational Requirements

While there are no uniform minimum education requirements for ADR professionals across the jurisdictions, there are some generally recognized standards within the industry.[15] Additionally, many state and federal court systems have minimum requirements for court annexed cases – that is, requirements for those providers that the courts will appoint.

In many states, the court annexed standards have become a sort of *de facto* standard, imposing in Texas for example, an expectation of a 40 hour course in ADR, except that retired or former judges who are sometimes excepted from the training requirement. Texas Civil Practice and Remedies Code § 154.052 requires 40 classroom hours of DR training for neutrals appointed by state courts, with an additional 24 hours of training in family dynamics requires for suits involving the parent child relationship.

Both the Southern and the Western Districts of Texas maintain rosters of neutrals for use by both the courts and attorneys. The Southern District requires that providers listed on the roster must have practiced law for at least 10 years and must have a minimum of 40 hours training in dispute resolution techniques. Members of the Southern District Roster must additionally participate in at

[14] This advice is equally applicable to mediations involving in house IRS Appeals mediators. The Appeals mediators should be able to give you the names of the private attorneys for whom they have previously mediated.

[15] *Id.* 42 of the 52 jurisdictions surveyed had no training required if the neutral was not court selected and appointed. The local federal districts have a decided tendency to mirror state norms in how much training they require and when it is required.

least 5 hours of additional ADR training each year.[16] The Western District of Texas requires the neutral to have practiced law for at least 5 years and either completion of a 40-hour training program in dispute resolution techniques or be a former judge of a court of record in the State of Texas.[17]

The Eastern District of Texas does not maintain a roster but does have a court annexed mediation plan adopted as Appendix H to the local rules. The qualifications for mediators in the district are that the mediator be either: a retired federal judicial officer or a former state court judge who presided over a court of general jurisdiction; or an attorney licensed to practice for a least 7 years who has also completed a 40 hour program in dispute resolution training.

The Northern District of Texas has published a brochure on ADR, generally encouraging it without adopting a roster or specific requirements The brochure is available on the Northern District's website, www.txnd.uscourts.gov.

There is far less standardization in training for early neutral evaluation ("ENE"), than for mediation or arbitration, especially in those parts of the country where ENE is less popular. Some federal districts, such as the Northern District of California and the Western District of Missouri, utilize ENE extensively, and many provide training sessions for ENE as a court function and as a requirement for listing on the court's roster. Most people performing early neutral evaluation in Texas are sitting judges or are former judges.

It is also not unusual to find federal districts where a magistrate judge (who should not be the one assigned to hear your case) will be assigned to provide early neutral evaluation as a court function. Similarly, the Court of Federal Claims has recently adopted an early neutral evaluation program using its sitting judges in the role of evaluators.[18]

In some districts, ENE is mislabeled as "mediation". The most documented instance of this is in the state of Michigan. "Michigan Mediation" is a term used to describe a form of early case evaluation more like Early Neutral Evaluation than mediation.

Experience

The second consideration when selecting a neutral is their level of experience. This is not just a question of numbers of ADR procedures. Some mediators do a tremendously high volume of cases, particularly in the areas of small personal injury and collections cases. These professionals, while highly experienced in those types of cases, are probably not sophisticated enough regarding employee benefits to handle an ERISA case.

You should look at the neutral's resume to see what type of cases they have handled, either as an attorney or as an ADR professional. Unfortunately, there are some well-respected ADR training programs that assert mediation is a generic skill and that a good mediator can mediate any type of case. That is not true, particularly when you are dealing with the more complicated and technical areas of the law.

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[16] See S.D. Tx. Local Rule 20.

[17] See W.D. Tx. Local Rule CV-88.

[18] See General Order 40 and Appendix H to the Court's Rules.

Tax and ERISA issues are at the top of most lists of complicated and technical areas of the law. Patents, admiralty and government contracts matters are not far beneath them on those lists. The understanding of the subject-matter that is necessary for the mediator to truly probe the information that the parties are providing and to identify posturing and pretense only comes from actual experience with the substantive area of the law.

The most important skill that a mediator has is the ability to find the risk in a case that has been overlooked by the parties and bring it to the forefront. The most important skill that an arbitrator or early neutral evaluator has is the ability to understand the legal rights at issue. These skills come from experience in the law (both substantive and procedural) and the subject matter at issue.

You should also consider is the neutral's knowledge of and skill in applying the process. Successful neutrals continue to learn from each other and at professional conferences. For example, good mediators will attempt to ensure that the case is not mediated too early and will recognize and warn the parties when a case is getting more difficult to settle because of the phenomenon known as "overcommitment to sunk costs."[19] Attendance and participation in conferences sponsored by professional organizations such as the ABA Section of Dispute Resolution or the Association for Conflict Resolution (the successor organization to SPIDR) is one indicator of a neutral who continually strives for excellence.

Fees and Costs

Arbitration can be the both the least and the most expensive choice among ADR processes. If the case is small, the relaxed rules of evidence can allow for an adjudicatory process where litigation would be cost prohibitive. On the other hand, arbitration can even more expensive than trying the case in the traditional manner at the courthouse. If an arbitral panel is used, as each panel member will need to be paid. Additionally, arbitration frequently involves the renting of space in which to hold the arbitration, which in some cases can be a significant expense.

Mediation is relatively inexpensive, requiring little more than the cost of a couple of conference rooms and the mediator's fee. Mediators generally set fees according to one of two models, based largely on geographic norms. In Texas, most mediators charge a daily or half-day rate to each party, while the norm in the rest of the country is to charge the parties on an hourly basis. Most attorney-mediators have set their mediation fees in a manner that approximates their hourly rate when they are practicing law. The total fee may be increased in multiple party cases due to the complexity of the confidentiality issues and the mechanics of scheduling a mediation when more than two parties are involved in a dispute.

Most private early neutral evaluators will charge for their services in a manner consistent with the fees charged for mediation in the community. Publicly provided ENE providers, such as magistrate judges, so not charge extra for their services. Because the focus of early neutral evaluation is to weed out weaker arguments and plan for the litigation of the case, including selection

[19] The classic example of overcommitment to sunk costs in the legal context occurs when a party perceives settling for less than his out of pocket legal expenses and costs as a loss even if his opponent concedes liability – which would otherwise be considered a "win."

of an appropriate future ADR process, the "expense" of private ENE can be difficult to judge, since the costs must be balanced against savings that are real, but difficult to quantify.

An ADR professional may charge a cancellation fee if the case settles prior to the ADR process. This is common with busy neutrals. The purpose of this fee is to compensate for the time involved in setting up the mediation, in reserving space, and in blocking out the time for the parties. The cancellation fee is necessary because a significant number of cases settle shortly after the ADR process is scheduled but before the process is actually held. The mere scheduling of an ADR event may in itself be a motivation to settle, if the party wishes to avoid either the fee or the necessity of bring in a decision makers from out of town pursuant to court order. Once time has been blocked on the neutral's calendar, that time is unavailable for other parties wishing to schedule. Because of the lead-time involved in scheduling, most neutrals cannot fill the time with another procedure.

Attorney-Client Disputes

Finally, no talk about ADR and lawyers would be complete without mention of adding dispute resolution clauses to your fee agreements and engagement letters. Mediation clauses are an excellent way to start, especially for clients that you wish to retain. Bar-sponsored fee dispute program are a form of arbitration and exist in many states.[20] ABA Formal Opinion 02-425 has just been issued, condoning arbitration agreements between lawyers and clients, as long as they are reasonable and the client is not asked to waive malpractice claims in advance. Law firms looking at arbitration clauses for lawyer-client disputes (other than disputes about the amount of a bill) should fully investigate the effect of that decision on client retention.

[20] A few bar associations also have dispute resolution programs for internal partnership disputes and for law firm dissolutions. See STATE AND LOCAL BAR ALTERNATIVE DISPUTE RESOLUTION SURVEY, *supra.*

Confidentiality Issues and Other Ethical Concerns In ADR Processes

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Ethical Rules Governing Neutrals

Attorneys who are ADR providers are subject to disciplinary rules relating to conflicts of interest. Many states and the new Model Rules have addressed issues that arise from lawyers acting in the role of neutral. Model Rule 2.4, entitled "Lawyer Acting as Third Party Neutral," specifically addresses this issue. That Model Rule requires that attorneys who serve as neutrals must inform unrepresented parties that the lawyer is not representing them, and to explain to the unrepresented party the difference between their role as a neutral and the role of an attorney who represents a client.

The American Bar Association through its Section of Dispute Resolution (which includes many non lawyer affiliate members) has been active in advancing the cause of ethical standards for neutrals, both lawyer and non-lawyer. The ABA and the American Arbitration Association jointly authored and promoted a Code of Ethics for Arbitrators in Commercial Disputes as far back as 1977. A different set of ethical rules has been promulgated for labor disputes, called the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

For mediators, the American Bar Association Sections of Litigation and Dispute Resolution, the American Arbitration Association and the Society of Professionals in Dispute Resolution (now called the Association for Conflict Resolution) have jointly adopted Model Standards of Conduct for Mediators. All of these rules are advisory only – there is no talisman list of "do's" and "don'ts" to which all neutrals are bound.[1] As a practical matter, this places the onus on the attorneys for the parties to ascertain the ethical standards to which the proposed neutral adheres.

Generally, the ethical restraints on neutrals revolve around three major concerns: ex parte communications, confidentiality and conflicts.

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[1] Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorney's Duty to Learn about ADR and What They Must Learn*, 1999 J. OF DISP. RES. 29 at 51.

Ex Parte Communications

Ex parte communication presents the same ethical issues in arbitration and other adjudicative processes as does ex parte communication in litigation. Because there are no uniform standards governing all arbitrations, the policy and practice of the arbitral panel should be discussed and agreed to before the engagement is confirmed.

In facilitative processes, such as mediation, ex parte communications are not a problem and may in fact help the process along by allowing the lawyers and the mediator to develop a level of rapport and trust before the mediation begins. Occasionally, a mediator realizes as a result of scheduling conversations that the parties are not as far apart as they thought – or even that there is overlap in positions. Sometimes mediators use those conversations to focus the process on the real issues in dispute – for example, by letting a lawyer vent about his opponent's delay tactics.

Conflicts of Interest

Conflicts of interest (real and perceived) create very real problems in ADR because they undermine the trust that is necessary for the process to work. Conflicts can arise for neutrals from pre-existing matters or relationships. These should always be disclosed to the party affected who may choose to waive them depending on their severity. A discussion of the law regarding conflicts in arbitration is beyond the scope of this paper, but practitioners should be aware that a substantial body of law has developed and persons contemplating the use of arbitration should familiarize themselves with these rules.[2]

For example, assume a prospective mediator's best friend is a partner at a large firm in town. If that firm is a party to a case for which the mediator is being considered as a mediator, the mediator should tell the parties about that relationship. As a partner, the friend has a small, somewhat attenuated, financial interest in the outcome of the case. Since mediators do not make decisions, but merely facilitate negotiation, this small conflict is usually waived. If the friend was actually working on the case, the issue is somewhat more significant, but is still waivable. If the friend (or the prospective mediator's client) is a party in the case, good practice would suggest that the prospective mediator decline to handle the mediation. Most ADR professionals are careful about disclosing pre-existing conflicts, and they do not usually cause problems for the parties.

Conflicts can arise after the mediation or arbitration, once the neutral has acquired confidential information relating to your client or the dispute. The most commonly occurring issue involves representation of a party after the mediation or arbitration. Other conflicts can arise from representation of a third party who might benefit from the confidential information.

[2] An excellent summary and entry point into these issues can be found in Stephen K. Huber, *The Role of Arbitrator: Conflicts of Interest*, 28 FORDMAN URBAN L.J. 915 (2001).

As an example from one state, Texas Disciplinary Rule of Professional Conduct 1.11 governs conflicts that arise as a result of an attorney acting as an "adjudicatory official." Texas Ethics Opinion 496 (August 1994), stating that the committee is without precedent to guide them, applies this disciplinary rule to mediators, holding that mediators are "adjudicatory officials."[3] The opinion discusses the ethical constraints imposed on a lawyer with regard to participants in a mediation after the lawyer has served as a neutral. Noting that the conflict is waivable if done by all parties to the proceeding under Rule 1.11,[4] the opinion states that during the pendency of a mediation, the mediator is prohibited from undertaking representation on behalf of or adverse to a party involved in the mediation, both with regard to related and unrelated matters. Likewise, the mediator's firm is disqualified unless the requirements of Rule 1.11(c) are complied with and the mediator is isolated from receiving a portion of the fee. Post mediation representation of the parties is also prohibited, unless consent of all parties is obtained. Clearly, this should be the rule with regard to the matter being mediated and any issue even remotely related to it.

Banning post mediation representation on unrelated matters that may arise many years in the future is an extension of the generally accepted limitation.[5] Compare Model Rule 1.12, which restricts a neutral from representing a party with regard to a matter in which they participated

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[3] The opinion strains the definition of "adjudicate" to encompass mediation as a way to reach a particular result. They define a mediator as one who serves on a tribunal. The terminology section of Disciplinary Rules of Professional conduct defines a tribunal to include "any other person engaged in the process of resolving a particular dispute or controversy. It includes such institutions as courts and administrative agencies *when engaging in adjudicatory or licensing activities…* as well as judges, magistrates, special masters, referees, arbitrators, mediators hearing officers, *and comparable persons empowered to resolve or recommend a resolution of a particular matter.*" (Emphasis added.) While the issue of future conflicts and misuse of confidential information derived from mediation is very real, Opinion 496 appears to take an overly broad approach to the role of a mediator. A key – if not the key – principle of mediation is that the mediator is not empowered to resolve the dispute or to recommend a particular result. In mediation, that power remains with the parties and their counsel. Fortunately for the mediation community, while the Texas Disciplinary Rules of Professional Conduct are mandatory, the Committee Opinions are advisory only.

[4] This begs the question of who are considered "parties to the proceeding" in large, multiple party cases. Certainly all plaintiffs and defendants who have disputes involving the affected party should have to agree, but fact situations can easily be imaged where some parties are not involved in all parts of the dispute. The disclosure to uninvolved parties that would be necessary to obtain consent might in itself breach the mediator's duty of confidentiality to the involved parties. In such cases, it is helpful to recognize that there may be many mediations going on under the guise of one cause number, each with their own facts and liability issues.

[5] See Robert F. Cochran, *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and other Professional Responsibility Standards,* 28 FORDHAM URBAN L.J. 895 (2001).

personally and substantially as a mediator, unless waived. This "same matter" restriction allows substantially more post mediation representation than Texas Opinion 496. The Model Rule reflects the current state of disqualification decisions rendered by the courts. The first federal case to address post mediation conflicts was *Poly Software, Int'l v. Su*, 880 F. Supp. 1487 (D. Utah 1995). In that case, the court disqualified an attorney who had served as a mediator in a substantially factually related dispute involving one of the same parties. In *Poly Software,* the court specifically limited the disqualification to subsequent situations having a substantial factual nexus with the previously mediated dispute.[6] The court also disqualified the other members of the mediator's small firm based on the factual and legal posture of the case.

McKenzie Construction Co. v. St. Croix Storage Corp., 961 F. Supp. 857 (D. V.I. 1997) involved an unsuccessful mediation. One party's law firm then hired the mediator. Not surprisingly, the other side moved to disqualify the law firm from representation in the case. The mediator was listed as "of counsel" to the firm, and the firm argued that it had maintained a cone of silence around the mediator with regard to the case. The firm conceded that the mediator herself was disqualified from working on the case. The Court, concerned about the appearance of impropriety and the threat that the litigation would be tainted, disqualified the entire firm.

Fields-D'Arpino v. Restaurant Associates, Inc., 39 F. Supp. 2d 412 (S.D.N.Y. 1999) involved an EEOC complaint. An attorney at the employer's outside law firm acted as an impartial mediator to try to resolve the dispute prior to the complaint being filed at the EEOC. He was unsuccessful but did learn much about the plaintiff's case. When suit was filed, the plaintiff moved to disqualify the firm on the grounds that they had acted as a mediator. The Court held that mediation is an inherently informal process and refused to draw arbitrary distinctions based on procedural rules and whether mediation was "formal" or "informal."[7] One of the facts the court found troubling was that the defense had attempted to exploit the mediator's knowledge at the EEOC hearing and had announced their intention to call him as a witness at trial. Citing *Poly Software* and *McKenzie,* the court found an unacceptable appearance of impropriety and disqualified the firm.

Many neutrals solve the problems of post ADR conflicts on unrelated matters by putting a waiver in their standard agreements or engagement letters.

Confidentiality

One of the bedrock assumptions made by participants in alternative dispute resolution procedures is that the process is confidential. It is true that ADR is far more private than the public process we call litigation. But the protection afforded communications made and actions taken during ADR is far from absolute.

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[6] 800 F. Supp. at 1494.

[7] 39 F. Supp. 2d at 415.

It is beyond the scope of this paper to discuss whether or not it is necessary for alternative dispute resolution to have the protection of a privilege, a confidential communication, or even whether or not statements made during ADR processes should be protected from admissibility. Much has been written by about that issue, which is the subject of much debate in the community of neutrals.[8] Rather, this paper will address the problem from the perspective of the litigator and review the current state of the law regarding communications made in alternative dispute resolution and the protection of confidentiality. Suggestions for plugging the holes will also be made.

State Law Protection Against Disclosure

Many practitioners do not realize that there is no uniformity among state laws concerning protection for confidential communications made during mediation, arbitration, or early neutral evaluation. Many litigators simply accept as a given the fact that these communications will not be disclosed, without focusing on exactly what that means or on the source of their protection

Under state law, confidentiality derives from enacted legislation or from rules promulgated by the local Supreme Court. There is no common law source for this protection such as exists for the attorney-client privilege. At present, there exists no Uniform Act to provide a model for each state, although the American Bar Association and the National Conference of Commissioners on Uniform State Laws are close to a final draft of a Uniform Mediation Act.

Confidentiality in state court cases is largely a patchwork of approaches that varies from case to case. It has been reported that there are over 250 statutes that currently address confidentiality in mediation.[9] Approximately half of these statutes deal with specific types of matters. The others are statutes of general application

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[8] See Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. DISP. RES. 1; J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. DISP. RES. 197; Mindy. D. Rufenacht, Comment, *The Concern Over Confidentiality in Mediation – An In-Depth Look at the Protection Provided by the Proposed Uniform Mediation Act,* 2000 J. DISP. RES. 113. The discussion of the necessity (or lack thereof) of privilege and confidentiality in dispute resolution was the subject of an entire issue of Dispute Resolution Magazine in the winter of 1998. Consensus on this issue has yet to be achieved.

[9] See Reporter's Notes to Section 2 of the Uniform Mediation Act.

The Texas statutes are contained in Chapter 154 of the Civil Practices and Remedies Code and are unusual in that there are no exclusions from the privilege except for otherwise discoverable information.[10] Texas attorneys in particular should be careful not to assume that the confidentiality rules in a sister state are as broad as the ones to which they are accustomed.

Only a few states specifically cover "conduct" as well as "communications."[11] Different states use different triggers for the protection. Some states cover "the subject matter of the mediation" while others also protect "materials prepared specifically for and actually used in the mediation."[12] Some state's statutes are triggered by an agreement to mediate.[13] Others are dependant on a court order to mediation.[14] As uneven as this situation is, it is still more comprehensive and less complicated than the confidentiality rules in federal cases.[15]

Claims Arising Under Federal Law

To the extent that the litigation involves state law claims, Federal Rule of Evidence 501 incorporates state-recognized privileges into the litigation. Unfortunately for federal tax, and ERISA lawyers, there is little, if any, state law involved in the litigation on their desks. The confidentiality issues in purely federal cases are more problematic and vary from district to district.

To understand the issue, it necessary to understand the source of the problem. Federal Rule of Evidence 501 provides privileges "under common law as it might be interpreted by the courts of the United States in light of reason and experience." Essentially, this creates federal common law of privilege that applies to all common law privileges. The general rule is that, when a case is in federal court due to federal question jurisdiction, the courts are required to use federal common law when examining the privilege.[16] Recognizing the tension between a privilege and the right of the public to know, the Supreme Court stated,

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[10] A. Kirtley, *supra* at 36. The statute provides that the court shall conduct an *in camera* review if the privilege conflicts with "other legal requirements for disclosure." See Tex. Civ. Prac. & Rem. Code § 154.073(d). Presumably this applies to requirements such as the duty to report child abuse.

[11] *Id.*

[12] See, *e.g.,* Wash. Rev. Code § 5.6.070(1)(b); Ariz. Rev. Stat. Ann. § 12-2238(A).

[13] See, e.g., Mo. Rev. Stat. § 435.014(1); N.D. Cent. Code § 31-04-11, Okla. Stat. Tit. 12, § 1804 (requiring specified form).

[14] See, e.g., Or. Rev. Stat. § 36.200(4); Wis. Stat. Ann. § 904.085(2)(a).

[15] See Gregory A. Litt, Comment, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998,* 78 TEX. L. REV. 1015 (2000).

[16] J. B. Reich, *supra*, at 204.

> "Testimony exclusionary rules and privileges contravene the fundamental principle that the public…has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence as a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[17]

The Supreme Court cited this exact portion of the Trammel case in its opinion in Jaffee v. Redmond, 518 U.S. 1 (1996), when it recognized the psychotherapist's privilege in 1996, thus reaffirming the validity of the statement.

Federal Rule of Evidence 501 was added in 1975, presumably to add flexibility to the federal law of privilege and allow the judicial branch of government, rather than the legislative branch establish its parameters. The overwhelming majority of proposed privileges have been declined.[18]

In the Alternative Dispute Resolution Act of 1998 (the "1998 ADR Act"), Congress mandated that ADR communication be confidential. The 1998 ADR Act requires each of the 97 federal districts to provide for alternative dispute resolution in their districts and to adopt local rules providing for the confidentiality of those processes. Congress expressly declined to establish a federal law of confidentiality, leaving that issue to the courts. In particular, Congress mandated the local rule prevail "until such time as rules are adopted under chapter 131 of this title, providing for the confidentiality of the alternative dispute resolution processes under this chapter."[19] In light of that directive, several cases have held that the 1998 ADR Act does not create, in and of itself, a privilege for mediation and other types of ADR.[20]

The local rules adopted by the federal court system vary from district to district and sometimes vary between the bankruptcy courts and the district courts in the same jurisdiction. The adopted local rules address the entire spectrum of confidentiality protection, from virtually non-existent to protected privilege. Each jurisdiction's rules should be consulted before reliance is placed. In many ways, the rules in the local federal district bear the imprimatur of local state practice and custom. Thus, districts located in states that require an agreement to trigger confidentiality may

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[17] *Trammel v. U.S.,* 445 U.S. 40 (1990).

[18] That FRE 501 was adopted on the heels of the decision in *U.S. v. Nixon,* 418 U.S. 683 (1974) declining to recognize presidential executive privilege may have been a factor in its narrow application.

[19] See, 28 U.S.C. §652(d).

[20] *Fed. Dep. Ins. Corp. v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999); *Olam v. Congress Mortgage Co.,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999); *Fields-D'Arpino v. Rest. Assoc., Inc.*, 39 F. Supp. 2d 412 (S.D. N.Y. 1999).

also require the execution of an agreement. Districts whose state provides a high degree of protection such as a privilege may themselves provide that by local rule. Care should be taken to check each district's local rules to ascertain the exact level of confidentiality granted.

It is important to understand the range of protections that can be afforded by confidentiality provisions. At the lowest level of protection are rules on inadmissibility such as Federal Rule of Evidence 408. At the highest level of protection are the privileges—both qualified and unqualified. This paper addresses the major categories of protections that are found in the federal court system, from the weakest to the strongest.

Problems with Rules Grounded in FRE 408.

Federal Rules of Evidence 408 provides little more than protection against the admission of settlement negotiations into the trial before the court. It specifically excludes otherwise discoverable evidence from its application. This is an important point that many attorneys overlook. Moreover, evidence of compromise or settlement is still admissible if offered to prove bias or prejudice on the part of a witness or for any purpose other than to prove ultimate liability, the invalidity of claim or its amount. Finally, Federal Rule of Evidence 408 only provides that the evidence of the compromise is inadmissible in the case to which the offer relates. In other words, evidence of offers to settle case number one are not admissible at the trial of case number one but may be admissible in a subsequent matter.[21] Put another way, Federal Rule of Evidence 408 will probably not be sufficient to insulate ADR participants from third party discovery of information that was presented in the course of ADR proceedings. It is important to realize that the third party may be somebody who is not at all involved in the first lawsuit. The possibility of collateral discovery in a subsequent lawsuit has serious implications in cases involving employment issues, employee benefits and in litigation involving large, complex transactions.

Problems with Rules that Provide Information is "Confidential"

The term "confidential" implies more than the simple inadmissibility of FRE 408. Because the term was not defined in the 1998 ADR Act, issues have arisen as to whether confidential information was discoverable.[22] This typically arises in collateral litigation where third parties want access to the information from the mediation in an earlier case. The various federal district courts have taken various approaches to these issues. Only one court, the Central District of California, has found the information to be privileged under Rule 501 and protected from discovery and use in a subsequent matter.[23] More typically, courts perform a balancing act test weighing the interest of the

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[21] See, *Uforma/Shelby Business Forms, Inc. v. NLRB*, 111 S. 3d 1284 (6th Cir. 1997).

[22] *Haworth, Inc. v. Steelcase, Inc.*, 12 F. 3d 1090 (Fed. Cir. 1993). In this case the third party sought to intervene in another's lawsuit to allow it to discover the ADR information by participating in the process.

[23] *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 1164 (C.D. Cal. 1998). *Folb*

parties in protection with Wigmore's oft-quoted statement that "the public has the right to every man's evidence."[24]

The real problem with balancing tests is that there is no certainty of application from district to district. Even identically worded local rules can be circumvented and information from a prior mediation discovered. The language granting confidentiality is identical in both the Northern District and the Southern District of Texas.[25] The rules promise confidentiality from disclosure, unless ordered by the court. An unpublished opinion of the Northern District of Texas, *Datapoint Corp. v Picturetel Corp.*, 1998 WL 25536 (N.D. Tex. Jan. 14, 1998) (Fitzwater, J.) compelled discovery of a mediated settlement agreement in a related case in the Southern District of Texas. This case stands for the proposition that attorneys cannot assume that phrases such as "unless ordered by the court" necessarily refer to the court in which the action was filed.

And, even more troubling for Texas attorneys, is *In re Grand Jury Subpoena Dated December 17, 1996,* 148 F. 3d 487 (5th Cir. 1998), *cert. denied* 1999 Lexis 2220. That case involved an agricultural loan mediation program at Texas Tech University. The federal legislation establishing funding for the program required that the mediations be confidential. The State of Texas established the program and received the federal funding, representing that the program would be operated in accordance with the Texas ADR statutes. It was then certified by the federal government as complying with the confidentiality requirement and qualified for the federal funding.

As previously noted, Texas has an unusually strong mediation statute that does rise to the level of a privilege. An exception exists for conflicts with other legal requirements for disclosure, and allows for *in camera* inspection in that event.[26] Sometime in 1995, the Office of the Inspector General audited the program and began to suspect criminal activity, leading to an investigation of the program. The Grand Jury subpoena involved an attempt to discover information provided by participants in the mediations.

The Fifth Circuit refused to quash the subpoena, holding that while confidentiality is critical to the mediation process, confidential does not mean privileged. Further the appellate court noted

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involved a sexual harassment claim. The injured employee filed suit. The employer fired the alleged wrongdoer, who then sued for wrongful termination. The alleged wrongdoer sought access to the mediation statements prepared by the company in the mediation of the injured employee's suit, no doubt looking for statements by the company denying the harassment. The court declined to allow discovery of these documents and recognized, in the Central District of California, at least, a mediation privilege in federal court. The 9th Circuit summarily affirmed *Folb* on other grounds in an unpublished opinion, available at 2000 Lexis 7239.

[24] WIGMORE ON EVIDENCE § 2196.

[25] G. Litt, *supra,* at 1023.

[26] Tex. Civ. Prac. & Rem. Code § 154.073(d).

that grand jury proceedings were themselves secret and so the harm to the participants from disclosure was not substantial. The court expressly recognized that in the event indictments were returned, the confidentiality would be breached, but held that the public interest in the administration of criminal justice outweighed any interest the parties had in mediation confidentiality.

Testimony by Neutrals

The Texas ADR statute and many judicial districts' local rules grant neutrals and other participants immunity from testifying about the proceeding.[27] Because the most common type of dispute giving rise to questions of compelled testimony from neutrals deals with alleged fraud or duress in the signing of a settlement agreement, these cases are always difficult.

Requiring or permitting the testimony can be akin to opening Pandora's proverbial box. One well reasoned opinion from the Northern District of California runs 41 pages in hard copy, before finding that no duress occurred.[28] The Northern District of Texas has issued two opinions on the subject of compelled mediator testimony. In *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994) (Fitzwater, J.), the court declined to recognize a federal mediator privilege. In that case, the parties had mediated a dispute pursuant to an agreement that incorporated both the Texas ADR statute and the Dallas County Local Court Rules, each of which provides the mediator with a testimonial privilege. The parties did not challenge the application of the Texas statutes and local rules, and the court found no other grounds to reverse the magistrate's decision barring the testimony. While declining to decide the issue, the court did state that any mediator privilege that might exist would be created under federal law, not state law, under FRE 501. It clearly left the door open for future cases.

FDIC v. White, 76 F. Supp. 2d 736 (N.D. Tex. 1999) dealt with evidentiary privilege. In that case, a settlement agreement was entered into as a result of mediation. One party sought to set aside the agreement due to duress. Testimony regarding the circumstances surrounding execution is necessary to establish this claim. The other party sought to exclude the testimony as confidential under the 1998 ADR Act. Magistrate Kaplan held that recognizing the evidentiary privilege would effectively bar common law defenses of fraud, coercion and mutual mistake, and that Congress did not intend such a draconian result when it adopted the 1998 ADR Act. The court allowed the testimony into evidence.

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[27] Tex. Civ. Prac. & Rem. Code § 154.073(b).

[28] *Olam v. Congress Mortgage Co.,* 68 F. Supp. 2d 1110 (N.D. Cal. 1999). The author of the opinion, Magistrate Judge Wayne Brazil, is a leader in the ADR community and has written extensively on the subject of dispute resolution. His discussion of the law of mediator privilege in the opinion is well worth reading.

Suggestions for Increasing Uniformity of Results and Increasing Confidentiality

First, use a mediation agreement that is signed by all parties prior to the disclosure of any confidential information. In that agreement, provide for as much contractual confidentiality protection as you can draft. Consider for example, contractually opting into the state confidentiality statute, particularly in Texas. While there is no guarantee that a federal judge will honor the agreement, it is evidence of the expectations of the parties you can then argue detrimental reliance.

Second, file a joint motion and get an order referring the case to mediation. This should trigger the protection in those jurisdictions that require a court order. Incorporate the provisions of the agreement to mediate into the court order if you can.[29]

Third, documents prepared for mediation should be marked "Prepared for Mediation Purposes" rather than the sometimes seen reference to Federal Rule of Evidence 408. Some jurisdictions provide greater protection to mediation documents than other settlement communications. By clearly marking the document as a mediation document, you increase the probability of protection in those jurisdictions.

Fourth, ask your neutral what their protocol is for document and file retention. Many neutrals destroy their notes shortly after the mediation as matter of course. Without notes, memories fade and specific testimony becomes less likely as time passes (unless of course there was something truly unusual in your mediation—in which case the memory may never fade). Some large international organizations have developed protocols that take into consideration the fact that confidentiality is more difficult in the multinational context. The World Bank, for example, requires its mediators to shred all notes and information in the presence of all parties before the mediation is adjourned.

Finally, realize that everything is relative. Whatever confidentiality protection you are able to get is far more than your client would get if the case was tried or even if the case was settled by the lawyers without ADR.

[29] An example of such an Order used by the Federal District Court for the District of Rhode Island is attached to this article.

Tips on Effective Representation in Mediation

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Preparation begins by selecting the appropriate mediator for your case. Investigate the proposed neutral's background and qualifications. In technical areas, such as tax or employee benefits, be sure that the neutral has at least a basic understanding of the substantive law. Better yet, find a neutral that has a firm foundation in the subject matter of the dispute. Selection of the right mediator can significantly improve the likelihood of settlement.

Prepare Your Client For The Mediation

Preparing your client for mediation is as important as preparing your case for trial. The client needs to be aware of both the process of mediation and the fact that no case is perfect. It is important for your client to understand that mediation is a process of give and take, the extent of the cloak of confidentiality and have an opportunity prior to the mediation to have the benefit of an honest and candid assessment from their counsel.

Cases are settled because both sides are persuaded that there are substantial risks if the case is tried, not because one side is persuaded that the other side is right. Be as honest with your client about the problems with their case as you have been about its strengths. While clients do not like to hear "bad news," they like surprises even less. You can expect the mediator will ask you about every potential problem that might occur at trial. Your client has the right to hear about these things first from you.

There are several items that should be prepared for any mediation. First, after you finish preparing the list of the strengths of your case, concentrate on preparing a complete list of the weaknesses. You do not ever need to disclose this list to the mediator if you are uncomfortable about doing so, but you should share it with your client prior to the time the mediation actually occurs. Recognize that there comes a time in most mediations where it is useful to be able to explain to your client in concrete terms why an opponent's settlement offer is not as abysmal as it would first appear.

Just as importantly, an accurate assessment of the risks of your client's case allows you to think through and prepare your response. It can help you to avoid the pitfalls of optimistic overconfidence. And by focusing your attention in advance on the problems in a case, you can hone in on ways to reduce the impact by preparing your response in advance. Sometimes there are

tangible things you can do to minimize the negative effect of a potential problem, thus improving what negotiation theorists refer to as your "BATNA"—the best alternative to a negotiated settlement.[1]

Finally, prepare your most potent mediation tool, a list of all the weaknesses in your opponent's case. You will want to be able to arm the mediator with one of the other side's problems as a companion to your offer of settlement. This makes your proposal more attractive, as it points up the risks of non-acceptance in a very real way. When both sides have made these lists, the mediator's task is simplified and settlement is more likely to occur.

Document the Amount of Your Claim

Effective representation in mediation involves knowing what the actual amount in controversy is, what penalties and interest add to that amount, and what attorney's fees are (if recoverable), all calculated through the date of mediation. Successful participants also come to the mediation with a realistic estimate of what expenses will be incurred through the date of trial if the case fails to settle. Demonstrative evidence that backs up your claim is the most effective. Bring a copy of the documentation you intend to use at trial for the calculations (and attorney's fees records) in order to justify the amount. Redact privileged information if necessary, and send a set of the calculations and billing statements into the other room with the mediator or deliver them across the table at the opening joint caucus.

If expert witnesses are involved, you will also need to know the current amount incurred for those expenses and have a realistic handle on the amount that will be incurred for expert fees if the case is tried. Most clients do not enjoy paying the bill that their own lawyers sent—and the feelings are magnified with regard to the other side's legal bills. Sharing your calculations and billing information can be a powerful and persuasive tactic, because people are always more convinced by cold hard numbers than by ballpark estimates.

A corollary of this rule is to bring the crucial documents to the mediation. The mediator needs these to persuade the other side of its weaknesses. If the disputed documents are not present, the mediator has much less chance of getting the case resolved. Your opponent's reaction to being confronted with the document in mediation will likely be different than the casual nonchalance he's been showing to you. A good rule of thumb is to bring every document or deposition that you intend to use at trial.

Pick the Right Point in Time to Mediate the Case

It is possible to mediate the case too early or too late in its life cycle. Ripeness for mediation purposes is a fluid thing that changes from case to case. Many ADR professionals believe that all

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[1] See, Roger Fisher & William Ury, GETTING TO YES, (Penguin, 2nd ed. 1994).

disputes go through specific cycles and cannot settle until certain ritual acts are performed.[2] At a minimum, some amount of preparation and investigation must be done to allow counsel to make an accurate evaluation of their client's position. There is some statistical research and much anecdotal evidence that indicates that a significant number of the cases that fail to settle at mediation, fail because they are mediated too soon.[3] The solution to this problem is for advocates to tie down key testimony before the mediation, either by deposition or other means. Every lawyer knows the sinking feeling that occurs when the document or testimony that the client insists will clinch the case fails to materialize. There is always a possibility that a witness will change his story in the deposition or that the "smoking gun" memo will turn out not to be the way your client had described it. These should be tied down before mediation. While it is not necessary to have the entire discovery done in the case, a certain portion of it should be done in order to give credibility to your claims.

Sometimes there is a party whose deposition one side wishes to avoid. Scheduling mediation just before that deposition can be an effective tactic. Once the deposition has been taken, an incentive may be lost. A similar incentive can exist as a result of summary judgment motions and other deadlines involving much work and large expense. At the end of the continuum, there is a point at which the other side can no longer afford to settle because of the expense that has already been invested in the litigation, typically, but not always, for attorneys' fees. This is the so-called "sunk cost" problem, which is a function of the relationship between risk aversion and loss aversion.

Good mediators are skilled in recognizing these timing issues and will help the parties plan the mediation at the most opportune time. Expect to be asked about the state of discovery and similar items by the mediator when you call to schedule a time for the mediation. Occasionally, a Judge will order a deadline for mediation that is simply too soon given the discovery plan. Most

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[2] See Christopher W. Moore, THE MEDIATION PROCESS (2d Ed. Jossey-Bass 1996) at 96.

[3] One 1993 study in Harris County, Texas, found that of the cases that failed to settle in mediation, scheduling the mediation before adequate discovery had been done was cited as the reason the case failed to settle 21% of the time. A related issue, lack of settlement authority was the only reason that caused more failures; it was as the reason for failure by 24% of the respondents. The full study is published in the 5th Annual ADR Institute published by the State Bar of Texas Professional Development Program in 1993; a summary of the findings can be found at www.adrr.com, the web site of Dallas mediator Stephen R. Marsh. On the other hand, the Western District of Missouri's Early Assessment Program, an early neutral evaluation program reports that over one third of the cases sent to the program have settled at the initial assessment conference, held within 30 days after answer if filed or at a second meeting held a short time after. SEE DONNA STIENSTRA AND THOMAS E. WILLGING, ALTERNATIVES TO LITIGATION: DO THEY HAVE A PLACE IN THE FEDERAL DISTRICT COURTS?, (FJC 1995) available for download at www.fjc.gov, at 40. Other ENE programs report far less settlement and use ENE as a tool to winnow out issues, define settlement ranges, help select an appropriate ADR process for the case and generally help prepare the case for trial. See, e.g., the ENE program in the Northern District of California.

courts will, if asked, extend the mediation deadline to accommodate a joint request to obtain necessary discovery.

Put Yourself In Your Opponent's Shoes

Look at the case from your opponent's side of the table. If you were representing his client, what arguments would you advance? Think about your response to those arguments. If rebuttal evidence is available, be sure to bring that information with you to the mediation. Having concrete evidence of bad facts actually helps your opposing counsel properly evaluate his client's case by making them harder to ignore. It is human nature to discount those pieces of the puzzle that do not fit the picture we have in our heads. Sometimes called partisan or selective perception, this tendency can best be described by quoting an old Russian proverb—that everyone sees the world from the bell tower of his village.[4] At some time in the mediation process, you should make a conscious effort to focus not on your choices, but on your opponent's choices. Switching bell towers can provide much insight and make progress toward settlement.

Share Your Mediation Statement With the Other Side

For many of the reasons stated above, sharing your mediation statement with the other side can be very effective. One way to do this when much, but not all of the information is discoverable, is to add a blind postscript for the mediator with the confidential information or simply pick up the phone and call. Sharing your mediation statement helps your opposing counsel see the case from your vantage point. This has the added benefit of demonstrating both to opposing counsel and his client that you have done your homework, that your arguments have merit and that you are willing to put them out there for public discussion, thereby communicating a willingness and ability to try the case if necessary.

It is also helpful to telegraph to the other side the range of values in which you think the case should settle. Some mediators recommend doing this by sending over the opening offer before the mediation. Either way, advance knowledge of the ballpark helps the parties come to the table with sufficient authority to settle the case at mediation.[5] Likewise, feel free to probe your opposing

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[4] This proverb is a favorite of Professor Roger Fisher at the Harvard Program on Negotiation. Professor Fisher has written extensively on the issue of partisan perception and on ways to neutralize it in negotiation. See Roger Fisher, Elizabeth Kopleman & Andrea Schneider, BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT (Harvard U. Press 1994). This phenomenon is sometimes also called "cognitive dissonance."

[5] See Footnote 3 *supra*, describing a Harris County survey that found lack of settlement authority to be the most frequent reason given (by 24% of the respondents) for failure to settle at mediation. Lack of authority comes in two main varieties. The first, failing to send someone to the mediation who has authority to settle the case, is easily avoided by obtaining a clear understanding of who must attend prior to the mediation date and making sure the decision maker is present. The second type is insufficient authority, which occurs when settlement values are mis-evaluated by the parties.

counsel for his opinion of the range of settlement. Do not be concerned if you are initially far apart. If you were close, the case would be settled without the mediator's help. Knowing the high end of the range (typically the opening offer) helps experienced litigators estimate settlement authority needed at the mediation.

Make Sure All Necessary Parties Are Present

This can be harder than you think. Sometimes the ultimate decision maker is not in the room. This occurs with equal regularity for both plaintiffs and defendants, with individual parties and with large companies. Every effort should be made to be sure that the person with final authority is the one attending the mediation. A related issue with individuals is that while the individual party may have all of the authority to settle, as a practical matter, they need the approval of another person—someone they feel the need to check with before the agreement is finalized. Sometimes this is a family member, such as a spouse, a sibling or even a friend or an adult child. If that person is not available, the settlement process will stall until the emotional approval is obtained. A similar problem arises when a mediation participant is unable to contact an accountant and thus cannot quantify the effect of a settlement proposal. Sometimes supervisory approval is needed (or if not needed, is desired).

The best practice is to involve those persons in the mediation from the beginning, thus reducing the likelihood that they will sabotage the deal later after all of your hard work. A good mediator will inquire about shadow parties at the beginning of the mediation and, if the mediator discovers that some decision makers are not present, will attempt to involve them by telephone contacts throughout the day.

Opening Sessions

Remember that the mediator is not there to make a decision. Therefore, try to break the habit of playing to an audience of one. It is far more effective to speak directly to the client on the other side of the table. Save your jury argument for trial; you are not going to persuade the other side anyway and you might as well not tip your hand as to trial strategy. This is your client's opportunity and your opportunity to speak directly to the client on the other side, without the filter of the lawyers and to attempt to work out misunderstandings and to better appreciate their view of the case. Quite simply, no matter how carefully we try to convey a particular conversation to our clients, there are nuances and subtleties that do not come through and get lost in the translation. Mediation can cut through the layers and facilitate awareness of issues and concerns.

Active listening can really pay off in joint sessions. Sometimes, most of what the other side wants is for your client to hear what they have been saying. Restate what they tell you, and ask them if you heard it right. "If I understand what you are saying, . . ." may be the most powerful seven words in mediation.

Communication of settlement ranges and initial offers prior to the mediation date can help offset this problem.

Be Polite and Respectful

Treat your opposing counsel and his client, at the mediation, as you would treat your partner or your family member. Adversarial posturing may impress your client in the short run, but it does not advance the cause of settlement. At best, such blustering wastes valuable time; at worst, it can destroy the legitimate aims of the mediation process. Remember that you get more flies with honey than you do with vinegar. Never yell, scream, or accuse the other party of a criminal act. Doing so will ensure that the case will not settle that day.

A Word about Venting

While counsel should keep a fairly tight check on their emotions, one of the prime advantages of mediation is the opportunity for clients to vent. Do not be uncomfortable with the emotions that your client may show. Mediators are used to this process and we understand that sometimes, the client simply needs to get it out of their system and tell somebody before they can focus on settlement. Trust the mediator to know when to move on. We are trained to do it in a way that makes your clients feel that their concerns and issues have been heard. Even if the issue seems unrelated and irrelevant to the issue being litigated, allow time for it to be articulated. While it may not be important to the legal strategy of the case, the issue is important to your client.

Give the Other Side a Helping Hand

Successful mediation is a team effort. Realize that the other side may need to save face or may have issues and concerns that may be impeding settlement. You may be able to help them out at little or not cost to our client. The classic example of this relates to the timing of payment. Occasionally, there will be reasons why the paying party may need arrangements, or the receiving party may need an immediate payment. Accommodation of those needs costs little, yet can go far towards resolving the dispute.

Factor in Intangible Costs and Benefits

Every dispute has costs that are not part of the amount in controversy. These include things like non-recoverable attorney's fees, time lost by valuable employees, missed opportunities and possible bad publicity. On the flip side, there are also intangible benefits to settlement. One frequently encountered benefit in tax cases is the ability to resolve an issue for all open years, regardless of where in the litigation pipeline those years are. The very real economic benefit to your client from litigation cost savings may sweeten the pie and make it palatable.

Reduce Your Agreements to Writing

Set definite timelines for completion of additional items and assign responsibility for them in the agreement. This avoids future disputes about what the agreement was and reduces the likelihood of buyer's remorse.